Land and Environment Court

New South Wales

Case Name:	Sturt v Shoalhaven City Council
Medium Neutral Citation:	[2021] NSWLEC 1698
Hearing Date(s):	6 – 8 September 2021, written submissions 19 September 2021
Date of Orders:	19 November 2021
Decision Date:	19 November 2021
Jurisdiction:	Class 1
Before:	Dickson C
Decision:	The Court orders that: (1) The appeal is dismissed. (2) Development application number DA 20/1676 for construction of an access driveway for access and maintenance purposes and associated earthworks, vegetation removal, vegetation restoration and tree planting, and drainage works at 23 Coorong Road North Nowra is determined by way of refusal. (3) The Exhibits are returned with the exception of Exhibit 1, A, and B.
Catchwords:	DEVELOPMENT APPLICATION – access driveway, associated earthworks, drainage works, vegetation removal – is there sufficient certainty about the impacts of the development – is the site suitable for the development – appeal dismissed
Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 4.15, 4.16 Environmental Planning and Assessment Regulation 2000, cl 55 Shoalhaven Local Environmental Plan 2014, cll 2.3, 5.10, 7.2, 7.3, 7.6, 7.7, 7.8 State Environmental Planning Policy (Coastal

	Management) 2018, cll 13, 14 State Environmental Planning Policy (Infrastructure) 2007, cl 45 Water Management Act 2000, s 91
Cases Cited:	Blake v Ku-ring-gai [2021] NSWLEC 1461 Super Studio v Waverley Council (2004) 133 LGERA 363; [2004] NSWLEC 91 BGP Properties Pty Ltd v Lake Macquarie City Council (2004) 138 LGERA 237; [2004] NSWLEC 399
Texts Cited:	Shoalhaven Development Control Plan 2014
Category:	Principal judgment
Parties:	Adam Sturt (Applicant) Shoalhaven City Council (Respondent)
Representation:	Counsel: J Smith (Applicant) F Berglund (Respondent) Solicitors: Foundation Law (Applicant) BAL Lawyers (Respondent)
File Number(s):	2020/296318
Publication Restriction:	No

JUDGMENT

1 **COMMISSIONER**: These proceedings are an appeal against the refusal of DA-20/1676 by the Respondent, Shoalhaven City Council. The development application was lodged on 7 July 2020 and seeks consent for construction of an access driveway for access and maintenance purposes and associated earthworks, vegetation removal, vegetation restoration and tree planting, and drainage works. Further, the development application seeks consent for construction of a temporary construction access including use of an existing driveway on adjoining land. The development is proposed at 23 Coorong Road, (Lot 2 DP 1056165) with construction access over 57 Coorong Road, North Nowra (Lot 1 DP 1056165).

2 In exercising the functions of the consent authority on the appeal, the Court has the power to determine the development application pursuant to s 4.16 of the *Environmental Planning and Assessment Act 1979* (EPA Act).

3 The development application was amended with leave of the Court on 8 June 2021. The joint conferencing of the experts, and therefore the evidence in the proceedings, address the amended development application. The amendments to the application principally relate to:

- Access for construction. Access is no longer proposed from a barge on Shoalhaven River and subsequently across the reserve. Access for construction is now proposed via the neighbouring property for which owners consent has been provided.
- Changes to the alignment of the access driveway to reduce impacts on vegetation and other site features.
- Implementation of 'no-go' zones within the site which are proposed to apply during construction.
- Identification of proposed crane locations.

(Exhibit P)

4 As part of the amended development application the Applicant also prepared the following reports and additional information:

- Flood compliance report (Exhibit G)
- Civil engineering plans (Exhibit D)
- Geotechnical assessment (Exhibit H)
- Construction Environmental Management plan (CEMP) (Exhibit J)
- Vegetation Management Plan (part of Exhibit F)

5 I have read and considered this material in the assessment of the development application and the determination of these proceedings.

6 The Respondent has confirmed that the amended development application is uploaded to the NSW Planning Portal, meeting the requirements of cl 55(1) of the Environmental Planning and Assessment Regulation 2000 (the Regulation).

7 Despite the amendments and provision of additional information, the Respondent maintains the development application warrants refusal.

Specifically, the Respondent argues that the site is unsuitable for the development proposed in light of:

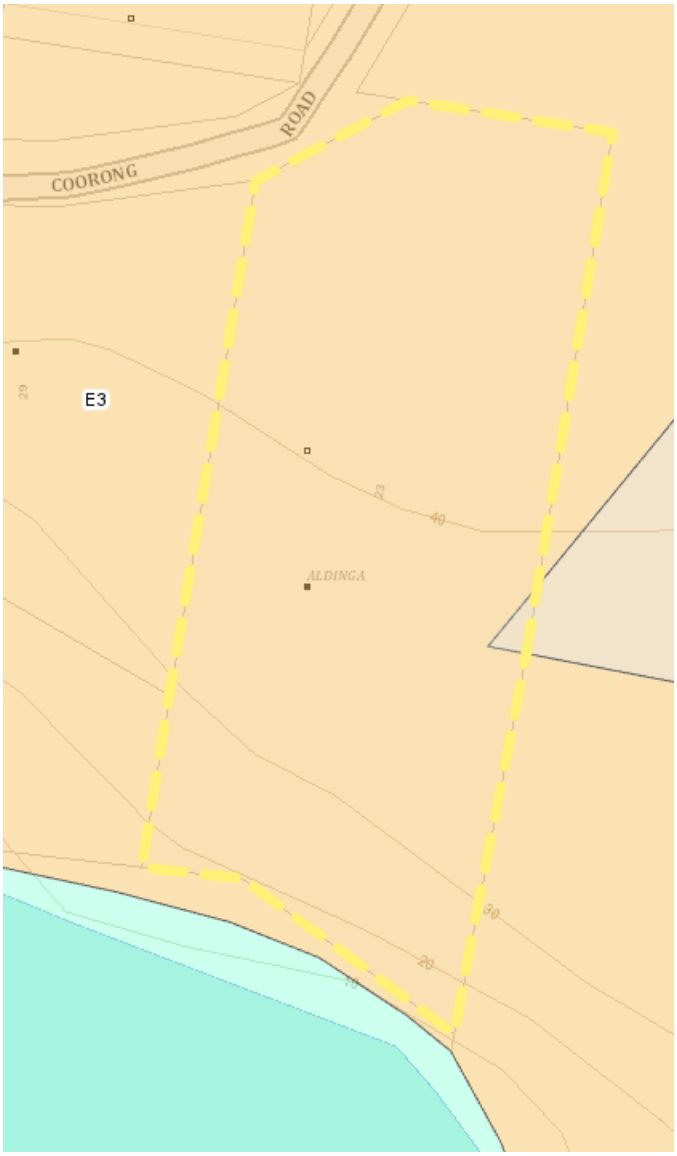
- The nature and constraints of the site; and
- The unacceptable impacts on:
    - the natural environment; and
    - visual amenity; and
- The inconsistency of the development with the objectives and controls of State Environmental Planning Policy (Coastal Management) 2018 (SEPP CM), Shoalhaven Local Environmental Plan 2014 (LEP 2014) and Shoalhaven Development Control Plan 2014 (DCP 2014).

The Site

8 The subject site is accessed from the southern side of Coorong Road in North Nowra and adjoins the public reserve fronting Shoalhaven River. The site includes a large cliff escarpment, approximately 30m from the Shoalhaven River. The following is an extract of the aerial mapping indicating the site and surrounding development:

(www.maps.six.nsw.gov.au)

9 Under LEP 2014 the majority of the subject site is zoned E3 Environmental Management, with a small portion zoned RU2 Rural Landscape. The distribution of these two zones across the subject site is shown in the following extract of the zoning map:



(NSW Planning Portal)

10 The subject site contains an existing dwelling and associated structures. The development is proposed to be carried out in the area of land zoned E3 Environmental Management under LEP 2014.

11 Due to the escarpment formation the site is subject to significant changes in level, for example the existing house sits at approximately RL 39.00 AHD, whereas the bottom of the proposed access driveway has a proposed finished level of 2.52 AHD (Exhibit H).

12 The visual impact assessment (VIA) describes the vegetation on the site in proximity to the works as follows:

> "1.7 Vegetation

> The relatively flat upper part of the site where it has not been cleared and modified is characterised by xeric woodland with emergent trees up to 25m in height (see arborist's report). The escarpment and scree slope and part of the floodplain carry mesic forest dominated by emergent *E. saligna x botryoides* open forest reaching a height of up to 30m, with a mid-level canopy estimated in the arborist' report at up to 15m in height. The mid-level canopy is of various species.
>
> The escarpment ranges in height between approximately 18m and 30m, meaning that the mesic forest vegetation canopy springing from the escarpment and scree slope and the canopy of xeric woodland of up to 25m in height that stands on the crest of the escarpment and beyond it, form a canopy visible from the river and to its south which considerably exceeds the height of the escarpment."
>
> (Exhibit K)

13 The VIA concludes that as a result of this vegetation the existing buildings on the site are not "of significant visibility from the river or the south bank of the river" (Exhibit K).

14 The site is mapped in a number of planning instruments, recognising the constraints of the site, including being:

(1) mapped as bushfire prone land: Shoalhaven Bushfire Prone Lands Map.

(2) Partially mapped as flood prone land: Flood Planning Area Map, LEP 2014.

(3) Mapped as both a 'coastal use area' and a 'coastal environment area': SEPP CM.

(4) Partially mapped as containing land in the vicinity of the Western Bypass Corridor: Clauses Map, LEP 2014.

(5) Mapped on the Scenic Protection Map in LEP 2014 as within the area designated 'scenic protection'.

15 The surrounding area is rural in character and the site is adjoined by rural residential and other bushland areas. The site adjoins the Shoalhaven River to the south and there is a small council reserve which separates the subject site from the river's edge.

16 The development application proposes access for the purposes of construction over 57 Coorong Road (Lot 1 DP1056165), as detailed in the Temporary Construction Access Plan (Exhibit B).

Public submissions

17 The Respondent confirms that the development applications were publicly exhibited in 2020 in accordance with the requirements of the Regulation and DCP 2014.

18 In determining the development application, the Court is to take into consideration any submissions made: s 4.15(d) of the EPA Act. The submissions received by Shoalhaven City Council since the lodgement of the development application were tendered in the proceedings as part of the Respondent's evidence. I have read and considered those submissions.

19 The issues raised by submissions in the initial exhibition can be summarised as:

(1) An opinion that the benefits for the provision of foreshore access and maintenance to the property owners is substantially outweighed by the biodiversity impacts that arise from the development.

(2) That the topography of the land, the limitations of the property and the environmental significance of the escarpment mean that the site is unsuitable for the development proposed.

(3) The development application does not demonstrate compliance with the objectives of the E3 Environmental Management zone under LEP 2014 or the relevant provisions of Chapters G2, G4 and G5 of DCP 2014.

(4) Approval is not in the public interest due to the environmental impacts and the visual impact of the development from Shoalhaven River.

(5) The development application lacks detail that confirms the stability of the existing escarpment.

(6) Little detail has been provided as to the means of construction, how the process will be managed and the extent and duration of proposed site disturbance.

(7) Concern about the extent of destruction of the escarpment proposed, including drilling, rock sawing as well as removal of boulders to prevent rock fall.

(8) That the application under plays the 'footprint' of the development by focussing only on what is in contact with the ground (pylons etc) not on the 78m length of the works.

(9) The development application is located within the easement for the Western by-pass. Other development applications proposing structures within the easement have been refused on this basis, the current application should be treated in the same manner.

(10) Noise intrusion from construction is a concern for adjoining neighbours, especially those who work from home.

(11) The development application relies on access from the Shoalhaven River across the Council Reserve. It doesn't appear that Council has provided owners consent.

(12) The site is flood prone land, but the application provides no flood assessment of the development proposed.

(13) The nominated construction cost appears to be significantly undervalued.

(14) The loading capacity of the bridge, at 12ton., appears excessive and at odds with the description of the development as a 'maintenance and access track'.

(15) No indigenous heritage assessment has been completed.

(16) The applicant purchased the property aware that no direct access was available to Shoalhaven River, this proposal is an impractical and environmentally damaging attempt to rectify this.

(17) No timeframe is provided for the period of construction, resulting in a potential for substantial construction and vehicle noise, dust and inconvenience for neighbours for an indeterminate period.

(18) There is potential for the site to contain habitat for Sooty Owl and Large-eared Pied- bat. The application overall downplays the environmental significance of the site.

(19) Any tree removal will alter the canopy and visual appeal of the treed escarpment on the site.

(20) The driveway section, above the escarpment, will require significant retaining (with an approximate height ranging between 3.8-4.8m) for a length of approximately 70m. This extent of work above the escarpment is unacceptable.

(21) This section of the Shoalhaven River, used by so many people for recreation, will be irreparably scarred by the proposed concrete accessway.

20 The amended development was also notified by the Respondent. The additional issues raised in objections are summarised below:

(1) As modified the development application still proposes to remove 28 of the 83 trees on site, along with proposing pruning of others. This is an unacceptable impact to facilitate convenient access to the Shoalhaven River for the property owner.

(2) There is no guarantee of rehabilitation as part of the development application or commitment to a timeframe to do so.

(3) Construction vehicles accessing the site from Coorong Road will impact local traffic and has the potential to damage the road surface.

(4) Concerns that the swing/arc of the crane proposed will traverse over neighbouring properties and/or impact adjoining infrastructure.

(5) The proposal continues to be inconsistent with the main objective of the E3 Environmental Management zone, namely, 'to protect, manage and restore areas with special ecological, cultural and aesthetic values'.

(6) The specialist reports accompanying the development application indicate the 'fine line' the application represents and the potential for adverse impacts that would arise if the methodology fails or site conditions vary.

(7) There is no assessment of how the construction work, in particular noise, light, dust etc, will impact any fauna.

(8) There is potential for stockpiles of materials to be located on or adjacent to the Council Reserve and the Shoalhaven River which will have adverse visual impacts and result in a potential pollution risk in times of flood.

(9) The subject site has already experienced significant clearing proximate to Coorong Road in recent years. The cumulative impacts of tree loss should be considered.

(10) The actual need for maintenance of the subject site below the escarpment is minor. The weeds present on this portion of the site would respond best to hand weeding and access can readily be provided via the Shoalhaven River to the owner without the need for such overscaled works. The scale of the development is incongruous when compared to the actual need for access for 'maintenance'.

(11) LEP 2014 specifically identifies the subject site as having high scenic value. The objectives of LEP 2014 in relation to scenic protection will be compromised by this development.

21 During the hearing provision was made for a number of objectors to address the Court and give evidence of their concerns in relation to the proposed development. These objections emphasised many of the submissions summarised in the proceeding. In their oral submissions the residents emphasised the following objections:

(1) The subject site is occupied by a single dwelling, the proposed development exceeds what is required for the occupant of the existing dwelling to enjoy the land. No need has been established by the Applicant for the works.

(2) The scenic quality of the site will be compromised. This will have concordant impacts on the scenic views from the adjoining properties and the Shoalhaven River.

(3) There is concern that due to the width, heavy duty ramp and bridge works the access driveway will be utilised for access to Shoalhaven

River for large recreation boats, jet skis etc. This is inappropriate for the sensitivity of the site.

(4) The development is inconsistent with the intent of the zoning of the land as E3 Environmental Management. It will have significant impacts on flora and fauna, the escarpment, the visual character of the locality as a treed ridgeline and will impact the quiet enjoyment of neighbouring properties.

(5) The development has the potential to impact road and pedestrian safety on Coorong Road given the anticipated large vehicles requiring access to the site.

(6) The use of concrete as the method of construction for the accessway and bridge components appears incongruous with the context and the setting of the subject site.

(7) That there is a high risk of accidents or unanticipated damage to the environment given the complexity of both the site and the proposed method of construction.

22 In determining the development application, I have read and considered the submissions received from members of the public: s 4.15(1)(d) of the EPA Act.

Planning Controls

23 The subject land is mapped as a 'coastal environment area' under SEPP CM. Clause 13(1) requires the consent authority to give consideration to the following factors in determining the development application:

> (1) Development consent must not be granted to development on land that is within the coastal environment area unless the consent authority has considered whether the proposed development is likely to cause an adverse impact on the following—
>
> (a) the integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment,
>
> (b) coastal environmental values and natural coastal processes,
>
> (c) the water quality of the marine estate (within the meaning of the *Marine Estate Management Act 2014*), in particular, the cumulative impacts of the proposed development on any of the sensitive coastal lakes identified in Schedule 1,
>
> (d) marine vegetation, native vegetation and fauna and their habitats, undeveloped headlands and rock platforms,
>
> (e) existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,
>
> (f) Aboriginal cultural heritage, practices and places,
>
> (g) the use of the surf zone.

24 Further, pursuant to cl 13(2) of SEPP CM prior to the grant of consent the consent authority must be satisfied that:

> (a) the development is designed, sited and will be managed to avoid an adverse impact referred to in subclause (1), or
>
> (b) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or
>
> (c) if that impact cannot be minimised—the development will be managed to mitigate that impact.

25 The subject site is also mapped as a 'coastal use area' under SEPP CM. Accordingly cl 14(1), and the following listed matters for consideration and satisfaction apply:

> (a) has considered whether the proposed development is likely to cause an adverse impact on the following—
>
> > (i) existing, safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,
> >
> > (ii) overshadowing, wind funnelling and the loss of views from public places to foreshores,
> >
> > (iii) the visual amenity and scenic qualities of the coast, including coastal headlands,
> >
> > (iv) Aboriginal cultural heritage, practices and places,
> >
> > (v) cultural and built environment heritage, and
>
> (b) is satisfied that—
>
> > (i) the development is designed, sited and will be managed to avoid an adverse impact referred to in paragraph (a), or
> >
> > (ii) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or
> >
> > (iii) if that impact cannot be minimised—the development will be managed to mitigate that impact, and
>
> (c) has taken into account the surrounding coastal and built environment, and the bulk, scale and size of the proposed development.

26 Following the hearing the applicant filed an Aboriginal due diligence assessment prepared by APEX archaeology. That report concludes, in part, that:

> "Ground disturbance was varied within the study area open brackets the subject site closed brackets. In the northern portion of the site, disturbance was moderate to high. In the southern portion of the site, below the Cliff line, disturbance was limited although there were still evidence of landscape modification within this area. The area around and below the Cliff line was very steep and considered unlikely to possess evidence of, or potential for, average

> nor cultural material to be present. The area was considered unlikely to contain any evidence of historical aboriginal habitation of the area due to the levels of disturbance present and the nature of the topography, along with historical flood activity in the area which would likely have removed any evidence of aboriginal occupation in the area if it had indeed been present."

27 LEP 2014 requires that consideration be given to whether a proposed development will impact on any Aboriginal heritage values: cl 5.10(4). SEPP CM also requires consideration be given to whether any proposal within the coastal environment or coastal use zone will adversely impact on Aboriginal cultural heritage practises and places. Based on the conclusion of the APEX archaeology report I am satisfied that the proposed development will not impact on any Aboriginal heritage values.

28 The development application was referred to Endeavour Energy in accordance with cl 45 of State Environmental Planning Policy (Infrastructure) 2007 (SEPP Infrastructure) due to the presence of overhead powerlines. No objection was received from Energy Australia to the development, subject to the imposition of the provided conditions (Exhibit 2). These conditions are included in the Respondent's draft without prejudice conditions of consent.

29 The development application was referred to the Natural Resources Regulator in accordance with s 91 of the *Water Management Act 2000* who determined that the works the subject of the development application are exempt from the need to obtain a controlled activity approval (Exhibit 2).

30 As required by cl 2.3 of LEP 2014 I have had regard to the objectives for development in the E3 Environmental Management and RU2 Rural Landscape zones when determining this development application. The objectives of the relevant zone extracted below:

> **E3 Environmental Management**
>
> - to protect and restore areas with special ecological, scientific, cultural or aesthetic values.
>
> - to provide for a limited range of development that does not have an adverse effect on those values.
>
> - to protect the natural and cultural features of the landscape, including cultural and foreshore areas that contribute to scenic value and visual amenity.
>
> - to maintain the stability of coastal landforms and protect the water quality and ecological values of estuaries and coastal streams

31 A small portion of the subject site is zoned RU2 Rural Landscape, for the purposes of cl 2.3 of LEP 2014 the objectives of the zone are as follows:

> - to encourage sustainable primary industry production by maintaining and enhancing the natural resource base.
>
> - to maintain the rural landscape character of the land.
>
> - to provide for a range of compatible land uses, including extensive agriculture.

32 The application is made for the accessway as ancillary to the permitted purpose of “dwelling house” which is a permitted use in both zones. The parties agree that development for the purposes of roads is also permissible with consent in both zones. I am satisfied the development is permitted with consent in both zones.

33 The development application proposes earthworks to construct the upper section of the access driveway. Clause 7.2 of LEP 2014 requires development consent for earthworks and requires the consent authority to consider the following matters prior to the grant of consent for earthworks (or for development involving ancillary earthworks):

> (3) Before granting development consent for earthworks (or for development involving ancillary earthworks), the consent authority must consider the following matters—
>
> (a) the likely disruption of, or any detrimental effect on, drainage patterns and soil stability in the locality of the development,
>
> (b) the effect of the development on the likely future use or redevelopment of the land,
>
> (c) the quality of the fill or the soil to be excavated, or both,
>
> (d) the effect of the development on the existing and likely amenity of adjoining properties,
>
> (e) the source of any fill material and the destination of any excavated material,
>
> (f) the likelihood of disturbing relics,
>
> (g) the proximity to, and potential for adverse impacts on, any waterway, drinking water catchment or environmentally sensitive area,
>
> (h) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.

34 Part of the subject site, below the escarpment is identified as high hazard floodway under Chapter G9 of DCP 2014. Since the Councils determination of the development application Clause 7.3 of LEP 2014 has been repealed.

However, the suitability of the site for the proposed development, including the flood affectation is a matter for consideration under s 4.15(1) of the EPA Act.

35 The proposed access driveway is located within 50m of a 'Watercourse Category 1', being Shoalhaven River: cl 7.6(2)(b) of LEP 2014. Clause 7.6 of LEP 2014 specifies that before determining a development application the consent authority must consider the following:

> (3) Before determining a development application for development on land to which this clause applies, the consent authority must consider—
>
> > (a) whether or not the development is likely to have any adverse impact on the following—
> >
> > > (i) the water quality and flows within the watercourse,
> > >
> > > (ii) aquatic and riparian species, habitats and ecosystems of the watercourse,
> > >
> > > (iii) the stability of the bed and banks of the watercourse,
> > >
> > > (iv) the free passage of fish and other aquatic organisms within or along the watercourse,
> > >
> > > (v) any future rehabilitation of the watercourse and its riparian areas, and
> >
> > (b) whether or not the development is likely to increase water extraction from the watercourse, and
> >
> > (c) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.

36 Further, pursuant to cl 7.6(4) of LEP 2014 the Consent must, prior to the grant of consent, be satisfied that:

> (4) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that—
>
> > (a) the development is designed, sited and will be managed to avoid any significant adverse environmental impact, or
> >
> > (b) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or
> >
> > (c) if that impact cannot be minimised—the development will be managed to mitigate that impact.

37 Clause 7.7: 'Landslide risk and other land degradation' applies to the subject site as has a slope in excess of 20%: cl 7.7(2)(a) of LEP 2014. Clause 7.7 of LEP 2014 specifies that before determining a development application the consent authority must consider any potential adverse impact, either from, or as a result of, the development in relation to—

(a) the geotechnical stability of the site, and

(b) the probability of increased erosion or other land degradation processes.

38 Further, pursuant to cl 7.7(4) of LEP 2014 the Consent authority must, prior to the grant of consent, be satisfied that:

> (a) the development is designed, sited and will be managed to avoid any significant adverse environmental impact, or
>
> (b) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or
>
> (c) if that impact cannot be minimised—the development will be managed to mitigate that impact.

39 The site is partially mapped as 'scenic protection' on the Scenic Protection Area Map in LEP 2014. Clause 7.8(3) of LEP 2014 specifies that in deciding whether to grant development consent the consent authority must:

> (a) consider the visual impact of the development when viewed from a public place and be satisfied that the development will involve the taking of measures that will minimise any detrimental visual impact, and
>
> (b) consider the number, type and location of existing trees and shrubs that are to be retained and the extent of landscaping to be carried out on the site, and
>
> (c) consider the siting of the proposed buildings.

40 The development application is also subject to the provisions of the DCP 2014, the provisions of which are discussed where they arise in relation to the issues in dispute between the parties in the remainder of the judgment.

Visual Impact

41 The Respondent contends that the site is unsuitable for the proposed development, in part, as it is likely to have an adverse visual impact when viewed from the public domain and an adverse impact on the visual amenity and scenic qualities of the coastal environments (Exhibit 1).

42 Further, as noted at [20] pursuant to SEPP CM as the site is mapped as a 'coastal use area' prior to the grant of consent the Court must consider whether "The proposed development is 'likely to cause an adverse impact on (ii) the visual amenity and scenic qualities of the coast".

43 Pursuant to cl 14(b) of SEPP CM, if I determine there is an adverse visual impact, I am required to be satisfied that either:

> (i) the development is designed, sited and will be managed to avoid… [that] adverse impact…, or
>
> (ii)if that impact cannot be reasonably avoided the development is designed sited and will be managed to minimise that impact, or
>
> (iii) if that impact cannot be minimised the development will be managed to mitigate that impact…

44 Finally, in undertaking an assessment of the development application against the provisions of cl 14 of SEPP CM I am required to take into account the surrounding coastal and built environment, and the bulk, scale and size of the proposed development.

45 Further, visual impact is a mandatory consideration under cl 7.8 of LEP 2014 as the site is mapped scenic protection (see [37]).

Evidence

Visual Impact assessment

46 Dr Lamb prepared a Visual Impact Assessment (VIA) which was tendered as Exhibit K. As part of the executive summary the VIA makes the following findings:

> "It was found that minor to moderate change would occur to the effect of the project on the effective visual catchment and to the visual character, scenic quality, and public domain sensitivity of the site as a result of the construction of the proposal.
>
> The overall level of visual effects was rated as moderate for all other than the closest range view.
>
> When the levels of visual effect were weighted against criteria of sensitivity, visual absorption capacity and compatibility with urban and natural features, including the likely future character of the visual context in this part of Shoalhaven River, the residual visual impacts were considered to be low to moderate overall.
>
> Moderate visual impacts, the highest level assessed for only the closest viewpoint are typical of urban developments in natural settings and not intrinsically unacceptable."
>
> (Exhibit K)

47 The VIA concludes that the proposed development would be of low visibility, apart from "the first section of upward trending pavement in the lower part of the accessway above the turning head at the riverbank" (Exhibit K). Dr Lamb's reasoning for this conclusion is extracted below:

“1. The presence of extensive areas of vegetation, both canopy and trunks of trees, growing on the talus slope at the foot of the escarpment and the escarpment itself.

2. The size of many of the tress that would cause screening or blocking of views, many of which have canopies that are higher that the crest of the escarpment, in some cases also growing on the lower part of the talus slope.

3. The screening or view blocking effect of the canopy on views from the river. This is attributable to the following:

a. Other than immediately at the river bank, there are several layers of vegetation canopy between a viewed and the proposed structure.

b. The vegetation is growing at several levels, as a result of the underlying topography and the variations in heights and species of trees.

c. The view of the structure other than the immediate river front area is at an upward angle. The angle means that the view is intersected by multiple layers of canopy and trees of different sizes.

d. The structure is close to the face of the escarpment over the majority of its alignment. As a result, it is permanently shaded by both escarpment and vegetation canopy, probably at all times of the day given the escarpment is subvertical and faces south.

e. The sunlit canopy would make it very difficult to discern any of the structure proposed and in addition make it difficult to discern any of the shaded canopy behind. The proposed road is therefore hidden not only by the depth of vegetation between a viewer and the structures, but also by both lit and shaded layers of vegetation through which there is unlikely to be significant visibility.

f. The visibility of the structures would also be minimal seen from the river because of the figure ground effect caused by the tree canopy. It is possible to have a highly screened view of the river from inside the site looking outward, but this is quite different from the view looking inward. This is because the vegetation in the immediate foreground of the view does not totally block the view, as it forms the ground of the view, with the river being the figure being partly visible through it.

g. The figure ground effect is reversible in the close view. This means that one can concentrate either on the immediate canopy in the foreground, or the river, where the vegetation is either the figure or ground of the view.

…

h. When looking inward from the river, the canopy is the figure and the dark and shadowed items on the site are the ground of the view. As a result of the distance, the canopy forms what looks like a solid screen, through which items of structure would be of minor visibility. This is also because at the distance typically involved. In this case, the figure ground effect is not reversible. The canopy and deep shade behind it always screen the view.

i. the removal of some trees in construction is unlikely to have a significant effect in increasing the visibility to the structures, as the canopy lost is part of a dense screen, the contribution to which of any

> individual tree would be unlikely to be able to be perceived. There would need to be a wholesale destruction of trees over a significant area outside the alignment of the road and between it and the river before any significant increase in visibility would occur."
>
> (Exhibit K)

48 Throughout the VIA it considers and gives weight to the following attributes of the development in determining visual impact:

- The salvage of native plants prior to clearing all earthworks and there use in rehabilitation in accordance with the Vegetation Management Plan (VMP).
- Use of small tracked excavation and other small machinery to assist in the installation of the bridge components to reduce disturbance.
- Use of existing bare or disturbed areas of the site for any stockpiling of materials.
- Monitoring of excavation and construction by an arborist to avoid significant damage to trees.
- Location of the lower construction access in weedy portions of the site.
- Use of a crane in construction to minimise tree clearing.

(Exhibit K)

49 Further, the VIA includes the following mitigation measures which were adopted by the Applicant:

> "a. Visibility of footings could be minimised by vegetation planted for the purpose, although it is likely that natural growth around them would occur. In the short term they could be painted. The best colour is black.
>
> b. Visibility of piles and their light colour is the most likely evidence structure. The powers could also be painted black.
>
> c. The edge of the concrete beams at the sides of the road, which could look like a white line amongst the trees, are potential but [an] unlikely item of visibility from off site. The concrete could be dark coloured to mitigate the impact. The edges of the slabs could also be painted black. Based on experience even if the beams edges were off form concrete initially, they would be likely to weather and become stained dark by surface growth of algae as well as becoming stained by organic matter such as litter falling onto the structure."
>
> (Exhibit K)

50 The VIA concludes that a "low level of visual effect" would be caused by the approval and construction of the proposed accessway. Specifically, it states

> "(h)igher levels of effects are confined to the closest range view, where the level of change proposed is primarily responsible for the level of visual effects analysed, rather than being a significant impact. The accessway when

> completed would generally have low to moderate visibility from a small and contained visual catchment. It would have generally low effects on visual character, and scenic quality and would not cause significant view loss or view blocking in the public domain views". (Exhibit K)

51 The VIA then assesses this view effect by considering a number of factors: the sensitivity of the view, the extent to which the existing visual environment can reduce or eliminate the perception of the visual effects of the development, and the visual compatibility of the proposal with the surrounds. For these factors, the VIA assigned a rating of "high" to the visual absorption capacity of the site, a rating of "moderate" to the compatibility of the proposed accessway in the environment and a rating of moderate to high to the sensitivity of the view, reflecting the "moderate number of potential viewers in the public domain feeling places on the river the natural character of this side and the importance placed on the scenic protection area by the Council." (Exhibit K)

52 Applying the preceding factors, the VIA concludes the overall level of visual impact ranges from low to moderate overall, with a moderate impact on a single close view location. The VIA concludes that the overall impact of the proposal on its visual catchment is minor or negligible (Exhibit K).

Expert evidence

53 The Court was assisted by visual impact and urban design expert's Dr Philip Pollard for the Respondent and Dr Richard Lamb for the Applicant. The experts joint conferenced on the proposed development and the VIA. The experts prepared a joint report which was tendered in the proceedings as Exhibit 6. The experts were also called for cross examination.

54 Relevantly the joint expert report records the following statements of agreement between the experts:

> "11. RL and PP agree that the majority of the site of the proposed development for the elevated section of road proposed and the turning head are visible from the Shoalhaven River, the foreshore of the site, RE1 land adjacent the shoreline and potentially from land zoned E3 on the south side of the River.
>
> 12. They agree that in the area of the River west of the caravan park, including the proposed development site, the current extent of development does not detract significantly from the overall visual and scenic qualities of the area.
>
> 13. The experts agree that the main locations from which the site is currently viewed is from the Shoalhaven River.

…

85. We agree that the site is a high amenity natural area with minimal visible building intrusions. We also agreed in relation to Particular b, above, the current extent of existing development visible from the River does not detract from the overall visual qualities of the locality.

…

107. That the proposed development is likely to be visible from Shoalhaven River."

(Exhibit 6)

55 Dr Lamb's evidence in the joint report, consistent with the VIA, is that the proposed development will not have more than a negligible adverse visual impact. Dr Lamb also states that in the locality the existence of a variety of structures, land and landform modification (including significant clearing construction of buildings and roads) does not significantly degrade the scenic qualities and value of views from the River. He argues "it must follow that the partial visibility of the accessway, at most, proposed in the application, cannot degrade the scenic qualities and character of the existing visual environment of the river to an extent that is unacceptable" (Exhibit 6). Dr Lamb argues that to warrant refusal a more significant visual impact, beyond visibility, would be required.

56 In the alternative, Dr Pollard's evidence can be summarised as follows:

- the site is visible from the public domain, including the waters of the Shoalhaven River, the area of public reserve adjacent the River and the elevated area of public land on the southern side of the River (which has not been assessed in the VIA due to lack of access);
- It is clear from the VIA (especially viewpoint one and six) that "(f)ully exposed, the development would be highly incompatible with its scenic surroundings" (Exhibit 6).
- The degree and certainty of the vegetative screening relied on by the Applicant is a critical consideration in respect of the acceptability, and the certainty of the visual impacts that arise from the development. In his evidence Dr Pollard concludes that the vegetative screening is critical to a conclusion of compatibility and acceptability of the proposed development.
- That whilst Dr Pollard agrees with Dr Lamb that it is true in general terms that the existing development visible from the river does not detract from the visual qualities of the area, Dr Pollard clarifies that this observation is in the context of moving from the urban township of Nowra westwards along the River. Relevantly, he draws a different conclusion about the visual context of the subject site when viewed from the Shoalhaven River:

> "the extent of visible development falls off quickly as one proceeds along the river westwards from the Township. From the bend in the river near the visually exposed ski park and past the zoo, the context becomes predominantly a landscape one, with the rock escarpment being an attractive, visually dominant feature in locations where it is exposed. Signs of habitation are visible in their area, but are in the main domestic, and most introduced elements are at least partially screened, and dominated in scale by surrounding vegetation. Highly novel visual elements do not currently predominate".
>
> (Exhibit 6)

57 Dr Pollard concludes that, given the preceding, the development is likely to be "considerably more visually exposed than the photomontages prepared by the Applicant depict" (Exhibit 6).

58 Dr Pollard provides the following reasoning for his conclusion that the photomontages underrepresent the visual exposure of the development (in particular the accessway and elevated bridge components):

- the choice of focal length of 35 mm in the base photographs utilised in the photomontages. Dr Pollard notes that whilst a 35 mm focal length is compliant with their LEC Guidelines it has the effect that the "… site would appear more distant than it does to the naked eye". He argues this gives the appearance that a viewer would be more distant from the site and the proposed works (Exhibit 6).
- The capacity for the works to be undertaken in close proximity to trees and understory designated for retention without damage or additional, un-planned tree removal. Dr Pollard emphasises the reliance of the Applicant on these trees to screen the works and support the conclusion of minor impact. He questions how conservative the Applicant's assessment of impact on trees in proximity to the works is, and whether it represents the actual impacts that would ultimately arise.
- The capacity, in the photomontages themselves, to accurately depict the extent of screening achieved by existing vegetation following the completion of the works. Dr Pollard details the following challenges with modelling the insertion of a proposed structure into an existing environment:

  > " … living plants, including trees changing their appearance overtime, they grow and recede, and ultimately die. A further challenge, is in removing from an image any visible components of trees intended to be removed for the subject works, and determining what would be visible behind them and digitally representing that in the photo montage." (Exhibit 6)

- That despite its greater cost, Dr Pollard argues that a more accurate approach to modelling the position of the trees and the proposed accessway structure would be to construct a 3D laser generated scan of the forest by a registered surveyor. This approach results in a 3D digital model of the site from which the specific trees proposed for removal are able to be digitally removed. He argues this would result in a more accurate representation of the screening of the

accessway structure. Dr Pollard contrasts this approach with the approach outlined in the VIA which involved the creation of a single synthesised “average tree”. This “average tree” was then repeatedly placed in the location of trees identified on the survey of the site. Dr Pollard explains the limitations of this approach as follows:

> “ the average tree was placed in the location identified in a land survey of existing trees with a trunk diameter greater than 100 millimetres. A number of the survey trees are identified in the arborist report, but unfortunately that report does not extend to many of the trees towards the south side and on the adjacent reserve. The arborist report relates only to a trees immediately near the proposed roadway, and not to the majority of trees to the South of the road that could potentially be contributory to the screening of the proposed works. The arborist report also omits identification of trees in the areas of the proposed temporary access roads.” (Exhibit 6)
>
> …
>
> “The primary screen trees that have been identified by the arborist are trees T50, T 51, T 52, T 53, T55, T 56, T 57, T 58, T59 and T60. Many of these trees are designated semi -mature, and all are fairly slender, with an average canopy diameter of 4.4 m, and an average height of 19.6 m. The tallest pair of these trees (T56 and T59) have a height designated in the arborist report of 30 m, but a canopy of only four m diameter. Each of these trees however is represented in the model as having a height in order of 28 m and (scaled) canopy in the order of 12.6 m. Thus, in my opinion, it appears that the representation of these trees capacity to screen the development, has been over- represented by the digital “average tree” model.”
>
> (Exhibit 6)

- On the basis of the preceding Dr Pollard argues that the modelling of screen vegetation in the photomontages is in overrepresentation of the screening that will occur of the proposed development.
- Finally, the likely future influences on existing vegetation and the potential for regeneration on the site. In particular Dr Pollard identifies the potential impacts arising from construction on the survival of key trees T 51, T 52, T 55, T 57, T 58 and T 60, as well as the potential for trees existing in the public reserve to be affected by scouring occurring to their root systems from fast flowing river waters in times of flood.

59 Giving consideration to all of the above Dr Pollard concludes that, in his opinion, there is a likelihood, or at the minimum, a significant risk, that the level of screening provided by the retained trees, relied on by the Applicant, would be reduced. In his view this would result in the altered escarpment and accessway structure arising from the proposed development being clearly identifiable as an elevated roadway running down the face of the escarpment. Further, he argues that the probable and potential impacts outlined above would significantly reduce the visual absorption capacity to a range of low to

moderate in contrast to the conclusion of the VIA that the site has a high visual absorption capacity.

60 Further, Dr Pollard disagrees with Dr Lamb's assessment of the compatibility of the proposal with the surrounds and this compatibility being assigned a moderate rating in the VIA. In a joint report Dr Pollard states:

> "the development is in my opinion incompatible with its surroundings, and is a highly novel development for a private residential property. The works proposed to the escarpment particularly are in my opinion quite incompatible with its surrounds. I would therefore be inclined to right the compatibility off the development somewhat lower than RL, in the low to moderate range". (Exhibit 6)

61 Dr Pollard concludes that, weighing the factors overall, the probable visual impacts of the proposal when viewed from the River are moderate to high.

Avoidance, minimisation and mitigation

62 Each of the experts also gave evidence in relation to the tripartite test detailed in SEPP CM at cll 13(2) and 14(1)(b). Dr Lamb characterised this as a question of whether the proposed development has been designed to minimise and manage impacts on views from the visual catchment in the public domain. He states that this is agreed to be confined to the visual catchment on and adjacent to the River. Dr Lamb states:

> "69. RL the proposed development has been designed to minimise and manage the potential visual impacts. It would be successful in minimising impacts, as the conditions for significant impacts to occur set out in relation to Contention 1C above would be unlikely to be met. It is not necessary to have no impacts to achieve successful minimisation of the impacts. Minimisation does not mean no impact, nor does it mean that minimisation should lead to imperceptible visual effects. As a result, the proposal would be successful in minimising adverse impacts. The impacts would be low, managed and minimised."
>
> (Exhibit 6)

63 The conditions for significant impacts to which Dr Lamb makes reference in the preceding quote include: either the high visual exposure of the structures; prominent or permanent evidence of the process of construction (such as excavation or vegetation material); or extensive and irreversible change to the appearance and scenic values the site; or its setting. Dr Lamb's evidence concludes these conditions do not exist in the subject development application (Exhibit 6).

64 In the alternative, Dr Pollard argues there is no evidence that the development has been designed to avoid, minimise or manage the potential visual impacts. He notes that his understanding of the provisions of SEPP CM is that the Applicant must first seek to avoid impact, and only if not practicable minimise impacts or manage those that do occur. Relevantly, Dr Pollard argues:

> "It remains unclear as to how the design brief was arrived at for the road, and what aspect of any required maintenance of the low were level would warrant an elevated, 4.5 m wide access road to be constructed in this area. A more appropriate design process would in my opinion have been, to specifically identify the practical functional requirements of the access and to consider whether a significant elevated structure of the proposed width and scale was consisted with minimising or managing visual impacts
>
> While I agree with RL that development in this area should not reasonably be required to achieve no visual impacts at all, unnecessary impacts which arise from a design that appears not well suited to its stated purpose, cannot be considered to have been avoided or minimised."
>
> (Exhibit 6)

65 The Respondent's contention, regarding whether the proposed development meets the requirements of cll 13(2) and 14(1)(b) of SEPP CM, was also the subject of expert town planning evidence. The planning expert for the Applicant was Mr Jeff Mead, with Mr Peter Woodworth for the Respondent. The experts prepared a joint report which was tendered as Exhibit 8. Relevantly, in their joint report the experts note the following agreement in relation to the tripartite test:

> "1.14. It is agreed that the requirements under clause 13 (2) of the coastal SEPP establish a hierarchy for siting, designing and managing development so that adverse impacts on coastal environmental values are avoided, or where impacts cannot be reasonably avoided, the development be sited, designed and managed to minimise the impact and where impacts cannot be minimised, the development will be managed to mitigate that impact. It is agreed that the provisions do not require that development has no impacts."
>
> (Exhibit 8)

66 Mr Mead and Mr Woodworth note that the Respondent does not contend that the proposed development does not meet the test at cl 14 of SEPP CM. However, as noted at [25] as the test is a precondition to the grant of consent, it remains a matter that the consent authority must be positively satisfied of.

67 Mr Mead's evidence is that, in his assessment, the proposed development has been purposely designed to respond to the site constraints, minimise its

impacts and that those impacts that remain can be adequately mitigated or managed. Mr Mead explains his reasoning as follows:

> "1.6 In my opinion, the proposal is a clear and direct response to the site constraints. The proposal navigates the site topography in a manner which provides for a usable driveway that meets relevant traffic standards. The proposal responds to the natural escarpment and site topography by generally following the natural contour of the land and where that topography is at its steepest, incorporates "bridging" in order to minimise intervention to the natural landform. The proposal purposely "crosses" the escarpment in a limited area in order that its natural form can be retained.
>
> …
>
> The current proposal significantly reduces and minimises the impact of the development through bridging the grades over the more challenging section, allowing retention of the existing slope and the majority of the trees and vegetation."
>
> (Exhibit 8)

68 Mr Mead concludes that the subject site is suitable for the development and that on his assessment the respondent's contention that the proposal is inconsistent with SEPP CM is not made out.

69 In the alternative, Mr Woodworth's assessment of the proposed development is that it does not adequately respond to the avoid, minimise, mitigate hierarchy established by cl 13(2) of SEPP CM. I note that the wording of cll 13(2) and 14(1)(b) of SEPP CM are identical. Mr Woodworth argues that:

> "the proposed vehicle access is intrusive and is not compatible with the coastal environment or natural features of the site. I note that the intent of the proposed development is to gain access to the land at the bottom of the escarpment. Access to (this part of the site) may be able to be achieved fire a pedestrian walking track or staircase or other arrangement which may have a lesser impact than the proposed vehicle access, and therefore I am not satisfied that the proposed access driveway has been designed and sited to avoid and/or minimise impacts. In my opinion, the proposal only attempts to include some mitigation devices to manage some of the avoidable adverse impacts to the coastal environment".
>
> (Exhibit 8)

70 Further, Mr Woodworth argues that both the extent and scale of the works proposed in the development application to provide vehicular access down the escarpment to the foreshore of the Shoalhaven River are not compatible with either the site constraints, the sensitive natural riparian environment or the sites E3: Environmental Management zoning (Exhibit 8).

71 The Court was also assisted by expert evidence from the following experts:

- Geotechnical: Mr Ernie (applicant), Mr Wright (respondent)
- Ecological: Mr Fanning (applicant), Mr Coddington (respondent)

72 In undertaking my assessment of the merits of the development I have read and considered these expert reports, as well as the documentation prepared by the Applicant in support of the development application.

Submissions

73 In her closing submissions Ms Berglund emphasises the following:

- that the Applicant does not have an entitlement to construct vehicular access on the site. Instead the onus is on the Applicant to demonstrate that the particular access proposed is suitable for the site and on merit should be approved.
- That screening by trees is an important factor in determining whether the visual impact of the development is acceptable. Ms Berglund submits that the Applicant has not adequately identified the trees that contribute most to the visual screening of the proposal. As a result, there is no assessment of whether the trees most relied on for screening: firstly, can withstand the impacts of construction; secondly, are in good health and vigour; and finally are able to be relied on to screen the development into the future.
- Further, Ms Berglund argues the replanting proposed by the VMP does not offer a complete solution to the loss of any trees. She cites concerns about certainty that the replanting will thrive, the delay in their maturity, and the reliance on future maintenance for their vigour (Respondents written submissions 14.9.21).
- Ms Berglund notes that the planning principle in *Super Studio v Waverley Council* (2004) 133 LGERA 363; [2004] NSWLEC 91 (‘*Super Studio’*) establishes that where vegetation is the main safeguard against any impact it should be given little weight.
- Ms Berglund submits that “the property could be maintained by a pedestrian path or other arrangement which may have a lesser impact than the proposed vehicular access. Vehicular access is not necessary for maintenance and not justified on the basis of convenience to the current owner or a hypothetical future owner” (Respondents written submissions p 5 14.9.21).

74 Further, Ms Berglund argues that the Applicant appears to start from a point of entitlement to construct vehicle access and asserts that the proposed development application (and the bridge design) is the most appropriate response to the site constraints to provide that access. In contrast, she submits that “if the site is not suitable for the development, then it doesn’t matter whether this application is better than another option for the same development” and that the proposal for vehicular access down the escarpment

in the particular location of the subject site is misconceived (Respondents written submissions p 6 14.9.21).

75 In relation to the jurisdictional test at cl 14 of SEPP CM, Ms Berglund confirms that in the current proceedings the relevant matter in cl 14(1)(a) is (iii): the visual amenity and scenic qualities of the coast. In considering the expert evidence Ms Berglund argues the Court should give weight to: firstly, its own observations of the scenic value of the site when viewed from Shoalhaven River and the Council reserve; and secondly, the evidence of nearby residents who "take walks along the riverbank to enjoy the ambience of those areas of the riverbank which do remain unspoiled and vegetated and that such areas have a high scenic value" (Respondents written submissions p 10 14.9.21).

76 Further, Ms Berglund argues the Court should give weight to Dr Pollard's evidence on the uncertainty of the outcome detailed in the Applicant's photomontages in making assessment of the extent of likely visibility of the proposed development and to what extent a few of the development has an adverse impact on that amenity. Ms Berglund concludes that the development application should be refused as:

- the Court cannot be satisfied that the development meets the test at cl 14(1)(b) of SEPP CM;
- it is likely to have an adverse visual impact on an area marked as "scenic protection" in LEP 2014; and
- on the basis that the development is unsuitable for the subject site given its constraints.

77 In his submissions to the Court, Dr Smith emphasises that the amended development application, its design and the supporting information, demonstrates the avoidance of impacts. Further, he submits that any impacts from construction are clear and have been designed in detail with both the Applicant's ecologist and arborist. He notes that the Applicant will accept a condition of any consent stating: "no trees within the construction buffer zones shall be removed". Dr Smith argues that there are no unknown unknowns, that the project parameters, the method of construction and management of the site during construction has been assessed and designed. He concludes that the design of the proposal results in acceptable impacts.

78 Further, Dr Smith highlights that the proposed development has positive environmental outcomes. In relation to the VMP, Dr Smith confirms that the work proposed in the VMP forms part of the proposed development. He notes it includes the planting of a minimum of 100 trees (a ratio of 3.5:1 of trees to be removed). In addition, the implementation of the VMP involves the removal of some 1,917m² of weeds and eroded soils, replaced with native vegetation. He argues that, consistent with the decision of the Court in *Blake v Ku-ring-gai Council* [2021] NSWLEC 1461 at [91] the Court should consider the VMP and its implementation in determining whether the proposed development is designed, sited and managed to avoid impacts.

79 In relation to the specific precondition at cll 13(2) and 14(1)(b) of SEPP CM, Dr Smith concludes that if the Court does not agree the development has been designed, sited and managed to avoid impacts that in the alternative:

> "… As clauses 13 (2) and 14 (1) (b) are "hierarchical" (see agreement of town planning experts Exhibit 8 page 6) the Applicant further submits that in the alternative, the development, through the chosen design and placement of the bridge (see Exhibit L tab 2 – options report), VMP, arboriculture (Exhibit E), ecological (Exhibit F) and visual impact [reports] (Exhibit K), investigation works and construction methodology (Exhibit J) demonstrate that the impacts are minimised and mitigated."
>
> (Applicant's written submissions p 15 8.9.21)

80 In relation to the visual impact and VIA, in summary form Dr Smith makes the following submissions:

- Dr Pollard agrees that if the photo montage is correct the visual impact is acceptable.
- The wider visual environment of the Shoalhaven River "includes various human interventions and changes to the vegetation, including a range between minor wholesale clearing, houses and other buildings and roads." Dr Pollard agrees that these do not degrade the overall scenic value.
- The method, logic and justification for the criteria used in the VIA have not been challenged by the Council or Dr Pollard.
- Objectively the photomontages show how there would be little evidence of the proposed accessway in the visual catchment of the Shoalhaven River.
- The photomontages do not show any potential mitigation that will occur from the implementation of the VMP which would assist in further screening of the development.

- The visual impacts, if any, arising from the development should also be considered in the context of the future character of the locality which includes the Nowra Western bypass. Dr Smith argues “a potential future bridge would be a very large structure at a high level, immediately adjacent to and dwarfing the proposed development in terms of scale and visual impacts, whether an attractive bridge or otherwise” (Applicant’s written submissions p 16 8.9.21).

81 Dr Smith argues when completed the proposed development would: firstly, generally have “a low to moderate visibility from a small and contained visual catchment”; secondly, it would have a generally low effect on visual character and; finally, it would not cause significant view loss or view blocking in the public domain (Applicant’s written submissions p 18 8.9.21).

82 Dr Smith submits that the court should accept the evidence of Mr Mead that the proposal is a clear and direct response to the site constraints. Dr Smith argues that in the context of the acceptable impacts of the proposal the Court would give weight to the planning principle in *BGP Properties Pty Ltd v Lake Macquarie Council* (2004) 138 LGERA 237; [2004] NSWLEC 399 at [115]-[119] where it is noted that “in most cases it can be expected that the Court will approve an application to use our site for a purpose for which it is owned provided of course the design of the project results in acceptable environmental impacts.” (Applicants written submissions p 20 8.9.21).

83 In reply to the Respondent’s submissions, Dr Smith argues that the Respondent’s contentions in the proceedings are not supported by the evidence. In contrast he submits that the Applicant

> “has methodically addressed each matter raised by the Council with the production of a primary report prepared by experts with (importantly) relevant experience and qualifications. When read together, their combined expertise leaves no uncertainty as to the impacts of the proposed development and demonstrates how the development has evolved and has been specifically designed to respond appropriately to the site” (Applicant’s written submissions in reply 19.9.21).

84 Further, Dr Smith submits that the Respondent is in error in assessing whether the development is the “best way” to achieve vehicular and disabled access. Dr Smith asserts this approach is incorrect, arguing the role of the consent authority is to assess the evidence relevant to the application and determine that development in accordance with the planning controls.

Consideration and Findings

85 Prior to outlining my findings in relation to the development application it is appropriate to give some context and description of the physicality and proposed construction of the access way/road. As described in Exhibit F the development has the following components:

(1) Upper part of the new access way, from the northern boundary at Coorong Road to the upper abutment at the top of the escarpment. This section is located partly along the alignment of an existing dirt and gravel driveway and partly over areas of existing fill. The Applicant's Ecological & Riparian Issues Report, Exhibit F, notes that the accessway is proposed to be at-grade or located in a rock lined trench. However, at chainage 140.00 for example the proposed accessway is in 600mm cut proximate to the common boundary of the adjoining property to the south. The accessway remains in cut until the concrete upper abutment.

(2) The 'bridge section': the proposed access way spans between an upper abutment at RL 23.50 to a lower abutment at RL 13.30 (Exhibit F). Between these abutments are proposed precast bridge panels and beams on micro-piles. The works traverse the existing sandstone escarpment. The Applicant's Ecological & Riparian Issues Report, Exhibit F, notes that:

- the locations of footings and other works have been identified on site by the project engineers in consultation with the ecologist to ensure minimisation of clearing;

- footings in the middle part are to be accessed by small excavators and micro-piling machinery from the lower works area using the bridge alignment or temporary access tracks;

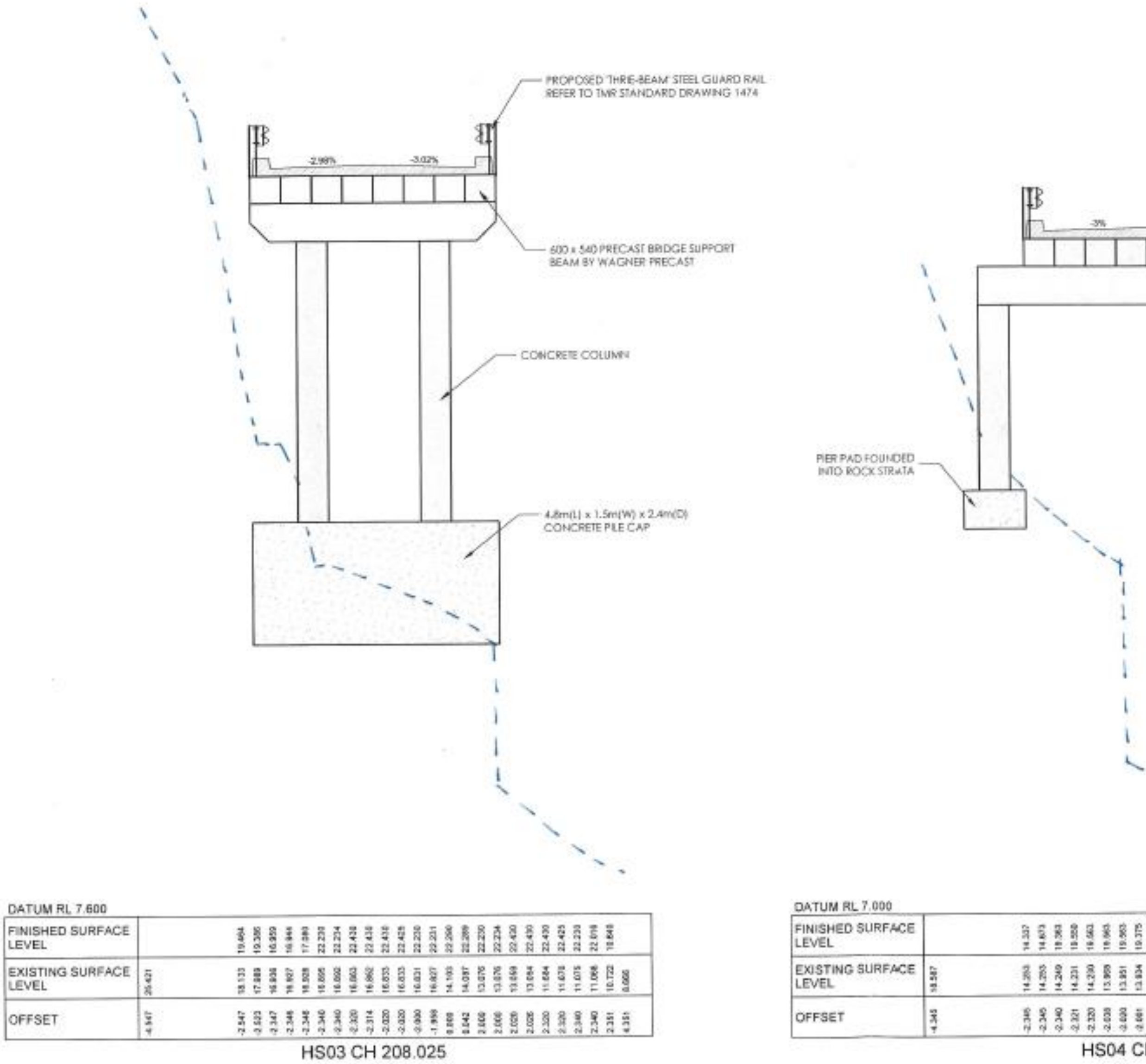
- equipment and materials will also be lowered and removed by Crane to avoid or minimise disturbance;

- concrete required for footings will be delivered from above by pump and boom; and

- precast concrete beams are to be lowered into place by crane.

Small areas of loose rock are proposed to be removed or bolted.

The scale and form of the proposed sections are extracted below (note for clarity I have highlighted the outline of the existing escarpment in the structural sections):



(3) The lower part of the access way including the turning head. This part of the access way is to be constructed at grade. Other works in the lower part include the construction of temporary construction access tracks which involve the clearing of vegetation along the Shoalhaven River foreshore and adjacent footing HS4. These temporary access tracks utilise geo-fabric, gravel and temporary drainage where necessary. They are proposed to be rehabilitated at the end of construction.

(4) The development application also incorporates the VMP which proposes replanting at a rate of 3.5 times the amount of trees proposed to be removed for the purpose of the development.

(Exhibit F)

The precondition at cl 14 of SEPP CM is not satisfied

The development will have an adverse visual impact on the visual amenity and the scenic quality of the coast.

86 I accept the agreed evidence of the town planners at [65] that the test at cl 14(1)(b) is hierarchical.

87 Pursuant to cl 14(1)(iii) of SEPP CM I find that the proposed development is likely to cause an adverse impact on the visual amenity and scenic qualities of the coast. My reasoning for this finding follows.

88 The subject site is designated in both SEPP CM and LEP 2014 as having specific visual sensitivity. Under SEPP CM this arises on the basis of it being part of a coastal environmental area and a coastal use area in which the instrument identifies the importance of a consideration of both visual impact and visual amenity. Under LEP 2014 the site is specifically designated as part of an area of high scenic amenity worthy of protection. Further, the designation of the site as having high scenic amenity is supported by the comments received in public submissions and an objective assessment of the attractiveness of the locality and the waterscapes of the Shoalhaven River. In my view these planning controls warrant a conservative approach to an assessment of the subject development's potential for adverse visual impacts.

89 In my view Dr Lamb's VIA does not represent a conservative approach to an assessment of the whole of the potential visual impact that may arise from the development. My reasoning is as follows:

- Firstly, the VIA focuses on what Dr Lamb describes as "the effective visual catchment" of the site which is, as he notes, not the total visual catchment of the works. The VIA describes the effective visual catchment as: "an area within which there is sufficient detail to perceive the nature and quality of the development, as well as the potential for it to have negative effects on items of scenic or cultural significance." (Exhibit K)
- In my view whilst an analysis of the effective visual catchment may be inappropriate in some circumstances (for example in an urban area) it is not in these circumstances. In these proceedings the zoning of the site (E3 Environmental Management), its location within both the "coastal environmental area" and the "coastal use area", and the expansive views of the site available from the Shoalhaven River support a more conservative and holistic assessment that identifies all the impacts in the total visual catchment. This may include for example undertaking an assessment of view impacts from

the adjoining private land, from the public recreation area directly opposite the site, and from within the site itself. No such assessment of the impact from these locations has been completed. This has the effect of minimising the visual impact and leaving uncertain the impacts of the proposed development on all of the land within the coastal use area, or that mapped as scenic protection under LEP 2014, that may be impacted.

- The VIA allocates a level of view sensitivity to the site of moderate-high, as detailed in the extract below. In my view this assessment does not take account of the public use of the public land immediately adjacent to the Shoalhaven River that borders the subject site.

> "2.1.5 View place sensitivity
>
> Visual sensitivity is a baseline factor that applies to viewing places in the public and private domains. The level of sensitivity varies among different viewing situations. Visual sensitivity is an assessment of the relative level of importance of viewing places in viewing situations, in both the public and private domains. Viewer sensitivity in the public domain decreases with distance. It is considered that the highest impacts occur in the closest sensitivity range open brackets within 500 metres closed brackets, with moderate sensitivity at the medium distance range open brackets 500 metres to 1000 metres close brackets and low sensitivity beyond 1000 metres.
>
> The site would rank as moderate dash highview place sensitivity in the present context as a result of the interaction of a moderate number of users of the waterway and exposure to public places on the river and to reserves. Recreational users of the river are expected to have higher expectations for visual quality, increasing view place sensitivity.
>
> View place sensitivity would be likely to remain the same following construction and use of the proposed development as ongoing use would not result in significant change to the visibility or character of the site, given the strategies adopted to minimise visual impacts."
>
> (Exhibit K)

- I am satisfied that an analysis of view place sensitivity in the context of the planning controls as well as the factors identified by Dr Lamb support a ranking of high view place sensitivity to the subject site.
- The VIA does not assess the visual impact of the proposed structure on the land which is the subject of the application.
- The assessment of visual absorption capacity takes account of the rehabilitation works proposed under the vegetation management plan (VMP) and as part of the natural revegetation process. This results in an allocation of high to the visual absorption capacity of the subject side.
- The VIA fails to consider the visual impact of the *use* of the proposed development, rather it treats the proposed accessway as a static piece of infrastructure.
- Further, the VIA does not assess the visual impact of the proposed development from within the subject site.

90 I accept the evidence of Dr Pollard in relation to the accuracy of the photomontages in particular the accuracy of the representation of the screening trees relied on by the applicant in the absence of survey data. I accept his evidence as summarised at [58]. I note that I have not given weight to the concerns raised by Dr Pollard in relation to the practicality of the proposed construction method or the risk that further vegetation will be impacted given that this evidence is contradicted by the agreed evidence of the geotechnical experts.

91 Notwithstanding the works proposed in the VMP, I am not persuaded that it is appropriate to allocate definitive weight to the mitigation effect of the existing screen trees and revegetation on the adverse visual impact of the proposed development. I accept the evidence of Dr Pollard at [56] that the vegetative screening is critical to a conclusion of compatibility and acceptability of the proposed development. The existing trees are a natural element, subject to the frailty of weather, disease and bushfire risk. It is this uncertainty that is the relevance of the Courts Planning Principle: *Super Studio* at [6].

92 I find that the visual impact of the proposed development is uncertain for further reasons, namely the method of the assessment and the scope of the view locations from which the assessment was made. The two grounds are:

(1) I agree with Dr Pollard's evidence that the use of an 'average tree' approach to generating the photomontages and the assessment of visual impact is uncertain. Given the extent these trees are relied on by the Applicant I accept and adopt the evidence of Dr Pollard at [58].

(2) The VIA does not assess the visual impact of the proposed development from within the subject site, adjoining properties nor the Council reserve at the boundary of the site and the Shoalhaven River.

93 Further, I disagree with Dr Lamb's characterisation of the existing visual environment summarised at [55]. With the benefit of the video material provided to the Court of the locality as viewed from the Shoalhaven River, I accept and prefer the evidence and conclusion of Dr Pollard at [56] that if the development was not screened by this vegetation, but exposed to view, it is incompatible with the scenic surrounds. I have also given weight to the express intention of cl 7.8 of LEP 2014 to maintain and protect the scenic amenity of the land in this locality.

94 For these reasons I am satisfied that the proposed development will have an adverse impact on the scenic qualities of the coast. Such a finding is relevant to both the consideration of the remaining subcll of 14(1) of SEPP CM, a consideration of the development application pursuant to cl 7.8 of LEP 2014 and finally as part of the evaluation of the development application under s 4.15 of the EPA Act as detailed in the following.

95 At [86] I found that the proposed development is likely to cause an adverse impact on the visual amenity and scenic qualities of the coast. In these proceedings it is this impact that is the focus the tests of satisfaction at cl 14(1)(b) of SEPP CM. Pursuant to cl 14(1)(b) of SEPP CM I find that the development is not designed, sited and managed to avoid an adverse visual impact when viewed from a public place. Neither am I satisfied that such an impact cannot be reasonably avoided: cl 14(1)(b)(ii) SEPP CM. My reasoning for these findings follows.

96 The subject development, as designed, is a significant civil engineering structure. As demonstrated at [85] the bridge component of the development has a pavement width of some 4m, with pile caps of 4.8m (l) x 1.5m (w) x 2.4m (d), seven ‘headstocks’ and two abutments. The accessway, in the location of the escarpment, includes steel beam guardrails and concrete upstands to direct road water. These elements, the dimensions of the accessway and the concrete material, are characteristic of urban local roads.

97 After a consideration of the evidence and submissions I am satisfied that it is reasonable to conclude that the Applicant has prepared a design that meets the requirements of the owner and then sought to minimise or mitigate any impacts that arise from that design. Significant technical expertise has sought to reduce the developments impacts. I accept the submission of Dr Smith that the only area of significant uncertainty in relation to the impacts that arise from the proposed development is in relation to my finding on visual impact. However, I am satisfied it is reasonable, in the context of the zone objectives, the nomination of the site as an area of scenic protection and the provisions of SEPP CM and the site specific characteristics of slope and the presence of the escarpment for any proposed access way to the foreshore to be of a reduced

scale, extent and materiality more characteristic of the residential use of the site. In my assessment such design and siting considerations fall within the scope of reasonable avoidance pursuant to cl 14(1)(b)(ii) of SEPP CM.

98 Whilst it is true that the bridging elements may avoid direct impacts to the escarpment, for the preceding reasons I am not satisfied that the adverse visual impact cannot be reasonably avoided.

99 Further, in determining the development application I am required to take into account the surrounding coastal and built environment, and the bulk, scale and size of the proposed development: cl 14(1)(c) of SEPP CM. Such a consideration weighs towards refusal of the development application given the significant physicality of the accessway, as detailed at [85], and the evidence of Dr Pollard of the criticality of the vegetative screening is to the acceptability and compatibility of the development. I note that the coastal use area is not restricted to the areas for which an assessment of visual impact was undertaken under the VIA. The total visual impact to which the cl 14 applies is therefore uncertain.

100 These findings are sufficient to conclude the precondition at cl 14(1)(b)(ii) SEPP CM is not satisfied. As the state of satisfaction required by cl 14(1)(b) of SEPP CM has not been met there is no power for the Court to grant consent to the development application.

The visual impact warrants refusal on merit

101 Giving weight also to the zone objectives (see [30]) and the public submissions (see [19] and [20]) I find that the form, scale and materiality of the proposed accessway is incongruous with the objectives of the E3 Environmental Management zone, which among others has an objective to ‘protect the natural and cultural features of the landscape, including cultural and foreshore areas that contribute to scenic value and visual amenity’.

102 At [88]–[91] I detail my reasoning as to why the VIA does not represent a conservative approach to an assessment of the whole of the potential visual impact that may arise from the development. At [86] I find that the proposed development is likely to cause an adverse impact on the visual amenity and

scenic qualities of the coast. On the same reasoning I find that the proposed development is inconsistent with cl 7.8: Scenic Protection in LEP 2014.

103 Giving weight to 7.8: Scenic Protection in LEP 2014, my findings in relation to the expert evidence, and the detrimental visual impacts arising from the proposed accessway I am satisfied that the subject development will have a detrimental impact on the scenic values of the locality and a detrimental visual impact on views from the Shoalhaven River. In my view such impacts are likely impacts arising from the development and are sufficient, of themselves, to warrant the refusal of the development application pursuant to s 4.15(1)(b) of the EPA Act. Further, I am satisfied that the visual impact of the proposed development on the subject site, adjoining land and the public foreshore is uncertain, and the uncertainty of these impacts weighs against the public interest.

Orders

104 The Court orders that:

(1) The appeal is dismissed.

(2) Development application number DA 20/1676 for construction of an access driveway for access and maintenance purposes and associated earthworks, vegetation removal, vegetation restoration and tree planting, and drainage works at 23 Coorong Road North Nowra is determined by way of refusal.

(3) The Exhibits are returned with the exception of Exhibit 1, A, and B.

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D M Dickson

Commissioner of the Court

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