



TWEED
SHIRE COUNCIL

Mayor: Cr B Longland

Councillors: M Armstrong (Deputy Mayor)
G Bagnall
C Byrne
K Milne
W Polglase
P Youngblutt

Agenda

Planning and Regulation Reports

Ordinary Council Meeting

Thursday 17 October 2013

held at Murwillumbah Cultural and Civic Centre
commencing at 4.45pm

COUNCIL'S CHARTER

Tweed Shire Council's charter comprises a set of principles that are to guide Council in the carrying out of its functions, in accordance with Section 8 of the Local Government Act, 1993.

Tweed Shire Council has the following charter:

- to provide directly or on behalf of other levels of government, after due consultation, adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively;
- to exercise community leadership;
- to exercise its functions in a manner that is consistent with and actively promotes the principles of multiculturalism;
- to promote and to provide and plan for the needs of children;
- to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development;
- to have regard to the long term and cumulative effects of its decisions;
- to bear in mind that it is the custodian and trustee of public assets and to effectively account for and manage the assets for which it is responsible;
- to facilitate the involvement of councillors, members of the public, users of facilities and services and council staff in the development, improvement and co-ordination of local government;
- to raise funds for local purposes by the fair imposition of rates, charges and fees, by income earned from investments and, when appropriate, by borrowings and grants;
- to keep the local community and the State government (and through it, the wider community) informed about its activities;
- to ensure that, in the exercise of its regulatory functions, it acts consistently and without bias, particularly where an activity of the council is affected;
- to be a responsible employer.

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REPORTS THROUGH THE ACTING GENERAL MANAGER

REPORTS FROM THE DIRECTOR PLANNING AND REGULATION

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 - SECT 79C 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
- (ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Director-General has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and
- (iii) any development control plan, and
- (iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and
- (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and
- (v) any coastal zone management plan (within the meaning of the Coastal Protection Act 1979),

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.

Note: See section 75P (2) (a) for circumstances in which determination of development application to be generally consistent with approved concept plan for a project under Part 3A.

The consent authority is not required to take into consideration the likely impact of the development on biodiversity values if:

- (a) the development is to be carried out on biodiversity certified land (within the meaning of Part 7AA of the Threatened Species Conservation Act 1995), or

(b) a biobanking statement has been issued in respect of the development under Part 7A of the Threatened Species Conservation Act 1995 .

(2) Compliance with non-discretionary development standards-development other than complying development If an environmental planning instrument or a regulation contains non-discretionary development standards and development, not being complying development, the subject of a development application complies with those standards, the consent authority:

- (a) is not entitled to take those standards into further consideration in determining the development application, and
- (b) must not refuse the application on the ground that the development does not comply with those standards, and
- (c) must not impose a condition of consent that has the same, or substantially the same, effect as those standards but is more onerous than those standards,

and the discretion of the consent authority under this section and section 80 is limited accordingly.

(3) If an environmental planning instrument or a regulation contains non-discretionary development standards and development the subject of a development application does not comply with those standards:

- (a) subsection (2) does not apply and the discretion of the consent authority under this section and section 80 is not limited as referred to in that subsection, and
- (b) a provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied to the non-discretionary development standard.

Note: The application of non-discretionary development standards to complying development is dealt with in section 85A (3) and (4).

(4) Consent where an accreditation is in force A consent authority must not refuse to grant consent to development on the ground that any building product or system relating to the development does not comply with a requirement of the Building Code of Australia if the building product or system is accredited in respect of that requirement in accordance with the regulations.

(5) A consent authority and an employee of a consent authority do not incur any liability as a consequence of acting in accordance with subsection (4).

(6) Definitions In this section:

- (a) reference to development extends to include a reference to the building, work, use or land proposed to be erected, carried out, undertaken or subdivided, respectively, pursuant to the grant of consent to a development application, and
- (b) "non-discretionary development standards" means development standards that are identified in an environmental planning instrument or a regulation as non-discretionary development standards.

21 [PR-CM] Variations to Development Standards under State Environmental Planning Policy No. 1 - Development Standards

SUBMITTED BY: Director



Civic Leadership

LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:

- 1 Civic Leadership
 - 1.4 Strengthen coordination among Commonwealth and State Governments, their agencies and other service providers and Statutory Authorities to avoid duplication, synchronise service delivery and seek economies of scale
 - 1.4.1 Council will perform its functions as required by law and form effective partnerships with State and Commonwealth governments and their agencies to advance the welfare of the Tweed community
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SUMMARY OF REPORT:

In accordance with the Department of Planning's Planning Circular PS 08-014 issued on 14 November 2008, the following information is provided with regards to development applications where a variation in standards under SEPP1 has been supported/refused.

RECOMMENDATION:

That Council notes the September 2013 Variations to Development Standards under State Environmental Planning Policy No. 1 - Development Standards.

REPORT:

On 14 November 2008 the Department of Planning issued Planning Circular PS 08-014 relating to reporting on variations to development standards under State Environmental Planning Policy No. 1 (SEPP1).

In accordance with that Planning Circular, the following Development Applications have been supported/refused where a variation in standards under SEPP1 has occurred.

DA No.	DA13/0119
Description of Development:	Partial demolition, alterations and additions of Salt Surf Lifesaving Club
Property Address:	Lot 173 DP 1075495 & Lot 901 DP 1066477 Bells Boulevard, Kingscliff
Date Granted:	23/9/2013
Development Standard to be Varied:	Clause 32B(4)(b) - overshadowing
Zoning:	2(f) Tourism and 7(f) Environmental Protection (Coastal Lands)
Justification:	The foreshore will be overshadowed by 626m ² at 3pm in mid winter (an increase of 401m ²) and 2313m ² at 6.30pm in summer. This exceeds the criteria specified in Clause 32B of the NCREP which provides that overshadowing of the foreshore may not occur prior to 3pm mid winter or 6.30pm mid summer. The extent of shadow (in percentage form) cannot be quantified.
Extent:	The foreshore will be overshadowed by 626m ² at 3pm in mid winter (an increase of 401m ²) and 2313m ² at 6.30pm in summer. This exceeds the criteria specified in Clause 32B of the NCREP which provides that overshadowing of the foreshore may not occur prior to 3pm mid winter or 6.30pm mid summer. The extent of shadow (in percentage form) cannot be quantified.
Authority:	Tweed Shire Council under assumed concurrence

DA No.	DA13/0121
Description of Development:	Minor boundary adjustment (stage 1) and two (2) lot subdivision (stage 2)
Property Address:	Lot 8 DP 579554 & Lot 9 DP 616569 No. 23 Satinwood Place, Chillingham
Date Granted:	25/9/2013
Development Standard to be Varied:	Clause 20(2)(a) - Minimum lot size 40ha
Zoning:	1(a) Rural, 7(l) Environmental Protection (Habitat), 2(d) Village
Justification:	SEPP No. 1 objection required as development standard for subdivision of land within the 2(d), 7(l) and 1(a) zoned land greater than 10% variance.
Extent:	Land zoned 7(l) has a variance of greater than 10% when subdivided for stage 2.
Authority:	Director-General of the Department of Planning and Infrastructure

DA No.	DA13/0130
Description of Development:	Rural industry and roadside stall (staged development)
Property Address:	Lot 5 DP 599760 No. 720 Clothiers Creek Road, Clothiers Creek
Date Granted:	24/9/2013
Development Standard to be Varied:	Clause 22 - Development near designated roads
Zoning:	1(a) Rural
Justification:	Clothiers Creek Road is a designated road. Clause 24 (Setbacks to Designated Roads) of the Tweed Local Environmental Plan 2000 requires that development is setback a minimum of 30m from a designated road in the 1(a) Rural zone. The Stage 1 roadside stall would be located 3.2m from the designated road, a variation of 89.4% to the development standard. The Stage 2 roadside stall would be located 5.02m from the designated road, a variation of 83.3% to the development standard. The rural industry building would be located 15.6m from the roadside stall, a variation of 48% to the development standard.
Extent:	Clothiers Creek Road is a designated road. Clause 24 (Setbacks to Designated Roads) of the Tweed Local Environmental Plan 2000 requires that development is setback a minimum of 30m from a designated road in the 1(a) Rural zone. The Stage 1 roadside stall would be located 3.2m from the designated road, a variation of 89.4% to the development standard. The Stage 2 roadside stall would be located 5.02m from the designated road, a variation of 83.3% to the development standard. The rural industry building would be located 15.6m from the roadside stall, a variation of 48% to the development standard.
Authority:	Tweed Shire Council under assumed concurrence

DA No.	DA13/0233
Description of Development:	20 lot subdivision (19 residential lots and 1 rural lot)
Property Address:	Lot 2 DP 231691 No. 44 Station Street, Burringbar
Date Granted:	25/9/2013
Development Standard to be Varied:	Clause 20(2)(a) - Minimum lot size 40ha
Zoning:	1(a) Rural
Justification:	Existing lot size of 13.94ha. Proposed lot size of 11.97ha. This was approved by the DOP, as the reduction in area was zoned 2(d) Village, with the remainder zoned 1(a) Rural.
Extent:	Approximately 70%
Authority:	Director-General of the Department of Planning and Infrastructure

COUNCIL IMPLICATIONS:

- a. Policy:**
Corporate Policy Not Applicable.

b. Budget/Long Term Financial Plan:

Not Applicable.

c. Legal:

Not Applicable.

d. Communication/Engagement:

Not Applicable.

UNDER SEPARATE COVER/FURTHER INFORMATION:

Nil.

22 [PR-CM] Development Application DA13/0294 for a Change of Use of 19 Tourist Accommodation Units to Dual Use Shop Top Housing and Serviced Apartments at Lots 11, 12, 13, 85, 86, 87, 88, 89, 17, 19, 92, 93, 94, 25, 99, 100, 28, 31 and 107 in SP 79995, Nos. 14-18 and 20-22 Stuart Street, Tweed Heads

SUBMITTED BY: Development Assessment

FILE REFERENCE: DA13/0294 Pt1



Civic Leadership

LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:

- 1 Civic Leadership
- 1.1 Ensure actions taken and decisions reached are based on the principles of sustainability
- 1.1.1 Establish sustainability as a basis of shire planning and Council's own business operations

SUMMARY OF REPORT:

Council is in receipt of DA13/0294 which seeks consent to convert 19 previously approved tourist only units to units which are capable of use for tourists or permanent residents (Stage 1 of Ultima). The application seeks the flexibility to enable individual owners to choose whether they use the units for tourists or permanent residents.

Given the units were originally approved as tourist use only the application triggers the need for a review of car parking and Section 64 and Section 94 Developer Contributions.

Since Stage 1 of Ultima was approved by the then Department of Planning (DoP) Council has reviewed its car parking rates for properties within the Tweed Heads area (Tweed DCP Section B2 – Tweed Heads). This new plan has significantly lowered the applicable parking rates in a hope of promoting business and revitalising the Tweed Heads central business district. The reduced rates now enable consideration of the current proposal, as under the previous regime the onsite car parking was already full to capacity.

There is also a concurrent item on this Business Paper for which Council is also being asked to consider Section 96 DA08/0907.07 applying to the Tweed Ultima site. In July 2008 Tweed Shire Council received and assessed [DA08/0907](#) which sought approval to change the use of 35 tourist accommodation units (within the ellipsoid Stage 1 towers of Ultima) into 35 dual use multi dwelling housing units/tourist accommodation units. The current Section 96 modification seeks to apply the reduced car parking rates (as applicable under Tweed DCP Section B2) to negate the need for additional parking either at grade or below the Stage 2 of the Ultima development as previously conditioned. This Section 96 also proposes to amend the Stratum Subdivision to better allocate car parking between the residential portion and the commercial portions of the site. This ensures sufficient parking is available for DA13/0294 and any other unit within Ultima which want to lodge a change of

use development application to enable flexible dual use between tourist use and residential use.

Both DA13/0294 and Section 96 DA08/0907.07 have received submissions (11 in total over the two applications) in regards to these applications. The submissions vary from other unit holders who just want to do the same thing to adamant objections to the proposals. The adamant objections to the proposal relate to whether the proposal is the same development which was originally approved, whether the loss of tourist units will have a detrimental affect on Tweed Heads as a tourist destination, whether there is sufficient car parking on site to cater for the changes, and whether the proposal results in equity between unit holders based on land values and entitlements.

From a planning perspective the proposed development:

- Is permissible with consent in the B3 Commercial Core zone;
- Continues to satisfy the applicable zone objectives;
- Complies with the required onsite parking provisions;
- Maintains a mix of uses within the building (but allows individual owners to choose residential or tourist based on personal circumstances and market conditions); and
- Does not disadvantage other unit holders from doing the same thing.

For these reasons the application is recommended for approval.

This application has been called up to Council by Councillor Michael Armstrong.

RECOMMENDATION:

That Development Application DA13/0294 for a change of use of 19 tourist accommodation units to dual use shop top housing and serviced apartments at Lots 11, 12, 13, 85, 86, 87, 88, 89, 17, 19, 92, 93, 94, 25, 99, 100, 28, 31 and 107 in SP 79995, Nos. 14-18 and 20-22 Stuart Street, Tweed Heads be approved subject to the following conditions:

GENERAL

- 1. This Development Application approves the change of use of 19 tourist accommodation units within the Stage 1 ellipsoid towers of the Tweed Ultima into 19 dual use units that can be used as either residential units (defined as shop top housing) or tourist accommodation units (defined as serviced apartments). The 19 affected units are as follows:**

- **Level 2 - Lots 11, 12, 13, 85, 86, 87, 88, and 89 in SP 79995.**
- **Level 3 - Lots 17, 19, 92, 93, and 94 in SP 79995.**
- **Level 4 - Lots 25, 99, and 100 in SP 79995.**
- **Level 5 - Lots 28, 31 and 107 in SP 79995.**

except where varied by the conditions of this consent.

[GEN0005]

- 2. The Ultima Stage 1 development is required to have the following parking provisions:**

- **55 Commercial Spaces in SP 80159;**

- 208 Accommodation Spaces in SP 79995 (16 of which have to be accessible for visitor parking).

Stacked parking spaces must be allocated to the same Lot Number.

The parking spaces are to be allocated within the respective body corporate and include parking for the disabled in accordance with Tweed Shire Council Development Control Plan Part A2 - Site Access and Parking Code.

[GENNS01]

3. Section 94 Contributions

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

Prior to the 19 units subject of this application being used for residential purposes (and within 3 months of the date of this consent) all Section 94 Contributions must have been paid in full and the Council must have sighted Council's "Contribution Sheet" signed by an authorised officer of Council.

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

These charges include indexation provided for in the S94 Plan and will remain fixed for a period of 12 months from the date of this consent and thereafter in accordance with the rates applicable in the current version/edition of the relevant Section 94 Plan current at the time of the payment.

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

(a) Shirewide Library Facilities:

13.4577 ET @ \$838 per ET	\$11278
(\$792 base rate + \$46 indexation)	
S94 Plan No. 11	

(b) Bus Shelters:

13.4577 ET @ \$64 per ET	\$861
(\$60 base rate + \$4 indexation)	
S94 Plan No. 12	

(c) Eviron Cemetery:

13.4577 ET @ \$123 per ET	\$1655
(\$101 base rate + \$22 indexation)	
S94 Plan No. 13	

(d) Extensions to Council Administration Offices
& Technical Support Facilities

2.4966 ET @ \$1860.31 per ET	\$4644.45
(\$1759.9 base rate + \$100.41 indexation)	
S94 Plan No. 18	

- (e) **Cycleways:**
 - 6.1921 ET @ \$473 per ET \$2929
 - (\$447 base rate + \$26 indexation)
 - S94 Plan No. 22
- (f) **Regional Open Space (Casual)**
 - 6.2377 ET @ \$1091 per ET \$6805
 - (\$1031 base rate + \$60 indexation)
 - S94 Plan No. 26
- (g) **Regional Open Space (Structured):**
 - 13.4577 ET @ \$3830 per ET \$51543
 - (\$3619 base rate + \$211 indexation)
 - S94 Plan No. 26

[GENNS02]

4. **Within 3 months of the date of this consent the applicant shall create easements for services, rights of carriageway and restrictions as to user as may be applicable under Section 88B of the Conveyancing Act including (but not limited to) the following:**

- (a) **The western Tweed Ultima towers are (Stage 1) are to have parking allocated as follows, 55 commercial spaces and 208 accommodation spaces (16 of which have to be accessible for visitor parking) and all stacked parking spaces must be allocated to the same Lot Number.**
- (b) **The clear nomination of the lawful development nature of each of the 160 units. This will need to delineate between those units which are tourist accommodation units only, those units which are multi dwelling housing only (residential) and those units which are flexible and can be used for either multi dwelling housing (residential) or tourist accommodation.**

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

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

Privately owned infrastructure on community land may be subject to the creation of statutory restrictions, easements etc in accordance with the Community Land Development Act, Strata Titles Act, Conveyancing Act, or other applicable legislation.

[GENNS03]

5. **The issue of this Development Consent does not certify compliance with the relevant provisions of the Building Code of Australia. It is the applicant's responsibility to ensure the building complies with all relevant provisions of the Building Code of Australia.**

[GENNS04]

REPORT:

Applicant: Zinkohl Pty Ltd
Owner: Zinkohl Pty Ltd
Location: Lots 11, 12, 13, 85, 86, 87, 88, 89, 17, 19, 92, 93, 94, 25, 99, 100, 28, 31 and 107 in SP 79995 Nos. 14-18 and 20-22 Stuart Street, Tweed Heads
Zoning: B3 Commercial Core under Tweed LEP 2012 (City Centre)
Cost: Not Applicable to Change of Use

Background:

The subject site is located across two allotments at 14-18 and 20-22 Stuart Street, Tweed Heads. It is located within the heart of the Tweed Heads Central Business District on large sites bound by Wharf Street, Navigation Lane and Stuart Street. The site is generally level with no significant vegetation.

The site has the benefit of water views to the east over Jack Evans Boat Harbour and Chris Cunningham Recreational Park. The site is separated from Jack Evans Boat Harbour by Wharf Street, a public car park and landscaping.

The site currently accommodates the Tweed Ultima Development.

Tweed Ultima comprises two main parts:

Stage 1 Two 14 storey ellipsoid towers set on a podium (creating two 15 storey buildings) on the western part of the site (already constructed):

- 1181m² mixed retail space.
- 594m² conference.
- 405m² gym and spa.
- 160 apartments (some tourist only units, some flexi units, some residential use units only).
- 265 car parking spaces (only 263 constructed).

Stage 2 An 11 storey rectangular building on the eastern portion of the site (not yet constructed)

- 2386m² mixed retail space.
- 415m² of restaurant/bar space.
- 75 units (some tourist only units, some flexi units, some residential use units only).
- Approximately 117 car parking spaces.

The area surrounding the site is undergoing transition. Beyond the site to the north and east is the Dolphin Hotel Redevelopment Site and the Twin Towns Development. Tweed Centro shopping centre is to the south east.

The Ultima Development has a long and complicated history. This is primarily as a result of multiple Section 96 modifications and multiple new Development Applications seeking first use applications and change of use applications all having an effect on the overall car parking requirements for the site. Below is a summary of that history to enable an understanding of how the subject application (DA13/0294) fits into the bigger Ultima approval regime:

Stages 1 and 2 of Ultima were originally approved in the one application by the Department of Planning (DoP) in 2004 (DoP Reference DA456-10-2003 and Council Reference DA04/0016).

The DoP has subsequently granted five modifications as follows:

MOD 56-4-2005 (DA04/0016.03) – 19 September 2005 – Changed contributions to enable staging separating ellipsoid towers from eastern rectangular tower. No impact on parking.

MOD160-10-2005 (DA04/0016.09) – 29 August 2005 – Exchanged 19 tourist units in the eastern ellipsoid tower with 19 residential units in the western ellipsoid towers. No overall change to parking.

MOD 48-5-2007 (DA04/0016.11) – 3 August 2007 – Change to Gym. Increased GFA 224m² which increased FSR by 0.7% to 4.228:1. This required 8 extra parking spaces. DoP said the 8 extra spaces required can be accommodated by the site's surplus.

DA456-10-2003 MOD 4 (DA04/0016.14) and DA456-10-2003 MOD 5 (DA04/0016.15) – Both approved on 11 December 2009 in a joint assessment – Mod 4 was predominantly changes to the external façade, an additional basement to Stage 2 of the development, and changes of use at the ground floor. Mod 5 sought to change the use of 23 tourist accommodation units in the eastern rectangular building (Stage 2) to dual use tourist accommodation/multi dwelling housing (residential).

In July 2008 Tweed Shire Council received an assessed DA08/0907 which sought approval to change the use of 35 tourist accommodation units (within the ellipsoid Stage 1 towers of Ultima) into 35 dual use multi dwelling housing units/tourist accommodation units. The applicant wanted the flexibility within these 35 units to do either tourist accommodation and/or multi dwelling housing (permanent occupation). The definition would therefore be both multi dwelling housing and tourist accommodation depending on how a particular owner utilised the individual units.

At this time the change from tourist to dual multi dwelling housing and tourist development required additional parking in accordance Tweed DCP Section A2 – Site Access and Parking Code. And accordingly DA08/0907 when approved in July 2009 was conditionally approved provided an additional 22 car parking spaces were accommodated under the yet to be constructed Stage 2 in an additional basement (which was ultimately approved by the DoP in DA456-10-2003 MOD 4).

There has been two subsequent Section 96 Applications to DA08/0907 (being DA08/907.05 and DA08/0907.06 which approved the following further changes:

S96 DA08/0907.05 was approved on 27 August 2010 with Condition 4 of the consent being amended to Condition 4A which gave the applicant 24 months (rather than 12 months) to comply with the additional parking requirements. Which meant Condition 4A would have needed to be satisfied by 10 July 2011, however, to date this condition has not been satisfied.

S96 DA08/0907.06 sought approval to swap two of the DA08/0907 approved flexi units (Lots 85 (Level 2) and 92 (Level 3) in SP 79995) with two tourist only units (Lots 51 and 129 (both on Level 9) in SP 79995). DA08/0907.06 was subsequently approved on 28 January 2011 with Condition 3 being modified to reflect the new units and Condition 3B and 3C being introduced to clarify the approval.

Current S96 DA08/0907.07 (which appears as a separate item on this business paper) seeks approval to:

1. Recalculate the applicable car parking rates for 34 units (34 out of the original 35 units subject to DA08/0907) based on the new Tweed DCP Section B2 Tweed Heads. The applicant has claimed that these recalculations will negate the need for the previously conditioned temporary car park. It should be noted that all units are two bedroom units.
2. Amend the approved stratum subdivision to redistribute car parking in the basement between the common property of the Strata Plan 79995 to common property of the Strata Plan 80159.
3. Change the description of the development by removing reference to the temporary at grade parking as the proposed changes seek to remove the need for this element.

This application appears on this business paper due to nature of the submissions and its relationship to the current DA13/0294. In determining DA13/00294 Councillors should also be aware of DA08/0907.07.

In addition to the above applications Tweed Shire Council has also determined the following first use applications:

- DA08/0067 - Commercial 370m², Lot 5 SP 801059 (includes Lots 10-12 in SP 80551);
- DA08/0104 - Beauty Salon 51.25m² (one consulting room and 8.7m² retail space), Part Lot 4, SP 80159;
- DA08/0105 - Café and Gallery 99.44m² (25m² café, 5.125m² dining, and 74.44m² gallery), Part Lot 4, SP 80159;
- DA08/0144 - Sales Office 103m², Lot 6 SP 80159;
- DA08/0856 - Hair Salon 114m², Lot 2 SP 80159;
- DA10/0708 – Office 219m², Lot 1 in SP80159; and
- DA13/0190 – Outdoor balustrade, Part Lot 4 in SP80159 and Office Fit Out, Lot 9 in DP 80159.

All of the above applications have had implications on the applicable onsite parking requirements.

The current proposed Development Application **DA13/0294** subject to this report now seeks approval to change the use of 19 previously approved tourist accommodation units (within Stage 1 Ultima being the two ellipsoid towers) to the dual uses of shop top housing units and serviced apartments as defined in the new Tweed City Centre LEP 2012. This would enable the individual owners the flexibility to use their units for either tourist use or residential use depending on their own personal circumstances.

All of the units affected by this proposal comprise two bedrooms, a kitchen, bathrooms and laundry facilities. No physical building work is proposed.

The affected units are as follows:

Floor Level	Lot Number in SP79995	Current Owner
Level <u>2</u>	Lot 11 (northern tower)	Zinkohl Pty Ltd
	Lot 12 (northern tower)	Zinkohl Pty Ltd
	Lot 13 (northern tower)	Zinkohl Pty Ltd
	Lot 85 (southern tower)	Zinkohl Pty Ltd
	Lot 86 (southern tower)	Zinkohl Pty Ltd
	Lot 87 (southern tower)	Zinkohl Pty Ltd
	Lot 88 (southern tower)	Zinkohl Pty Ltd
	Lot 89 (southern tower)	Zinkohl Pty Ltd
Level <u>3</u>	Lot 17 (northern tower)	Grangeride Pty Ltd
	Lot 19 (northern tower)	Zinkohl Pty Ltd
	Lot 92 (southern tower)	Zinkohl Pty Ltd
	Lot 93 (southern tower)	Zinkohl Pty Ltd
	Lot 94 (southern tower)	Zinkohl Pty Ltd
Level <u>4</u>	Lot 25 (northern tower)	Zinkohl Pty Ltd
	Lot 99 (southern tower)	Zinkohl Pty Ltd
	Lot 100 (southern tower)	Zinkohl Pty Ltd
Level <u>5</u>	Lot 28 (northern tower)	Godfrey
	Lot 31 (northern tower)	Zinkohl Pty Ltd
	Lot 107 (southern tower)	Zinkohl Pty Ltd

The proposed development will require a recalculation of the sites available car parking and a recalculation of the applicable Section 64 and Section 94 Developer Contributions as the change from Tourist to Residential triggers different rates in this regard.

The application was placed on public exhibition for 14 days between 3 July 2013 and 17 July 2013. During this period Council received five submissions. Of the five submissions two of them just want the right to do the same thing for their unit while three adamantly object to the Development Application. One of the key objectors is from the tourist letting agents for the site who have advised that they bought the business on the basis of the tourist nature of the units and that there is a genuine need for tourist units in this area and Council should not be allowing the change of use application. The same representations have been made to the Federal Member of Parliament Justine Elliot about this matter.

The following report addresses these submissions in detail however from a planning perspective allowing units in this location to be either tourist or permanent could be good thing to ensure the town centre is revitalised, as it enable landowners the flexibility to adjust based on market demands as they change over time. It is also permissible to enable both uses. This report also establishes that given the new parking rates in Tweed DCP Section B2 – Tweed Heads the subject site could accommodate all units within Tweed Ultima being granted dual tourist/residential use subject to an application being received accordingly.

Therefore, the proposed development has been recommended for approval subject to the payment of the applicable developer contributions and the recommended conditions of consent.

This application has been called up to Council by Councillor Michael Armstrong.

SITE DIAGRAM:



Locality Plan
 Strata Plan 79995
 14-22 Stuart Street, Tweed Heads

Disclaimer: While every care is taken to ensure the accuracy of this data, Tweed Shire Council makes no representation or warranty as to the accuracy or reliability of the information about its accuracy, reliability, completeness or suitability for any particular purpose and declines all responsibility and all liability (including indirect liability) in connection with its use. Users should verify the accuracy of this data before they use it for any purpose. This information is provided for the general public and is to be considered indicative and does not constitute a 'final' or 'official' copy and is not to be used for any purpose other than that intended. The information contained in this document remains the property of Tweed Shire Council.

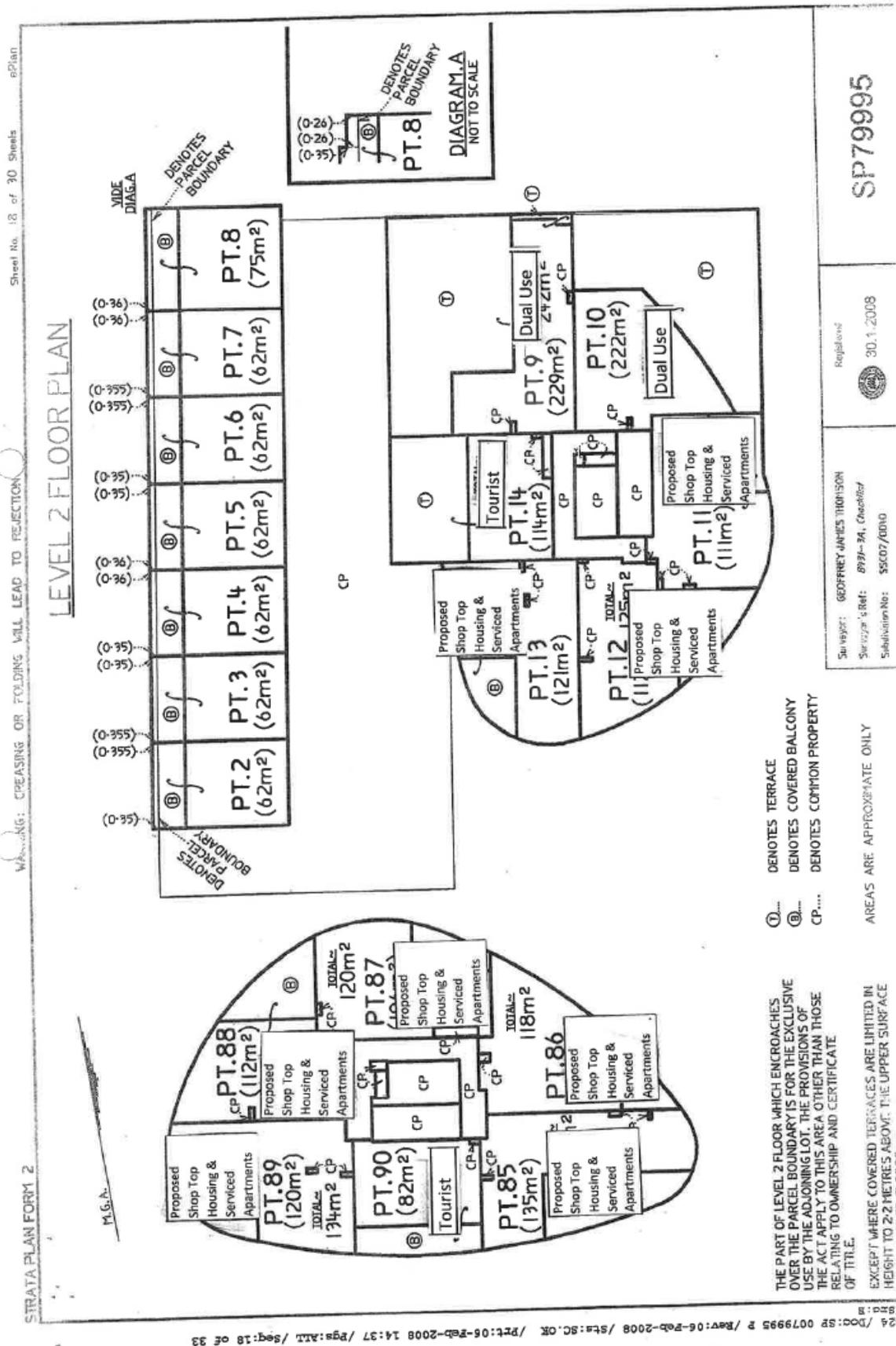
Call centre 29705/2013
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 Knowledge is Power. Share it. Considered appropriate only.

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 2012-2013
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 2012-2013

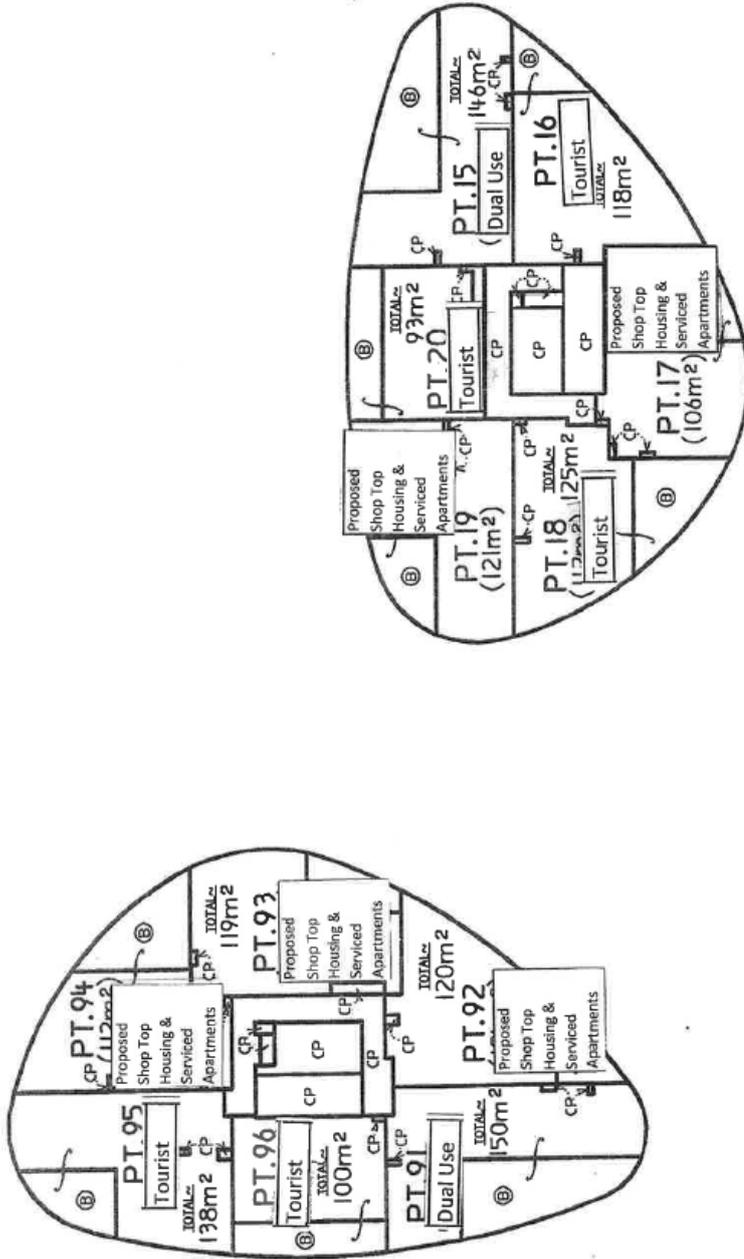
City and Cultural Centre
 2 Turongum Road
 Murumbidgee NSW 2486
 PO Box 218
 Murumbidgee NSW 2486
 T 02 6878 2400 | 1300 297 872
 F 02 6878 2425
 W www.tweedshire.nsw.gov.au
 E planning@tweedshire.nsw.gov.au

TWEED
 SHIRE COUNCIL

DEVELOPMENT/ELEVATION PLANS:



LEVEL 3 FLOOR PLAN



Ⓟ DENOTES COVERED BALCONY
 CP... DENOTES COMMON PROPERTY

AREAS ARE APPROXIMATE ONLY

Surveyor: GEOFFREY JAMES THOMPSON
 Surveyor's Ref: 6131-34, Credited
 Subdivision No: SSC07/0190
 Lengths are in metres. Reduction: 1:250

Registered
 30.1.2008

SP79995

M.G.A.

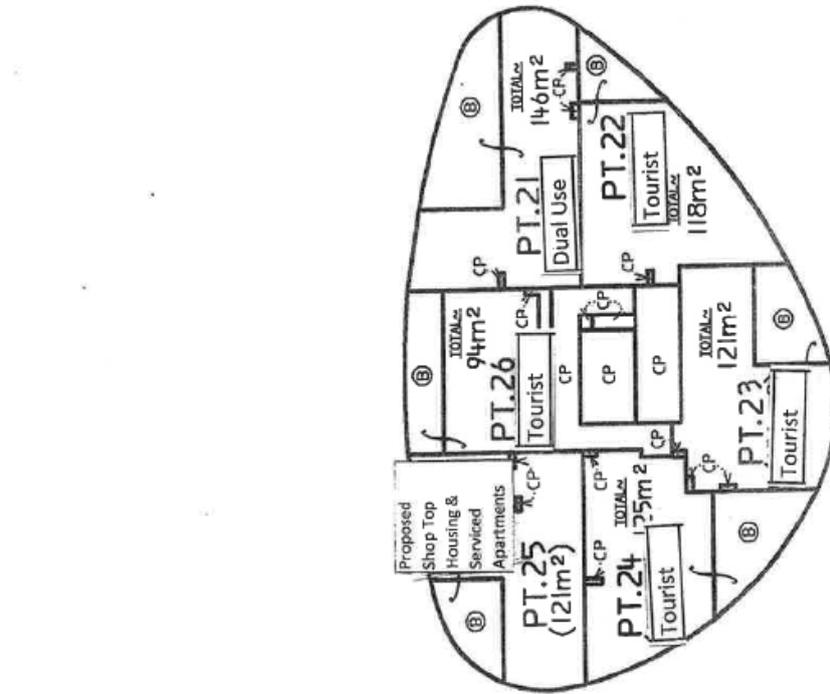
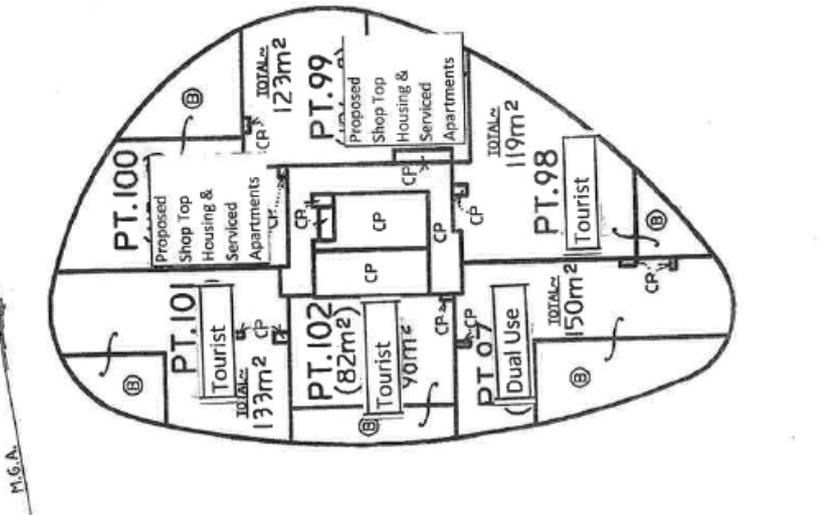
Doc: SB 0079995 P / Rev: 06-Feb-2008 14:37 / Pgs: ALL / Seq: 19 of 33
 Rev: 06-Feb-2008 14:37 / Pgs: ALL / Seq: 19 of 33
 Rev: 06-Feb-2008 14:37 / Pgs: ALL / Seq: 19 of 33

Sheet No. 20 of 30 Sheets ePlan

WARNING: CREASING OR FOLDING WILL LEAD TO REJECTION

STRATA PLAN FORM 2

LEVEL 4 FLOOR PLAN

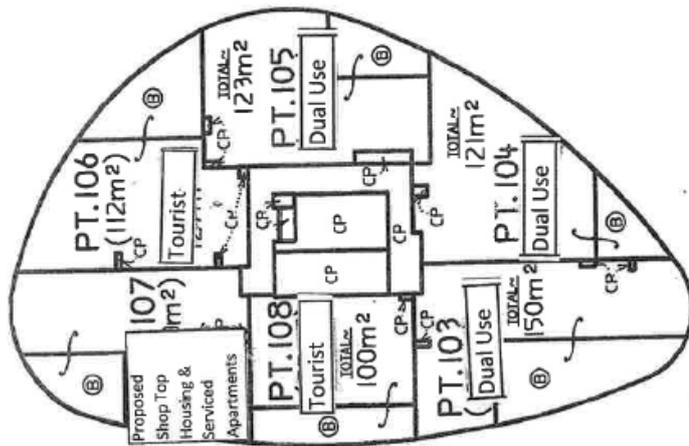


B... DENOTES COVERED BALCONY
 CP... DENOTES COMMON PROPERTY
 AREAS ARE APPROXIMATIVE ONLY

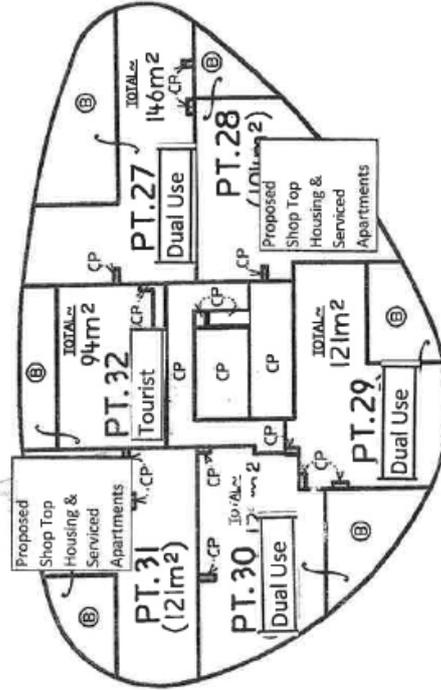
Surveyor: GEOFFREY JAMES THOMPSON Surveyor's Ref: 0981-26, Chartered Subdivision No: 55009/00091 Copyright: Land Information Australia Inc. 1997-2000	Registered 30.1.2008	SP79995
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100:SP 0079995 P / Rev:06-Feb-2008 / sts:SC-OK / prt:06-Feb-2008 14:37 / pgs:ALL / Seq:20 of 33
 100:SP 0079995 P / Rev:06-Feb-2008 / sts:SC-OK / prt:06-Feb-2008 14:37 / pgs:ALL / Seq:20 of 33

LEVEL 5 FLOOR PLAN



ⓐ... DENOTES COVERED BALCONY
 CP... DENOTES COMMON PROPERTY
 AREAS ARE APPROXIMATE ONLY

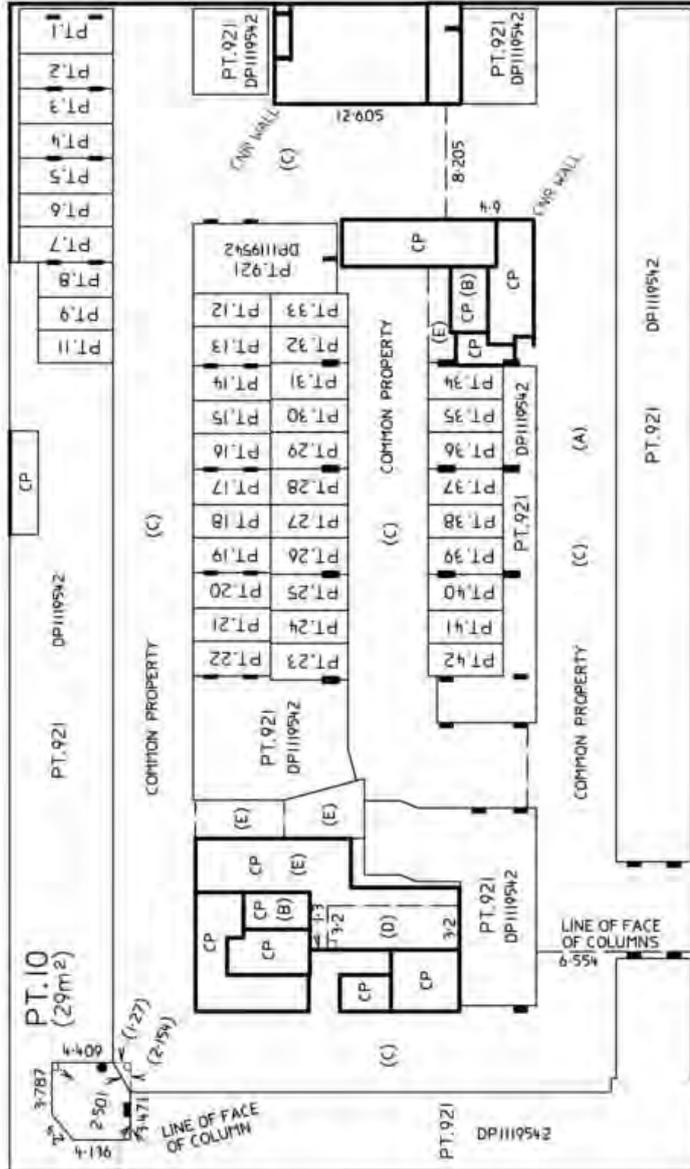


Surveyor: GEOFFREY JAMES THOMPSON Surveyor's Ref: 8191-34 - OneWay Subdivision No: 55007/0110 Lengths are in metres. Reduction Ratio 1: 250	Registered 30.1.2008	SP79995
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BASEMENT FLOOR PLAN

M.S.A.



— DENOTES CENTRELINE OF COLUMN
 ⊥ DENOTES RIGHT ANGLE

AREAS ARE APPROXIMATE ONLY.
 CP... DENOTES COMMON PROPERTY
 (A) RIGHT OF VEHICULAR ACCESS VARIABLE WIDTH
 (B) RIGHT TO USE LIFTS VARIABLE WIDTH
 (C) RIGHT OF VEHICULAR & PEDESTRIAN ACCESS VARIABLE WIDTH
 (D) RIGHT TO USE ESCALATORS 3.2 WIDE
 (E) RIGHT OF PEDESTRIAN ACCESS VARIABLE WIDTH

Surveyor: **GEOFFREY JAMES THOMPSON**
 Surveyor's Title: **26/31-34, Chartered**
 Subdivision No.: **55007/0900**
 Landfile are in metres, Reduction Ratio 1:100

Registered
 30.1.2008

SP79995

10	20	30	40	50	60	70	80	90	100	110	120	130	140
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Considerations under Section 79C of the Environmental Planning and Assessment Act 1979:

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

Tweed City Centre Local Environmental Plan 2012

Clause 1.2 Aims of the Plan

The particular aims of this Plan are as follows:

- (a) *to give effect to the desired outcomes, strategic principles, policies and actions contained in the Council's adopted strategic planning documents,*
- (b) *to promote employment, residential, recreational, arts, social, cultural and tourism opportunities in Tweed City Centre,*
- (c) *to encourage the responsible sustainable management and conservation of Tweed City Centre's natural and environmentally sensitive areas, the built environment and cultural heritage,*
- (d) *to promote development that is consistent with the principles of ecologically sustainable development,*
- (e) *to promote the economic revitalisation of Tweed City Centre,*
- (f) *to strengthen Tweed City Centre as a multi functional and innovative regional centre that encourages employment and economic growth,*
- (g) *to protect and enhance the vitality, identity and diversity of Tweed City Centre,*
- (h) *to facilitate building design excellence appropriate to a regional city in Tweed City Centre.*

The proposed change of use would allow individual unit owners the flexibility to either rent their units out for tourist use, rent their units out for residential use or live in the units permanently as owners. This opportunity for flexibility is considered the best option to ensure that the building is occupied at all times in whatever manner best suits the current market conditions and the individual owner's circumstances and thus will best promote the economic revitalisation of the Tweed City Centre.

Council has however received three objections opposed to this notion. The objections are discussed in detail later in this report.

From a planning perspective the proposed change of use (which only affects 19 units) is considered to satisfy all of the above aims of the Plan.

Clause 2.3 Zone Objectives & Land Use Table

In accordance with the new Tweed City Centre LEP 2012 the subject site is now zoned B3 Commercial Core. The objectives of this zone are as follows:

- *To provide a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community.*
- *To encourage appropriate employment opportunities in accessible locations.*

- *To maximise public transport patronage and encourage walking and cycling.*
- *To encourage upper floor residential or tourist accommodation that does not compromise the commercial use of the land.*

Tweed Ultima was originally approved as a mixed use development incorporating commercial space, tourist accommodation, dual use (flexi use) accommodation and residential accommodation.

The proposed change of use purely seeks to convert 19 of the tourist units to allow them to be used for tourist use or residential use.

Under the new LEP the applicable definitions are:

Serviced apartment means a building (or part of a building) providing self-contained accommodation to tourists or visitors on a commercial basis and that is regularly serviced or cleaned by the owner or manager of the building or part of the building or the owner's or manager's agents. Note. Serviced apartments are a type of tourist and visitor accommodation

Shop top housing means one or more dwellings located above ground floor retail premises or business premises. Note. Shop top housing is a type of residential accommodation.

Both of these land uses are permissible with consent in the B3 Commercial Core Zone.

The proposed change of use application is considered to be consistent with the zone objectives.

Clause 4.3 Height of Buildings

The proposed development does not involve any physical works and does not impact on the height of the building.

Clause 4.4 Floor Space Ratio

The proposed development does not involve any physical works and does not impact on the floor space ratio.

Clause 5.5 Development within the coastal zone

The proposed development does not involve any physical works and would not impact on the coastal area.

Clause 6.1 Acid Sulfate Soils

The proposed development does not involve any physical works and will not impact any acid sulfate soils.

Clause 6.2 Flood Planning

The proposed development does not involve any physical works and will not affect the flood levels for the site.

Clause 6.5 Restriction on Certain uses in Zone B3

This Clause states *“Development consent must not be granted to development for the purposes of backpackers’ accommodation or serviced apartments on land in Zone B3 Commercial Core, unless the development is part of a mixed use development.”* The proposed serviced apartments are part of a mixed use development and can therefore be supported.

Clause 6.6 Minimum Building Street frontage (needs a 20m street frontage)

The proposed development does not involve any physical works and does not impact the external appearance of the structure.

Clause 6.7 Serviced apartments

The Clause states as follows:

- (1) *The objective of this clause is to prevent substandard residential building design occurring by way of converted serviced apartment development.*
- (2) *Development consent must not be granted for the subdivision, under a strata scheme, of a building or part of a building that is being, or has ever been, used for the purpose of serviced apartments unless the consent authority has considered the following in relation to the development, as if it were a residential flat development:*
 - (a) *the design quality principles set out in Part 2 of State Environmental Planning Policy No 65—Design Quality of Residential Flat Development,*
 - (b) *the design principles of the Residential Flat Design Code (a publication of the Department of Infrastructure, Planning and Natural Resources, September 2002).*
- (3) *Subclause (2) (a) does not apply if the development is the subdivision of a building to which State Environmental Planning Policy No 65—Design Quality of Residential Flat Development has ever applied.*

The development as a whole was assessed against SEPP 65 and is considered to be acceptable having regard to this Clause.

Clause 6.9 Airspace Operations

The proposed development does not involve any physical works and does not impact on any air space operations.

Having regard to all the applicable controls in the Tweed City Centre LEP 2012 the proposed development is considered capable of approval.

State Environmental Planning Policies

SEPP 1 –Development Standard

This policy does not apply if Tweed City Centre LEP 2012 applies.

SEPP North Coast Regional Environmental Plan

This policy does not apply if Tweed City Centre LEP 2012 applies.

SEPP 71 – Coastal protection

The proposed development does not involve any physical works therefore the provisions of SEPP 71 are not considered relevant in this instance

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

Nil applicable.

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

Tweed Development Control Plan

Sections A2-Site Access and Parking Code & B2-Tweed Heads

The proposed change of use application requires the reconsideration of onsite car parking.

Since the Tweed Ultima development was approved Tweed Shire Council has reduced the car parking requirements within the Tweed Central Business District in (Tweed DCP Section B2) as a way of encouraging development and revitalising Tweed Heads. This application specifically seeks to utilise the amended car parking rates to justify the proposed change of use.

When Tweed Ultima was approved the following car parking rates applied in accordance with the then DCP 2 Site Access & Parking Code:

Residential Accommodation: 1.5 spaces per unit including 25% for visitors

Tourist Accommodation: 1 space per unit, 0.5 spaces per staff member and 20% discount to staff

Under the new provisions of Tweed DCP Section B2 – Tweed Heads attached residential dwellings have the following car parking rates:

- 1 car space for 1 and 2 bedroom dwellings; or
- 1.5 car spaces for a 3 bedroom unit; and
- 1 space per 10 dwellings for visitors in multi unit developments.

There are no specific rates for tourist development.

The following table details the history of the affected units and the required car parking rates associated with the various uses as approved since the development was initially approved.

<u>LOT NUMBER IN</u> SP79995	<u>ORIGINAL APPROVAL BYDOP</u> DA456-10-2005 10/01/2005	<u>MOD160-10-2005</u> 29/8/2006	<u>DA08/0907</u>	<u>S96</u> DA08/0907.06	<u>CURRENT</u> DA08/0907.07 TO ADOPT NEW B2 RATES	<u>PROPOSED</u> DA13/0294	<u>CAR SPACES REQUIRED</u>
		Swapped 19 residential uses in eastern unbuilt tower to the western ellipsoid towers	Changed 35 previous tourist units into dual use units	Lot 85 and 92 dual use swapped for Lots 51 and 129	Requested revised car parking rates to 34 of the 35 units amended part of DA08/0907	Change 19 previous tourist units into dual use units	
LOT 11 2 BED	Tourist Only 1 car space	N/A	N/A	N/A	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 12 2 BED	Tourist Only 1 car space	N/A	N/A	N/A	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 13 2 BED	Tourist Only 1 car space	N/A	N/A	N/A	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 17 2 BED	Tourist Only 1 car space	N/A	N/A	N/A	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 19 2 BED	Tourist Only 1 car space	N/A	N/A	N/A	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 25 2 BED	Tourist Only 1 car space	N/A	N/A	N/A	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 28 2 BED	Tourist Only 1 car space	N/A	N/A	N/A	N/A	Dual Use 1.1 spaces	1.1 spaces

<u>LOT NUMBER IN SP79995</u>	<u>ORIGINAL APPROVAL BY DOP</u> DA456-10-2005 10/01/2005	<u>MOD160-10-2005</u> 29/8/2006 Swapped 19 residential uses in eastern unbuilt tower to the western ellipsoid towers	<u>DA08/0907</u> Changed 35 previous tourist units into dual use units	<u>S96 DA08/0907.06</u> Lot 85 and 92 dual use swapped for Lots 51 and 129	<u>CURRENT DA08/0907.07 TO ADOPT NEW B2 RATES</u> Requested revised car parking rates to 34 of the 35 units amended part of DA08/0907	<u>PROPOSED DA13/0294</u> Change 19 previous tourist units into dual use units	<u>CAR SPACES REQUIRED</u>
LOT 31 2 BED	Tourist Only 1 car space	N/A	N/A	N/A	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 85 2 BED	Residential Only 1.5 spaces	Tourist 1 car space	Dual Use 1.75 car spaces	Tourist Only 1 car space	N/A	Dual Use 1.1spaces	1.1 spaces
LOT 86 2 BED	Residential Only 1.5 spaces	Tourist 1 car space	N/A	N/A	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 87 2 BED	Residential Only 1.5 spaces	Tourist 1 car space	N/A	N/A	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 88 2 BED	Residential Only 1.5 spaces	Tourist 1 car space	N/A	N/A	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 89 2 BED	Residential Only 1.5 spaces	Tourist 1 car space	N/A	N/A	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 92 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 car spaces	Tourist Only 1 space	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 93 2 BED	Tourist Only 1 space	N/A	N/A	N/A	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 94 2 BED	Tourist Only 1 space	N/A	N/A	N/A	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 99 2 BED	Tourist Only 1 space	N/A	N/A	N/A	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 100 2 BED	Tourist Only 1 space	N/A	N/A	N/A	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 107 2 BED	Tourist Only 1 space	N/A	N/A	N/A	N/A	Dual Use 1.1 spaces	1.1 spaces

The above table shows the affected units and demonstrates that the originally required spaces (21.5 car spaces) are greater than the required spaces (20.9 car spaces) and therefore the proposed development is acceptable on car parking grounds.

At **Attachment 1** the whole Stage 1 car parking analysis is included which demonstrates the following holistic car parking demands across Stage 1 of Ultima:

- 71.7 spaces for the dual use units (62 units including the 8 work/dual use units)
- 42 spaces for the tourist uses (42 Units)
- 84 spaces for the residential uses (56 Units)
- 4.280 spaces for the work/office space associated with the dual flexi units (Lots 1-8)

Therefore a minimum of **201.98** onsite parking spaces for the 160 Units as approved by both DA08/0907.07 and DA13/0247 is required, with 16 of these spaces having to be available for visitor use.

However, if all units were to convert to dual use units utilising the new B2 car parking rates the site would only need to accommodate 186.557 onsite parking spaces for the residential uses (145 units x 1.1 spaces and 15 units x 1.6 spaces and 3.057 for the flexi work/office areas).

Total Stage1 Ultima parking comprises 201.98 residential spaces plus 42.2934 commercial spaces which equates to **244.27 spaces**

There are 263 spaces approved and constructed under the ellipsoid towers.

Therefore the development caters for adequate onsite parking for both the commercial component and residential component leaving a surplus of 18.7 spaces which other unit holders and or commercial uses could utilise.

Based on that assessment the site has adequate onsite parking requirements to cater for DA13/0294 subject to the recommended conditions of consent about the split of car parking between the two strata (the residential stratum SP79995 will accommodate 208 spaces and the commercial stratum SP80159 will accommodate 55 spaces as proposed by the applicant).

In all other regards the proposed development is considered consistent with the objectives for the Tweed Heads CBD as outlined in Tweed DCP Section B2.

A11-Public Notification of Development Proposals

The application was advertised and notified for a period of 14 days. The objections are discussed in detail below.

A13-Socio-Economic Impact Assessment

A Social Impact Assessment is required for residential development comprising 50 units or more. This would have been assessed in the original assessment of Tweed Ultima. The proposed change of use application to convert 19 units into flexible units (being for permanent or tourist use) will enable owner's flexibility and assist in encouraging a vibrant and active CBD.

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

Clause 92(a) Government Coastal Policy

Not applicable to the subject application.

Clause 92(b) Applications for demolition

Not applicable to the subject application.

Clause 93 Fire Safety Considerations

The recommended conditions of consent will ensure compliance with the BCA.

Clause 94 Buildings to be upgraded

The recommended conditions of consent will ensure compliance with the BCA.

(a) (v) Any coastal zone management plan (within the meaning of the Coastal Protection Act 1979),

Not applicable to the proposed change of use.

Tweed Shire Coastline Management Plan 2005

Not applicable to the proposed change of use.

Tweed Coast Estuaries Management Plan 2004

Not applicable to the proposed change of use.

**Coastal Zone Management Plan for Cobaki and Terranora Broadwater
(adopted by Council at the 15 February 2011 meeting)**

Not applicable to the proposed change of use.

(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

Change of Use - Tourist Units changing to Dual Use Units (being Permanent or Tourist Units)

The proposed change of use will not have any adverse impact upon the natural environment as the site is currently developed. In terms of the built environment the proposed mixed use development is consistent with the transition phase of older developments being redeveloped for higher density residential, tourist and commercial developments. The proposed development merely changes the mix of residential verses tourist units. This application merely seeks to improve the flexibility for the already approved units.

The application seeks to change the use of the following 19 units:

Level **2** - Lot 11, Lot 12, Lot 13, Lot 85, Lot 86, Lot 87, Lot 88, and Lot 89.

Level **3** - Lot 17, Lot 19, Lot 92, Lot 93, and Lot 94.

Level **4** - Lot 25, Lot 99, and Lot 100.

Level **5** - Lot 28, Lot 31 and Lot 107.

This will result in 42 remaining sole tourist units, 56 residential units, and 62 dual use units within Stage 1 Ultima (Ellipsoid Western Towers). This mix is considered a positive outcome as it allows the individual owners to best utilise their units based personal circumstances and market conditions.

(c) Suitability of the site for the development

The subject site is within the commercial business district of Tweed Heads, which provides for a variety of shopping, dining, and recreational opportunities. The area is serviced by medical facilities including the Tweed Heads Hospital and various professional consulting rooms in Boyd Street.

The subject site has been nominated as a designated high-density area to utilise the areas facilities as detailed above. The existing public infrastructure is adequate to service the proposed additional permanent residents and the proposed mixed use nature of the building is desirable.

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

The application was advertised and notified for a period of 14 days between Wednesday 3 July 2013 and Wednesday 17 July 2013.

During this period Council received five submissions. Of the five submissions two of them just want the right to do the same thing for their unit while three

adamantly object to the Development Application. The submissions are summarised below:

Submission 1

"We are raising strong Objections to proposed further changes to the original DA and original intent for Tweed Ultima Apartments, as application for Change of Use is placed with Council, to change from Tourist Only to Dual Use Shop Top and Serviced Apartments which introduces another zoning category previously not used in conjunction to Tweed Ultima.

Investment

When BNH Resort Pty Ltd purchased the Management Rights Business at Tweed Ultima late 2008, our purchase was strongly influenced by the DA stipulating Tourism only apartments. Over the past 4 years we have invested more than \$1M on Tourism Marketing to bring many tourists to Tweed Heads and the Tweed Valley Region. Changes to the Tourist Only zoning, will drastically reduce the number of apartments catering for Tourist accommodation.

BNH Resort Pty Ltd invested heavily into Tweed Ultima primarily based upon the volume of Tourist Units which allowed for strong and varied marketing campaigns. Our investment is coupled with the investments of many unit owners whom also invested in Tweed Ultima as a Tourism Venture. If the DA allows these changes of use, then these investors will be disadvantaged financially and they, and others, may be less likely to invest in the Tweed Region again.

Tweed Ultima, a tourist/holiday/residential building in Tweed Heads, offers Tourist, Corporate, short term/long term letting and holiday accommodation, including disability apartments. These disability Units among those listed for change. Ultima Conference Centre caters for Conferences, Seminars and Weddings and other Events bringing delegates and guests into the Tweed Heads area. Through both businesses the need for large numbers of apartments for tourist and short term accommodation is vital and we are very concerned with the future of our business, and the potential decline of Tourism in Tweed Heads if zoning changes approved.

Original DA

It seems the original intent for Tweed Ultima will be changed, without consideration for the impact to Tourism, local employment, investors, and local businesses.

We draw your attention to Zone 3 (a) Sub-Regional Business, in relation to Tweed Ultima in Council defined Zone Objective noted in sale contracts for Tweed Ultima.

"Primary Objective

To encourage the development and rejuvenation of the Tweed Heads core business area as a sub-regional centre primarily for tourist, cultural, retail and commercially oriented development, including a choice of accommodation.

Secondary Objective

To encourage upper floor residential and tourist accommodation."

The Original DA passed for Tweed Ultima was Tourist only Use 104 apartments, Residential Use 56 apartments. Now Tweed Shire Council's correspondence

dated 5/10/12 states Tourist Accommodation only 61, Residential Use Only 56 and Dual Use Residential and Tourist Accommodation 43. This current application for change of many of the remaining Tourist Units to Dual Use Shop Top and serviced apartments (a new category previously not used) is now with Council.

We are very concerned that the original intent is to be eroded, with Tourist Only Units been changed to Dual Use Shop Top and serviced Apartments in the building. To date 43 of the 104 have been changed to Dual Use. With many of these no longer used for Tourism/Holiday Accommodation, the impact at busy times is already noticeable. The change to the DA Tourist Only Disabled apartments seems particularly against the original intent of the DA. The result of these proposed zoning changes, may well be that the nature of this business and building will change from Tourist to Permanent letting and Owner Occupied.

The resultant glut of permanent accommodation available will see a reduction in rents and perhaps standard of tenant.

When we first arrived at Tweed Ultima purchasing the Management Rights from The Developer in 2008/2009, some units used for permanent letting, had less than desirable tenants, we have worked hard through our Property Letting Management to vet the applicants for permanent letting and remove the undesirable element. Zoning changes that will allow many more apartments changed to Dual Use, may be self -managed, use outside agent etc and will bring competition for tenants, reduction in rents and standard of tenant may be less than desirable; replacing the family friendly tourist environments now offered and desired for the area by all parties.

Car Parking

A principal component of the original DA surrounded car parking.

It called for 1.5 car spaces allowance for Residential Unit. This we believe has now been reduced to 1.1 car spaces per Residential Unit.

The reality is it should be 2 car spaces per Residential Unit as most residents have 2 vehicles and some 3 vehicles. This is evidenced by the vehicles being parked in Stuart Street and Bay Street and also some in Outrigger /Twin Town car park. The proposed change to the DA of the 19 Lots would put significant pressure on parking in the building which would cause more use of parking spaces in the surrounding streets and other available car spaces. Tourist requirement for parking generally is less, as many guests fly in and or have only 1 vehicle parking requirement.

Tourism and Promotion of Tweed Heads as Tourist Destination.

When our tourist/corporate customers arrive at Tweed Ultima reception, they often ask are we in NSW or Queensland, and we reply NSW, about 40 metres into NSW.

There seems to be a plan been played out to change Tweed Ultima to permanent letting/owner occupied building and force the tourists/corporate trade that currently stay at Tweed Ultima, to change their destination perhaps to Coolangatta, Queensland for accommodation. If Tourists cannot find accommodation they will go elsewhere and this will cause a spiralling in numbers of Tourist staying in the Tweed Heads area.

Apart from Tweed Ultima and Outrigger Twin Towns Resort and a few Motels, the NSW side of the border offers very little in sought after Tourist style self-contained apartment accommodation.

BNH Resort Pty Ltd management has networked closely with many businesses within the region, encouraging Tourists and other groups to Tweed Heads. We travelled to Trade Shows and the like with other Tourism Businesses, such as Outrigger/Twin Towns, Tweed Heads Bowls Club, Tropical Fruit World, Macadamia Society, Endeavour Cruises and several others visiting these Trade Shows throughout Australia, New Zealand and Asia. The common theme for all participants is to first promote the region and then promote our business. We have discussed DA application proposed changes with several Tourist related business people who were dismayed and critical of the change of Use, and the effect on Tourism and the flow onto other Tourism dependant businesses. Rob Smith General Manager of Outrigger/Twin Towns was very disappointed and stated how both our businesses benefitted from our joint and separate marketing and assists in making Tweed Heads a Tourist destination. Gerard Robinson, General Manager of Tweed Heads Bowls Club indicated that if our sponsorship was withdrawn or reduced, it would affect the operations of the Club and if the number of Tourist Apartments were not available, they would need to reconsider the structure of several high profile tournaments that bring large numbers of bowlers and supporters to the area. It should be noted that there is currently an under supply of Tourist accommodation in the area.

BNH Resort Pty Ltd t/as Tweed Ultima, have marketed very heavily encouraging Tourism to the area, marketing the area as a destination as well as our accommodation and conference centre, and are concerned that we will see the tourist numbers decline, as our Tourist Apartment numbers decline, when the apartments move to Dual Use and Permanent or Owner Occupied dwellings.

If the Tweed Shire Council allows further zoning changes to the DA to move Tourist Only to Dual Use in Tweed Ultima, the whole dynamic of the area as a Tourist destination will change to the detriment of the Tweed Heads area.

Recently the NSW tourist commission Destination NSW made a landmark deal with Qantas for 3 year promotion of tourism to NSW. The Tweed area is in NSW, and Tweed Heads should have the infrastructure to offer the Tourist style accommodation necessary to assist in raising the Tourism profile of the area and NSW. The local council should not be working against this vital trend in raising Tourism as a vital economic element, through allowing reduction in Tourist accommodation.

We are concerned that the customers and repeat customers, that we have generated for Tweed Ultima, with our Marketing and Promotion of the Tweed Heads and Tweed area, will be lost as without large number of tourist accommodation apartments available, we will be very restricted in supplying volume required to sustain our tourist trade.

We currently include as customers, large numbers of tourist/corporate travellers to our area, with large group bookings such as the film crew that come twice a year to film in Murwillumbah, taking 70 approx apartments, for 4 weeks and more, large numbers of tourists for Cooly Rocks, Surf Carnivals, Bowls events with Tweed Heads Bowls Club, (with whom we are a major sponsor), Netball Tournaments and various other such sporting events, and all year round tourists, surfers etc; Older Tourists who stay for 4 – 6 weeks to escape the colder states

during winter, corporate business, people staying for medical reasons, Doctors and other Medical Professionals working short term or locum duties at nearby hospitals including Tweed Hospital , Short stay Students and others from Southern Cross University, pilots from Flight School at Airport (their stay may be short or longer depending on length of course and their success at their studies;) family reunions etc. We provide overflow accommodation for Outrigger/Twin Towns for their conference groups and events. More recently, together with Tourism Australia we are bringing large volumes of Chinese tourists into the region, working with THBC and Endeavour Cruises in Group package Tours, our emphasis on the Tweed Heads and Tweed Valley area.

BNH Resort Pty Ltd, through Ultima Conference Centre, and Tweed Ultima Accommodation spend a huge marketing budget promoting our local area as a destination, marketing domestically, internationally in New Zealand, UK, Europe, China, Malaysia, USA etc.

We have been approached by the Commonwealth Games Organizers in regard to the number of beds we would have available for the catering of Accommodation for that large Event.

Ultima Conference Centre.

Our related business, Ultima Conference Centre, generates corporate bookings for conferences, seminars, training sessions; sporting groups catering needs, offering accommodation for delegates/guests. Many of these corporate bookings are with New South Wales Government Departments (must be catered for in NSW).

We Cater for Weddings, other family functions and many other events that require accommodation for guests, generating tourism spending and bringing visitors to the area.

Job Losses.

If we cannot provide the accommodation for this short term accommodation market, the reduced Tourists in the area, will cause financial downturns to many local businesses, and reduce the employment opportunities in Tweed Heads. Should the tourism business to Tweed Ultima be reduced, which will happen should the DA be altered, it may directly impact on 20 jobs and indirectly many more. It will also cause current sponsorships to such places as Tweed Heads Bowls Club to be terminated or greatly reduced, which will have a direct flow on to the community at large.

Tourism Losses are Community Losses.

Currently designated Residential and Tourist Zones allows sufficient variety of accommodation choices at Tweed Ultima, with similar financial returns to owners from both Tourist and Permanent Letting. If the application to change further units from Tourist to Dual Use Shop Top and Serviced Apartments is accepted, the original Objective of the Council to develop Tweed Heads as a sub-regional centre primarily for tourist, cultural, retail and commercial will be lost, and the tourist trade will be forced to go to Coolangatta or further afield, Queensland, not far, but across the border in another State.

If this application, and others that may follow, to change of proposed Use is passed, slowly (as properties are sold,) but continually, the number of Tourist apartments will reduce. The valuation of properties within Tweed Ultima will be

inconsistent, with the range of zoning Uses creating confusion, particularly when new Zoning uses are created as with Dual Use Shop Top and serviced apartments.

In conclusion, we firmly disapprove of any application by the Developer (The originator of the Tweed Ultima Concept) Zinkhol Pty Ltd, and or others to change further apartments from Tourist to Dual Use Shop Top Housing and Serviced Apartments, and request and encourage The Council and Councillors to stand firm on their original well considered DA and Zoning issued to the Developer, and should maintain the intention to grow tourism on this site and in Tweed Heads in the Best Interests of Tweed Heads, the Tweed Heads region, local businesses, employment opportunities and future investment in the area."

Council Officer Assessment Submission 1

The above objection raises some important issues that Councillors should consider when determining this Development Application.

From a planning perspective the proposed development:

- Is permissible with consent in the B3 Commercial Core Zone;
- Continues to satisfy the applicable zone objectives;
- Complies with the required onsite parking provisions;
- Maintains a mix of uses within the building (but allows individual owners to choose residential or tourist based on personal circumstances and market conditions); and
- Does not disadvantage other unit holders from doing the same thing.

For these reasons the application is recommended for approval.

The issues raised about potential job losses and loss of tourist development in the area are difficult to substantiate as over time these figures may change depending on how individual unit owners choose to utilise their units and therefore this submission is not considered to warrant refusal of the application.

Submission 2

"I am the owner of lot 118 at Tweed Ultima and I protest the proposed change of use of the apartments.

When I invested into Tweed Ultima it was entirely influenced by the strong management and the secure tourist letting pool as laid down in the DA. I have several tourist properties and this is my ongoing criteria.

I find it difficult to believe that, only 5 years after opening the building, Council is doing a back flip and is prepared to abandon the concept of improving the Tweed Ultima end of town and encourage tourism into the region.

I'm unsure whether it's the greed of the developer or the greed of Council. The developer is boasting that the change will add \$100,000 to each one of his properties but this will occur at the expense of tourism investors like myself as Real Estate agents are saying our properties will fall in value by \$50,000 to \$80,000 as a result of the greed of the developer.

Is Council going to offer me some compensation for this down valuing of my property?

I believe that this proposed change has been a flow on of changes the car park allocation and that residential car parks have been reduced from 1.5 parks to 1.1 parks. This change was obviously done without any research. When speaking with the building manager, we calculated that permanent residents and tenants use 1.79 car parks per unit. It's for this reason car parking over flows into Stuart Street and with this proposed change it will add another 15 cars into Stuart Street , which incidentally is across the road from the school.

Many people have invested into the property with the understanding of developing tourism. Their investment is a life style investment set around investment and personal use of the apartment. The potential weakening the pool to the extent shown will have a significant downturn effect on the pool and the income generated.

I believe that this change will have a detrimental effect on tourism in the area which will flow onto other tourist people such as restaurants, golf courses, boating, clubs, shops and other tourist attractions. After visiting shopping centres in the area, I believe Council cannot afford to have any more shops close down."

Council Officer Assessment Submission 2

As detailed above in Submission 1 the above objection raises some important issues that Councillors should consider when determining this Development Application. From a planning perspective the application is considered suitable as tourist development within these 19 units will still be possible as it is just adding another permitted use being permanent residential use. Therefore this submission is not considered to warrant refusal of the application.

Note: the objectors unit Lot 118 was originally approved for tourist use and has remained that way ever since.

Submission 3

"I raise strong Objection to proposed changes to the original DA and original intent and purpose for Tweed Ultima Apartments.

Application deemed Out of Order by Body Corporate

- *The application is not equivalent to original DA and current DA approved by Council.*
- *The application was not approved at standard Body Corporate meeting.*
- *Building management (as body corporate member) has identified high risk to unit values.*

True Purpose of the Application

- *As stated in the minutes of the EGM 8 May 2013, the purpose of the application is to reduce and share the residential parking in the existing Towers in order to reduce construction of parking in the next proposed residential commercial/tourist tower by 22 car parks.*

Matters for consideration

Insufficient car parks & zero barriers to daytime use

- *One single imminent incoming commercial tenant is reported by management as seeking 12 car parks already – Whilst this will likely be declined the demand of 22 reduction is already clear;*

- *Nature of car park operation due to dual commercial purpose of building has daytime open inbound access & automatic exit access all times;*
- *The building has not installed infrastructure to preserve unit holders occupants car parking;*
- *Nature of access allows full and free of charge daytime access for any person, effectively rendering the building a free public car park during business hours for all car parks. The roller door is left up during daytime hours in support of commercial tenants.*
- *Resident and owner car park allotments are spread through B1 & B2 – B1 tenants will likely lose access at regular interval;*
- *Current peak period load has building car parking reported by management at capacity;*
- *Some commercial spaces remain vacant however upon completion of Eastern tower, North and South tower, commercial tenant and client use will likely significantly increase;*
- *Further increase in joint commercial and tourist car park utilisation will likely result in less than 1 park availability per unit for occupying tenants;*
- *Less than 1 car park per unit will necessitate spillage onto local streets, particularly with access adjacent to school during concurrent school and trading hours;*
- *Stuart Street adjacent to school may congest in period of heavy demand;*
- *Further and continuous DA approvals by Council allowing for further scale back in Eastern Tower parking will increase demand on the North and South Towers and likely increase frustration and potential aggressive actions and driver behaviour between residents, commercial tenants, commercial custom and school traffic through spillage rates in the Stuart Street school vicinity.*

At issue is the strong practical and actual likelihood that due to non-specific and non-preserved parking facilities the Council approval will cause the car parking per unit will fall below the purchased allocation of 3 at peak trading and tourist times. In most joint commercial and residential accommodation facilities, private car parks are preserved and inaccessible to non-residents.

Potential impact of approval under DCP 2012 based on LEP 2012 – Council reference DA04/0036

- *Precedent for reliance for continuous rezoning of units from well-maintained 4 star tourist facility to multi-tower, poorly maintained high rise dominated by cheap permanent rental accommodation adjacent to beach.*
- *Approval and continued reliance on same to rezone tourist accommodation may cause management rights to become less viable over time and may contribute toward cessation of operation as a managed tourist destination*
- *Current issues with the building and management matters has units trading at and below \$100,000 already rendering them some of the cheapest units on the Gold Coast.*

Building car park has water penetration across floor

Car park flooding and leakage – water over car park floor

- *some car parks are constantly affected by water posing a possible slip/fall risk, regardless of weather conditions and particularly with rain some appear to experience continuous water coverage;*
- *whilst it may be in part be due to sea level, pits are shallow and complex appear to have insufficient pit barriers allowing seepage to constantly come onto car park flooring, however this would need to be confirmed by visual inspection;*
- *unit complex rubbish bin cleaning occurs on B1 and contaminated run-off is suggest by management that it may seep directly on B2 car parking areas which if so would clearly be contaminating the floor – however this needs to be confirmed;*

Additional commercial car park demand pressure on current car park caused by further reduction in Eastern Tower parking requirements and “Shop Top Use” will decrease availability of car parks and force residents, tourists and commercial visitors to use rather than avoid any water affected car parks more regularly.

Impact upon investors in Tweed and Tweed Ultima Complex

Approval will reduce value and resale to acquires of this property on following basis:

- *Tweed Ultima complex has not fixed DA status or certainty;*
- *Tweed Ultima unit values already trading up to 25% below recent advertised liquidation price (\$300,000 vs. “from \$425,000”)*
- *Tweed Council Tourist DA approved developments have established precedents of constant change of use;*
- *Approval casts a shadow over ongoing value of investment in Tweed;*
- *Management reports permanent tenants via external real estate agency are letting units at as low as \$320 per week compared to \$425-\$450 per week when let via complex management.*

A range of matters are currently causing the complex to trade below 2/3 story walk up tenancies at the rear of Coolangatta and Kirra. Exacerbated car park issues may cause further decline in tourist holiday appeal and risk creating a multi-tower cheap accommodation complex immediately behind Twin Towns and on the Main street of Coolangatta/Tweed. If standards are not maintained it may become a high density low cost accommodation complex.

Potential impact on current star rating and social media

- *In peak periods mentality of tourists may consider high likelihood of loss of car park if they move their vehicle;*
- *Lack of car parking/reduced availability in accommodation will impact travel agency and established referrals to the complex;*
- *Sites such as Trip Advisor are likely to report problems and frustrations of holidaying tenants;*
- *Negative social media comments have high and immediate impact and further, will end with referral to alternate accommodation options;*

- Any reduction in rental returns will result in less expenditure by investors on their properties possibly resulting in further building downgrades;
- Tweed Ultima name by definition and brand association will reflect negatively on NSW Tweed.

Unestablished current demand for change

I object that Council would approve a change of use of apartments premised upon the "Shop Top Use" if in fact the demand does not currently exist. The location seems to require tourist accommodation rather than services apartments which are more commonly required in large CBD areas such as Brisbane, Sydney and Melbourne. There also appear to be insufficient commercial space to warrant 19 Shop Top accommodation facilities.

Alternate & concurrent solution

Whilst I do not support this application, in the interests of finding a cost effective solution for the applicant if Council sees fit to approve I recommend and suggest the following subject to Council regulations and requirements:

Option 1

- *Applicant and developer be required by Council as part of approval to construct secure car park infrastructure equivalent to the purchased quantity of car parks for each Residential and Tourist zoned units for existing North and South Tower including;*
- *Caged/barred secure car accessed access on B1 and B2 for allotted car parks;*
- *Any existing unit holders cages be relocated by the applicant (although this is unlikely as direction of access toward B2 rams is where approved cages are located and likely to remain);*
- *Water seepage into B1 & B2 resulting in water over some car parks is inspected by Council.*

Should the council find the applicant request otherwise meets the requirements this small amendment would preserve resident and tourist access to entitled parking, common and consistent with many joint purpose developments creating awareness of reduced capacity for general parking and avoid aggravation and complaint to Council.

In essence, there is no alternate car park available for residential and tourist tenants of the building and Council must maintain and preserve tenant's rights to their purchased car park else management may well be forced to constantly tow away vehicles.

Option 2

Change application for Eastern Tower and apply for multiple Service Apartments, construct same for purpose and apply for multiple "shop top" accommodation in new tower."

Council Officer Assessment Submission 3

As detailed above this objection raises some important issues that Councillors should consider when determining this Development Application. From a planning perspective the application is considered suitable as tourist development

within these 19 units will still be possible it's just adding another permitted use being permanent residential use.

In regards to the water issue in the basement this appears to be a maintenance issue that should be pursued through the body corporate as the building's Construction Certificate has been signed off as complete.

Therefore this submission is not considered to warrant refusal of the application.

Note: the objectors unit Lot 43 was originally approved for tourist use and has remained that way ever since.

Submission 4

"We purchased our Unit Lot 136, 10th floor 5 years ago with the understanding that the unit was for dual purpose both Residential and holiday letting and at the time paid more for the unit, for this reason. We also purchased a furniture package to cater for the holiday letting.

As you would be aware we have now been informed that this is not the case and our unit is only for residential letting (10th floor up).

We feel it would be further unfair for the above applicant to gain change of use for the 19 units as we understand from the 9th floor down , units were for holiday letting only. This would mean making more units available for residential letting and therefore making it harder again for us and others on the 10th floor and above to permanent let the units. At the time we understood these units to also be cheaper sale price as they were for holiday letting only."

Council Officer Assessment Submission 4

It is extremely unfortunate that there has been such confusion about which units were approved for what purpose. This objection is based on the perception of the approved uses rather than the actual approved uses and this is difficult to justify on planning grounds.

From a planning perspective the application is considered suitable as tourist development within these 19 units will still be possible it's just adding another permitted use being permanent residential use. Therefore this submission is not considered to warrant refusal of the application.

Note: the objectors unit Lot 136 was originally approved for residential use only and has remained that way ever since.

Submission 5

No objection to the DA but wants to do the same thing and doesn't want this development from prohibiting his change of use.

Council Officer Assessment Submission 5

As detailed within this report there is sufficient onsite parking to accommodate all uses within Stage 1 Ultima to change to dual use subject to the appropriate development applications being received. Therefore this submission is not considered to warrant refusal of the application.

Note: this submission came from Lot 112 which was originally approved for tourist use only and has remained that way ever since.

Summary

In conclusion the proposed Development Application is considered lawful and does not preclude other unit owners from lodging their own change of use applications to be assessed on their merits. In regards to the loss of tourist units the proposed application maintains the tourist flexibility but also allows residential use if that better suits the needs of the individual owner. Accordingly the objections received are not considered to warrant refusal or further amendment of the application.

(e) Public interest

The proposed development is considered to be in the general public interest as it complies with the applicable planning provisions applying to the site.

APPLICABLE DEVELOPER CONTRIBUTIONS:

The original Ultima development was charged for commercial, tourist and residential uses as per the nominated uses at the time of the approval. Accordingly this application needs to be charged the difference between the already charged lower tourist rate and the proposed higher residential rates.

A full contributions calculation is below:

Contribution Plan	Tourist Rates (Credit)	Current Residential Rate for 2 Bedroom Unit	Chargeable Difference Per Unit	Total Chargeable ET and Monetary Figure
S64 Water	0.5 ET per dwelling	0.5ET	No Charge	Nil
S64 Sewer	0.75 ET per dwelling	0.75ET	No Charge	Nil
S94 No. 4 TRCP	3.9 trips per unit	3.9 trips per unit	No Charge	Nil
S94 Plan No. 5 Open Space	No longer applicable in Tweed Heads			
S94 Plan No. 11 Libraries	No Credit	0.7083 ET Per Unit	0.7083 ET Per Unit	13.4577 ET \$11,278
S94 Plan No. 12 Bus Shelters	No Credit	0.7083 ET Per Unit	0.7083 ET Per Unit	13.4577 ET \$861
S94 Plan No. 13 Cemeteries	No Credit	0.7083 ET Per Unit	0.7083 ET Per Unit	13.4577 ET \$1,655
S94 Plan No. 15 Community Facilities	0.7083 ET per unit	0.7083 ET Per Unit	No Charge	Nil
S94 Plan No. 18 Council Administration	0.5769 ET per unit	0.7083 ET Per Unit	0.1314 ET Per Unit	2.4966 ET \$4644.45
S94 Plan No. 22 Cycleways	0.3864 ET per unit	0.7083 ET Per Unit	0.3259 ET Per Unit	6.1921 ET \$2,929
S94 Plan No. 26 Regional Open Space Casual	0.38 ET per unit	0.7083 ET Per Unit	0.3283 Per Unit	6.2377 ET \$6,805
S94 Plan No. 26 Regional Open Space Structured	No Credit	0.7083 ET Per Unit	0.7083 ET Per Unit	13.4577 ET \$51,453

Contribution Plan	Tourist Rates (Credit)	Current Residential Rate for 2 Bedroom Unit	Chargeable Difference Per Unit	Total Chargeable ET and Monetary Figure
S94 Plan No. 27 Tweed Heads	19 Unit Credit	No Change	No Charge	Nil
TOTAL				\$79,715.45 (which equates to \$4195.55 per unit)

OPTIONS:

1. Approve the application in accordance with the recommended conditions of consent; or
2. Refuse the application with reasons for refusal.

Council officers recommend Option 1.

CONCLUSION:

The proposed development still provides a mixed use high rise development in an area nominated for such a use given its location within the commercial business districts of Tweed Heads.

Subject to the recommended conditions of consent the application is considered to warrant conditional approval.

COUNCIL IMPLICATIONS:

a. Policy:

Corporate Policy Not Applicable.

b. Budget/Long Term Financial Plan:

Not Applicable.

c. Legal:

Not Applicable.

d. Communication/Engagement:

Not Applicable.

UNDER SEPARATE COVER/FURTHER INFORMATION:

Attachment 1.

Stage 1 Tweed Ultima Car Parking Assessment as at October 2013 (ECM 3181345)

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- 23 [PR-CM] Section 96 Application DA08/0907.07 - Amendment to Development Consent DA08/0907 for Change of Use of Tourist Accommodation Units to Flexible Multi Dwelling Housing Units or Tourist Accommodation Units, Stratum Subdivision and Temporary At-Grade Parking Area at Lot 1 SP 80159 and Lots 9, 10, 15, 91, 21, 97, 98, 27, 29, 30, 103, 104, 105, 33, 35, 36, 109, 110, 111, 41, 42, 116, 117, 46, 47, 48, 121, 122, 51, 52, 53, 54, 127, 128, and Lot 129 in SP 79995 Nos. 14-18 and 20-22 Stuart Street, Tweed Heads

SUBMITTED BY: Development Assessment

FILE REFERENCE: DA08/0907 Pt5



Civic Leadership

LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:

- 1 Civic Leadership
- 1.1 Ensure actions taken and decisions reached are based on the principles of sustainability
- 1.1.1 Establish sustainability as a basis of shire planning and Council's own business operations

SUMMARY OF REPORT:

Council is in receipt of a Section 96 Modification DA08/0907.07, which applies to the Tweed Ultima site.

In July 2008 Tweed Shire Council received and assessed DA08/0907 which sought approval to change the use of 35 tourist accommodation units (within the ellipsoid Stage 1 towers of Ultima) into 35 dual use multi dwelling housing units/tourist accommodation units.

The current Section 96 Modification seeks to apply the reduced car parking rates (as applicable under Tweed DCP Section B2) to negate the need for additional parking either at-grade or below the Stage 2 of the Ultima development as previously conditioned. There are no physical works associated with this Section 96. It is a procedural amendment to apply the contemporary parking rates when making available more parking spaces to accommodate further changes of use as proposed in DA13/0294.

This Section 96 also proposes to amend the Stratum Subdivision to better allocate car parking between the residential portion and the commercial portions of the site. This would ensure that sufficient parking is available for a concurrent item on this Business Paper (DA13/0294) and any other unit within Ultima which may want to lodge a change of use development application to enable flexible dual use between tourist use and residential use.

The associated concurrent item on this Business Paper is DA13/0294 which seeks consent to convert 19 previously approved tourist only units to units which are capable of use for tourists or permanent residents (Stage 1 of Ultima). The application seeks the flexibility to enable individual owners to choose whether they use the units for tourists or permanent residents. Given the units were originally approved as tourist use only the application triggers the need for a review of car parking and Section 64 and Section 94 Developer Contributions.

Since Stage 1 of Ultima was approved by the then Department of Planning (DoP) Council has reviewed its car parking rates for properties within the Tweed Heads area (Tweed DCP Section B2 – Tweed Heads). This new plan has significantly lowered the applicable parking rates with the main objective of promoting business and revitalising the Tweed Heads Central Business District. The reduced rates now enable consideration of the current Section 96 Modification DA08/0907.07 and the current Development Application (DA13/0294), as under the previous regime the onsite car parking was already full to capacity.

Both DA13/0294 and Section 96 DA08/0907.07 have received submissions (11 in total over the two applications) in regards to these applications. The submissions vary from other unit holders who just want to do the same thing to adamant objections to the proposals. The adamant objections to the proposal relate to whether the proposal is the same development which was originally approved, whether the loss of tourist units will have a detrimental effect on Tweed Heads as a tourist destination, whether there is sufficient car parking on site to cater for the changes, and whether the proposal results in equity between unit holders based on land values and entitlements.

From a planning perspective the proposed modification:

- Is permissible with consent in the B3 Commercial Core zone;
- Continues to satisfy the applicable zone objectives;
- Complies with the required onsite parking provisions;
- Maintains a mix of uses within the building (but allows individual owners to choose residential or tourist based on personal circumstances and market conditions); and
- Does not disadvantage other unit holders from doing the same thing.

For these reasons the application is recommended for approval.

DA13/0294 was called up to Council by Councillor Michael Armstrong and given its association with the current Section 96 Modification DA08/0907.07 both applications have been reported to Council.

RECOMMENDATION:

That Section 96 Modification DA08/0907.07 for an amendment to Development Consent DA08/0907 for change of use tourist accommodation units to flexible multi dwelling housing units or tourist accommodation units, stratum subdivision and temporary at-grade parking area at Lot 1 SP 80159 and Lots 9, 10, 15, 91, 21, 97, 98, 27, 29, 30, 103, 104, 105, 33, 35, 36, 109, 110, 111, 41, 42, 116, 117, 46, 47, 48, 121, 122, 51, 52, 53, 54, 127, 128, and Lot 129 in SP 79995 Nos. 14-18 and 20-22 Stuart Street, Tweed Heads be approved subject to the following amendments being made to the consent:

- 1. Amend the description of the development to read as follows:**

DA08/0907 for change of use tourist accommodation units to flexible multi dwelling housing units or tourist accommodation units and the associated stratum subdivision to allocate car parking at Stage 1 Tweed Ultima at Lot 1 SP 80159 and Lots 9, 10, 15, 91, 21, 97, 98, 27, 29, 30, 103, 104, 105, 33, 35, 36, 109, 110, 111, 41, 42, 116, 117, 46, 47, 48, 121, 122, 51, 52, 53, 54, 127, 128 and Lot 129 in SP 79995 Nos. 14-18 & 20-22 Stuart Street, Tweed Heads.

-
2. Delete Condition 1 and replace with new Condition 1A which reads as follows:
- 1A. The development shall be completed in accordance with:
- The Statement of Environmental Effects prepared by Darryl Anderson Consulting dated July 2008 except where varied by the amended S96 Applications as detailed in Darryl Anderson Consulting letters dated 16 September 2008 (DA08/09070.5), 23 April 2009 (DA08/0907.06), and 3 July 2013 (DA08/0907.07);
 - Proposed Stratum Subdivision Plan (in relation to Stage 1 of Ultima) Nos 8431-22 (Sheets 1-6) prepared by Michel Group Services and dated 14/06/2013;
- except where varied by the conditions of this consent.
- [GEN0005]
3. Delete Condition 3A, 3B and 3C and replace these with new condition 3D which reads as follows:
- 3D. This Development Application (being a combination of the original DA08/0907, S96 DA08/0907.05, S96 DA08/0907.06 and S96 DA08/0907.07) approves the change of use of 35 tourist accommodation units within the ellipsoid towers of the Tweed Ultima into 35 flexible units that can be used as either multi dwelling housing units (shop top housing) or tourist accommodation units (serviced apartments). The 35 affected units are as follows:
- Level 2 - Lots 9 and 10 in SP 79995
 - Level 3 – Lots 15 and 91 in SP 79995
 - Level 4 – Lots 21, 97, and 98 in SP 79995
 - Level 5 – Lots 27, 29, 30, 103, 104, and 105 in SP 79995
 - Level 6 – Lots 33, 35, 36, 109, 110, 111 in SP 79995
 - Level 7 – Lots 41, 42, 116, and 117 in SP 79995
 - Level 8 – Lots 46, 47, 48, 121 and 122 in SP 79995
 - Level 9 – Lots 51, 52, 53, 54, 127, 128 and 129 in SP 79995
- [GENNS01]
4. Delete Condition 4A which related to the at-grade parking area.
5. Delete Condition 5 which related to the at-grade parking area.
6. Delete Condition 6 and replace it with Condition 6A which reads as follows:
- 6A The Ultima development is required to have the following parking provisions:
- Stage 1 - Western Ellipsoid Towers**
- Stage 1 (comprising the two western ellipsoid towers) shall provide parking as follows:
- 55 Commercial Spaces in SP 80159;
-

- **208 Accommodation Spaces in SP 79995 (16 of which have to be accessible for visitor parking).**

Stacked parking spaces must be allocated to the same Lot Number.

The parking spaces are to be allocated within the respective body corporates and include parking for the disabled in accordance with Tweed Shire Council Development Control Plan Part A2 - Site Access and Parking Code.

[GENNS04]

7. Delete Condition 22 and replace it with Condition 22A which reads as follows:

22A. The creation of easements for services, rights of carriageway and restrictions as to user as may be applicable under Section 88B of the Conveyancing Act including (but not limited to) the following:

- (a) **Easements for sewer, water supply and drainage over ALL public services/infrastructure on private property.**
- (b) **DELETED**
- (c) **The western ellipsoid towers (Stage 1 of Ultima) are to have parking allocated as follows: 55 commercial spaces in SP 80159 and 208 Accommodation Uses in SP 79995 (16 of which have to be accessible for visitor parking) and all stacked parking spaces must be allocated to the same Lot Number.**
- (d) **The clear nomination of the lawful development nature of each of the 160 units. This will need to delineate between those units which are tourist accommodation units only, those units which are multi dwelling housing only (residential) and those units which are flexible and can be used for either multi dwelling housing (residential) or tourist accommodation.**

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

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

Privately owned infrastructure on community land may be subject to the creation of statutory restrictions, easements etc in accordance with the Community Land Development Act, Strata Titles Act, Conveyancing Act, or other applicable legislation.

[PSC0835]

8. Delete Condition 25 and replace it with Condition 25A which reads as follows:

25A Prior to issuing the subdivision certificate the applicant is to have:

- **Surrendered that part of Development Consent No. DA456-10-2003 relating to any areas now redundant as a consequence of DA08/0907 and/or any S96 approved by the Department of Planning. Such surrender shall be by lodgement of the prescribed information, suitably executed, as required by Section 80A(1)(b) of the Environmental Planning and Assessment Act, 1979 (as amended) and Clause 97 of the Environmental Planning and Assessment Regulations, 2000**

[PSCNS01]

REPORT:

Applicant: Zinkohl Pty Ltd
Owner: Zinkohl Pty Ltd
Location: Lot 1 SP 80159 and Lots 9, 15, 91, 21, 97, 98, 27, 29, 30, 103, 104, 105, 33, 35, 36, 109, 110, 111, 41, 42, 116, 117, 46, 47, 48, 121, 122, 51, 52, 53, 54, 127, 128, and Lot 129 in SP 79995 Nos. 14-18 & 20-22 Stuart Street, Tweed Heads
Zoning: B3 Commercial Core under Tweed City Centre LEP 2012
Cost: Not Applicable to Change of Use

Background:

The subject site is located across two allotments at 14-18 and 20-22 Stuart Street, Tweed Heads. It is located within the heart of the Tweed Heads Central Business District on large sites bound by Wharf Street, Navigation Lane and Stuart Street. The site is generally level with no significant vegetation.

The site has the benefit of water views to the east over Jack Evans Boat Harbour and Chris Cunningham Recreational Park. The site is separated from Jack Evans Boat Harbour by Wharf Street, a public car park and landscaping.

The site currently accommodates the Tweed Ultima Development.

Tweed Ultima comprises two main parts:

Stage 1 Two 14 storey ellipsoid towers set on a podium (creating two 15 storey buildings) on the western part of the site (already constructed):

- 1181m² mixed retail space.
- 594m² conference.
- 405m² gym and spa.
- 160 apartments (some tourist only units, some flexi units, some residential use units only).
- 265 car parking spaces (only 263 constructed).

Stage 2 An 11 storey rectangular building on the eastern portion of the site (not yet constructed):

- 2386m² mixed retail space.
- 415m² of restaurant/bar space.
- 75 units (some tourist only units, some flexi units, some residential use units only).
- Approximately 117 car parking spaces.

The area surrounding the site is undergoing transition. Beyond the site to the north and east is the Dolphin Hotel Redevelopment Site and the Twin Towns Development. Centro Tweed shopping centre is to the south east.

The Ultima Development has a long and complicated history. This is primarily as a result of multiple Section 96 Modifications and multiple new Development Applications seeking first use applications and change of use applications all having an effect on the overall car parking requirements for the site. Below is a summary of that history to enable an

understanding of how the subject application (DA08/0907.07) fits into the bigger Ultima approval regime:

Stages 1 and 2 of Ultima were originally approved in the one application by the Department of Planning (DoP) in 2004 (DoP Reference DA456-10-2003 and Council Reference DA04/0016).

The DoP has subsequently granted five modifications as follows:

MOD 56-4-2005 (DA04/0016.03) – 19 September 2005 – Changed contributions to enable staging separating ellipsoid towers from eastern rectangular tower. No impact on parking.

MOD160-10-2005 (DA04/0016.09) – 29 August 2005 – Exchanged 19 tourist units in the eastern ellipsoid tower with 19 residential units in the western ellipsoid towers. No overall change to parking.

MOD 48-5-2007 (DA04/0016.11) – 3 August 2007 – Change to Gym. Increased GFA 224m² which increased FSR by 0.7% to 4.228:1. This required 8 extra parking spaces. DoP said the 8 extra spaces required can be accommodated by the site's surplus.

DA456-10-2003 MOD 4 (DA04/0016.14) and DA456-10-2003 MOD 5 (DA04/0016.15) – Both approved on 11 December 2009 in a joint assessment – Mod 4 was predominantly changes to the external façade, an additional basement to Stage 2 of the development, and changes of use at the ground floor. Mod 5 sought to change the use of 23 tourist accommodation units in the eastern rectangular building (Stage 2) to dual use tourist accommodation/multi dwelling housing (residential).

In July 2008 Tweed Shire Council received an assessed DA08/0907 which sought approval to change the use of 35 tourist accommodation units (within the ellipsoid Stage 1 towers of Ultima) into 35 dual use multi dwelling housing units/tourist accommodation units. The applicant wanted the flexibility within these 35 units to do either tourist accommodation and/or multi dwelling housing (permanent occupation). The definition would therefore be both multi dwelling housing and tourist accommodation depending on how a particular owner utilised the individual units.

At this time the change from tourist to dual multi dwelling housing and tourist development required additional parking in accordance Tweed DCP Section A2 – Site Access and Parking Code and accordingly DA08/0907 when approved in July 2009 was conditionally approved provided an additional 22 car parking spaces were accommodated under the yet to be constructed Stage 2 in an additional basement (which was ultimately approved by the DoP in DA456-10-2003 MOD 4).

There has been two subsequent Section 96 Applications to DA08/0907 (being DA08/907.05 and DA08/0907.06 which approved the following further changes:

S96 DA08/0907.05 was approved on 27 August 2010 with Condition 4 of the consent being amended to Condition 4A which gave the applicant 24 months (rather than 12 months) to comply with the additional parking requirements. Which meant Condition 4A would have needed to be satisfied by 10 July 2011, however, to date this condition has not been satisfied.

S96 DA08/0907.06 sought approval to swap two of the DA08/0907 approved flexi units (Lots 85 (Level 2) and 92 (Level 3) in SP 79995) with two tourist only units (Lots 51 and 129 (both on Level 9) in SP 79995). DA08/0907.06 was subsequently approved on 28 January 2011 with Condition 3 being modified to reflect the new units and Condition 3B and 3C being introduced to clarify the approval.

The Current S96 DA08/0907.07 now seeks approval to:

1. Recalculate the applicable car parking rates for 34 units (34 out of the original 35 units subject to DA08/0907) based on the new Tweed DCP Section B2 Tweed Heads. The applicant has claimed that these recalculations will negate the need for the previously conditioned temporary car park. It should be noted that all units are two bedroom units.
2. Amend the approved stratum subdivision to redistribute car parking in the basement between the common property of the Strata Plan 79995 to common property of the Strata Plan 80159.
3. Change the description of the development by removing reference to the temporary at-grade parking as the proposed changes seek to remove the need for this element.

If the above changes are approved the consent would need to be modified in regards to:

- a. Condition 1 - amend stratum plan reference and delete reference to at-grade parking
- b. Condition 3A, 3B and 3C – delete and create 3D to advise of the applicable units
- c. Condition 4A - delete the need for the additional parking at Stage 2 of Ultima
- d. Condition 5 - delete the need for this additional temporary at-grade parking area
- e. Condition 6 - amend to reflect new parking rates
- f. Condition 22 - amend to delete 22(b) as the extra parking would no longer be required
- g. Condition 25 - amend to reflect revised parking requirements and the impact this has on other approvals

The application was placed on public exhibition for 14 days between 24 July 2013 and 7 August 2013. During this period Council received six submissions, of these one of them was a letter of support, three of them just want the right to do the same thing for their unit while two object to the Section 96. The issues raised are the equity between units within Ultima, the sites ability to cater for the proposal having regard to parking and the lawfulness of the Section 96 Application.

The following report addresses these submissions in detail however from a planning perspective the Section 96 Modification is lawful and this application does not jeopardise any other unit for applying for the same flexibility.

Therefore, the proposed development has been recommended for approval subject to the recommended changes to the original conditions of consent.

In addition to the above applications Tweed Shire Council has also determined the following first use applications:

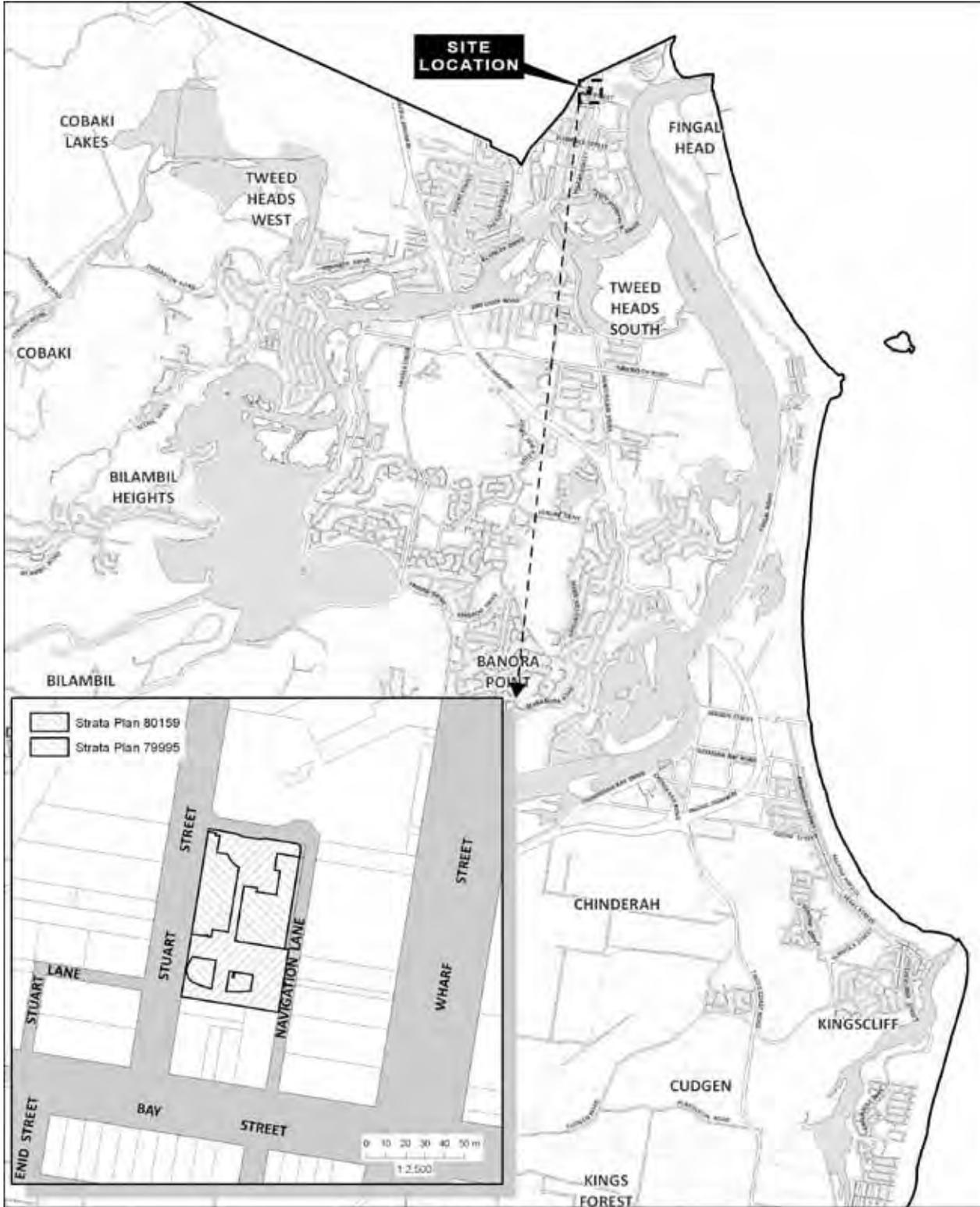
- DA08/0067 - Commercial 370m², Lot 5 SP 801059 (includes Lots 10-12 in SP 80551);
- DA08/0104 - Beauty Salon 51.25m² (one consulting room and 8.7m² retail space), Part Lot 4, SP 80159;
- DA08/0105 - Café & Gallery 99.44m² (25m² café, 5.125m² dining, and 74.44m² gallery), Part Lot 4, SP 80159;
- DA08/0144 - Sales Office 103m², Lot 6 SP 80159;
- DA08/0856 - Hair Salon 114m², Lot 2 SP 80159;
- DA10/0708 – Office 219m², Lot 1 in SP80159;
- DA13/0190 – Outdoor balustrade, Part Lot 4 in SP80159 & Office Fit Out, Lot 9 in DP 80159.

All of the above applications have had implications on the applicable onsite parking requirements.

The associated concurrent item on this Business Paper is DA13/0294 which seeks consent to convert 19 previously approved tourist only units to units which are capable of use for tourists or permanent residents (Stage 1 of Ultima). The application seeks the flexibility to enable individual owners to choose whether they use the units for tourists or permanent residents. Given the units were originally approved as tourist use only the application triggers the need for a review of car parking and Section 64 and Section 94 Developer Contributions.

DA13/0294 was called up to Council by Councillor Michael Armstrong and given its association with the current Section 96 Modification DA08/0907.07 both applications have been reported to Council.

SITE DIAGRAM:



Locality Plan
 Strata Plan 79995 and Strata Plan 80159
 14-22 Stuart Street, Tweed Heads

Disclaimer: This site plan is to be used in conjunction with the relevant Strata Plan. It does not constitute an offer of any services, facilities, amenities or facilities, nor does it constitute a contract or agreement. It is not intended to be used as a basis for any legal proceedings. It is not intended to be used as a basis for any legal proceedings. It is not intended to be used as a basis for any legal proceedings.

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 Boundary lines should be considered approximate only.

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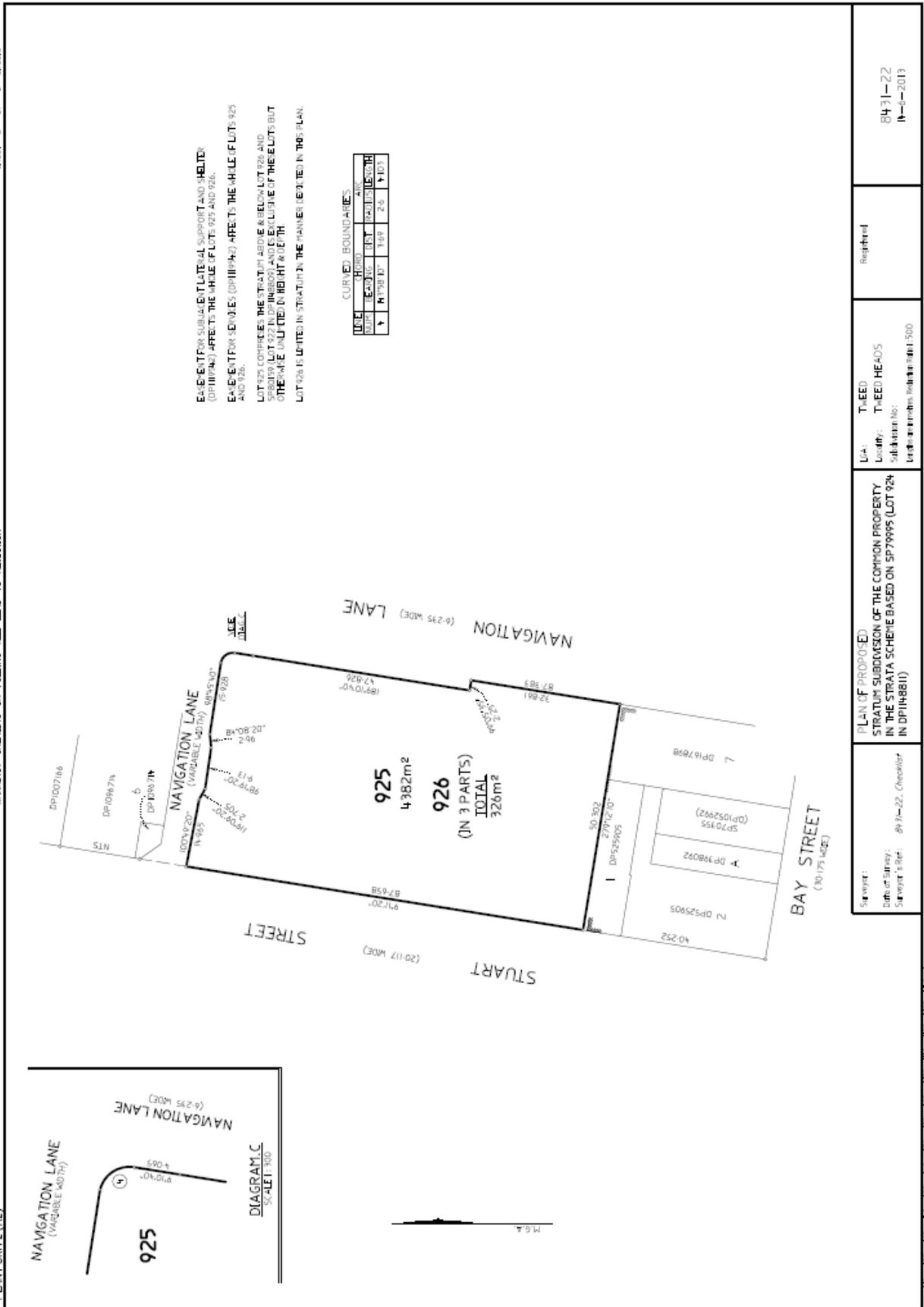
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City and Cultural Centre
 2 Macquarie Road
 Murumbidgee NSW 2454
 PH (04) 810
 MURUMBIDGEE 2454 2884
 T (02) 6870 2400 / 6300 290 810
 F (02) 6870 2423
 W www.tweed.nsw.gov.au
 E planning@tweed.nsw.gov.au

TWEED
 SHIRE COUNCIL

WARNING: CREASING OR FOLDING WILL LEAD TO REJECTION

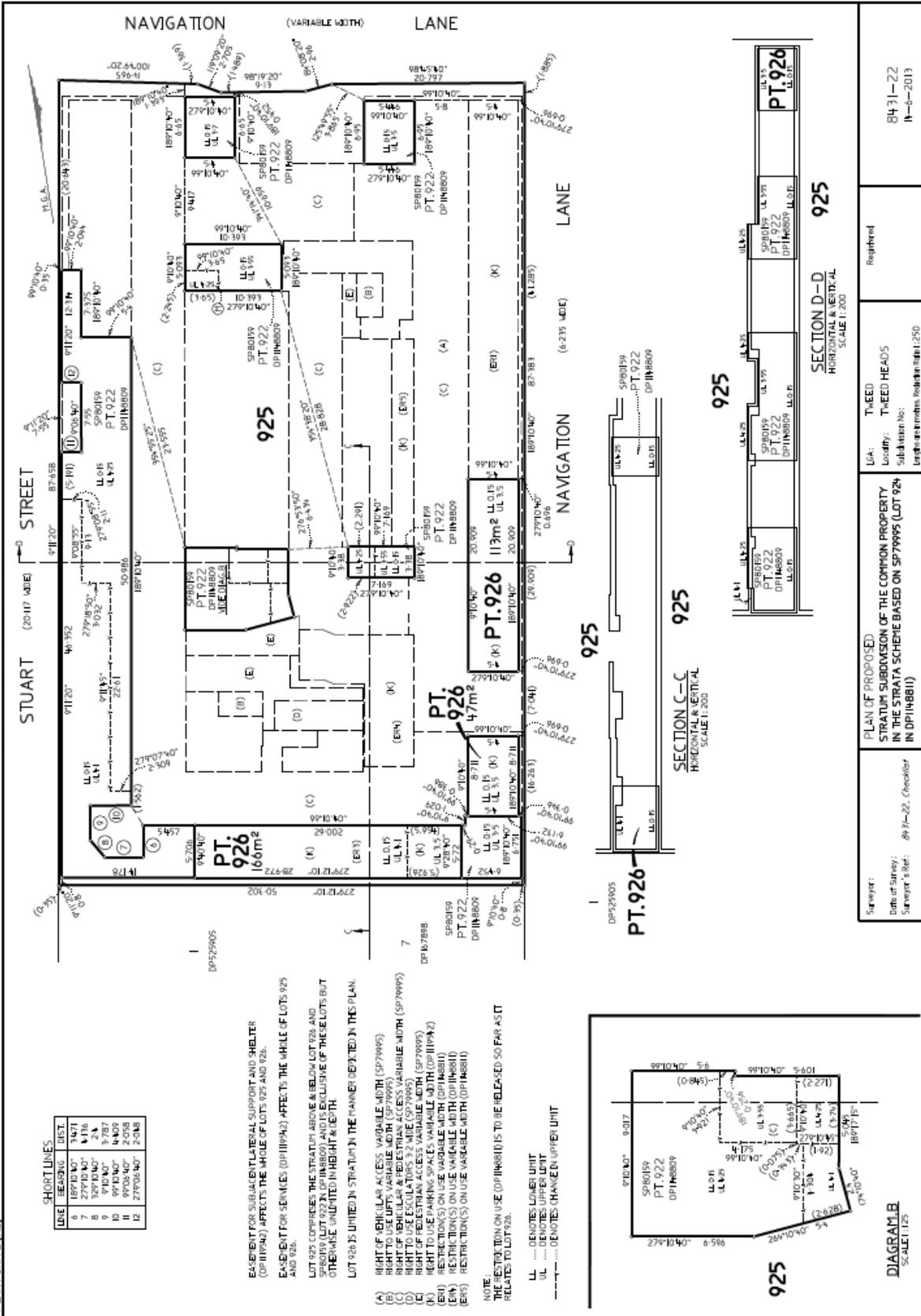
PLAN FORM 2 (A2)



Sheet 4 of 6 Sheets

WARNING: CREASING OR FOLDING WILL LEAD TO REJECTION

PLAN FORM 2 (A2)



SHORT LINES

EASEMENT FOR SUBJUGATED LATERAL SUPPORT AND SHELTER (DP11942) AFFECTS THE WHOLE OF LOTS 925 AND 926.

EASEMENT FOR SERVICES (DP11942) AFFECTS THE WHOLE OF LOTS 925 AND 926.

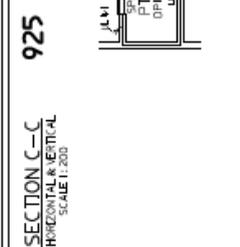
LOT 925 COMPRISES THE STRATUM ABOVE & BELOW LOT 926 AND SP8019 (LOT 922 IN DP118809) AND IS EXCLUSIVE OF THESE LOTS BUT OTHERWISE UNLIMITED IN HEIGHT & DEPTH.

LOT 926 IS LIMITED IN STRATUM IN THE MANNER DEPICTED IN THIS PLAN.

(A) RIGHT OF VEHICULAR ACCESS VARIABLE WIDTH (SP79995)
 (B) RIGHT TO USE LIFTS VARIABLE WIDTH (SP79995)
 (C) RIGHT OF VEHICULAR & PEDESTRIAN ACCESS VARIABLE WIDTH (SP79995)
 (D) RIGHT TO USE ESCALATORS 3.2 MILE (SP79995)
 (E) RIGHT OF PEDESTRIAN ACCESS VARIABLE WIDTH (SP79995)
 (F) RIGHT TO USE PARKING SPACES VARIABLE WIDTH (DP11942)
 (G) RIGHT OF PEDESTRIAN ACCESS VARIABLE WIDTH (DP11942)
 (H) RESTRICTION(S) ON USE VARIABLE WIDTH (DP118809)
 (I) RESTRICTION(S) ON USE VARIABLE WIDTH (DP118809)

NOTE: THE RESTRICTION ON USE (DP118809) IS TO BE RELEASED SO FAR AS IT RELATES TO LOT 926.

LL DENOTES LOWER UNIT
 UL DENOTES UPPER UNIT
 - - - - - DENOTES CHANGED UPPER UNIT



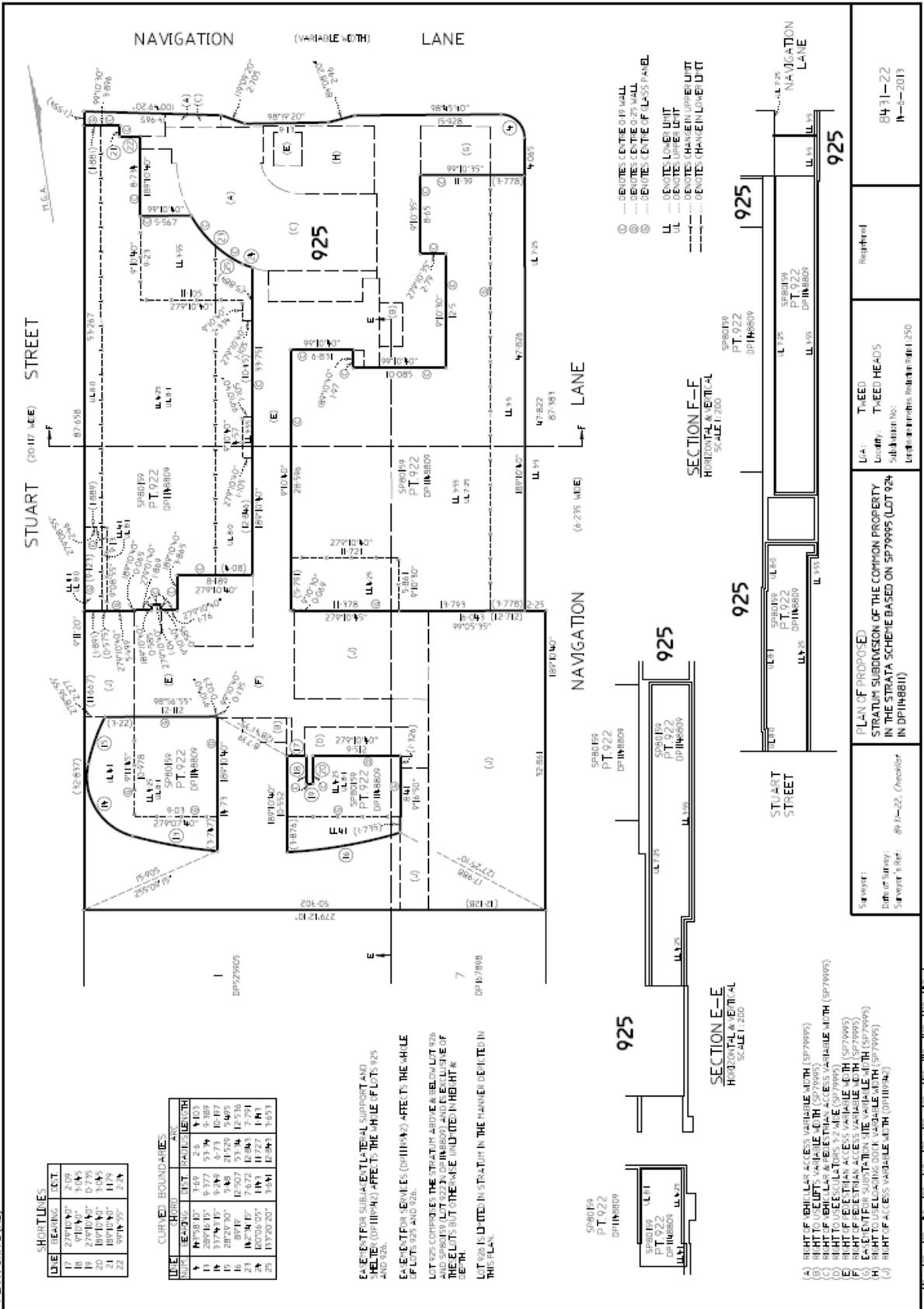
Surveyor:	U.A.	THEED	Registered
Date of Survey:	Locality:	THEED HEADS	
Surveyor's Ref:	Substation No:	84-1-22	
	Lot Reference:	84-1-22	
		11-0-2013	

PLAN OF PROPOSED STRATUM SUBDIVISION OF THE COMMON PROPERTY IN THE STRATA SCHEME BASED ON SP79995 (LOT 926 IN DP118809)

Sheet 5 of 6 Sheets

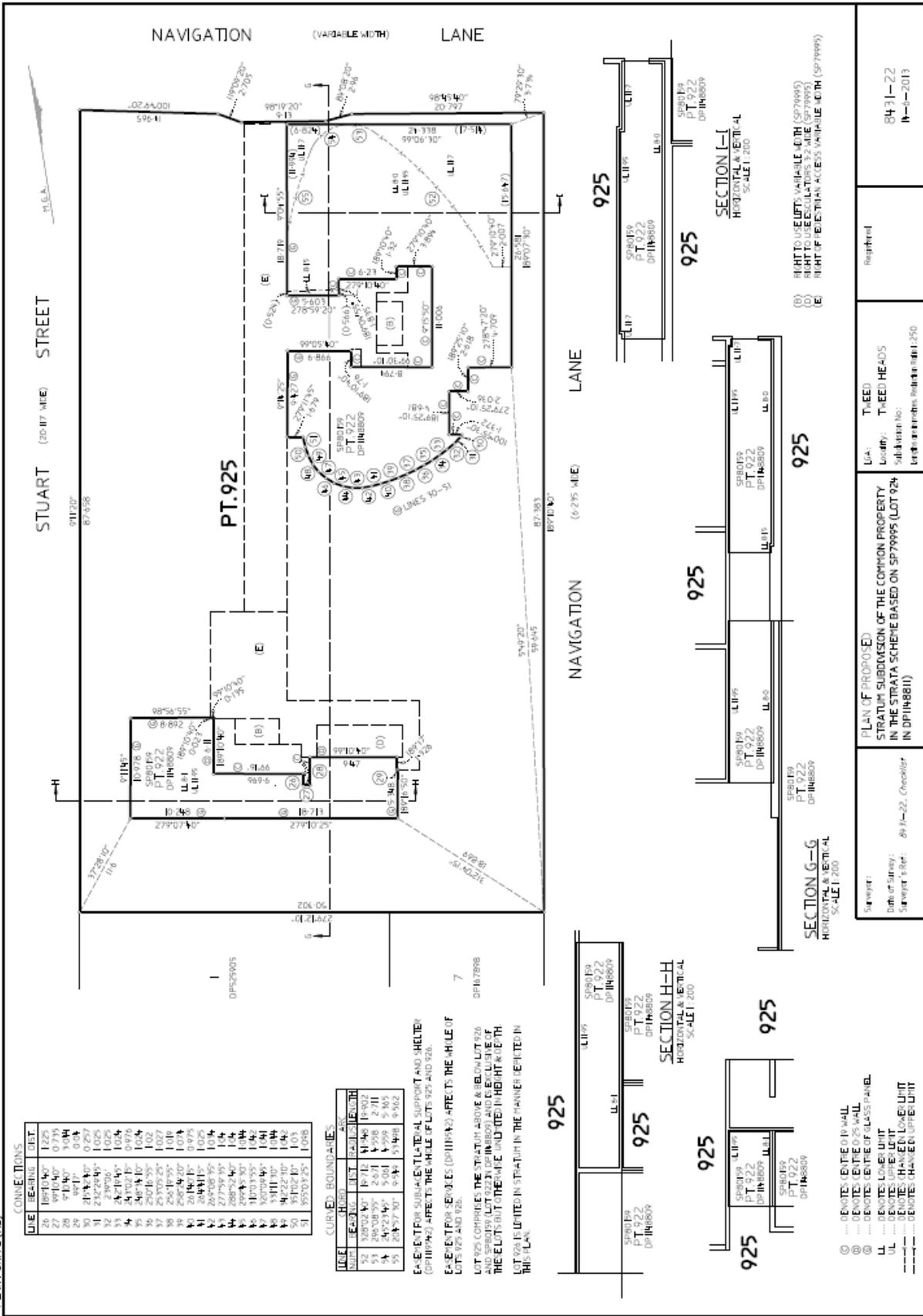
WARNING: CREASING OR FOLDING WILL LEAD TO REJECTION

PLAN FORM 2 (A2)



PLAN FORM 2 (A2) Sheet 6 of 6 Sheets

WARNING: CREASING OR FOLDING WILL LEAD TO REJECTION



CONNECTIONS

LINE	BEARING	DIST.
26	189°10'42"	1.222
27	91°10'40"	0.735
28	9°10'40"	1.044
29	10°10'40"	0.814
30	11°10'40"	0.625
31	232°29'40"	1.025
32	239°06'	1.025
33	242°16'40"	1.044
34	240°10'10"	0.975
35	240°10'10"	1.044
36	239°06'	1.025
37	232°29'40"	1.025
38	255°18'55"	1.018
39	258°18'20"	1.014
40	261°18'10"	0.975
41	264°11'15"	1.025
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43	269°52'40"	1.044
44	272°41'30"	1.044
45	275°30'10"	1.044
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47	281°06'10"	1.044
48	283°54'10"	1.044
49	286°42'10"	1.044
50	289°30'10"	1.044
51	292°18'10"	1.044
52	295°06'10"	1.044
53	297°54'10"	1.044
54	300°42'10"	1.044
55	303°30'10"	1.044
56	306°18'10"	1.044
57	309°06'10"	1.044
58	311°54'10"	1.044
59	314°42'10"	1.044
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300	989°30'10"	1.044
301	992°18'10"	1.044
302	995°06'10"	1.044
303	997°54'10"	1.044
304	1000°42'10"	1.044
305	1003°30'10"	1.044
306	1006°18'10"	1.044
307	1009°06'10"	1.044
308	1011°54'10"	1.044
309	1014°42'10"	1.044
310	1017°30'10"	1.044
311	1020°18'10"	1.044
312	1023°06'10"	1.044
313	1025°54'10"	1.044
314	1028°42'10"	1.044
315	1031°30'10"	1.044
316	1034°18'10"	1.044
317	1037°06'10"	1.044
318	1039°54'10"	1.044
319	1042°42'10"	1.044
320	1045°30'10"	1.044
321	1048°18'10"	1.044
322	1051°06'10"	1.044
323	1053°54'10"	1.044
324	1056°42'10"	1.044
325	1059°30'10"	1.044
326	1062°18'10"	1.044
327	1065°06'10"	1.044
328	1067°54'10"	1.044
329	1070°42'10"	1.044
330	1073°30'10"	1.044
331	1076°18'10"	1.044
332	1079°06'10"	1.044
333	1081°54'10"	1.044
334	1084°42'10"	1.044
335	1087°30'10"	1.044
336	1090°18'10"	1.044
337	1093°06'10"	1.044
338	1095°54'10"	1.044
339	1098°42'10"	1.044
340	1101°30'10"	1.044
341	1104°18'10"	1.044
342	1107°06'10"	1.044
343	1109°54'10"	1.044
344	1112°42'10"	1.044
345	1115°30'10"	1.044
346	1118°18'10"	1.044
347	1121°06'10"	1.044
348	1123°54'10"	1.044
349	1126°42'10"	1.044
350	1129°30'10"	1.044
351	1132°18'10"	1.044
352	1135°06'10"	1.044</

STRATA PLAN FORM 2

WARNING: CREASING OR FOLDING WILL LEAD TO REJECTION

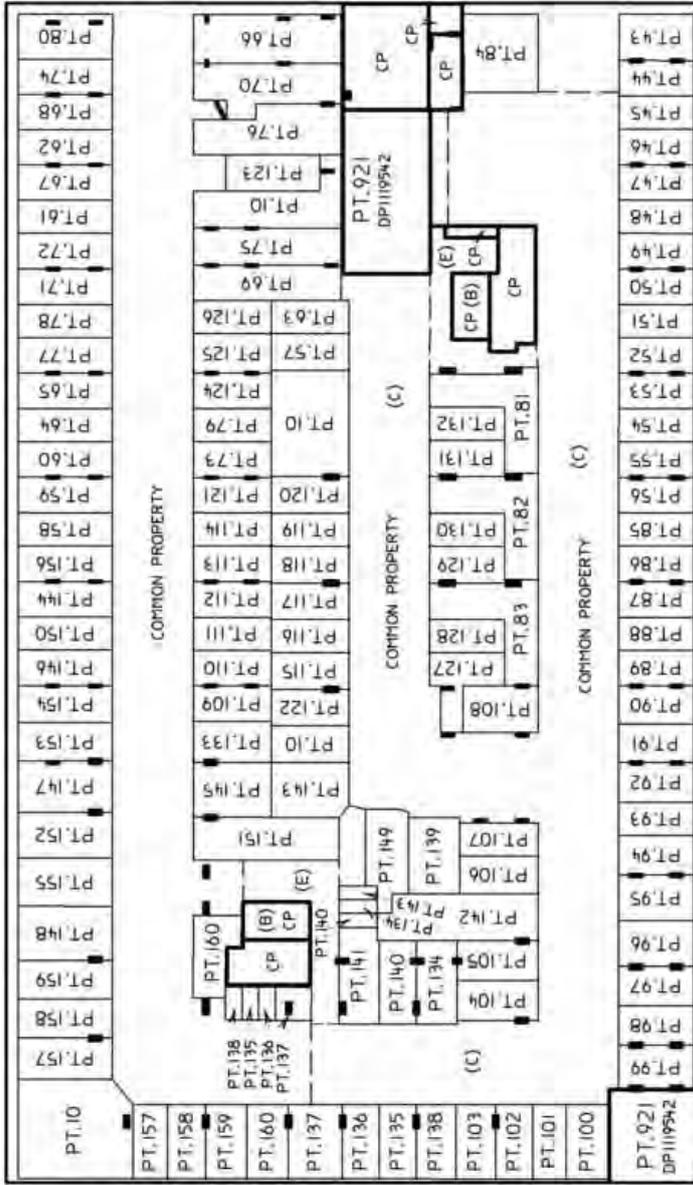
Sheet No. B of 30 Sheets

aplan

LOWER BASEMENT FLOOR PLAN

M.G.A.

- (B) RIGHT TO USE LIFTS 2.8 WIDE
- (C) RIGHT OF VEHICULAR & PEDESTRIAN ACCESS VARIABLE WIDTH
- (E) RIGHT OF PEDESTRIAN ACCESS VARIABLE WIDTH



- AREAS ARE APPROXIMATE ONLY
- DENOTES CENTRELINE OF COLUMN
- DENOTES RIGHT ANGLE
- CP ... DENOTES COMMON PROPERTY

Surveyor: **GEORFFREY JAMES THOMPSON**
 Surveyor's No: **69 W-14, Credited**
 Subdivision No: **55C07/0040**
 Lengths are in metres. Reduction Ratio 1: 300

Registrar
30.1.2008

SP79995

10 20 30 40 50 60 70 80 90 100 110 120 130 140

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

The original application (DA08/0907) was assessed against all relevant planning policies and the relevant Tweed Development Control Plans.

This Section 96 Modification only requests reconsideration having regard to the difference between Tweed DCP Section A2 as per the original assessment verses the new Tweed DCP Section B2 which has new parking rates. The assessment is as follows:

Tweed DCP Section A2 Verses Tweed DCP Section B2 Tweed Heads

DA08/0907 undertook a detailed assessment of the entire Tweed Ultima Development and then reviewed what DA08/0907 required to change 35 units from tourist use to dual use against Tweed DCP Section A2 and concluded as follows:

The proposed development to change 35 tourist units into 35 residential units (DA08/0907) needs an additional 26.25 spaces.

This is based on $35 \times 1.5 = 52.5 + 35/4$ for visitor spaces = 61.25 - 35 existing tourist unit spaces = 26.25.

The site at that time was deemed to have a car parking credit of 4.537 surplus – 26.25 spaces for current DA08/0907 = - 21.713 spaces short

The applicant amended their application on 23 April 2009. The amendment proposes that the shortfall of 21.713 spaces be made up via a deferred temporary at-grade parking lot on the site subject to the future rectangular building (as part of Ultima Stage 2).

Under the new provisions of Tweed DCP Section B2 – Tweed Heads attached residential dwellings have the following car parking rates:

- 1 car space for 1 and 2 bedroom dwellings;
- 1.5 car spaces for a 3 bedroom unit;
- 1 space per 10 dwellings for visitors in multi unit developments.

The applicant has requested that Council recalculate DA08/0907 (but only for 34 of the 35 units affected by DA08/0907 – not Lot 10) against the above B2 rates. The affected units are shown in the below table:

<u>LOT NUMBER</u> IN SP79995	<u>ORIGINAL APPROVAL</u> BY DoP DA456-10-2005 10/01/2005	<u>MOD160-10-2005</u> 29/8/2006	<u>DA08/0907</u>	<u>S96</u> DA08/0907.06	<u>CURRENT</u> DA08/0907.07 TO ADOPT NEW B2 RATES	<u>CAR SPACES</u> <u>REQUIRED</u>
		Swapped 19 residential uses in eastern unbuilt tower to the western ellipsoid towers	Changed 35 previous tourist units into dual use units	Lot 85 and 92 dual use swapped for Lots 51 and 129	Requested revised car parking rates to 34 of the 35 units amended part of DA08/0907	
LOT 9 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 10 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.75	1.75 spaces
LOT 15 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 21 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 27 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces

<u>LOT NUMBER</u> <u>IN SP79995</u>	<u>ORIGINAL</u> <u>APPROVAL</u> <u>BY DOP</u> <u>DA456-10-</u> <u>2005</u> <u>10/01/2005</u>	<u>MOD160-</u> <u>10-2005</u> <u>29/8/2006</u> Swapped 19 residential uses in eastern unbuilt tower to the western ellipsoid towers	<u>DA08/0907</u> Changed 35 previous tourist units into dual use units	<u>S96</u> <u>DA08/0907.06</u> Lot 85 and 92 dual use swapped for Lots 51 and 129	<u>CURRENT</u> <u>DA08/0907.07</u> <u>TO</u> <u>ADOPT NEW B2</u> <u>RATES</u> Requested revised car parking rates to 34 of the 35 units amended part of DA08/0907	<u>CAR SPACES</u> <u>REQUIRED</u>
LOT 29 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 30 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 33 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 35 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 36 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 41 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 42 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 46 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 47 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 48 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 51 2 BED	Residential Only	Tourist 1 space	N/A	Dual Use 1.75 spaces	Dual Use 1.1 spaces	1.1 spaces
LOT 52 2 BED	Residential Only	Tourist 1 space	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 53 2 BED	Residential Only	Tourist 1 space	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 54 2 BED	Residential Only	Tourist 1 space	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 85 2 BED	Residential Only	Tourist 1 space	Dual Use 1.75 spaces	Tourist Only 1 space	N/A	1.1 spaces
LOT 91 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 92 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	Tourist Only 1 space	N/A	1.1 spaces
LOT 97 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 98 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 103 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 104 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 105 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 109 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 110 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 111 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 116 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 117 2 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 121 1 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 122 1 BED	Tourist Only 1 space	N/A	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces

<u>LOT NUMBER</u> IN.SP79995	<u>ORIGINAL APPROVAL BY DO P</u> DA456-10-2005 10/01/2005	<u>MOD160-10-2005</u> 29/8/2006	<u>DA08/0907</u>	<u>S96</u> DA08/0907.06	<u>CURRENT</u> DA08/0907.07 TO ADOPT NEW B2 RATES	<u>CAR SPACES</u> <u>REQUIRED</u>
		Swapped 19 residential uses in eastern unbuilt tower to the western ellipsoid towers	Changed 35 previous tourist units into dual use units	Lot 85 and 92 dual use swapped for Lots 51 and 129	Requested revised car parking rates to 34 of the 35 units amended part of DA08/0907	
LOT 127 2 BED	Residential Only	Tourist 1 space	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 128 2 BED	Residential Only	Tourist 1 space	Dual Use 1.75 spaces	N/A	Dual Use 1.1 spaces	1.1 spaces
LOT 129 2 BED	Residential Only	Tourist 1 space	N/A	Dual Use 1.75 spaces	Dual Use 1.1 spaces	1.1 spaces

The associated car parking rates for these units is as follows:

$34 \times 1 = 34 + 34/10$ for visitor spaces = 37.4 - 34 existing tourist unit spaces = 3.4 spaces shortfall

$1 \times 1.5 = 1.5 + 1/4$ for visitor spaces = 1.75 - 1 existing tourist unit spaces = 0.75 spaces shortfall

Total Shortfall 4.15

Given that prior to DA08/0907 was approved the site was deemed to have a 4.537 credit the 4.15 spaces shortfall takes advantage of the previous surplus and negates the need for the at-grade parking area. Therefore at this simplistic level the current application can be supported on parking grounds with the at-grade parking area being removed.

The applicant has undertaken a further analysis of the overall parking for the entire Ultima site and has demonstrated that the site has sufficient surplus in parking to accommodate all tourist units being converted to dual use and thus allowing the redistribution of 21 parking spaces from the common property area in SP79995 (the residential strata) to the common property areas in SP 80159 (the commercial strata).

The complete re-assessment of the entire parking requirements at Ultima is therefore and is demonstrated in full at **Attachment 1**.

In summary the commercial components of the ellipsoid towers necessitates 42.29 onsite parking spaces, while the residential component of the ellipsoid towers necessitates.

- 71.7 spaces for the dual use units (62 units)
- 42 spaces for the tourist uses (42 Units)
- 84 spaces for the residential uses (56 Units)
- 4.280 spaces for the work/office space associated with the dual flexi units (Lots 1-8)

Therefore a minimum of **201.98** onsite parking spaces for the 160 Units as approved by both DA08/0907.07 and DA13/0247 is required, with 16 of these spaces having to be available for visitor use.

However, if all units were to convert to dual use units utilising the new B2 car parking rates the site would only need to accommodate 186.557 onsite parking spaces for the residential uses (145 units x 1.1 spaces and 15 units x 1.6 spaces and 3.057 for the flexi work/office areas).

Total Stage1 Ultima parking comprises 201.98 residential spaces plus 42.2934 commercial spaces which equates to **244.27 spaces.**

There are 263 spaces approved and constructed under the ellipsoid towers.

Therefore the development caters for adequate onsite parking for both the commercial component and residential component leaving a surplus of 18.7 spaces which other unit holders and or commercial uses could utilise.

It should also be noted that the applicant submitted a car parking analysis by Bitzios Consulting which concludes that occupancy surveys showed 71% for a typical weekday and 66% for a typical weekend day and accordingly if Council adopted the new rates in B2 there would be no adverse parking impacts.

However, this traffic report does not provide detail on the occupancy of the units at this time.

Notwithstanding, the application proposes 208 spaces in the residential strata and 55 spaces in the non accommodation strata. Given the above assessment it is recommended that this application can endorse changes to the approved Stratum to reallocate 21 spaces from the common property of the Residential Strata Plan 79995 to common property of the Non Residential Accommodation Strata Plan 80159.

The application is therefore considered to comply with the relevant policies and controls.

CONSIDERATIONS UNDER SECTION 96(1A) OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979:

Substantially the Same Development

The proposal is considered to be the same development. The proposed modification only relates to a recalculation of car parking in accordance with a new DCP.

Whilst this is an unusual proposal given that the building and parking is already built and allocated Council sought some preliminary advice from HWL Lawyers who stated that the proposal was unusual but it did not present a lawful impediment.

Minimal Environmental Impact

The development is not considered to result in any adverse environmental impacts.

Notification & Submissions

The proposal was advertised and notified between 24 July 2013 and 7 August 2013. During this period Council received six submissions which are summarised below:

Submission 1 – Letter of support – A positive step for the company to start being proactive in commencing development of the front tower to help beautify the area. There is no shortage of car parking in Tweed Ultima.

Council Assessment

No comment from Council required.

Submission 2 – Letter of objection – Condition 4 (now Condition 4A) has never been satisfied and therefore the consent has lapsed. A new DA should be lodged. It is inappropriate and inconsistent to adjust car parking levels down for some lots within the building when the same principal that justifies the reduction would require an increase in car parking for other lots in the building. Allowing this amendment will place some Lot owners in a more advantageous position than others.

Council Assessment

Whilst Condition 4A in regards to the construction of the temporary at-grade car parking has not been satisfied this does not make the consent invalid. The subject Section 96 is a lawful mechanism to delete this requirement.

Furthermore, this application does not preclude other unit owners from lodging their own change of use applications to be assessed on their merits. Accordingly the matters raised in this objection do not warrant refusal or further amendment of the application.

Submission 3 – No objection but want to do the same thing for my unit and doesn't want this application to restrict their rights or access to common car parking to accommodate my change.

Council Assessment

The car parking assessment has demonstrated that all unit holders in Tweed Ultima could be converted to Dual Use (with development consent) as there is sufficient car parking to accommodate this within the arrangement as approved by this Section 96. Each tourist unit wishing to change to dual use would be subject to developer contributions. Therefore this objection does not warrant any further amendments to the consent.

Submission 4 – Letter of objection – Levels 10 and above should remain for residential use only as this was how the development was sold and people purchased on this basis. There is not enough on site security to cover extra tourist use.

Council Assessment

This application does not affect any units above the 10th floor. The onsite management issues should be raised with the body corporate and is not a matter for Council.

Submission 5 – No objection but wants to do the same thing for their unit.

Council Assessment

The car parking assessment has demonstrated that all unit holders in Tweed Ultima could be converted to Dual Use (with development consent) as there is sufficient car parking to accommodate this within the arrangement as approved by this Section 96. Each tourist unit wishing to change to dual use would be subject to developer contributions. Therefore this objection does not warrant any further amendments to the consent.

Submission 6 – No objection but want to do the same thing for my unit.

Council Assessment

The car parking assessment has demonstrated that all unit holders in Tweed Ultima could be converted to Dual Use (with development consent) as there is sufficient car parking to accommodate this within the arrangement as approved by this Section 96. Each tourist unit wishing to change to dual use would be subject to developer contributions. Therefore this objection does not warrant any further amendments to the consent.

In conclusion there is therefore only one objection (Submission 2) which requires careful consideration. As detailed above the proposed Section 96 is lawful despite the non compliance with Condition 4A and this application does not preclude other unit owners to lodge their own change of use applications to be assessed on their merits. Accordingly the objections received are not considered to warrant refusal or further amendment of the application.

FINAL ASSESSMENT:

If Council are supportive of the proposal the following changes are necessary to the existing conditions of consent:

1. Amend the description of the development to read as follows:

DA08/0907 for change of use tourist accommodation units to flexible multi dwelling housing units or tourist accommodation units and the associated stratum subdivision to allocate car parking at Stage 1 Tweed Ultima at Lot 1 SP 80159 and Lots 9, 10, 15, 91, 21, 97, 98, 27, 29, 30, 103, 104, 105, 33, 35, 36, 109, 110, 111, 41, 42, 116, 117, 46, 47, 48, 121, 122, 51, 52, 53, 54, 127, 128, and Lot 129 in SP 79995 Nos. 14-18 & 20-22 Stuart Street, Tweed Heads.

2. Delete Condition 1 and replace with new condition 1A which reads as follows:

1A. The development shall be completed in accordance with:

- The Statement of Environmental Effects prepared by Darryl Anderson Consulting dated July 2008 except where varied by the amended S96 Applications as detailed in Darryl Anderson Consulting letters dated 16 September 2008 (DA08/09070.5), 23 April 2009 (DA08/0907.06), and 3 July 2013 (DA08/0907.07);
- Proposed Stratum Subdivision Plan (in relation to Stage 1 of Ultima) Nos 8431-22 (Sheets 1-6) prepared by Michel Group Services and dated 14/06/2013;

except where varied by the conditions of this consent.

[GEN0005]

3. Delete Condition 3A, 3B and 3C and replace these with new condition 3D which reads as follows:

3D. This Development Application (being a combination of the original DA08/0907, S96 DA08/0907.05, S96 DA08/0907.06 and S96 DA08/0907.07) approves the change of use of 35 tourist accommodation units within the ellipsoid towers of the Tweed Ultima into 35 flexible units that can be used as either multi dwelling housing units (shop top housing) or tourist accommodation units (serviced apartments). The 35 affected units are as follows:

- Level 2 - Lots 9 and 10 in SP 79995
- Level 3 – Lots 15 and 91 in SP 79995
- Level 4 – Lots 21, 97, and 98 in SP 79995
- Level 5 – Lots 27, 29, 30, 103, 104, and 105 in SP 79995
- Level 6 – Lots 33, 35, 36, 109, 110, 111 in SP 79995
- Level 7 – Lots 41, 42, 116, and 117 in SP 79995
- Level 8 – Lots 46, 47, 48, 121 and 122 in SP 79995
- Level 9 – Lots 51, 52, 53, 54, 127, 128 and 129 in SP 79995

[GENNS01]

4. Delete Condition 4A which related to the at-grade parking area.

~~4A The applicant is to construct a temporary car park accommodating 22 spaces on Lot 100 in DP755892 until a second tier of basement is built under the rectangular building associated with Tweed Ultima (Stage 2). During construction of the rectangular building the subject site will be short 22 car spaces.~~

~~Should the developer start building Stage 2 within 24 months from the date of this consent the deferred temporary at grade parking lot will not be required. If construction of building Stage 2 has not commenced to Council's satisfaction within 24 months from the date of the consent DA08/0907 (July 2009), the temporary at grade parking spaces are needed to supply the temporary shortfall until such time as the second tier basement is constructed.~~

~~Stage 2 of Ultima will permanently be burdened on title to provide a further 22 spaces to make up the shortfall of parking as a result of this application.~~

~~Any floodlighting associated with the temporary car park shall not spill beyond the boundaries of the site. Lighting shall comply with AS 4282 and other relevant Australian Standards. A plan of the lighting shall be approved by the General Manager or his delegate **PRIOR** to use of the car park.~~

~~The off-street car park shall be designed and constructed to the standards set in AS/NZS 2890.1 Parking facilities - Off-street car parking, and Council's DCP Section A2 - Site Access and Parking Code. Certification of the works by a qualified professional engineer is required to be submitted to the PCA **prior to occupation.**~~

5. Delete Condition 5 which related to the at-grade parking area.

~~5. The temporary car park is to be finished in a professional manner and incorporate landscaping to soften the impact of the car park. The area is to remain in a clean and tidy manner at all times and should not be used for storage of any building or site materials.~~

[GENNS03]

6. Delete Condition 6 and replace it with Condition 6A which reads as follows:

~~6. The Ultima development is required to have the following parking provisions:~~

Stage 1 – Western Ellipsoid Towers

~~Stage 1 (western ellipsoid towers) shall provide parking as follows:~~

- ~~—— 40 Commercial Spaces (minimum 19 in basement, remainder at grade via temporary car park then via basement within Stage 2 see below);~~
- ~~—— 23 Visitor Spaces;~~
- ~~—— 61 Tourist Spaces;~~
- ~~—— 160 Residential Spaces divided equally (stacked spaces must be allocated to the same unit).~~

Stage 2 – Eastern Rectangular Tower & Navigation Lane

~~Stage 2 (eastern rectangular tower) shall provide parking as follows:~~

- ~~—— 121 spaces for the development as per the approved plans;~~
- ~~—— 22 Commercial Spaces as a result of this DA (DA08/0907);~~
- ~~—— Plus any additional spaces to cater for future change of use applications from tourist to residential;~~
- ~~—— Plus any additional spaces to cater for current S96 Modifications before the Department of Planning~~

~~The parking spaces are to be allocated within the respective body corporates and include parking for the disabled in accordance with Tweed Shire Council Development Control Plan Part A2 – Site Access and Parking Code.~~

[GENNS04]

6A The Ultima development is required to have the following parking provisions:

Stage 1 - Western Ellipsoid Towers

Stage 1 (comprising the two western ellipsoid towers) shall provide parking as follows:

- 55 Commercial Spaces in SP 80159;
- 208 Accommodation Spaces in SP 79995 (16 of which have to be accessible for visitor parking).

Stacked parking spaces must be allocated to the same Lot Number.

The parking spaces are to be allocated within the respective body corporates and include parking for the disabled in accordance with Tweed Shire Council Development Control Plan Part A2 - Site Access and Parking Code.

[GENNS04]

7. Delete Condition 22 and replace it with Condition 22A which reads as follows:

22A. The creation of easements for services, rights of carriageway and restrictions as to user as may be applicable under Section 88B of the Conveyancing Act including (but not limited to) the following:

- (a) Easements for sewer, water supply and drainage over **ALL** public services/infrastructure on private property.
- (b) ~~DELETED 21 car parking spaces within the eastern Tweed Ultima Building are to be allocated to and made available to the commercial strata in association with the western Tweed Ultima towers.~~
- (c) The western ellipsoid towers (Stage 1 of Ultima) are to have parking allocated as follows: 55 commercial spaces in SP 80159 and 208 Accommodation Uses in SP 79995 (16 of which have to be accessible for visitor parking) and all stacked parking spaces must be allocated to the same Lot Number.
- (d) The clear nomination of the lawful development nature of each of the 160 units. This will need to delineate between those units which are tourist accommodation units only, those units which are multi dwelling housing only (residential) and those units which are flexible and can be used for either multi dwelling housing (residential) or tourist accommodation.

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

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

Privately owned infrastructure on community land may be subject to the creation of statutory restrictions, easements etc in accordance with the Community Land Development Act, Strata Titles Act, Conveyancing Act, or other applicable legislation.

[PSC0835]

8. Delete Condition 25 and replace it with Condition 25A which reads as follows:

25A Prior to issuing the subdivision certificate the applicant is to have:

- ~~DELETED Modified DA456-10-2003 to incorporate an additional basement tier to accommodate the 22 additional spaces as required by DA08/0907. The second tier should further accommodate 14 more spaces to ensure the eastern tower of Tweed Ultima is self sufficient with parking requirements. Any future change of use applications may also generate additional parking demand and should be catered for within the new second tier basement;~~
- Surrendered that part of Development Consent No. DA456-10-2003 relating to any areas now redundant as a consequence of DA08/0907 and/or any S96 approved by the Department of Planning. Such surrender shall be by lodgement of the prescribed information, suitably executed, as required by Section 80A(1)(b) of the Environmental Planning and Assessment Act, 1979 (as amended) and Clause 97 of the Environmental Planning and Assessment Regulations, 2000

[PSCNS01]

Note: Developer contributions have previously been levied and paid in regard to DA08/0907 and the proposed S96 makes no change to the applicable developer contributions.

OPTIONS:

1. Approve the Section 96 Modification in accordance with the recommended changes to the consent; or
2. Refuse the Section 96 Modification with reasons.

Council officers recommend Option 1.

CONCLUSION:

The proposed Section 96 Modification still provides a mixed use high rise development in an area nominated for such a use given its location within the commercial business districts of Tweed Heads.

Subject to the recommended changes to the conditions of consent the application is considered to warrant conditional approval.

COUNCIL IMPLICATIONS:

a. Policy:

Corporate Policy Not Applicable.

b. Budget/Long Term Financial Plan:

Not Applicable.

c. Legal:

Not Applicable.

d. Communication/Engagement:

Not Applicable.

UNDER SEPARATE COVER/FURTHER INFORMATION:

Attachment 1. Stage 1 Tweed Ultima Car Parking Assessment as at October 2013 (ECM 3181240)

Attachment 2. DA08/0907.06 Determination Notice (ECM 3181241)

- 24 [PR-CM] Development Application DA13/0132 - Change of Use (First Approved Use) to Surfboard Manufacturing, Extension of Mezzanine Level and Associated Signage at Lot 19 SP 80033, No. 19/23-25 Ourimbah Road, Tweed Heads

SUBMITTED BY: Development Assessment

FILE REFERENCE: DA13/0132 Pt1



Civic Leadership

LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:

- 1 Civic Leadership
 - 1.1 Ensure actions taken and decisions reached are based on the principles of sustainability
 - 1.1.1 Establish sustainability as a basis of shire planning and Council's own business operations
-

SUMMARY OF REPORT:

Updated Information

At its meeting of 19 September 2013, Council voted the following:

563

Cr M Armstrong
Cr G Bagnall

It was Moved that this report be deferred for consideration at the October meeting.

564

AMENDMENT 1 to the motion

Cr K Milne
Cr G Bagnall

PROPOSED that this report be deferred for consideration at the October meeting to allow the applicant to submit the information identified by Council staff.

Amendment 1 was Lost

FOR VOTE - Cr K Milne, Cr G Bagnall

AGAINST VOTE - Cr P Youngblutt, Cr W Polglase, Cr C Byrne, Cr M Armstrong, Cr B Longland

565

AMENDMENT 2 to the motion

Cr C Byrne

Cr B Longland

PROPOSED

1. *Development Application DA13/0132 for a change of use (first approved use) to surfboard manufacturing, extension of mezzanine level and associated signage at Lot 19 SP 80033 No. 19/23-25 Ourimbah Road, Tweed Heads be refused for the following reasons:*
 - A. *The development does not satisfy Section 79C of the Environmental Planning and Assessment Act, particularly Section (b) – “the likely impacts of that development including environmental impacts environmental impacts on both the natural and built environments, and social and economic impacts in the locality” as the development has not provided sufficient information in regards to the air quality as a result of the proposed development.*
 - B. *The development does not satisfy Section 79C of the Environmental Planning and Assessment Act, particularly Section (c) – “the suitability of the site for the development” as the development has not demonstrated the sites suitability given the developments potential impact on adjoining tenancies.*
 - C. *The development is not considered to be in the public interest as the application has failed to adequately address the issues raised in submissions received during the assessment of the application.*
 - D. *The application has not been supported by sufficient owners consent acknowledging that DA13/0132 also seeks approval for the use of premises and signage not just the mezzanine construction.*

and:

2. *Council instigate compliance action to have the business cease operating from the subject site and rectify illegal works undertaken to the mezzanine level.*

*Amendment 2 was **Lost***

FOR VOTE - Cr C Byrne, Cr K Milne, Cr B Longland

AGAINST VOTE - Cr P Youngblutt, Cr W Polglase, Cr M Armstrong, Cr G Bagnall

*The original Motion put by Armstrong and Bagnall was put and **Carried** (Minute No 563 refers)*

FOR VOTE - Cr P Youngblutt, Cr W Polglase, Cr M Armstrong, Cr K Milne, Cr G Bagnall, Cr B Longland

AGAINST VOTE - Cr C Byrne

Since writing the initial report to Council on this matter Council has received the following e-mail from the applicant (17 September 2013):

“I realise the urgency and importance of this ! I will contact the director of superbrand PTY LTD today ! I am happy and completely understand that the test needs to be done

to your satisfaction , but I have been informed by several air quality specialist that the test you require would be inconclusive and I would be open to continually having to conduct this test to satisfy the complaints . I have had one specialist ring 3 different councillors to request a more sufficient and conclusive test but was unsuccessful in his request !

I will speak to both specialists I have had quotes from today to confirm they both think the alternative test is a more conclusive. I am happy to move forward and have this done within the allocated 30 days stated in your email this morning!"

The previous report has been re-submitted to Council for its determination.

Original Report

In November 2012 Council received a complaint that Superbrand (a surf board manufacturing business) had started to occupy Unit 19, 23-25 Ourimbah Road, Tweed Heads without development approval. In addition the complaints raised the issue of fumes associated with the business and that such fumes were having an impact on their health. These complaints have continued to date.

The subject Development Application was lodged in April 2013 seeking approval for the ongoing use of the site for the surfboard manufacturing business, the ongoing use of the already constructed mezzanine level and the ongoing use of already installed signage.

Since 19 April 2013 Council Officers have been requesting the applicant provide an Air Quality Impact Assessment Report prepared by a suitably qualified air quality investigation consultant in accordance with the NSW Office of Environment & Heritage's Approved Methods for Modelling and Assessment of Air Pollutants in New South Wales.

Council explained to the applicant that if the effects of air pollution originating from this operation are not examined by a suitably qualified air quality investigation consultant, Council is not undertaking due diligence in terms of legislative requirements and health, safety and welfare of those who could be put at risk from the works being carried out at this business.

Since lodgement of the Development Application the applicant has been making amendments to the premises to try to improve the issue of odour and fumes escaping the premises. This has occurred following Work Cover Authority of NSW getting involved.

However Council's previous experience over many years in dealing with environment and health issues concerning industries where NSW WorkCover has also been involved, has revealed that WorkCover addresses issues that relate to the health and safety of employees in the work place only. Environment and health issues or impacts that are external to the operation of an industry such as noise, air pollution or offsite migration of contaminants for example are to be resolved by the Appropriate Regulatory Authority. Therefore as Council's concerns relate to possible air pollution impacts that are external to the workplace operations of this particular industry, it cannot be assumed that by resolving any NSW WorkCover issues, the subject industry has complied or indeed negated Council's requirement for the provision of an Air Quality Impact Assessment Report.

To date the applicant has not provided the requested Air Quality Impact Assessment Report. As recently as 20 August 2013 the applicant made representations to the elected Councillors questioning the need for the requested Air Quality Impact Assessment.

Accordingly it was considered prudent to report this matter to Council based on the information submitted within the application.

Based on the information currently submitted by the applicant Council Officers are unable to recommend approval of the application as the applicant has not demonstrated that the business will not have an impact on adjoining businesses.

Therefore the application is recommended for refusal and for the Council to resolve to instigate compliance action to have the business cease operating from the subject site and rectify illegal works undertaken to the mezzanine level.

Alternatively the Council could allow the applicant an additional 30 days to produce an Air Quality Impact Assessment Report and reconsider the application after receipt of that Report. If the report is not received within 30 days refuse the Development Application (under staff delegation) based on the reasons as outlined in this report.

Or Council could request that conditions of consent are brought forward to the next Council meeting to enable the application to be considered for approval.

RECOMMENDATION:

That:

- 1. Development Application DA13/0132 for a change of use (first approved use) to surfboard manufacturing, extension of mezzanine level and associated signage at Lot 19 SP 80033 No. 19/23-25 Ourimbah Road, Tweed Heads be refused for the following reasons:**
 - A. The development does not satisfy Section 79C of the Environmental Planning and Assessment Act, particularly Section (b) – “the likely impacts of that development including environmental impacts environmental impacts on both the natural and built environments, and social and economic impacts in the locality” as the development has not provided sufficient information in regards to the air quality as a result of the proposed development.**
 - B. The development does not satisfy Section 79C of the Environmental Planning and Assessment Act, particularly Section (c) – “the suitability of the site for the development” as the development has not demonstrated the sites suitability given the developments potential impact on adjoining tenancies.**
 - C. The development is not considered to be in the public interest as the application has failed to adequately address the issues raised in submissions received during the assessment of the application.**
 - D. The application has not been supported by sufficient owners consent acknowledging that DA13/0132 also seeks approval for the use of premises and signage not just the mezzanine construction.**

and:

- 2. Council instigate compliance action to have the business cease operating from the subject site and rectify illegal works undertaken to the mezzanine level.**

REPORT:

Applicant: SuperBrand (Mr Adam Fletcher)
Owner: Chashell Pty Ltd
Location: Lot 19 SP 80033 No. 19/23-25 Ourimbah Road, Tweed Heads
Zoning: 4(a) Industrial and Uncoloured Land
Cost: \$15,000

Background:

Council first received a complaint about SuperBrand (surfboard manufacturer) operating from Unit 19, 23 -25 Ourimbah Road, Tweed Heads, without approval in November 2012.

Following this complaint Council advised the applicant that a Development Application was required for the land use as Unit 19 had never received a first use approval as required by DA05/1332 which approved the industrial unit complex.

The Development Application was then subsequently lodged on 2 April 2013.

Between November 2012 and April 2013 when the application was lodged Council received numerous complaints about the business in regards to odour (toxic resin fumes), health implications (red itchy eyes, headaches etc), lack of filtration and air locks, and poor work practices.

The subject application now seeks consent for:

- § Change of Use (first use) of the premises for a surfboard manufacturing business (SuperBrand). The business has been operating at the subject unit without consent since November 2012.
- § Extension of existing mezzanine by 112m² for the purposes of manufacturing, storage and office space (this work has been done without approval and would require the lodgement of a Building Certificate to validate the construction standard).
- § Use of equipment such as air compressor (stored in room under stairs), a hand-operated sander, a cordless power drill and dust extraction unit.
- § Hours of operation – 8am to 5pm Mondays to Fridays excluding Public Holidays.
- § Up to ten employees.
- § Minimal signage consisting of one flush wall sign measuring 6m x 1m.

The application was supported by a Statement of Environmental Effects, a Building Code of Australia report by a private certifier, a certificate from Naros Air Conditioning and Sheet Metal certifying that the mechanical ventilation has been installed in accordance with the Australian Standard and an engineering report certifying the construction standard of the mezzanine level.

The subject site is located in an established industrial area, within the Ourimbah Road Industrial precinct. The subject site comprises of an industrial unit complex, which contains 24 actual units (Stage 1) and plans for 16 further individual units (Stage 2). It is a corner allotment and as such has dual site entry.

The proposal is for the first approved use of Strata Unit 19 and has a total current Gross Floor Area of 213m² (165 ground/48 mezzanine). The factory unit is of concrete tilt up construction with an insulated metal roof.

The adjoining property to the west of the site is a bus depot and the adjoining property to the east of the subject site is vacant, however was approved as stage two of DA05/1335 for

factory units in conjunction with the approval for the subject site (stage 1). DA12/0552 also approved a different development over that part of the site previously allocated for Stage 2. The different use authorises a car rental facility in association with the Gold Coast Airport. Neither Stage 2 of DA05/1332 nor DA12/0552 have been acted upon to date.

Residential development to the south is separated from the subject site by a 7m wide vegetated corridor.

Internal of the site the adjoining businesses are a Summit Press Printing (Strata Unit 18) and a naturopathic business where essences are tested and mixed (Strata Unit 20).

As soon as the development application was lodged the primary issue with the application was in relation to the emissions (smell) that the business was emitting that adjoining businesses were experiencing.

Therefore on 19 April 2013 Council Officers specifically requested the applicant to undertake an Air Quality Impact Assessment Report prepared by a suitably qualified air quality investigation consultant in accordance with the NSW Office of Environment & Heritage's Approved Methods for Modelling and Assessment of Air Pollutants in New South Wales.

The air quality investigation was required to incorporate the existing operations and include air sampling for odour causing substances external to the premises (with particular attention to neighbouring units in the immediate vicinity of the premises) that are associated with the surfboard manufacturing process (eg styrene etc) as well as investigating the adequacy of the existing mechanical ventilation system for removing odours/air impurities etc prior to discharge to the external environment, not purely in relation to the indoor air quality within the premises where the manufacturing is being carried out.

The report was required to include appropriate recommendations necessary to demonstrate that the surfboard manufacturing process can be carried out without causing an odour nuisance to any adjoining premises.

On 1 May 2013 the applicant provided Council with a copy of a quote for the required report from Air Noise Environment which came to a cost of \$5,900.

On 9 May 2013 the applicant questioned the need for the requested report due to the cost of the report and the extent of works that SuperBrand had done to try to mitigate impacts to neighbouring businesses (reviewed the roof cavity and filled obvious gaps between businesses, and installed whirly birds to ensure ventilation overnight).

As a result of the applicant's letter of 9 May 2013 Council Officers (from planning and environmental health) arranged a site visit to inspect both the subject property and the adjoining businesses affected by the smell.

The site visit occurred on 21 May 2013. Council Officer's first met with the adjoining business owners (on both sides of SuperBrand) who complained that the smell coming from the SuperBrand Surfboard Manufacturing business at times was unbearable. They complained that the smell was bad while the boards were being applied with resin but also first thing in the morning after the premises had been closed up over night. The complainants also were concerned that best practices were not being adopted and the protective clothing was not being worn by the staff at Superbrand.

After meeting with the complainants Council staff met with the applicant and had a tour of the premises and were shown what processes occurred within the premises. Generally upstairs was being used for office space, storage space and to shape and sand the boards, while downstairs the resin was being applied to the boards on a floor covered in sand. The sand would then get thrown in the bin when it got too clogged with spilt resin. During the inspection there was one staff member applying resin to a couple of boards. There was

capacity for additional boards and additional staff in this area. Council Officers witnessed the front roller doors being left open which seemed to be contributing to the smell of the resin leaving the premises and affecting neighbouring businesses.

On 23 May 2013 SuperBrand were reported to WorkCover Authority of NSW by an individual. WorkCover staff visited the site and issued the applicant with a list of Notices to ensure compliance with the WorkCover legislation. WorkCover have stated as follows:

"I write to confirm WorkCover NSW investigated a complaint in the name of Superbrand Pty Ltd at unit 19-25 Ourimbah Road Tweed Heads on 23/5/2013. As a result of this investigation directions were given to instigate remedial measures to ensure compliance with Work Health & Safety Legislation in particular Section 19 of the Work Health & Safety Act 2011. Subsequent visits were made to the premises to ensure compliance on two (2) occasions. In addressing the before mentioned matters the organisation fully cooperated with WorkCover to achieve the required outcome."

Whilst Council is pleased that WorkCover are now satisfied with the premises from their legislative perspective Council Officers have stated that:

"Previous experience over many years in dealing with environment and health issues concerning industries where NSW WorkCover has also been involved, has revealed that WorkCover addresses issues that relate to the health and safety of employees in the work place only. Environment and health issues or impacts that are external to the operation of an industry such as noise, air pollution or offsite migration of contaminants for example are to be resolved by the Appropriate Regulatory Authority. Therefore as Council's concerns relate to possible air pollution impacts that are external to the workplace operations of this particular industry, it cannot be assumed that by resolving any NSW WorkCover issues, the subject industry has complied or indeed negated Council's requirement for the provision of an Air Quality Impact Report."

On 30 May 2013 Council receives a complaint that states:

"These premises have been used to manufacture surfboards for approx 60 months and the fumes, being resin fumes, from these activities are unbearable. During this time, many of my employees have needed to leave work after inhaling the fumes, even as early as 10 minutes after commencing work. Symptoms being experienced include nausea, headache, eye irritation and blood shot eyes. There is also a constant white dust that has been released from the premises into the common property of the complex, i.e. car park. Clients which have visited our premises have also experienced eye irritation and noted the strong fumes that present in our premises. During this time, constant contact has been made with the tenants of the said premises and we had been advised that the appropriate actions were being taken to minimise any of these issues including appropriate extraction fans to be installed. We believe these fans have been installed, however the fumes are still prevalent."

On 5 June 2013 Council staff wrote to the applicant reinforcing the need for the Air Quality Impact Assessment Report. Section 79C of the Environmental Planning & Assessment Act 1979 requires Council to consider the likely impacts of the development and the site suitability. Council does not have a policy on air quality however there are many resources available that have guided Council in this matter including:

- Warringah Council - The Business of Air Quality guidelines
- Department of Sustainability, Environment, Water, Population and Communities - National Pollutant Inventory
- NSW Office of Environment & Heritage's Local Government Air Quality Toolkit

- NSW Office of Environment & Heritage's Approved Methods for Modelling and Assessment of Air Pollutants in New South Wales
- NSW Office of Environment & Heritage's Environmental Information for the Composites Industry

These guidelines explain that Fibreglass Reinforced Products (FRP's) create emissions of volatile organic compound (VOC's) emissions and odours. The main sources of such pollution are:

- Poor ventilation, filtration and discharge of particulates, dust, VOCs and odours. This is often caused by inappropriate stack and ventilation system configurations, fugitive emissions and inefficient air circulation and filtration.
- Poor housekeeping practices such as failure to place lids on containers and general poor storage and handling of containers.
- Poorly maintained equipment and equipment malfunction or failure. Maintenance of filtration systems and spray, sanding or polishing equipment contributes greatly to overspray, inefficient product use and emission of particulates, dust, VOCs and odours.
- The technical ability of personnel manufacturing FRPs can sometimes be low.
- Poor tool or equipment clean up. Commonly used cleaning products often contain solvent and are hazardous due to high flammability and chlorine content. Acetone, toluene, xylene and various alcohols are of particular concern. Emulsifiers and citrus based solvents may also be toxic.

Council explained to the applicant that if the effects of air pollution originating from this operation are not examined by a suitably qualified air quality investigation consultant, Council is not undertaking due diligence in terms of legislative requirements and health, safety and welfare of those who could be put at risk from the works being carried out at this business.

On 9 July 2013 the applicant submitted a revised a copy of a quote for the required report from Air Noise Environment which came to a cost of \$8,100.

On 10 July 2013 Council agreed that the proposed methodology seemed sound provided recommendations were made to remove paths that would allow emissions between businesses and that the site audits occurred during worst case scenario conditions.

On 12 July 2013 the applicant advised Council as follows:

".. I have been advised by the directors of Superbrand Pty Ltd that they are prepared to meet the costs of the Impact Assessment Report if Council can provide a preliminary approval for the development application, subject to the outcome of the report.

If Council is unable to provide preliminary development approval then Superbrand Pty Ltd requires some degree of comfort that Council will not allow its activities to be continually impinged by a vexatious complainant that has clearly driven the processes of Council in this development application"

On 8 August 2013 Council responded as follows:

*"Council **cannot** give any guarantee (or in principal approval) that by undertaking the requested Air Quality Impact Assessment Report you will be granted an approval. To do so would be unlawful and contrary to the Environmental Planning & Assessment Act 1979 and Council's Code of Conduct.*

Council has been requesting an Air Quality Impact Assessment Report since 19 April 2013. To date Council has been very lenient in allowing extra time for you to provide such a report. However such leniency cannot continue indefinitely. Please advise Council within 14 days of when the requested Air Quality Impact Assessment Report will be submitted to Council.

Upon receipt of the requested report a determination of your application will be made. If an approval is issued you will be held to comply with the conditions of consent imposed on you in regards to air quality (probably as recommended within the air quality report), hours of operations and any other standard conditions. If you were to breach any such conditions Council would follow this up as a compliance matter.

If an approval was issued and Council still received complaints about the business operations from neighbours each individual complaint would be assessed on its merits having regard to the conditions imposed on the consent. Council would act on complaints if they had merit.

Your letter of 12 July 2013 also asks why Superbrand are being asked to provide the Air Quality Impact Assessment Report when other surfboard manufacturers have not been asked to do the same thing.

Over recent years Council has been receiving more and more complaints about air pollution from various businesses including surfboard manufacturers and accordingly Council has been undertaking more vigorous assessments of potential air pollution causing activities against best practice guidelines.

I can assure you that Council are requesting the Air Quality Impact Assessment Report to satisfy the legislative requirements and Council Officers concerns not just as a result of the complaints received in regards to your business. I can also advise that Council Officers have been to your site on numerous occasions and experienced a strong smell coming from the premises, thus necessitating the Air Quality Impact Assessment Report..."

On 20 August 2013 the applicant responded to the above with disappointment and an indication that further quotes are being sought for the work.

On 28 August 2013 the applicant made representations to the elected Councillors again questioning the need for the requested Air Quality Impact Assessment.

Accordingly it was considered prudent to report this matter to Council based on the information submitted within the application.

Based on the information currently submitted by the applicant Council Officers are unable to recommend approval of the application as the applicant has not demonstrated that the business will not have an impact on adjoining businesses. Therefore the application is recommended for refusal and for the Council to resolve to instigate compliance action to have the business cease operating from the subject site and rectify illegal works undertaken to the mezzanine level.

SITE DIAGRAM:

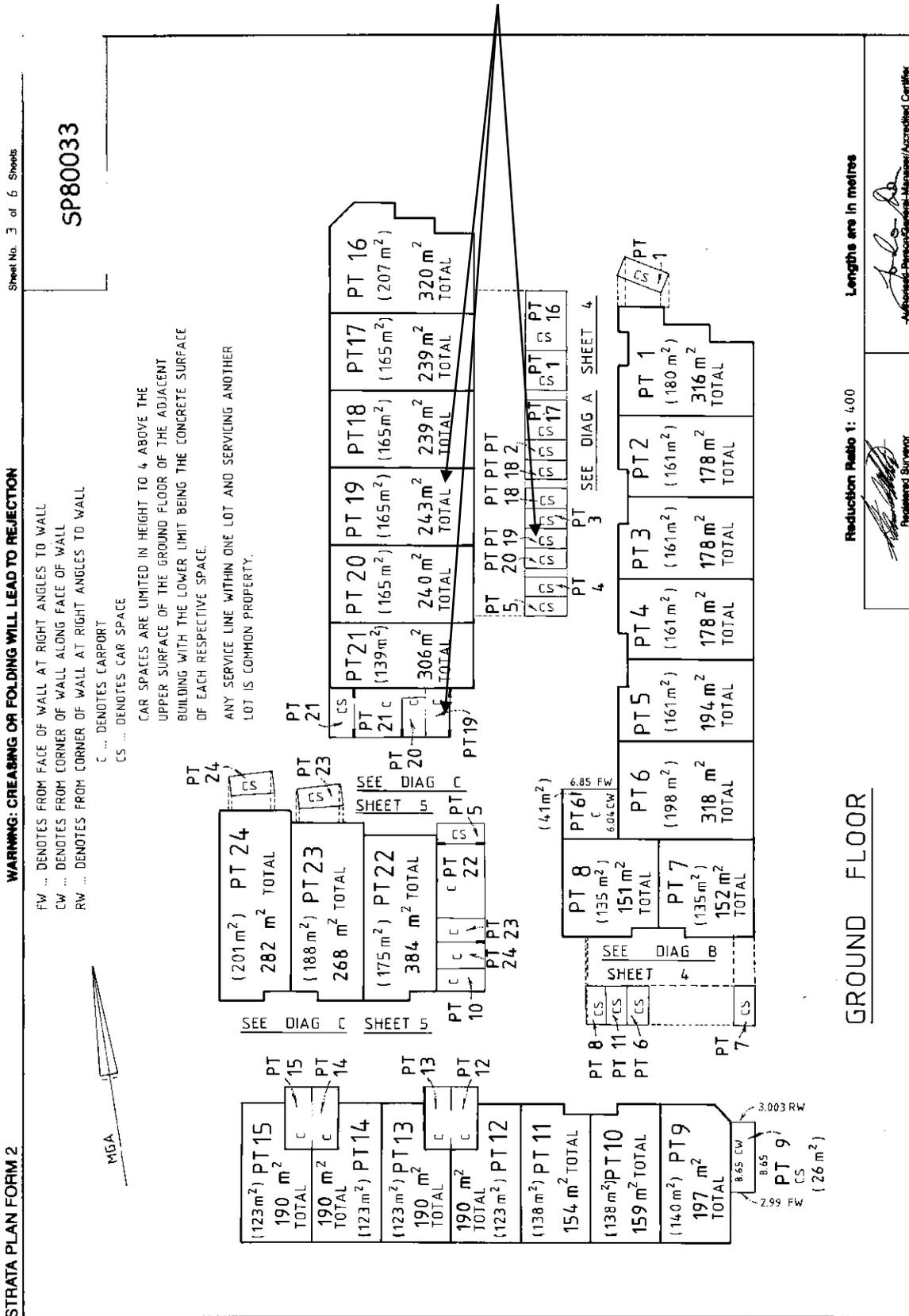


Locality Plan
 Lot 19 SP 80033 (Lot 10 DP1121137)
 No. 19/23-25 Ourimbah Road, Tweed Heads

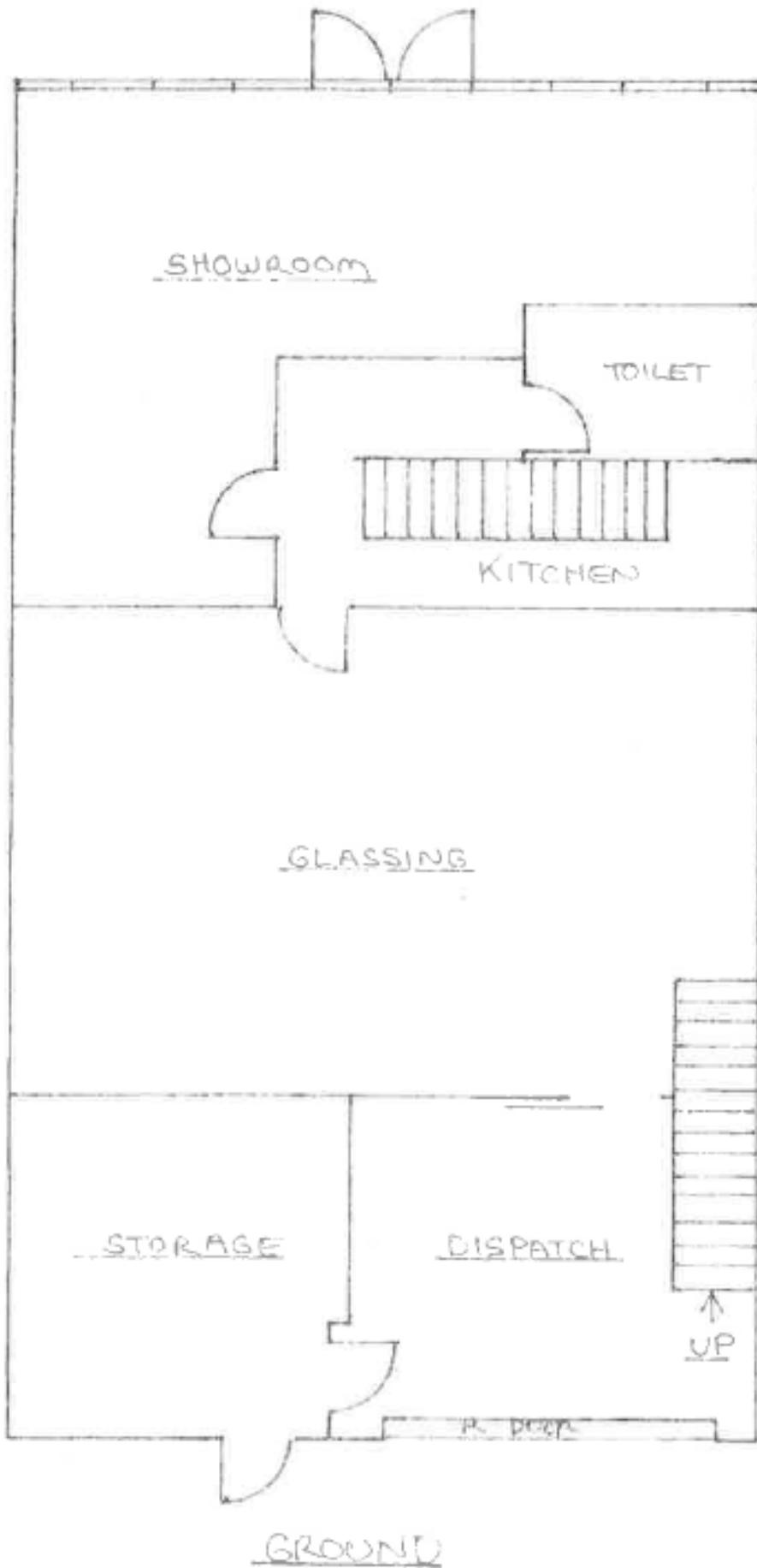
<p>Disclaimer: This site plan is to be used in conjunction with the relevant Council's Local Government Act 1995 (NSW) and the relevant Council's Local Government Act 1995 (NSW) and the relevant Council's Local Government Act 1995 (NSW). It is not intended to be used as a substitute for a professional survey or other relevant documents. The Council is not responsible for any errors or omissions in this site plan. The Council is not responsible for any errors or omissions in this site plan. The Council is not responsible for any errors or omissions in this site plan.</p>	<p>Copyright © 2013 © Land and Property Information (LPI) & Tweed Shire Council Boundary lines should be considered approximate only</p>	<p>1:50,000 AA Portrayal 000000000 000000000</p> <p>1:50,000 AA Portrayal 000000000 000000000</p>	<p>Civic and Cultural Centre 2 Macquarie Road Murumbidgee NSW 2454 PH (61) 616 Murumbidgee NSW 2454 T (61) 616 2400 FAX 616 250 810 F (61) 616 2429 W www.tweed.nsw.gov.au E planning@tweed.nsw.gov.au</p>
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DEVELOPMENT/ELEVATION PLANS:

Unit 19 and its associated car parking spaces:



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Considerations Under Section 79c Of The Environmental Planning And Assessment Act 1979:

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

Tweed Local Environmental Plan 2000 (TLEP 2000)

Clause 4 - Aims of the Plan

Clause 4 illustrates that the aims of the TLEP 2000 are to give effect to the desired outcomes, strategic principles, policies and actions of the Tweed Shire 2000+ Strategic Plan. The vision of the plan 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”*.

Clause 4 further aims to provide a legal basis for the making of a DCP to provide guidance for future development and land management, to give effect to the Tweed Heads 2000+ Strategy and Pottsville Village Strategy and to encourage sustainable economic development of the area which is compatible with the Shire’s environmental and residential amenity qualities.

The subject development application is capable of being considered suitable if the application were supported by an Air Quality Impact Assessment Report which demonstrates the business can operate without negatively affecting others within the Ourimbah Road, Industrial development area.

Clause 5 - Ecologically Sustainable Development

The TLEP aims to promote development that is consistent with the four principles of ecologically sustainable development, being *the precautionary principle, intergenerational equity, conservation of biological diversity and ecological integrity and improved valuation, pricing and incentive mechanisms*.

The subject proposal is considered consistent with the above criteria, as the development is not likely to have significant ramifications for ecologically sustainable development.

Clause 8 - Consent Considerations

This clause specifies that 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 that those other aims and objectives of this plan (the TLEP) 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.*

In this instance, the subject site is zoned 4(a) Industrial, the primary objective of which is to *provide land primarily used for industrial development and to facilitate economic activity and employment generation*.

It is anticipated that developments such as this are located within Industrial Zones. However, the applicant needs to demonstrate that his business practices can occur without negatively affecting others particularly by way of smell. An Air Quality Impact Assessment Report would ensure the business operated in

accordance with best practice guidelines and that all possible building modifications were undertaken to ensure no adjoining premises are negatively affected by the proposed business operations.

Without the benefit of an Air Quality Impact Assessment Report Council staff are unable to ensure the development won't impact negatively on other businesses within the vicinity of the site.

Clause 11 - Zone Objectives

The site is zoned 4(a) Industrial which has the following objective:

To provide land primarily used for industrial development and to facilitate economic activity and employment generation.

The secondary objective is *to allow non industrial development which either provides a direct service to industrial activities and their workforce or which due to its type, nature or scale is inappropriate to be located in another area.*

The proposed development is considered capable of compliance with these objectives subject to the lodgement of an Air Quality Impact Assessment Report which can recommend the necessary building modifications and work practices to mitigate the impacts associated with the proposed surfboard manufacturing business.

The site also has a small slither of land unzoned. The original Development Application which approved the industrial sheds addressed this zoning and authorised the sites layout. No further assessment is considered necessary in this instance.

Clause 15 - Essential Services

All essential services are made available to the subject site.

Clause 16 - Height of Building

The subject site exhibits a 3 storey height limit. The proposal development is to occur within an existing 2 storey configuration and does not exceed the 3 storey limit.

Clause 17 - Social Impact Assessment

Having regard to Tweed DCP Section A13 the proposed development would not require the lodgement of a Socio Economic Impact Assessment.

The proposal is not considered to generate any significant social impact.

Clause 35 - Acid Sulfate Soils

The subject site is mapped on Councils GIS system as being affected by acid sulfate soils (Class 3). The application is for the first approved use of the tenancy and does not propose any excavation of the natural ground surface. Therefore no Acid Sulfate Soils Management Plan is required.

Clause 47 – Advertising Signage

Clause 47 relates to signage and aims to regulate the impact of signage throughout the Shire.

The proposal involves one flush wall signage panel associated with the factory unit tenancy which is consistent with that supplied for other tenancies within the complex.

Total signage area equates to 6m² which is acceptable.

The signage is considered to be compatible with the existing signage at the industrial complex. It is moderate in scale and does not project above the top of the tilt-up panel concrete wall.

The signage is not illuminated and is located entirely within the signage panel designated for the tenancy. Overall, signage is considered compliant with Clause 47 of the LEP.

State Environmental Planning Policies

SEPP (North Coast Regional Environmental Plan) 1988

Clause 32B - Coastal Lands

The subject site is located on lands to which the NSW Coastal Policy 1997 applies. This proposal is considered compliant with the provisions of the NSW Coastal Policy, the Coastline Management Manual and the North Coast Design Guidelines. The manufacturing unit will not obstruct public foreshore access or result in overshadowing of the nearby beach or open space areas. This has also been considered previously in the original development application approving the complex (DA05/1335).

The proposal is considered to comply with Clause 32B of the SEPP NCREP 1988.

Clause 47 – Principles for Commercial and Industrial Development

The location of an industrial factory unit in an existing industrial zone in Tweed Heads is in accordance with the objectives of this clause in that it maintains the integrity of the main business area in this location, and provides for creation of an additional business on land which is zoned for such a purpose. It also strengthens the multi-functionality of the industrial area by its proximity to other industrial operations. All relevant services are available to the site and the site is located in proximity to existing local and regional road networks. However, the application has not adequately demonstrated that the business can function without having a negative impact on surrounding properties by way of smell.

The proposal is considered capable of compliance with the strategic aims and objectives contained generally within the North Coast Regional Environmental Plan 1988 subject to the lodgement of Air Quality Impact Assessment Report which can recommend the necessary building modifications and work practices to mitigate the impacts associated with the proposed surfboard manufacturing business.

SEPP 64 – Advertising and Signage

There are no specific provisions for 'business identification signs' within this SEPP. The SEPP deals with 'Wall Advertisements' and states that there should only be one per elevation of a building. However, this is not the definition of the proposed signage.

An assessment against Schedule 1 of the SEPP indicates that the proposed signage (flush wall sign) is compatible with the industrial/commercial character of the area, it does not detract from the amenity of any special areas, it does not jeopardise any views or vistas, and is of an appropriate form and scale for the streetscape and the subject building. There is no illumination and no safety hazards as such.

Therefore, the proposal is considered to comply with the provisions of SEPP 64.

State Environmental Planning Policy No. 71 – Coastal Protection

The subject site is located on land to which the above policy applies. However, the site is not identified as a sensitive coastal location under the policy, and therefore a referral to the Department of Planning and Infrastructure is not required.

As the proposal is for the first approved use of an industrial unit, the matters for consideration under SEPP71 have already been considered as part of the approval for the existing factory building (DA05/1335).

The proposal is considered to generally comply with the provisions of SEPP 71.

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

The Draft Tweed Local Environmental Plan (LEP 2012) was placed on re-exhibition in late 2012/early 2013. The post exhibition version of the Draft Tweed LEP 2012 with amendments as resolved by Council on 31 May 2013 has been forwarded to Parliamentary Counsel via the Department of Planning and Infrastructure.

As such, the Draft Tweed Local Environmental Plan is considered to be “certain and imminent” in terms of previous legal precedent and as such has determining weight.

The Draft LEP proposes to re-zone the subject site to IN1: General Industrial.

There is a 10m height limit and the minimum allotment size for this draft zone is 2000m².

The building has already been approved under a separate application and the proposal does not modify the building externally.

The proposed factory for the use of surfboard manufacturing is described as ‘Industry’ which, within the draft IN1 zone is a permissible form of development under Item 3.

Please note that the unzoned land portion of the site is draft zoned IN1 as well.

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

Tweed Development Control Plan Section A2 – Site Access and Parking code

Tenancy 19 has a proposed GFA of 325m² (165m² at ground level + 160m² at the increased mezzanine which is used for manufacturing, storage and office space).

The tenancy was defined as “industrial” and allocated 2 spaces under SP80033 (one being a car space outside the tenancy and the second being a car port outside Lot 21).

The tenancy increases the GFA from 213m² (excluding car spaces) to 325m² (excluding car spaces) and would require one additional car space for the increased GFA on the mezzanine level.

DA05/1335 used the “industry” rate under DCP A2 (1 space/100m² GFA). The application approved 106 spaces based on a GFA of 7788m² (28 surplus spaces). The Section 96 for this consent approved 91 spaces (based on a GFA of 8141sqm, resulting in a surplus of 10 spaces for the entire site).

DA12/0552 approved a different development (car rental facility associated with gold coast airport) over the Stage 2 part of DA05/1335.

Neither Stage 2 of DA05/1332 nor DA12/0552 has been built to date which means that Stage 1 of DA05/1332 may be a standalone development without the surplus spaces as indicated above.

If Stage 1 of DA05/1332 becomes a standalone development the total approved GFA would be 5019m² requiring 40 spaces on site (1 per 100m² less 20% for ESD). There are 41 spaces shown on the Strata Plan for this section of the site (SP80033). Therefore **1 space credit**.

The following is a list of DA's that have been approved over Stage 1:

- DA07/0832 – Strata Unit 11 - Salt Packaging – Warehouse (required less parking than allocated so +.92 spaces back into car parking pool). Therefore **1.92 spaces credit**.
- DA08/0183 – Strata Unit 21 – Storage Equipment Tweed Byron Aboriginal Land Council – Industry (required the same parking as approved by DA05/1332). Therefore **1.92 spaces credit**.
- DA08/0449 – Strata Unit 24 – Dance Studio (Recreational Facility) – car parking assessment deemed acceptable due to hours of operation. Therefore **1.92 spaces credit**.
- DA11/0163 – Strata Unit 9 – Surfboard Manufacturing Business - (required the same parking as approved by DA05/1332 but one extra space given increased GFA). Therefore **0.92 spaces credit**.
- DA12/0010 – Strata Unit 12 – Alcohol Distribution - (required the same parking as approved by DA05/1332). Therefore **0.92 spaces credit**.
- DA12/0608 – Strata Unit 8 – Printing Company (required the same parking as approved by DA05/1332 but one extra space given increased GFA). Therefore **0.08 short**.

As such, there is no carparking credit left on site if only Stage 1 proceeds. Each application would need to be addressed on its merits in regards to car parking.

The applicant has stated as follows in regards to the shortfall of car parking:

- *There are 7 unallocated car spaces located in the front of the subject premises;*
- *The development is of a low key nature;*
- *The demand for parking generated by the development is minor. The majority of the contact with the customer is made via e-mail, and the boards are sold out of surf shop contacts within the locality;*
- *The proposed mezzanine development is to be used for non traffic generating use being storage of surfboards. The need for storage of the surfboard is high, and additional room is needed away from the manufacturing machinery;*
- *The development would not generate any heavy vehicle traffic or create any demand for additional delivery vehicles;*
- *The industrial complex is well served with car parking spaces. Numerous site inspections have been undertaken at the complex and parking has been readily available on all site visits;*

- *The site contains two road frontages and ample on street parking in close proximity to the premises.*

The above comments are not entirely concurred with. The mezzanine level is predominantly used for the manufacturing of the boards, sanding and shaping the boards. This use generates staff and is not just storage space.

The complex does not appear well serviced with car parking spaces. Given the car spaces are allocated to businesses many of the spaces are taken up by employees and visitors coming to the site are often forced to find parking on the street which is not always readily available due to the busy nature of the area.

In regards to this application the applicant has indicated that the business employees up to 10 employees (as detailed verbally at Council's site visit in May 2013). The industry car parking rate of 1 space for every 100m² is a combined staff and customer average.

The subject site could not adequately cater for staff and customers if every business employed staff of those numbers. However as this is an average and the application triggers the extra parking for the additional mezzanine level there is an argument to support the development despite the technical short fall of the one on site car parking space.

It should also be noted the majority of the units within the complex are still operating without first use development consent as required by DA05/1332 and if they were all made to lodge development applications Council may find additional mezzanines have been built without consideration for the additional parking that this would generate.

DCP A4 – Advertising Signs Code

The applicant has noted that signage will comprise of a single 6m² signage panel above the factory unit tenancy. This is consistent with all of the other factory units within the complex.

Signage on the above flush wall signage panel must not exceed the background dimensions of the panel. As the proposed signage does not exceed the background dimensions, and does not exceed the maximum number of five signs per premises, the proposed signage is considered to be consistent with the provisions of the DCP.

A standard condition will apply to cater for any possible changes to signage that may occur in the future.

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

Clause 92(a) Government Coastal Policy

The proposed development will not negatively impact upon the Government Coastal Policy.

Clause 92(b) Applications for demolition

No demolition is proposed within this application, therefore Clause 92(b) is not applicable

Clause 93 Fire Safety Considerations

The application proposes a change of use (first approved use) and the construction of a mezzanine level. The mezzanine level has been constructed without approval and would require a Building Certificate to legitimise its construction.

Clause 94 Buildings to be upgraded

The building could comply with the Building Code of Australia subject to suitable conditions of consent if Council wanted to approve the development.

- (a) (v) **Any coastal zone management plan (within the meaning of the Coastal Protection Act 1979),**

Tweed Shire Coastline Management Plan 2005

The subject site is not located within an area that is affected by this management plan. Therefore, no further assessment is required.

Tweed Coast Estuaries Management Plan 2004

The subject site is not located within an area that is affected by this management plan. Therefore, no further assessment is required.

Coastal Zone Management Plan for Cobaki and Terranora Broadwater (adopted by Council at the 15 February 2011 meeting)

The subject site is not located within an area that is affected by this management plan. Therefore, no further assessment is required.

- (b) **The likely impacts of the development and the environmental impacts on both the natural and built environments and social and economic impacts in the locality**

Context and Setting

The proposed development will be situated within an established industrial area in Ourimbah Road, Tweed Heads. The proposed development comprises of the use of an existing industrial unit for surfboard manufacturing and storage. The application is considered capable of support provided that a suitable Air Quality Impact Assessment report could be produced detailing valid recommendations and conditions.

Odour

To understand the issue surrounding odour below is the extract from Council's letter to the applicant dated 5 June 2013:

Council has reviewed the Policy Documents which provide guidelines for the assessment of similar businesses.

Below is a summary of that Policy Information

Section 79C (1) of the Environmental Planning and Assessment Act 1979 states that 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:

- (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, and*
- (d) any submissions made in accordance with this Act or the regulations.*

Further, as per Section 4.7 of Council's Development Application Guide the applicant is required to show that the proposal will not cause or be affected by air or noise emissions. To date your application has not adequately addressed air pollution concerns.

Although Council does not have a policy on air quality, there are many resources available including:

- Warringah Council - The Business of Air Quality guidelines*
- Department of Sustainability, Environment, Water, Population and Communities - National Pollutant Inventory*
- NSW Office of Environment & Heritage's Local Government Air Quality Toolkit*
- NSW Office of Environment & Heritage's Approved Methods for Modelling and Assessment of Air Pollutants in New South Wales*
- NSW Office of Environment & Heritage's Environmental Information for the Composites Industry*

Warringah Council has developed "The Business of Air Quality" guidelines that provide minimum standards of controls for air quality relevant to businesses. The program was a partnership between Warringah Council and the NSW State Government designed to educate local industrial and light manufacturing businesses on air quality pollution issues and details the best ways for individual businesses to undertake a wide range of manufacturing processes while minimising their air pollution emissions. The guidelines and other educational materials have been made available for use by all councils in NSW.

In Section 5.5 - Fibreglass Reinforced Products (FRPs) and Composites Production, best practice guidelines have been outlined. The industry FRPs (note the use of this term includes composites production, structural products made of a combination of different types of materials where the performance of a finished composite is far stronger than that of any of the individual components) are used in the manufacture of a diverse range of products including boats, surfboards, bathroom fixtures, swimming pools, building materials, sporting equipment, appliances, storage tanks and piping, simulated marble products and motor vehicles. The versatility of FRPs in manufacturing has allowed for development of new applications for FRPs.

The guide explains that the FRP industry is experiencing significant growth. New products continue to be developed and produced for greater durability and strength. However this growth has triggered serious environmental and health concerns, particularly in businesses unwilling to upgrade to new more efficient technologies.

The main emissions of concern in FRP manufacture are volatile organic compound (VOC) emissions and odours. These can have adverse impacts offsite if a business is poorly managed or controlled. Odour is the most common cause of complaint for businesses producing FRPs.

Particulate and dust emissions are also a concern particularly during the moulding and finishing processes. Activities such as grinding, polishing and

sanding and the cutting of matting for use in the laminating process can create excessive particulate and dust emissions.

The main sources of pollution in FRP manufacture include:

- Poor ventilation, filtration and discharge of particulates, dust, VOCs and odours. This is often caused by inappropriate stack and ventilation system configurations, fugitive emissions and inefficient air circulation and filtration.
- Poor housekeeping practices such as failure to place lids on containers and general poor storage and handling of containers.
- Poorly maintained equipment and equipment malfunction or failure. Maintenance of filtration systems and spray, sanding or polishing equipment contributes greatly to overspray, inefficient product use and emission of particulates, dust, VOCs and odours.
- The technical ability of personnel manufacturing FRPs can sometimes be low.
- Poor tool or equipment clean up. Commonly used cleaning products often contain solvent and are hazardous due to high flammability and chlorine content. Acetone, toluene, xylene and various alcohols are of particular concern. Emulsifiers and citrus based solvents may also be toxic.

The most common VOC used in the manufacture of FRPs is styrene (ethenylbenzene). Styrene is a highly volatile monomer which is used in polyester and vinyl resins. Most of the resins and catalysts used in the manufacture of FRPs are also highly flammable.

The NSW Office of Environment & Heritage's Environmental Information for the Composites Industry advises that extraction systems that simply dilute the concentration of styrene in the exhaust by adding air do not reduce the total VOC emission. A significant reduction in styrene emissions can be achieved by reducing emissions at the source.

It is noted that the Department of Sustainability, Environment, Water, Population and Communities' National Pollutant Inventory advises that styrene affects the central nervous and respiratory systems, including depression, concentration problems, muscle weakness, fatigue, unsteadiness, narcosis, defatting dermatitis, and nausea. Exposure may also irritate the nose, throat, and eyes, including severe eye injuries. The International Association for Research into Cancer (IARC) classifies styrene as 'possibly carcinogenic to humans (Group 2B)'. It enters the body by absorption into the blood through the lungs, stomach, skin or eyes.

It is noted that the complainants have advised of headaches, nausea, and also skin, eye and throat irritations from pollutants exiting the subject site directly into their units and in common areas.

As per Section 2.3 of the Local Government Air Quality Toolkit (Module 3: Guidance note—Composite structural products), a sense of smell cannot be used to judge whether the exposure is of concern with respect to toxicity. People complaining about chemical odours may well be seeking assurances

that the level of exposure is not hazardous to their health. In situations where there is any doubt about possible health implications, an assessment of potential impacts should be carried out using the techniques described in the NSW Office of Environment & Heritage's Approved methods for the modelling and assessment of air pollutants in NSW (2005). The technical assessment described in this document will generally require specialist input.

It's clear that you have spent considerable funds trying to rectify the problems experienced by occupants of the neighbouring units however the works undertaken to date by the applicant have been improvised. The complainants are still being affected by the operation of the unauthorised use.

If the effects of air pollution originating from this operation are not examined by a suitably qualified air quality investigation consultant, Council is not undertaking due diligence in terms of legislative requirements and health, safety and welfare of those who could be put at risk from the works being carried out at this business.

You are therefore required to submit the following information for review and approval prior to your application being determined. Failure to provide such information will likely result in a recommendation for refusal of the development application.

- 1. An Air Quality Impact Assessment Report prepared by a suitably qualified air quality investigation consultant in accordance with the NSW Office of Environment & Heritage's Approved Methods for Modelling and Assessment of Air Pollutants in New South Wales shall be submitted to Council's Environmental Health Officer for consideration.*

The air quality investigation shall incorporate the existing operations and include air sampling for odour causing substances external to the premises (with particular attention to neighbouring units in the immediate vicinity of the premises) that are associated with the surfboard manufacturing process (eg styrene etc) as well as investigating the adequacy of the existing mechanical ventilation system for removing odours/air impurities etc prior to discharge to the external environment, not purely in relation to the indoor air quality within the premises where the manufacturing is being carried out.

The report shall include appropriate recommendations necessary to demonstrate that the surfboard manufacturing process can be carried out without causing an odour nuisance to any adjoining premises.

To date this report has still not been provided despite Council requesting this since 19 April 2013. Accordingly the application is recommended for refusal.

Waste

Waste generated from the business is dust from sanding the surfboards which is collected in two dust extraction units located on the upper floor where the dust is collected in bags and disposed of in bins on the site. Standard conditions could be applied.

Noise and Vibration

A previous application for a surfboard manufacturing business (within a different unit) was supported by a Noise Impact Assessment Report. No such report has been provided for this application although noise has not appeared to be an issue for adjoining businesses.

(c) Suitability of the site for the development

Surrounding Land Uses/Development

The subject site is zoned 4(a) Industrial and is within an established industrial area. The subject site is zoned to facilitate industrial uses which includes surfboard manufacturing. The surrounding development is predominately Industrial and specialist developments that due to their type nature or scale are suited to an Industrial zoning, however this development needs to demonstrate that it will not have an unreasonable impact on adjoining businesses by way of odour (air quality).

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

Under Tweed DCP Section A11 – Public Notification of Development Proposals the proposal was not required to be advertised or notified for public comment. However, given the compliance history associated with this application Council Officers alerted the complainant about the development and invited comments based on the application as displayed on Council's Online DA Tracker.

Accordingly Council has received objections from two neighbouring businesses. The nature of the complaints are summarised below:

Council has received written objections from the two adjoining businesses.

The first objection states as follows:

"With reference to the above application number, please acknowledge this letter as an objection to this application. I am the director of the business located adjacent to the above premises and the owner of XXXX. At no time were we consulted in this application to commence a surfboard manufacturing business directly adjacent to us

It should be noted that the owner's consent provided with the application does not meet legal requirements in that the consent from the unit owner and the Body Corporate only relate to the construction of the mezzanine, whereas the application is clearly for the establishment of the Surfboard Manufacturing Use, The use of the premises is not addressed in the Owners Consent letters or Body Corporate minutes.

These premises have been used to manufacture surfboards for approx 60 months and the fumes, being resin fumes, from these activities are unbearable. During this time, many of my employees have needed to leave work after inhaling the fumes, even as early as 10 minutes after commencing work. Symptoms being experienced include nausea, headache, eye irritation and blood shot eyes. There is also a constant white dust that has been released from the premises into the common property of the complex, ie carpark. Clients which have visited our premises have also experienced eye irritation and noted the strong fumes that present in our premises. During this time, constant contact has been made with the tenants of the said premises and we had been advised that the appropriate

actions were being taken to minimise any of these issues including appropriate extraction fans to be installed. We believe these fans have been installed, however the fumes are still prevalent.

We are a business that has been present in the local community for approximately 15 years and feel that our concerns should be heard."

Council Assessment:

In regards to owners consent the owner's consent letter stated:

"Chashell Pty Ltd Superannuation Fund is the owner of the above lot, and Chashell Pty Ltd as trustee for the fund, hereby gives consent to the current tenant Superbranded Pty Ltd to construct a mezzanine within Lot 19."

If Council wants to approve this application the owner's consent would need to be expanded authorising the lodgement of DA13/0132 detailing that the application seeks consent for the ongoing use of the premises, the mezzanine construction, and signage.

In regards to the odour complaints this complaint reinforces Council's assessment that an Air Quality Impact Assessment report is required.

The second objection comprises multiple e-mails of complaint (dating back to November 2012) regarding the subject business and the issues raised are summarised as follows:

Comments dated 12 Feb 2012:

- *There are toxic resin fumes leaching into our tenancy which are causing illness, red eyes and flushed skin.*
- *The adjoining tenant on the other side has advised that he experiences red eyes and can detect resin fumes when he attends his office in the morning.*
- *There is no filtration on the extraction unit that extracts resin fumes from the said premises...and these toxic fumes are just pumped into the atmosphere.*
- *There is no air lock between the "glassing room" and the outside car park...the door to the said room is left open at all times therefore allowing fumes to escape into the public area and be carried by the wind in any direction.*
- *Some staff do not seem to be wearing any protective clothing and/or breathing apparatus...I would think this would be a serious work cover issue*
- *The storage of "Highly Flammable" resin in just an open area adjacent to the roller door and can be viewed from the car park...if there was a spill there is no facility for containment and is a serious fire risk.*
- *The fumes from the resins used are highly toxic and are accumulative and are life threatening.*

Comments dated 12 Feb 2013:

- *Question..what filters are used and where? (when used)..how are these filters cleaned?..how are these filters disposed of when passed their use by?...what controls are in place with the disposal of toxic byproducts e.g. the sand from the floor (used in the glassing room) and other associated materials*

- *The emissions from the manufacturing process ie. blank shaping/sanding, fibreglass, resin and catalyst are all contributing to the carbon footprint and greenhouse gases.*
- *As a point of reference...James Hardy and the asbestos cover up was a sleeping giant!!...whilst a different business, the materials used in the manufacture and glassing of surfboards are toxic and a threat to human health.. this may well be another sleeping giant!?*

Comments dated 16 April 2013:

- *Their statement ... "the additional mezzanine area is solely for storage purposes" is not true and correct. Please refer to site plan "level one" ...and as I would expect, councils physical inspection.*
- *I do not accept that the Mechanical Ventilation system installed is sufficient or adequate for the safe operation of the subject business.*
- *Site Access and Parking: The applicants statement is totally untrue, incorrect and farcical. The said business at any one time occupies up to 7 or more parking spaces depending on their work load on that day. The site does not provide excess car parking spaces. There are NOT "seven 'unallocated' car spaces located in front of the subject premises" The development is NOT of a low -key nature. The demand for parking generated by the development is greatly increased. Who conducted the numerous site inspections?...when and who by? Ask any owner or tenant regarding the parking problems created by the said business and the above will be confirmed.*
- *I draw your attention to the statement by Coastline Building Cert Div ..."Health and amenity" point three...Natural ventilation via a roller door is totally inadequate and there should be some form of air lock dividing the public and the operation. I do not accept their statement "the requirements applicable to the surfboard manufacturing industry having regard workplace health and safety etc etc" is at all adequate and within any accepted safety levels.*

Comments dated 14 May 2013:

- *We are having a very serious problem with resin fumes leaching into our premises from #19...I have also advised the landlord of the said premises...that the matter is now becoming critical...also the car parking is causing extreme stress with a number of unit holders...due to the staff of unit 19 occupying any spot they like!!.....*

Comments dated 14 May 2013:

- *We are having a very serious problem with resin fumes leaching into our premises from #19...I have also advised the landlord of the said premises...that the matter is now becoming critical...also the car parking is causing extreme stress with a number of unit holders...due to the staff of unit 19 occupying any spot they like!!.....*

Council Assessment:

The odour complaints reinforces Council's assessment that an Air Quality Impact Assessment report is required.

Many comments above also relate to possible Work Cover matters which Work Cover have now stated as being satisfactory for their legislation.

(e) Public interest

The application as lodged (without an Air Quality Impact Assessment Report) is not considered in the public interest.

OPTIONS:

1. Refuse the Development Application in accordance with the reasons submitted in this report and instigate compliance action to have the business cease operating from the subject site; or
2. Allow the applicant an additional 30 days to produce an Air Quality Impact Assessment Report and reconsider the application after receipt of that Report. If the report is not received within 30 days refuse the Development Application (under staff delegation) based on the reasons as outlined in this report; or
3. Request conditions of consent be brought forward to the next Council meeting to enable the application to be considered for approval.

CONCLUSION:

Whilst the subject application could be considered a suitable development for the site the applicant has failed to provide sufficient documentation to demonstrate that the business practices of the proposed surfboard manufacturing can operate without adversely affecting the adjoining properties.

An Air Quality Impact Assessment Report is considered crucial to ensure that the building is modified to avoid vapours exiting the site and affecting adjoining properties. The Air Quality Impact Assessment Report would also need to make recommendations on the practices of the business to ensure best practice guidelines are being satisfied.

Without this report Council Officers are not convinced that the proposed development is suitable for the subject site given the proximity to other premises.

COUNCIL IMPLICATIONS:

a. Policy:

Corporate Policy Not Applicable.

b. Budget/Long Term Financial Plan:

Not Applicable.

c. Legal:

If Council were to refuse the development application the applicant would have a right of appeal to the NSW Land & Environment Court.

d. Communication/Engagement:

Not Applicable.

UNDER SEPARATE COVER/FURTHER INFORMATION:

Nil

25 [PR-CM] Development Application DA13/0247 for a Dual Use of Existing Dwelling (Tourist Accommodation) at Lot 21 DP 1030322 No. 39 Collins Lane, Casuarina

SUBMITTED BY: Development Assessment

FILE REFERENCE: DA13/0247 Pt1



Civic Leadership

LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:

- 1 Civic Leadership
 - 1.1 Ensure actions taken and decisions reached are based on the principles of sustainability
 - 1.1.1 Establish sustainability as a basis of shire planning and Council's own business operations
-

SUMMARY OF REPORT:

Previous Report to Council

At its meeting of 19 September 2013, Council resolved the following in respect of this matter:

"RESOLVED that this report be deferred to allow a Workshop to be scheduled prior to the November meeting."

A Councillors Workshop for this application was held on 10 October 2013.

This report is now submitted to Council for its further determination.

The proposed development is for dual use of an existing dwelling for tourist accommodation purposes. The dwelling would be leased to a maximum of 10 visitors at any one time as holiday accommodation. Intended clientele are predominantly family groups.

The existing dwelling was approved on 23 May 2005 for single dwelling purposes only. Since that time, the dwelling has been utilised for tourist accommodation on a commercial basis. As a result, Conditions 44 and 45 of the development consent have been breached.

The site is currently zoned 2(e) Residential Tourist and 7(f) Environmental Protection and the development is defined as 'tourist accommodation' under the current Tweed Local Environmental Plan 2000. Whilst the proposed tourist accommodation could be considered as permissible under the 2(e) Residential Tourist zone, it is prohibited under the proposed R2 Low Density Residential zone of the Draft Tweed Local Environmental Plan 2012. In addition, the proposal is not considered to be consistent with the objectives of the R2 Low Density Residential zone under the draft plan.

There are various legal precedents created under the NSW Land and Environment Court, which require consent authorities to give greater weighting to their draft environmental planning instruments which are 'certain and imminent'. Previous case law suggests that this

weighting has greater relevance once a draft LEP has been publically exhibited, adopted by Council, and forwarded to the Minister for final making and gazettal.

Following an earlier public exhibition, Council at its meeting of 31 May 2013 resolved to adopt the exhibited Draft Tweed LEP 2012, subject to certain changes. The modified draft LEP has been referred to the Department of Planning and Infrastructure, and gazettal of the plan is expected within a number of months.

On that basis, it is the officer's view that the Draft Tweed LEP 2012 should be given increased weighting in the determination of the subject development application, and as a prohibited use, should therefore be refused.

It is noted that lawful use of the dwelling for tourist accommodation purposes under the current LEP does not afford the applicant greater privilege than other land owners within the 2(e) zone at this point in time. However, once the draft LEP is in force and such use becomes prohibited within the R2 zone, other land owners will not have the same legal and financial right to operate their dwellings for the purposes of tourist and visitor accommodation, thus giving rise to equity issues. Although consistent with current objectives of the 2(e) zone, tourist and visitor accommodation is not consistent with the future desired character of the locality, reinforced by low density residential draft zoning and prohibition.

The development application has been referred to Council to determine given the current legal status which does not preclude Council from granting consent to the Development Application.

It should be noted that approval of the application would result in Existing Use Rights being relied upon once the Draft LEP 2012 is gazetted, which is not considered to be good planning practice and results in inconsistent use within the residential zone.

RECOMMENDATION:

That Development Application DA13/0247 for a dual use of existing dwelling (tourist accommodation) at Lot 21 DP 1030322 No. 39 Collins Lane, Casuarina be refused for the following reasons:

- 1. The development does not satisfy Section 79C of the Environmental Planning and Assessment Act, particularly Section (a)(ii) – *the provisions of any Draft Environmental Planning Instruments* in that the development is prohibited within the R2 Low Density Residential zone.**
- 2. The development does not satisfy Section 79C of the Environmental Planning and Assessment Act, particularly Section (a)(ii) – *the provisions of any Draft Environmental Planning Instruments* in that the development is inconsistent with the objectives of the R2 Low Density Residential zone.**
- 3. The development is not considered to be in the public interest.**

REPORT:

Applicant: Mr JJ Dixon
Owner: Mr John J Dixon
Location: Lot 21 DP 1030322 No. 39 Collins Lane, Casuarina
Zoning: 2(e) Residential Tourist and 7(f) Environmental Protection (Coastal Lands)
Cost: Not Applicable

Background:

Council is in receipt of a development application that seeks consent for dual use of an existing dwelling (tourist accommodation) on a parcel of land zoned 2(e) Residential Tourist and 7(f) Environmental Protection (Coastal Lands).

History

The single dwelling was constructed in 2005 following development consent in association with DA05/0311. Final occupation and compliance certificate was issued 24 February 2006 in the name of the current applicant.

The existing dwelling has had little alteration externally or internally since its original construction. The owners have used the dwelling for residential purposes and leased the property for the purposes of tourist accommodation (without the benefit of development consent). As such, Conditions 44 and 45 of the development consent for DA05/0311 have been breached:

44. The building is to be used for single dwelling purposes only.

[USE0110]

45. The keeping of dogs, cats or other animals on the property is to be in accordance with any relevant 88B Instrument requirements.

[USE0290]

The Subject Site

The site is regular and rectangular shaped with a 12m frontage to Collins Lane and rear access to community land at the rear that provides a buffer to the coastal reserve. The site has a total land area of 746m². The site is generally flat and landscaped to the rear of the dwelling. On-site parking is located at the Collins Lane frontage by way of a double carport and driveway space.



Figure 1: Context of Site (No. 39)

The existing two-storey dwelling has four bedrooms with large living areas (internal and external) on both levels that are oriented to the east. Dwellings on either side of the subject site extend further to the east and exhaust the developable area available within the 2(e) zone. Vegetated areas are located within the 7(f) zone.

The Proposed Development

The application proposes flexibility in maintaining long-term residential use and legalisation of ongoing use of an existing four-bedroom single dwelling for the purposes of short-term tourist accommodation. No physical works are required in order to facilitate the proposal.

On-site parking for up to four vehicles is proposed within the double carport and driveway area.

The property is currently advertised as "White Haven Beach House" via an online accommodation profile which currently states it can comfortably sleep up to eight persons. However, it is intended that the dwelling be leased via single booking to one tourist group comprising a maximum of 10 persons at any one time.

A typical group may be a small extended family consisting of parents, children, grandparents or the like or two small families (eg. two adults plus three children x 2). Groups of that size would only be approved upon application and a cap on the number of adults able to be accommodated would be applied. The proposal does not include use of the dwelling for events such as parties, weddings or end of school celebrations.

The owner has taken responsibility for bookings and management of the site for the last three years and undertakes on-line research of prospective tenants. However, prior management of the property did allow event bookings to occur which were not monitored. Cleaning and maintenance contractors attend to the residence and grounds following tenants vacating the premises.

The property has been advertised as 'dog-friendly' upon approval by the owner and a restriction to one (<10kg) dog only. This is problematic as a restriction on the use of the land pursuant to the Section 88B Conveyancing Act 1919 (registered 27 June 2001) applies to the property (eleventhly referred to) restricting the keeping of dogs (below) and specifically requires dog registration with Tweed Shire Council.

7.2 No person occupying a lot burdened shall have more than one dog upon any lot burdened and shall not have any such dog unless the boundaries of the subject lot are securely fenced.

7.3 *No person occupying any lot burdened may have a dog unless it is registered with the Tweed Shire Council and the relevant fee paid by the applicant and a secure dog-proof compound has been constructed upon the lot and such compound has been approved by the Tweed Shire Council.*

7.4 *No person occupying any lot may retrieve a dog that has been impounded by the Tweed Shire Council unless that person can satisfy Tweed Shire Council that a secure dog-proof compound has been constructed on the subject lot.*

The abovementioned restrictions have been put in place to enable careful management of environmentally sensitive land (zoned 7(f) Environmental Protection) located on and to the east of the Collins Lane properties and to mitigate the impacts of domestic animals such as dogs and cats upon native wildlife/habitat. Tweed Shire Council is empowered to release, vary or modify the restriction eleventhly referred to associated with Deposited Plan 1030322.

Several minor constructed changes to approved dwelling plans are also proposed that rectify practical changes involve the following:

Ground level

- Internal shutters on all north and south elevation windows (as opposed to external timber screens); and
- Patio screening to both sides.

Upper level

- Deletion of two windows on north elevation of family room;
- Internal shutters on all north and south elevation windows (as opposed to external timber screens); and
- Top deck privacy screening to both sides.

The applicant has proposed that a plan of management be submitted to Council for approval (upon condition) which will regulate use of the property, consistent with development consent conditions and existing S88B restrictions on the use of the land.

Additional wheelie bins are to be provided to ensure adequate waste management.

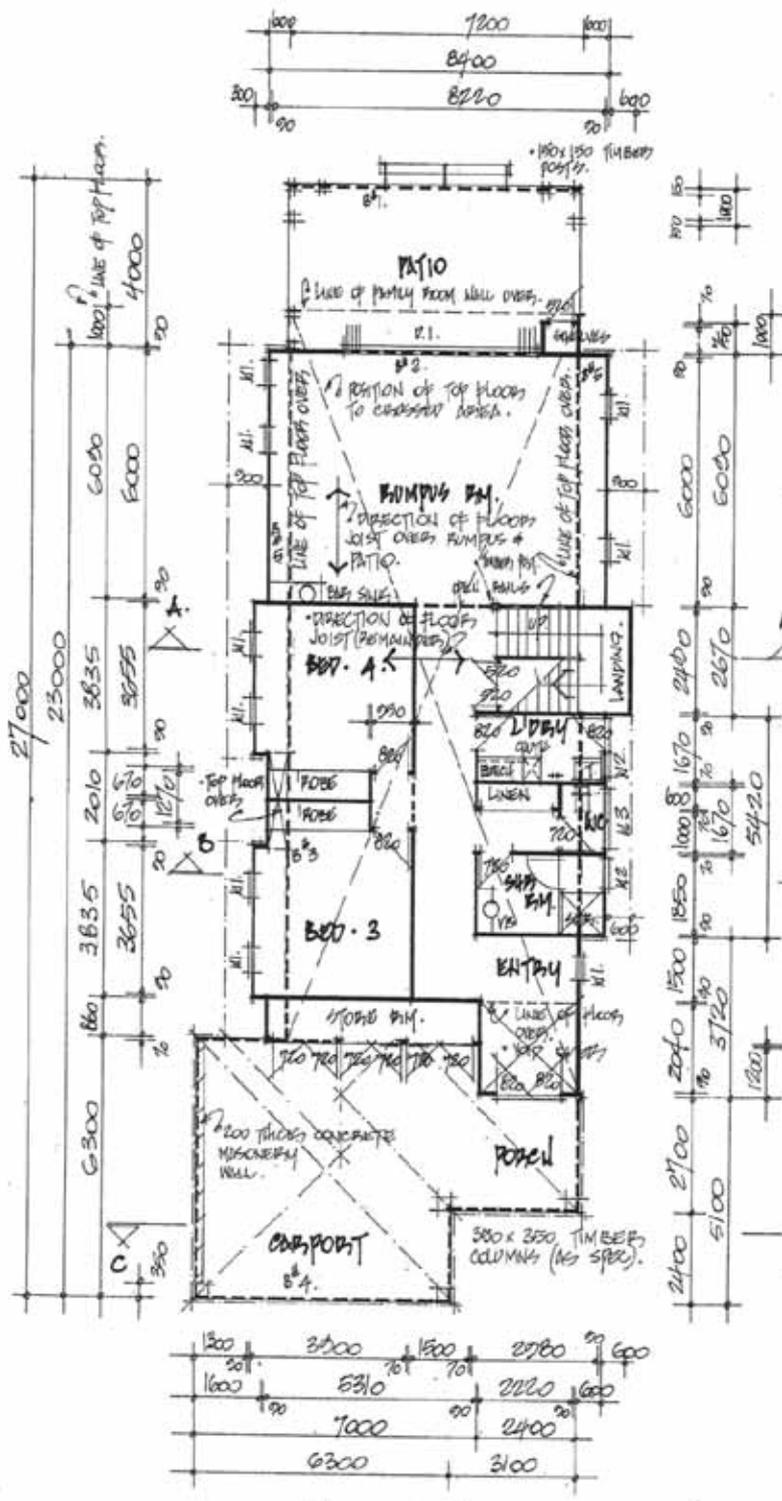
Summary

An assessment in accordance with current Tweed LEP 2000 controls indicates that the proposal may have merit in planning terms.

However, the development is prohibited by and inconsistent with the Draft LEP 2012, specifically the objectives of the R2 Low Density Residential zone. It is therefore recommended that the development be refused.

DEVELOPMENT/ELEVATION PLANS:

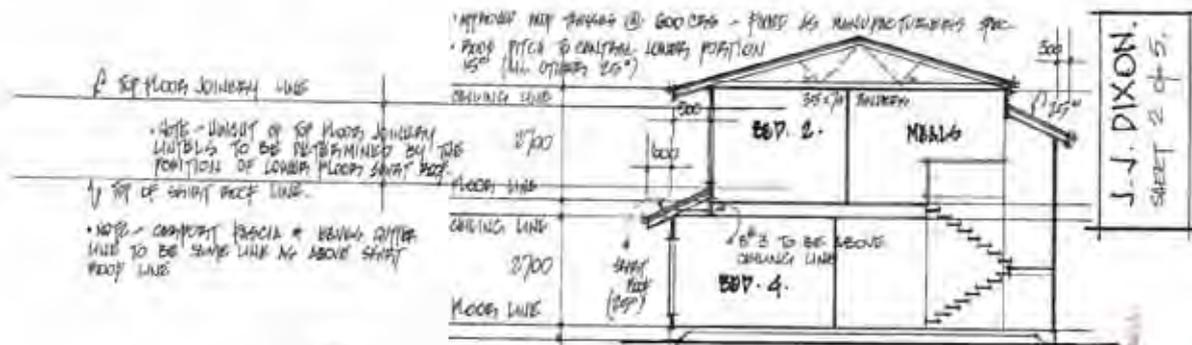
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SHEET 1 of 5.



JOINERY LEGEND:
 GROUND FLOOR ONLY - REFERS TO SHEET 2 FOR TOP FLOOR.
 N1. 1800 x 600 ALUM DOUBLE HUNG.
 N2. 900 x 600 " HOPPER WINDOW WITH OBS. GLASS.
 N3. 900 x 1500 ALUM. SLIP WINDOW WITH OBS. GLASS.
 P1. 2100 x 4800 SET OF 3-ALUM. STRUCTURAL ROOFS.

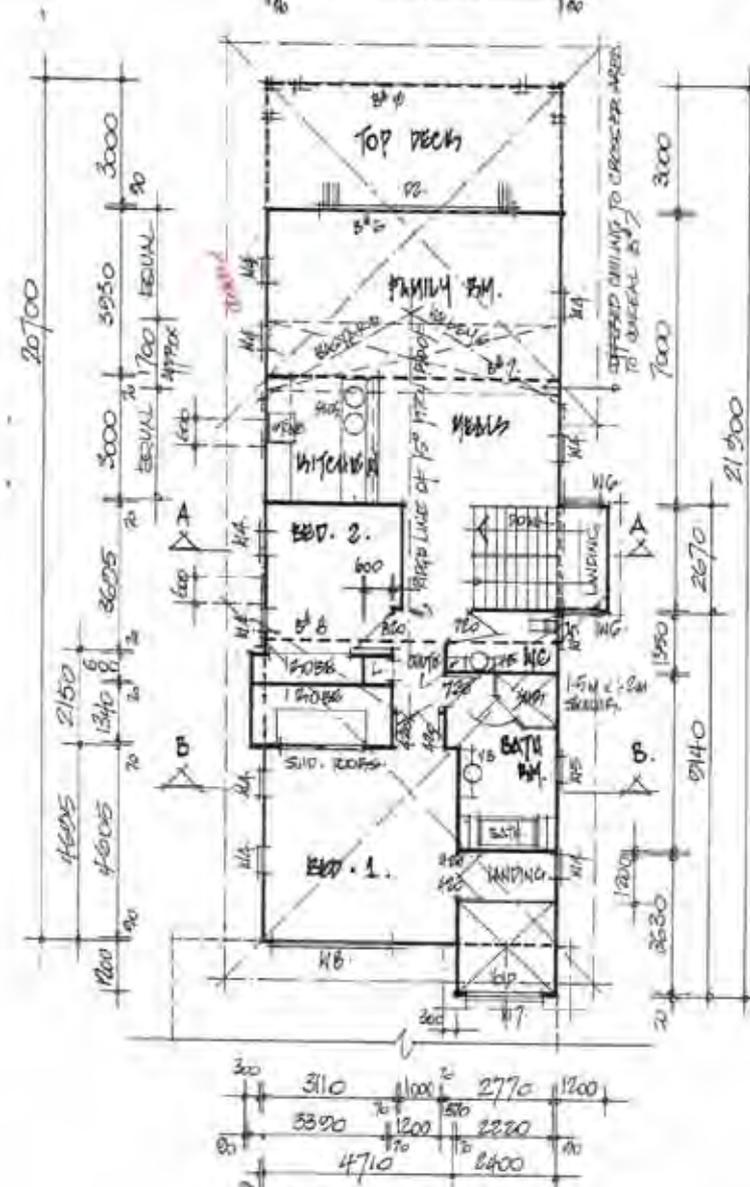
BEAMS:
 BEAMS #1 TO #8 - "ASBONS" AS ENGINEER'S DESIGN ATTACHED.
 BEAM #3 & #5 TO BE POSITIONED IN FRAME WALL & BE ABOVE G/FLOOR CEILING LINE - FL JOIST TRIMMED TO SIDE OF BEAM.
 B#4 & OTHERS UNLESS TO CARPORT TO BE SAME DEPTH FOR FULL PERIMETER.
 A. UNLESS OVER D/BAY, N.C., S/BY P.M. TO BE KEPT ABOVE CEILING LINE
 B#7 & #8 - DETAIL 'A' (SHEET 2), SO AS TO REDUCE DEPTH OF CORNERED CEILING SURROUNDING B#7, BEAM DESIGN TO BE CALCULATED USING A 85MM WIDE TRANSVERSAL 18C

GROUND FLOOR PLAN: SCALE 1:100.



J.J. DIXON.
SHEET 2 of 5.

FOOTINGS, FOUNDATIONS & FLOOR SLAB AS ARCHITECT'S DESIGN ATTACHED.
SECTION A-A:



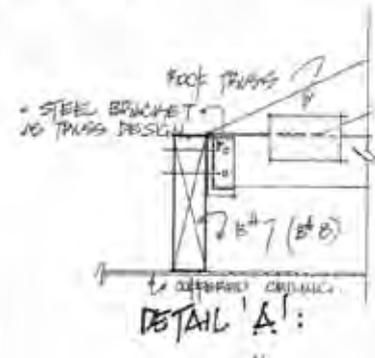
JOINTLY LEGEND:
TOP FLOOR ONLY - REFER TO SHEET 1 FOR GROUND FLOOR.

- NA. 1800 x 600 ALUM. DOUBLE HUNG WINDOW
- NB. 900 x 600 x HOPPER WINDOW
- NG. FILLED GLASS (REFLECTIVE) AS SHOWN ON ELEVATION - ALUM. FRAME.
- N7. F.C.F. - SAME NOTE AS NG
- N8. SET OF 3 ALUM. HOPPER WINDOWS 1000 x 900, 800 x 900, 600 x 900 WITH BELOWED REFLECTIVE GLASS
- N9. 2100 x 4800 ALUM. SET OF 8 DOORS.

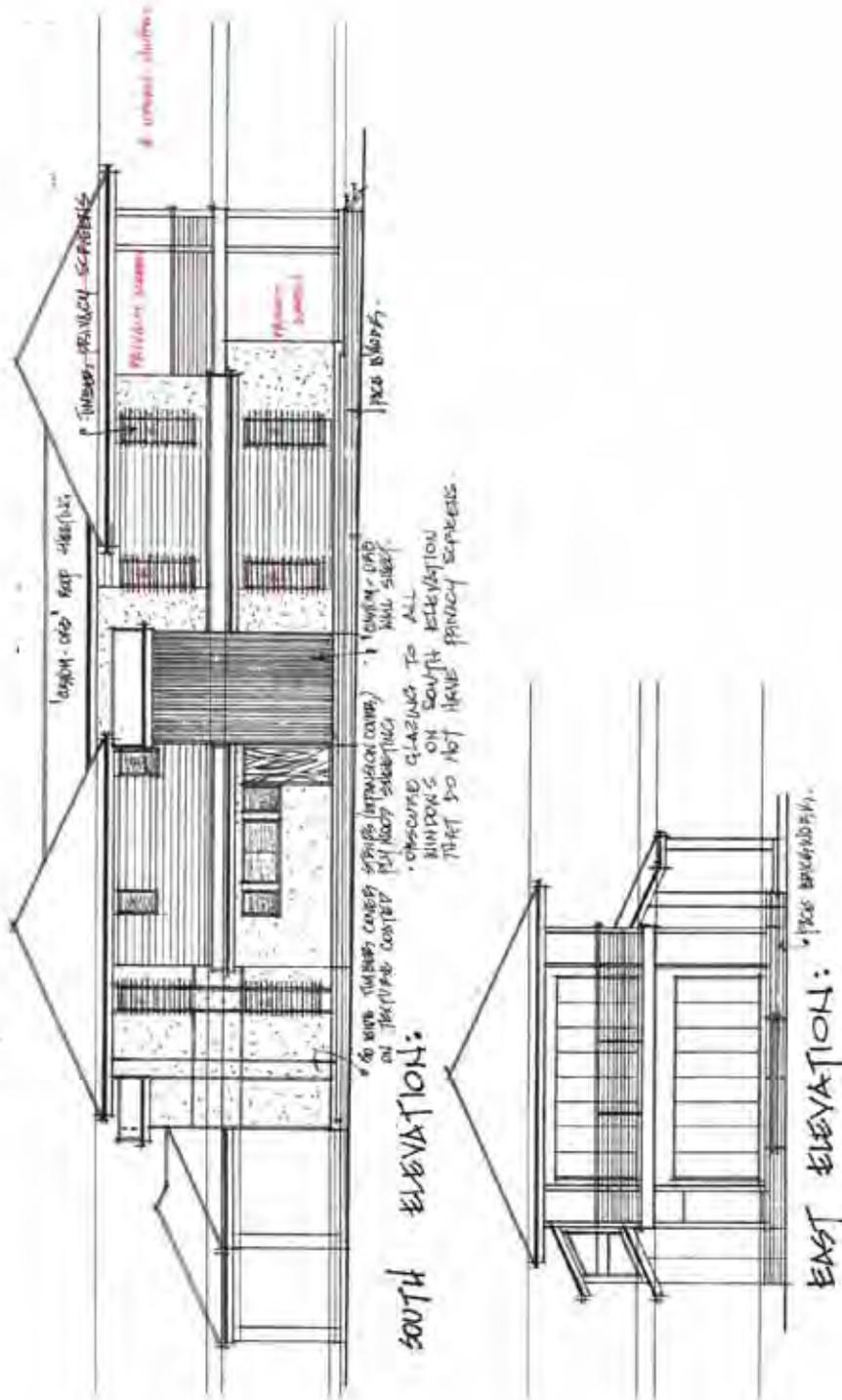
• TOP DECK TO BE SLOPED WITH JAMES HARDIE'S COMPRESSED SHEET & WATER PROOFED TO JAMES HARDIE'S SPECIFICATION & SHEET WITH SELECTED FLOOR TILES

• CEILING OF PATIO TO BE SLOPED WITH 'TILLS BOARD' & SET AS JAMES HARDIE'S SPECIFICATION.

• CEILING & STAIRWELL (LANDING POSITION) TO BE FINED ON RANGE OF PATTERNS.



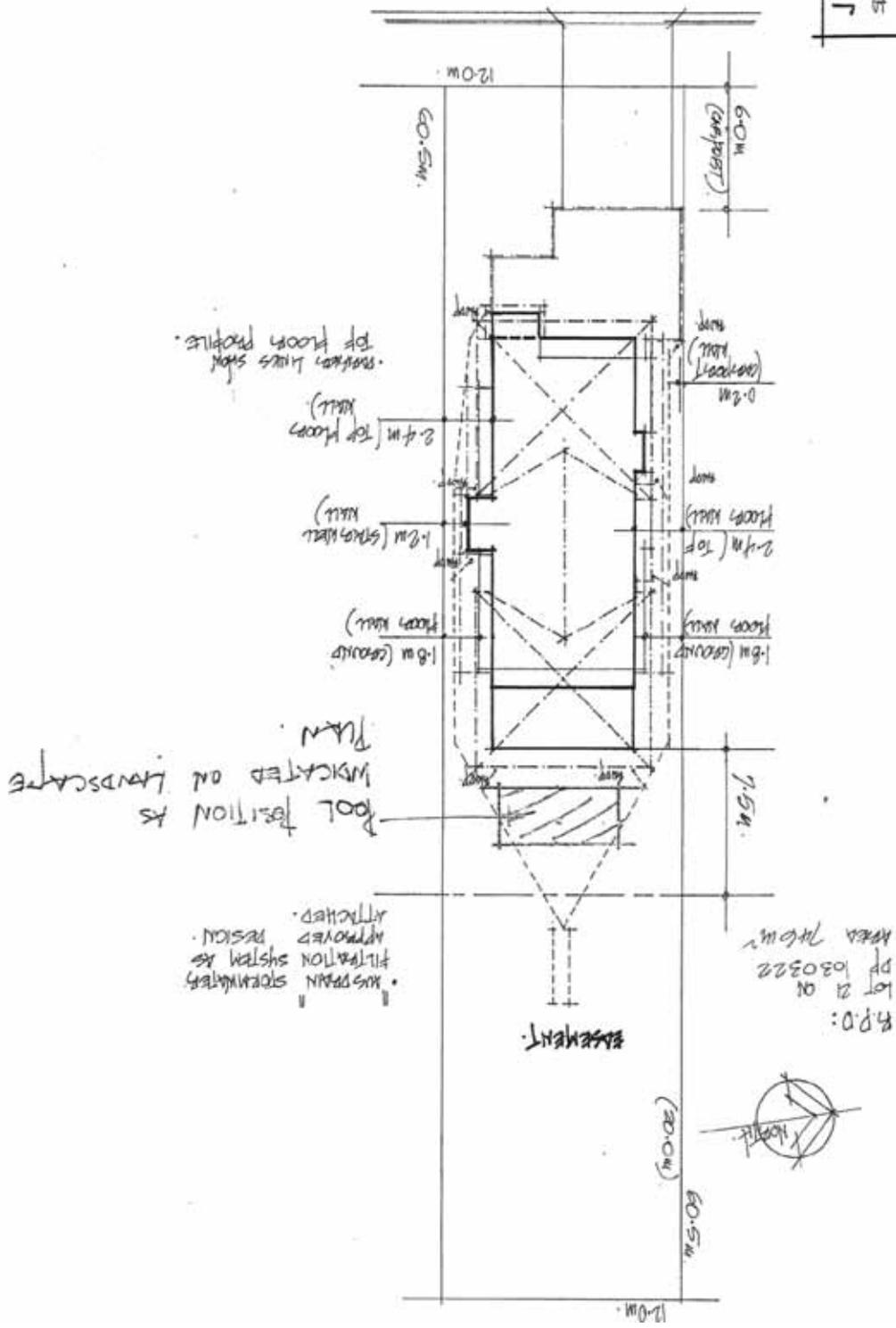
TOP FLOOR PLAN: SCALE 1:100



J. J. DIXON.
sheet 4 of 5.

J. J. DIXON
SHEET 5 OF 5.

SITE PLAN: COLLINS LODGE
SCALE 1:200



Considerations Under Section 79c Of The Environmental Planning And Assessment Act 1979:

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

Tweed Local Environmental Plan 2000 (TLEP 2000)

Clause 4 - Aims of the Plan

The proposed change of use is considered consistent with the aims of the plan.

Clause 5 - Ecologically Sustainable Development

The development raises no specific concerns or implications in respect of ecologically sustainable development.

Clause 8 - Consent Considerations

This clause specifies that 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 that those other aims and objectives of this plan (the TLEP) 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.*

In this instance, the subject site is zoned 2(e) Residential Tourist, the primary objective of which is to:

encourage the provision of family-oriented tourist accommodation and related facilities and services in association with residential development including a variety of forms of low and medium density housing and associated tourist facilities such as hotels, motels, refreshment rooms, holiday cabins, camping grounds, caravan parks and compatible commercial services which will provide short-term accommodation and day tourist facilities.

The proposed dual use of the existing dwelling (tourist accommodation) is considered consistent with the primary objective of the zone in that the proposal provides a form of family-oriented short-term accommodation.

Other relevant clauses of the TLEP have been considered elsewhere in this report and it is considered that the proposed dual use of the existing dwelling (tourist accommodation) generally complies with the aims and objectives of each.

Subject to the imposition of development consent conditions to regulate activity at the site and under current controls, the proposal is not considered to contribute to an unacceptable cumulative impact in the community.

Clause 11 - Zone Objectives

The subject site is located within the 2(e) Residential Tourist zone (pink) with the rear of the site being zoned 7(f) Environmental Protection (orange). All structures on site are located entirely within the 2(e) Residential Tourist zone.



Figure 2: Split Zoning of the Site

The primary objective of that zone and consistency of the proposal with that objective has been outlined above. The secondary objective permits other development which has an association with a residential/tourist environment and is unlikely to adversely affect the residential amenity or place demands on services beyond the level reasonably required for residential use.

It is submitted that the proposal, being a form of residential/tourist development within an established residential area is suitable in scale and form as the appearance of a single dwelling is maintained. Although there are few such developments that Council are aware of, it is not considered currently to have significant effects on the character of the area. Impacts upon amenity have been raised by objectors in submissions received during the exhibition period and are discussed elsewhere in this report.

Clause 15 - Essential Services

The subject site is located within an established residential area with all essential services available.

Clause 16 - Height of Building

The proposal does not contravene the imposed three storey height restriction on the subject site as there is no change to the two storey height of the existing dwelling.

Clause 17 - Social Impact Assessment

The proposal does not require a social impact assessment.

Clause 35 - Acid Sulfate Soils

Class 4 Acid Sulfate Soils are present on the site. There are no works proposed. As such, no further consideration is required and this clause is satisfied.

Other Specific Clauses

Clause 39A – Bushfire Protection

The site is bushfire prone. The application was referred to the NSW Rural Fire Service as integrated development for assessment as Tourist Accommodation is a special fire protection purpose. A bush fire safety authority under section 100B

of the Rural Fires Act 1997 was received from the service on 3 July 2013 inclusive of conditions regarding Asset Protection Zones, Evacuation and Emergency Management, Design and Construction and Landscaping.

Clause 54 – Tree Preservation Order

The 1990 and 2011 TPO (Koala Habitat) apply to the site. The proposal does not require any removal of vegetation. As such, this clause is satisfied.

State Environmental Planning Policies

SEPP (North Coast Regional Environmental Plan) 1988

Clause 32B: Coastal Lands

The proposal is considered consistent with Clause 32B as it is deemed unlikely that it will impede public foreshore access to the beach or result in significant overshadowing of adjacent open space. The proposal does not contradict the strategic aims of the NSW Coastal Policy, the Coastline Management Manual or the North Coast: Design Guidelines.

Clause 33: Coastal hazard areas

The rear of the site is subject to the 2100 coastal hazard projection line. The site is not impacted by either the immediate or the 2050 coastal hazard projection line.

Clause 43: Residential development

The application does not contradict the objectives of Clause 43. On-site density has been maximised without adversely affecting the environmental features of the land.

Clause 75: Tourism development

The plan generally refers to the location of large scale resort developments within prime tourism development area such as Kingscliff and Tweed Heads. The proposal does not meet the definition for small scale or low key tourism development as defined by the regional plan.

SEPP No 71 – Coastal Protection

The subject land has frontage to community land that provides a buffer to the coastal foreshore reserve. The proposal will therefore not restrict public access to the foreshore. The development is generally consistent with the zone objectives of TLEP 2000, the requirements of relevant Council DCPs and consistent with ESD principles and objectives. It is therefore considered that the proposal satisfies the matters for consideration under SEPP 71.

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

The Draft Tweed Local Environmental Plan (LEP) (2012) was placed on exhibition in late 2012/early 2013. The post exhibition version of the Draft Tweed LEP 2012 with amendments as resolved by Council on 31 May 2013 has been forwarded to Parliamentary Counsel via the Department of Planning and Infrastructure.

As such, the Draft Tweed Local Environmental Plan is considered to be “certain and imminent” in terms of previous legal precedent and as such has determining weight.

A recent article published in a Planning Institute of Australia (PIA) NSW Newsletter (June 2013) from Gadens Lawyers noted the following with respect to the determining weight of a draft LEP:

"Question: I would like to understand why a Draft LEP is highly relevant to the assessment of a DA when the draft LEP is 'certain and imminent', and what exactly that means?"

The starting point is that s.79C of the Act expressly requires a consent authority, when assessing any development application, to take into consideration the provisions of any draft planning instrument (for example, an LEP or SEPP) that "is or has been the subject of public consultation" and that has been notified. However taking something into account is one thing - the remaining question is how much weight or emphasis to place on that EPI's provisions when it is only a draft document, and may well be quite inconsistent with a current and in-force LEP.

*In that regard, the Courts have developed a body of caselaw to the effect that a Draft LEP will be given greater weight when it is "certain and imminent". Funnily enough, this phrase does not appear anywhere in the Act or Regulations, nor in any savings or transitional provisions that we are aware of, and although it is bandied about by judges, commissioners, lawyers, and government authorities, you'd have to search hard to find its source of origin. It actually dates back to a 1980 Judgment (*Balgownie Pty Ltd v Shoalhaven City Council (1980)*), which well and truly predates s.79C of the Act. In that matter, the Court had some limited regard to a draft proposal to rezone the site, but only because it was said to be "the latest and best informed expert opinion" relating to the site.*

*It is therefore surprising that this has morphed into a general principle that any draft LEP that is 'certain or imminent' should be given considerable weight in the s.79C balancing act (in fact, the courts have used confusing terminology here too, referring variously to "significant weight", or "some weight", or "considerable weight" or "due force" or "determining weight" - see the discussion of this in *Blackmore Design Group v North Sydney (2000)*).*

*Nevertheless, what is clear is that the weight to be attributed to a draft environmental planning instrument will be greater if there is a greater certainty that it will be adopted (*Terrace Tower Holdings Pty Ltd v Sutherland Shire Council (2003)*). Where the LEP has been exhibited and sent by the council to the Minister for approval and gazettal, it will often be given great weight, even more than the existing and in force LEP.*

But is that approach fair and correct? The answer is probably not. It can be very hard to predict when an LEP is 'certain' and 'imminent', because this depends on the future decision of the Minister and his staff at the Department. For example, our team at Gadens was involved in an appeal in the Warringah local government area in 2011 where the Court ruled that a change to the zoning of the site was certain and imminent and should be given 'determinative weight', and refused the DA. About a month later, the Minister made the LEP but carved out the site as a 'deferred' matter (its zoning did not change). The Court and Council's assessment that the proposed rezoning was 'certain' and 'imminent' had been dead wrong. But

such a task is inherently uncertain because it relies on predictions as to a decision of the Minister that has not yet been made.

Notwithstanding 'certainty and imminence', a consent authority may of course grant consent to a development application which does not comply with the draft instrument. As the Court said in the Blackmore Design Group v North Sydney Council matter:

"In giving the 2001 LEP the weight of being imminent and certain, that does not mean that there is no further inquiry. It is necessary to look at the aims and objectives of the later instrument and then see whether the proposed development is consistent therewith [or "antipathetic" thereto]."

In light of the above advice, it is considered that refusal of the proposed development is the appropriate course of action. The draft LEP has been exhibited and sent by Council to the Minister for approval and gazettal. Approval of the development would result in creating Existing Use Rights for the development, which is not considered to be good planning practice.

The draft zone for the subject site is R2: Low Density Residential. The proposed dual use of the existing dwelling (tourist accommodation) is defined as *Tourist and Visitor Accommodation*:

tourist and visitor accommodation means a building or place that provides temporary or short-term accommodation on a commercial basis, and includes any of the following:

- (a) backpackers' accommodation,
- (b) bed and breakfast accommodation,
- (c) farm stay accommodation,
- (d) hotel or motel accommodation,
- (e) serviced apartments,

But does not include:

- (f) camping grounds, or
- (g) caravan parks, or
- (h) eco-tourist facilities.

which is a prohibited use in the draft zone by its inclusion in Item 4:

4 Prohibited

Agriculture; Airstrip; Air transport facilities; Amusement centres; Animal boarding or training establishments; Boat building and repair facilities; Camping grounds; Caravan parks; Cemetery; Charter and tourism boating facilities; Commercial premises; Correctional centres; Crematorium; Depots; Eco-tourist facilities; Entertainment facilities; Exhibition homes; Exhibition villages; Extractive industries; Farm buildings; Forestry; Freight transport facilities; Function centres; Heavy industrial storage establishments; Highway service centres; Home occupation (sex services); Hostels; Industries; Industrial retail outlets; Industrial training facilities; Information and education facilities; Marinas; Moorings; Mortuaries; Open cut mining; Passenger transport facilities; Port facilities; Public administration building; Recreation facilities(major); Registered clubs; Research stations; Residential flat buildings; Restricted premises; Rural industries; Rural worker's dwellings; Service stations; Sex services premises; Shop top housing; Storage premises; Tourist and visitor accommodation; Transport depots; Truck depots; Vehicle body repair workshops; Vehicle repair stations; Veterinary hospitals; Warehouse or distribution centres; Wharf or boating facilities; Wholesale supplies

Objectives of the R2 zone include the following:

- To provide for the housing needs of the community within a low density residential environment; and
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.

The proposal to utilise the dwelling for the purposes of tourist and visitor accommodation is not consistent with the objectives of the R2 Low Density Residential zone. The proposed use does not satisfy housing needs of the community, nor does it provide facilities or services to meet the day to day needs of residents.

Draft zoning for the locality has been informed by the LEP Practice note PN 09-006 *Providing for tourism in Standard Instrument local environmental plans*, circulated by the Department of Planning on 2 December 2009. These practice guidelines stipulate that tourist and visitor accommodation is not recommended in the R2 Low Density Residential zone.

As such, the draft LEP has zoned the balance of the land (exclusive of parks/reserves and medium density residue allotments) as low density residential which is consistent with the as-built environment.

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

Tweed Development Control Plan

A1-Residential and Tourist Development Code

The dwelling was approved on 23 May 2005 by way of development application DA05/0311 prior to DCP A1 coming into force in April 2008.

The current DCP A1 came into force on 21 May 2013. A minor variation to Control C13 (Side Setbacks) of the current DCP A1 has been identified. The 1.2m side setback of the 2.67m long stair well wall is 300mm short of the required

1.5m side setback for two storey dwellings. Otherwise, the dwelling generally complies with current controls adequately.

A2-Site Access and Parking Code

The existing dwelling provides for a total of four on-site car parking spaces. A variation has been requested to delete the requirement for staff and delivery vehicle parking as the nature of the proposal does not require it. It is considered that the existing on-site parking arrangements are sufficient for an extended family group.

A11-Public Notification of Development Proposals

The development proposal was advertised in accordance with this section. The proposal was notified to adjoining owners for 14 days from 19 June to 3 July 2013. Two submissions were received as a result of this process which are discussed elsewhere in this report.

B5-Casuarina Beach

This policy relates to the subdivision and release of land within Casuarina, most of which has already occurred. It does not offer guidance for change of use applications such as is being assessed. Development of the single dwelling accords with policy contained within DCP B5.

B9-Tweed Coast Strategy

The Plan sets objectives for future development concentrating on public services and design principals. This application does not contradict the objectives of this plan.

B25-Coastal Hazards

The rear of the site is subject to the 2100 coastal hazard projection line. The site is not impacted by either the immediate or the 2050 coastal hazard projection line.

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

Clause 92(a) Government Coastal Policy

The proposed site is located within the area covered by the Government Coastal Policy, and has been assessed with regard to the objectives of this policy. It is not considered that the proposed dual use of the existing dwelling for tourist accommodation contradicts the objectives of the Government Coastal Policy.

This proposal does not require demolition or a change of BCA classification and no works are proposed. As such, Clause 92(b) (Applications for demolition), Clause 93 (Fire Safety Considerations) and Clause 94 (Buildings to be upgraded) of the Regulations do not apply.

(a) (v) Any coastal zone management plan (within the meaning of the Coastal Protection Act 1979),

The proposal does not impact upon coastal zone management plans.

Tweed Shire Coastline Management Plan 2005

The proposal does not impact upon coastline management strategies.

Tweed Coast Estuaries Management Plan 2004

The proposal does not impact upon estuaries management strategies.

**Coastal Zone Management Plan for Cobaki and Terranora Broadwater
(adopted by Council at the 15 February 2011 meeting)**

The proposal does not impact upon coastal zone management strategies for Cobaki and Terranora Broadwater.

(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

Amenity

Adjacent properties may be impacted by the constant nature of short-term visitors. The applicant has proposed the use of a plan of management to monitor and regulate amenity impacts that may arise from the development inclusive of those raised in submissions below.

Context and Setting

The proposed development is located within an area dominated by large dwellings lawfully utilised for long-term residential purposes and large scale resort developments within the prime tourism development area of Kingscliff. It is intended that the large scale resorts provide tourist accommodation and flexible use options into the future, not single dwellings.

(c) Suitability of the site for the development

The site is not considered to be suitable for the proposed development as the future (imminent and certain) zoning under Draft LEP 2012 will prohibit the proposed use.

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

The proposal was notified to adjoining properties in accordance with DCP A11 – Public Notification of Development Proposals for a period of 14 days from Wednesday 19 June to Wednesday 3 July 2013. During this time, two submissions were received.

Issues raised include the following:

- Impact upon tranquil family residential lifestyle in quiet family cul-de-sac;
- Tourist accommodation is provided elsewhere in Casuarina: Beach Shacks, Pandanus Pocket etc;
- Residents purchased here specifically for the quiet beachside family lifestyle;
- People come to party in large groups: excessive noise during day and late at night;
- Parking congestion (off site and on road reserve areas) and blocking of driveways;
- Barking dogs, especially when dogs are in a new house in unfamiliar territory;
- TSC unregistered dogs – more than one at a time;
- Rubbish, littering and vandalism;
- Trespassing / opening gates of neighbouring property;

- Discharge of fireworks; and
- Request for neighbours to approach tenants directly to remedy matters.

The applicant responded to the issues raised within the submissions as follows:

- Capacity will be capped at 10 persons. No party groups or groups exceeding this amount are permitted;
- It is not envisaged that more than two cars will be on-site at any time;
- Controls will apply to the inclusion of a family dog during tenancy inclusive of a non-refundable immediate ejection from the premises should the controls be breached;
- Additional waste and recycling wheelie bins are part of the proposal;
- Other issues to be addressed in the proposed plan of management;
- Tenants do not abide by agreements even though they are made aware of the policy;
- The property has been rented for 50 nights over the last 12 months by 8 families with an average stay of 6 nights per family; and
- Tenants have been harassed during their stay.

Assessment

It is clear that the way the tourist accommodation has been managed in the past is not consistent with how the applicant intends to manage it in the future.

Many of the issues raised may be resolved by the implementation of a firm management plan and an available 24 hour contact should issues arise as a result of tenancy.

The ability for tenants to lease the premises inclusive of the family dog as part of the tourist accommodation proposal is contrary to aforementioned restrictions on use of the land. There is no secure dog-proof compound on the site and fencing between properties is not intended to restrain dogs. Given the environmentally sensitive nature of the site and immediate locality, it is important that restrictions regarding keeping of domestic animals be retained.

It is noted that the external (upper and lower) living area of the southern adjoining property extends further to the rear of the site, possibly for solar access purposes. There is no privacy screening in place and minimal building separation. There is an interface between the two dwellings (despite measures taken to screen the sides of the upper verandah on the subject site) which may or may not be able to be resolved.

It is Council's intention to maintain availability of flexible tourist and visitor accommodation within larger scale developments at Casuarina. This is reflected in the objectives of draft zoning and supported by State government policy.

Referral to NSW Rural Fire Service

The application was referred to the NSW Rural Fire Service as integrated development for assessment as Tourist Accommodation is a special fire protection purpose. A bush fire safety authority under section 100B of the Rural Fires Act 1997 was received from the service on 3 July 2013 inclusive of

conditions regarding Asset Protection Zones, Evacuation and Emergency Management, Design and Construction and Landscaping.

(e) Public interest

Whilst the proposed development at present complies with the zoning controls under Tweed Local Environmental Plan 2000, it is certain and imminent that the Draft LEP 2012 will prohibit the development. As such, the development is not considered to be in the public interest.

OPTIONS:

1. Refuse the application for the reasons supplied; or
2. Grant in-principle support for the application and a report to be brought back to a further Council meeting with recommended conditions of consent for Council to determine.

The Council officers recommend Option 1.

CONCLUSION:

The development is prohibited by and inconsistent with the Draft LEP 2012, specifically the objectives of the R2 Low Density Residential zone. It is therefore recommended that the development be refused.

COUNCIL IMPLICATIONS:

a. Policy:

Corporate Policy Not Applicable.

b. Budget/Long Term Financial Plan:

Not Applicable.

c. Legal:

The applicant may seek to lodge an appeal against a Council determination in the NSW Land and Environment Court.

d. Communication/Engagement:

Not Applicable.

UNDER SEPARATE COVER/FURTHER INFORMATION:

Nil.

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26 [PR-CM] Development Application DA13/0392 for Nine Lots into Two Lot Subdivision at Lots 13, 15, 16, 17, 24 DP 860153 and Lots 5, 6, 7, 13 DP 860666 No. 324 Reserve Creek Road, Kielvale

SUBMITTED BY: Development Assessment

FILE REFERENCE: DA13/0392 Pt1



Civic Leadership

LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:

- 1 Civic Leadership
 - 1.1 Ensure actions taken and decisions reached are based on the principles of sustainability
 - 1.1.1 Establish sustainability as a basis of shire planning and Council's own business operations
-

SUMMARY OF REPORT:

The proposed development involves a subdivision/amalgamation of nine lots into two lots.

The site is located adjacent to the Kielvale village, to the south east. The local area is characterised by smaller properties in the Kielvale village used for residential purposes, and larger properties predominantly used for grazing.

The nine lots are made up of one large parcel of land (current Lot 24 DP 860153) and eight small allotments which appear to have been left over from road widening and the like. All are in the same ownership.

The site comprises a combination of 1(a) Rural, 1(c) Rural Living and 2(d) Village zonings.

The subdivision/amalgamation will result in the creation of two allotments, proposed Lot 1 and proposed Lot 2.

Proposed Lot 1 would have an area of 2.25 hectares and would contain a site for a future dwelling. This lot will comprise a dual zoning of 1(a) Rural and 1(c) Rural Living.

Proposed Lot 2 would have a total area of 207.3 hectares. The 1(a), 1(c) and 2(d) zonings all feature on the proposed allotment.

A SEPP 1 objection accompanies the application. The objection is in respect of the planning standard identified within Clause 20 (2)(a) of the Tweed Local Environmental Plan 2000, specifically seeking variance to the 40 hectare minimum lot size development standard for the 1(a) Rural zone. The SEPP 1 objection relates to proposed Lot 1 which has a total area of 2.25 hectares, split over the 1(a) Rural and 1(c) Rural Living zones.

The application has been referred to the Department of Planning and Infrastructure for consideration who have granted concurrence in respect to the variation of the 40 hectare development standard contained in clause 20(2)(a) of the Tweed LEP 2000 to permit the creation of proposed Lot 1 and Lot 2.

This development application is being reported to Council due to the Department of Planning's Circular PS08-014 issued on 14 November 2008 requiring all State Environmental Planning Policy No. 1 (SEPP No. 1) variations greater than 10% to be

determined by full Council. In accordance with this advice by the Department of Planning and Infrastructure (Department), officers have resolved to report this application to full Council. The development standard is varied by approximately 98% in the case of Proposed Lot 1.

RECOMMENDATION:

That Development Application DA13/0392 for Development Application DA13/0392 for Nine Lots into Two Lot Subdivision at Lots 13, 15, 16, 17, 24 DP 860153 and Lots 5, 6, 7, 13 DP 860666 No. 324 Reserve Creek Road, Kielvale be approved subject to the following conditions:

GENERAL

1. The development shall be completed in accordance with the Statement of Environmental Effects and Plan of Proposed Subdivision (Sheets 1 and 2), prepared by NC White and Associates and dated 17/06/2013, except where varied by the conditions of this consent.

[GEN0005]

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

[GEN0125]

3. The approved subdivision/development shall not result in any clearing of native vegetation without prior approval from the relevant authority.

[GEN0290]

4. Application shall be made to Tweed Shire Council under Section 138 of the Roads Act 1993 for works pursuant to this consent located within the road reserve. Application shall include engineering plans and specifications undertaken in accordance with Councils Development Design and Construction Specifications for the following required works:

Vehicular access - the access location for proposed Lot 1 will require construction of a sealed driveway, from the road carriageway to 3m inside the property boundary.

The work shall be undertaken and completed generally in accordance with TSC standard drawing SD011.

A gate shall also be installed for the driveway in the boundary fence.

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

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

DURING CONSTRUCTION

5. During construction, a “satisfactory inspection report” is required to be issued by Council for all works required under Section 138 of the Roads Act 1993. The proponent shall liaise with Councils Engineering and Operations Division to arrange a suitable inspection.

[DUR1925]

USE

6. A roof catchment water supply source shall be provided for domestic purposes where a Council reticulated supply is unavailable. Any domestic water supply roof collection system should be fitted with a first flush device. Minimum storage tank capacity shall be 20,000 litres for the first bedroom, then an additional 15,000 litres per bedroom thereafter and shall be in addition to any water volume requirements stipulated by the NSW Rural Fire Services. Installation, water collection, and maintenance of rainwater tanks used for drinking purposes must comply with NSW Health requirements.

[USE1470]

PRIOR TO ISSUE OF SUBDIVISION CERTIFICATE

7. Section 94 Contributions

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

Prior to the occupation of the building or issue of any Interim or Final Occupation Certificate (whichever comes first), all Section 94 Contributions must have been paid in full and the Certifying Authority must have sighted Council's "Contribution Sheet" signed by an authorised officer of Council.

Pursuant to Section 109J of the Environmental Planning and Assessment Act, 1979 a Subdivision Certificate shall NOT be issued by a Certifying Authority unless all Section 94 Contributions have been paid and the Certifying Authority has sighted Council's "Contribution Sheet" signed by an authorised officer of Council.

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

These charges include indexation provided for in the S94 Plan and will remain fixed for a period of 12 months from the date of this consent and thereafter in accordance with the rates applicable in the current version/edition of the relevant Section 94 Plan current at the time of the payment.

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

(a) Tweed Road Contribution Plan:

6.5 Trips @ \$1871 per Trips \$12162

(\$1807 base rate + \$64 indexation)

S94 Plan No. 4

Sector10_4

(b) Open Space (Casual):	
1 ET @ \$543 per ET	\$543
(\$502 base rate + \$41 indexation)	
S94 Plan No. 5	
(c) Open Space (Structured):	
1 ET @ \$622 per ET	\$622
(\$575 base rate + \$47 indexation)	
S94 Plan No. 5	
(d) Shirewide Library Facilities:	
1 ET @ \$838 per ET	\$838
(\$792 base rate + \$46 indexation)	
S94 Plan No. 11	
(e) Eviron Cemetery:	
1 ET @ \$123 per ET	\$123
(\$101 base rate + \$22 indexation)	
S94 Plan No. 13	
(f) Community Facilities (Tweed Coast - North)	
1 ET @ \$1389 per ET	\$1389
(\$1305.6 base rate + \$83.4 indexation)	
S94 Plan No. 15	
(g) Extensions to Council Administration Offices & Technical Support Facilities	
1 ET @ \$1860.31 per ET	\$1860.31
(\$1759.9 base rate + \$100.41 indexation)	
S94 Plan No. 18	
(h) Regional Open Space (Casual)	
1 ET @ \$1091 per ET	\$1091
(\$1031 base rate + \$60 indexation)	
S94 Plan No. 26	
(i) Regional Open Space (Structured):	
1 ET @ \$3830 per ET	\$3830
(\$3619 base rate + \$211 indexation)	
S94 Plan No. 26	

[PSC0175]

8. A Subdivision Certificate will not be issued by the General Manager until such time as all conditions of this Development Consent have been complied with.

[PSC0825]

9. The creation of easements for services, rights of carriageway and restrictions as to user (including restrictions associated with planning for bushfire) as may be applicable under Section 88B of the Conveyancing Act including (but not limited to) the following:

A Restriction on Title is to be created over Lot 1 stating that:

- The lot is not connected to a reticulated water service, and that future owners will need to make alternative arrangements for a potable water supply.
- Future dwellings will need to provide rainwater tanks with a minimum capacity of 20,000 litres.
- The lot is not connected to a reticulated sewer system, and any dwelling will need to provide an on-site sewer management system to the satisfaction of Tweed Shire Council.
- Any proposed dwelling to be erected on this lot shall be located in the nominated building envelope approved by Development Consent DA13/0392. Alternative locations can be considered but will require separate approval of Council.

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

[PSC0835]

10. Submit to Council's Property Officer for approval an appropriate plan indicating the street/road address number to both proposed and existing lots. In accordance with clause 60 of the Surveying and Spatial Information Regulation 2012 the Plan of Subdivision (Deposited Plan) shall show the approved street address for each new lot in the deposited plan.

Furthermore, prior to the issue of a Subdivision Certificate, each lot shall have its' address number displayed in accordance with Council's procedure on street numbering.

[PSC0845]

11. Prior to registration of the plan of subdivision, a Subdivision Certificate shall be obtained.

The following information must accompany an application:

- (a) original plan of subdivision prepared by a registered surveyor and 7 copies of the original plan together with any applicable 88B Instrument and application fees in accordance with the current Fees and Charges applicable at the time of lodgement.
- (b) all detail as tabled within Tweed Shire Council Development Control Plan, Part A5 - Subdivision Manual, CL 5.7.6 and Councils Application for Subdivision Certificate including the attached notes.

Note: The Environmental Planning and Assessment Act, 1979 (as amended) makes no provision for works under the Water Supplies Authorities Act, 1987 to be certified by an Accredited Certifier.

[PSC0885]

12. Prior to the issue of a Subdivision Certificate, a properly dimensioned plan shall be lodged with Council showing the relative position of existing fences, road formation and boundaries. Any encroaching road boundary fence deemed by Council to be a safety risk is to be relocated to the correct alignment prior to issuing a Subdivision Certificate. Any road widening deemed necessary following submission of the plan shall be dedicated at no cost to Council.

[PSC0945]

13. The production of written evidence from the local telecommunications supply authority certifying that the provision and commissioning of a telephone supply at the front boundary of the allotment has been completed.

[PSC1165]

14. The production of written evidence from the local electricity supply authority certifying that the reticulation of overhead electricity (rural subdivisions) and energising has been provided to each allotment.

Should any electrical supply authority infrastructure (sub-stations, switching stations, cabling etc) be required to be located on Council land (existing or future), then Council is to be included in all negotiations. Appropriate easements are to be created over all such infrastructure, whether on Council lands or private lands.

[PSC1175]

15. Prior to the issuing of the subdivision certificate the applicant is to obtain an approval to operate the on-site sewage management facility on proposed Lot 2. In the event of more than one on-site sewage management facility, individual approvals to operate are required for each on-site sewage management facility. An approval to operate is issued under Section 68 of the *Local Government Act 1993*, and must be obtained from Council.

16. Prior to the issuing of the subdivision certificate the applicant is to provide a written statement regarding the suitability of proposed Lot 1 to accommodate an on-site sewage management facility. The statement is to be prepared by a suitably qualified on-site sewage management design and assessment consultant.

[PSCNS01]

GENERAL TERMS OF APPROVAL UNDER SECTION 100B OF THE RURAL FIRES ACT 1997

1. The development proposal is to comply with the subdivision layout identified on the drawing prepared by NC White and Associates numbered 21047DE/1B, dated 17 June 2013.

REPORT:

Applicant: Mr B Casey
Owner: Mr Raymond A Nardi
Location: Lots 13, 15, 16, 17, 24 DP 860153 and Lots 5, 6, 7, 13 DP 860666 No. 324 Reserve Creek Road, Kielvale
Zoning: 1(a) Rural Living, 2(d) Village, 1(a) Rural
Cost: \$2,000

Background:

Consent is sought for a subdivision/amalgamation of nine lots into two lots.

The nine lots are made up of one large parcel of land (current Lot 24 DP 860153) and eight small allotments which appear to have been left over from road widening and the like. All are in the same ownership.

The site comprises a combination of 1(a) Rural, 1(c) Rural Living and 2(d) Village zonings.

The subdivision/amalgamation will result in the creation of two allotments, proposed Lot 1 and proposed Lot 2.

Proposed Lot 1 would have an area of 2.25 hectares and would contain a site for a future dwelling. This lot will exhibit dual zoning of 1(a) Rural and 1(c) Rural Living. Approximately 0.1ha would be in the 1(a) zone and 1.44ha would be in the 1(c) zone. The site is not connected to sewer and as such, the applicable minimum lot sizes are as follows:

1(a) zone – 40ha

1(c) zone – 1hectare

It is thus evident that the creation proposed Lot 1 would be consistent with the subdivision controls prescribed by the 1(c) zone and thus the lot would be afforded a dwelling entitlement.

However, the creation of part of the allotment in the 1(a) zone also needs to be considered and this is why the application is being reported to Council. The proposal seeks to create a lot of less than 90% of the applicable standard (for the 1(a) zone this is the 40ha minimum lot size). A SEPP 1 Objection to Clause 20 (2) of Council's Local Environmental Plan 2000 was required and due to the extent of the variation, concurrence was also required from the Department of Planning (which was issued in a letter from the Department dated 14 August 2013).

Proposed Lot 2 would have a total area of 207.3 hectares. The 1(a), 1(c) and 2(d) zonings all feature on the proposed allotment.

The proposed development would result in approximately 161.5 hectares within the 1(a) zone, 18.8ha within the 1(c) zone and 27ha within the 2(d) zone on proposed Lot 2. As such, the minimum lot sizes for each zone are met.

There is an existing dwelling on this allotment within the 2(d) zoning. No change is proposed to this dwelling under this application.

Considerations under Section 79C of the Environmental Planning and Assessment Act 1979:

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

Tweed Local Environmental Plan 2000

Clause 4 - Aims of the Plan

The proposed development is considered to be consistent with the aims of the TLEP 2000.

Clause 5 - Ecologically Sustainable Development

The subject development application is considered consistent with the four principles of ESD, being *the precautionary principle, intergenerational equity, conservation of biological diversity and ecological integrity and improved valuation, pricing and incentive mechanisms* as it rationalises an existing random subdivision plan.

Clause 8 – Consent Considerations

The consent authority may grant consent to development only if:

- a) it is satisfied that the development is consistent with the primary objectives of the zone within which it is located, and
- b) it has considered those 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.

In this instance, the site exhibits 3 zones, being the 1(a) Rural zone, the 1(c) Rural Living zone and the 2(d) Village zone. The zone objectives are discussed in detail below but for the purposes of Clause 8 it is considered that the development is consistent with the primary objective of each relevant zone in that the proposal enables residential development of the subject land without jeopardising the ability of the land to be used for rural/agricultural purposes.

The proposal is considered to be consistent with the aims and objectives of the TLEP 2000 as it maintains rural use of the land. The subject proposal is not considered to result in any unacceptable cumulative impact on the community, locality, catchment or Tweed Shire as a whole due to its minor nature. Approval of this application (though minor) is not considered to set a precedent for further like applications as each would be assessed on its merits and likely require its own SEPP 1 objection.

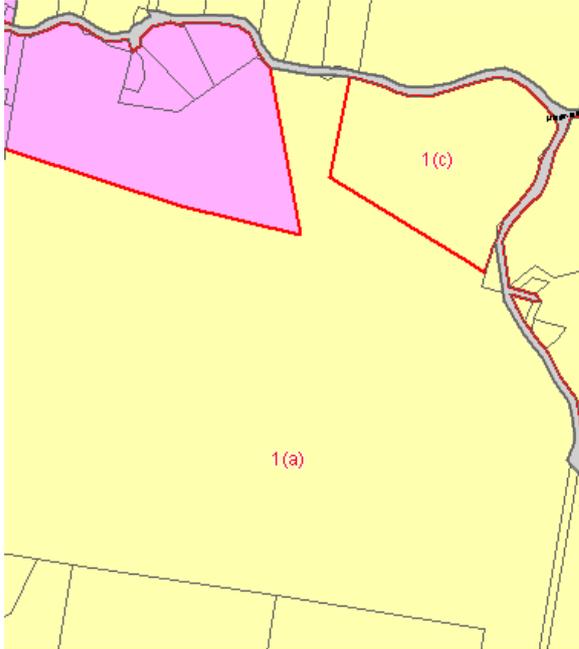
The proposal is considered to be consistent with Clause 8.

Clause 11 – Zone Objectives

As per the image below, the site exhibits multiple zonings under the Tweed Local Environmental Plan (LEP) 2000:

- 1(a) Rural
- 1(c) Rural Living
- 2(d) Village

The proposed subdivision would create two lots, one with 1(a)/1(c) zoning and one with 1(a)/2(d) zoning. In each zone, subdivision is permissible with consent, subject to meeting the minimum lot size controls.



The objectives of the 1(a) Rural zone are to:

Primary Objective

- *To enable the ecologically sustainable development of land that is suitable primarily for agricultural or natural resource utilization purposes and associated development.*
- *To protect rural character and amenity.*

Secondary Objective

- *To enable other types of development that rely on the rural or natural values of the land such as agri- and eco-tourism.*
- *To provide for development that is not suitable in or near urban areas.*
- *To prevent the unnecessary fragmentation or development of land which may be needed for long-term urban expansion.*
- *To provide non-urban breaks between settlements to give a physical and community identity to each settlement.*

The proposed development is consistent with the zone objectives in that it maintains rural use of the site and does not unnecessarily fragment the site. The small portion of 1(a) land which is to be contained within Proposed Lot 1 doesn't detract from the rural potential of the larger lot and enables a rational boundary to be created in accordance with the geographic features of the land.

The 1(c) zone has the following objectives:

Primary

- *To enable rural residential development in selected areas possessing particular environmental and servicing attributes which do not compromise the viability of rural activities on land in the vicinity, do not detract from the*

quality of the rural and natural environment and do not create unreasonable or uneconomic demands, or both, for the provision or extension of public amenities or services.

- To provide rural residential development of a design integration, quality and scale compatible with, and making a positive contribution to, the character of the rural area in the vicinity.

Secondary

- To enable other development that is compatible with rural residential development.

The development is considered to be consistent with the zone objectives by virtue of enabling rural/residential development on a suitably sized and compliant allotment. The proposed dwelling site will be serviced by onsite sewer and rainwater tanks so there will be no demands on Council services and the overall development would be in keeping with the existing small lot subdivision pattern in the Kielvale area.

The objective of the 2(d) Village zone (which covers a portion of land in proposed Lot 2) is as follows:

Primary

- To provide for residential development and a full range of services and facilities traditionally associated with a rural village which is of a design and scale that makes a positive contribution to the character of the village.

Notably, the proposed development does not utilise any of the 2(d) area and as such preserves that portion of the site for use for future residential purposes which would remain in keeping with the zone objective.

As such, it is apparent that the proposed development would be consistent with the objectives of each relevant zone, in particular the 1(a) and 1(c) zones which will comprise the new Lot 1.

Clause 15 - Essential Services

Council's reticulated potable water supply and reticulated sewer are not available in the area. Tank water for domestic use and a static provision for fire fighting will be made available.

On site effluent treatment is proposed. Council's Environmental Health Officer has reviewed the proposed arrangement (and existing OSSM system) and raised no objections, subject to conditions.

Clause 16 - Height of Building

A three storey height limit applies in the locality however no building works are proposed as part of this application and Clause 16 is not relevant.

Clause 17 - Social Impact Assessment

The proposed development is not anticipated to generate significant social impacts, being rural/residential in nature and of a small scale.

Clause 19 – Subdivision

This clause outlines that a person must not subdivide land without consent. Consent is therefore sought for the subject application.

Clause 20 – Subdivision in zones 1(a), 1(b), 7(a), 7(d) and 7(l)

This clause aims to prevent the potential for fragmentation of ownership of rural land that would adversely affect the continuance or aggregation of sustainable agricultural units or generate pressure to allow isolated residential development and provide public amenities and services in an uncoordinated and unsustainable manner. It also aims to protect the ecological and scenic values of the land and protect the quality of water supply.

Clause 20 specifies that consent may only be granted to subdivision in the 1(a) zone if the allotment to be created is at least 40ha.

A SEPP 1 objection thus accompanies the application. The objection is in respect of the planning standard identified within Clause 20 (2)(a) of the Tweed Local Environmental Plan 2000, specifically seeking variance to the 40 hectare minimum lot size development standard for the 1(a) Rural zone. The SEPP 1 objection relates to proposed Lot 1 which has a total area of 2.25 hectares, split over the 1(a) Rural and 1(c) Rural Living zones.

In this instance, part of the land (proposed Lot 1) within the 1(a) zone has an area of 0.81ha. This part of the lot is currently part of larger Lot 24 DP 860153 which has 162.31ha in the 1(a) Rural zone. As such, it is evident that the proposed development would have the effect of slightly fragmenting the 1(a) land, however not to the extent that any impacts on the use of the land would occur. The fragmented section of the 1(a) zone would be incorporated into an allotment with sufficient land area within the 1(c) zone to permit a dwelling.

Concurrence from the Department of Planning and Infrastructure was sought for the subdivision, which is discussed in the SEPP 1 Objection section of this report. The Department issued concurrence on the basis that there is no public benefit to maintaining the standard in this case.

Proposed Lot 2 will remain above the 40ha standard for the 1(a) zone, as well as above the 1ha standard for the 1(c) zone and the 450m² standard for the 2(d) zone, with sufficient area contained within each specified zone. Proposed Lot 2 will thus remain consistent with the objectives of Clause 20.

Overall, the proposal not considered to adversely affect the continuance of agricultural use of the subject sites or surrounding properties or generate unfavourable pressure for development. The proposal is not considered to detract from the ecological or scenic values of the land and is considered to accord with Clause 20.

Clause 34 – Flooding

Parts of larger Lot 24 are identified as being flood prone, however not in proximity to the proposed dwelling site. Council's Development Assessment Engineer has raised no concerns in this regard due to the nature of the development and Clause 34 is considered satisfied.

Clause 35 - Acid Sulfate Soils

The site is affected by part Class 3 and part Class 5 (majority of the site) ASS. The Class 3 soils are not located in proximity to the dwelling site and there are no further concerns in this regard.

Clause 39 – Remediation of contaminated land

Existing Lot 24 contains a cattle dip site which classifies the site as 'potentially contaminated', thus making Clause 39 relevant. Clause 39 calls up the provisions of SEPP 55. Council's Environmental Health Officer has reviewed the proposed development with respect to contaminated land and the SEPP provisions and returned no objections subject to conditions. It is subsequently considered that Clause 39 is satisfied.

Clause 39A – Bushfire Protection

The subject site is partially bushfire prone and the application was referred to the Rural Fire Service as Integrated Development. After consultation, the RFS issued a bushfire safety authority with a standard condition.

State Environmental Planning Policies

SEPP (North Coast Regional Environmental Plan) 1988

Clause 12: Impact on agricultural activities

This Clause specifies that Council shall not grant consent to an application to carry out development on rural land unless it has first considered the likely impact of the proposed development on the use of adjoining or adjacent agricultural land and whether or not the development will cause a loss of prime crop or pasture land.

The proposed development will not impact adversely upon adjoining rural properties nor cause a loss of prime crop or pastureland. The proposed development does not further fragment or alienate this land and the proposed development does not contravene Clause 12.

SEPP No. 1 - Development Standards

SEPP 1 provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act.

Where development could, but for any development standard, be carried out under the Act (either with or without the necessity for consent under the Act being obtained therefore) the person intending to carry out that development may make a development application in respect of that development, supported by a written objection that compliance with that development standard is unreasonable or unnecessary in the circumstances of the case, and specifying the grounds of that objection.

A SEPP 1 Objection was submitted to Clause 20 of the Tweed Local Environmental Plan, as the development creates a lot containing 0.81ha of land in the 1(a) Rural zone. This represents a variation of more than 90% of the 40ha standard, in fact creating an area which measures around 2% of the required standard.

This development application is being reported to Council due to the Department of Planning's Circular PS08-014 issued on 14 November 2008 requiring all State Environmental Planning Policy No. 1 (SEPP No. 1) variations greater than 10% to be determined by full Council. In accordance with this advice by the Department of Planning and Infrastructure (Department), officers have resolved to report this

application to full Council. The development standard is varied by approximately 98% in the case of Proposed Lot 1.

The applicant has supplied the following justification for the SEPP 1 Objection (italicised):

“The objection is consistent with the aims and objectives of the standard in that the majority of the proposed Lot 1 is zoned 1(c) Rural Living and there will be a negligible effect on the agricultural capacity of the larger lot as the amount of land to be transferred is small, with the balance of the larger Lot 2 being 207.3ha. The proposal slightly decreases the area of the large residue Lot 2 by 0.81ha and increases the size of smaller Lot 1. The subdivision results in a practical new boundary location with regard to existing natural features and existing fencing. The increase in size made available by the extra 1(a) Rural land provides greater scope for Lot 1 to utilise the land with very little impact on the larger residue Lot 2.

The existing location of the zone boundary line within proposed Lot 1 is an arbitrary straight line on paper and does not fit with the natural features and topography on site. The line runs across the side of the hill and does not appear to fit with any feature on site. A decision to uphold this objection would locate the proposed subdivision line in a practical location on the ground creating easier management for both lots.

The aims of the SEPP 1 Policy are to provide flexibility in the application of planning controls with regard to development standards. Compliance with the development standard would hinder effective development of the site having regard to the site characteristics.

Compliance with the development standard is unreasonable and unnecessary in this instance as it would only serve to undermine the release of a quality rural living lot with negligible benefit regarding the protection of the agricultural land.

It is put forward that upholding the objection would be consistent with the aims of SEPP 1 in that strict compliance with the control would unnecessarily hinder the appropriate development of the site”.

In the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827, Chief Justice Preston articulated the SEPP 1 test as follows:

1. *The applicant must satisfy the consent authority that “the objection is well founded” and compliance with the development standard is unreasonable and unnecessary in the circumstances of the case;*
2. *The consent authority must be of the opinion that granting consent to the development application would be consistent with the policy’s aim of providing flexibility in the application of planning controls where strict compliance with those controls would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act 1979; and*
3. *It is also important to consider:*
 - (a) *whether non-compliance with the development standard raises any matter of significance for State or regional planning; and*

- (b) *the public benefit of maintaining the planning controls adopted by the environmental planning instrument.*

Preston CJ then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Though not stated by the applicant, the subject SEPP 1 Objection seems to rest upon point one above, in that the objectives of the 1(a) zone are achieved notwithstanding the undersized allotment.

The objection is considered to be well founded, as proposed Lot 1 will be made up predominantly of 1(c) land which permits a smaller lot size and the portion of 1(a) land to be transferred to Lot 1 is small. The transfer would not have any material adverse effect on the continued ability of proposed Lot 2 to be used for rural purposes.

In addition to being satisfied that the SEPP 1 Objection is well founded, the consent authority must also be of the opinion that granting consent to the development application would be consistent with the policy's aim of providing flexibility in the application of planning controls.

The aims of the policy are as follows:

"This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act".

Sections 5(a) (i) and (ii) are as follows:

- (i) *the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.*

- (ii) *the promotion and co-ordination of the orderly and economic use and development of land.*

With respect to Sections 5(a) (i) and (ii) the proposed development is not considered to hinder the proper management, development and conservation of any resources, in particular the subject rural land and rural/residential development surrounding the subject site. Negligible impact upon resources and the social and economic welfare of the community is anticipated to result from approval of the application.

Further, non compliance with the development standard is not considered to raise any matters of significance for State or regional environmental planning. As no material impact would be created by the incorporation of the small area of 1(a) land into proposed Lot 1, no public benefit would be gained by maintaining the standard in this instance.

Concurrence was required from the Director General, Department of Planning and Infrastructure for the creation of Proposed Lot 1. Concurrence was issued by the Department on 14 August 2013, for the following reasons (excerpt from letter dated 14 August 2013):

- There is no public benefit in maintaining the standard; and
- The development will not result in inappropriate fragmentation of rural land.

Council officers concur that there would be no public benefit in maintaining the development standard in this instance.

Based on the above, support of the subject SEPP 1 Objection is considered appropriate in this instance.

SEPP (Rural Lands) 2008

This SEPP aims to facilitate the orderly and economic use and development of rural lands for rural and related purposes and reduce land use conflicts through utilising Rural Planning Principles and Rural Subdivision Principles. It also aims to identify State significant agricultural land for the purpose of ensuring the ongoing viability of agriculture on that land.

Clause 10(3) specifies the following matters to be considered in determining development applications for rural subdivisions or rural dwellings:

- (a) *the existing uses and approved uses of land in the vicinity of the development;*
- (b) *whether or not the development is likely to have a significant impact on land uses that, in the opinion of the consent authority, are likely to be preferred and the predominant land uses in the vicinity of the development,*
- (c) *whether or not the development is likely to be incompatible with a use referred to in paragraph (a) or (b),*
- (d) *if the land is not situated within a rural residential zone, whether or not the development is likely to be incompatible with a use on land within an adjoining rural residential zone,*
- (e) *any measures proposed by the applicant to avoid or minimise any incompatibility referred to in paragraph (c) or (d).*

In this instance, the proposed subdivision is considered to be consistent with the surrounding agricultural land use, which comprises predominantly pasture land. The proposal is not considered to impact upon any such uses, nor will it prejudice the ability for the subject site to continue to be used for rural/agricultural purposes commensurate with the zone objectives. The proposal is consistent with Clause 10(3)(a).

The preferred land uses in the 1(a) Rural zone are considered to be agriculture and forestry (both allowed without consent in the zone). The subject proposal is not considered to have a significant impact on either such land use given the application essentially maintains the status quo and does not propose any intensification or change of use on rural lands. The 1(c) zone permits residential development at a higher density. The proposal is consistent with Clause 10(3)(b).

Given the proposal is for a subdivision only, it is not considered to be incompatible with the land uses mentioned in (a) or (b) above. The proposal is not considered to reduce the agricultural viability of the subject site or surrounding properties. The proposal is consistent with Clause 10(3)(c).

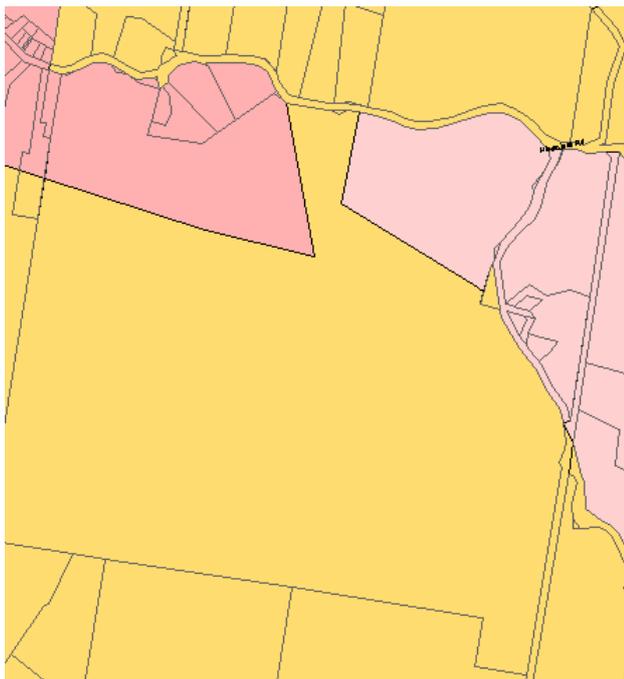
Adjoining sites exhibit the same zonings as the subject site and the proposed development is considered to be compatible with adjoining land uses. Clause 10(3)(d) is considered satisfied.

Negligible conflict or incompatibility between surrounding land uses (which mirror the current land uses of the subject sites) is foreseeable. Clause 10(3)(e) is considered satisfied.

The proposed subdivision has no further ramifications for SEPP (Rural Lands) 2008 and is considered to be consistent with the Policy in its entirety.

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

The Draft Tweed Local Environmental Plan (LEP) 2012 has been on public exhibition and is yet to be gazetted by Council. The Draft generally follows the current zoning controls utilising the RU5 Large Lot Residential, RU2 Rural Landscape and RU5 Village zones as shown below:



The lot size map prescribes the following lot sizes for each zone:

RU5 Large Lot Residential – 1ha (refer to Clause 4.2)

RU2 Rural Landscape – 40ha

RU5 Village – 450m²

As such, it is evident that the new zoning/lot size essentially maintains the status quo.

Clause 4.2 of Part 4 of the Draft Tweed LEP 2012 relates to rural subdivision in land zoned RU2 and states:

- (3) *Land in a zone to which this clause applies may, with consent, be subdivided for the purpose of primary production to create a lot of a size that is less than the minimum size shown on the Lot Size Map in relation to that land.*
- (4) *However, such a lot cannot be created if an existing dwelling would, as the result of the subdivision, be situated on the lot.*
- (5) *A dwelling cannot be erected on such a lot.*

Proposed Lot 1 would not comply with this clause as it would contain an area of 0.81ha in the rural zone and would comprise a residential component (though it is noted that the dwelling site would be located in the RU5 area which permits residential development on 1ha of land).

Clause 4.6 (Exceptions to development standards) provides flexibility in applying certain development standards to particular developments. Point (3) states that consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that compliance with the development standard is unreasonable or unnecessary and that there are sufficient environmental planning grounds to justify contravening the development standard. As detailed within this report, it is considered that compliance with the development standard is both unreasonable and unnecessary in this instance.

Further, point (4) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposed development would be in the public interest because it is consistent with the objectives of the zone in which the development is to be carried out, and the concurrence of the Director-General has been obtained.

With regard to point (4), it is considered that the maintenance of the development standard in this instance would not be in the public interest as it would preclude any alteration to the existing land parcel to permit a rational subdivision and creation of a lot on which a dwelling is permitted under another zone. Additionally, concurrence has also been granted from the Director-General in relation to the creation of the undersized allotment to be used for residential purposes. The Director General noted that there is no public benefit to maintaining the standard in this case.

However, point (6) states that *Consent must not be granted under this clause for a subdivision of land in Zone RU2 [if]:*

- (a) *The subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*

- (b) *The subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot to be a development standard.*

In relation to 4.6(6)(a) the proposed subdivision would not result in the creation of two undersized allotments. In relation to 4.6(6)(b), the subdivision would result in one lot being less than 90% of the minimum area (i.e. less than 36 hectares).

However, given the particular merits of this case, in that the small lot (Lot 1) contains sufficient complying area of another zone, it is considered unreasonable to refuse the proposed subdivision on this basis.

As detailed within this report, it is considered that the proposed subdivision would be unlikely to set a harmful precedent for the creation of undersized allotments for residential purposes or the fragmentation of rural land. It is considered that the proposal would be consistent with the provisions of the Draft Tweed LEP 2012.

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

Tweed Development Control Plan

A1-Residential and Tourist Development Code

The application nominates a dwelling site within proposed Lot 1. The size of this lot is sufficient to ensure that DCP A1 controls will be able to be met for the future construction of a dwelling on the allotment.

A3-Development of Flood Liable Land

The subject site is identified as partially flood prone as detailed under 'Impacts' below, though not in proximity to the proposed house site. Council's Engineer has reviewed the application in this regard and raised no objections. No further consideration with regard to flooding impacts is required and DCP A3 is considered to be satisfied.

A5-Subdivision Manual

The proposed subdivision generally complies with the requirements of Section A5 of the DCP. With regard to the relevant provisions regulating lot size, one allotment exceeds the 40ha minimum lot size and one allotment will be undersized (with regard to the portion in the 1(a) zone though the lot meets the 1(c) zone minimum lot size provisions).

With regard to physical constraints on the site, it is noted that parts of the site area identified as flood prone though each allotment is predominantly out of the flood plain with all dwelling sites/structures clearly outside such area. Council's Development Assessment Engineer has raised no concerns in this regard.

A cattle dip site is located on the property. This is discussed later in this report however it is concluded that this element of the proposal is consistent with DCP A5.

The site is bushfire prone and a Bushfire Assessment Report was submitted and reviewed by the New South Wales Rural Fire Service under the integrated development provisions of the Act. The Rural Fire Service issued a bushfire safety authority under Section 100B of the Rural Fires Act and the recommended conditions have been applied.

With regard to rural watercourses and drainage, being a rural environment, stormwater discharge will remain as is, with Council's Development Assessment

engineer noting no need at this stage to make any amendments to the existing method of stormwater management at the site.

The existing road network is adequate for servicing the new subdivision according to Council's Development Assessment Engineer.

Negligible impacts on the existing rural movement network are envisaged as a result of approval of this application.

Subject to conditions, the proposed boundary adjustment is considered to generally accord with DCP A5.

A11-Public Notification of Development Proposals

Public exhibition was not required by DCP A11. No submissions were received.

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

Clause 92(a) Government Coastal Policy

The site is not covered by the Government Coastal Policy.

Clause 92(b) Applications for demolition

No demolition is proposed in the application.

Clause 93 Fire Safety Considerations

No consideration of fire safety within the bounds of Clause 93 is required.

Clause 94 Buildings to be upgraded

There are no buildings to be upgraded.

(a) (v) Any coastal zone management plan (within the meaning of the Coastal Protection Act 1979),

The land is not covered by any coastal zone management plan.

Tweed Shire Coastline Management Plan 2005

The land is not covered by this plan.

Tweed Coast Estuaries Management Plan 2004

The land is not covered by this plan.

Coastal Zone Management Plan for Cobaki and Terranora Broadwater (adopted by Council at the 15 February 2011 meeting)

The land is not covered by this plan.

(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

Flooding

The Design Flood Level for this area is RL 4.1m AHD. Some very small sections of the western part of the site are considered flood liable, but the existing development on this part of the site (proposed Lot 2) is clear of direct affectation.

Proposed Lot 1 is not affected by the Design Flood Level.

The PMF affects the northern and western portions of the site, with levels of RL 9.1m AHD and 9.2m AHD respectively.

No concerns are raised regarding such affectation on the existing development on the site. The PMF partly affects proposed Lot 1, but only within the gully area along the eastern and western boundaries. The dwelling site, the driveway access to the road frontage, as well as the eastern extent of Reserve Creek Road, are all above the PMF level.

Access

In accordance with the requirements of TSC DCP A5.5.6, the access location for proposed Lot 1 will require construction of a sealed driveway, from the road carriageway to 3m inside the property boundary. A gate shall be installed for the driveway in the boundary fence.

This will be a condition of consent and will require submission of a Section 138 application.

The existing dwelling on proposed Lot 2 has an existing sealed access driveway. This remains satisfactory and no upgrade is required.

Contribution Charges

Contribution charges (Section 94 only) are applicable for the creation of one additional allotment. Section 64 contributions do not apply as the site is not serviced by Council's water or sewer supply.

(c) Suitability of the site for the development

Concurrence

Concurrence was required from the Director General, Department of Planning as one of the lots to be created is less than 90% of the required standard. Concurrence was issued by the Department on 14 August 2013, for the following reasons (excerpt from letter dated 14 August 2013):

- There is no public benefit in maintaining the standard; and
- The development will not result in inappropriate fragmentation of rural land.

Potential for Land Use Conflict

Construction of dwellings in close proximity to agricultural land has the potential to result in land use conflict.

Living and Working in Rural Areas: A handbook for managing land use conflict issues on the NSW North Coast (2007) (LWRA) was developed to assist with managing land use conflict matters in the local area. The document states that one of the accepted planning tools used to reduce the likelihood of land use conflict is buffers. It is acknowledged that recommended buffers should be used as a guide in the absence of more appropriate separation arrangements. **Chapter 6 of LWRA recommends a minimum 50 m buffer between 'grazing of stock' and 'rural dwellings'. A minimum 50 m buffer is also recommended between 'grazing of stock' and 'residential areas and urban development'.**

The Tweed Shire Development Control Plan 2008, Section A5 Subdivision Manual (to be referred to as 'Subdivision Manual'), includes recommended buffers for proposed subdivisions. The Subdivision Manual states that subdivision design and lot layout should endeavour to ensure that the nominated building envelopes, in lots created by the subdivision, comply with the

recommended buffers. **In relation to noise, dust and odours, the Subdivision Manual recommends a minimum 30 m buffer from 'grazing'.**

With regards to the current proposal, it is apparent that the proposed dwelling site is approximately 50m from agricultural activities. The buffer between the adjacent agricultural use and the proposed dwelling site is considered to be consistent with the recommended buffers in LWRA and the Subdivision Manual.

Cattle Dip Site

The Cattle Dip Site Locator (NSW Department of Primary Industries, www.dpi.nsw.gov.au) classifies Cliffords Dip which is located on existing Lot 24/proposed Lot 2 as being 'active'. Council's hard-copy cattle dip site register includes Cliffords Dip and states that it is located approximately 300m from Reserve Creek Road.

Council's DCP A5 (Subdivision Manual) states that the Cattle Tick Dip Site Management Committee (DIPMAC) recommends a 200m radius assessment zone around all cattle dip sites.

The applicant has confirmed that the boundary of proposed Lot 1 is approximately 224m from the dip site, with the proposed dwelling site approximately 309m from the dip site. Additionally, the proposed dwelling site is at an approximate height of 21m RL, whereas the dip site is at an approximate height of 8.4m RL.

Therefore the dip site is not considered to be of consequence regarding use of proposed Lot 1.

Onsite Sewer and Water Supply

Conditions have been applied regarding water and sewer supply. Rainwater tanks and OSMS will be utilised for the proposed dwelling site.

Surrounding Landuses/Development

The development would remain consistent with the rural residential nature of the Kielvale area.

Flora and Fauna

No vegetation clearing or land forming is required to necessitate the proposed development. Parts of the site are identified as high/very high ecological status/sensitivity and one of these areas is proposed to be incorporated into proposed Lot 1 in proximity to the proposed dwelling site. In this regard, standard conditions prohibiting the removal of native vegetation have been applied and it is considered that detailed assessment of required tree removal (if any) would be undertaken at development application stage for the future dwelling. There are no threatened flora or fauna species in proximity to the dwelling site. It is also noted that the site is covered by Council's Tree Preservation Order (1990) which would require consideration in any future dwelling assessment. Secondary koala habitat is mapped on the site, however this is in excess of 600m from the proposed dwelling site.

No further consideration is required at this stage.

Regionally Significant Farmland

Parts of the site are regionally significant farmland with a small section also identified as significant non contiguous farmland (this area is not in proximity to

the proposed new lot). The proposed development will not reduce the potential of either site to be used for rural/farming purposes and there are not considered to be any further considerations required in this regard.

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

No public submissions were received.

The Rural Fire Service submitted conditions with regard to the integrated referral which have been applied.

(e) Public interest

The proposed development represents a reasonable and well considered development which will rationalise a currently irregular subdivision pattern and enable the construction of a future dwelling house within a suitably sized allotment. Whilst the approval of an allotment less than 40ha within the 1(a) Rural zone would not usually be permitted for residential purposes, the nature of the proposal is such that residential use of the land is permitted by an adjoining zone.

As such, the proposed SEPP 1 Objection is considered reasonable in this instance and the application has adequately demonstrated that the proposal raises no matters of significance for State or Regional Planning and that no public benefit results from maintaining the development standard. Concurrence has been granted by the Director-General for the creation of the undersized allotment as it was considered that there is no public benefit in maintaining the development standard in this instance.

The proposed development generally complies with all relevant matters for Council's consideration, being considered suitable for the subject site and without significant environmental impacts.

The proposed development is therefore considered to be in the public interest.

OPTIONS:

1. Approve the application with conditions of approval in accordance with the recommendation of approval; or
2. Refuse the application.

Council officers recommend Option 1.

CONCLUSION:

The proposed subdivision/amalgamation has been the subject of detailed assessment with regard to Council's policies and those prescribed by the State Government, inclusive of the SEPP 1 Objection, to which concurrence has been granted by the Department of Planning and Infrastructure. It is considered that the proposal represents a reasonable and well considered development which will rationalise a currently irregular subdivision pattern and enable the construction of a future dwelling house within a suitably sized allotment. Negligible environmental impacts are envisaged as a result of approval of this application.

The development is considered to be suitable for the subject site and will not reduce agricultural use of the site or the subject locality.

Approval in accordance with the recommended conditions is therefore recommended.

COUNCIL IMPLICATIONS:

a. Policy:

Corporate Policy Not Applicable.

b. Budget/Long Term Financial Plan:

Not Applicable.

c. Legal:

Not Applicable.

d. Communication/Engagement:

Not Applicable.

UNDER SEPARATE COVER/FURTHER INFORMATION:

Nil.

27 [PR-CM] Development Application DA13/0115 for a Two Lot Leasehold Subdivision at Lot 17 DP 833570 Nos. 26-74 Chinderah Bay Drive, Chinderah

SUBMITTED BY: Development Assessment

FILE REFERENCE: DA13/0115 Pt1



Civic Leadership

LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:

- 1 Civic Leadership
 - 1.1 Ensure actions taken and decisions reached are based on the principles of sustainability
 - 1.1.1 Establish sustainability as a basis of shire planning and Council's own business operations
-

SUMMARY OF REPORT:

Council has received a development application for a two lot subdivision at Lot 17 DP 833570, otherwise known as No 26-74 Chinderah Bay Drive, Chinderah. The subject site currently comprises a residential dwelling and the existing Brims Transport Depot facility.

The proposed subdivision would divide this lot into two lots as follows: Lot 1 at 10.48 hectares and Lot 2 at 0.87 hectares. Access to both lots would be via Waugh Street. The purpose of the proposed subdivision is to allow for the long term lease of the land which the existing Brims Transport depot operates. Sites proposed to be leased for more than five years require a separate lot.

The subject site is zoned both 7(a) Environmental Protection and 1(a) Rural, with a small portion of the site being 6(a) Open Space. Clause 20(2)(a) of the Tweed Local Environmental Plan (LEP) 2000 states that subdivision of land may be granted on 1(a) Rural and 7(a) Environmental Protection land provided each allotment is at least 40 hectares. Clause 20(3) of the Tweed LEP 2000 allows the subdivision of land where the subject allotment would be less than 40 hectares, provided it would not be used for agricultural or residential purposes.

Proposed Lot 1 would be below the minimum lot size (10.48 hectares) and would be used for residential purposes. As such a State Environmental Planning Policy (SEPP) No. 1 - Planning Principles Objection has been received in relation to the variation of the development standard.

The application has been referred to the Department of Planning and Infrastructure for consideration who have granted concurrence in respect to the variation of the 40 hectare development standard contained in clause 20(2)(a) of the Tweed LEP 2000 to permit the creation of proposed Lot 1 and Lot 2 for the following reasons:

- *The proposal will not fragment rural land and the existing character and amenity will remain;*

- *The proposed subdivision is unlikely to undermine the objectives of the 1(a) zone as the proposal will facilitate the lease of the existing Brims Transport site for 15 years; and*
- *There is not public benefit in maintaining the standard in this case.*

This development application is being reported to Council due to the Department of Planning's Circular PS08-014 issued on 14 November 2008 requiring all State Environmental Planning Policy No. 1 (SEPP No. 1) variations greater than 10% to be determined by full Council. In accordance with this advice by the Department of Planning and Infrastructure (Department), officers have resolved to report this application to full Council. The development standard is varied by approximately 74% in the case of Proposed Lot 1 and 98% in the case of Proposed Lot 2.

Of key importance in the determination of this application is that concurrence has been granted by the Director-General to permit the creation of Proposed Lot 1. Whilst the creation of an undersized allotment for residential purposes within the Shire would not normally be encouraged, it is considered that there is no public benefit in maintaining the development standard in this instance as the subdivision will not change the status quo of the land.

Of note, during the assessment of this application it was revealed that the existing transport depot, approved under DA04/1166 has not been operating in accordance with a number of conditions of consent. DA04/1166 approved a transport depot only and did not allow the servicing of vehicles or the storage of fuels or oils. There was also no requirement at that time for the site to be connected to sewer as there was no requirement for staff on the site. As detailed within this report, more than 12 vehicles are being stored at the site; the servicing of vehicles is being carried out; fuels are stored at the site; and staff amenities (kitchen and bathroom) have been installed.

The applicant has been requested to address these various non-compliances and have submitted a Section 96 application (DA04/1166.04) to modify the original consent. This Section 96 application is currently in the process of being assessed by Council officers. Details in relation to land contamination, sewage management and water supply will be considered in accordance with the relevant guidelines and policies.

Concerns have been raised in relation to wastewater management and potential groundwater contamination. With relevance to the current application, the applicant has advised that they will no longer rely on an on-site sewage management system (OSMS) at the property and will connect to reticulated sewer with an appropriate trade waste treatment device. A condition will be applied to this consent for the proposed two lot subdivision to ensure that the site is connected to reticulated sewer prior to the issue of the subdivision certificate. A preliminary Contamination Report has also been provided that has adequately addressed matters relating to land contamination. It is considered that the proposed two lot subdivision may now be approved subject to conditions of approval. A condition will be applied to this particular application (DA13/0115) to ensure that, prior to the issue of the subdivision certificate the applicant is to demonstrate that all of the conditions of development consent DA04/1166.04 have been complied with.

Having regard to the relevant statutory controls and an assessment of the submitted SEPP No. 1 Objection in relation to Clause 20(2)(a) of the Tweed LEP 2000, in particular, it is considered that the proposed two lot subdivision is justified in this instance. On this basis approval of the proposed development is recommended.

RECOMMENDATION:

That Development Application DA13/0115 for a two lot leasehold subdivision at Lot 17 DP 833570 Nos. 26-74 Chinderah Bay Drive, Chinderah be approved subject to the following conditions:

GENERAL

1. The development shall be completed in accordance with the Statement of Environmental Effects and Plan Nos WS_PLHD_1980_01 (Proposed Leasehold Subdivision) prepared by Planit Consulting and dated December 2012, except where varied by the conditions of this consent.

[GEN0005]

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

[GEN0125]

3. Approval is given subject to the location of, protection of, and/or any necessary approved modifications to any existing public utilities situated within or adjacent to the subject property.

[GEN0135]

4. No preferred koala feed trees (*Eucalyptus robusta*, *Eucalyptus tereticornis*, *Eucalyptus microcorys* and *Eucalyptus propinqua*) may be cleared without specific approval of the General Manager or delegate.

[GENNS01]

5. The applicant is advised that the two lot subdivision associated with DA13/0115 will have the effect of extinguishing any existing dwelling entitlement on existing lot 17 DP 833570 / proposed lot 1 and the existing dwelling shall have to rely on existing use rights within proposed Lot 1.

[GENNS02]

6. An application shall be lodged together with any prescribed fees including inspection fees and approved by Tweed Shire Council under Section 68 of the Local Government Act for any water, sewerage, on site sewerage management system or drainage works including connection of a private stormwater drain to a public stormwater drain, installation of stormwater quality control devices or erosion and sediment control works.

In this regard the applicant is required to construct a sewer service for proposed Lot 2 via construction of a sewer rising main (SRM) within Waugh Street, generally in accordance with the 'Sewer Concept Plan P.15.56 / Sk1' by Cozens Regan Williams Prove submitted to Council on 18.9.2013. Further, the applicant is required to submit appropriate applications to Council for approval as follows:

- a. A 'Private Ejection Pump' form;
- b. A 'Connection to Sewer' form;
- c. A Trade Waste Application form.

[GENNS03]

7. Please note that Section 64 Developer Contributions have been applied to this Development Application to ensure that proposed Lot 2 has access to services. The Section 96 application to modify the consent (DA04/1166.04) in association with the truck storage depot will have additional Section 64 Developer Contributions payable to cater for the land use.

[GENNS04]

PRIOR TO COMMENCEMENT OF WORK

8. The proponent shall accurately locate and identify any existing sewer main (including rising mains), stormwater line or other underground infrastructure within or adjacent to the site and in the vicinity of the proposed SRM works. Council shall be advised of the location and depth of any such infrastructure prior to commencing works and ensure there shall be no conflict between the proposed development and existing infrastructure prior to start of any works.

[PCW0005]

DURING CONSTRUCTION

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

[DUR0995]

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

- Noise, water or air pollution.
- Dust during filling operations and also from construction vehicles.
- Material removed from the site by wind.

[DUR1005]

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

[DUR1795]

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

[DUR1875]

PRIOR TO ISSUE OF SUBDIVISION CERTIFICATE

13. Prior to issue of a subdivision certificate, all works/actions/inspections etc required by other conditions or approved management plans or the like shall be completed in accordance with those conditions or plans.

[PSC0005]

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

Prior to the occupation of the building or issue of any Interim or Final Occupation Certificate (whichever comes first), all Section 64 Contributions must have been paid in full and the Certifying Authority must have sighted Council's "Contribution Sheet" and a "Certificate of Compliance" signed by an authorised officer of Council.

Pursuant to Section 109J of the Environmental Planning and Assessment Act, 1979 a Subdivision Certificate shall NOT be issued by a Certifying Authority unless all Section 64 Contributions have been paid and the Certifying Authority has sighted Council's "Contribution Sheet" and a "Certificate of Compliance" signed by an authorised officer of Council.

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

Water DSP4:	1 ET @ \$12575 per ET	\$12575
Sewer Kingscliff:	1 ET @ \$6042 per ET	\$6042

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

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

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

[PSC0165]

15. Prior to the issue of a Subdivision Certificate a defect liability bond (in cash or unlimited time Bank Guarantee) shall be lodged with Council.

The bond shall be based on 5% of the value of the sewer rising main works (or minimum value as tabled in Council's fees and charges current at the time of payment - currently \$1910) which will be held by Council for a period of 6 months from the date on which the plan of subdivision is registered.

It is the responsibility of the proponent to apply for refund following the remedying of any defects arising within the 6 month period.

[PSC0215]

16. Prior to the issue of a Subdivision Certificate, Work as Executed Plans shall be submitted in accordance with the provisions of Tweed Shire Council's Development Control Plan Part A5 - Subdivision Manual and Council's Development Design Specification, D13 - Engineering Plans.

The plans are to be endorsed by a Registered Surveyor OR a Consulting Engineer Certifying that:

- (a) all drainage lines, sewer lines, services and structures are wholly contained within the relevant easement created by the subdivision;

(b) the plans accurately reflect the Work as Executed.

Note: Where works are carried out by Council on behalf of the developer it is the responsibility of the DEVELOPER to prepare and submit works-as-executed (WAX) plans.

[PSC0735]

17. A Subdivision Certificate will not be issued by the General Manager until such time as all conditions of this Development Consent have been complied with.

[PSC0825]

18. Prior to the issue of the Subdivision Certificate, certification from a Fire Protection Association Australia (FPA Australia) accredited Bushfire Planning And Design (BPAD) certified practitioner, must be submitted to the PCA, confirming that the subject development complies with the Rural Fire Service's General Terms of Approval imposed under Section 100B of the Rural Fires Act 1997 on the consent.

[PSC0830]

19. The creation of easements for services, rights of carriageway and restrictions as to user (including restrictions associated with planning for bushfire) as may be applicable under Section 88B of the Conveyancing Act including (but not limited to) the following:

(a) Easements for sewer, water supply and drainage over ALL public services/infrastructure on private property.

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

[PSC0835]

20. Submit to Council's Property Officer for approval an appropriate plan indicating the street/road address number to both proposed and existing lots. In accordance with clause 60 of the Surveying and Spatial Information Regulation 2012 the Plan of Subdivision (Deposited Plan) shall show the approved street address for each new lot in the deposited plan.

[PSC0845]

21. Prior to registration of the plan of subdivision, a Subdivision Certificate shall be obtained.

The following information must accompany an application:

(a) original plan of subdivision prepared by a registered surveyor and 7 copies of the original plan together with any applicable 88B Instrument and application fees in accordance with the current Fees and Charges applicable at the time of lodgement.

(b) all detail as tabled within Tweed Shire Council Development Control Plan, Part A5 - Subdivision Manual, CL 5.7.6 and Councils Application for Subdivision Certificate including the attached notes.

Note: The Environmental Planning and Assessment Act, 1979 (as amended) makes no provision for works under the Water Supplies Authorities Act, 1987 to be certified by an Accredited Certifier.

[PSC0885]

22. The six (6) months Defects Liability Period commences upon the registration of the Plan of Subdivision.

[PSC0925]

23. Prior to issuing a Subdivision Certificate, reticulated water supply and outfall sewerage reticulation shall be provided to Proposed Lot 2 in accordance with Tweed Shire Council's Development Control Plan Part A5 - Subdivisions Manual, Councils Development Design and Construction Specifications and the Construction Certificate approval.

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

[PSC1115]

24. The production of written evidence from the local electricity supply authority certifying that the reticulation of overhead electricity (rural subdivisions) and energising has been provided to each allotment.

Should any electrical supply authority infrastructure (sub-stations, switching stations, cabling etc) be required to be located on Council land (existing or future), then Council is to be included in all negotiations. Appropriate easements are to be created over all such infrastructure, whether on Council lands or private lands.

Compensatory measures may be pursued by the General Manager or his delegate for any significant effect on Public Reserves or Drainage Reserves.

[PSC1175]

25. Prior to the issuing of the subdivision certificate, the applicant is to submit a potential groundwater contamination assessment that considers previous potentially contaminating activities at the depot. The potential groundwater contamination assessment is to be to the satisfaction of the General Manager or his delegate.

Prior to the issuing of the subdivision certificate, the applicant is to demonstrate that all conditions of development consent DA04/1166.04 have been complied with.

[PSCNS01]

26. Prior to the issue of the Subdivision Certificate for this Development Application (DA13/0115), the relevant Section 64 Developer Contributions for both this Development Application and for the Section 96 Modification for the truck storage depot (DA04/1166.04) must have been paid to Council.

27. Prior to the issue of the Subdivision Certificate, the applicant is to submit a separate application for sewer connection to Council. Proposed Lot 2 is not to be connected to sewer until the relevant application has been approved by Council. The submitted application shall include details of (but not limited to): the proposed route of the sewer; proposed earthworks and construction details; and details of vegetation removal if required.

[PSCNS01]

28. Prior to the issue of a Subdivision Certificate, the applicant shall produce a copy of the "satisfactory inspection report" issued by Council for all works completed under the Sec.68 sewer approval for the sewer rising main works.

[PSCNS02]

GENERAL TERMS OF APPROVAL UNDER SECTION 100B OF THE RURAL FIRES ACT 1997

1. The development proposal is to comply with the subdivision plan, titled Proposed Leasehold Subdivision, drawing number WS_PLHD_1980_01, dated December 2012.

General Advice - Consent Authority to Note

2. This Bush Fire Safety Authority is based on the requirement that proposed leasehold lot 2 us used as a transport depot that does not include any residential or habitable land use.

REPORT:

Applicant: Brims Transport
Owner: Mr Russell P Burns
Location: Lot 17 DP 833570 Nos. 26-74 Chinderah Bay Drive, Chinderah
Zoning: 1(a) Rural, 5(a) Drainage, 6(a) Open Space, 7(a) Environmental Protection (Wetlands & Littoral Rainforests)
Cost: Nil

Background:

The subject site is known legally as Lot 17 in DP 833570 No 26 - 74 Chinderah Bay Drive. The site has an area of 11.36 hectares and is relatively regular in shape. The site currently comprises a dwelling house and the Brims Transport Depot, both of which are accessed from Waugh Street.



The site is relatively flat and regular in shape. The northern portion of the site comprises remnants of vegetation of high ecological status although the land surrounding the Brims Transport Depot has been substantially cleared of vegetation. The south of the site has a frontage of approximately 350m to Waugh Street, to the east a frontage of 323m to Chinderah Bay Drive. To the west of the site is the Pacific Highway and to the north a broader stand of vegetation that extends toward Wommin Lake and Fingal Head.

The proposed subdivision would divide the subject site into two lots as follows: Lot 1 at 10.48 hectares and Lot 2 at 0.87 hectares. Access to both lots would remain as existing via Waugh Street. The purpose of the proposed subdivision is to allow for the long term lease of the land which the existing Brims Transport depot operates. A 15 year leasehold subdivision over 0.87 hectares of the parent parcel is proposed. Leases in excess of five years are required to be formalised as a leasehold subdivision.

A SEPP No. 1 Objection in relation to Clause 20(2)(a) of the Tweed LEP 2000 has been received in relation to the creation of an undersized allotment (less than 40 hectares) for residential purposes. Concurrence has been granted by the Director-General in this instance for the following reasons:

- *The proposal will not fragment rural land and the existing character and amenity will remain;*
- *The proposed subdivision is unlikely to undermine the objectives of the 1(a) zone as the proposal will facilitate the lease of the existing Brims Transport site for 15 years; and*
- *There is not public benefit in maintaining the standard in this case.*

The granting of concurrence in this instance is of material consideration to the proposed development. It is considered, as the proposed subdivision will not alter the existing status quo of the land, that maintaining the development standard would not be in the public benefit.

In relation to other relevant heads of consideration, the site is not serviced by reticulated sewer and a search of Council's records has not revealed any approvals to install or operate an on-site sewage management system (OSMS) at the property. Council's reticulated sewerage network is located adjacent to the property on Waugh Street. The site is connected to reticulated water with Council records indicating two separate metres are installed at the property.

The Brims Transport Depot was approved under development application DA04/1166 on 17 December 2004. This application approved the construction of a large storage shed, hardstand driveway, manoeuvring area and open truck storage compound with access from Waugh Street. Within this application it was proposed that the use of the site would be for a storage depot only, for approximately 12 trucks and was not intended for the servicing of vehicles or for the storage of bulk storage of fuels or oils. The application detailed that due to the nature of the proposal that no sewer connection to the site was required as there was no requirement for staff to be provided within the facilities at the site.



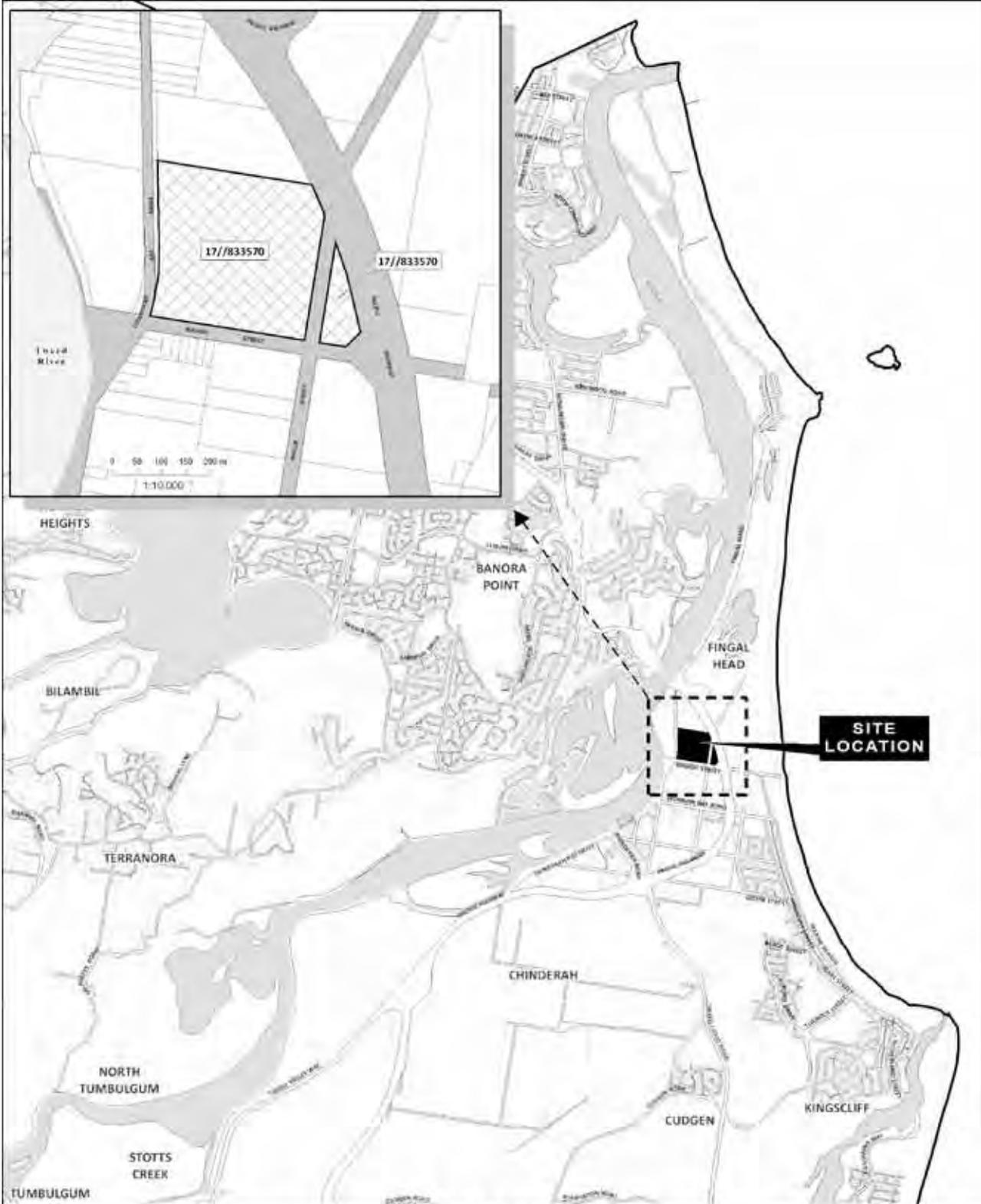
The Brims Transport Depot located in the south eastern portion of the site with access onto Waugh Street

The assessment of the current application DA13/0174 revealed a number of non-compliances in relation to DA04/1166 as follows: trucks are being maintained/serviced at the property; fuels and lubricants are being stored at the property; and a large above-ground storage tank is present. Further, toilet and amenities are present and the maintenance and servicing of trucks appears to be contaminating soil with lubricants and fuels.

In order to enable the adequate assessment of DA13/0174 in relation to matters relating to land contamination and on-sewage management, the applicant was required to address the various non-compliances with the conditions of DA04/1166. The applicant was required to submit a Section 96 (S96) application to modify the original approval. A S96 application has since been received (DA04/1166.04) whereby the applicant has addressed each of the non-compliances. The S96 application is currently being assessed by Council officers.

With relevance to the current application, the applicant has advised that they will no longer be relying on an OSMS and will connect to reticulated sewer with an appropriate trade waste treatment device. A condition will be applied to this consent for the proposed two lot subdivision to ensure that the site is connected to reticulated sewer prior to the issue of the subdivision certificate. A preliminary Contamination Report has also been provided that has adequately addressed matters relating to land contamination. It is considered that the proposed two lot subdivision may now be approved subject to conditions of approval. A condition will be applied to this particular application (DA13/0115) to ensure that, prior to the issue of the subdivision certificate, the applicant is to demonstrate that all of the conditions of development consent DA04/1166.04 have been complied with.

SITE DIAGRAM:



Locality Plan
 Lot 17 DP 833570
 26-74 Chinderah Bay Drive, Chinderah

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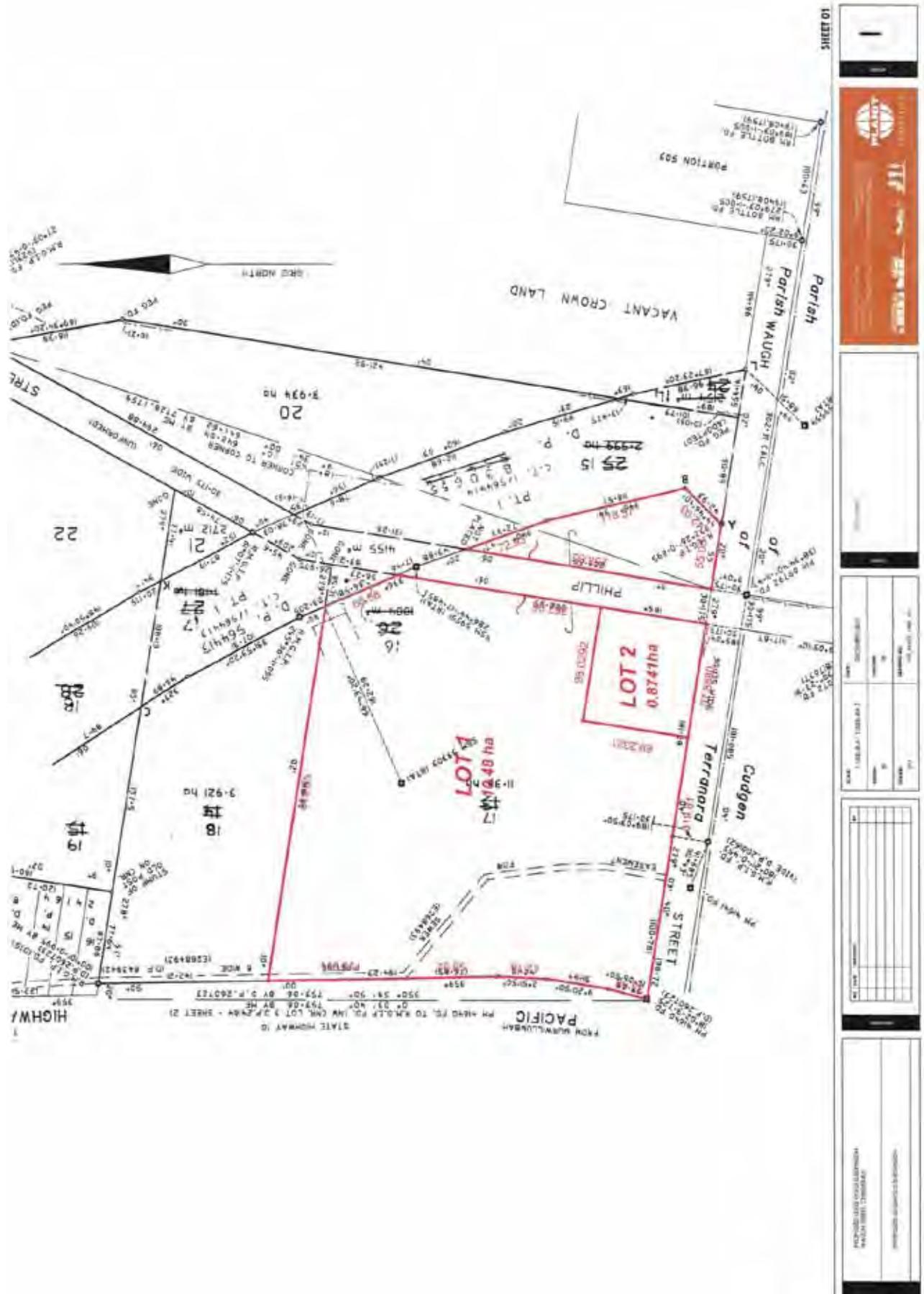
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 Board members should be consulted approximately.

Scale: 1:50,000 (A4 Format) 100' (30.48m) (A4 Format)

City and Council Centre
 1 Tweedgate Road
 Murumbidgee NSW 2454
 PO Box 616
 Murumbidgee NSW 2454
 T (02) 9670 2499 | 1300 292 872
 F (02) 5470 2423
 E planning@twsh.gov.au
 E planning@twsh.gov.au

TWEED SHIRE COUNCIL

DEVELOPMENT/ELEVATION PLANS:





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DATE	17 OCTOBER 2013
TIME	10:00 AM
LOCATION	1800 633 333
CONTACT	ALYSON HAYES

PROVIDED BY: ELANTY
 PREPARED BY: ELANTY
 PROVIDED TO: ELANTY

Considerations under Section 79C of the Environmental Planning and Assessment Act 1979:

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

Tweed Local Environmental Plan 2000

Clause 4 - Aims of the Plan

Clause 4 illustrates that the aims of the TLEP 2000 are to give effect to the desired outcomes, strategic principles, policies and actions of the Tweed Shire 2000+ Strategic Plan. The vision of the plan 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”. Clause 4 further aims to provide a legal basis for the making of a Development Control Plan (DCP) to provide guidance for future development and land management, to give effect to the Tweed Heads 2000+ Strategy and Pottsville Village Strategy and to encourage sustainable economic development of the area which is compatible with the Shire’s environmental and residential amenity qualities.

The development proposes a two lot subdivision that would result in the creation of two undersized allotments, one of which would be used for residential purposes. However, the proposal would not impact on the existing status quo of the land (the existing transport facility and residential components are currently located on an undersized allotment) and would be unlikely to set a harmful precedent for the creation of undersized allotments.

It is considered that the proposed subdivision would not result in the fragmentation of rural land and would not impact on the rural character or amenity of the locality, provided the subdivision is carried out in accordance with the conditions of consent.

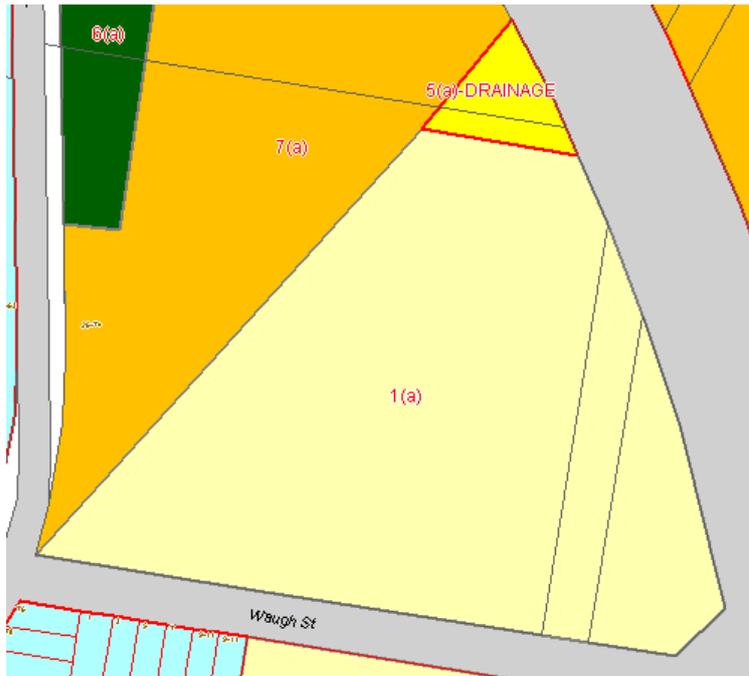
Clause 5 - Ecologically Sustainable Development

The intent of this clause is to provide for development which is compatible with principles of ecological sustainable development (ESD) including the precautionary principle, inter-generational equity, ecological and environmental factors. The scale and nature of the proposal is minor and will not conflict with principles of ESD.

The four principles of ecologically sustainable development are the precautionary principle, inter-generational equity, conservation of biological diversity and ecological integrity and improved valuation, and pricing and incentive mechanisms. The proposed subdivision is considered to be generally in accordance with these principles.

Clause 8 - Consent Considerations

The subject site is located within numerous zones as shown in the following snapshot of Council's GIS:



Tweed LEP 2000 Zoning incorporating 6(a) Open Space, 7(a) Environmental Protection (Wetlands & Littoral Rainforest), 5(a) Drainage and 1(a) Rural

Clause 8 states that 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.

The proposed subdivision does not propose any alteration to the existing status quo of the subject site. Whilst the site is also zoned 6(a) Open Space, 7(a) Environmental Protection and 5(a) Drainage, the proposed portion of land to be subdivided is located solely within the 1(a) Rural zone. It is therefore considered that the proposed subdivision should be assessed against the provisions of the 1(a) Rural zone.

The primary objective of the 1(a) Rural zone seeks to enable ecologically sustainable development of land that is primarily suitable for agricultural or natural resource utilisation and associated development as well as to protect the rural character and amenity. A secondary objective is to provide for development that is not suitable in or near urban areas.

The existing residential dwelling house and transport depot facility are already contained on the subject site and therefore the proposed subdivision will not alter the existing status quo of the land. There is already an approved and fully functioning transport depot located on the subject site, as well as a residential dwelling located on an already undersized allotment.

It is also considered that the proposed subdivision would be consistent with the other aims and objectives of this plan, specifically Clause 20(2)(a) of the Tweed

LEP 2000 that relates to the subdivision of land in the 1(a) Rural and 7(a) Environmental Protection zone. A SEPP No. 1 Objection to vary this development standard has been received and referred to the Department of Planning. Concurrence has been granted for the variation of the development standard, as detailed further within this report.

On this basis, the proposed subdivision is considered to be consistent with the objectives of the rural zone and would not have an unacceptable cumulative impact on the community or the locality, or on the area of Tweed as a whole and would be consistent with this clause.

Please note that a depot is defined as '*Land used for the storage or maintenance, or both, of plant, machinery, equipment, building materials and the like*'. A depot would be a permissible form of development within the 1(a) Rural zone within the current Tweed LEP 2000.

Clause 11 - Zone Objectives

The subject site is located within numerous zones, as detailed above. However, the portion of the site to which the proposed two lot subdivision relates is located within the 1(a) Rural zone. The primary objective of the 1(a) Rural zone is to enable ecologically sustainable development of land that is primarily suitable for agricultural or natural resource utilisation and associated development as well as to protect the rural character and amenity. A secondary objective is to provide for development that is not suitable in or near urban areas.

The transport depot has already been approved on the subject site, being permissible with consent in the 1(a) Rural zone. Further, the residential property is already located on an undersized allotment within the 1(a) Rural zone. It is considered that the proposed subdivision would not alter the status quo of the land and would therefore be unlikely to jeopardise the agricultural capacity of the land, nor impact on the rural character or amenity of the area.

It is considered that the proposal would be consistent with the objectives of the 1(a) Rural zone.

Clause 15 - Essential Services

The primary objective is to ensure that development does not occur without adequate measures to protect the environment and the community's health.

Connection to reticulated water at the depot site was not proposed within the original application (DA04/1166). However, Council records indicate that the site is connected to reticulated water with two water meters on the subject property. This water connection provided at the depot facility will be ratified by this subdivision proposal and a number of conditions of the consent will be applied with this regard.

The site is not connected to reticulated sewer and Council's records have not revealed that an approval to operate an OSMS has been issued. A site inspection revealed that a toilet, kitchen and shower has been installed and an OSMS Report (prepared by HMC) has advised that wastewater would be directed to an existing septic tank/pump well, which is then directed to a new septic tank/pump well, with effluent then being directed to an evapotranspiration bed.

The site is also being used for maintenance and servicing of vehicles and the wastewater associated with these works is not being directed to an appropriate trade waste treatment device. The applicant has been required to address the non-compliances with the original approval (DA04/1166) for the transport depot

and rectify in particular the on-site sewage management issues in relation to the treatment of trade waste.

The applicant has since advised that they intend to connect to the adjacent reticulated sewerage system. With relevance to the current application, the applicant has advised that they will no longer be relying on an OSMS and will connect to reticulated sewer with an appropriate trade waste treatment device. A condition will be applied to this consent to ensure that the site is connected to reticulated sewer prior to the issue of the Subdivision Certificate.

Clause 16 - Height of Building

The application does not propose any modifications to the existing building height.

Clause 17 - Social Impact Assessment

This clause requires Council to consider whether a proposed development is likely to have a significant social or economic impact. Given the minor scale and nature of the development it is considered that the proposal does not require a social impact assessment.

The proposed two lot subdivision would result in the creation of two undersized allotment, one of which would be used for residential purposes, contrary to Clause 20 of the Tweed LEP 2000. It is considered that in this instance the proposed 15 year subdivision for leasehold purposes, would not alter the status quo of the existing land. It is considered unreasonable and not in the public interest to uphold the development standard with this regard and it would be unlikely, given the circumstances of this application, that the proposal would set a harmful precedent for similar development in the future.

Clause 19 - Subdivision

The development application proposes the subdivision of the existing lot to form two lots and therefore this clause applies. The objective of the clause is to provide a comprehensive system of planning controls for the subdivision of land in the Tweed local government area.

The application is seeking consent for a subdivision and is therefore in accordance with the provisions of the clause.

Clause 20 - Subdivision in Zones 1(a) and 7(a)

The subject site is zoned 1(a) Rural and 7(a) Environmental Protection and therefore this clause applies. The objectives of the clause are as follows:

(1) Objectives

- *to prevent the potential for fragmentation of ownership of rural land that would:
 - (i) *adversely affect the continuance or aggregation of sustainable agricultural units, or*
 - (ii) *generate pressure to allow isolated residential development, and provide public amenities and services, in an uncoordinated and unsustainable manner.**
- *to protect the ecological or scenic values of the land.*
- *to protect the area of Tweed's water supply quality.*

- (2) Consent may only be granted to the subdivision of land:
- (a) within Zone 1 (a), 1 (b2), 7 (a), 7 (d) or 7 (l) if the area of each allotment created is at least 40 hectares, or
 - (b) within Zone 1 (b1) if the area of each allotment created is at least 10 hectares.
- (3) Despite subclause (2), consent may be granted to the subdivision of land where an allotment to be created is less than 40 hectares, or 10 hectares in the case of Zone 1 (b1), if the consent authority is satisfied that the allotment will be used for a purpose, other than for an agricultural or residential purpose, for which consent could be granted.

The development application seeks the subdivision of the existing allotment to create two lots.

Proposed Lot 1 would be 10.48 hectares and would comprise a dwelling house. Proposed Lot 2 would be 0.871 hectares and would comprise the Brims Transport Depot facility.

Part 2(a) of the Clause requires consent to be granted for the subdivision of land within the 1(a) Rural zone and the 7(a) Environmental Protection zone if the area of each allotment created is at least 40 hectares. Part (3) of the Clause states that consent will only be granted in the 1(a) and 7(a) zone if the consent authority is satisfied that the allotment will be used for a purpose other than for agriculture or residential purposes.

Proposed Lot 1 would not comply with this Clause as it would be only 10.48 hectares in size and would comprise a dwelling house.

On this basis a SEPP No. 1 Objection was received for the creation of the undersized allotment to be used for residential purposes. Within this Objection the applicant advises:

'The proposed non-compliance raises no matters of significance for State or Regional Planning and no public benefits results from maintaining the development standard in this particular case [and...] enforcing compliance with Clause 20(2)(a) would effectively prevent the formalisation of a leasehold subdivision agreement. The land will remain in its existing storage capacity and will not have any environmental impact upon the surrounding area. It is noted that the 1(a) and 7(a) portions of land will not be further subdivide. The 1(a) portion on which Lot 2 will be created is for lease purposes and will be extinguished after a 15 year period. No changes to the existing arrangement of 7(a) zoned land will result as part of the subdivision.'

It is considered that the maintenance of the 40 hectare development standard is not justified in this instance and would not be in the public benefit. It is noted that a dwelling house is located on Proposed Lot 1 and the existing Brims Transport Depot facility is located on Proposed Lot 2. The proposed subdivision will not alter the status quo of the existing land parcels nor impact on the character or amenity of the area.

It is therefore considered that the variation to this development standard is justified in this instance.

Clause 22 - Development near designated roads

Chinderah Bay Drive is a Council designated road, as is Phillip Street. However, access to the site is via Waugh Street which is not a designated road. In any case, the proposed subdivision will not alter the existing access arrangements on the site. It is therefore considered that the proposed subdivision would be unlikely to impact on the capacity, efficiency or safety of the road.

Clause 34 - Flooding

The subject site is identified with a Design Flood Level of RL 2.7m AHD and is located within the Probable Maximum Flood of RL 6.9m AHD and is also located wholly within the low flood area. The applicants have provided an assessment of Section A3 of the Tweed Development Control Plan (DCP) 2008, as detailed further within this report. The proposed subdivision does not propose any building works, filling or earthworks to necessitate its being carried out, other than the installation of appropriate sewer connection. It is therefore considered that the proposal would be unlikely to result in future potential flood damage or increase the risk of adverse flooding on the community.

Clause 35 - Acid Sulfate Soils

The subject site is mapped as being Class 2 and Class 3 ASS. The proposed subdivision will not raise any matters of concern in relation to ASS.

Clause 39 - Remediation of contaminated land

As previously detailed within this report, current activities carried out on the site of the Brims Transport Depot facility include the servicing of vehicles and the storage and use of fuels and lubricants. Also, a large above ground storage tank is present. During an inspection of the site it was evident that these activities were resulting in contamination.

The applicant was required to submit a site contamination investigation whereby soil sampling revealed various chemical pollutants such as petroleum hydrocarbons. A further site contamination investigation was carried out that revealed levels of petroleum hydrocarbons were below the health investigation levels for soil for commercial/industrial land use (as outlined in Schedule B (1) of the National Environment Protection (Assessment of Site Contamination) Measure 1999). The investigation reports therefore that no further remediation work is required in order to necessitate the proposed subdivision. It also notes that the depot operator is to review current practices and implement improvements to minimise the risk of spills and leaks.

Information in relation to potential contamination of groundwater has not been received. Given the potentially contaminating activities on the site and the likelihood of excavations for trade wastewater treatment systems additional information is required from the applicant in relation to potential contamination of groundwater. A condition will be applied to any consent to ensure that, prior to the issue of a subdivision certificate, the applicant is to provide a potential groundwater contamination assessment that considers previous potentially contaminating activities at the depot.

Clause 39A - Bushfire Protection

Portions of the subject site is bushfire prone, therefore this clause applies. The objective of the clause is to minimise bushfire risk to built assets and people and to reduce bushfire threat to ecological assets and environmental assets.

The development application was Integrated Development in accordance with Clause 55(1) of the Environmental Planning and Assessment Regulation 2000. The applicants have submitted a Bush Fire Assessment for the proposal which has been referred to the NSW Rural Fire Service (RFS) for consideration.

The NSW RFS granted a bush fire safety authority as required under section 100B of the Rural Fires Act 1997 with appropriate conditions of the consent in relation to water and utility provision and access.

Clause 54 - Tree Preservation Order (TPO)

The subject site is covered by the Tweed Shire Council 2004, TPO 2011 (Bushland) and 2011 (Koala Habitat) Tree Preservation Orders and therefore this clause applies. The objective of the clause is to enable the protection of vegetation for reasons of amenity or ecology.

The submitted information does not provide any detailed information in relation to vegetation removal. It is considered that, in general, the proposed subdivision would be unlikely to necessitate the removal of vegetation. However, it is a requirement of this application that Proposed Lot 2 is connected to reticulated sewer. As shown in the following image there are a number of trees located along the southern boundary of the site:



Subject site and location of existing sewer manhole

Removal of vegetation within the site or road reserve may be required in order to necessitate connection to reticulated sewer. A condition will be applied to any development consent to ensure that prior to the issue of a subdivision certificate, an application is made to Council in relation to sewer connection to proposed Lot 2, detailing (but not limited to): proposed route, earthworks and vegetation removal if required.

Clause 57 - Protection of existing dwelling entitlement

An objective of Clause 57 is to protect an existing dwelling entitlement on an allotment lawfully created after the commencement of the Tweed LEP 2000. No additional dwelling entitlement would be created, either on Proposed Lot 1 or Proposed Lot 2, by the subject application. A dwelling has been constructed on the subject site (on Proposed Lot 1).

This dwelling house would have to rely on existing use rights for any future development as the proposed subdivision would result in any dwelling entitlement being extinguished. A condition will be applied to the development consent to ensure that the applicant is made aware that the proposed subdivision would have the effect of extinguishing any existing dwelling entitlement on existing Lot

17 DP 833570/Proposed Lot 1 and the existing dwelling would have to rely on existing use rights within Lot 1.

State Environmental Planning Policies

SEPP (North Coast Regional Environmental Plan) 1988

Clause 12: Impact on agricultural activities

This clause states that council shall not consent to an application to carry out development on rural land unless it has first considered the likely impact of the proposed development on the use of adjoining or adjacent agricultural land and whether or not the development will cause a loss of prime crop or pasture land.

The proposed subdivision would be unlikely to impact the use of adjoining or adjacent agricultural land or result in the loss of prime crop or pasture land. As detailed within this report, the proposed subdivision will not alter the existing status quo of the subject site. It is considered that the proposal is consistent with Clause 12 of the NCREP 1988.

Clause 32B: Coastal Lands

The subject site is coastal land however the proposed subdivision would not alter the existing nature or character of the subject land. It is considered that the proposal would not raise any significant implications in respect of NSW Coastal Policy 1997 nor impact on the coastal values of the locality.

SEPP No. 1 - Development Standards

The original application details did not provide a SEPP No. 1 Objection as the applicant considered that proposed Lot 2 would not be used for residential or agricultural purposes. Council requested a SEPP No. 1 Objection however on the basis that the proposed two lot subdivision would result in the creation of a Proposed Lot 1 that would be below the minimum lot size (40 hectares) and would be used for residential purposes.

A SEPP No. 1 Objection was received with this regard whereby the applicant has advised the following:

- *It is noted that the existing Brims Transport depot operates under the restrictions of the existing consent, which is consistent with land uses other than 'agriculture' or a 'dwelling house'. Council may grant consent notwithstanding non-compliance with the 40ha lot size;*
- *The proposed leasehold subdivision will bind the landholder and the lessee in a landuse agreement. A leasehold Plan of Subdivision will be prepared for enactment during the 15 year period and approved by Council;*
- *The proposed non-compliance raises no matters of significance for State or Regional Planning and no public benefit results from maintaining the development standard in this particular case;*
- *Chief Justice Preston notes that there is a public benefit in maintaining planning controls, however in this instance, enforcing compliance with Clause 20(2)(a) would effectively prevent the formalisation of a leasehold subdivision agreement;*
- *The land will remain in its existing storage capacity and will not have any environmental impact upon the surrounding area;*

- *It is noted that the 1(a) and 7(a) portions of land will not be further subdivided. The 1(a) portion on which Lot 2 will be created is for lease purposes and will be extinguished after a 15 year period;*
- *No changes to the existing arrangement of 7(a) zoned land will result as part of the subdivision.*

The proposed SEPP No. 1 Objection has been referred to the Department of Planning and Infrastructure who have provided concurrence in relation to Clause 20(2)(a) of the Tweed LEP 2000. Concurrence has been granted by the Director-General in relation to the creation of an undersized allotment (less than 40 hectares) for residential purposes in this instance for the following reasons:

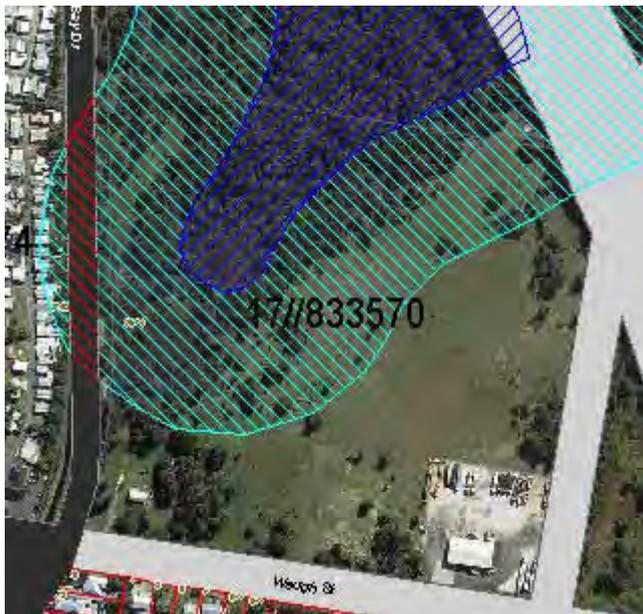
- *The proposal will not fragment rural land and the existing character and amenity will remain;*
- *The proposed subdivision is unlikely to undermine the objectives of the 1(a) zone as the proposal will facilitate the lease of the existing Brims Transport site for 15 years; and*
- *There is not public benefit in maintaining the standard in this case.*

Council officers concur that there would be no public benefit in maintaining the development standard in this instance. The subject site is already below the minimum lot size. It is considered that there would be no public benefit in maintaining the development standard in this instance.

It is therefore considered that the proposed subdivision should be supported in this instance.

SEPP No. 14 - Coastal Wetlands

Portions of the site are located within the SEPP 14 Wetland and Wetland Buffer, as shown in the following image:



Dark blue hatched area being SEPP No. 14 wetland and light blue hatched area being SEPP No. 14 buffer

Clause 2 of the SEPP states that the aim of the Policy is to ensure that coastal wetlands are preserved and protected in the environmental and economic

interests of the State. Draft guidelines prepared by Department of Infrastructure, Planning and Natural Resources (DIPNR) (2004) provide guidance in determining whether a development application is affected by SEPP 14.

Field recognition criteria within DIPNR's draft guidelines states that the disturbance footprint of a development is not considered as SEPP No. 14 wetland where there is an absence of wetland vegetation. As shown in aerial above, the portion of land to be subdivided is not affected by SEPP No. 14 (being located outside of the buffer). In any case, the proposed subdivision would not result in the removal of vegetation within the area nominated as SEPP No. 14 wetland.

It is therefore considered that the proposed modification would be unlikely to impact on any wetland vegetation and the development would therefore be consistent with this policy.

SEPP No. 44 - Koala Habitat Protection

SEPP 44 aims to encourage the proper conservation and management of areas of natural vegetation that provide habitat for koalas and ensure a permanent free-living population over their present range and reverse the current trend of population decline.

A small portion of the north of the site is nominated as potential secondary koala habitat and given that the vegetation on the site forms a broader link with substantial vegetation extending towards the north east it is likely that koalas may be present on the subject site from time to time. However the proposed subdivision will not result in any changes to the existing land and would be unlikely to necessitate the removal of vegetation. A condition will be applied to any development consent to ensure that the sewer connection is suitably assessed under a separate application. Within this application for sewer connection the precise location of the sewer line and extent of earthworks and vegetation removal will be considered.

It is considered that the proposed subdivision would therefore be unlikely to impact on koalas or koala habitat.

SEPP No. 55 - Remediation of Land

Proposed Lot 2 would comprise the existing Brims Transport Depot facility that was approved under DA04/1166 in December 2004. As detailed within this report, the assessment of this application has revealed a number of non-compliances with the conditions of DA04/1166 and a Section 96 application to modify the previous approval and address these matters has been received and is currently being assessed by Council officers.

Clause 7 of SEPP No. 55 states that a consent authority must not consent to the carrying out of any development on land unless it has considered whether the land is contaminated and, if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable after remediation) for the purpose for which the development is proposed to be carried out. Therefore consent cannot be granted for the subdivision until the consent authority is satisfied that land contamination issues on the site have been adequately addressed.

Land contamination issues have been addressed by Council officers and further information has been requested from the applicant with this regard. As detailed within this report, a site contamination investigation has revealed levels of

petroleum hydrocarbons were below the health investigation levels for soil for commercial/industrial land use on Proposed Lot 2 (as outlined in Schedule B (1) of the National Environment Protection (Assessment of Site Contamination) Measure 1999). The investigation reports therefore no further remediation work is required in order to necessitate the proposed subdivision. It also notes that the depot operator is to review current practices and implement improvements to minimise the risk of spills and leaks.

Information in relation to potential contamination of groundwater has not been received and that, given the potentially contaminating activities on the site and the likelihood of excavations for trade wastewater treatment systems, that additional information is required from the applicant. A condition will be applied to the development consent in relation to the submission of a potential groundwater contamination assessment on the subject site.

It is considered that the proposed subdivision would be consistent with the SEPP.

SEPP No 71 – Coastal Protection

The subject site is coastal land however the proposed subdivision would not alter the existing nature or character of the subject land. The aims of this Policy are to, amongst other things: to protect and manage the natural, cultural, recreational and economic attributes of the NSW coast; to protect and improve existing public access to and along the coast; to ensure that coastal and marine vegetation is protected; and to ensure that the type, bulk, scale and size of development is appropriate for the location and improves the natural scenic quality of the surrounding area.

As detailed within this report, the proposed two lot subdivision will not alter the existing status quo of the land, given that the transport depot facility and dwelling house is already located on the subject site. The proposed subdivision would not alter the existing access arrangements.

In particular, Clause 15 of the Policy relates to effluent disposal and requires that the consent authority must not consent to a development application to carry out development in which effluent is proposed to be disposed of by means of a non-reticulated system, if the consent authority is satisfied that the proposal will, or is likely to, have a negative effect on the water quality of the sea, coastal creek or other similar water body. Further information in relation to the provision of adequate treatment of trade wastewater was requested and the applicant has advised that Proposed Lot 2 will be connected to reticulated sewer.

It is considered that the proposal would be consistent with the aims of the Policy.

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

Draft Tweed Local Environmental Plan 2012

The Draft Tweed Local Environmental Plan (LEP) 2012 has been on public exhibition and is yet to be gazetted by Council. In this Draft the zones of the subject site are similarly aligned to the current zones, as shown in the following snapshot of Council's GIS imagery:



Draft LEP 2012 zoning: E2 Environmental Conservation (orange); RE2 Private Recreation (light green); RU2 Rural Landscape (yellow)

As detailed above, whilst the site is also zoned E2 and RE2 (a) Open Space, the proposed portion of land to be subdivided is located solely within the RU2 zone. It is therefore considered that the proposed subdivision should be assessed against the provisions of the 1(a) Rural zone.

The objectives of the RU2 zone are to encourage sustainable primary industry production; maintaining the rural landscape character of the land and to provide for a range of compatible land uses. It is considered that the proposed two lot subdivision would be consistent with the objectives of the zone.

Akin to the current Tweed LEP 2000, the Draft Tweed LEP 2012 Lot Size Map indicates that the minimum lot size for the subject site is 40 hectares.

Clause 4.2 of Part 4 of the Draft Tweed LEP 2012 relates to rural subdivision in land zoned RU2 and states:

- (3) *Land in a zone to which this clause applies may, with consent, be subdivided for the purpose of primary production to create a lot of a size that is less than the minimum size shown on the Lot Size Map in relation to that land.*
- (4) *However, such a lot cannot be created if an existing dwelling would, as the result of the subdivision, be situated on the lot.*
- (5) *A dwelling cannot be erected on such a lot.*

Proposed Lot 1 would not comply with this clause as it would only be 10.48 hectares in size and would comprise a residential component.

Clause 4.6 (Exceptions to development standards) provides flexibility in applying certain development standards to particular developments. Point (3) states that consent must not be granted for development that contravenes a development

standard unless the consent authority is satisfied that compliance with the development standard is unreasonable or unnecessary and that there are sufficient environmental planning grounds to justify contravening the development standard. As detailed within this report, it is considered that compliance with the development standard is both unreasonable and unnecessary in this instance. The proposed two lot subdivision will not alter the status quo of the existing land parcel.

Further, point (4) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposed development would be in the public interest because it is consistent with the objectives of the zone in which the development is to be carried out, and the concurrence of the Director-General has been obtained.

With this regard it is considered that the maintenance of the development standard in this instance would not be in the public interest as it will not result in any alteration to the existing land parcel: i.e. Proposed Lot 1 would comprise a dwelling house and Proposed Lot 2 would comprise the transport depot facility. It is considered that, for this reason, the proposed two lot subdivision would be consistent with the objectives of the RU2 zone and would have no implications for the remaining zones (given the portion of land to be subdivided is located solely within the RU2 zone). Concurrence has also been granted from the Director-General in relation to the creation of the undersized allotment to be used for residential purposes.

However, point (6) states that *Consent must not be granted under this clause for a subdivision of land in Zone RU2 [if]:*

- (a) *The subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
- (b) *The subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

In relation to 4.6(6)(a) the proposed subdivision would result in the creation of two lots that would be less than the minimum lot size: Lot 1 being 10.48 hectares and Lot 2 being 0.8741 hectares in size. In relation to 4.6(6)(b), the subdivision would result in both lots being less than 90% of the minimum area (i.e. less than 36 hectares). However, given the circumstances of the proposed subdivision, that does not propose any alteration to the existing status quo of the land for the purpose of a 15 year leasehold purposes, it is considered unreasonable to refuse the proposed subdivision on this basis.

As detailed within this report, it is considered that the proposed subdivision would be unlikely to set a harmful precedent for the creation of undersized allotments for residential purposes or the fragmentation of rural land. It is considered that the proposal would be consistent with the provisions of the Draft Tweed LEP 2012.

Please note that, in relation to the permissibility of the servicing and maintenance of vehicles on the site, that the Draft Tweed LEP 2012 defines as depot as: *'a building or place used for the storage (but not sale or hire) of plant, machinery or other goods (that support the operations of an existing undertaking) when not required for use, but does not include a farm building'*. The servicing of vehicles within the depot would be a permissible form of development within the Draft Tweed LEP 2012.

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

Tweed Development Control Plan

A2-Site Access and Parking Code

Section A2 aims to be consistent with ESD principles, ensure provision of safe, convenient and equitable access to developed land for pedestrians and vehicles. It also sets minimum parking requirements for certain development types.

No alterations are proposed to the existing access arrangements, parking or manoeuvring capabilities on the site. Council officers consider that the access and parking provisions are satisfactorily addressed on the site and that no conditions are to be imposed with this regard. It is considered that the proposal would be consistent with DCP A2.

A3-Development of Flood Liable Land

The subject site is flood prone however no building works, filling works or structures are proposed (other than works required to necessitate connection to reticulated sewer). It is considered that the proposal would be consistent with DCP A3.

A5-Subdivision Manual

The applicant advises that the proposed subdivision would be carried out in accordance with Section A5 of the DCP. The proposed subdivision would not result in the requirement for major earthworks. Conditions will be applied to the consent in relation to the issue of a Construction Certificate and Subdivision Certificate as well as a condition in relation to the connection of reticulated sewer.

A11-Public Notification of Development Proposals

The development did not require notification to surrounding properties in accordance with Section A11.

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

Clause 92(a) Government Coastal Policy

The subject land is coastal land however as the proposed two lot subdivision would be unlikely to necessitate any significant earthworks, vegetation removal or the construction of any structures, it is considered that the proposal would be consistent with the provisions of the NSW Coastal Policy 1997.

Clause 92(b) Applications for demolition

The application does not propose any demolition and therefore this clause does not apply.

(a) (v) Any coastal zone management plan (within the meaning of the Coastal Protection Act 1979),

Tweed Shire Coastline Management Plan 2005

The primary objectives of the Coastal Management Plan are to protect development; secure persons and property; and to provide, maintain and replace infrastructure. The proposed two lot subdivision would not raise any significant implications in relation to the Tweed Shire Coastline Management Plan.

Tweed Coast Estuaries Management Plan 2004

Not applicable to the development proposal as the subject site is not located within

the vicinity of an estuary ecosystem and is unlikely to impact on waterways or biodiversity of waterways.

**Coastal Zone Management Plan for Cobaki and Terranora Broadwater
(adopted by Council at the 15 February 2011 meeting)**

Not applicable to the development proposal as the subject site is not located within the vicinity of an estuary ecosystem and is unlikely to impact on waterways or biodiversity of waterways.

(b) The likely impacts of the development and the environmental impacts on both the natural and built environments and social and economic impacts in the locality

Context and Setting

As previously detailed within this report the application does not comprise any physical works (other than the connection to reticulated sewer) and will not affect the status quo of the existing land parcel. The existing and previously approved transport depot facility is located on the land parcel subject to this application. It is considered that the proposed subdivision would be unlikely to impact on the character or amenity of the locality.

Access, Transport and Traffic

No alterations are proposed to the existing access or parking arrangements. The proposed subdivision would be unlikely to impact on matters relating to access or traffic. As detailed previously within this report, during the assessment of this particular application it was noted that the transport depot is not operating in accordance with a number of conditions of DA04/1166. Matters relating to access arrangements, parking, number of trucks stored at the site and so on will be considered within the submitted Section 96 application to modify the original approval.

Flora and Fauna

In general the proposed subdivision would be unlikely to necessitate the removal of any vegetation. The installation of a sewer main along the southern boundary of the site however may result in the removal or lopping of vegetation in this area. A condition will be applied to ensure that an additional application is made to Council to connect proposed Lot 2 to sewer. This future application to Council will need to provide details in relation to the proposed sewer alignment and vegetation to be removed.

Cumulative Impacts

The development proposes the creation of two allotments that would be below the minimum allotment size, one of which would be utilised for residential purposes. As detailed within this report, the dwelling house located on Proposed Lot 1 and transport depot on Proposed Lot 2 are already in situ. This situation will not alter as a result of the proposed subdivision. It is considered that there would be no public benefit in maintaining the development standard in this instance and there would be no adverse cumulative impact as a result of the proposed subdivision.

(c) Suitability of the site for the development

Surrounding Landuses/Development

Neighbouring land comprises of vacant land parcels, residential properties and a plant nursery to the south and a caravan park to the west. It is considered unlikely that the proposed subdivision would impact on surrounding residential amenity. As detailed above, matters in relation to the various non-compliance with the original consent for the transport depot (DA04/1166) will be considered within the submitted Section 96 application to modify the consent.

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

Public Submissions Comment

No Submissions were received as a result of the notification process.

Public Authority Submissions Comment

The proposed development was referred to the NSW Rural Fire Service as the proposed subdivision is Integrated Development in accordance with Clause 55(1) of the Environmental Planning and Assessment Regulation 2000. A bush fire safety authority as required under section 100B of the 'Rural Fires Act 1997' has been issued, including a number of conditions to be applied to the consent relating to water and utilities provision and access.

(e) Public interest

The creation of an undersized allotment within the 1(a) Rural zone used for residential purposes would not usually be permitted, in order to prevent the fragmentation of ownership of rural land. As detailed within this report, the dwelling house is already located on an undersized allotment and therefore the proposed two lot subdivision would be unlikely to impact on the character or amenity of the subject site or surrounding area, nor on the status quo of the existing land parcel.

A SEPP No. 1 Objection has been received that demonstrates that in this instance the proposal raises no matters of significance for State or Regional Planning and that no public benefit results from maintaining the development standard. Concurrence has been granted by the Director-General for the creation of the undersized allotment as it was considered that there is no public benefit in maintaining the development standard in this instance.

It is considered that the proposed subdivision would be unlikely to set a harmful precedent for the creation of undersized allotments, given the circumstances of this application. It is considered therefore that the approval of the application would not raise any implications in relation to the public interest.

OPTIONS:

1. Approve the application with conditions of approval in accordance with the recommendation of approval; or
2. Refuse the application.

Council officers recommend Option 1.

CONCLUSION:

The development application proposes a subdivision that divides the subject lot into two lots as follows: Lot 1 at 10.48 hectares and Lot 2 at 0.87 hectares. Proposed Lot 1 would be below the minimum lot size (10.48 hectares) and would be used for residential purposes.

As such a State Environmental Planning Policy (SEPP) No. 1 - Planning Principles Objection has been received in relation to the variation of the development standard.

The application has been referred to the Department of Planning and Infrastructure for consideration who have granted concurrence in respect to the variation of the 40 hectare development standard contained in clause 20(2)(a) of the Tweed LEP 2000 to permit the creation of proposed Lot 1 and Lot 2 for the following reasons:

- *The proposal will not fragment rural land and the existing character and amenity will remain;*
- *The proposed subdivision is unlikely to undermine the objectives of the 1(a) zone as the proposal will facilitate the lease of the existing Brims Transport site for 15 years; and*
- *There is not public benefit in maintaining the standard in this case.*

Whilst the creation of an undersized allotment for residential purposes within the Shire would not normally be encouraged, it is considered that there is no public benefit in maintaining the development standard in this instance as the subdivision will not change the status quo of the land.

Having regard to the relevant statutory controls and an assessment of the submitted SEPP1 Objection in relation to Clause 20(2)(a) of the Tweed LEP 2000, in particular, it is considered that the proposed two lot subdivision is justified in this instance. On this basis approval of the proposed development is recommended.

COUNCIL IMPLICATIONS:

a. Policy:

Corporate Policy Not Applicable.

b. Budget/Long Term Financial Plan:

Not Applicable.

c. Legal:

Not Applicable.

d. Communication/Engagement:

Not Applicable.

UNDER SEPARATE COVER/FURTHER INFORMATION:

Nil.

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28 [PR-CM] Development Application D90/0436.07 for an amendment to Development Consent D90/0436 for the Erection of a Tavern and Nine Shops

SUBMITTED BY: Development Assessment

FILE REFERENCE: PF3975/145 Pt8



Civic Leadership

LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:

1	Civic Leadership
1.1	Ensure actions taken and decisions reached are based on the principles of sustainability
1.1.1	Establish sustainability as a basis of shire planning and Council's own business operations

SUMMARY OF REPORT:

Council is in receipt of a S96(1A) modification application to extend the trading hours of the Pottsville Tavern. The existing hours for the Tavern are 10.00am to 10.00pm seven days a week. The applicant has requested the hours to be modified to:

- *Sunday to Thursday – 10.00am to 10.00pm;*
- *Friday & Saturday – 10.00am to 12.00 Midnight;*

Variation of the above hours are permitted for a maximum of six (6) times per year with the written approval of the General Manager, or delegate, of Tweed Shire Council within the 12 month period.

Council have previously approved these hours of operation subject to appropriate 'Plan of Management' measures to mitigate impacts on the surrounding area for a 12 month trial period. This trial period has not been carried out as the tavern operator has as yet to gain a variation to the liquor licence to trade beyond 10pm.

The applicant has proposed permanent ameliorative measures in order to allow these hours of operation on a permanent basis.

Council staff do not support the permanent extension of hours proposed by the applicant. However, an extension of hours to midnight for Friday and Saturday nights is considered acceptable, subject to appropriate conditions and mitigation measures, including the provision of a reviewable condition of consent which would be reviewed after 12 months or upon receipt of a valid complaint, after the extended trading hours commence.

The proposal was advertised for a period of 14 days, during which time seven submissions and one petition (27 signatories) opposed to the proposal were received. One late submission has also been received. These are detailed later in this report.

RECOMMENDATION:

That Development Application D90/0436.07 for an amendment to Development Consent D90/0436 for the erection of a tavern and nine shops at Lot 171 DP 629328 No. 28-40 Overall Drive, Pottsville be approved and the consent be amended as follows:

1. Condition No. 10A is to be deleted and replaced with Condition No. 10B which reads as follows:

10B. Hours of operation:

Sunday to Thursday – 10.00am to 10.00pm

Friday and Saturday – 10.00am to 10pm

Variation of the above hours are permitted for a maximum of six times per year with the written approval of the General Manager, or delegate, of Tweed Shire Council.

Notwithstanding this condition, please see condition No 29 regarding the reviewable condition.

2. Condition No. 20 is to be deleted and replaced with Condition No. 20A which reads as follows:

20A. The Tavern shall operate in accordance with the Environmental Noise Impact Report prepared by CRG Acoustical Consultants dated 23 July 2013. All mitigation works shall be completed prior to commencement of extended trading hours.

3. The following new Conditions are to be added:

27. An updated Plan of Management shall be submitted and approved to the satisfaction of the General Manager or delegate within three months of the date of this consent.

28. Notification shall be provided within seven days of the commencement of extended hours of trading accompanied by a compliance audit report against the operational conditions of the consent inclusive of the plan of management.

29. Reviewable Condition

This consent is subject to a reviewable condition under Section 80A of the Environmental Planning and Assessment Amendment Act. The reviewable condition relates to a condition that permits extended hours of operation. The purpose of this condition is to enable Council to monitor potential impacts associated with extended hours of operation at this site on the surrounding area and, if appropriate, to revert the development consent to its previously approved hours of operation.

Extended trading is permitted on Friday and Saturday until 12 Midnight subject to this condition being reviewed by Council after 12 months or upon receipt of a complaint that Council deems to be reasonable from the date the extended trading hours commence.

Council is to provide not less than 14 days written notice to the operator of the development that a review is to be carried out under this condition. Where requested by Council, the proponent is to submit a compliance audit against the operational conditions of the development consent, including the plan of management and noise audit report. Council may notify such other persons as it thinks fit of the review, and must take into account any submissions received within 14 days after notice is given.

Please note see Condition No 10B.

REPORT:

Applicant: Pottsville Tavern
Owner: Premium Custody Services Pty Ltd
Location: Lot 171 DP 629328 No. 28-40 Overall Drive, Pottsville
Zoning: 3(b) General Business
Cost: Not Applicable

Background:

Council records indicate that consent was granted for the construction of a tavern and nine shops on 21 January 1991. The approved hours of operation for the tavern were restricted to 10.00am to 10.00pm.

Amended consents were issued on 14 February 1991, 24 May 1991 and 25 January 1994. These did not modify the approved trading hours for the tavern. A Hotel Liquor Licence was issued in November 1999. The licence limits the tavern's trading hours to 10.00am - 10.00pm (as per the abovementioned approval), subject to conditions.

An application to modify the hours of operation of the original consent was lodged in July 2001. The proposed hours of operation were:

- Mon – Sat 8.00am to 11.00pm;
- Sunday 10.00am to 10.00pm; and
- Christmas Day/ Good Friday 12 noon to 10.00pm.

The modification to extend the approved trading hours was considered to result in an increase in adverse impacts on the surrounding residents and was subsequently refused by Council on 19 December 2001.

An additional Section 96 application was lodged (D90/0436.04) in December 2005. The proposed trading hours were:

- Mon – Thurs and Sun 10.00am to 10.00pm; and
- Fri, Sat and public holidays 10.00am to 12 midnight.

The proposed trading hours were for an initial 12 month time frame from the date of the approved amended consent. The modification to increase the trading hours was refused on 19 April 2007, as a result of potential for increased community disturbances by noise and activities of patrons leaving the premises.

The applicant then lodged a Class One Appeal with the Land and Environment Court in June 2007. Council resolved to engage solicitors to act on Council's behalf and defend the appeal. The applicant discontinued the appeal in July 2007.

A further Section 96 application was received (D90/0436.05) in December 2009 with respect to extending the hours of operation of the Pottsville Tavern. Under this application, Council amended the consent to allow the following hours of operation for a *maximum period of 12 months from the date of this amended consent* (20 May 2010):

Sunday to Thursday – 10.00am to 10.00pm

Friday and Saturday – 10.00am to 12.00 Midnight

Variation of the above hours are permitted for a maximum of six (6) times per year with the written approval of the General Manager, or delegate, of Tweed Shire Council within the 12 month period.

Following the lapse of the 12 month period the hours of operation shall be restricted to 10.00am to 10.00pm.

Any further application for the variation of hours of operation outside of 10.00am to 10.00pm shall be prepared by a suitably qualified person and accompanied by a noise impact assessment in accordance with AS 1055 Acoustics – Description and measurement of environmental noise, the Noise Guide for Local Government June 2004 and any other relevant and accepted guideline.

Additional conditions of consent were also amended in order to provide mitigation measures for any potential noise impacts arising from the amended hours of operation. It is noted that this 12 month trial period was not completed, with NSW Police advising that NSW Office of Liquor, Gaming and Racing (OLGR) denied an application to trade in line with the operating hours approved under D90/0436.05.

On 22 November 2011, Council received an application to remove the 12 month trial period element of this condition, however Council received correspondence indicating that approval from the Casino, Liquor & Gaming Control was not obtained in relation to an extension of hours of operation on the liquor licence and as such the 12 month trial period had not taken place. This application was subsequently withdrawn as Council officers advised the applicant that the extended hours of operation would not be supported without a suitable trial period being undertaken.

PROPOSED DEVELOPMENT:

Tweed Shire Council has received an application under Section 96(1A) of the *Environmental Planning and Assessment Act 1979* proposing to modify the approved trading hours of the Pottsville Tavern at 28-40 Overall Drive, Pottsville (Lot 171 DP 629328).

This application seeks to permanently implement the operating times outlined under the D90/0436.05 approval, with the exception of the 12 month limited period outlined in condition No.10A. It is proposed to provide ameliorative measures, including noise barriers adjacent to existing outdoor areas of the Tavern, which the applicant states will ensure there will not be adverse impacts on surrounding residents. The proposal is supported by an Environmental Noise Impact Report, which includes recommended noise mitigation measures.

As such, revised condition 10A would outline the following hours of operation:

Sunday to Thursday – 10.00am to 10.00pm

Friday and Saturday – 10.00am to 12.00 Midnight

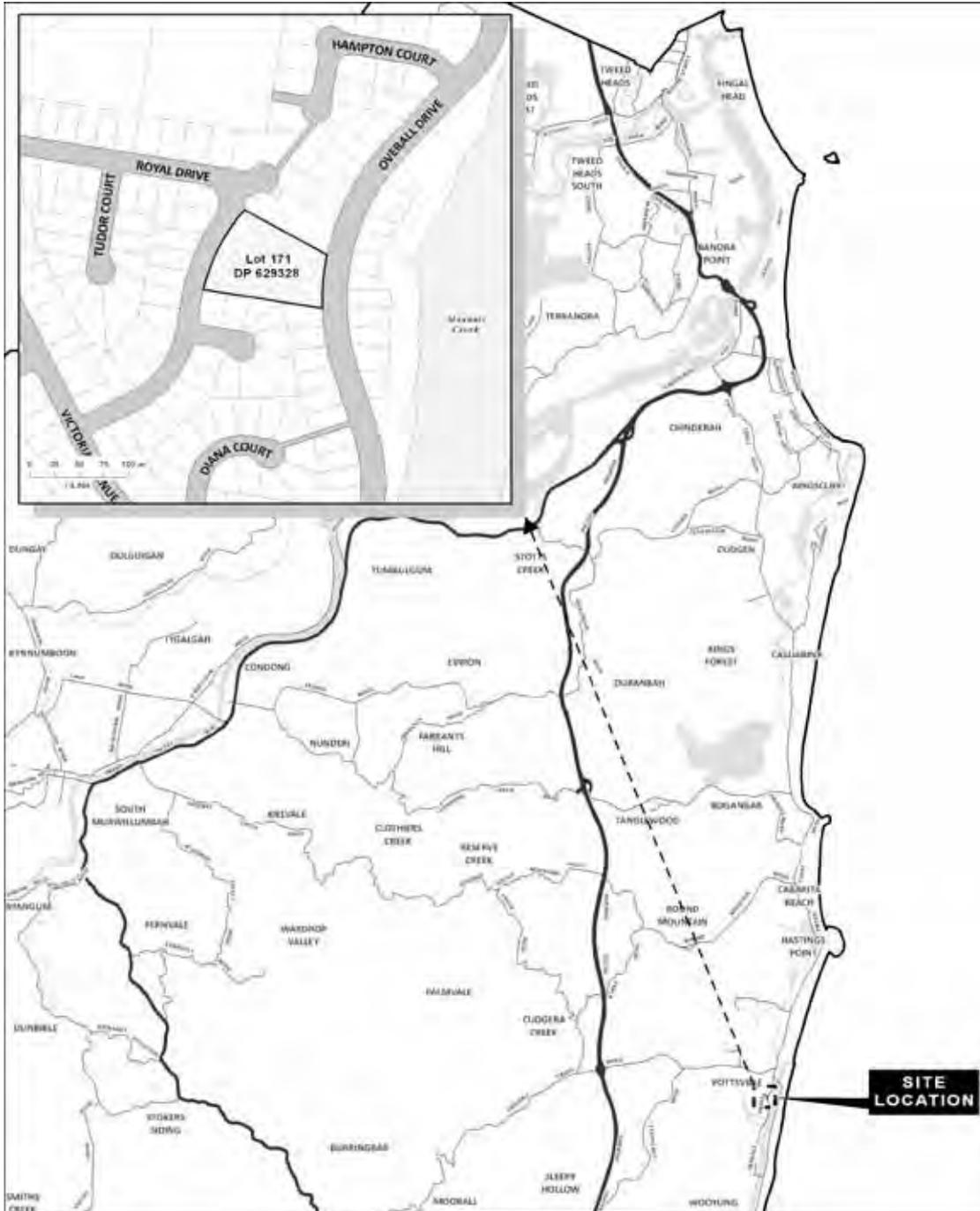
Variation of the above hours are permitted for a maximum of six (6) times per year with the written approval of the General Manager, or delegate, of Tweed Shire Council.

The application was advertised for a period of 14 days from Wednesday 10 April 2013 to Wednesday 24 April 2013. During this time, seven submissions and one petition (27 signatories) opposed to the proposal were received. The application was also forwarded to the NSW Police for comment.

Councils Environmental Health Unit have reviewed the subject application and advised that the request to vary hours of operation is not supported as proposed as it has been insufficiently demonstrated that a trial period was conducted and therefore the impact on the surrounding community can not be adequately assessed. It is recommended that a reviewable condition of consent be applied to an approval to ensure the operators can adequately demonstrate that by adopting noise mitigation measures and satisfactory

operational practices, impacts can be managed. Should this not occur the extended hours of operation would not be permitted to continue.

SITE DIAGRAM:



Locality Plan
 Lot 171 DP 629328
 No. 24-40 Overall Drive, Pottsville

<p>Information provided in this plan is for general information only. It is not intended to constitute a contract or any other legal document. The Council is not responsible for any loss or damage arising from the use of this information. The Council is not liable for any loss or damage arising from the use of this information.</p>	<p>Created: 20 September 2012 © Land and Property Management Authority (LPA) & Tweed Shire Council All other content should be referenced to the appropriate authority.</p>	<p>Scale and Contact Details Tweed Shire Council Municipal Office 2455 PO Box 876 Murrumbidgee NSW 2454 T: (02) 6676 2400 F: (02) 6676 2427 E: info@twec.nsw.gov.au</p> 
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Considerations under Section 79C of the Environmental Planning and Assessment Act 1979:

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

Tweed Local Environmental Plan 2000 (TLEP 2000)

Clause 4 - Aims of the Plan

Clause 4 illustrates that the aims of the TLEP 2000 are to give effect to the desired outcomes, strategic principles, policies and actions of the Tweed Shire 2000+ Strategic Plan. The proposed amendments are considered to meet the provisions of Clause 4.

Clause 5 - Ecologically Sustainable Development (ESD)

Clause 5 of the LEP relates to ecologically sustainable development. The TLEP aims to promote development that is consistent with the four principles of ecologically sustainable development, being *the precautionary principle, intergenerational equity, conservation of biological diversity and ecological integrity and improved valuation, pricing and incentive mechanisms*.

The proposed amendments are not considered to significantly impact upon the ESD principles of this development. It is considered that the proposal will therefore be in accordance with Clause 5 of the LEP.

Clause 8 - Consent Considerations

This clause specifies that 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 that those other aims and objectives of this plan (the TLEP) 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.*

As noted above, the proposed modifications are considered to result in a development which is consistent with the primary objective of the 3(b) zone, subject to conditions of consent.

Other relevant clauses of the TLEP have been considered elsewhere in this report.

Council's Development Assessment Unit is satisfied that the proposed development would not have an unacceptable cumulative impact on the locality or the community as a whole, subject to appropriate mitigation measures being acted upon and the inclusion of a reviewable condition of consent with respect to the hours of operation. As such, the proposal is considered to meet the provisions of Clause 8 of the LEP.

Clause 11 - Zone Objectives

Clause 11 of the LEP relates to zone objectives. The subject land is zoned 3(b) General Business under the provisions of the LEP. The primary objective of the zone is to:

- *to provide business centres in which the community's shopping, business, welfare and social needs can be met; and*
- *to provide business locations within residential areas, and to ensure that the scale and type of development is compatible with the character and amenity of the surrounding residential areas.*

A tavern is defined as a Hotel, which is permissible with consent under the provisions of the Tweed LEP 2000. The proposed modifications are considered to be consistent with the objectives of the zone, subject to conditions of consent.

If all applicable mitigation measures included in the Environmental Noise Impact Report are acted upon and relevant conditions of consent are imposed, the proposal is considered to result in a development which is consistent with the objectives of the zone.

Placing a reviewable condition on the consent is considered to be a reasonable method of allowing Council to determine if the proposal will impact upon surrounding residents over a period of time.

(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

Hours of Operation

The applicant has noted the following:

"This application is being prepared at the request of new owners and subsequent to the carrying out of a new acoustic assessment that attempts to address the matters previously raised by Council and the impacts that the Hotel operation has on adjoining residences.

This application seeks to permanently implement the operating times with the exception of the 12 month limited period outlined in condition No.10A. In this regard, this application also seeks approval for permanent ameliorative measures that render a limited time period or trial period, unnecessary. These ameliorative measures, as recommended in the attached Acoustic report, will ensure that the increase in operating hours will only occur in the knowledge that doing so will not create any adverse impacts upon surrounding residents. We note that the ameliorative measures proposed do not seek to implement 3m high barriers on the boundary of the subject land, rather, it seeks to place them on areas immediately surrounding the existing outdoor areas, therefore again limiting impacts on adjoining residences."

Comment:

As a result of Council officer concerns with respect to the impact of the proposed operating hours on the surrounding area, the applicant's proposal to permanently implement the operating hours without a trial period is not supported. Councils Environmental Health Unit has provided the following advice in this regard:

"However proposed noise mitigation works include the construction of permanent barriers surrounding the external areas that may be cost prohibitive should a further 12 month restriction be placed upon the consent. To off-set the concerns raised by the surrounding community a reviewable could be imposed to ensure the operators can adequately demonstrate that by adopting noise mitigation measures and satisfactory operational

practices impacts can be managed and should this not occur the extended hours of operation would not be permitted to continue."

Under the Environmental Planning and Assessment Amendment Act provisions for reviewable conditions were introduced within Section 80A with the criteria specified within subsections (10B) to (10E). This outlines the following:

(10B) Review of extended hours of operation and number of persons permitted

A development consent that is granted subject to a reviewable condition may be granted subject to a further condition that the consent authority may review that condition at any time or at intervals specified by the consent and that the reviewable condition may be changed on any such review.

(10C) The regulations may make provision for or with respect to the kinds of development that may be subject to a further condition referred to in subsection (10B), the matters that must be included in such a condition and the procedures for a review under such a condition.

(10D) A decision by a consent authority to change a reviewable condition on a review is taken to be a determination of a development consent for the purposes of this Act.

Note. *A review application or an appeal against a determination of a development consent may be made under this Division or Division 8.*

(10E) For the purposes of subsections (10B)–(10D), a **reviewable condition means any of the following:**

- (a) a condition that permits extended hours of operation (in addition to other specified hours of operation),*
- (b) a condition that increases the maximum number of persons permitted in a building (in addition to the maximum number otherwise permitted).*

The subject application has also been forwarded to NSW Police for comment, who have advised that the venue management had made application to the NSW Office of Liquor, Gaming and Racing to change the trading hours of the venue to be able to trade in line with the operating hours approved under D90/0436.05. The application was denied, and therefore a trial of the above hours could not have been undertaken. NSW Police could therefore not comment on the venue's affect on the community during the trial period. The Police had not opposed the variation however conditions had been sought, which have been taken into account in the amended conditions of this consent.

Councils Environmental Health Units recommendations are considered to represent a reasonable outcome with respect to the proposed amendment as it allows the tavern to operate extended opening hours and it also protects the surrounding community from possible negative impacts associated with same by maintaining the potential to revert the hours of operation through a reviewable condition of consent.

Noise Impact

The most recent Environmental Noise Impact Report (prepared by CRG Consultants, dated 23 July 2013) submitted as part of this application recommends that the following acoustic treatments and management principles be incorporated at the tavern to allow operation until midnight:

- The "Plan of Management" be updated to include the requirements of this acoustic report (refer to the previous "Plan of Management" in Appendix B) and be maintained for the Tavern.

- Recommended 3.0m high acoustic barriers around the perimeters of the outdoor areas of the tavern.
- The southern 1.8m high acoustic fence along the common boundary with the residential dwellings along Windsor Court should be upgraded (if required) and maintained as a 1.8m high acoustic barrier which is free of gaps and holes.
- The carpark gates along the western boundary (fronting Royal Drive) be closed at 10pm.
- No alcohol is to be consumed in the carpark area.
- Maintain a Neighbourhood Complaints Register.
- Amplified music and live entertainment be allowed inside the building up to midnight provided external windows and doors are kept closed. A maximum level of 91 dB(A) measured at 3m from any speaker would allow for a solo or duo act under moderate amplification.
- A sound limiter device be installed for amplified music and live entertainment to the levels presented below. The levels are measured at 3m from any speaker. All musical equipment should be connected to the sound limiter device.

Amplified entertainment inside building with windows and doors closed	SPL Hz Octave Band Centre Frequencies dB(A)									
	31.5	63	125	250	500	1000	2000	4000	8000	AP
Predicted allowable noise source level until midnight (measured at 3m)	50	59	69	76	85	88	79	80	74	91

- Speakers for amplified music or live entertainment should be directed towards the north (i.e. towards the Bottle shop drive-through) away from the nearest dwellings to the south.
- The south-western and north-western car spaces should be designated staff spaces to minimise the number of car movement events from these spaces.
- Appropriate signage should be erected at the main entry/exit doors asking patrons to be considerate of surrounding neighbours.
- Staff of the tavern should be diligent in maintaining acceptable activities and noise levels at the outdoor areas of the tavern.
- Provide a security person in the carpark after 10pm to maintain acceptable activities in the carpark (i.e. noise boisterous activity or drinking or congregating of patrons).
- New mechanical equipment (if required) be designed and installed to comply with applicable noise criterion. If new mechanical plant is required it should be positioned as far from the nearest offsite dwellings as possible (i.e. the north-eastern corner of the building).

Comment:

Council's Environmental Health Unit has reviewed the Environmental Noise Impact Report prepared by CRG Acoustical Consultants dated 23 July 2013 and advised that the report appears to have been prepared in accordance with the NSW Industrial Noise Policy and has addressed outstanding concerns. In this regard, the proposed mitigation measures contained within the report are considered to be generally acceptable, however a trial period

is to be undertaken through a reviewable condition of consent which would allow monitoring of the site for a minimum of a 12 month timeframe to determine noise impacts.

CONSIDERATIONS UNDER SECTION 96 OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979:

Substantially the Same Development

The proposed modification is essentially the same development as originally approved, with the proposed amendments relate to the hours of operation and are not considered likely to result in any significant changes to the originally approved development.

Likely Environmental Impact

The proposed amendments to the approved development are not likely to result in any significant impact upon the surrounding area, as noted in the section 79c assessment above. The proposed amendments are therefore not considered to result in any significant environmental impact, subject to appropriate conditions of consent.

Consideration of Submissions

The application was an exhibition for 14 days. During this time, seven written submissions were received and one petition with 27 signatories. One late submission was also received with respect to the proposal. The issues raised have been summarised below:

Issue Raised	Council Officer Assessment
When the Tavern previously applied for an extension to hours of operation there were many conditions with respect to noise amelioration measures. None of these have been undertaken.	From advice provided to Council by NSW Police it is considered that the amended hours of operation approved under a previous S96 application were not enabled as the tavern failed to obtain a licence from Office of Liquor Gaming and Racing (OLGR) to operate these times. As such, the amelioration measures would not have been required to be implemented.
Anti-social behaviour and noise from bands would be worse with exacerbated by extended hours of operation.	The issue of anti-social behaviour is a matter for NSW Police. This matter is a social issue, rather than planning consideration under the provisions of the Environmental Planning and Assessment Act. In any event amelioration measures have been provided by the applicant with respect to noise from bands. The proposal does not warrant refusal on this issue.
The proposal will result in decreased property values.	This matter is not considered to constitute a planning consideration under the provisions of the Environmental Planning and Assessment Act and the proposal does not warrant refusal on this issue.
Lack of permanent local Police support in Pottsville means that there is a lack of protection to neighbouring properties from anti-social behaviour.	The lack of Police numbers in the Pottsville locality is not a matter of consideration under the provisions of the Environmental Planning and Assessment Act. The proposal does not warrant refusal on this issue.

Issue Raised	Council Officer Assessment
Pottsville does not require extended hours for the consumption of alcohol as there are sufficient liquor retailers in the village. This leads to litter in the streets.	The subject site is appropriately zoned for the existing development on site. Liquor licences deal with the sale of alcohol and are policed by the Office of Liquor Gaming and Racing (OLGR). Littering associated with the proposal is a behavioural issue and not a planning consideration under the provisions of the Environmental Planning and Assessment Act.
The proposed acoustic treatment is not considered sufficient and the ability of the acoustic barrier to operate adequately is questioned.	The application has been reviewed by Councils Environmental Health Unit with respect to this matter, with it being assessed that the submitted Environmental Noise Impact Report is acceptable to relevant industry standards, subject to appropriate conditions of consent.
Tavern was approved as a small family tavern, as a quiet place for people to rest, have a meal and go home safely.	The tavern is defined as a 'hotel' under the Tweed LEP 2000. The behaviour of patrons is a social issue which is not a planning consideration under the Environmental Planning and Assessment Act but rather an operational management/ NSW Police issue. Where this relates to a Plan of Management, the applicant is required to submit to Council for approval. Conditions have been attached to the consent in this regard.
Security should be undertaken by a reputable security firm.	The identity of the security officers is not a planning consideration under the Environmental Planning and Assessment Act.
The proponent of a mixed residential/commercial development approved to the north of the site objects to the proposed hours of operation on the basis that increased trading hours would be detrimental to their properties development due to anti-social behaviour.	The subject site is zoned appropriately for the subject tavern development and the hours of operation are considered acceptable through a reviewable condition to determine if amelioration measures negate impacts on surrounding properties. The behaviour of patrons is a social issue which is not a planning consideration under the Environmental Planning and Assessment Act but rather an operational management/ Police issue. Where this relates to a Plan of Management, the applicant is required to submit to Council for approval. Conditions have been attached to the consent in this regard.

Issue Raised	Council Officer Assessment
<p>When the original DA was approved and Liquor Licensing Court issued a licence, trading hours were determined in order to preserve the tranquillity of the area.</p>	<p>Liquor licences usually reflect the approved trading hours imposed on the development consent. An assessment of the trading hours has been undertaken with the potential impacts to residents taken into account. In this regard it is considered appropriate that a reviewable condition be provided which allows a trial period of extended hours of operation to determine any impacts on the surrounding area. If any extension of trading hours is approved, the liquor licence can be amended as a result. NSW Police and OLGR are responsible for the enforcement of licensing conditions. The proposal does not warrant refusal on this issue.</p>
<p>Anti-social behaviour (including littering, vandalism, cars/motorbikes with loud mufflers) and drink-driving are issues associated with the development at present will be exacerbated by additional hours of operation.</p>	<p>The issue of anti-social behaviour and drink driving is a matter for NSW Police. This is a social issue, rather than planning consideration under the provisions of the Environmental Planning and Assessment Act. The proposal does not warrant refusal on this issue.</p>
<p>The applicants argument for extended opening hours with respect to zoning objectives, community's social needs etc is not supported.</p>	<p>The subject tavern is considered to be located on an appropriately zoned site for such a development and the hours of operation take into account surrounding properties. In this regard, the applicant has submitted an 'Environmental Noise Impact Report' which contains amelioration measures with respect to impacts on surrounding properties. It is recommended that these measures be implemented and a reviewable condition be attached to the consent in order to determine actual impacts arising from extended hours of operation.</p>

Issue Raised	Council Officer Assessment
<p>The submission states that some of the mitigation measures are inconsistent with the Liquor licence provisions, in particular with respect to the playing of live music. It is also noted that mitigation measures outlined in a 2009 Plan of Management have '<i>escaped full-hearted implementation</i>'.</p>	<p>The Liquor licence is assessed independently from the Development Application and the tavern would be required to comply with the provisions of same. The measures outlined in the Environmental Noise Impact Report are considered to mitigate noise impact in the event of music being played. The approval of an amended consent does not allow the playing of music on the site, but rather provide mitigation measures were it to be approved through the Liquor license. With respect to the 2009 Plan of Management, these measures were to be undertaken in order to allow extended hours of operation at that time. Council have been advised by NSW Police that Liquor license approval was not obtained for the extended operating hours at this time and as such it is reasonable to assume that the amended consent which required these management measures was effectively not acted upon.</p>
<p>Amenity of surrounding properties must be protected.</p>	<p>Mitigation measures and a trial period, by way of a reviewable condition, have been proposed in order to protect the amenity of the surrounding properties. The proposed amendment is considered to be acceptable in this regard.</p>
<p>The licence (assume this is liquor licence) restricted trading hours.</p>	<p>The applicant would be required to amend the liquor licence to amend trading hours in this regard. This is not a matter for Office of Liquor Gaming and Racing (OLGR) to consider and is not a planning matter.</p>
<p>The proposed change in hours of operation is not minor and it is requested that Council reject this application in the interests of the community.</p>	<p>The subject application has been reviewed by Councils Environmental Health Unit and it is advised that subject to the implementation of amelioration measures and a reviewable condition with respect to the hours of operation, the proposal was considered to be acceptable.</p>

The recommended extension of hours through a reviewable condition of consent is considered to be a reasonable compromise to the applicant's proposal and the issues raised by the submissions above. The extension of hours of operation is reliant upon the applicant applying the recommendations of the Environmental Noise Impact Report, as well as all additional conditions of consent.

In terms of a negative impact on the community, surrounding residents are encouraged to use the proposed incident report at the Tavern, or lodge any valid complaints with Council or the Police. Without complaints being lodged, issues of non-compliance go unnoticed by the relevant authorities and cannot be substantiated at a later date.

Public interest

The proposed modifications to Development Consent D90/0436 are considered to be acceptable in terms of public interest. The amended conditions of consent will give the

applicant an opportunity to demonstrate that they are capable of running the Tavern at the extended hours, with minimal impact on the local area, whilst the public will also have an opportunity to log any complaints with respect to the extended operating hours, should they occur. The proposed modifications are not considered to result in a significant negative impact upon the surrounding residential area, subject to the continual application amelioration measures as outlined in the Environmental Noise Impact Report and other recommended conditions of consent.

Recommendation

The request to vary Condition 10A as outlined by the applicant is not supported as proposed as it has been insufficiently demonstrated that a trial period was conducted and therefore the impact on the surrounding community has not be adequately assessed.

However proposed noise mitigation works include the construction of permanent barriers surrounding the external areas that may be cost prohibitive should a further 12 month restriction be placed upon the consent. To off-set the concerns raised by the surrounding community a reviewable condition could be imposed to ensure the operators can adequately demonstrate that by adopting noise mitigation measures and satisfactory operational practices impacts can be managed and should this not occur the extended hours of operation would not be permitted to continue. Therefore the following alternative amendments and conditions are recommended:

1. Condition No. 10A is to be deleted and replaced with Condition No. 10B which reads as follows:
10B. Hours of operation:
Sunday to Thursday – 10.00am to 10.00pm
Friday and Saturday – 10.00am to 10pm
Variation of the above hours are permitted for a maximum of six times per year with the written approval of the General Manager, or delegate, of Tweed Shire Council.
Notwithstanding this condition, please see condition No 29 regarding the reviewable condition.
 2. Condition No. 20 is to be deleted and replaced with Condition No. 20A which reads as follows:
20A. The Tavern shall operate in accordance with the Environmental Noise Impact Report prepared by CRG Acoustical Consultants dated 23 July 2013. All mitigation works shall be completed prior to commencement of extended trading hours.
 3. The following new Conditions are to be added:
 27. An updated Plan of Management shall be submitted and approved to the satisfaction of the General Manager or delegate within three months of the date of this consent.
 28. Notification shall be provided within seven days of the commencement of extended hours of trading accompanied by a compliance audit report against the operational conditions of the consent inclusive of the plan of management.
 29. Reviewable Condition
This consent is subject to a reviewable condition under Section 80A of the Environmental Planning and Assessment Amendment Act. The reviewable
-

condition relates to a condition that permits extended hours of operation. The purpose of this condition is to enable Council to monitor potential impacts associated with extended hours of operation at this site on the surrounding area and, if appropriate, to revert the development consent to its previously approved hours of operation.

Extended trading is permitted on Friday and Saturday until 12 Midnight subject to this condition being reviewed by Council after 12 months or upon receipt of a complaint that Council deems to be reasonable from the date the extended trading hours commence.

Council is to provide not less than 14 days written notice to the operator of the development that a review is to be carried out under this condition. Where requested by Council, the proponent is to submit a compliance audit against the operational conditions of the development consent, including the plan of management and noise audit report. Council may notify such other persons as it thinks fit of the review, and must take into account any submissions received within 14 days after notice is given.

Please note see Condition No 10B.

OPTIONS:

1. Approve the amendment of the development consent as outlined above; or
2. Refuse the application for stated reasons.

CONCLUSION:

The assessment has had regard for the issues raised by the public submissions, the applicant's Environmental Noise Impact Report, as well as advice from NSW Police and Councils Environmental Health unit. As a result, the proposed modification to the trading hours of the Tavern is considered to be acceptable, subject to the changes recommended by Council staff, including the provision of a reviewable condition. As such, it is considered that the proposal warrants approval, subject to the recommended amendments to Development Consent D90/0436.

COUNCIL IMPLICATIONS:

a. Policy:

Corporate Policy Not Applicable.

b. Budget/Long Term Financial Plan:

Not Applicable.

c. Legal:

Not Applicable.

d. Communication/Engagement:

Not Applicable.

UNDER SEPARATE COVER/FURTHER INFORMATION:

Nil.

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29 [PR-CM] Section 82A Review of Development Application DA12/0498 for the Demolition of Existing Dwelling and Construction of a Three Storey Dwelling at Lot 1 DP 214686 No. 4 Marine Parade, Kingscliff

SUBMITTED BY: Building and Environmental Health

FILE REFERENCE: DA12/0498 Pt2



Civic Leadership

LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:

- 1 Civic Leadership
- 1.1 Ensure actions taken and decisions reached are based on the principles of sustainability
- 1.1.1 Establish sustainability as a basis of shire planning and Council's own business operations

SUMMARY OF REPORT:

On 27 August 2013 Council received an application for a Section 82A Review of Determination for DA12/0498 which was determined by refusal at Council's meeting of 20 June 2013. The refused application sought approval to demolish an existing two storey dwelling house at No. 4 Marine Parade, Kingscliff and construct a new three storey dwelling house with a total floor area of 325m².

The decision to refuse the application stemmed primarily from the noise nuisance that would be likely to result from the proposed third storey roof top terrace that would only be made possible on this site by exceeding the 9.0m height limit of the Development Control Plan and the two storey limit in the Local Environmental Plan.

The applicant has included amended plans with the Section 82A application which show an overall reduction of the usable roof terrace area of generally 30% and have reduced the spa area from 15m² to 11.5m², lowered the sunlounge deck and added some addition potted trees and planter boxes. The smaller size of the area is acknowledged but the smaller size does not necessarily equate to less impact.

The Review of Determination was formally re-notified to the surrounding landowners and resulted in Council receiving one submission of objection who had also objected to the previously determined application.

The applicant's Section 82A submission in relation to the reasons for refusal including the amendments to the plans is not considered sufficient to alter the substance of the previous report or the recommendation.

On review of the application taking into account the submission of the applicant, the amended roof terrace plan, the submission of the objector and on the balance of the relevant planning matters, it is considered that the proposed development is not suitable for approval and should be refused.

RECOMMENDATION:

That:

- 1. ATTACHMENT 1 is CONFIDENTIAL in accordance with Section 10A(2) of the Local Government Act 1993, because it contains:-**
 - (a) personnel matters concerning particular individuals (other than councillors).**
- 2. The Section 82A Review of Development Application DA12/0498 for the demolition of existing dwelling and construction of a three-storey dwelling at Lot 1 DP 214686 No. 4 Marine Parade, Kingscliff be refused for the following reasons:**
 - 1. Pursuant to Section 79C(1)(a)(i) the development proposal has not demonstrated that compliance with the development standard as being unreasonable or unnecessary in accordance with State Environmental Planning Policy No. 1 – Development Standards:**
 - The impact of the additional storey incorporating a roof top deck has not been adequately justified.**
 - 2. Pursuant to Section 79C(1)(b) the development proposal has not demonstrated acceptable impacts on the built environment:**
 - The development is considered to have negative impact on the amenity of the adjoining property to the southwest.**
 - 3. Pursuant to Section 79C(1)(a)(iii) the development has not demonstrated compliance with Tweed Shire Council Development Control Plan 2008 Section A1 in particular:**
 - The development proposal exceeds the nine (9) metre height limit.**

REPORT:

Applicant: Mrs K Carter and Mr R Carter
Owner: Ms Kristine A Carter
Location: Lot 1 DP 214686 No. 4 Marine Parade, Kingscliff
Zoning: 2(b) Medium Density Residential
Cost: \$1,225,000

Background:

On the 27 August 2013 Council received an application for a Review of Determination for DA12/0498, which originally sought approval for the demolition of an existing two storey dwelling house at No. 4 Marine Parade, Kingscliff and construct a new three storey dwelling house with a total floor area of 325m².

At the Council meeting of 20 June 2013, Councillors resolved to refuse development application DA12/0498 for the following reasons:

- "1. Pursuant to Section 79C(1)(a)(i) the development proposal has not demonstrated that compliance with the development standard as being unreasonable or unnecessary in accordance with State Environmental Planning Policy No. 1 – Development Standards:
 - The impact of the additional storey incorporating a roof top deck has not been adequately justified.
2. Pursuant to Section 79C(1)(b) the development proposal has not demonstrated acceptable impacts on the built environment:
 - The development is considered to have negative impact on the amenity of the adjoining property to the southwest.
3. Pursuant to Section 79C(1)(a)(iii) the development has not demonstrated compliance with Tweed Shire Council Development Control Plan 2008 Section A1 in particular:
 - The development proposal exceeds the nine (9) metre height limit."

The decision to refuse the application stemmed primarily from the noise nuisance that would be likely to result from the proposed third storey roof top terrace that would only be made possible on this site by exceeding the 9.0m height limit of the Development Control Plan and the two storey limit in the Local Environmental Plan.

The applicant has now included amended plans with the Section 82A application which show a reduction of the spa area from 15m² to 11.5m², lowered the sunlounge deck added some addition potted trees and planter boxes and deleted the 23m² artificial turf area. This equates generally to a 30% reduction of the usable area from 118m² to 84m² and this has been achieved largely by deleting an artificial turf area. It is estimated that the 118m² may comfortably accommodate 20 people and the 84m² may accommodate 13 people. These numbers are derived by allowing 3m² per person over the tiled and turfed zones. It is considered that the potential noise nuisance from the occupancy of the smaller space would be potentially similar to the larger area.

Loud conversation, laughing, music etc are the likely noises to emanate from the roof terrace and the proximity of those noises is what would be a disturbance to the amenity of the neighbours at the rear brought about by a design that does not comply with height controls.

The visual privacy afforded to and between adjoining properties by the design is considered to be reasonable.

It is considered that the amended proposal is '*substantially the same development as the development described within the original development*' therefore satisfies Section 82A (4)(c).

The smaller size of the area is acknowledged but the smaller size in this instance does not necessarily equate to less impact.

The Section 82A review application has been notified to the same properties as the original proposal and one objection has been received. The objector maintains that there will be no change to the impact on their amenity from the reduced size and that the applicant's argument referring to a similar amenity issue from 32 Hungerford Lane is unfounded.

The following is an extract of the applicant's justification for the Section 82A application dated 26 August 2013:

".....

4.0 Justification

Pursuant to Clauses (1) and (2) of Section 82A of the Environmental Planning and Assessment Act 1979, this document forms a request for a review of the determination for DA12/0498. Pursuant to Clause (3)(A), 'in requesting a review, the applicant may make amendment to the development described in the original application, subject to subsection (4)(c)'. Subsection (4)(c) states that 'in the event that the applicant has made amendments to the development described in the original application, the consent authority is satisfied that the development, as amended, is substantially the same development as the development described within the original application'. It is considered that minor amendments have been made to the proposed development to further address the refusal items noted by Tweed Shire Council. These amendments do not substantially change the proposed development.

The development application was refused by Tweed Shire Council based on the items raised within Table 1. Comment and justification has been provided for each of the refusal items as below;

TABLE 1 Refusal Item	Justification Provided
<p>1. Pursuant to Section 79C(1)(a)(i) the development proposal has not demonstrated compliance with the development standard as being unreasonable or unnecessary in accordance with State Environmental Planning Policy No. 1 - Development Standards:</p> <ul style="list-style-type: none"> • The impact of the additional storey incorporating a rooftop deck has not been adequately justified. 	<ul style="list-style-type: none"> • As part of the initial development application, Council was provided with a SEPP No.1 Objection to address the proposed developments non-compliance with the building height controls of the Tweed Local Environmental Plan 2000 (TLEP2000). The proposed dwelling exceeds the 9m physical building height limit by 1.2m. This 1.2m exceedance is formed by the balustrade located on the trafficable rooftop deck area. • The application was notified to the adjoining property owners for comment during the application period. Correspondence was received from Tweed Shire Council noting that the rooftop deck was considered to have the potential for a negative impact upon surrounding landowners and further information and justification was requested. • In response to Council's request, a detail survey was undertaken to locate surrounding outdoor living areas and vegetation so as to relate to the proposed location of the rooftop deck. Height and distance detail was used and

<p>TABLE 1</p> <p>Refusal Item</p>	<p>Justification Provided</p>
	<p><i>the results of this survey are illustrated within Drawings 01.10-01.13 of Appendix A - Proposed Development Plans. As detailed, the outdoor living areas of the surrounding properties are located a significant distance away from the rooftop deck area. Appendix B - Supporting Photographs shows the outdoor living areas of the properties elevated above No. 4 Marine Parade.</i></p> <ul style="list-style-type: none"> • <i>Direct views are also obstructed by the vegetation located between No. 4 Marine Parade and the properties elevated above (See Appendix B - Supporting Photographs). To further lessen the potential visual impact of the rooftop deck on surrounding properties, visual and acoustic screening has now been proposed (Drawing No. 08 of Appendix A - Proposed Development Plans). This will serve to create additional privacy for the proponent as well as retaining the existing level of amenity enjoyed by surrounding residents.</i>
<p>2. Pursuant to Section 79C(1)(b) the development proposal has not demonstrated acceptable impacts upon the built environment:</p> <ul style="list-style-type: none"> • The development is considered to have negative impact upon the amenity of adjoining property to the southwest. 	<ul style="list-style-type: none"> • <i>The adjoining property to the southwest is commonly known as No. 34 Hungerford Lane, Kingscliff and is elevated from the subject site. The outdoor living area of this dwelling has been picked up as part of the detail survey that was undertaken (Balcony 3 Drawing No. 01.10 and 01.12 See Appendix A - Proposed Development Plans).</i> • <i>The outdoor living area of No. 34 Hungerford Lane (Balcony 3 Drawing No. 01.10 and 01.12 See Appendix A - Proposed Development Plans) is located immediately adjacent to the outdoor living area of No. 32 Hungerford Lane. No attempt has been made by the owner of No. 34 Hungerford Lane to protect their privacy when using their outdoor area from this direct overlooking. As such, any potential privacy issues as a result of the proposed development (located substantially lower and therefore much less invasive) pale in comparison to the existing privacy issue. The owner has made no attempt to retain their privacy through the use of screening or shutters and therefore it is considered that the proposed rooftop deck located some 8.5m below will not create any unreasonable impact.</i> • <i>As demonstrated, the view of Kingscliff Beach, Cudgen Creek estuary and the Kingscliff Beach Reserve will not be impeded by the proposed development. No loss of visual amenity can be attributed to the proposed development. The vegetation that is located between No. 34 Hungerford Lane and the subject site will obstruct direct view from No. 34 Hungerford Lane onto the rooftop deck area. To further lessen any potential visual impact of the rooftop deck on No. 34 Hungerford Lane, visual screening has been proposed (Drawing No. 08</i>

<p>TABLE 1</p> <p>Refusal Item</p>	<p>Justification Provided</p>
	<p>of Appendix A - Proposed Development Plans). This will serve to create additional privacy for the proponent as well as retaining the existing level of amenity enjoyed by surrounding residents.</p> <ul style="list-style-type: none"> • It is noted that the outdoor living area of No. 34 Hungerford Lane in its current state is subject to noise reception from No. 32 Hungerford Lane, Marine Parade road traffic as well as public use of the Kingscliff Beach Reserve. The outdoor living area of No. 32 Hungerford Lane is located 5m from the edge of No. 34 Hungerford Lane's outdoor living area (See Drawing No. 01.10 of Appendix A - Proposed Development Plans). It is considered that noise generated from this living area would be much greater than any potential noise that the rooftop deck of the proposed dwelling could generate. Both Marine Parade and the Kingscliff Beach Reserve are at their highest use during the summer months when Kingscliff has a high level of tourist activity. The rooftop deck will also be at its highest use during the summer months and will not substantially increase the level of noise generated by the current arrangement. • To allay any fears Council may have related to noise generation, the screening to be located on the rear elevation of the dwelling is to be acoustically treated to ensure that the acoustic amenity of the surrounding properties is maintained (See Appendix A - Proposed Development Plans).
<p>3. Pursuant to Section 79C(1)(a)(iii) the development has not demonstrated compliance with Tweed Shire Council Development Control Plan 2008 Section A 1 in particular:</p> <ul style="list-style-type: none"> • The development proposal exceeds the nine (9) metre height limit. 	<ul style="list-style-type: none"> • As part of the initial development application, Council were provided with a SEPP No.1 Objection to address the proposed developments non-compliance with the building height controls of the Tweed Local Environmental Plan 2000 (TLEP2000). The proposed dwelling exceeds the 9m physical building height limit by 1.2m. This 1.2m exceedance is the balustrade located on the trafficable rooftop deck area. • The proposed dwelling is compliant with the 9m physical height limit as prescribed by Tweed Shire Council. The exceedance of the height limit comes from the trafficable rooftop deck and associated 1.2m high balustrade. The proposed layout of the rooftop deck has been reduced in trafficable area to ensure that the useable portion is set back from the edges of the dwelling (See Drawing 04 Appendix A - Proposed Development Plans). This ensures that any potential overlooking onto the private open space of the adjoining properties is negated. • The additional acoustic and visual screening proposed within Appendix A is to be measured from the finished ground level directly below

TABLE 1 Refusal Item	Justification Provided
	<p><i>the built element. As such, this results in a total height of 8.5m which is compliant with the 8m physical height control.</i></p> <ul style="list-style-type: none"> <i>The trafficable rooftop deck has been proposed on-site due to the limited lot size (417.3m²). The site does not allow for a suitable amount of outdoor private open space due to the steep escarpment of Kingscliff Hill. As such, the proposed dwelling and building height variation is considered to be a well designed and acceptable solution worthy of Council's support.</i>

5.0 Conclusion

Having reviewed the applicable legislation, it is submitted that the proposed development is generally consistent with the relevant policy and statutory requirements and demonstrates an appropriate development of the land. In terms of the built and natural environment, no adverse impacts are likely to result in relation to the proposed development. The variations requested to Council's development controls are considered to be justified by the location and constraints applying to the site. The dwelling will integrate with the existing built character of the Marine Parade and Kingscliff Hill area. Council's support for the proposed development is respectfully requested.

Should you have any further questions relating to this information it is requested that you contact the under signed at our office on (02) 6674 5001."

Response to applicant's justification for the Section 82A Review

Table 1 - Refusal item 1

The above document appears not to address the fact that the first reason for refusal was that the proposed building exceeds the two storey height limit set by the current Local Environmental Plan. It is in fact the additional storey and the consequence of the roof terrace on that storey that exacerbates the likely noise impacts on the neighbour at 34 Hungerford Lane and potentially to the occupants of 36 Hungerford although they have not made any formal submission.

Table 1 - Refusal item 2

The comparison to the outdoor living area of 32 Hungerford Lane is acknowledged but is incorrect in part in that the owner of 34 Hungerford Lane does have a substantial privacy screen on the edge of their verandah that does not adversely obstruct their view and screens them from the adjacent outdoor verandah at 32 Hungerford Lane. Also they advise that they have the potential of enclosing that side of their house with a solid wall for acoustic treatment if they need to in the future without compromising their outlook. The applicants suggestion that the proposed 2.5m high acoustic wall will '*ensure that the acoustic amenity of the surrounding properties is maintained*' is misleading as the acoustic advice by CRG Acoustic Consultants provided by the applicant, is noted as conservative but suggests that to be fully effective an acoustic screen would need to be 4.5m high and return half way along the sides of the building.

Table 1 - Refusal item 3

The proposal does exceed the 9m height limit contained in the current Development Control Plan and the Draft Local Environmental Plan 2012 by 1.2m.

The applicant has included amended plans with the Section 82A application which show a reduction of the spa area from 15m² to 11.5m², lowered the sunlounge deck added some

addition potted trees and planter boxes and deleted the 23m² artificial turf area. This equates generally to a 30% reduction of the usable area from 118m² to 84m² and this has been achieved largely by deleting an artificial turf area. It is estimated that the 118m² may comfortably accommodate 20 people and the 84m² may accommodate 13 people. The smaller size of the area is acknowledged but the smaller size in this instance does not necessarily equate to less impact.

It is difficult to evaluate the likely intensity and frequency of use of the proposed roof terrace and therefore how often nuisance impacts may occur. However what is known is that the designed variation to the height limit and number of storeys is what has facilitated the potential nuisance of a roof terrace in this position.

The letter of objection is a confidential attachment.

DEVELOPMENT/ELEVATION PLANS:



Example provided by applicant of a 'green screen'

Assessment under Section 82A:

On 27 August 2013 Council received a Section 82A application for a Review of Determination for DA12/0498, which originally sought approval for the demolition of an existing two storey dwelling house at No. 4 Marine Parade, Kingscliff and construct a new three storey dwelling house with a total floor area of 325m². At the Council meeting of 20 June 2013, Councillors resolved to refuse development application DA12/0498.

The Section 82A application will be evaluated using the relevant terms of Section 79C of the Act.

As a part of the assessment process numerous site visits by Council's assessing officer have been undertaken to all of the surrounding properties and involving many hours. Impacts have been discussed by phone with the objectors and concerns raised have been discussed in meetings with the applicant planning consultant. A further site inspection from the objectors property was also carried since the Section 82A application was lodged particularly to assess the position of the external entertaining areas of the property at 32 Hungerford Lane.

The previously determined application assessment also utilised the expertise of Council Senior Urban Design Planner who gave assistance in gauging the impact of the development in the context of streetscape and design merit of the building relative to the adjoining buildings and constraints of the site.

This Section 82A review will include reassessment of the impact of the amended roof terrace.

Considerations Under Section 79C Of The Environmental Planning And Assessment Act 1979:

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

Tweed Local Environmental Plan 2000 (TLEP 2000)

Clause 4 - Aims of the Plan

The aims or objectives of the plan are not compromised by the proposed development.

Clause 5 - Ecologically Sustainable Development

For the scale of this development compliance with the submitted BASIX certificate achieves the objective of this clause.

Clause 8 - Consent Considerations

Zone Objectives

The subject site is zoned 2(b) Medium Density Residential. The primary objective of the zone is to encourage development for the purpose of medium density housing that achieves good urban design outcomes. The secondary objectives relate to allowance for non residential and tourist development and to discourage the under-utilization of the land for residential purposes, particularly close to the Tweed Heads sub region area.

The proposed development is not consistent with the primary objective of the zone but it has been argued by the applicant that there are a number of constraints to the site that justify the single dwelling being proposed. The allotment is small, with an area of 417 m², and is only 17m in depth from front to rear making the potential for medium density difficult. Also, the applicant points out that this could be categorised as small lot housing being on a lot less than 450m² which is an alternative form of medium density.

Cumulative Impacts

The proposed building at three storeys is consistent with other buildings in the area and is unlikely to be dominant amongst the Kingscliff hill.

There is an argument for cumulative impact on the locality in that the building does not comply with the two storey height limits of current Local Environmental Plan (LEP). This is somewhat countered by the existing three storey development along Marine Parade. In addition, the draft Tweed LEP 2012 seeks to remove the reference to number of storey and instead limit the height in this area to 9 metres. The proposed development will have a total height of 10.2m (RL 14550) measured to the top of the roof top deck balustrade.

Clause 11 - Zone Objectives

As discussed above.

Clause 15 - Essential Services

All essential services are available within the area.

Clause 16 - Height of Building

In this case a State Environmental Planning Policy No. 1 objection to the number of permissible storeys has been included in the application.

The proposed dwelling exceeds the two storeys permissible and exceeds the total height of 9m contained in the current DCP part A1 by 1.2m. It should be noted however that the proposed 'acoustic green screen' complies with the height provisions of the LEP and DCP because the site rises steeply at the rear and therefore measuring from existing ground level at that point shows compliance.

The proposed building at three storeys is consistent with other buildings in the area and is unlikely to be dominant amongst the Kingscliff hill.

The roof top deck associated with the extra storey will result in an adverse impact on the amenity of residence of at least one rear adjoining property.

Clause 17 - Social Impact Assessment

A social impact assessment is not required given the relatively minor nature of the proposal being satisfied that it is unlikely to have a significant social or economic impact in the locality.

Clause 35 - Acid Sulfate Soils

The site is classified as having the potential for Class 5 soils under the Acid Sulphate Soils mapping. The works proposed are not likely to impact on the affected soils zone.

Clause 39A – Bushfire protection

The site is mapped as bushfire prone however the vegetation resulting in the mapping no longer exists and therefore no further consideration is required.

Other Specific Clauses

None apparent.

State Environmental Planning Policies

SEPP (North Coast Regional Environmental Plan) 1988

Clause 32B: Coastal Lands

This clause controls development which could impede public access to a foreshore or overshadow the foreshore before 3pm midwinter (standard time) or 6.30pm midsummer (daylight saving time).

It is recognised throughout all coastal areas that existing urban areas will have some impact in regards to the shadow of the foreshore.

In this case a State Environmental Planning Policy No. 1 objection has been included in the application and the facts and argument presented are acceptable.

The extent of the shadow is minor and is in fact intercepted by the shadow cast by the hillside and vegetation behind. The applicant describes the shadow as 'invisible' because of the hillside at the rear and there is no significant adverse impact resulting on the foreshore parkland to the east of Marine Parade.

Clause 43: Residential development

The proposed development is consistent with the objectives of the North Coast Regional Environmental Plan 1988 Division 2 for Urban Housing requiring broader consideration of roads, access to services, transport, site erosion and of maximising density.

Clause 81: Development adjacent to the ocean or a waterway

Extract

- (1) *The council shall not consent to a development application for development on land within 100 metres of the ocean or any substantial waterway unless it is satisfied that:*
- (a) *there is a sufficient foreshore open space which is accessible and open to the public within the vicinity of the proposed development,*
 - (b) *buildings to be erected as part of the development will not detract from the amenity of the waterway, and*
 - (c) *the development is consistent with the principles of any foreshore management plan applying to the area.*
- (2) *Nothing in subclause (1) affects privately owned rural land where the development is for the purpose of agriculture.*

The proposed development does not impact on the available foreshore open space, accessibility or amenity of the waterway.

SEPP No. 1 - Development Standards

An objection to development standard contained in the Council's LEP regarding number of storeys and the standard contained in Clause 32B of the North Coast Regional Environmental Plan have been lodged with the development application and have been addressed under separate headings.

SEPP No 55 – Remediation of land

There is no evidence or past land use activity that would suggest that the land is contaminated.

SEPP No 71 – Coastal Protection

The development is generally consistent with the specific provisions and intent of Clause 8 of SEPP 71.

SEPP (Building Sustainability Index: BASIX) 2004

The applicant has provided a BASIX certificate for the proposal which is consistent with the required energy target.

NSW Coastal Policy, 1997

The proposed dwelling is not inconsistent with the Coastal Policy.

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

The Draft Tweed Local Environmental Plan 2012 proposes similar controls to the site as currently exist with the exception of one significant variation. The Draft Plan proposes to remove the two storey height limit and instead apply a maximum building height of 9m.

The proposed building has a height of 9m to the floor level of the roof top deck and has balustrading, spa, decking and planter boxes up to a further 1.2m higher again. The proposed development would not comply with the height controls of the draft plan unless the roof top deck use was removed and therefore not require the balustrading and spa pool etc.

The Draft Local Environmental Plan is now considered imminent. The implications are the same in that the 9m maximum height of the building would form part of the

Local Environmental Plan and carry more weight than the current 9m control in the Development Control Plan and therefore not support the proposed building.

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

Tweed Development Control Plan

A1-Residential and Tourist Development Code

Variation to A1 have been sought for the height of the building, wall plate height, rear deep soil zone, front building line, rear setback and the floor space ratio requirement.

Council's recently adopted amendment to DCP part A1 version 1.5 has effectively removed or minimised some of the non-compliant aspects of this development. Wall plate height and floor space ratio have been removed. Deep soil zone requirements a relaxed and setbacks are also reduced and the consequence is that there are fewer variations to the DCP applicable to the development.

A2-Site Access and Parking Code

Complies generally.

If approved, a condition requiring separate approval for front fencing incorporating driveway sight clearances has been included.

A11-Public Notification of Development Proposals

The application was notified in accordance with policy. Please refer to a further section in the report to view a summary of the submissions and the officer's response to those submissions.

B9-Tweed Coast Strategy

The proposal does not contradict any parts of the Tweed Coast Strategy.

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

Clause 92(a) Government Coastal Policy

The proposed dwelling is not inconsistent with the Coastal Policy.

Clause 92(b) Applications for demolition

Australian Standard 2601 is referred to in the demolition work plan and will be reinforced by conditions should the application be approved.

Clause 93 Fire Safety Considerations

Not applicable.

Clause 94 Buildings to be upgraded

Not applicable.

(a) (v) Any coastal zone management plan (within the meaning of the Coastal Protection Act 1979)

The proposed building is outside the 2100 erosion escarpment line and no specific development controls need to be applied.

Tweed Shire Coastline Management Plan 2005

This plan does not apply to the subject site.

Tweed Coast Estuaries Management Plan 2004

The proposed development will not adversely impact on the Cudgen Creek water quality as the proposal will discharge roofwater only into the existing street stormwater system.

Coastal zone Management Plan for Cobaki and Terranora Broadwater

This plan does not apply to the subject site.

(b) The likely impacts of the development and the environmental impacts on both the natural and built environments and social and economic impacts in the locality

Context and Setting

An infill development is proposed, within an established residential subdivision which has been specifically created for residential development. The proposed development is of a design generally in keeping with the architectural style and residential character of the area taking into account the redevelopment occurring overall in the area, with the exception that the roof top deck which has 118 square metres of usable recreation area may result in an undesirable precedent for development on the lower part of a hillside where higher level dwellings can be affected.

Access, Transport and Traffic

Minimal impact is envisaged, the proposal is a single residence within an approved residential subdivision.

Flora and Fauna

Minimal impact is envisaged; the site has no significant plantings and is part of an existing urban environment.

Site design and Internal design

The roof top deck will have adverse impact on the amenity of the residents of the property to the rear No. 34 Hungerford Lane.

The inclusion of the roof top deck on the proposed three storey building is the primary concern in this development. It raises the level of outdoor living area to a level and position that will impact on the residents of at least one property above. Noise and potential evening illumination will impact on their amenity. The design now incorporates a 2.5m high 'acoustic green screen' on the back edge of the deck which is likely to reduce a little of the noise impact and provide for some greater visual privacy particularly in relation to the position of the spa/pool. It is to be noted that the total height of the building measured from natural ground level at the point of the 'acoustic green screen' does comply with the 9m maximum height requirements of the DCP.

Acoustic advice by CRG Acoustic Consultants has been provided and is noted as conservative but suggests that to be fully effective an acoustic screen would need to be 4.5m high and return half way along the sides of the building. That would be unsightly and contribute further to the non compliant height of the building.

It is difficult to evaluate the frequency of use of the proposed roof top deck which needs to be taken into account when considering what is reasonable. The design of this deck at 118 square metres of usable floor area and a spa/pool would suggest frequent use.

Other than the concern about the roof top deck the building is considered to be of reasonable design taking into account the relationship with the adjacent buildings on either side. The external finishing is mixed and provides good architectural merit. The design provides four off street car parking spaces and includes privacy screening to the second floor balconies to minimise impact on adjoining residences either side.

(c) Suitability of the site for the development

Surrounding Landuses/Development

The proposal is consistent with the surrounding land use and the site is suitable for the proposed development. The property is located within an existing residential area and utilities including reticulated water, public sewer and power are provided to the site. A mixture of old and new dwellings with varying architectural styles exist within the area, the design of the dwelling is considered to be in keeping with the existing residential character of the area.

Flora and Fauna

Minimal impact is envisaged; the site has no significant plantings and is part of an existing urban environment.

Topography

The site rises steeply at the rear of the allotment and the geotechnical reports submitted state that the development could proceed without destabilisation of the adjoining properties.

Site Orientation

The living areas of the dwelling have been mainly orientated to the north and northeast to optimise ocean views and breezes and solar access to the north.

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

The objector has reiterated concerns regarding the loss of amenity and these concerns are considered justified.

(e) Public interest

The development will not have an adverse impact or compromise public interest.

OPTIONS:

1. Uphold the decision to refuse the application based on the three reasons for refusal previously determined; or
2. Support in principle the development application and that a report be brought forward to the next Council meeting providing recommended conditions of consent.

CONCLUSION:

No substantive additional information has been lodged to cause a different recommendation. The amended plans providing reduction of the usable area of the roof terrace are not considered likely to remove the potential impact on the amenity of the occupants of 34 Hungerford Lane. The proposed development exceeds the number of storeys permitted by the current Local Environmental Plan, exceed the 9m height limit in the DCP and the Draft LEP. The use of the roof as a deck necessitates the provision of a balustrade which then

creates non-compliance in the height of the building of 1.2m. It is these two variations that will result in the adverse impact on the amenity of the residents behind and although there is uncertainty in the likely frequency and intensity of use of the deck it is considered that these variations are not justified and the proposal should be refused.

COUNCIL IMPLICATIONS:

a. Policy:

Corporate Policy Not Applicable.

b. Budget/Long Term Financial Plan:

Not Applicable.

c. Legal:

Should the applicant be dissatisfied with the determination they have the right to appeal the decision in the Land and Environment Court which would incur financial costs to Council in defence.

Should the applications be approved there is potential for the objector to lodge an appeal against the adequacy of the processing of the application which would incur financial costs to Council in defence.

d. Communication/Engagement:

Not Applicable.

UNDER SEPARATE COVER/FURTHER INFORMATION:

(Confidential) Attachment 1. Letter from objector dated 12 September 2013 (ECM 3179353)

30 [PR-CM] Application for a Site Compatibility Certificate for Seniors Housing Development Lot 13 DP 868620, Cudgen Road Cudgen

SUBMITTED BY: Development Assessment



Civic Leadership

LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:

- 1 Civic Leadership
 - 1.2 Improve decision making by engaging stakeholders and taking into account community input
 - 1.2.1 Council will be underpinned by good governance and transparency in its decision making process
-

SUMMARY OF REPORT:

The NSW Department of Planning and Infrastructure (DP&I) have requested comments from Council regarding an application for a site compatibility certificate for a senior's housing development at Cudgen. The proposal is for 261 dwellings. Two dwelling types are proposed being 90m² apartments and 155m² town houses. The development site would be split into a northern sector and a southern sector. The proposal includes an internal road network, on site ancillary facilities, bus and ambulance. Each dwelling will have one undercover car park and one driveway parking space. The development falls under the provision of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004.

Under the State Environmental Planning Policy (SEPP) a senior is defined as any of the following:

- (a) people aged 55 or more years,
- (b) people who are resident at a facility at which residential care (within the meaning of the *Aged Care Act 1997* of the Commonwealth) is provided,
- (c) people who have been assessed as being eligible to occupy housing for aged persons provided by a social housing provider.

Under the SEPP, development proponents have to firstly gain an approved Site Compatibility Certificate (SCC) from the DP&I as a form of "gateway" to enable a development application to be lodged with Council.

Council staff have not had sufficient time to fully review the proponents' Site Compatibility Certificate (SCC) documentation, and were only in a position to provide preliminary comments as part of this report to Council.

Council's water and sewer infrastructure is available in the vicinity and will need extending to service the site the whole site. For example the sewer may need to be pumped to Council's pump station located on Tweed Coast Road to the north of the site rather than utilising the sewer rising main that is located in Cudgen Road.

The Seniors Living SEPP permits residential development for Senior's on rural land provided the site adjoins land zoned primarily for urban purposes. As the site is part zoned rural and part agricultural protection and part environmental protection, the applicant is relying on the site's proximity to the residentially zoned land at Cudgen to pass this threshold test. There has been judicial review of this test and the DP&I will be required to make a legal interpretation of this issue. It should be noted that the land immediately to the east of this site failed this threshold test recently.

It should also be noted that DP&I previously refused to grant concurrence to a development application for a subdivision for the subject site to enable a new police station facility to be built, for the following reasons:

1. The application raises issues of State and regional significance for the preservation and protection of significant agricultural resources;
2. The application is inconsistent with the objectives of the 1(a) Rural and 1(b) Agricultural Protection zones in that it will not result in ecologically sustainable development of land primarily suited and strategically identified for agricultural purposes and does not protect identified prime agricultural land from fragmentation; and
3. Approval of the application will undermine the commitment of the Tweed Shire Council and the State government to protect the remaining land of high agricultural value from urban uses in this locality.

The proposed creation of a new aged residential community in this location poses some concern for Council officers, in the absence of any broader strategic planning investigation and justification, particularly in terms of the Council's long held support of retaining the State Significant Farmland areas of Cudgen. It is therefore the officers' view that Council request the DP&I for additional time to review the SCC documentation prior to submitting a further report for Council's consideration.

If the site compatibility certificate is issued a development application can be submitted to Council for assessment and determined by the Joint Regional Planning Panel as the capital investment value would exceed 20 million dollars.

RECOMMENDATION:

That Council, in respect of the Application for a Site Compatibility Certificate (SCC) for Seniors Housing Development on premises Lot 13 DP 868620 Cudgen Road, Cudgen, writes to the NSW Department of Planning and Infrastructure seeking additional time to review the SCC documentation, and provide more detailed comment through a further report to Council, outlining the broader strategic planning implications of this development.

REPORT:

Applicant: Kingscliff Land Unit Trust C/- Planit Consulting Pty Ltd
Owner: Donald Beck (Director) and Maroun Stephen (Director)
Location: Lot 13 DP 868620 Cudgen Road, Cudgen
Zoning: 1(a) Rural, 1(b1) Agricultural Protection and 7a Environmental Protection
Cost: > \$20 million

BACKGROUND:

The Department of Planning and Infrastructure has requested Council's comments on the site compatibility certificate for a Senior's Living Development at Cudgen.

The application has identified the following constraints:

- Zoned a combination of Rural, Agricultural Protection and Environmental Protection;
- Mapped as State Significant Farm Land;
- Located immediately adjacent to existing agricultural operations;
- Mapped as containing Melaleuca and Swamp She-oak Forest; and
- Mapped as being partially subject to flooding.

Other issues are town water and sewer services and direct access off Tweed Coast Road for the southern sector however there are likely to be engineering solutions for these items.

The key issues for determination are considered to be the State Significant Farmland mapping and the impact on adjacent agricultural land/activities.

It is considered a wider strategic planning assessment for the area should be undertaken prior to providing support for individual site redevelopment that is contrary to current zonings and proposed zonings under the draft Local Environmental Plan 2012 (LEP 2012). The ad hoc nature of strategic compatibility certificates for Seniors Living Development at this key location is not conducive to sound long term planning.

OPTIONS:

Option 1:

- Writes to the NSW Department of Planning and Infrastructure seeking additional time to review the SCC documentation, and provide more detailed comment through a further report to Council, outlining the broader strategic planning implications of this development; or

Option 2:

- Writes to the NSW Department of Planning and Infrastructure providing its support to the SCC application.

Option 3:

- Writes to the NSW Department of Planning and Infrastructure declining to support the SCC application due to its conflict with current strategic planning objectives.

The Council officers recommend Option 1.

CONCLUSION:

Urbanising one parcel of land at this location is considered poor planning and if a move from rural and agricultural use is envisaged a wider planning exercise should be undertaken.

COUNCIL IMPLICATIONS:

a. Policy:

Council's Rural Lands Strategy process and broader rural land use and LEP approach to the Cudgen State Significant Farmland area.

b. Budget/Long Term Financial Plan:

Not Applicable.

c. Legal:

Not Applicable.

d. Communication/Engagement:

Not Applicable.

UNDER SEPARATE COVER/FURTHER INFORMATION:

Attachment 1.

Development Concept Plans (ECM 3181967).

31 [PR-CM] Development Application DA13/0221 for a Pontoon Boat and Water Sports Boat Operation on the Tweed River from Fingal Boat Ramp with Passenger Pick Up/Set Down from Beach at Old Barney's Point Bridge Jetty at Lot 403 DP 755740 Main Road Fingal Head;

SUBMITTED BY: Development Assessment

FILE REFERENCE: DA13/0221 Pt1



Civic Leadership

LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:

- 1 Civic Leadership
 - 1.1 Ensure actions taken and decisions reached are based on the principles of sustainability
 - 1.1.1 Establish sustainability as a basis of shire planning and Council's own business operations
-

SUMMARY OF REPORT:

The proposed development is for approval of a Water Sports Boat and a Barbeque Pontoon Boat operation on the Tweed River between Tweed Heads and Murwillumbah. The boats are to be launched from Fingal boat ramp with passenger pick up/set down from beach at old Barney's Point Bridge. Passenger car-parking is to be provided at the BP Chinderah nearby.

The water sports boat is to engage in tow water sport activities including skiing, wakeboarding, wake skate, ski chair, tube and kneeboard in the Tweed River reach located between the Cane Road Bridge and Stotts Island. Outside of these areas the boat is to be operated without water ballast. This boat can seat up to 9 people. The Pontoon boat is to be available for 12 people in a self-drive arrangement or 22 people if skippered.

The proposed development is considered to be generally deficient in terms of information submitted, however assessment of the proposal against the applicable planning policies has demonstrated that the proposal is not considered to be able to comply with these and as such refusal of the application is recommended.

Furthermore, the proposed development is considered to raise a number of environmental and social issues which have not being adequately addressed. As sufficient information has not been submitted to enable support of the application it is recommended that the proposal be refused on these reasons also.

The application has been called up for determination through a full Council meeting by an elected member.

Having regard to relevant statutory controls and an assessment against the relevant legislative policies, the proposed development is not considered suitable for the location and therefore the proposed development is recommended for refusal.

RECOMMENDATION:

That Development Application DA13/0221 for a Pontoon Boat and Water Sports Boat Operation on the Tweed River from Fingal Boat Ramp with Passenger Pick Up/Set Down from Beach at Old Barney's Point Bridge Jetty at Lot 403 DP 755740 Main Road Fingal Head; Lots 9 and 10 DP 24164; Lots 9-12 DP 830655 Nos. 2-12 Chinderah Bay Drive, Chinderah and Tweed River, Tweed Heads be refused for the following reasons:

1. Pursuant to Section 5 Objects of the Environmental Planning & Assessment Act 1979 (as amended), the proposed development cannot be determined to satisfy sub section (a)(ii), the orderly and economic use and development of the land.

The proposal has the ability to impact negatively upon adjacent land; accordingly the proposal is not identified as satisfying the Objects of the Environmental Planning & Assessment Act 1979.

2. Pursuant to Section 5 Objects of the Environmental Planning & Assessment Act 1979 (as amended), the proposed development cannot be determined to satisfy sub section (a)(vi), the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats.

The proposal has the ability to impact upon the protection and conservation of native animals and plants; accordingly the proposal is not identified as satisfying the Objects of the Environmental Planning & Assessment Act 1979.

3. Pursuant to Section 79C(1)(a)(i) of the Environmental Planning & Assessment Act 1979 (as amended) the proposed development is not considered to be compliant with Environmental Planning Instruments.

The proposed development is inconsistent with the aims of:

State Environmental Planning Policies:

- SEPP 14: Coastal Wetlands
- SEPP 64: Advertising and Signage (Clauses 10 and 27)
- SEPP 71: Coastal Protection (Clause 8(a), (d), (g), (h), (k), (l), (n) and (p)(i))
- NCREP: Clauses 15, 32B, 75 and 76

The proposed development does not satisfy the provisions contained within:

The Tweed LEP 2000:

- Clause 4: Aims of this plan
- Clause 5: Ecologically sustainable development
- Clause 8(1): Consent Considerations
- Clause 11: Zoning
- Clause 13: Development of uncoloured land on the zone map
- Clause 25: Development in Zone 7(a) Environmental Protection (Wetlands and Littoral Rainforests) and on adjacent land
- Clause 29: Development adjacent to Zone 8(a) National Parks and Nature Reserves

· Clause 31: Development adjoining waterbodies

4. The proposal is inconsistent with the applicable management plans that highlight the need to protect ecology and reduce erosion within the vicinity of the Tweed River.
5. Pursuant to Section 79C (1) (c) of the Environmental Planning & Assessment Act 1979 (as amended) the proposed site is not considered suitable for the proposed development.

The use of unzoned land adjacent to environmental conservation areas of State significance for the purposes of water sports boat operation is considered unacceptable due to its possible impact on and loss of habitat, due to river erosion.

6. Pursuant to Section 79C (1) (b) of the Environmental Planning & Assessment Act 1979 (as amended) due to the likely impacts of the proposed development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.

The proposed development would have an unacceptable impact with respect to amenity and noise impacts on surrounding residents and other passive recreational river users as well as having an unacceptable negative impact on cumulative river erosion in the operational area.

7. In accordance with Section 79C (1) (e) of the Environmental Planning & Assessment Act 1979 (as amended) the proposed development is not considered to be in the public interest.

It is in the broader general public interest to enforce the standards contained within the Tweed LEP 2000 specifically as it relates to the objectives of unzoned land and the 1(b2) Agricultural Protection, 2(a) Low Density Residential, 3(d) Waterfront Enterprise, 4(a) Industrial, 5(a) Special Uses, 6(a) Open Space, 6(b) Recreation, 7(a) Environmental Protection (Wetlands and Littoral Rainforests), 7(d) Environmental Protection (Scenic/Escarpment) and 8(a) National Parks and Nature Reserves zones.

8. The development does not satisfy Section 79C of the Environmental Planning and Assessment Act, particularly Section (a)(ii) - *the provisions of any Draft Environmental Planning Instruments* in that the development is prohibited within the RE1 Public Recreation, W3 Working Waterways, W2 Recreational Waterways and SP2 Infrastructure zones.
9. The development does not satisfy Section 79C of the Environmental Planning and Assessment Act, particularly Section (a)(ii) - *the provisions of any Draft Environmental Planning Instruments* in that the development is inconsistent with the objectives of the RE1 Public Recreation, W3 Working Waterways, W2 Recreational Waterways and SP2 Infrastructure zones.

REPORT:

Applicant: Tweed River Wake & Ski Pty Ltd
Owner: Tweed Shire Council
Location: Lot 403 DP 755740 Main Road Fingal Head; Lots 9 and 10 DP 24164; Lots 9-12 DP 830655 Nos. 2-12 Chinderah Bay Drive, Chinderah and Tweed River, Tweed Heads
Zoning: 6(a) Open Space, 7(a) Environmental Protection (Wetlands & Littoral Rainforests), 3(d) Waterfront Enterprise
Cost: Nil

Background:

Subject Site

The proposed development is to be undertaken over a number of different land parcels, summarised as follows:

Fingal Head Boat Ramp- Lot 403 DP 755740 Main Road, Fingal Head

It is proposed to launch the boats at the Fingal Heads Boat Ramp, which is situated in a recreational reserve with an area of 4.123 hectares. The eastern portion of the land is heavily vegetated and zoned 7(a) Environmental Protection. The remaining portion of the land (and perimeter - eastern and southern boundaries) is zoned 6(a) open space. The boat ramp is located in the north western section of the site.



Figure 1: Aerial view of Fingal Head Boat Ramp site

Lots 9 and 10 DP 24164 and Lots 9-12 DP 830655 Nos. 2-12 Chinderah Bay Drive, Chinderah

These allotments are currently developed with a BP Chinderah service station. It is proposed to provide both customer and staff vehicles (and boat trailers) to a 300m² area to the north of this site.



Figure 2: Aerial view of BP Chinderah Car parking area

Pick up/set down point adjacent to Barneys Point Bridge, Chinderah

It is proposed to pick up and set down boat passengers at the sandy beach between Banora Point Bridge and the old Barneys Point Bridge (jetty).



Figure 3: Aerial view of Barney Point Bridge Pick up and Set-down point

Tweed River

The pontoon and water sports boats are to operate on the Tweed River between Murwillumbah and Tweed Heads. It is stated that the water sports boat is to engage in tow water sport activities including skiing, wakeboarding, wake skate, ski chair, tube, kneeboard in the reach located between the Cane Road Bridge and Stotts Island only. The Tweed River adjoins a multitude of various land zones, including environmentally sensitive land which is detailed elsewhere in this report.

Proposed Development

Council is in receipt of an application for a commercial boating operation on the Tweed River between Tweed Heads and Murwillumbah. The proposal comprises of a Water Sports Boat and a Barbeque Pontoon Boat. The water sports boat is to engage in tow water sport activities including skiing, wakeboarding, wake skate, ski chair, tube, kneeboard in the reach located between the Cane Road Bridge and Stotts Island. Outside of these areas the boat is to be operated without water ballast or wake enhancing devices. This boat can seat up to 9 persons. The Pontoon boat is to be available for 12 people in a self-drive arrangement or 22 people if skippered.

The boats are to be launched from Fingal Head Boat Ramp, with passenger pick up and set down to be from the sandy beach between Banora Point Bridge and the old Barneys Point Bridge Jetty which is opposite BP Chinderah. Car parking of customer vehicles and staff

vehicles (and boat trailers) is to be at the BP Chinderah site where an area of approximately 300m² has been allocated for parking.

The proposal seeks consent to operate between 8.00am and 4.00pm seven days per week.

The proposal is defined as 'tourist facilities' under the Tweed Local Environmental Plan 2000 (LEP 2000). In order for this use to be permissible on unzoned land (the Tweed River), it must be compatible with surrounding development and zones. Due to the length of the Tweed River from Murwillumbah to Tweed Heads (a distance of approximately 30km) there are multiple adjoining zones including 1(a) Rural, 1(b2) Agricultural Protection, 2(a) Low Density Residential, 3(c) Commerce and Trade, 3(d) Waterfront Enterprise, 4(a) Industrial, 5(a) Special uses, 6(a) Open Space, 6(b) Recreation, 7(a) Environmental Protection (Wetlands and Littoral Rainforests), 7(d) Environmental Protection (Scenic/Escarpment) and 8(a) National Parks and Nature Reserves. The proposal is inconsistent with the provisions of many of these zones, and would be prohibited in the 7(a), 7(d), 8(a) and 2(a) zones.

The proposed development is also considered to raise a number of issues regarding river erosion, local amenity, impact upon the ecosystem and critical habitats, conflict with existing recreational river uses, proximity to residential development and suitability for the site given the environmental sensitivity of the area which are detailed elsewhere in this report.

The applicant was advised that Council officers did not support the subject application and was advised to withdraw the development application. The applicant's planning consultant has provided written advice stating that '*our client will not be withdrawing the application*' and that a response was to be provided to the issues raised in Council's correspondence. It was further stated that '*It is not possible to give you a time frame for the response but it will be as soon as possible.*'

Given that the applicant could not provide a timeframe for the submission of further information, it was determined that the application should be determined. The applicant has submitted a seven page submission in response to the issues raised in Council correspondence. This submission includes a request that a separate consideration of the low impact pontoon boat use be provided. It is considered that irrespective of how the application is to be modified in this way, sufficient information has not been provided in order for Council officers to determine that the proposal would result in an appropriate development proposal and in this regard the development application is not supported.

Development History

Council has received two applications in recent times which are of particular relevance with respect to the development history of the subject site.

DA11/0356- Wakeboarding coaching clinic between Fingal and Chinderah along the Tweed River (operating from Fingal boat ramp). Refused 21 February 2012.

The reasons for refusal included the following:

- The proposed development cannot be determined to satisfy the orderly and economic use and development of the land.
- The proposed development cannot be determined to satisfy the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats.
- The proposal has the ability to impact upon the protection and conservation of native animals and plants.

- The proposal is not considered to be compliant with relevant Environmental Planning Instruments.
- The proposal is inconsistent with management plans produced by Council and the Maritime authority that highlight the need to protect ecology and reduce erosion within the vicinity of the Tweed River.
- The proposed site is not considered suitable for the proposed development.
- The proposed development is not considered to be in the public interest.

DA11/0144- Commercial boat hire operations on the Tweed River from Fingal boat ramp.
Withdrawn 25 May 2011.

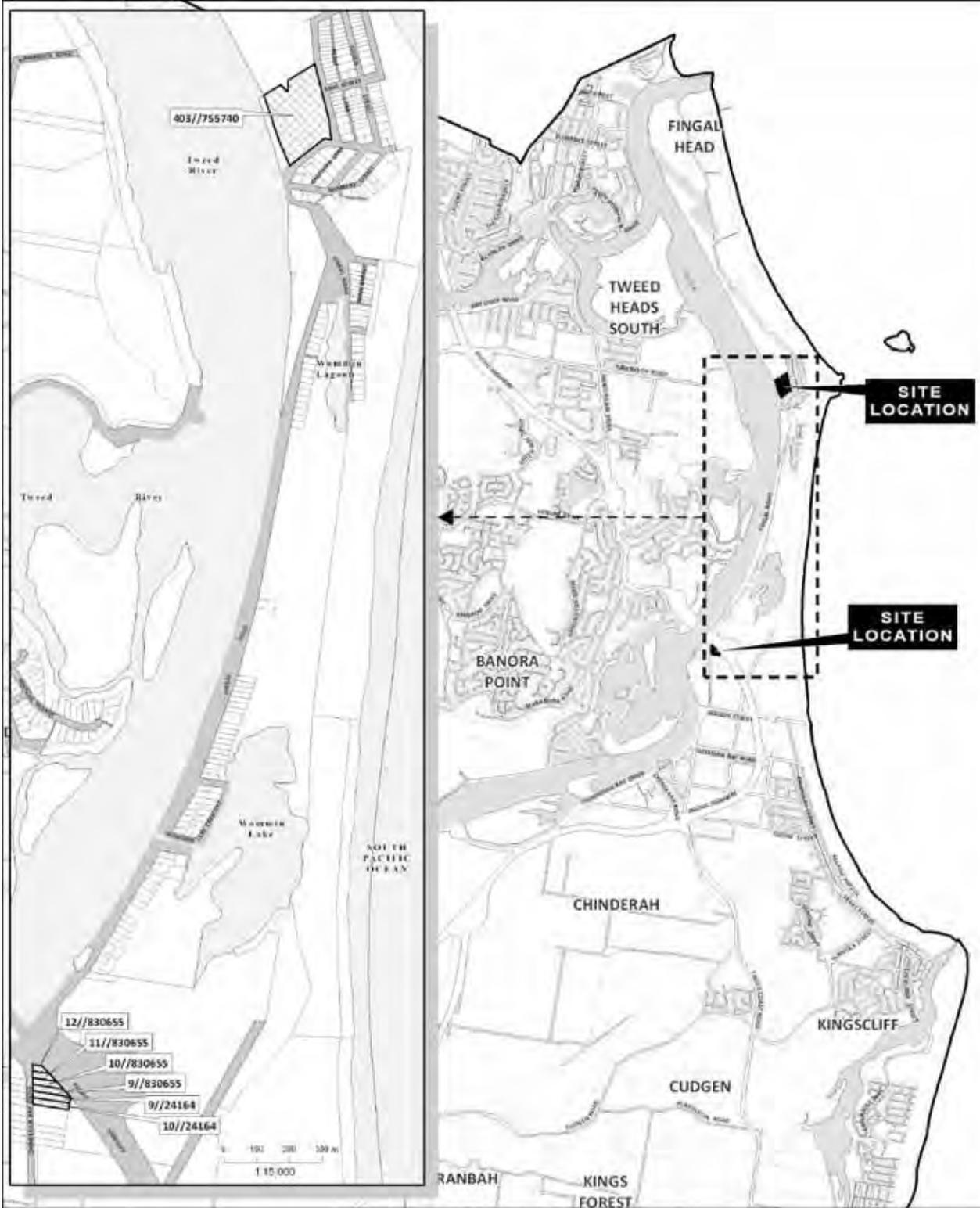
Public Submissions

The proposal was advertised in accordance with DCP A11 – Public Notification of Development Proposals for a period of 14 days from Wednesday 29 May to Thursday 13 June 2013. During this time, 27 submissions were received, with a further three late submissions received. A full assessment of the submissions is provided in the body of this report.

Summary

Having regard to relevant statutory controls and an assessment against the relevant legislative policies, the proposed development is not considered suitable for the location and therefore the proposed development is recommended for refusal.

SITE DIAGRAM



Locality Plan
 Strata Plan 79995 and Strata Plan 80159
 14-22 Stuart Street, Tweed Heads

Disclaimer: This site plan is to be used in conjunction with the relevant Council's Local Government Act 1995 (NSW) and the relevant Council's Local Government Act 1995 (NSW) and the relevant Council's Local Government Act 1995 (NSW). It is not intended to be used as a legal document and should not be relied upon for any legal purpose. The information contained in this document is for general information only and should not be used as a legal document.

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City and Cultural Centre
 2 Macquarie Road
 Murumbidgee NSW 2454
 PH (61) 616 3466
 MURUMBIDGEE NSW 2454
 T (61) 616 3466
 F (61) 616 3466
 E information@tweedshire.gov.au

TWEED SHIRE COUNCIL

Considerations under Section 79C of the Environmental Planning and Assessment Act 1979:

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

Tweed Local Environmental Plan 2000 (TLEP 2000)

Clause 4 - Aims of the Plan

Clause 4 illustrates that the aims of the Tweed Local Environmental Plan (TLEP 2000) are to give effect to the desired outcomes, strategic principles, policies and actions of the Tweed Shire 2000+ Strategic Plan. The vision of the plan 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*". Clause 4 further aims to provide a legal basis for the making of a DCP to provide guidance for future development and land management, to give effect to the Tweed Heads 2000+ Strategy and Pottsville Village Strategy and to encourage sustainable economic development of the area which is compatible with the Shire's environmental and residential amenity qualities.

The subject development application is not considered to be in accordance with the above in that it is likely to compromise the unique natural character of the Tweed River. The proposal has not demonstrated that it is compatible with the Shire's environmental and residential amenity qualities and as such is considered to be in contravention of this Clause. Refusal of the application is recommended in this regard.

Clause 5 - Ecologically Sustainable Development

The TLEP 2000 aims to promote development that is consistent with the four principles of ecologically sustainable development, being *the precautionary principle, intergenerational equity, conservation of biological diversity and ecological integrity and improved valuation, pricing and incentive mechanisms*.

The subject proposal is not considered consistent with the above criteria in that the proposed activities on the Tweed River threaten biological diversity and ecological integrity. Approval of the proposal is considered likely to have negative ramifications for ecologically sustainable development principles on the Shire's waterways and it is recommended that the application be refused in this regard.

Clause 8 - Consent Considerations

This clause specifies that 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 that those other aims and objectives of this plan (the TLEP) 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.*

In this instance, the boats are to be launched on land zoned 6(a) Open Space at Fingal Boat Ramp, passengers are to be picked up at Barneys Point Bridge which

is unzoned Road Reserve and passenger cars are to be parked on land zoned 3(d) at BP Chinderah.

The boating operations are to be undertaken on unzoned waterway between Tweed Heads and Murwillumbah. Development on unzoned land is detailed further under Clause 13 below.

The proposed development would be defined as 'Tourist Facilities' under the provisions of the TLEP 2000 which means:

'An establishment principally used for the recreation or enjoyment of tourists and may include an amusement park, boat shed, boating facility, cruise craft dock, tavern, marina, playground, refreshment room, shop, theme park, water sport facilities or the like or a club used in conjunction with any such activities.'

Under the TLEP 2000, tourist facilities are permitted with consent in the 6(a) Open Space and 3(d) Waterfront Enterprise zones.

The primary objectives of the abovementioned zones (and consistency of the proposal with the objectives) are as follows:

6(a) Open Space

- *To identify existing public land and land that is proposed to be acquired for public ownership to satisfy the open space and recreational needs of local residents and visitors to the area of Tweed and to enable its development to encourage or assist their recreational use and enjoyment of the land.*

The purpose of 6(a) zoned land is to 'satisfy the open space and recreational needs of local residents and visitors to the area of Tweed'. Development should only be encouraged to assist this recreational use and enjoyment.

The proposal represents a commercial use of the river which it is considered to compete with many of the recreational uses and enjoyment of the land by local residents and visitors to the area solely for recreational purposes. In this regard the proposal is not considered to be in accordance with the primary objective of the zone.

3(d) Waterfront Enterprise

- *To encourage development related to waterfront and marine activities, recreation or tourism.*

The purpose of 3(d) zoned land is to 'encourage development related to waterfront and marine activities, recreation or tourism. In this regard the proposal is considered to encourage development for tourism purposes and therefore complies with the primary objective of the zone.

Other aims and objectives of the TLEP 2000 that are relevant to the proposal have been considered and are discussed in the body of this report.

The Tweed River is recognised as having a unique value within the Northern Rivers Region. The proposal has the potential to impact negatively and detrimentally upon the river system and existing recreational use of the river, as outlined elsewhere in this report. The development is considered to have an unacceptable cumulative impact on the community, the locality and on the area of Tweed as a whole which is detailed further elsewhere in this report.

Clause 11 - Zone Objectives

Primary objectives of the relevant zones have been discussed under Clause 8 above in relation to the proposal.

Secondary objectives for the relevant zones include the following:

6(a) Open Space

- To allow other development that is compatible with the recreational use of the land.

The proposal is not considered to be compatible with the recreational use of the land as it creates conflict with other passive river uses.

3(d) Waterfront Enterprise

- *to allow for residential development in association with waterfront, tourist or recreational uses.*
- *to allow for other development that is compatible with the primary function of the zone.*

While subject application does not propose any residential development it has been advised under Clause 8 that the proposal is considered to be compatible with the primary objective of the 3(d) zone.

In any event, it is considered that the development application as a whole is not compatible with the primary (as outlined above) or secondary objectives of the 6(a) Open Space zone and in this regard the proposal is therefore not in accordance with Clause 11 of the TLEP 2000.

Clause 13 – Development of uncoloured land on the zone map

The submitted application states that the proposed development is to operate on navigable parts of the Tweed River between Murwillumbah and Tweed Heads. The Tweed River is unzoned under the provisions of this TLEP and as such this clause applies to the development application. Furthermore, passenger pick-up and set-down is to be undertaken on unzoned Road Reserve at Barneys Point Bridge.

The objectives of Clause 13 are as follows:

- To enable the control of development on unzoned land.
- To ensure that development of unzoned land is compatible with surrounding development and zones.
- To ensure that development of certain waters takes account of environmental impacts and other users of the waters.

In deciding whether to grant consent to development on unzoned land, the consent authority must consider:

- a) *whether the proposed development is compatible with development permissible in the adjoining zone and the character and use of existing development in the vicinity.*

Due to the length of the Tweed River from Murwillumbah to Tweed Heads (a distance of approximately 30km) there are multiple adjoining zones and development characters in the vicinity of the development area as outlined below:

1(a) Rural

Primary objectives

- to enable the ecologically sustainable development of land that is suitable primarily for agricultural or natural resource utilisation purposes and associated development.
- to protect rural character and amenity.

Secondary objectives

- to enable other types of development that rely on the rural or natural values of the land such as agri- and eco-tourism.
- to provide for development that is not suitable in or near urban areas.
- to prevent the unnecessary fragmentation or development of land which may be needed for long-term urban expansion.
- to provide non-urban breaks between settlements to give a physical and community identity to each settlement.

Tweed River adjoins land zoned for 1(a) purposes, the objectives of which are outlined above. A tourist facility development is permissible in this zone. The 1(a) land is located adjacent to areas of the river which are not to be utilised for water sports activities which has been identified as contributing to river bank erosion to an unacceptable level. Having regard to this, and the permissibility of the tourist facility development in this zone, the proposal is considered to be acceptable.

1(b2) Agricultural Protection

Primary objective

- to protect identified prime agricultural land from fragmentation and the economic pressure of competing land uses.

Secondary objective

- to allow other development that is compatible with agricultural activities.

Tweed River adjoins vast tracts of land zoned 1(b2) between Chinderah and Murwillumbah. A tourist facility development is prohibited in this zone in this regard is considered to be incompatible with this land use. As outlined elsewhere in this report, Councils Natural Resource Management Unit have advised that the water sport activities component of the proposal '*will add to the cumulative impact of wake waves on river bank erosion in the subject reach.*' As such it is considered that the proposed use would be in contravention of the objectives of the zone as erosion of the river bank at these locations would not protect the agricultural use of the land.

2(a) Low Density Residential

Primary objective

- To provide for and maintain a low density residential environment with a predominantly detached housing character and amenity.

Secondary objective

- To allow some diversity of housing types provided it achieves good urban design outcomes and the density, scale and height is compatible with the primary objective.
- To allow for non-residential development that is domestically based, or services, the local needs of the community, and does not detract from the primary objective of the zone.

The Tweed River adjoins land zoned 2(a) under the TLEP 2000 to the southern bank of the river between Murwillumbah and Condong.

Commercial use of the river of this nature and intensity adjacent to dwellings is likely to impact negatively on low density residential amenity and is not consistent with the primary objective for this zone within which tourist facilities are prohibited.

With respect to the secondary objectives, the proposal is not domestically based nor does it is considered to service the local needs of the community. In this regard the proposal is not considered to be compatible with development permissible in the adjoining zone or the character and use of existing development in the vicinity of the river.

3(c) Commerce and Trade

Primary objective

- to provide for commercial, bulky goods retailing, light industrial and trade activities which do not jeopardise the viability or function of the sub-regional or business centres.

Secondary objectives

- to provide for those retailing activities which are not suited to, or desirable in, the other business zones or which serve the needs of the other businesses in the zone.
- to allow for other development that is compatible with the primary function of the zone.

Tweed River adjoins a section of land zoned 3(c) between 51 and 65 Tweed Valley Way. A tourist facility is a permissible use in this zone and it is considered that the proposal could be broadly identified as complying with the primary objective of the zone. In this regard, the proposal is considered acceptable.

3(d) Waterfront Enterprise

The unzoned road reserve site at Barneys Point Bridge allocated for passenger pick-up and set-down adjoins land zoned 3(d).

3(d) Waterfront Enterprise objectives and development permissibility have been discussed under Clause 8 and Clause 11 above with it being determined that in this instance the tourist facilities development is considered to be compatible with the primary objective of the 3(d) zone and represents an allowable use at this location.

4(a) Industrial

Primary objectives

- to provide land primarily for industrial development.

- to facilitate economic activity and employment generation.

Secondary objective

- to allow non-industrial development which either provides a direct service to industrial activities and their work force, or which, due to its type, nature or scale, is inappropriate to be located in another zone.

The Tweed River adjoins land zoned for industrial purposes at Condong Sugar Mill. Tourist facilities are prohibited in this zone. Whilst it could be argued that the proposal would '*facilitate economic activity and employment generation*' it is considered that the proposal does not comply with the other objectives of the zone.

5(a) Special Uses (Proposed Classified Road)

Primary objective

- to identify land which is developed or is proposed to be developed, generally by public bodies, for community facilities and services, roads, railways, utilities and similar things.

Secondary objective

- to provide flexibility in the development of the land, particularly if it is not yet or is no longer required for the relevant special use.

The Tweed River adjoins land zoned 5(a) Special Uses (Proposed Classified Road) at Barneys Point Bridge. The proposed tourist facilities are prohibited in this zone and in this regard is not considered to be compatible with development permissible in the adjoining zone.

6(a) Open Space

- *To identify existing public land and land that is proposed to be acquired for public ownership to satisfy the open space and recreational needs of local residents and visitors to the area of Tweed and to enable its development to encourage or assist their recreational use and enjoyment of the land.*

6(a) Open Space objectives and development permissibility have been discussed under Clause 8 and Clause 11 above with it being determined that in this instance the subject proposal would not be in accordance with the primary objective of the zone.

Land zoned 6(a) is located on both sides of the Tweed River in close proximity to Fingal Boat ramp.

6(b) Recreation

Primary Objective

- To designate land, whether in public or private ownership, which is or may be used primarily for recreational purposes.

Secondary objective

- To allow for other development that is compatible with the primary function of the zone.

Tourist facilities are permissible with consent (Item 2) in this zone which occurs on the northern side of the Pacific Motorway bridge at Barney's Point.

7(a) Environmental Protection (Wetlands and Littoral Rainforests)

The objectives of this zone are:

Primary

- To identify, protect and conserve significant wetlands and littoral rainforest.
- To prohibit development which could destroy or damage a wetland or littoral rainforest ecosystem.

Secondary

- To protect the scenic values of wetlands and littoral rainforests.
- To allow other development that is compatible with the primary function of the zone.

Land in this zone is represented along both sides of the river in the designated area of operation as islands or foreshore.

The proposal is inconsistent with both primary objectives of this zone and the tourist facility development is prohibited in this zone. The commercial intensity of the proposal compromises protected areas and has the potential to impact negatively upon wetland and/or littoral rainforest ecosystems.

7(d) Environmental Protection (Scenic/Escarpment)

The objectives of this zone are:

- To protect and enhance those areas of particular scenic value to the area of Tweed, minimise soil erosion from escarpment areas, prevent development in geologically hazardous areas, and maintain the visual amenity of prominent ridgelines and areas.
- To allow other development that is compatible with the primary function of the zone.

The proposal does not protect or enhance areas of particular scenic value to the Tweed and is inconsistent with the primary objective in this regard. Furthermore, the proposal is a prohibited form of development in this zone. As such the use of the Tweed River for tourist facility purposes adjacent to this 7(d) land is not considered to constitute a use that is compatible with adjoining zone.

8(a) National Parks and Nature Reserves

The primary objectives of this zone are:

- To identify land which is reserved or dedicated under the *National Parks and Wildlife Act 1974*.
- To allow for the management and appropriate use of that land as provided by that Act.

Use of the Tweed River adjacent to this zone for the proposed tourist facilities is not compatible with development permissible in this adjoining zone as tourist facilities are prohibited under this zone and not considered to be consistent with the management and appropriate use of that land in accordance with the Act.

Furthermore, it is noted that the proposed area of operation (Tweed River) also adjoins land zoned under the Tweed City Centre LEP 2012. In this regard the unzoned land (Tweed River) adjoins land zoned RE1 Public Recreation, R3

Medium Density Residential and W2 Recreational Waterways under the provisions of this LEP. Under this LEP the proposed development would be defined as a 'business premises'.

RE1 Public Recreation

The objectives of this zone are;

- To enable land to be used for public open space or recreational purposes.
- To provide a range of recreational settings and activities and compatible land uses.
- To protect and enhance the natural environment for recreational purposes.

A business premises is prohibited in this zone. Furthermore, the proposal is a commercial use of the river which it is considered to compete with many of the potential recreational activities and uses. In this regard the proposal is not considered to be in accordance with the objective of the zone.

R3 Medium Density Residential

The objectives of this zone are:

- To provide for the housing needs of the community within a medium density residential environment.
- To provide a variety of housing types within a medium density residential environment.
- To enable other land uses that provides facilities or services to meet the day to day needs of residents.

A business premises is permitted with consent in this zone. Although quite a few submissions against the proposal have been received from local residents, it is considered reasonable in this regard to accept that an argument could be construed that the proposed development would provide a facility or service to meet the needs of residents. As such, the proposal is considered to be generally compatible with development permissible in the adjoining zone at this location.

W2 Recreational Waterways

The objectives of this zone are:

- To protect the ecological, scenic and recreation values of recreational waterways.
- To allow for water-based recreation and related uses.
- To provide for sustainable fishing industries and recreational fishing.

A business premises is prohibited in this zone and the proposed development is not considered to be in accordance with the objectives of the zone with respect to the ecological, scenic and recreational values of waterways or by providing for recreational fishing.

The discussion under Clause 8 and Clause 11 concludes that the proposed development is incompatible with existing passive recreational uses of the river in accordance with the objectives of zones 6(a).

It is also concluded under this Clause that the proposed development is inconsistent with the desired development of the 1(b2), 2(a), 4(a), 5(a), 6(a), 7(a), 7(d) and 8(a) zones under the Tweed Local Environmental Plan 2000.

Furthermore under the provisions of the Tweed City Centre Local Environmental Plan 2012 the proposed development is considered to be inconsistent with the desired development the RE1 and W2 zones.

- b) *in the case of unzoned land that is below the mean high-water mark of the ocean or an estuary, bay, lake or river:*
- (i) *whether or not the proposed development would alienate the use of the waters of the ocean, estuary, bay, lake or river from recreational uses or from commercial fishing and, if so, whether there is sufficient area in the locality for those uses to mitigate the adverse effect of the proposed development on those uses, and*
 - (ii) *the provisions of any coastal, estuary or river plan of management in force from time to time that applies to the unzoned land or land in the vicinity, and*
 - (iii) *any impact the proposed development may have on the natural environment.*

The proposed development is considered to conflict with passive recreational uses of the river including rowing, sailing, kayaking, canoeing, bird watching, recreational fishing, sightseeing and the mooring of vessels such as houseboats.

The proposal is inconsistent with management plans produced by Council and the Maritime authority that regulate the use and formulate strategies to preserve and maintain the unique character of the Tweed River and environment. These are outlined elsewhere in this report.

The impact that the proposal may have on the natural environment is discussed later in this report. A thorough assessment has been provided by Council's Natural Resource Management Unit and refusal of the proposal is recommended in this regard.

Conclusion

The proposal is not considered to be in accordance with the provisions of this Clause and refusal of the application is recommended.

Clause 15 - Essential Services

Due to the nature of the proposal which is predominantly on the Tweed River it is considered that the provision of essential services is not required.

Clause 17 - Social Impact Assessment

In accordance with DCP A13 a socio-economic impact assessment is not required in association with this proposal.

Clause 25 – Development in Zone 7(a) Environmental Protection (Wetlands and Littoral Rainforests) and on adjacent land

The uncoloured land upon which the proposal is to take place is located adjacent to land zoned 7(a).

The objective of this clause is:

- *to ensure that wetlands and littoral rainforests are preserved and protected in the environmental and economic interests of the area of Tweed.*

In relation to the proposal, the consent authority must take into account 'the likely effects of the development on the flora and fauna found in the wetlands or littoral rainforest'.

The proposal is at odds with the objective of this clause. It is not considered to be in the environmental interests of the subject area to support the proposal as it has not been demonstrated that it would not impact negatively and cumulatively on sensitive environmental areas of significance.

Clause 29 – Development adjacent to Zone 8(a) National Parks and Nature Reserves

The proposal extends to the river adjacent to Stotts Island and adjacent to Ukerebagh Nature Reserve.

The objective of this clause is:

- *to ensure that development of land adjacent to Zone 8(a) does not have a significant impact on wildlife habitat.*

The proposal is not consistent with the management and appropriate use of the reserve in accordance with the *National Parks and Wildlife Act 1974*. The proposed development does not ensure a high level of protection for this area and resultant disturbance may lead to a significant and permanent impact on wildlife habitat. Council's Natural Resource Management Unit have provided advice which states that the operation of the water sports activities (which operates to Stotts Island) '*will add to the cumulative impact of wake waves on river bank erosion in the subject reach.*' In this regard it is considered that the proposal would be contrary to this Clause and it is recommended that the application be refused in this regard.

Clause 31 – Development Adjoining Waterbodies

The objectives of this clause are:

- to protect and enhance scenic quality, water quality, aquatic ecosystems, bio-diversity and wildlife habitat and corridors.
- to provide adequate public access to waterways.
- to minimise the impact on development from known biting midge and mosquito breeding areas.

The proposal does not impact upon the provision of adequate public access to waterways given that the Fingal Head boat ramp is available to the public. It is considered that with respect to this application the most relevant objective of this clause is:

- to protect and enhance scenic quality, water quality, aquatic ecosystems, bio-diversity and wildlife habitat and corridors.

In the issue of consent, the following matters relevant to the application must be considered and the consent authority must be satisfied that:

- a) the development will not have a significant adverse effect on scenic quality, water quality, marine ecosystems, or the bio-diversity of the riverine or estuarine area or its function as a wildlife corridor or habitat, and

- c) the development is compatible with any coastal, estuary or river plan of management adopted by the Council under the *Local Government Act 1993* that applies to the land or to land that may be affected by the development.

The development is not considered to be compatible with plans of management adopted by Council and as a result, it is recommended that the application be refused on this basis.

Clause 34 - Flooding

The subject development area is entirely flood prone to varying degrees, having regard to its location on or adjacent to the Tweed River.

Whilst higher levels of the river resulting from flooding may increase the risk of impact upon river banks and habitat within the riverine/estuarine area it is noted that the subject application does not propose any building or development works which would be susceptible to flood damage. In this regard it is considered that the proposal would not represent an unacceptable development in terms of the provisions of this Clause.

Clause 35 - Acid Sulfate Soils

The proposed development is not considered to result in significant disturbance of acid sulfate soils due to its nature. No building work is required and as such there is considered to be minimal impact in this regard. The proposed development is considered to be acceptable having regard to the provisions of this clause.

State Environmental Planning Policies

SEPP (North Coast Regional Environmental Plan) 1988

Clause 15: Wetlands or Fishery Habitats

The subject application relates to the operation of a pontoon and water sports boat on the Tweed River and as such this clause applies to the subject development. This clause states that council shall not consent to an application to carry out development for any purpose within, adjoining or upstream of a river or stream, coastal or inland wetland or fishery habitat area or within the drainage catchment of a river or stream, coastal or inland wetland or fishery habitat area unless it has considered the following matters:

- (a) the need to maintain or improve the quality or quantity of flows of water to the wetland or habitat,

The subject application is not considered to impact to a significant degree on the quality or quantity of water flow in to Tweed River.

- (b) the need to conserve the existing amateur and commercial fisheries,

The proposed development is considered to potentially impact on existing amateur fishing practices due to noise and the impact of the water sports proposed on the waterbody.

- (c) any loss of habitat which will or is likely to be caused by the carrying out of the development,

This application has been forwarded to Councils Natural Resource Management Unit who have advised that the water sports element of this application is not supported as 'This use will add to the cumulative impact of wake waves on river bank erosion in the subject reach. River bank erosion results in environmental

degradation.’ Having regard to this, it is considered that the proposal is likely to cause a loss in habitat and the application should be refused in this regard.

- (d) whether an adequate public foreshore reserve is available and whether there is adequate public access to that reserve,

The proposal is considered to be generally acceptable in this regard.

- (e) whether the development would result in pollution of the wetland or estuary and any measures to eliminate pollution,

The subject application is not considered to present an unacceptable application in this regard. Whilst noise pollution is a element of the proposal that is reviewed elsewhere in this report, this clause is considered to relate more so to physical contamination pollution which is not considered to be a likely impact from the proposal.

- (f) the proximity of aquatic reserves dedicated under the Fisheries Management Act 1994 and the effect the development will have on these reserves,

The subject application is not considered to impact on any aquatic reserves as outlined above.

- (g) whether the watercourse is an area of protected land as defined in section 21AB of the Soil Conservation Act 1938 and any measures to prevent soil erosion, and

Not applicable to the subject application.

- (h) the need to ensure that native vegetation surrounding the wetland or fishery habitat area is conserved, and

As outlined under (c) above, the proposed development is considered likely to cause a loss in habitat due to a cumulative impact of wake waves on the river bank erosion and the application should be refused in this regard. This is also considered to be relevant to this clause as wetlands are located within the area identified for water sports use, including adjacent to Stotts island and to the north river bank at Tumbulgum and it is recommended that the application be refused in this regard.

- (i) the recommendations of any environmental audit or water quality study prepared by the Department of Water Resources or the Environment Protection Authority and relating to the river, stream, wetland, area or catchment.

Not considered to be specifically applicable to the subject application.

From the above, it is considered that the primary concern in relation to this clause is the possible impact on and loss of habitat, including native vegetation due to river erosion arising from wake waves associated with the water sports boat. As outlined above, the proposal is inconsistent with Clause 15, in particular (c) and (h) above and refusal is recommended.

Clause 32B: Coastal Lands

This clause applies to land (coastal river, estuaries and islands) within the region to which the NSW Coastal Policy 1997 applies. The 1997 Coastal Policy has as its central focus the ecologically sustainable development (ESD) of the NSW coastline

and is based on the four principles of ESD contained in the Intergovernmental Agreement on the Environment (IGAE) signed in 1992:

- conservation of biological diversity and ecological integrity
- inter-generational equity
- improved valuation, pricing and incentive mechanisms, and
- the precautionary principle.

ESD is particularly relevant to the coastal zone in view of the nature of the coastal environment and the varied and intense demands placed on its resources.

Of these four principles, the proposed development is considered to be inconsistent with three. The nature and intensity of the proposed development is considered to threaten critical habitat and compromises the preservation of biological diversity through its impact on river erosion.

It does not ensure that essential natural and cultural resources of the coastal zone are preserved for the benefit and enjoyment of future generations. The precautionary principle operates in this instance as locational considerations are critical and environmental impacts are uncertain but potentially significant.

Clause 75: Tourism development

Of particular relevance under this Clause is 75(1)(c) which states that Council must not grant consent to tourism development unless it is satisfied that *the development will not be detrimental to the scenery or other significant features of the natural environment*. It has been established that the nature and intensity of the proposal has the capacity to affect features of the natural environment through a cumulative impact on erosion. As such, the proposal is considered to be inconsistent with this clause.

Clause 76: Natural tourism areas

The operational area proposed by the applicant is considered to be a natural tourism area as defined under this clause. It adjoins nature reserves, Crown land, protected areas and is, in the opinion of Council, considered to be a natural area with qualities which make it a major attraction.

Assessment of the application must take into account the regional policy: 'Tourism Development Near Natural Areas: Guidelines for the North Coast'. This policy was created to expand upon the basic concepts put forward in the NCREP and relates specifically to tourism developments the attraction of which depends on their proximity to major natural areas. The aim of the guidelines is to encourage the development of viable yet environmentally sensitive tourism developments. Specifically it aims to:

- Promote developments which enhance rather than erode the values of the adjacent natural areas.
- Encourage a broader awareness and understanding of the natural areas of the North Coast.
- Identify the potential markets for tourism developments adjacent to major natural areas and the type of facilities suited to those areas.

- Assist potential developers and landowners in developing appropriate tourism projects, taking into account location, scale, site, design, operations and feasibility.
- Provide guidance for local councils to assess applications for tourism developments of this type.
- Set out a feasibility assessment procedure to be followed in developing a proposal.

The policy states that any tourism development near a natural area needs to be compatible with the prime purpose of the natural area. In this case, the prime purpose of the natural area is conservation of critical habitat. Passive recreational activities within the locality are aimed at the enjoyment of the natural area and appreciation of conservation initiatives.

The major issues of tourism in natural areas arise from the interaction between conservation, development and planning objectives. Essential conservation issues relate to maintenance of the natural and cultural resources of the area and their protection for the long term benefit of people and for the wildlife dependent on the area.

Appropriate forms of development are encouraged with regard to the nature of the recreation use and should allow a greater number and wider cross-section of visitors to enjoy and appreciate the natural area. It is important that such developments respect natural character and not detract from the natural values of the area.

Essential planning issues centre on achieving environmentally sensitive development – an environmentally sustainable development that can provide benefits but not decrease the natural values or options available to future generations. The policy advocates that any tourist development adjacent to a natural area must limit its proposed activities to those which will not threaten the value or integrity of the natural area and that activities which pose a threat should be excluded altogether.

In addition, the tourist development should be sufficiently separated from the natural area so that the noise it generates does not cause nuisance to users of the natural area or distress its native fauna. Scale of development must be limited so that it does not dominate the natural area or cause use of it to exceed its environmental capacity.

Recreation facilities recommended in coastal lake, estuary and beach areas include the provision of equipment such as canoes, sail boards and other unpowered craft which provide access to the area's main waterways, beaches etc. Any educational facilities should be aimed at promoting an understanding of the values of the natural environment.

It is considered that the proposed development is inconsistent with this clause as it has not been demonstrated that the proposal will not cause a nuisance with respect to noise or impact negatively on the natural area in which it is proposed to operate due to erosion concerns.

Clause 81: Development adjacent to the ocean or a waterway

Clause 81(1)(c) requires Council to be satisfied that the development is consistent with the principles of any foreshore management plan applying to the area. The subject application was referred to Councils Natural Resource Management Unit

who have provided advice on the application with respect to the Tweed River Estuary Bank Management Plan 1998. From this is noted that *'The above management plan provides advice on the mechanisms for river bank erosion, sites for priority stabilisation works, and design options for stabilisation. There is no advice or policy statement with respect to the operation of vessels which may cause wake wave erosion.'*

In this regard, it is considered that the proposal would not necessarily contravene the provisions of this clause and consequently refusal is not recommended in this regard.

SEPP No. 14 - Coastal Wetlands

The aim of this policy is to ensure that coastal wetlands are preserved and protected in the environmental and economic interests of the State.

SEPP 14 wetlands are located on the subject site (Fingal Head Boat Harbour) and on adjacent land to the north managed by the Tweed Byron Local Aboriginal Land Council. They also cover most of Ukerebagh Nature Reserve, Tony's Island and Tim's Island to the north of the motorway bridge.

To the south of the motorway bridge land on Lillie's Island, Chinderah Bay, Chinderah Island, Dodds Island in close proximity to Chinderah display SEPP 14 Wetlands whilst further west a small amount of land adjacent to the Tweed Broadwater is identified as Coastal Wetland. In the area identified for water sports operation, there is a small unidentified island off Stotts Island which is mapped SEPP 14 Coastal Wetlands also.

Clause 4(2) states that 'this policy does not apply to land dedicated or reserved under the *National Parks and Wildlife Act 1974* as an Aboriginal area, historic site, national park, nature reserve, state game reserve or state recreation area.' This would include land zoned 8(a) under the TLEP 2000 (Ukerebagh Nature Reserve).

Clause 7 outlines 'restriction on development of certain land' (clearing, constructing a levee, draining, filling) that require the concurrence of the Director-General. The proposal does include these actions.

The proposed development is not consistent with the aim of this SEPP in that it does not preserve and protect coastal wetlands in the environmental and economic interests of the State, given the cumulative erosion impact arising from the proposed development, in particular on the Coastal Wetlands adjacent to Stotts Island. In this regard, the proposal is contrary to the provisions of this SEPP.

SEPP No. 26 - Littoral Rainforests

The aim of this Policy is to provide a mechanism for the consideration of applications for development that is likely to damage or destroy littoral rainforest areas with a view to the preservation of those areas in their natural state.

SEPP 26 areas are located on land within proximity of the Fingal Head boat ramp to the western side of the river at this location where the 100m buffer area extends into the river.

In accordance with Clause 7(1), the following acts are considered 'designated development' which require consent and concurrence from the Director-General: *erect a building, carry out work, use land for any purpose, or subdivide it, disturb, change or alter any landform or disturb, remove, damage or destroy any native*

flora or other element of the landscape or dispose of or dump any liquid, gaseous or solid matter.

Within the 100m buffer zone, the following acts require consent: *erect a building, disturb or change or alter any landform or disturb, remove, damage or destroy any native flora, or dispose of or dump any liquid, gaseous or solid matter.*

The applicant has submitted information stating:

"The only SEPP 26 mapped areas along the river are located in the sand dunes of Fingal and on the Coolangatta Tweed Heads Golf Course, The proposed operation of the Pontoon Boat and Water Sports Boat will not be within 100m of the mapped areas. The actual towing area is located approximately 10km upstream, Council Officers could condition the consent such that the boats are not to be used within 100m of a mapped SEPP 26 area."

Council officers would have concerns with respect to the proposal meeting the provisions of this SEPP. As the buffer extends into the water adjacent to the proposed operational area, it is possible that there may be impact upon native flora within those areas. The applicants recommendation to condition the use of the boats within 100m of a mapped SEPP 26 area would present concerns with respect to policing such a condition and in substantiating compliance action in the event it were required.

It is considered that the proposed development would have the potential to damage littoral rainforest areas as outlined above, however it is not considered that the application warrants refusal in this regard.

SEPP No 71 – Coastal Protection

Aims of this policy are as follows:

- a) to protect and manage the natural, cultural, recreational and economic attributes of the New South Wales coast, and
- b) to protect and improve existing public access to and along coastal foreshores to the extent that this is compatible with the natural attributes of the coastal foreshore, and
- c) to ensure that new opportunities for public access to and along coastal foreshores are identified and realised to the extent that this is compatible with the natural attributes of the coastal foreshore, and
- d) to protect and preserve Aboriginal cultural heritage, and Aboriginal places, values, customs, beliefs and traditional knowledge, and
- e) to ensure that the visual amenity of the coast is protected, and
- f) to protect and preserve beach environments and beach amenity, and
- g) to protect and preserve native coastal vegetation, and
- h) to protect and preserve the marine environment of New South Wales, and
- i) to protect and preserve rock platforms, and
- j) to manage the coastal zone in accordance with the principles of ecologically sustainable development (within the meaning of section 6 (2) of the *Protection of the Environment Administration Act 1991*), and

- k) to ensure that the type, bulk, scale and size of development is appropriate for the location and protects and improves the natural scenic quality of the surrounding area, and
- l) to encourage a strategic approach to coastal management.

Land on the subject site and on either side of the river is described as a *sensitive coastal location*, in this instance primarily identified as land within 100m above mean high water mark of the sea, a bay or an estuary. Some of the operational area includes land to which SEPP 14 applies and land reserved/ edicated under the *National Parks and Wildlife Act 1974*.

Assessment of the proposal involves consideration of the matters for consideration at Clause 8 of this policy, as follows:

- a) the aims of this Policy set out in clause 2,
The subject application is not considered to be in accordance with the aims of this policy, in particular with respect to aims a, d and g.
- b) existing public access to and along the coastal foreshore for pedestrians or persons with a disability should be retained and, where possible, public access to and along the coastal foreshore for pedestrians or persons with a disability should be improved,
The subject application is not considered to impact significantly on existing public accessways to the coastal foreshore.
- c) opportunities to provide new public access to and along the coastal foreshore for pedestrians or persons with a disability,
The subject application is not considered to generate opportunities to provide new public access along the coastal foreshore.
- d) the suitability of development given its type, location and design and its relationship with the surrounding area,
The proposed development is not considered to represent a suitable development at this location due to its non-compliance with both the relevant planning policies and concerns with respect to river erosion and compatibility with the surrounding area due to noise etc.
- e) any detrimental impact that development may have on the amenity of the coastal foreshore, including any significant overshadowing of the coastal foreshore and any significant loss of views from a public place to the coastal foreshore,
The proposed development is not considered to impact on the coastal foreshore as outlined above with respect to loss of views or overshadowing.
- f) the scenic qualities of the New South Wales coast, and means to protect and improve these qualities,
The subject application is not considered to contravene the scenic qualities of the New South Wales coast.
- g) measures to conserve animals (within the meaning of the Threatened Species Conservation Act 1995) and plants (within the meaning of that Act), and their habitats,

The subject development has the potential to impact on habitats as a consequence of cumulative erosion resulting from this proposal as outlined elsewhere in this report.

- h) measures to conserve fish (within the meaning of Part 7A of the Fisheries Management Act 1994) and marine vegetation (within the meaning of that Part), and their habitats

The subject application is not considered to impact significantly on measures to conserve fish and marine vegetation as outlined above.

- i) existing wildlife corridors and the impact of development on these corridors,

The subject application is not considered to impact significantly on wildlife corridors as outlined above.

- j) the likely impact of coastal processes and coastal hazards on development and any likely impacts of development on coastal processes and coastal hazards,

The subject application is not considered to result in any specific impacts with respect to coastal processes or hazards in this instance.

- k) measures to reduce the potential for conflict between land-based and water-based coastal activities,

The subject application is considered to demonstrate potential for conflict between land and water based coastal activities. As outlined elsewhere in this report, Council have received numerous objections to the proposed development, many of which objected to other recreational uses on and around the Tweed River. In this regard Councils Environmental Health Unit requested that a Noise Impact Assessment be submitted to Council to determine the impact from the proposed use in terms of noise and amenity. The applicant has declined to provide this, stating that 'the boats are standard recreational boats that do not create excessive noise. Noise impact is not considered to be a significant issue.'

It is not considered that the proposed development has adequately demonstrated measures to reduce impact between land and water-based activities and as such the application is recommended for refusal in this regard.

- l) measures to protect the cultural places, values, customs, beliefs and traditional knowledge of Aboriginals,

The subject application was forwarded to NSW Government (Office of Environment & Heritage) and the Tweed Byron Local Aboriginal Land Council (TBLALC) through the referral process. Council received correspondence from NSW Government (Office of Environment & Heritage) outlining the following:

'Prior to determining the application, Council should also be satisfied that an appropriate level of Aboriginal cultural heritage assessment has been undertaken, and that the proposal is not likely to impact on areas of cultural significance to the Aboriginal community. Also, it is important that the views of Aboriginal

community groups be sought in regard to the proposed development.'

In this regard, Council has received a submission from the TBLALC outlining concerns with the proposal and requesting that a full Cultural Heritage Assessment be undertaken.

The applicant has provided information in response stating that the proposed use and associated impacts are identical to those of the numerous other similar boats on the river, and outlining that it would be impossible to distinguish the impacts of the proposed boats separately from other boating use. A full Cultural Heritage Assessment is not to be undertaken according to the applicant.

In this regard it is not considered possible to fully assess the impact of the proposal with respect to the criteria outlined above. As such, the application is not supported in the absence of adequate supporting information to ensure the proposal won't impact on measures to protect the cultural places, values, customs, beliefs and traditional knowledge of Aboriginals.

- m) likely impacts of development on the water quality of coastal waterbodies,

The proposed development is not considered likely to have a negative impact with respect to the water quality of coastal waterbodies.

- n) the conservation and preservation of items of heritage, archaeological or historic significance,

As outlined under l) above the subject application was forwarded to NSW Government (Office of Environment & Heritage) and the Tweed Byron Local Aboriginal Land Council (TBLALC) through the referral process. Council received correspondence from NSW Government (Office of Environment & Heritage) outlining the following:

'Prior to determining the application, Council should also be satisfied that an appropriate level of Aboriginal cultural heritage assessment has been undertaken, and that the proposal is not likely to impact on areas of cultural significance to the Aboriginal community. Also, it is important that the views of Aboriginal community groups be sought in regard to the proposed development.'

In this regard, Council has received a submission from the TBLALC outlining concerns with the proposal and requesting that a full Cultural Heritage Assessment be undertaken.

The applicant has provided information in response stating that the proposed use and associated impacts are identical to those of the numerous other similar boats on the river, and outlining that it would be impossible to distinguish the impacts of the proposed boats separately from other boating use. A full Cultural Heritage Assessment is not to be undertaken according to the applicant.

In this regard it is not considered possible to fully assess the impact of the proposal with respect to the criteria outlined above. As such, the application is not supported in the absence of adequate supporting

information to ensure the proposal won't impact on the conservation and preservation of items of heritage, archaeological or historic significance.

- o) only in cases in which a council prepares a draft local environmental plan that applies to land to which this Policy applies, the means to encourage compact towns and cities,

Not applicable to the subject application.

- p) only in cases in which a development application in relation to proposed development is determined:

- i. the cumulative impacts of the proposed development on the environment, and

The proposed development is considered to result in an unacceptable cumulative impact with respect to river erosion as detailed elsewhere in this report.

- ii. measures to ensure that water and energy usage by the proposed development is efficient.

There is not considered to be specific measures applicable to this application with respect to water/ energy usage.

An assessment of the proposal against Clause 8 highlights that the proposal is not consistent with the aims of the policy as set out in Clause 2, specifically but not limited to, a), d), g), k), l), n) and p). The nature of the proposal is unsuitable for and incompatible with the surrounding area. It is considered to conflict with measures to conserve habitats and aboriginal heritage. The cumulative impact of the proposed development on the environment is not considered sustainable and the proposal is not supported with respect to this SEPP and refusal is recommended in this regard.

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

The **Draft Tweed Local Environmental Plan 2012** which has been adopted by Council is applicable to the subject site.

Part 1 Preliminary

1.2 Aims of Plan

The aims of this plan as set out under Section 1.2 of this plan are as follows:

- (1) This Plan aims to make local environmental planning provisions for land in Tweed in accordance with the relevant standard environmental planning instrument under section 33A of the Act.
- (2) The particular aims of this Plan are as follows:
 - (a) to give effect to the desired outcomes, strategic principles, policies and actions contained in the Council's adopted strategic planning documents, including, but not limited to, consistency with local indigenous cultural values, and the national and international significance of the Tweed Caldera,
 - (b) to encourage a sustainable, local economy, small business, employment, agriculture, affordable housing, recreational, arts,

social, cultural, tourism and sustainable industry opportunities appropriate to Tweed Shire,

- (c) to promote the responsible sustainable management and conservation of Tweed's natural and environmentally sensitive areas and waterways, visual amenity and scenic routes, the built environment, and cultural heritage,
- (d) to promote development that is consistent with the principles of ecologically sustainable development and to implement appropriate action on climate change,
- (e) to promote building design which considers food security, water conservation, energy efficiency and waste reduction,
- (f) to promote the sustainable use of natural resources and facilitate the transition from fossil fuels to renewable energy,
- (g) to conserve or enhance the biological diversity, scenic quality, geological and ecological integrity of the Tweed,
- (h) to promote the management and appropriate use of land that is contiguous to or interdependent on land declared a World Heritage site under the Convention Concerning the Protection of World Cultural and Natural Heritage, and to protect or enhance the environmental significance of that land,
- (i) to conserve or enhance areas of defined high ecological value,
- (j) to provide special protection and suitable habitat for the recovery of the Tweed coastal Koala.

The proposed development is considered to be in contravention of aims (c), (d) and (g) above due to concerns with respect to the impact the proposed development would have on river erosion on the Tweed River.

1.4 Definitions

The proposed development is considered to be defined as a 'business premises' under the provisions of this plan.

business premises means a building or place at or on which:

- (a) *an occupation, profession or trade (other than an industry) is carried on for the provision of services directly to members of the public on a regular basis, or*
- (b) *a service is provided directly to members of the public on a regular basis, and includes a funeral home and, without limitation, premises such as banks, post offices, hairdressers, dry cleaners, travel agencies, internet access facilities, betting agencies and the like, but does not include an entertainment facility, home business, home occupation, home occupation (sex services), medical centre, restricted premises, sex services premises or veterinary hospital.*

Note. *Business premises are a type of commercial premises - see the definition of that term in this Dictionary.*

Part 2 Permitted or prohibited development

2.1 Land use zones

As outlined under the TLEP 2000 assessment, the development area encompasses Fingal Boat Ramp, Barneys Point Bridge, the BP Chinderah site and the Tweed River between Murwillumbah and Tweed Heads.

The proposed development area is zoned as the following:

RE1 Public Recreation: Fingal Head Boat Ramp.

W3 Working Waterways: Tweed River between Tweed Heads and Motorway Bridge.

SP2 Infrastructure: Passenger pick up and set down point at Barneys Point Bridge.

B4 Mixed Use: Vehicle parking area at BP Chinderah.

W2 Recreational Waterways: Tweed River between M1 Motorway Bridge and Murwillumbah.

A business premises is prohibited in the RE1, W3, SP2 and W2 zones.

2.3 Zone objectives and Land Use Table

The Draft TLEP 2012 zones the development area as RE1 Public Recreation, W3 Working Waterways, SP2 Infrastructure, B4 Mixed Use and W2 Recreational Waterways. The objectives of these zones are:

RE1 Public Recreation

Objectives of zone

- To enable land to be used for public open space or recreational purposes.
- To provide a range of recreational settings and activities and compatible land uses.
- To protect and enhance the natural environment for recreational purposes.

The proposed development is not considered to be consistent with the objectives of this zone as it does not enable land to be used for open space or recreational purposes, provide a range of recreational settings or protect and enhance the natural environment for recreational purposes.

W3 Working Waterways

Objectives of zone

- To enable the efficient movement and operation of commercial shipping, water-based transport and maritime industries.
- To promote the equitable use of waterways, including appropriate recreational uses.
- To minimise impacts on ecological values arising from the active use of waterways.
- To provide for sustainable fishing industries.

The proposed development is not considered to be in accordance with any of the above objectives. The proposal does not enable commercial shipping, water based transport or maritime industries. Furthermore, it is considered that the

proposed development would not promote an equitable use of waterways as it is considered to be detrimental to various other recreational uses including rowing, canoeing and fishing. The proposal is not considered to minimise impacts on ecological values.

SP2 Infrastructure

Objectives of zone

- To provide for infrastructure and related uses.
- To prevent development that is not compatible with or that may detract from the provision of infrastructure.

The proposed development is not considered to be consistent with the above objectives. The area of land zoned SP2 is located at Barneys Point Bridge and is to be used for passenger pick up and set down. This is considered to be inconsistent in the event that this land is required for the provision of infrastructure in the future.

B4 Mixed Use

Objectives of zone

- To provide a mixture of compatible land uses.
- To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.

The proposed use is permissible in this zone.

W2 Recreational Waterways

Objectives of zone

- To protect the ecological, scenic and recreation values of recreational waterways.
- To allow for water-based recreation and related uses.
- To provide for sustainable fishing industries and recreational fishing.

The proposed development is not considered to protect ecological, scenic or recreational values of the water through cumulative impacts on river erosion and potential impacts on the other recreational uses on the river. Furthermore, the proposal is not considered to encourage sustainable fishing industries or recreational fishing.

As outlined under clause 2.1 above it is noted that a business premises is prohibited in the RE1, W3, SP2 and W2 zones. The applicant has not addressed the objectives of these zones or provided supporting information to demonstrate that the proposal meets these zone objectives despite being a prohibited use and it is considered that the proposed use does not meet the objectives above and the application warrants refusal in this regard.

Part 5 Miscellaneous provisions

5.5 Development within the coastal zone

This clause of the draft LEP states that development consent must not be granted to development on land that is wholly or partly within the coastal zone unless the consent authority has considered the following;

- (a) *existing public access to and along the coastal foreshore for pedestrians (including persons with a disability) with a view to:*
- (i) *maintaining existing public access and, where possible, improving that access, and*
 - (ii) *identifying opportunities for new public access, and*

The proposed development is not considered to impact upon access to coastal foreshore.

- (b) *the suitability of the proposed development, its relationship with the surrounding area and its impact on the natural scenic quality, taking into account:*
- (i) *the type of the proposed development and any associated land uses or activities (including compatibility of any land-based and water-based coastal activities), and*
 - (ii) *the location, and*
 - (iii) *the bulk, scale, size and overall built form design of any building or work involved, and*

The proposed development is not considered to represent a suitable development at this location as potential cumulative river erosion impacts are likely to impact on the surrounding area. In this regard the application is not supported.

- (c) *the impact of the proposed development on the amenity of the coastal foreshore including:*
- (i) *any significant overshadowing of the coastal foreshore, and*
 - (ii) *any loss of views from a public place to the coastal foreshore,*

The proposed development is considered to result in an unacceptable impact on the amenity of the coastal foreshore through the issues raised elsewhere in this report including noise and impact on other recreational users of the river.

- (d) *how the visual amenity and scenic qualities of the coast, including coastal headlands, can be protected, and*

The proposed development is not considered to protect the scenic qualities of the coast as it represents a commercial development which has been identified as having a cumulative impact on river erosion in the Tweed River. In this regard the proposal is considered to compromise the above provision.

- (e) *how biodiversity and ecosystems, including:*
- (i) *native coastal vegetation and existing wildlife corridors, and*
 - (ii) *rock platforms, and*
 - (iii) *water quality of coastal waterbodies, and*
 - (iv) *native fauna and native flora, and their habitats,*
can be conserved, and

The proposed development is considered to represent a risk with respect to existing biodiversity and ecosystems along the Tweed River due to concerns arising from cumulative erosion associated with the water sports boat.

(f) *the cumulative impacts of the proposed development and other development on the coastal catchment.*

The proposed development is not considered to result in an unacceptable cumulative impact on the coastal catchment.

This clause goes on to further state:

(3) *Development consent must not be granted to development on land that is wholly or partly within the coastal zone unless the consent authority is satisfied that:*

(a) *the proposed development will not impede or diminish, where practicable, the physical, land-based right of access of the public to or along the coastal foreshore, and*

As outlined elsewhere in this report, the proposal is not considered to impede or diminish the right of access of the public either to or along the public foreshore.

(b) *if effluent from the development is disposed of by a non-reticulated system, it will not have a negative effect on the water quality of the sea, or any beach, estuary, coastal lake, coastal creek or other similar body of water, or a rock platform, and*

The effluent provisions identified by the applicant have been reviewed by Councils Environmental Health Unit and assessed as being acceptable in this instance.

(c) *the proposed development will not discharge untreated stormwater into the sea, or any beach, estuary, coastal lake, coastal creek or other similar body of water, or a rock platform, and*

Not applicable to the subject application.

(d) *the proposed development will not:*

(i) *be significantly affected by coastal hazards, or*

(ii) *have a significant impact on coastal hazards, or*

(iii) *increase the risk of coastal hazards in relation to any other land.*

With respect to the submitted information it is not possible to conclude that the proposed development will not have a significant impact on coastal hazards or increase the risk of coastal hazards to other lands due to identified impacts with respect to cumulative river erosion.

5.7 Development below mean high water mark

This clause is applicable to the subject application and states the following:

(1) The objective of this clause is to ensure appropriate environmental assessment for development carried out on land covered by tidal waters.

(2) Development consent is required to carry out development on any land below the mean high water mark of any body of water subject to tidal influence (including the bed of any such water).

The subject application has been submitted in order to gain development consent as the proposal relates to an activity on the Tweed River. The subject application has been referred to Councils Environmental Health and Natural Resource Management Units and it has been considered that the proposal represents an

unacceptable development with respect to environmental impact and refusal is recommended.

Conclusion

The proposed development does not meet the provision of the Draft LEP 2012 as outlined above. As this LEP is considered to be certain and imminent and the proposal is not in accordance with the aims and objectives of the instrument it is therefore recommended that the proposal be refused.

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

Tweed Development Control Plan

A2-Site Access and Parking Code

The provisions of this DCP do not make specific reference to car parking requirements for commercial boating operations such as that proposed in this application. The proposed development is to provide customer car parking at a designated area adjacent to BP Chinderah. The application was referred to Councils Infrastructure Engineering Section with respect to traffic and parking who have advised the following:

"Traffic generation of the proposal is minimal and customers are expected to park in the adjacent service station. It is recommended that appropriate signage be conditioned directing those customers to the allocated parking. These signs would be installed and worded to the satisfaction of Council's Director of Engineering and Operations and located in Council's car park located adjacent to the old Barneys Point Bridge and in the proposed parking area at the Service Station."

As such the application is considered to be acceptable from a parking and traffic perspective subject to appropriate conditions of consent. The proposal is considered not to contravene the provisions of DCP A2.

A3-Development of Flood Liable Land

The subject development area is entirely flood prone to varying degrees, having regard to its location on or adjacent to the Tweed River. It is noted that the subject application does not propose any building or development works which would be susceptible to flood damage. In this regard it is considered that the proposal would not represent an unacceptable development in terms of the provisions of this DCP.

A11-Public Notification of Development Proposals

The proposal was advertised in accordance with DCP A11 for a period of 14 days from Wednesday 29 May 2013 to Thursday 13 June 2013. During this time 27 public submissions were received with a further three late submissions received. Issues raised within the submissions are discussed elsewhere in this report.

DCP B2- Tweed City Centre

A portion of the Tweed River is mapped as being within the area that this DCP is applicable to and as such it is required to assess the proposal against the provisions of this DCP.

In this regard it is noted that the Tweed River adjoins both the Southern Boat Harbour and the Tweed River Environment and Recreation Precinct, which relate to the subject application. In this regard the following is offered:

Southern Boat Harbour

An objective of this zone is to *'promote the maritime theme of the boat harbour, and to encourage and facilitate tourism and boating on the Tweed River'*. In this regard, the proposed development would be considered to be generally consistent with this objective.

Tweed River Environment and Recreation Precinct

The Tweed River Environment and Recreation Precinct is identified as the major natural area within Tweed Heads City and comprises significant wetland areas, watercourses and the golf course. It has significant biodiversity value and the DCP states that *'development should be minimised to land uses that complement the natural qualities of the precinct, and have tourist or recreational qualities'*.

In this regard, it is considered that the proposal would have tourist or recreational qualities, however Council officers would have concerns with respect to determining satisfactorily that the proposal would complement the natural qualities of the precinct. In this manner, the proposal is considered not to warrant a recommendation of refusal against this DCP, however Council officers would have concerns with respect to same.

Waterways Policy

The subject application has been reviewed by Councils Natural Resource Management Unit with respect to the applicable waterways policies relevant to this application. In this regard the following comment is provided:

Impact of wake on river bank erosion Study (2012)

The Impact of Wake on Tweed River Bank Erosion Study has established that wake wave energy is one of the primary causes of river bank erosion in the Tweed estuary. While it is recognised that floods and a lack of riparian vegetation are also significant issues contributing to erosion problems, it is accepted that wake is a significant contributing factor.

There is no method that can be used to quantify the contribution of wake from the proposed vessel use and its relative significance with respect to ongoing erosion in this river reach. Total wake impact created will depend on the intensity of use of the vessel, and variables associated with its operation. The former is directly linked to demand for the business product offered, and the latter to the actions of the vessel driver.

Despite it not being possible to accurately quantify the amount of wake potentially generated, it can be assumed that wake generation by this individual vessel would create only a minor increased impact, over and above the total wake wave energy created by the existing sum of powered vessels already using this reach of the river for recreational towing activities. It is clear however, that the proposal would contribute cumulatively to wake wave energy, and as such, is an activity that will contribute cumulatively to river bank erosion.

Upper Tweed Estuary Management Plan (1996)

Council prepared a management plan for the Upper Tweed Estuary in 1996. The plan does not specifically address the issue of commercial operation of tow based water sports in the river.

Relevant objectives of the management plan are to provide an integrated program of works that will:

- Identify, enhance and protect significant habitat, particularly tidal wetlands and riparian corridors
- Protect heritage
- Provide recreation facilities
- Encourage boating activities
- Increase awareness
- Address river bank erosion
- Improve water quality, particularly in Rous
- Minimise ASS impacts
- Conserve scenic qualities of the river

The plan contains a comprehensive list of management constraints and opportunities. Most relevant to consideration in the assessment of this development proposal is the following:

- There is widespread bank erosion along the upper Tweed Estuary. Appropriate measures are required in areas where significant assets may be threatened and where waves from increased boating would exacerbate erosion.

While the plan does acknowledge and recognise the need to accommodate recreational boating in the Upper Tweed Estuary, it highlights that protection of wetland vegetation and riparian corridors and addressing river bank erosion is a high priority.

It is considered that operation of a commercial water sport vessel engaging in towing activities is not consistent with the Upper Estuary Management Plan objectives of, "Identify, enhance and protect significant habitat, particularly tidal wetlands and riparian corridors."

NSW State Rivers and Estuary Policy (1993)

The objective of the NSW Rivers and Estuary Policy is to manage the rivers and estuaries of NSW in ways which:

- Slow, halt or reverse the overall rate of degradation in their systems,
- Ensure the long-term sustainability of their essential biophysical functions, and
- Maintain the beneficial use of these resources.

These objectives are to be achieved through application of the following management principles:

- Those uses of the rivers and estuaries that are non-degrading should be encouraged.
- Non-sustainable resource uses which are not essential should be progressively phased out.
- Environmentally degrading processes and practices should be replaced with more efficient and less degrading alternatives.

- Environmentally degraded areas should be rehabilitated and their biophysical functions restored.
- Remnant areas of significant environmental values should be accorded special protection.
- An ethos for the sustainable management of river and estuarine resources should be encouraged in all agencies and individuals who own, manage or use these resources, and its practical application enabled.

Operation of a commercial water sports vessel that includes towing activities in the subject reach is not in accordance with the first objective of the NSW Rivers and Estuaries Policy. The proposed activity will add to the cumulative impact of wake on river bank erosion, and as such, does not assist in slow, halt or reverse the overall rate of degradation (in this cases, river bank erosion) in the Tweed River.

Operation of a commercial water sports vessel has the potential impact of reducing the amenity that the river provides for passive recreational use, in particular the established and important use by the Murwillumbah Rowing Club. As such, approval of the development would be inconsistent with the first management principal, that being to encourage uses of the estuary that are non-degrading.

It is also noted that Stott's Island would qualify for special protection from any potential impact by wake creating activities under management principle five, as it is an area of significant environmental value.

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

Clause 92(a) Government Coastal Policy

The NSW Coastal Policy 1997 has as its central focus the ecologically sustainable development (ESD) of the NSW coastline and is based on the four principles of ESD contained in the Intergovernmental Agreement on the Environment (IGAE) signed in 1992:

- Conservation of biological diversity and ecological integrity;
- Inter-generational equity;
- Improved valuation, pricing and incentive mechanisms, and
- The precautionary principle.

ESD is particularly relevant to the coastal zone in view of the nature of the coastal environment and the varied and intense demands placed on its resources.

Of these four principles, the proposed development is inconsistent with three. The nature and intensity of the proposed development threatens critical habitat and compromises the preservation of biological diversity. It does not assure that essential natural and cultural resources of the coastal zone are preserved for the benefit and enjoyment of future generations. The precautionary principle operates in this instance as locational considerations are critical and environmental impacts are uncertain but potentially significant.

(a) (v) Any coastal zone management plan (within the meaning of the Coastal Protection Act 1979),

Tweed Shire Coastline Management Plan 2005

This Plan applies to the Shire's 37 kilometre coastline and has a landward boundary that includes all lands likely to be impacted by coastline hazards plus relevant Crown lands. The subject application is to operate within the navigable waters of the Tweed River and does not include the coastal foreshore in this regard. As such the development area is not included in coastal hazards mapping and this management plan does not apply specifically to this Development Application.

Tweed Coast Estuaries Management Plan 2004

The proposed development is not within Cudgen, Cudgera or Mooball Creeks. This Plan is therefore not applicable to the application.

Coastal Zone Management Plan for Cobaki and Terranora Broadwater (adopted by Council at the 15 February 2011 meeting)

The subject operation area does not extend to the Cobaki and Terranora Broadwater Catchment. The submitted application is for operation in the navigable water of the Tweed River only and as such does not extend into land covered by this plan. This Plan is therefore not relevant to the proposed development.

(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

Amenity/Noise

The proposed development is considered to warrant particular assessment with respect to potential amenity and noise impacts. Councils Environmental Health Unit have requested the applicant to provide a noise impact assessment however this has not been submitted, with the applicant stating in their response letter in regards to noise *"It is considered unreasonable to require a Noise Impact Assessment, given that both boats are standard recreational boats and given the number of other similar boat activity on the river. We are not aware of any other Noise Assessment that has been undertaken for a commercial boat operation on the Tweed River."* The further information submitted by the applicant in regards to noise is considered insufficient to undertake an adequate assessment of the potential noise impacts arising from the proposed development.

Furthermore, the proposal is considered to impact upon other users of the Tweed River, including low impact recreational and passive river uses such as fishing, walking, cycling, picnicking, sailing, paddling, snorkelling, bird-watching, rowing and kayaking. It is considered that commercial towing activities are inconsistent with these uses which should be protected.

In this regard, the proposed development is not supported given Council concerns with the potential noise and amenity impacts on the surrounding area.

River Erosion

The subject application was referred to Councils Natural Resource Management (NRM) Unit for comment who have advised that the proposed water sport activities are not supported as this use will add to the cumulative impact of wake waves on river bank erosion.

It is noted that the river reach in which the activity has been proposed is subject to serious ongoing erosion, and it is considered that for Council to approve an

activity that will cumulatively add to the worsening of existing erosion is not in the public interest. There are a number of serious bank slumps adjacent to and within metres of the Tweed Valley Way within the river reach, and it would be prudent for Council to prioritise actions that slows, reverses or halts factors exacerbating this erosion. While it is recognised that the most serious bank erosion in this river reach will require engineered stabilisation, it is not appropriate to approve a use that will worsen erosion of areas that are not yet in a critically eroded condition. Refusal of the application is recommended in this regard.

(c) Suitability of the site for the development

Surrounding Landuses/Development

The nature of surrounding land uses is dealt with in detail earlier in this report under Clauses 8, 11 and 13 of the TLEP 2000. The nature and intensity of the proposal is inconsistent with surrounding land uses, passive recreational enjoyment of the natural area and the general lack of intensive development along the river foreshore.

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

The proposal was advertised in accordance with DCP A11 – Public Notification of Development Proposals for a period of 14 days from Wednesday 29 May to Thursday 13 June 2013. During this time, 27 submissions were received, with a further three late submissions received.

Issues raised within the submissions are many and varied. A summary of the issues is provided below along with any response provided by the applicant following receipt of submission copies.

Summary of Submissions	Response from applicant
<ul style="list-style-type: none"> · Wakeboarding unit would be too noisy in a populated area. · A high intensity water sports operation would compromise low impact recreational and passive river uses such as fishing, walking, cycling, picnicking, sailing, paddling, snorkelling, bird-watching, rowing and kayaking. · The Tweed Rivers natural amenity, ecosystems and critical habitats should be preserved and protected from the proposed use. · Proposal would impact negatively on established business which are sustainable and low impact (eg surf/stand-up-paddle school) · Public land should not be used for the ingress/ egress for a floating pontoon due to OH & S concerns. · Tweed public have to pay for River upkeep/ maintenance and not the applicant. Tweed River should be protected and instead promote ecotourism rather than potentially damaging proposals. 	<p>Most of the submissions received are from residents of Fingal Head. The proposal will have minimal impact upon Fingal Head. The Fingal Head boat ramp will be used to launch the boats but the parking of cars and trailers is on private property. Towing activities can only occur upstream of Tumbulgum some 10km away from Fingal Head.</p> <p>The Pontoon Boat is proposed to be used in other areas including adjacent to Fingal but it is of very low impact and no different to other similar pontoon boats operated by other commercial boat hire businesses in the area.</p> <p>Only 2 submissions were received from people that actually reside within the area intended for the towing activities.</p> <p>The issues are summarised as follows:</p> <p>Noise</p> <p>Concerns have been raised relating to the noise of the boats. The boats are standard recreational boats that do not create excessive noise. Noise impact is not considered to be a significant issue.</p> <p>Bank Erosion</p> <p>This issue has been discussed previously.</p>

Summary of Submissions	Response from applicant
<ul style="list-style-type: none"> • Existing recreational wakeboarding in 'tow zone' already causes disruption and disturbance to • Wakeboarding does not have a legislated measuring system and in this way is 'lawless'. Also impacts on other river users including fishing, canoeing, houseboats and swimming. • There are inadequate car parking and virtually no toilet/shower amenities provided at Barney's Point Bridge. Clients are therefore likely to use the nearest facilities at Tweed Ski Lodge Caravan Park which is private property. • Wakeboarding causes a huge amount of damage to the river bank and property of residents along the river. Furthermore this does not contribute to the local economy. • Approval of this DA will increase bank erosion and disrupt and endanger rowing and other low impact boating activities. • The proposal is to be undertaken where there is minimal revetment wall, resulting in this proposal causing river erosion • The proposed development would impact on safety of rowers on Tweed River one of Australia's best rowing courses. Wake waves are typically 0.25m in height and would swamp a skull boat which has a freeboard of 0.1m. • Stabilisation of riverbank cost in the wake boarding area would be \$7.7 million upfront with an ongoing maintenance cost of \$1.7 million. Council should not ignore these costs. • It is premature to approve this application prior to a strategy for use of the river. If Council were to approve the current development application, it could be liable to compensate the operator if towing activity were to be restricted in the future. • The statement of environmental effects is inadequate and the environmental impacts of the proposal are not properly addressed. In many instances the DA merely states that the impact of the proposal would be no different to recreational wakeboarding. • Proposal does not address cumulative impact on the environment and is not considered to be in the public interest. • A commercial pontoon and wakeboarding business operating between 8am and 4pm 7 days a week would raise noise issues 	<p>Refer to comments at Item 3 and 4 (reproduced below). Appropriate conditions may be applied to manage potential impacts of the Water Sports Boat. The Pontoon Boat is similar to other existing hire Pontoon Boats and should be considered separately.</p> <p>3. Waterway Management Plans</p> <p>Council submits that the proposal is inconsistent with "Waterway Management Plans" which highlight the need to reduce erosion within the vicinity of the Tweed River. In response to this, again, it is pointed out that the subject boats are already in use on the Tweed River most weekends and holidays (in a recreational capacity).</p> <p>Demand for the operation by members of the public will be seasonal and the peak times will be on weekends and holidays. It is not proposed to use ballast in the commercial operation.</p> <p>Therefore the impacts of the proposal are likely to be similar to the existing recreational use of the boats and would not significantly increase erosion impacts.</p> <p>In order to further address the issue of erosion the proposal limits the area for tow sports to upstream of Stotts Island and downstream of the Cane Rood Bridge. This is consistent with the most logical and reasonable recommendation of the "Impact of Woke on Tweed River Bank Erosion Study" prepared by SMEC dated 18 January 2012, being Option 3, which is in the following terms:</p> <p style="padding-left: 40px;">"Option 3 represents an option involving restriction of towing activities to a purpose built section of estuary (with protected banks). For example the area from the Cane Rd (Condong) Bridge to upstream of Stotts Island Nature Reserve (east of Tumbulgum) has been considered for the purposes of this comparative assessment. This approximately 7km stretch of waterway is popular for towing activities as it has reaches that are sheltered from the different prevailing wind directions providing a good flat water surface for water skiing and wakeboarding in most conditions. This option would aim to consolidate towing activities to on existing popular area with suitable facilities.</p> <p>Subsequently, the remainder of the estuary would be relieved from the bank erosion potential of towing boat wakes."</p>

Summary of Submissions	Response from applicant
<p>and destroy peaceful and quiet enjoyment of the area.</p> <ul style="list-style-type: none"> · There are inadequate resources in place to monitor the activities of this type of business. · Proposal is inconsistent with the recommendations of 'The Boat Impact and Wake Study review of the Tweed Estuary River Bank Management Plan. · Proposed development would also impact on roosting migratory bird sites and heritage sites. · Stotts Island contains at least 8 endangered plants and 47 bird species. As such it is not appropriate to operate a commercial water sports operation in this vicinity. · Commercial operation would set a precedent for future similar applications. · Concerns raised with respect to the proposals proximity to culturally sensitive areas including Ukerabagh Island. · The proposed commercial operation is inconsistent with surrounding residential zones. · Congestion at the Fingal Head boat ramp is a concern. · The proposed development would create noise and air pollution. 	<p>It is noted that bank protection works have been undertaken in this area and the area is, and will continue to be popular for tow sport activities.</p> <p>4. Suitability of the Site - Bank Erosion</p> <p>The site (the Tweed River) is subject to on uncontrolled number of recreational boat users of any size craft. It is considered that it is a contradictory position to maintain that the controlled commercial use of a Pontoon Boat and a Water Sports Boat would have unreasonable bank erosion impact while many similar craft may use the same waterway.</p> <p>As previously mentioned the intensity of the use would be similar to the existing recreational use of the same boats, but appropriate conditions may be applied to manage the potential impacts.</p> <p>Other River Users</p> <p>Normal "distances off" and right of way to unpowered craft regulations apply. The river is large enough to cater for all different forms of watercraft and interests. The proposal seeks to limit the area of tow sports and the nominated towing area is large enough to allow avoidance of other users should they be present. It is on unreasonable position of any river user to expect exclusive use of the entire river.</p> <p><u>Residential Development</u></p> <p>May be controlled by operating hours.</p> <p><u>Proximity to Culturally Sensitive Areas</u></p> <p>The boats will use the same waterway as other similar boats.</p> <p><u>Impacts of Flora and Fauna</u></p> <p>Again the boats are standard recreational boats using parts of the river that are already frequented by similar boats. It is unlikely that the proposal would pose a significant effect on threatened species or their habitat.</p> <p>The application is seeking to provide a business that would enable visitors to the area to partake in a range of water based activities. The support of a viable tourism industry by providing a range of activities is considered to be in the public interest.</p>
<ul style="list-style-type: none"> · A further late submission has been received from Destination Tweed in support of the application. 	<p>Not applicable.</p>

Council Assessment of Submissions

Issues raised within the submissions have been dealt with in the body of the report where Council is the regulatory authority. It is considered that the submitted application and the applicant's response to the issues raised does not provide a level of information which adequately addresses many of the concerns raised above, particularly with respect to river bank erosion, noise/amenity impacts, cultural heritage impacts and potential for impacts on protected habitats. In this regard refusal of the application is recommended.

Public Authority Submissions Comment

The application was referred to the following external agencies for consultation purposes (the proposal was not identified as integrated development):

- NSW Transport Roads & Maritime Services
- Tweed Byron Local Aboriginal Land Council (TBLALC)
- Office of Environment & Heritage (National Parks)

The application was forwarded to NSW Government Crown Lands Department. Advice was received on 16 May 2013 advising that '*Crown Lands has no comment to make on DA13/0221 at this stage.*'

TBLALC lodged a submission in June 2013 objecting to the proposed development due to cultural and environmental concerns.

Concerns raised included the following:

- Activities outlined in the above described DA will threaten to harm and desecrate a possible eight (8) government registered Aboriginal cultural heritage sites.
- A full Cultural Heritage Assessment is expected to be completed as the proposed activity is within 200metres of a permanent water course where there is higher potential to find unregistered cultural sites/material.
- Impact on cultural fishing and gathering of resource material in the Tweed region along the Tweed River.
- The proposed development will have a negative effect on the ability of Aboriginal people to continue with cultural fishing practices.
- The proposal will have a negative impact on the river bank erosion, seagrasses and fish stock. Ukerebagh Island is a declared Aboriginal place and was recognised as such by the NSW Government, this activity may also cause further damage to the already severely eroded eastern bank of Ukerebagh Island. TBLALC is concerned that the Aboriginal cultural sites and practices must be considered and addressed by the applicant when considering this Development Application.

The Office of Environment & Heritage supplied the following comment on 13 June 2013:

"Council should consider the following matters in its assessment of the development application:

Disturbance from noise and wake generated by power boats has potential to impact adversely on key shorebird roosting and feeding areas at Shallow

Bay, Tony's Bar and Wommin Lake, all of which lie between the boat ramp and the bridge. Further, the western foreshore of the Tweed River is generally unprotected by revetments and includes dredge spoil that is used for high tide roosts that are highly prone to erosion from wave action.

A number of threatened shorebirds subject to international conservation agreements such as the Japan and China Australia Migratory Bird Agreements inhabit the area. These include Terek Sandpiper, Greater Sand Plover, Pied and Sooty Oystercatchers, Black-tailed Godwit, Great Knot, Red-necked Stint, Sanderling, Beach Stone-curlew and several others. Little Tern are known to roost on Tony's Bar and Ospreys also nest and feed in the vicinity.

The 1999 Plan of Management for Ukerebagh Nature Reserve upstream from the boat ramp has identified foreshore erosion along the eastern shoreline to be of "particular concern" where the Coastal Saltmarsh Endangered Ecological Community (EEC) appears at risk from such erosion. Should the boat operation extend downstream from the boat ramp then the important conservation values at Kerosene Inlet on Fingal Spit may be similarly affected.

It is unclear from the information provided whether the proposal will extend further upstream in future towards Condong and the Stotts Island Nature Reserve. If so, then although impacts on wading bird habitat are likely to be reduced due to the, steeper river banks and reduced tidal influence, erosion from boat wake in the vicinity of the nature reserve would remain a significant concern.

In addition to the above matters, OEH recommends that Council should satisfy itself that this proposal will not result in any significant impacts upon threatened species, populations, ecological communities, or their habitats, as scheduled under the NSW Threatened Species Conservation Act 1995, including the Coastal Saltmarsh EEC.

Should Council determine that significant impacts to threatened species populations, ecological communities, or their habitats are likely, the matter should be formally referred to OEH for issuing of Director-General's requirements for the preparation of a Species Impact Statement.

Prior to determining the application, Council should also be satisfied that:

- The proposal is consistent with the provisions of the Protection of the Environment Operations Act, 1997.*
- The proposal is not likely to cause impacts on areas of native vegetation, with special reference to threatened or regionally significant flora and fauna species, populations and ecological communities.*
- The proposed development is consistent with the threatened species provisions of the Environment Planning and Assessment Act, 1979, State Environmental Planning Policy (SEPP) 71 – Coastal Protection and the Native Vegetation Act, 2003.*
- An appropriate level of Aboriginal cultural heritage assessment has been undertaken, and that the proposal is not likely to impact on areas of cultural significance to the Aboriginal community. Also, it is*

important that the views of Aboriginal community groups be sought in regard to the proposed development.

- *Potential direct and indirect impacts on OEH estate, wilderness areas, wild rivers and recognised areas of high conservation value have been adequately considered.*
- *The proposal is consistent with:*
 - i) *The NSW Coastal Policy 1987, which has as its central focus the ecologically sustainable development of the NSW coast;*
 - ii) *The Estuary Management Policy, with the general goal to achieve an integrated, balanced, responsible and ecologically sustainable use of the State's estuaries, which form a key component of coastal catchments;*
 - iii) *The Coastline Hazard Policy 1988, with the primary objective to reduce the impact of coastal hazards on individual owners and occupiers, and to reduce private and public losses resulting from natural coastal forces; and*
 - iv) *Relevant Coastal Zone and/or Estuary Management Plans.*

Your attention is also drawn to the Commonwealth Environment Protection and Biodiversity Conservation Act 1999. If the proposal affects any species requiring consideration under this legislation then approval may be required from the Commonwealth Department of Sustainability, Environment, Water, Population and Communities."

The proposed development is considered to raise a number of concerns with respect to its potential impacts regarding the above. The applicant has not submitted adequate information to enable Council officers to determine that the proposal would not have an unacceptable impact and in this regard it is recommended that the proposed development be refused.

NSW Transport Roads & Maritime Services were requested to provide any comment within a specified time period. No response has been received with respect to the proposed development.

(e) Public interest

The proposed development is inconsistent with relevant environmental planning instruments, Council policy requirements and Tweed River management plans. The proposal is considered unsuitable and inappropriate for the subject site, given its proximity to environmentally sensitive land, where such a proposal is prohibited.

The proposal is considered likely to impact significantly upon the amenity of the surrounding area and conflict with passive shore-based and water-based recreational activities undertaken by locals and tourists within this area.

The application submitted is deficient in detail. However, sufficient information has been submitted to determine that the nature of the proposal is unsuitable for the site. This unsuitability is reflected in the proposal's non compliance with the statutory and strategic framework applicable to the application.

As such, the application is not considered to be in the public interest and is recommended for refusal.

OPTIONS:

That Council:

1. Refuse the application for the recommended reasons; or
2. Grant in-principle support for the application and a report be submitted to the next Council meeting with recommended conditions of consent.

Council officers recommend Option 1.

CONCLUSION:

Important operational and cumulative environmental issues have been identified during the assessment of the proposal that warrant its refusal. Further, management plans produced by Council and the Maritime Authority highlight the need to protect ecology and reduce erosion within the vicinity of the Tweed River.

Accordingly, assessment of the proposal against the relevant statutory legislation and an internal comment from the Natural Resource Management Unit has resulted in a recommendation for the application to be refused.

COUNCIL IMPLICATIONS:

a. Policy:

Corporate Policy Not Applicable.

b. Budget/Long Term Financial Plan:

Not Applicable.

c. Legal:

The applicant has a right of appeal in the NSW Land and Environment Court if dissatisfied with the determination.

d. Communication/Engagement:

Not Applicable.

UNDER SEPARATE COVER/FURTHER INFORMATION:

Nil.

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