Land and Environment Court

New South Wales

Case Name:	Pridel Investments Pty Ltd v Coffs Harbour City Council
Medium Neutral Citation:	[2017] NSWLEC 1042
Hearing Date(s):	16-23 October 2015, 27-29 January; 24 April 2016;
Date of Orders:	7 February 2017
Decision Date:	7 February 2017
Jurisdiction:	Class 1
Before:	Dixon C
Decision:	At [159]
Catchwords:	APPEAL - development application for subdivision and boundary adjustment - permissibility of development - lot size - inadequate assessment of the risk of coastal hazards to the Site - suitability of development
Legislation Cited:	Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Regulation 2000 Land and Environment Court Act 1979 Threatened Species Conservation Act 1995 Coffs Harbour Development Control Plan 2013 Coffs Harbour Local Environmental Plan 2013 CDCP 2000 NSW Coastal Policy 1997: A Sustainable Future for the New South Wales Coast State Environmental Planning Policy No 55 - Remediation of Land, cl 7 State Environmental Planning Policy No 71- Coastal Protection, cll 7, 8, 16 and 18 Coffs City Local Environmental Plan 2000, cl 12.14.18 23 and 23A ; Planning Proposal to amend Coffs Harbour Local Environmental Plan 2013

	Draft Coffs Harbour Local Environmental Plan 2012, cl 7.17 NSW Coastal Policy 1997
Cases Cited:	BGP Properties Pty Ltd v Lake Macquarie Council (2004) 138 LGERA 237, [2004] NSWLEC 399 International Air Transport v Ansett Australia Holdings Ltd (2008) 234 CLR 151 Najask Pty Ltd v Palerang Council (2009) 165 LGERA 171 Tolson v RMS (2014) 201 LGERA 367
Texts Cited:	Environmental Planning and Assessment Act 1979 Land and Environment Court 1979
Category:	Principal judgment
Parties:	Pridel Investments Pty Ltd (Applicant) Coffs Harbour City Council (Respondent)
Representation:	Counsel: Mr N Eastman (Applicant) Mr T Robertson SC (Respondent) Solicitors: Dentons (Applicant) Sparke Helmore (Respondent)
File Number(s):	172754 of 2016
Publication Restriction:	No

TABLE OF CONTENTS

JUDGMENT

Introduction

1 This appeal relates to a development application for a 39-lot subdivision and boundary adjustment on land at Solitary Islands Way, Emerald Beach near Coffs Harbour. It is brought under Class 1 of the Court's jurisdiction pursuant to Pt 3 Div 1, s 17 of the *Land and Environment Court Act 1979 (NSW)* (the LEC Act) and Pt 4 Div 8, s 97 of the *Environmental Planning and Assessment Act 1979 (NSW)* (the EPA Act).

2 The development application (DA 0172/14) (the DA) lodged by Pridel Investments Pty Ltd (the Applicant) on 29 August 2013 was refused by Coffs Harbour City Council (the Council) on 26 March 2015. These Class 1 proceedings were commenced on 22 April 2015 to challenge the Council's refusal of the DA.

Background

3 The DA proposes the following development:

(1) 38-lot residential subdivision and one residual lot on Lot 62, DP 1143405, Solitary Islands Way (the Site); and

(2) Boundary adjustment between the Site and Lot 32, DP 1143505 (Lot 32) known as 73 Fishermans Drive, Emerald Beach.

4 The proposed development is development requiring consent.

5 The Council resolved to refuse the DA for the following reasons outlined in the Council's original Statement of Facts and Contentions (the SFC):

(1) Inadequacies in the proposed treatment and management of Acid Sulphate Soils as per the submitted ASS Management Plan;

(2) Inconsistencies with Our Living City Settlement Strategy;

(3) Absence of owner's consent for the planned pedestrian walkway through the Coffs Coast Regional Park;

(4) Unacceptably high risk of flooding and inundation;

(5) Unacceptable impacts on Fiddamans Creek;

(6) Unacceptable effects on the identified coastal corridor lands;

(7) Unacceptable impacts on the neighbouring Coffs Coast Regional Park;

(8) The development is demonstrably contrary to the public interest.

Council's contentions

6 On 23 July 2015 the Council was granted leave to file an amended SFC (the ASFC) (Exhibit 1). In the ASFC, the Council outlined a number of facts, matters and circumstances that it contended should cause the Court to refuse the application - including two legal reasons why the proposed development is not permissible. The contentions outlined in the ASFC are:

- *Contention 1*: Inadequate information to assess flood risks;
- *Contention 2*: Flood impacts are unacceptable;
- *Contention 3*: Flood considerations under climate change are inappropriate and inconsistent with normal practice;
- *Contention 4*: Clause 23A(4) of the 2000 LEP and safe occupation of floodprone land not demonstrated;
- *Contention 5*: Development not in accordance with Coastal Policy;
- *Contention 6*: Inadequate assessment of the risk of coastal hazards to the Site;

- *Contention 7*: Site not appropriate for development due to likely coastal hazards;
- *Contention 8*: Boundary adjustment not permitted;
- *Contention 9*: Development exceeds the environmental capacity of the Site in breach of the objectives of the 2A Zone in the 2000 LEP;
- *Contention 10*: Proposed development not permitted under the draft LEP, as exhibited, because of the minimum lot size;
- *Contention 11*: Not in the public interest.

7 As the nature of the contentions are both broad and overlapping, making it difficult to simply address each matter in turn, the Applicant addressed the Council's concerns under four disciplines: town planning, coastal processes, flooding, ecology. My judgment adopts a similar approach.

8 However, my determination of the identified legal issues adversely to the Applicant is sufficient in themselves to justify the refusal of the development consent sought. That relieves me of the need to determine all of the merit issues between the parties. I have addressed the town planning blockage issues and some of the coastal processes issues because the determination of those merit issues underlines the inappropriateness of the Site for the development as a matter of merit.

Evidence

9 Pursuant to s 97 of the EPA Act and ss 17(d) and 39(2) of the LEC Act, as consent authority I am bound to take into consideration the matters contained in s 79C of the EPA Act, where relevant, having regard to the evidence, including the submissions received by the Council in response to the notification of the DA, and the evidence of the objectors taken at the commencement of the hearing at the Site and from various properties located along Fiddamans Creek (Exhibits 13 and 18).

10 Generally speaking, the objectors' concerns about coastal processes, sea-level rise, beach erosion, flooding, ecology, the development's lack of connectivity with the existing village and an emergency Site access are reflected in the contentions raised by the Council and were dealt with by the experts retained by the parties.

11 Broadly speaking, the flooding issues identified as Contentions 1-4 in the ASFC were addressed by the Applicant's consultant, Mr Darren Lyons, and the Council's consultant, Mr Drew Bewsher. Their Joint Report is Exhibit 7.

12 Contentions 5-7, dealing with coastal processes, were the subject of expert evidence by the Applicant's consultant, Dr Philip Haines, and the Council's expert, Mr Douglas Lord. Their Joint Report is Exhibit 6.

13 Contentions 8, and part of 9, 10 and 11, relating to town planning matters, were dealt with by the Applicant's expert, Mr Steve Connelly, and the Council's expert, Mr Garry Fielding.

14 The ecology issues were dealt with by the Applicant's experts, Mr Greg Elks and Mr Williams, and the Council's expert, Dr David Rohweder. Their Joint Report is Exhibit 8.

Overview

15 The Site is located north of the village of Emerald Beach, which is approximately 18 kilometres north of the Coffs Harbour business and commercial precinct. The land has an area of 29.74 hectares and is of an irregular shape.

16 It fronts Solitary Islands Way to the north-west and the Moonee Beach Nature Reserve, which forms part of the Coffs Coast Regional Park, to the south-east. Privately owned properties adjoin the Site to the north-east and south-west, including the Emerald Beach Holiday Park.

17 The majority of the Site (being 25 hectares) is currently zoned Residential 2A pursuant to the CLEP 2000. The CLEP 2000 remains in force as far as the zoning of the land is concerned, as the Council resolved, on 13 December 2012, to defer this Site and other areas from the *Coffs Harbour Local Environmental Plan* 2013 (LEP 2013) and the *Coffs Harbour Development Control Plan* 2013 (DCP 2013).

18 On 26 March 2015, the Council resolved to adopt a Site-specific Planning Proposal which recommends a Residential 2A Low Density zoning over the footprint of the developable area of the Site, the subject of this DA.

19 The land surrounding the Site is zoned Open Space 6A Public Recreation, Residential 2A Low Density and Environmental Protection 7A Habitat and Catchment.

20 The proposed subdivision will be sited in the south-eastern part of the property between 130 metres to 260 metres landward from the face of the foredune on Emerald Beach. The proposed residential lots will vary in size from 635 square metres to 700 square metres.

21 An access road incorporating a multi-spanned bridge, with 19 culverts, is proposed to be built from the Pacific Highway to the Site through a Swamp Forest, which is an endangered ecological community (EEC). It is accepted that blockage of the culverts is likely to impact on predevelopment flood levels to the north of the Site. That said, the Applicant submits that there is an engineering answer to this outcome and, if the Court were minded to otherwise approve the DA, it should be given opportunity to explore a further engineering solution to ensure there is no blockage eg more culverts.

22 Connection to sewerage infrastructure and an installation of a sewer pump station are also part of the application.

23 Emerald Beach has a single foredune with a crest elevation, at the time of the hearing, of approximately eight metres AHD. The dune was mined in the 1960s and 1970s and reformed and revegetated following the completion of mining. The relationship between the development site and the foredune on the beach can be understood from Figure 1 below.

Figure 1: Cross section location for profile given in Figure 2, showing 'unlikely' 2010, 2050 and 2100 hazard lines (progressing landward) and the proposed development layout

24 As it presently stands, the dune is the barrier that protects the Site from the erosive forces of the sea. It also protects the land in another way: both the dune and its vegetation provide a visual barrier to the development. The longevity of the dune, as both a protective and visual barrier to the development, is therefore of critical importance in this case.

25 Climate change will accelerate coastal processes and make it much more likely that the Site will be inundated from the sea, within the presumed 100--year life of the development. That said, the Council's case is not dependent at all on climate change (Respondent's written submissions (RWS) at [26]). Rather, the Council contended there is a clear risk in the present that the dune will be eroded and its vegetation stripped by the erosive forces of the sea. This will make the development more susceptible to coastal processes and when the foredune eventually slumps - by erosion over time - given the proximity of property boundary to the toe of the foredune - a rebuilt lower dune would be subject to periodic wave overtopping and ongoing erosion.

26 The parties' coastal experts agreed that the impacts of this overtopping water on the proposed development and its infrastructure would be dependent on the distance between the dune to the development, ground levels, ground porosity,

roadway design, stormwater drainage capacity and freeboard to dwellings and, of course, the predictability of the storm event. They also agreed that these impacts are not disclosed by the hazard lines adopted by the Council in its coastal hazard maps. These lines "*do not include any additional provision for slope adjustment following storm bite, reduced foundation capacity behind the eroded beach face or for wave overtopping following a storm event at the nominated timeframe*" (Exhibit 6 paragraph 5, page 2).

27 Despite that, the Applicant contended, on its evidence, that such impacts as wave overtopping following a storm and slope adjustment following storm bite have been appropriately accommodated in the design detail of the development. Council disagreed and contended that the appropriate planning approach for a "greenfield" site is to avoid risks which jeopardise structures and people.

28 In addition to coastal impacts outlined, the Site forms part of a relatively narrow floodplain that has been described as an "infilled estuarine basin". It is located within the Fiddamans Creek Catchment. Fiddamans Creek traverses the Site and discharges into the Pacific Ocean at the southern end of Emerald Beach. The lower reaches of Fiddamans Creek are characterised by a narrow channel that is largely stable in nature. However, marine sand build-up within the creek entrance area typically controls backwater levels within the creek.

29 With respect to the ocean entrance of Fiddamans Creek, the coastal experts agreed that future evolution of this entrance under projected sea-level rise scenarios and associated shoreline responses within the Emerald Beach embayment are unknown. Although they accepted that elevated sea levels in the future will likely result in higher groundwater levels across Fiddamans Creek Floodplain, and given the range of future scenarios and predicted outcomes, they endorsed conservative development design conditions on this Site. The Council's coastal expert, Mr Lord, is concerned that the likely impacts in which the creek entrance develops into the future have not been adequately assessed in the ESS and the Applicant's consultant's modelling.

30 The extent of the flooding experienced by the properties along Fiddamans Drive after a large storm event can be appreciated from the

photographs taken 13 January 2011 (attached to Mr Widdowson's letter of objection dated 15 October 2015) and from the Court's inspection of the flood lines on the ground-floor level of his home (observed at the site view) and the oral testimony of some of the other residents (Exhibits 13 and 18).

31 Given the floodprone nature of the Site, 23,000 cubic metres of fill will be imported onto the Site to create a finished level for the access road, the residential roads and the residential lots to be above the one-in-100-year flood level. Despite the development being erected on a pad between 4.5 metres and 5.5 metres in height and two-storey houses being permissible, whilesoever the dune remains at its current height and vegetated state the evidence is that the development will not be visible from the beach. However, as already noted, once the dune and vegetation are removed (either partly or wholly), the evidence suggests that the Site will be either partially or fully visible from the Coffs Coast Regional Park, areas of the beach and from some locations on the headland. The Court observed the Site from these locations at the view.

32 The Site contains inherent conservation values associated with seven flora communities, including: forest and woodland communities of wet heath communities and two similar dry health communities occupying the Site; and a number of fauna species that utilise the Site. Initial construction stages of the development will result in impacts on the environment through vegetation removal; however, these environmental impacts of the development are said to be offset by the "retirement of bio-banking credits" - both off-site and on-site.

33 The DA was submitted with a Bio-Banking Statement (BBS) prepared by GHD Pty Ltd (GHD) and determined by the NSW Office of Environment and Heritage (OEH). A revised Bio-Banking Assessment (BBA) and a revised Red Flag Variation Assessment (RFVA) for the Paperbark Swamp Forest, prepared by GHD, was submitted and approved by OEH in May 2014.

34 In response to initial feedback from the Council on the proposed development after submission of the DA and the accompanying Statement of Environmental Effects (SEE), the development proposal was shifted landward approximately 60 metres to ensure that it does not encroach into the future "Unlikely" (2100) Hazard Area as defined in the Council's Coffs Harbour Coastal Processes and

Hazard Definitions Study (2011) (the CPHDS) (Exhibit G, page 5 at 2.3). It is accepted that the development is compliant with the relevant setback identified in the BMT WBM Pty Ltd Coffs Harbour Coastal Zone Management Plan Final Report January 2013 (CZMP). This modification to the DA means that the coastal hazards information presented in the SEE accompanying the application prepared by Worley Parsons (2012) is redundant and does not form part of the application (Exhibit G, page 10). The Applicant relies on the evidence of Dr Haines for coastal processes.

35 The 2011 CPHDS study considered coastal hazards that had the likelihoods of "almost certain", "unlikely" and "rare" (as per the ISO Standard 31000:2009) for the time periods of "Immediate" (2011), "2050", and "2100". The report represented the hazard lines as nine lines that represent a range of possible shoreline positions, extending from present day to 2100. The hazard lines were determined in accordance with the standard risk management principles endorsed by the NSW Government as part of the Principles for Coastal Management - as documented in the Guidelines for Preparing Coastal Zone Management Plans (OEH, 2013).

36 The coastal hazards identified and assessed in the CPHDS underpin the Coffs Harbour Coastal Zone Management Study (2012) (the CZMS) and the Coffs Harbour Coastal Zone Management Plan (2013) (the CZMP). These Council documents all advocate the use of the "Unlikely" hazard lines as the basis to control future development in the local government area (the LGA).

37 The "Unlikely" line in the CZMP marks the potential landward migration of the shoreline under future sea-level rise conditions at projected times. It means:

> There is a low possibility that the event will occur, however, there is a history of infrequent and isolated occurrence" (Exhibit 10, Tab 6, page 201).

38 While the "Unlikely" line is accepted to be a conservative estimate of future shoreline positions, it is considered appropriate for broad land use planning purposes, including subdivision of land. The provisions of any CZMP are an express consideration under s79C(1)(a)(v) of the EPA Act.

39 Throughout the assessment period, the Council accepted that the DA had been lodged utilising the bio-banking provisions of the *Threatened Species*

Conservation Act 1995 (NSW) (the TSC Act) and the EPA Act and was "biodiversity certified development". As such, the development was taken to be development that was not likely to significantly affect any threatened species, population or ecological community: the TSC Act. In that circumstance, the Council did not require the DA to be accompanied by a Species Impact Statement (SIS) or need to take into consideration the likely impacts of the development on biodiversity values. The Applicant contended that the Court can adopt the same approach but has provided to the Court all of the material which was before the OEH that generated its approval, should the Court decide to look behind the OEH's certification. Part of the proposed residual lot is intended to be used as a bio-banking site if consent for subdivision is otherwise granted. As such, if approved, the proposal will result in the protection of 23.75 hectares for conservation purposes.

The statutory controls

40 The ASFC records that the following statutory controls are applicable:

- *NSW Coastal Policy 1997: A sustainable Future for the New South Wales Coast* (Coastal Policy)

  The New South Wales Coastal Policy is the primary policy document in relation to coastal hazards. It is a consideration that must be taken into account by a consent authority when determining a development application in the Coffs Harbour Local Government Area (in accordance with cl 92(1)(a) of the *Environmental Planning and Assessment Regulation* 2000 (EPA Regulation)).

- *State Environmental Planning Policy No 55 – Remediation of Land:* cl 7;
- *State Environmental Planning Policy No 71 - Coastal Protection*: clls 7,8,16 and 18;
- *Coffs City Local Environmental Plan* 2000: cl 12.14, 18 23 and 23A;
- Planning Proposal to amend Coffs Harbour Local Environmental Plan 2013 (June 2015);
- *Draft Coffs Harbour Local Environmental Plan* 2012: cl 7.17

  Coastal Hazard Planning and Part D3 Flooding and Coastal Hazards of the planning proposal.

41 There are also a number of other polices and documents of relevance – they are listed at [4] of the ASFC. Having said that, the list omitted the latest risk-based climate modelling document, entitled "The East Coast Cluster Report, Climate Change in Australia Projections for Australia's NRM Regions", prepared by the CSIRO and Bureau of Meteorology (CSIRO 2015) (Cluster Report) which was released subsequent to the lodgement of the DA.

42 Objective 2.2 of the Cluster Report requires the consent authority to consider the potential impacts of climate change on the planning and management of coastal development. The Council contended that the proposal does not address a number of issues raised in the Cluster Report, including: allowance for extreme sea levels along the east coast or Antarctic Ice Sheet collapse; a defined public access line for the development (as discussed in Table 3 to Appendix C). It is also contended that the proposal can be characterised as "ribbon development", which is contrary to s 2.3 of the Cluster Report, which discourages ribbon development on the coast.

Town planning

43 The following issues for determination relating to town planning were identified by the Applicant during the hearing:

(1) Does cl 18(4) of the CLEP 2000 allow the boundary adjustment as proposed?

(2) What is the effect of the Planning Proposals?

(3) Is the development isolated and is this unacceptable?

(4) Is the "view impact" unacceptable?

Permissibility

Does cl 18(4) of the CLEP 2000 allow the boundary adjustment as proposed?

44 Part of the proposed subdivision is a boundary adjustment which will cede land to the existing caravan park to accommodate emergency access from the residential subdivision via a six-metre wide, all-weather sealed access way from the south of the Site to a public road.

45 The emergency access required by the Bushfire Assessment in the SEE (Exhibit B, page x), and described as a "key urban design feature of the Master Plan" (Exhibit B, SEE, page xiv), utilises a pathway through the boundary

adjustment land to a public road. This emergency access has the same priority as the Site's main access to the Pacific Highway (Exhibit B, SEE, page 37.1). It is road number 6 in the development (Table 2). The land the subject of the boundary adjustment has both ecological and bushfire significance. It contains disturbed woodland and tall closed scrubland (Exhibit B, ESS, Figures 12, 93 - Vegetation Communities 2 and 6) and the land is referred to in the BBS.

46 The Council contended that the boundary adjustment suffered from a fundamental legal impediment. It is prohibited under cl 18 of the LEP. The clause states:

> **18 Subdivision and erection of dwellings within rural and environmental protection zones**
>
> **Objective of provision**
>
> To allow the subdivision of land in accordance with the land's environmental capacity **and** zone objectives.
>
> (1) This clause applies to land in Zone 1A, 1B, 1F, 7A or 7C.
>
> (2) Consent shall not be granted to the subdivision of land within a zone specified in the first column of the table to this clause which will enable creation of an allotment smaller than the area specified for that zone in the second column of the table.
>
> (3) Regardless of subclause (2), consent may be granted to the subdivision of land within Zone 1A to create an allotment not less than six hectares in area where the consent authority is satisfied that the allotment will be used for the purpose of banana growing as shown on Map 1 "Banana Lands" supporting the Council's *Rural Lands Development Control Plan*.
>
> (4) Regardless of subclause (2)
>
> (a) if land in Zone 1A adjoins land in Zone 7A, consent may be granted to a subdivision of the composite parcel provided each resultant allotment contains at least 40 hectares of land within Zone 1A, or
>
> (b) if land in Zone 7A adjoins land in Zone 1B, 2A, 2B, 2C, 2D or 2E, consent may be granted to a subdivision of the composite parcel provided:
>
> (i) each resultant allotment contains an adequate (in the opinion of the consent authority) building envelope outside the land in Zone 7A, and
>
> (ii) the consent authority considers that the subdivision is desirable for achieving long term management of the land within Zone 7A, and
>
> (iii) if the composite parcel contains land in Zone 1B and 7A, each resultant allotment has an area of at least the greater of the following:

(A) the minimum area specified in *Korora Rural Residential Development Control Plan* as in force on the commencement of *Coffs Harbour City Local Environmental Plan 2000 (Amendment No 28)*,

(B) one hectare,

(c) if land in Zone 7A adjoins land in Zone 2A, 2B, 2C, 2D or 2E, consent may be granted to a subdivision of the composite parcel provided:

(i) each resultant allotment contains an adequate (in the opinion of the consent authority) building envelope outside the land in Zone 7A, and

(ii) the consent authority considers that the subdivision is desirable for achieving long term management of the land within Zone 7A.

(5) Consent shall not be granted to a subdivision pursuant to subclause (4) (a) where additional riparian access rights to streams, creeks, rivers and other waterways may be created.

(5A) Consent may be granted to the subdivision of land to which this clause applies that comprises a boundary adjustment or rearrangement of allotment boundaries only if:

(a) the development consent does not authorise the creation of any additional allotment or dwelling entitlement, and

(b) each proposed allotment contains only one of the existing dwelling-houses or attached dual occupancies, and

(c) each proposed allotment comprises an area of at least 10 hectares, and

(d) the consent authority is satisfied that:

(i) if the land is within Zone 1A, the proposal meets the aim and objectives of Zone 1A, and

(ii) if part of the land is within Zone 7A, the long term management of the land in Zone 7A will be assisted.

47 Clause 18 (2) provides a blanket prohibition of the subdivision of land zoned 7A unless the resulting allotments have an area of 40 hectares.

48 The land included in the boundary adjustment (Lot 32) is partly zoned 7A - Environmental Protection under CLEP 2000 and currently has an area of 4,297 hectares. After the boundary adjustment, the lot will have an area of approximately 4.8 hectares.

49 However, there are exceptions to the prohibition contained in subcl (2) set out in the provision. In this case, the parties accept that the proposal meets the requirements of subcl (4)(b) and, thereby, compliance to the prohibition in subcl (2) is lifted.

50 The Applicant says that is the end of the matter. Either subcll (4) or (5A) lift the prohibition imposed by subcl (2) and, here controversially, subcl (4) is met. In this case, subcl (5A) is subservient.

51 The Council contends that the satisfaction of cl 18(4)(b), does not remove the requirement to also satisfy the criteria in subcl (5A).

52 The Council contends that both subclauses of cl 18 need to be satisfied before the boundary adjustment can be approved.

53 The Council invites the Court to consider the text of the chapeau to subcl (5A). It provides :

> Consent may be granted to the subdivision of land to which this clause applies that comprises a boundary adjustment or rearrangement of allotment boundaries **only if** …
>
> (Emphasis added)

54 The Council submits that the chapeau identifies the subject matter of the subclause, which is the subdivision of land "*to which this clause applies*". Subclause (1) provides that the clause applies to land, inter alia, in Zone 7A. Not all the land need be within the one zone: for example, subcl (4)(a) refers to a composite parcel containing more than one zone. After identifying the subject matter of the subclause, the chapeau then provides that subdivision by way of a boundary adjustment may occur "only if" one or a number of conditions are met. In other words, satisfaction of the subdivision criteria is a condition precedent to the grant of consent. Therefore, the Court has no power to consent to the subdivision without that satisfaction. The words "only if" are emphatic and exclude other ways of obtaining consent: *Najask Pty Ltd v Palerang Council* (2009) 165 LGERA 171 at [28]-[29]; *Tolson v RMS* (2014) 201 LGERA 367 at [37].

55 As the lot after the boundary adjustment in this case will be less than 10 hectares, the Council contends that the proposed boundary adjustment is prohibited by cl18(5A)(c).

56 In the event that the Court does not agree with the Applicant's interpretation of the clause in respect of this aspect of the proposal, then the Applicant submits

the Court could approve the balance of the development subject to the provision of revised plans deleting the boundary adjustment.

Finding

57 After reading the text of cl 18 of CLEP 2000, I must agree with the Council's interpretation as outlined. A further reason which supports this interpretation is the qualification in subcl (5A) referring specifically to boundary adjustment subdivision, which applies in this case.

58 The resulting allotment (after the boundary adjustment) will be less than 10 hectares and, thereby, in breach of subcl (5A). Subclause (5A) applies irrespective of compliance with the exception in subcl (4).

59 As there is no evidence before the Court in respect of an alternative emergency access from the Site, I consider this to be a fatal flaw with the current application.

60 In the interests of finality of litigation, I am not prepared to approve the balance of development subject to receipt of a revised plan deleting the boundary adjustment. The deletion of this land will have implications for other aspects of the development, including the need for a revised BBS. The proposed emergency access route was a requirement of the Rural Fire Services (RFS) General Terms of Approval. Given the floodprone nature of the Site and the inherent bushfire risks, I am not prepared to approve this application without an appropriate assessment of these important matters. Emergency access from this isolated site is a key issue in my assessment of the suitability of the Site for this development. The Applicant has been given fair notice of this issue, as it was raised in the Council's ASFC, which was the subject of a contested Notice of Motion hearing.

61 My determination of this boundary adjustment legal issue is sufficient to refuse the DA. However, as previously stated, if I am wrong in that interpretation it is appropriate that I deal with some of the central merit issues raised by the evidence which, in my assessment, collectively support a refusal of the development.

What is the effect of the Planning Proposals?

62 The parties dispute the "effect of the Planning Proposals" in this case.

63 The Applicant contends that they endorse the proposed development for this Site. Mr Connelly, the Applicant's planner, describes them as representing the culmination of "*a long line of strategic and statutory planning dating back to the early 1980's supporting residential development on the site*" (Mr Connelly, Joint report, Exhibit 9). Therefore, the Planning Proposal should be given significant weight in my assessment of this DA.

64 The Council contends the existing zoning under CLEP 2000 is an artefact of an earlier era before current policy, and the proposed zoning is to enable the significant environmental constraints of the Site to be resolved by testing them in a DA. For those reasons, neither the existing nor the proposed zoning in the Planning Proposal should be given significant weight; *BGP Properties Pty Ltd v Lake Macquarie Council* (2004) 138 LGERA 237, [2004] NSWLEC 399, McClellan CJ, [117]-[119] (*BGP Properties*).

65 As noted earlier, the majority of the Site (being 25 hectares) is currently zoned 2A - Residential pursuant to the CLEP 2000. The CLEP 2000 remains in force as far as the zoning of the land is concerned, as the Council resolved, on 13 December 2012, to defer this Site and other areas from the CLEP 2013 and the CDCP 2013.

66 The draft *Coffs Harbour Local Environmental Plan* 2012 (the draft LEP 2012) had been formally notified and exhibited at the time the DA was lodged. Under the draft LEP 2012, the Site was zoned E2 - Environmental Conservation and a minimum lot size of 40 hectares applied to the Site under cl 4.1. The Council's initial position was that the Draft LEP 2012 would continue to apply to the deferred areas as a draft instrument until a determination was made to rezone the deferred areas. However, in the Council's final written submissions, at [3], it is submitted that the legal effect of excluding the land was not that the 2013 LEP was to be treated as a draft LEP, but that it simply did not apply to the land (cl 1.3(1A)). That said, the parties' town planners agreed, in their Joint Report, that for the purposes of these proceedings "… *this proposal is stale and no substantive weight should be given to this Draft*" (Exhibit 9, page 2 at

[18]). They formed that view because, on 26 March 2015, the Council resolved to adopt a site-specific Planning Proposal which recommends a 2A - Residential Low Density zoning over the footprint of the developable area the subject of this DA. This is shown as follows (Exhibit 9, page 35):

67 The Council engaged Monteath & Powys, in association with David Broyd Consulting Services Pty Ltd, to assist in the preparation of the June 2015 Planning Proposal. They were instructed to determine appropriate zones for the deferred areas, including the subject site and prepare relevant documentation (Exhibit 10, Vol 1 at Tab 7, page 262). The documentation prepared included an environmental study which assessed the general suitability of the area for development purposes and the appropriateness of the zonings that would be complementary to the surrounding areas, as well as a justification for the Planning Proposal. These documents were to be publicly exhibited with the Planning Proposal after the gateway determination had been issued by NSW Planning & Environment.

68 The Council's June 2015 Planning Proposal specifically referred to the subject site and the Applicant's DA. The relevant extract is reproduced below.

Table 1; Recommended Zonings

Locality	Recommended Zone(s)	Comments	Part 3A Approval

Emerald Beach (north)	Existing caravan park RE2 Private Recreation Area north of caravan park Part E2 Environmental Conservation and part R2 Low Density Residential Other areas to be zoned E2 Environmental Conservation	The RE2 permits a caravan park whereas the rural zones prohibit them now. Council has recently (26/3/15) refused a 38 lot subdivision for land to the north of Emerald Beach. Stakeholders and residents have raised various issues with respect to the undevelopable potential of the land particularly regarding the environmental constraints. However, it has been concluded that a residential zone is warranted on part of the Site the justification being consistency with the Section 117 Directions in relation to the fact	No Part 3A revoked

		that the Site has been zoned for residential development under Coffs Harbour LEP 2000. Further, it is understood that residential development has been permissible on these lands since 1988, bringing into consideration equity issues given the sites historical zoning provisions. Notwithstanding, there are pertinent issues that need to be adequately addressed on this Site before development can occur including flood liability, potential sea level rise impacts, bushfire and visual impacts. It is noted that there is a bio banking agreement applicable to the	

		Site as well. Overall, a number of issues were weighed up in coming to the proposed zonings in this area particularly the ecological analysis undertaken as part of this study. It is considered that this is a challenging Site, however, at this strategic level it is considered some residential zoning is warranted after balancing up all the issues investigated as part of this study. Larger minimum lot sizes (550 sq. m) are also recommended to protect the integrity of the Site.	

69 While the Council accepted that the Planning Proposal - at the strategic level - acknowledged a reduced residential zoning for part of the Applicant's land, it contended that this outcome was not because of intense, site-specific examination of the environmental capacity of the land but, rather, the result of broad-brush recommendations and equity considerations which did not include all relevant consideration of coastal processes. The Council contends that the

environmental study prepared by Monteath & Powys underpinning the June 2015 Planning Proposal mandated further site-specific analysis as part of the DA process. The principle strategic policy behind the earlier 2014 Planning Proposal was based on the Mid-North Coast Regional Study (the MNCRS) (Exhibit 10, Tab 7, pages 263, 270). After close reading of the 2015 Planning Proposal, there is only brief qualified commentary on the CPHDS and the following caution:

> Specific data collated for this study would need to be considered in studies prepared as part of any rezoning or development application for certain sites within the study area" (Exhibit 10, Tab 7, page 356).

70 The limitations of the investigations behind the environmental study supporting the 2015 Planning Proposal are heralded in the first pages of the document under the headings "CAVEAT" and "CURRENT APPLICATONS". It states:

> CAVEAT
>
> It is important to acknowledge at the outset that this study was primarily based on the examination of existing, and publicly held, information with some ground truthing where possible in relation to ecological issues. This study has involved discussions with a range of stakeholders and considered a number of issues including (but not limited to) environmental, social and economic as well as current approvals on lots in the deferred areas, provisions under the Environmental Planning and Assessment Act 1979 (eg section 117 Directions) current zoning arrangements in and around the study area, and infrastructure provisioning.
>
> Importantly, the results of this study do not negate that any future development applications (DA) will still be required to undertake detailed studies (where required) as part of the DA process.
>
> …
>
> CURRENT APPLICATIONS
>
> It should be noted up front that just because a zone is identified on any of the deferred areas that this does not guarantee any development outcome. Any development in NSW still has to go through a rigorous assessment process under the EPA Act and *any development on a Site will need to be consistent with current legislation and policy guidelines*.

71 In the absence of coastal processes mapping, in the detail which is now before the Court, the Council submitted that the reduced residential zoning recommended in the Planning Proposal must be accepted as a "kind of holding zone" to enable the resolution of these outstanding questions, at the DA stage (RWS at [21]). It is submitted that the text of the Planning Proposal acknowledged as much when it describes the residential zoning as a result of

bringing into consideration equity issues, given the Site's historical zoning provisions. For these reasons the Council contended that neither the existing nor the proposed zoning should be given significant weight in my assessment of the DA: *BGP Properties*. This is not to go behind the zoning but to see it for what it is currently "… *a relic, inconsistent with the regional strategy, but providing an equitable opportunity for the owner of the land to test the suitability of the site for residential development by making an application*".

72 Despite the recommended zoning outcome, the Planning Proposals clearly state that there are "*pertinent issues"* that need to be adequately addressed on this "*challenging site*" before residential development can occur, including an assessment of flood liability, potential sea-level rise impacts, bushfire and visual impacts. Assuming permissibility, the Council's final position based on the evidence is that:

> No case is made out that it is necessary for strategic planning reasons to urbanise this part of the coastline at the intensity proposed: strategic planning disfavours the urbanisation of this land. That is not to say that a low density residential development of the subject land is impossible (Exhibit B, page 2.7) (RWS, page 4 [2]).

73 Finally, it is contended that the chronology of events to date suggests that the draft Planning Proposal is neither certain or imminent. On 26 June 2015, it was submitted to the Department and the Gateway Determination was made on 24 July 2015, giving the Council then 12 months to make a determination, but withdrawing any delegation to Council to make the LEP amendment (Exhibit 10.1, Tab 6, page 2024). To date, nothing more has happened.

74 The Applicant maintains that coastal processes and risk mapping were a central focus of the Monteath & Powys environmental study behind the 2015 Planning Proposal. In making that submission, the Applicant contended that the 2014 Planning Proposal and the 2015 Planning Proposal need to be read together (Exhibit 10, Tabs 6 and 7). The August 2014 Planning Proposal specifically dealt with coastal hazards, and then the 2015 Planning Proposal carried that forward and "… *is working off the back of that very detailed work done on the adoption of the unlikely hazard line for residential zone boundaries in different areas including on the subject land*" (Applicant's Written Submissions in Response (AWSR at [8]). Collectively, the two Planning

Proposals evidence the fact that "coastal process was at the centre of the consideration" in the Planning Proposals.

75 It was further submitted by the Applicant that the development is compliant with the current zoning, compliant with the proposed zoning (which incorporates the relevant setback required by the CZMP) and those matters are mandatory considerations under s 79C which support an approval of the DA consistent with the Council planning officer's recommendation for approval (Exhibit 10, Tab 30).

Finding

76 Quite clearly, the Planning Proposal does not compel, or necessarily mandate, residential development on this Site without further assessment of the pertinent issues identified. While the proposed residential zoning is relevant to my assessment of the DA under s 79C(1)(a)(ii) of the EPA Act, it is not, as the Applicant contends, to be given significant weight (Applicant's Written Submissions (AWS) at [231]).

77 I accept that the environmental study that underpins the 2015 Planning Proposal is qualified and limited. Moreover, the endorsement in the 2015 Planning Proposal for a reduced residential zone on the Site is heavily qualified. By its terms, it mandates a detailed assessment of "*potential issues pertinent to this Site including flood liability, potential sea level rise impacts, bushfire and visual impacts*" and "… *consistent with current legislation and policy guidelines"* at the DA stage. The qualified recommendation for a residential zoning is not surprising when one takes into consideration that it came about during the assessment of the DA after discussions with stakeholders and a balancing up of all the issues investigated as part of the environmental study, including a consideration of "… *equity issues given the site's historical zoning provision*" (Exhibit 10, Tab 7, page 270.3).

78 The evidence is that the 2014 Planning Proposal was prepared in response to high priority actions contained in the Council's adopted CZMP which endorsed the preparation of planning controls reflecting the coastal hazards and risks for different planning horizons and sea-level rise scenarios as defined in the CPHDS (Exhibit 10, Tab 6, page 200). The proposal has only a cursory

reference to the NSW Coastal Policy 1997 (Exhibit 10, Tab 6, page 212). The coastal processes analysis in the 2014 Planning Proposal (relied upon in the 2015 Planning proposal) was based on the CPHDS and adopted CZMP. The main strategic planning instrument referred to in the proposal was the 2009 MNCRS, and the study records that the MNCRS was not the basis of the recommendation for a residential zone on the Site. Relevant considerations under the NSW Coastal Policy have not been addressed in either Planning Proposal. The NSW Coastal Policy lists the strategic actions relevant to development control, and the design and locational principles for consideration in development control (Exhibit 10, Tab 1, pages 82-86) and at the hearing the Court spent some time taking evidence about the matters listed in in Tables 2 and 3 of the Coastal Policy for the purposes of this DA.

79 While Dr Haines is satisfied that all relevant coastal processes have been fully accounted for in the proposed design, because the development meets the design conditions for 2100 and sits behind the “Unlikely” line adopted by the Council‘s CZMP (arising out of the CPHDS) (Exhibit G, Page 5), this does not dispose of the need for the Court to consider all relevant policies, including the Coastal Policy when determining this DA.

80 Clause 92(1)(a) of the EPA Regulation makes the NSW Coastal Policy a mandatory consideration under s 79C(1)(a)(iv) of the EPA Act.

81 Having said that, the existing zoning of the Site permits the proposal and provides the Applicant with the equitable opportunity to test the suitability of the Site for the proposed residential development against the relevant planning controls, including the NSW Coastal Policy, the Cluster Report and the adopted CZMP and the other relevant evidence before the Court under s 79C of the EPA Act.

Is the development isolated and is this unacceptable?

82 The Coastal Policy discourages ribbon development, unregulated cluster development and continuous urban areas on the coast, and promotes compact and contained urban development in order to avoid them (Exhibit 1, pages 21,58).

83 Ribbon development is generally used in planning to refer to development along a main road that is development that proceeds in a strip. The Coastal Policy refers to the coastline as a strip (Exhibit 10.4) and "coastal strip" is used in common speech to refer to the linear nature of the coastline. The Council submits that ribbon development is equally descriptive of development along the coastal strip, in the context of the Coastal Policy: *International Air Transport v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at [53].

84 The development is described in various ways and, while there was some debate as whether it could be characterised as "cluster development" and "ribbon development" in the conventional 1960-1970s sense, in the overall context of the Coastal Policy, the issue was whether it was "*promoting compact urban forms*" to allow a residential development in this location approximately 50 metres in a lineal form along the coast.

85 With respect to connectivity to the existing Emerald Beach Village, the issue was whether the design was contrary to the Coastal Guidelines (2003). It is addressed in the planners' Joint Report (Exhibit 9 at page 17) and their oral evidence.

86 To put the evidence in context, it needs to be understood that access from the Site to the existing Emerald Beach Village is through the adjoining caravan park (which is not part of the development proposal) or by taking a 2.5 kilometre trip along the existing proposed public road to the Pacific Highway and making your way to Fiddamans Road. The Court took a view of the existing Emerald Beach Village and travelled the access paths to that area through the caravan park and along the proposed road from the Site to the Pacific Highway.

87 Mr Fielding told the Court that the proposed development has a "*poor level of connectivity to the existing village contrary to the Coastal Design Guidelines (2003) (*the Guidelines*) and good planning practice*". He also said that the siting of the development offended the NSW Coastal Policy which, as stated earlier, discourages ribbon development, unregulated cluster development, continuous urban areas and other inappropriate housing developments on the coast (Exhibit 10, Tab 1, 2.3 Key Actions of the Coastal policy). The Coastal

Policy promotes street forms for coastal villages which are interconnected and permeable (Exhibit 9, page 17).

88 The Coastal Design Guidelines (2003) (the Guidelines) seek to limit and control coastal sprawl by planning for compact settlement footprints. To achieve this end, they encourage a compact settlement by consolidating growth within the existing boundary of the settlement. And, in circumstances where a village is able to expand, then this should:

> … reinforce and extend the existing urban structure of the settlement by expanding only on land that can respond to and reinforce the settlement's key characteristics.

89 Mr Fielding expressed the view that the proposed subdivision's lack of connectivity with the existing Emerald Beach Village and its expansion of the village for a distance of approximately 500 metres along the coast is a poor and undesirable planning and development outcome.

90 The Applicant has maintained throughout the case that the NSW Coastal Policy is essentially a document that informs strategic planning. The objectives and actions outlined in the Policy are directed to the preparation of planning instruments and development control plans and do not relate to individual development assessment (AWS at page 78 [226]). During cross-examination, it was suggested to Mr Fielding that:

> The ship has sailed, hasn't it? They've zoned it and in their draft in 2015 they've said that that's an appropriate zoning.

91 Mr Fielding disagreed and expressed concerns about the grounds in support of the Planning Proposal which had been tabled to the Council. He said, in response to this line of questioning:

> I question in that context the grounds under which that recommendation was put to Council at that time. I must say I was not impressed with the grounds within the Monteath & Powys environmental study that led to that recommendation that the R2 zone be applied to the area covered by the subdivision, the development application of the subdivision now before the Court. (AWS at page 78 [226])

92 A number of objectors have raised concerns about the linear design of the proposal behind the dune, the subdivision's isolation and its lack of connectivity with the existing Emerald Beach community. Mr Storey, on behalf of the OEH NSW National Parks and Wildlife Service (NPWS), gave oral evidence onsite

about the Departments' continuing concerns with the location of the amended development proposal. His evidence reflected the same concerns expressed in the NPWS's earlier written submission to the Council commenting on the DA (Exhibit 10.3, Tab 27 at 2370). That submission recorded that the Site forms a common boundary with the CCRP. The CCRP had been reserved to protect and conserve areas in natural or modified landscapes which are suitable for public recreation and enjoyment. The CCRP is managed by a Trust Board established in 2011 which facilitates cooperative joint management and enhancement community participation in the management of the park. The park is currently managed under a memorandum of understanding between the Council and the NPWS. The submission is critical of the siting of the development. The submission states:

> Local NPWS staffs have recently identified the following issues that are likely to arise if the proposed development was to proceed. The highlighted issues are common problems where linear urban development has occurred adjacent to NPWS estate. Experience has shown developments such as this one rarely factor in the full range of adverse community and environmental impacts on adjacent public lands. It is then up to the public land manager to manage these issues, often at great public expense.
>
> (1) There are no provisions or a designated beach accesses through the dunes in the CCRP to Emerald Beach adjacent to the proposed development. Beach access can be achieve at Diggers Point in Moonee beach Nature Reserve (MBNR) to the north, or traversing through to the private property to the south (Emerald Beach Holiday Park).History has shown that many residents who do not have access tracks to the beach relatively close to where the adjoining property boundary is, will create these illegal access tracks as they are often covertly reopened by the nearby neighbour. This type of unauthorised development results in fragmentation of the sensitive adjoining dune vegetation and destabilisation of the dune system. NPWS considers that this type of unauthorised development is highly likely to occur if this development was to proceed as proposed.
>
> (2) NPWS considers that the maintenance of a healthy vegetation cover on the narrow coastal dune in the Coffs Harbour Regional Park will be important strategy in managing the long term coastal recession of Emerald Beach the development. The development proposal plans to clear vegetation to the boundary of the CCRP. NPWS consider this will create adverse "edge effects' on this sensitive, narrow piece of dune vegetation. The CCRP vegetation cover is currently 85 metres at its widest point along the Emerald Beach. Examples of such edge effects include increased invasion of toxic weeds, neighbour encroachments and exposure of the native vegetation cover. The existing vegetation cover is regrowth vegetation resulting from sand mining activities, believed to have been carried out in the late 1960's. NPWS considers the proposed development and its associated edge effects will have a deleterious effect of this already disturbed and regenerating vegetation cover. It is noted that the Worsley and Parsons report (2012) attached to the

> DA 142/14 highlights that possible future beach erosion and recession at Emerald Beach due to sea level rising is estimated to be 42m in the year 2100. It is considered that additional pressure from the landward side may increase the vulnerability of this important coastal barrier.
>
> (3) Increased occurrence of domestic animals in the CCRP and Moonee Beach Nature Reserve (MBNR) as a result of urban development.
>
> (4) Increased illegal activities in this part of CCRP and MBNR (rubbish dumping, cubby and BMX construction) which is currently relatively inaccessible to vehicular traffic.
>
> (5) Increased pressure on public land mangers cater for "wildfire concerns' as result of this "island like "development which is surrounded by native vegetation on all of its main boundaries".

93 Mr Connelly supported the lineal design of the proposal and raised no issue with the development's connectivity with the existing village by foot through the caravan park via a right-of-way, even if blocked by a locked gate. He said that the proposed right-of-way will allow persons benefited by the right-of-way to cross and recross the right-of-way but not stop. He described this level of connectivity as "*normal in terms of development in Emerald Beach and northern beaches of Coffs Harbour*" and then provided examples of other such development along the coastline (Exhibit 9, page 18).

Finding

94 The principal point the Applicant advanced in support of the siting of this development is that its location is consistent with the strategic planning for the locality, as reflected in the now settled residential zoning.

95 For the reasons stated, I cannot accept that proposition. The Court must now consider these matters at the DA stage under s 79C. I do not accept, as the Applicant submits on the evidence, that there has been a rigorous statutory process that has mandated the exact development in this DA. The existing zoning permits a residential use subject to a merit assessment and the Planning Proposal also invites close scrutiny of pertinent issues at the DA stage. The study supporting the Planning Proposal expressly states that:

> … *any development on a Site will need to be consistent with current legislation and policy guidelines*... (Exhibit 10, Tab 7, 1.5 CAVEAT, page 338)

This includes a proper consideration of the relevant objectives of the Coastal Policy, the Guidelines and the submissions from objectors and relevant departments such as the NPWS in the s 79C assessment.

96 I accept Mr Fielding's expert assessment that the development offers a "*poor level of connectivity to the existing village contrary to the Coastal Design Guidelines (2003) (*the Guidelines*) and good planning practice*". Having regard to my observation of the Site from the headlands and beach, I accept, for all intents and purposes, this proposal is a modern form of "ribbon development" along the coast which is discouraged by relevant state policy.

97 At the view I observed the distance between the development and the existing Emerald Beach Village. It is isolated and disconnected. It cannot be described as compact development and its location is therefore not in accord with the Guidelines. It is, in my assessment, urban sprawl along the coast.

98 I do not accept Mr Connelly's planning evidence that this level of connectivity is "*quite normal in terms of development in the Emerald Beach and northern beach areas of Coffs Harbour*", as discussed in his evidence by reference to other development sites. Nor do I accept that it is practical or reasonable to expect the occupants of this 38-lot subdivision to access the existing village through the adjoining caravan park via a six-metre wide **gated**/footway path which is the same access path for resident evacuation and emergency vehicles in the event of fire in accord with RFS GTAS (Exhibit 10.2, page 2367).

99 There are no provisions for a designated beach access through the dunes in the CCRP to Emerald Beach adjacent to the proposed development. In those circumstances, I accept the evidence of the NPWS (based on past experiences with similar developments adjoining beaches) that it is likely that many residents will create illegal access tracks across the dune to access the beach rather than use the existing approved access points some distance form this Site.

100 The unacceptable impacts on the natural environment likely to be generated by the location of this development proximate to the CCRP to Emerald Beach Village, as discussed in the submission from the NPWS and the submissions from the local residents (Exhibit 10.3, Tab 27), are relevant considerations in my assessment of this DA: s 79C(1)(b). The development's linear design, isolation and lack of connectivity to the existing village are contrary to the Guidelines. For those reasons, an approval of the DA cannot be in the public

interest: s 79C(e). These matters support the conclusion that the Site is simply not suitable for this development: s 79C(c).

Is the "view impact" unacceptable?

101 In the Joint Report of the town planners, Mr Fielding states that the "visual impact assessment referred to in the SEE illustrates the proposal's inappropriateness, having regard to the Coastal Policy's objectives of discouraging ribbon development and continuous urban areas on the coast (Objective 6.2) and encouraging compact development that enhances the natural beauty of the Coastal zone (Objective 3.3).

102 The Applicant submits that, of itself, visual impact is not in issue. The residential development is permissible and, really, this concern is about its location. Even if the development were ultimately to be able to be seen from distant viewing points (against Mr Connelly's view that it would be very limited and very distant viewing points), it, ultimately, is an outcome which is clearly to be expected in an area with a residential zoning, with the minimum allotment sizes and height limits which have been imposed.

Finding

103 The objectives of the Coastal Policy to "*encourage compact development that enhances the natural beauty of the Coastal zone*" (Objective 3.3) are relevant considerations when assessing the visual impact of the development under s 79C. Based on Mr Fielding's evidence, and my own observations on the view from the dune of the beach and the headlands, I cannot accept that this lineal development is consistent with Objective 3.3 of the Coastal Policy. It will be plainly visible when the dune and its vegetation are inevitably eroded by coastal processes. Dr Haines stated that residential coastal development has a life span of approximately 40-50 years. Within that 50-year timeframe, it is not unreasonable to assume, on the available evidence, that the existing vegetation on the dune will have been removed or changed (despite efforts by the NPWS and Council to maintain it in accord with the management actions in the CZMP (BD.2 and BD.3); that the dune will have eroded or reformed after a storm or perhaps never rebuilt; or perhaps the top of the dune - which is presently shielding the development from view when standing on the headland - is whipped out in a severe storm. This could happen tomorrow, according to

Dr Haines's evidence. It is accepted that without the top of the existing dune and some vegetation, the development will be visible from various headlands in varying degrees. In my assessment, the visibility of this linear development behind the beach from a location of the dune or headland will detract from the natural beauty of the Coastal zone which is sought to be enhanced by the Coastal Policy.

104 The inevitable increasing visual impact of this development from the coastline over its 50-year life must weigh in the balance of a refusal of this DA. It is simply not in the public interest: s 79C(1)(e) and is contrary to the objectives of the Coastal Policy: s 79C of the EPA Act.

Flooding

105 The Site is flood liable. Most of the land is shown as floodprone on the Floodprone Land Map (Exhibit 19). Additionally, it will be influenced by climate change. The potential effects of this must be considered under Objective 2.2 of the Coastal Policy. Having said that the issue of flooding can be disposed of relatively quickly because I am not satisfied on the evidence that the Applicant has discharged its onus to prove that increase in flooding generated by this development is not detrimental : cl 23A(4)(a), (d).

106 Clause 23A of the CLEP provides**:**

> **23A Development on flood prone land**
>
> (1) The objectives of this clause are:
>
> (a) to maintain the existing flood regime and flow conveyance capacity, and
>
> (b) to enable safe occupation of flood prone land, and
>
> (c) to avoid significant adverse impacts on flood behaviour, and
>
> (d) to avoid significant adverse effects on the floodplain environment that would cause avoidable erosion, saltation, destruction of riparian vegetation or a reduction in the stability of the river bank or watercourse, and
>
> (e) to limit uses to those compatible with flow conveyance function and flood hazard.
>
> (2) This clause applies to land shown as flood prone land on the Flood Prone Land Map.
>
> (3) Development consent is required for the following development:
>
> (a) subdivision of land,

(b) filling and earthworks,

(c) the erection of a building,

(d) the carrying out of a work,

(e) flood mitigation works,

on land to which this clause applies.

(4) Consent required by subclause (3) must not be granted unless the consent authority is satisfied that the development:

(a) will not adversely affect flood behaviour resulting in detrimental increases in the potential flood affectation of other development or properties, and

(b) will not significantly alter flow distributions and velocities to the detriment of other properties or the environment of the floodplain, and

(c) will enable safe occupation of the flood prone land,

(d) will not significantly detrimentally affect the floodplain environment or cause avoidable erosion, saltation, destruction of riparian vegetation or a reduction in the stability of the river bank or watercourse, and

(e) will not be likely to result in unsustainable social and economic costs to the flood affected community or general community, as a consequence of flooding, and

(f) is compatible with the flow conveyance function of the floodway, and

(g) is compatible with the flood hazard within the floodway.

(5) In this clause, Flood Prone Land Map means the map marked "Coffs Harbour City Local Environmental Plan—Flood Prone Land Map".

107 The proposal is to raise the principal access road slightly above the 1% recurrence flood. Simply stated, the access road is 67.9 metres long and is to be built over a swamp on 19 culverts in order to reduce upstream impacts of flooding (Exhibit M).

108 The flooding experts have considered various levels of blockage of the culverts to assess the flooding impacts off the Site: 100%, 50% and 25%.

109 The evidence is that if a 100% blockage occurs then flood levels will increase and the owners of potentially affected land to the north at Sandy Beach have not been notified. Figure 2 in Mr Bewsher' statement (Exhibit 2, page 12), relying on the Applicant's flood study, identifies 45 flood affected lots in the area north of the Site and east of the Pacific highway, most of which have dwellings constructed on them. The flood level rises between 0.16 metres and

0.20 metres, which both hydrologists considered was “unacceptable” (Exhibit 7, [8]). Given the heavily vegetated area within the wetland immediately upstream of the proposed access road, Mr Bewsher said that the adoption of severe blockage assumptions was not unreasonable. Two lots, one of which is a nature reserve, and the other is part of the Regional Park, have flood levels between 0.20 metres and 0.29 metres.

110 If the blockage levels in Figure 2 are correct, then any development on Mr Minhimmett’s land will need to be built to a height of 0.29 metres to 0.44 metres because of the proposed development. This is considerably larger than the 0.02 metres to 0.04 metres increase to which Mr Minhimmett agreed (Exhibit 26).

111 No assessment of the impact of those levels on the floodplain environment of the land has ever been undertaken by the Applicant. This absence of evidence is relevant because the Applicant must prove that the increase is not detrimental under cl 23A(4)(a), (d) of the CLEP 2000.

112 When considering cl 23A, the impact of coastal erosion is not relevant. It is only concerned with flooding and flood liable land. The Council contends that the Applicant did not provide evidence to the Court to prove that it will meet the criteria of avoiding detrimental off-site impacts and, for that reason alone, development consent should be refused. Nor has the Applicant established, on the evidence, that the development will enable safe occupation of the floodprone land, given the lack of an emergency planning: subcl (4)(c). Nor can it establish that significant detriment will not be caused to the floodplain environment: subcl (4)(d).

113 Based on the evidence before me, I am not satisfied that the development proposal complies with the policy of maintaining predevelopment flood levels and with no blockage at all would not increase flood levels on neighbouring land. In reaching this conclusion, I have considered the evidence of Mr Lyons and the revised flood modelling in February 2015.

114 I have inspected the area surrounding the proposed road and cannot accept the proposition that vegetation in the floodplain upstream of the access road would be effective in “snagging” most waterborne debris prior to reaching the

access road, as Mr Lyons suggests. Nor do I accept that "*it is highly unlikely that all of the floodplain culverts would be to 100% blockage simultaneously, particularly considering the limited potential for large size debris that would bridge the full culvert width*". I have considered the blockage guidelines document (Exhibit K) and I do not accept, based on my observations at the view and the evidence of Mr Bewsher, that it is unreasonable to assume in this wetland environment that a large tree or branch could fall across the front of several culverts and block them even with the proposed cleared areas. I am unclear in any event who will maintain the culverts to keep them free from debris to ensure no, or no unacceptable, level of blockage to avoid the detrimental flood impacts referred to in cl 23A(4)(a) and (d).

115 The Applicant submitted that a 50% blockage of the 67.9 metre bridge over the existing floodway to Fiddamans Creek is improbable and represents a negligible risk. The Applicant's case is that a 10% to 12.5% blockage is a conservative assessment, and that the proposal would not result in unacceptable upstream impacts. In any event, the Applicant submitted, in the alternative, that design solutions could be implemented to overcome the Council's concerns.

116 After careful consideration, I prefer the evidence of Mr Bewsher, based on the Guidelines (Exhibit K), which is the only methodology before the Court. His evidence is that the 25% and 50% blockage-modelled results in unacceptable impacts, given the housing development that is likely to be affected. I accept that such increases would be contrary to New South Wales floodplain management practice and would not be permitted by any New South Wales council.

117 Both experts agreed that the upstream flood level impact is directly a consequence of the waterway capacity of the proposed culverts and bridges within the access road. By increasing the size and number of the culverts/bridges, the upstream impact can be reduced. Ignoring the cost of the work, I am invited to accept that an engineering solution can be found. If sufficient additional culverts/bridge infrastructure is provided, it will be possible to reduce the upstream impact to acceptable levels. The table in Exhibit 22

shows the Applicant's final position. Mr Lyons' evidence is that a 25% blockage assumption has an upstream effect of 0.02 metres to 0.04 metres. And, with minimal changes to the bridge design, he believed that the impact could be brought down to nil. I have no certainty of that result, on the evidence before me, and no understanding of the impact of changing the bridge on the ecology issues.

118 It was submitted that there is no guideline for blockage that deals with contemplating a structure as long as that proposed. This assertion was rejected by Mr Bewsher (Transcript 21, page 10, lines 24-49). He said the Council blockage assumption of 100% was still relevant because it would be applied to upstream development, but that he had used the Blockage Guidelines for multi-span bridges/culverts in Table 6 at 50% because he considered it appropriate. He rejected the suggestion that s 4.4.9 allowed for a reduction by half on the facts of this case.

119 Despite the Applicant's submissions to the contrary, I do not think it is improbable that a tree, or trees, 15 metres to 20 metres high (which was the evidence of the ecologists) might fall and, together with other debris, cause a 25% blockage of the culverts.

120 I accept the Guidelines in Exhibit K are not a definitive approach; however, it states that:

> … they do attempt to provide an approach that allows a consistent analysis methodology, while not becoming too extreme in either direction since there are risks in either under or over estimating the influence of blockage.

In the circumstances, they are the only evidence before the Court and, given the floodprone nature of the Site, I accept their application, as interpreted by Mr Bewsher.

121 I do not accept that adding more and more culvert through the wetland is the answer. The application is before the Court on the plans provided and this is not a case where an "amber light" approach can accommodate a different design for this primary access way over the wetland. The evidence is that the development, in this regard, will increase flooding upstream at levels which are unacceptable to Mr Bewsher and the Court and, moreover, offend cl 23A(4) of

the CLEP2000. For that reason I am precluded from issuing a consent to this DA.

Coastal processes

122 The following issues relating to coastal processes were identified by the Applicant during the hearing. They were addressed by the coastal experts, Dr Haines and Mr Lord.

(1) Whether the setback of the lots is appropriate, having regard to the "Unlikely" line adopted by the Council in its CZMP and draft LEP;

(2) What are the circumstances in which wave overtopping becomes an issue and what is its effect? and

(3) Is the height of the berm likely to exceed 3.3AHD by 2100 and what are the implications for potential upstream flooding?

123 On the evidence, the answers to these questions are not readily apparent. Put simply, there has been inadequate assessment of the risk of coastal hazards to this Site. For this reason, also, the DA must be refused.

124 I have formed this view after a consideration of all of the evidence, including that of the Applicant's coastal expert, Dr Haines. He told the Court that the CZMP "Unlikely" hazard line adopted by the Council in the Planning Proposal was misleading.

125 The evidence is that the methodology adopted in the CZMPS was conservative for the range of outcomes resulting from shoreline recession and erosion at the three time points of 2010, 2050 and 2100. It provided acceptable estimates of future positions within the context of a qualitative risk assessment. Yet beyond the broad definitions in Table 3.1 of the Coastal study it is not possible to give quantitative probabilities to the "Almost certain", "Unlikely" or "Rare" hazard lines at 2010, 2050 and 2100. The Council contended that the "Unlikely" line dictating the development setback for this Site was not a product of proper "risk assessment". It submitted that the Hazard Definition Study assessed the likelihood or probability of occurrence of coastal hazards, by analysing coastal processes and historical beach responses. The consequences of coastal hazards were then analysed using a risk assessment as part of the coastal zone management phase. At that stage, "combining consequence and the likelihood will allow the determination of a level of risk from coastal hazards at

various locations along the coastline". Management responses can then be tailored to the level of risk (Exhibit 10.2, page 1286, (RWS at page 17 at [35]).

The two stages – probability of occurrence and consequences if the risk occurs - is the essence of risk assessment. However, it is submitted that the Council Planning Proposals (and its hazard line) only took into account the first stage, but ignored the "Rare" risk, and have ignored the second. Therefore, it is not the product of a risk assessment.

126 Dr Haines referred to this matter in the Joint Report. It states:

> Dr Haines notes that the draft LEP 2015 requires development of this type to be located landward of the 2100 "Unlikely" line. Dr Haines believes that Council have adopted this position based on the information presented in the Coastal Processes and Hazard Definition study and well as the Coastal Zone Management Plan. Dr Haines believed that the position adopted by the Council is comparable with other Councils within New South Wales and other states. In the future, Dr Haines believes that Council may choose to adopt a more risk-based approach to land use management, which is more in line with the principles that were recommended within the Coastal Zone Management Plan. This would include defining the suitability of land that is both seaward and landward of the "Unlikely" line for particular sites through risk-based assessment of consequences of impact should the land be materially affected.

127 He explained it this way during cross examination:

> A risk-based approach must consider the rare or extreme event which Council's "Unlikely" line did not. (Transcript, page 1, line 59.25-Transcript, page 2, lines 35.40-36.15)

128 To overcome this limitation in the risk assessment informing the building setback line, Dr Haines suggested:

> … that any development located immediately landward of the 2100 "Unlikely" line could address associated issues with potential ocean inundation and reduced bearing capacity through conditions of consent, which would specify minimum floor levels and specific foundations. Such conditions are common practice.

129 Within the context of the proposed "greenfield" development, slope adjustment and reduced bearing capacity provisions for the 2100 "Unlikely" line which defines Council's development coastal setback requirement are said to be accommodated within the proposed road reserve that is located seaward of the proposed private lots. That is, the design and construction of the proposed roadway needs to accommodate these conditions.

130 The Council contends that it is not an acceptable planning outcome to use the road infrastructure to offset the impacts of the development in circumstances where this infrastructure will be dedicated and maintained by the Council. The shifting of the development site to the west is an admission that the land between its eastern boundary, and the commandment of hard engineering works for the subdivision, is expected to be eroded by coastal processes by 2100. Yet, at the same time, this land is proposed to be part of the design of the development - intended to perform both an ecological and landscaping function.

131 Accepting that hazard lines adopted in the CZMP could mislead by inferring that no damaging coastal events would occur landward of them (Exhibit 10.2, Tab 17, page 1287.8), Dr Haines and Mr Lord agreed that the development's compliance with the Council's strategic and development planning documents did not negate the need for site-specific analysis.

132 In fact, both experts acknowledged in their Joint Report that:

> … the general paucity of data regarding the coastal environment within and around the subject site warrants a more conservative approach to calculating potential coastal recession and coastal inundation, under present day conditions and future scenarios.

The lack of data about such things as offshore bathymetry sediment composition, distribution and grain size, dune and back-beach stratigraphy, and the impacts of past sand mining on the historical response of the dune to storm erosion events - whilst not unusual - reinforced the need for a cautious assessment of a foreshore site (Exhibit 6, page 2 at [3]).

133 The experts agreed that if the dune had been eroded and replaced (over a period of years) with a smaller dune, denuded vegetation, then this would cause a significant impact for the development. The real concern, as articulated by Dr Haines in cross-examination, is that there is really no way of knowing if or when this might occur – it could occur now. On that basis the Council submitted that this is not a case about climate change into the future. Climate change, it is agreed, will accelerate coastal processes and make it more likely that the subject land will be inundated from the sea, within the

presumed 100-year life of the development. However, the evidence before me is that this could happen tomorrow.

134 Dr Haines said that within a coastal environment "*residential dwellings are not expected to have a lifespan of beyond 40-50 years*" (Exhibit 6, [24]). In the event of an approval of this application, his evidence was that the residents would have an opportunity for redevelopment before the land might be subject to a future hazard and, in that time, Council could develop "*appropriate adaptive responses, should the need arise*". He gave the example of the rebuilding of houses on piers taken to a rock foundation (eg Malibu) (Transcript, page 1, line 80.25), rebuilding the public perimeter road on piles (Transcript, page 1, line 80.40) to building a rock revetment wall, which would have to extend for the length of the beach, in order to protect the development (Transcript, page 1, lines 104.10-50). The Council contends that good planning avoids development that is likely to impose expensive costs for mitigating the impact of coastal processes on future residents and/or the Council. The fact that there are already properties within the LGA which may be worse off than the current development is irrelevant (Transcript, page 1, lines 106.15-25).

135 Dr Haines provided to the Court a typical cross-section profile of the dune and the proposed development area taken in the middle of the property to demonstrate the approximate location of the 2010, 2050 and 2100 "Unlikely" hazard lines in relation to the proposed development layout, roadways and allotments (Figure 2, page 6 in Exhibit 6). The shoreline modelling used in the Coastal Study 2011 assumed that a foredune will be maintained with a crest elevation of five metres above sea level. Within the context of the proposed development, the existing dune's approximate coastal level is eight metres AHD - it will potentially be eroded with time. It is assumed within the model that once the entire existing dune is eroded, a small dune will develop, overlying the existing ground levels to a maximum height of five metres above mean sea level. This represents a natural dune rebuilding process. As the natural ground level immediately behind the dune is approximately four metres AHD, it is assumed in the modelling that this reformed dune would be about one metre to two metres high and, therefore,

the width of this dune would be relatively narrow and will be formed immediately landward of the beach base.

136 Once the existing dune of eight metres height is eroded, any smaller, naturally rebuilt dune would be subject to periodic wave overtopping and ongoing erosion. Impacts of this overtopping water on the proposed development would then be dependent on the distance between the dune to the development, ground levels, ground porosity, road design, stormwater drainage capacity and freeboard to dwelling.

137 Dr Haines told the Court during cross examination that in a large storm event:

> … the top of the dune is sliced off, is actually reduced in height … and all the fringing vegetation on the top of that dune of course would be destroyed as well. (Transcript, page 1, line 36.20)

He said that there is evidence of storms in the past of the magnitude to do so (Transcript, page 1, lines 40/50), and if this happened it would take centuries to return the dune to a height of eight metres (Transcript, page 1, lines 35/40). He also agreed that any replacement dune would be overtopped in a subsequent large storm event (Transcript, page 1, line 40.15). The Council submitted that a dune which is four metres to five metres above sea level (approximately AHD) is plainly vulnerable to wave overtopping and further erosion.

138 The design storm event assessment was a storm that happened, not one that was merely predicted to happen but had not. The Council submitted that if no such large storm event occurred until 75 years' hence, that event itself would impact and erode the property, according to Dr Haines' evidence. Dr Haines told the Court that there were a succession of storm events between 1974 and 1978 and that the subsequent smaller storms may be more damaging because the beaches are already in an eroded condition from the first storm (Transcript, page 1, line 37.15). Dr Haines assumed dune recovery as it was an input to the model used by his firm , but Mr Lord told the Court that, on the Coffs Harbour coast, there have been examples of dunal systems not recovering after storms (Transcript, page 1, line 55.40-50), for example, at Campbell Beach (Exhibit 10, Vol 2, page 1372, Fig 4.4, 4-16).

139 Dr Haines told the Court that when assessing risk in the present, the impact of climate change is subsumed in existing data concerning historical storm activity

and beach recession. However, it is separately assessed in examining the risk in the two future scenarios of 2050 and 2100.

140 The purpose of undertaking a risk assessment is to cater for uncertainty, not to resolve it. The precautionary principle is relevant to coastal processes and the impact of climate change. In the Hazard Study, which Dr Haines managed, it states:

> The definition of coastal hazards inherently involves uncertainty relating not only to limited data and assessment methods but also to the uncertainties involved with climate change. Cowell et al (2006) describe uncertainty in climate change and coastal processes assessments due to "uncertainty about climate change itself; uncertainty about its effect on sea levels and wave climates; and process uncertainty and modelling beach responses on time scales relevant to climate change (decades or longer)".

141 The Council submitted that in the Cluster Report, CSIRO and BOM report projections for climate change, there is very high confidence that temperatures will rise. There is agreement on the extent of the rise within one degree for the near future to 2030. However, for later in the century (2090), there is significant difference between the predicted temperature increases, from 1.3 degrees to 4.7 degrees (Exhibit 10, Vol 1, page 889).

142 COP21 obtained non-binding agreements from nations to lower future emissions, into the future, to prevent temperatures rising above two degrees. However, the Council contends that the most reliable estimates of fossil fuel usage published since COP21 (BPS Global Energy Outlook) declined to factor in the COP21 temperature cap on lack of policy in place to achieve such commitments.

143 There is also high confidence that the intensity of heavy rainfall events will increase, and therefore storms causing "bite" of the frontal dune will have more severe consequences, and flooding. However the magnitude of change, and the time when any change may be evident against natural variability, cannot be reliably predicted (Exhibit 10, Vol 1, page 890).

144 Sea levels are also predicted with high confidence to continue to rise. By 2030, projected sea-level rise is within an agreed range with only minor differences depending on the emissions scenarios (RCPS). By 2090, the range of differences are said to be between 0.33 metre and 0.88 metre (depending on

emission scenarios). Having regard to these impacts, the Council contended that the degree of uncertainty, within agreed bounds of future storm activity and sea-level rise, invites the application of the precautionary principle in this case (RWS at [41]).

145 The Applicant submits, on the evidence of Dr Haines in the Joint Report, that provisions for wave overtopping of the dune are largely accommodated within the estimates of coastal erosion and the development design. His evidence is that the "Unlikely" 2100 hazard line represents the extent of erosion after a significant storm that occurs at that timeframe. In his assessment the pre-storm profile would be more seaward than the finishing profile, and that the pre-storm naturally rebuilt dune would also sit seaward of the finishing profile. Following the storm that erodes the beach to the "Unlikely" 2100 line, Dr Haines considered a new dune would be rebuilt that is partly landward of the "Unlikely" 2100 line, depending on the degree of beach reaccretion in front of the eroded scarp. Ultimately, Dr Haines said that overtopping of the dune and further subsequent erosion of the beach is beyond the reasonable design conditions and timeframe for development (Exhibit 6 at AWS [98]-[107]).

146 While the Applicant conceded that Figure 2 in the Joint Report demonstrates a storm event could have a significant impact on the height of the dune, it submits the issues relating to wave overtopping, as detailed in the Joint Report by Mr Lord, required a number of things to occur before there is a threat of wave overtopping affecting the development. It assumes: a sea-level rise of 0.9-metre-plus, initial overtopping of the dune, plus another overtopping event before it can be rebuilt (both one-in-100-year events), plus no human intervention, the chances of which are incredibly low. In the ultimate, the Applicant asserted wave overtopping is "improbable" (AWS [98]).

147 It is accepted that the extent of wave overtopping depends on the severity of the storm, the height of the foredune at the time (if any) and the level of the adjacent land. Mr Lord said the potential impact from wave overtopping has not been appropriately addressed and may result in impacts further landward if the natural profile continues to slope downward to the west from any relocated erosion escarpment landward of the existing dune. The dune height is

assumed for the modelling and it is not certain that dune would reform or if reformed what height and shape you might have. They are separate hazards and the wave run-up and inundation by definition can only occur landward of the erosion escarpment. There is no likelihood that in real time the landward translation of the foredune will occur with the recession and the reformation of a dune, it is postulated, would take many months or years once the erosion escarpment has stabilised (if at all will depend on the availability of sand, wind conditions and storminess). It is agreed that overtopping of a dune with a crest level of five metres' AHD to six metres' AHD will occur and that overtopping and inundation will be greater with the dune removed during the storm.

148 Ultimately, both experts agreed that the 2100 "Unlikely" line does not represent the landward limit of the hazard to 2100. The line, as plotted, is the location of the crest of the vertical erosion escarpment caused by erosion/recession during that storm. It does not include the overtopping which occurs during that storm which extends landward of the escarpment crest for an unspecified distance. To exclude the impact of wave run-up and inundation landward of the escarpment crest is to suggest that this cannot exist. It is precisely during the storm that creates the erosion escarpment when overtopping and inundation landward is most likely to occur.

149 During, and immediately following, the storm, the back beach will be directly exposed to wave overtopping with no dune in place. The BMT WBM position does not consider that any reformed dune may be regularly breached/overtopped during future erosion events even before the 2100 erosion escarpment 'Unlikely' line is reached. Towards 2100, rates of sea-level rise and consequent recession rates will be many times higher than at present, increasing the frequency and volume of overtopping potential of the dune postulated by Dr Haines to reform has a maximum height of two metres above the natural ground surface. With the landward and seaward slope at 30 degrees and zero crest with this, the dune would be seven metres wide and must be located landward of the 2100 slumped escarpment (2100 "Unlikely" hazard line plus three metres) or a total of 10 metres seaward of the plotted hazard line location. This would extend to approximately the centre of the proposed seaward roadway of the proposed development in 2010. The volume

of this dune above the natural ground surface is only seven cubic metres/M of beach and is negligible in comparison to the measured storm bite of 320 cubic metres/M for New South Wales to the “Unlikely” allowance of 55 metre linear storm bite adopted by BMT WBM (2011).

150 Mr Lord does not believe that the overtopping volumes at the peak of a storm in 2100 and beyond could be handled by any drainage system while these ocean levels are occurring. A risk-based approach must consider the impacts of this scenario. There are precedents for this storm overwash damage elsewhere in New South Wales, which include the loss of the entire village of Sheltering Palms and the north of Brunswick Heads in the 1970s. This village was in similar situation with low and narrow foredune which was breached during the storms, low ground elevation landward of the erosion escarpment which sloped downward and landward to the north arm of the Brunswick River.

151 With respect to the ocean entrance of Fiddamans Creek, the experts agreed that the future evolution of this entrance under projected sea-level rise scenarios and associated shoreline response within the beach embayment ***is unknown***. A number of hypothetical conditions can be formulated; however, there is little basis to assume one set of future conditions would be more likely than another.

152 The Coastal Processes and Hazard Study 2011 proposed a vertical translation of present conditions. The Council, in correspondence to the Applicant on 18 February 2014, prescribed an ocean tailwater level of 2.4 metres AHD be used for 1% AEP flood conditions, and the addition of 0.9 metres (ie 3.3 metres AHD) for considering 1% AEP conditions at the year 2100. This is 0.3 metres lower than the assumed 1% AEP level presented in the Coastal Processes and Hazard Study 2011. The coastal experts were unclear as to why the Council's adopted ocean level is lower than the value in the Coastal Processes Study 2011 (Tables 3-6) which have been adopted by the Council.

153 That said, the experts agreed that elevated sea levels in the future will likely result in higher groundwater levels across the Fiddamans Creek floodplain. Depending on the future tidal condition of the entrance, the environmental conditions within the Fiddamans Creek waterway may also change, to a more

marinised system within higher salinity concentrations through altered tidal exchange. As future conditions cannot be predicted with much certainty, it was agreed that it would be pragmatic to consider a range of future scenarios and possible outcomes, with development design conditions favouring a more conservative basis. The experts agreed that future scenarios should consider circumstances of an eroded entrance channel, as well as circumstances of a more accreted entrance channel. Mr Lord believes that the likely impacts in which the creek entrance develops into the future has not been adequately assessed.

154 In the ultimate, Mr Lloyd acknowledges the siting of the development appears to comply with the wording of the draft Council LEP 2015 in that it is landward of the 2100 "Unlikely" line as plotted by BMT WBM (2011). He notes that the LEP is draft and that the underpinning CZMP maps have not yet been gazetted. The 2100 "Unlikely" line does not incorporate potential wave overtopping, the space required for a foredune, the allowance for slope stability or the potential extent of coastal storm inundation via the creek for various entrance configurations. There are four problems with the 2100 "Unlikely" line proposed in the draft LEP.

The Coastal Policy - ecological sustainable development (ESD)

155 In meeting the principles of ESD, Dr Haines believes that the development is sited such that the potential material impacts due to coastal hazards are beyond a reasonable planning horizon. In the Joint Report, he stated that:

> Although impacts may occur at some time in the distant future, a long period of time likely to be more than 100 years provides opportunity for Council to develop alternative planning and policy responses to coastal hazards that would be applicable to the whole coastline including the proposed development.

156 Mr Lord disagreed and states in the Joint Report:

> … the proposed development does not accord with the principles of Coastal Policy in that it does not adequately consider the "ecologically sustainable development of the NSW coastline" which includes the principle of intergenerational equity. The development is located in a sensitive, low-lying back beach area. The beach is eroding at the present time and the rate of that beach erosion is such that the "Unlikely" case (excluding foundation stability, dune formation and wave overtopping) the "Unlikely" hazard line (plotted by BMT WBM 2011) by 2011 is landward of the property boundary and at the proposed road edge (Dr Haines' Statement of Evidence, page 6, Figure 2-1

> top image for 2100). Higher or lower sea levels to 2100 cannot be ruled out at the present time. Coastal hazards, including wave run-up, and inundation, slope stability and dune formation extend landward of this line at 2100. Beyond 2100, the science advises that sea level will continue to rise (perhaps by as much as five times the current rate) and will continue for several centuries, irrespective of future emissions levels. The development may become unsuitable for the current proposed use by 2100 and will be unsuitable at some future time.

157 Mr Lord does not consider the planning period of 85 years (accepted by Dr Haines) as being adequate for a subdivision of land, effectively creating new allotments which a reasonable person would have an expectation of having an economic life beyond 85 years. The true value created in an asset is the property and the right to use the property - in most locations. The current LEP (2013) requires that development is safe from coastal hazards for a 100-year period. The definition of a "risk" is "hazard (or likelihood) times consequences". In this case, the lower the likelihood of the development being subject to damage from coastal processes by 2100 results in a significant jump in the consequences, once the subdivision is affected shortly after 2100 for the "Unlikely" scenario (or shortly before on the "Rare" scenario). It is normal practice, in a risk-based approach, to consider the combination of hazard (likelihood) and the consequences in deciding the appropriateness or otherwise of a development. This is done through a sensitivity study using a range of outcomes of varying probabilities. An appropriate sensitivity study has not been undertaken for this development.

158 Relevantly, the OEH and the Marine Parks Authority have also both provided written advice that the development as proposed is inappropriate.

Conclusion

159 Based on the evidence of Mr Lord, I do not accept that the development meets the principles of ESD within the Coastal Policy. In reaching this conclusion, I accept that ESD is not about preventing development on the basis that it may experience a hazard sometime in the distant future. Nor is ESD about curtailing development, as this would have negative impacts on social equity principles that underpin ESD. The purpose of undertaking a risk assessment is to cater for uncertainty, not to resolve it. The Applicant submits that the risk from coastal processes is so remote that it should not be considered. Yet a number of experienced experts in coastal processes, town planning, flooding and

ecology have expressed serious reservations about this development which have not been satisfactorily dealt with on the evidence. ESD (specifically, the precautionary principle) requires more where there is a risk of serious harm or damage to the environment, life, and property. It casts an onus on the Applicant to demonstrate that those risks have been assessed, and that mitigation measures can be implemented to avoid them. I am not satisfied, on the evidence, that the Applicant has discharged this onus. Dr Haines and Mr Lord agreed the development's compliance with Council's strategic and development documents did not negate the need for specific site analysis. I accept Mr Lord's expert assessment that the potential impacts due to coastal hazards have not been adequately assessed for this development.

160 For the reasons stated, the development application is refused. The Court orders that:

(1) The appeal is dismissed.

(2) Development consent to development application DA 0172/14 is refused.

(3) The exhibits are returned.

Susan Dixon

Commissioner

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