

JRPP No:	2009NTH011
DA No:	09/0757
PROPOSED DEVELOPMENT:	Additions to Existing Manufactured Home Estate (Noble Lakeside Park) including 45 New Manufactured Home Sites, Construction of a Community Hall and Facilities and Extension of Internal Roads at Lot 193 DP 1014329, No. 39 Monarch Drive, Kingscliff
APPLICANT:	Baclon Pty Ltd T/AS Noble Lakeside Australia
REPORT BY:	Director Planning and Regulation, Tweed Shire Council

Assessment Report and Recommendation

SUMMARY OF REPORT:

Council is in receipt of a development application for an extension to an existing manufactured homes estate on Lot 193 DP1014329 at 39 Monarch Drive Kingscliff.

The extension allows for 45 new manufactured homes on the northern side of the existing on-site lake. The proposal includes construction of a new community facilities building as well as an internal road and additional car parking.

The main issues raised during the assessment of the application include the following:

- Legal uncertainties in terms of existing use rights, canal estate development and applicable provisions;
- Flooding and drainage impacts;
- Geotechnical and landforming issues, particularly with proposed fill;
- Ecological issues and impact on potential on-site Endangered Ecological Communities (EEC);
- Impacts on amenity due to loss of open space, and
- Issues associated with land use conflict and noise.

The applicant has satisfactorily addressed most of the matters of concern, however, insufficient information remains outstanding in relation to drainage and on-site EEC. In this regard, deferred commencement conditions have been recommended to ensure that off-site compensatory habitat is nominated and Council drainage works have been undertaken prior to commencement of the consent.

REPORT:

Applicant: Baclon Pty Ltd
Owner: Baclon Pty Ltd T/AS Noble Lakeside Australia
Location: Lot 193 DP 1014329, No. 34 Monarch Drive Kingscliff
Zoning: 1(a) Rural
Cost: \$10,384,000.00

BACKGROUND:

The subject site is zoned Rural 1(a) pursuant to the Tweed Local Environmental Plan 2000 (TLEP).

A summary of relevant consents is provided below:

- 12 April 1996 - Development consent issued for the erection of manufactured homes estate.
- 7 March 1989 - Development consent for an artificial waterbody was issued (87/430 Noble Caravan park Resort, comprising 396 caravan sites in six cluster locations, associated facilities and artificial lakes). This consent was granted by the Minister.
- The existing artificial lake was formed to provide fill for building platforms at the Q100 flood level. The caravan park component of the 1989 Consent was never constructed.
- March 1992 - a development application was lodged to fill certain land east of the property (DA92/353) which was at the time, in the same ownership. The additional eastern filling was to alter certain existing drainage channels on the land and to construct new perimeter drainage channels to the east. The proposal was a designated development. The eastern drains would drain independently of the property. Consent was granted by the Minister to this application in March 1993. Condition 10 of this consent required surrender of the 1987 Consent and provided a “retrospective recognition of an existing lake (Noble Lake)” and a Lake Management Plan to regulate future water quality in Noble Lake.
- 7 January 1993 - The 1989 Consent for the caravan sites and lake was surrendered, which extinguished any right to use the property for any purpose or any buildings or caravans.
- 12 April 1996 - Development consent for a manufactured home estate (95/442) was approved, providing for 234 sites in 7 stages, including an administration centre, community facilities and managers residence. The consent related to the whole land and the area around the perimeter of the lake was proposed to become ‘open space for recreation’ for the proposed manufactured home estate development. Landscaping was proposed around the shore of the lake.

- 10 December 1999 – Development Consent (No. K99/1447) was granted for a twenty additional sites at the existing manufactured home estate. This resulted in a total of 254 home sites.
- A s96 application to amend Development Consent 95/442 was received to create an additional home site to allow the erection of a manufactured home. The application was refused and subsequently appealed by the applicant in the Land and Environment Court. In 10 January 2005, the Court dismissed the appeal and the refusal was upheld. The Court found that resident's amenity would be adversely affected by the proposed dwelling as the character of the entrance to the estate would be fundamentally and seriously changed by the proposed dwelling. The loss of open space and views beyond the entrance were important and integral elements of the entry vista.

SITE AND SURROUNDS

The site is described as Lot 193 DP1014329 and is located at 34 Monarch Drive Kingscliff. It has an area of approximately 21.9 hectares and includes a large artificial lake on the northern portion of the site.

The site is relatively flat. Land adjacent to the southern boundary is at approximately RL 4m AHD. The site slopes down towards the lake to approximately RL 2m AHD.

The allotment is currently improved with 254 existing manufactured homes, an existing community building, internal roads, services and a recreational hall.

Vegetation on site include slash pines, lawn and common garden species, mid open forest (located on the northern bank of the western section of the lake), low open woodland (around the northern bank) and aquatic vegetation around the banks of the lake.

Land to the north of the site is zoned 5(a) (Sewerage Treatment / Turf) under Tweed Local Environmental Plan 2000 (TLEP) and was Council's sewerage treatment plant. This site is currently being remediated as Council's sewerage treatment plant has been relocated to another site in Kingscliff. Land to the east of the site is zoned 5(a) (Drainage) and comprises of a drainage corridor. Further east, beyond the drain is residential land zoned 2(c). Land to the south of the site is comprised of rural land zoned 1(a) and 7 (l) Environment Protection. Land to the west of the site is also zoned Rural 1(a) and 1(b2). The western boundary of the site adjoins Tweed Coast Road.

Overall, the surrounding character of the area as viewed from Tweed Coast Road is dominated by the pines on the boundary of the existing manufactured homes estate and rural land surrounding Tweed Coast Road. The character of the area around Monarch Drive is low density residential.

PROPOSAL

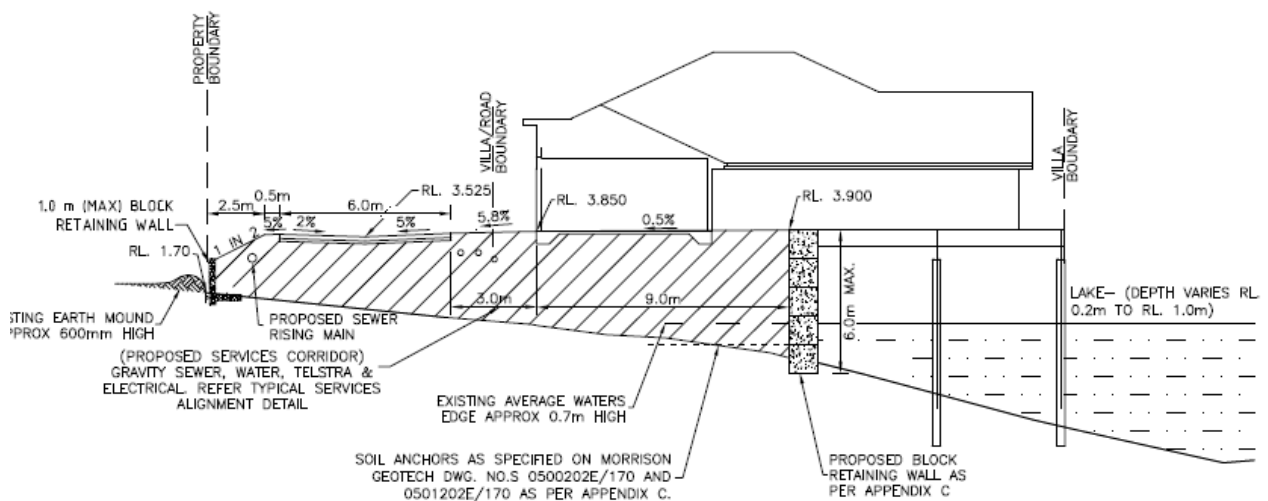
The proposal seeks the addition of 45 new manufactured home sites on the northern side of the on-site lake / artificial waterbody. Each new home is proposed to be constructed off-site and transported and installed on the property. Each manufactured home will contain two bedrooms and a study or media room as well as a garage.

The proposal also comprises a single storey community recreation hall with a gross floor area of 90m², including associated swimming pool, facilities and outdoor terrace overlooking the lake.

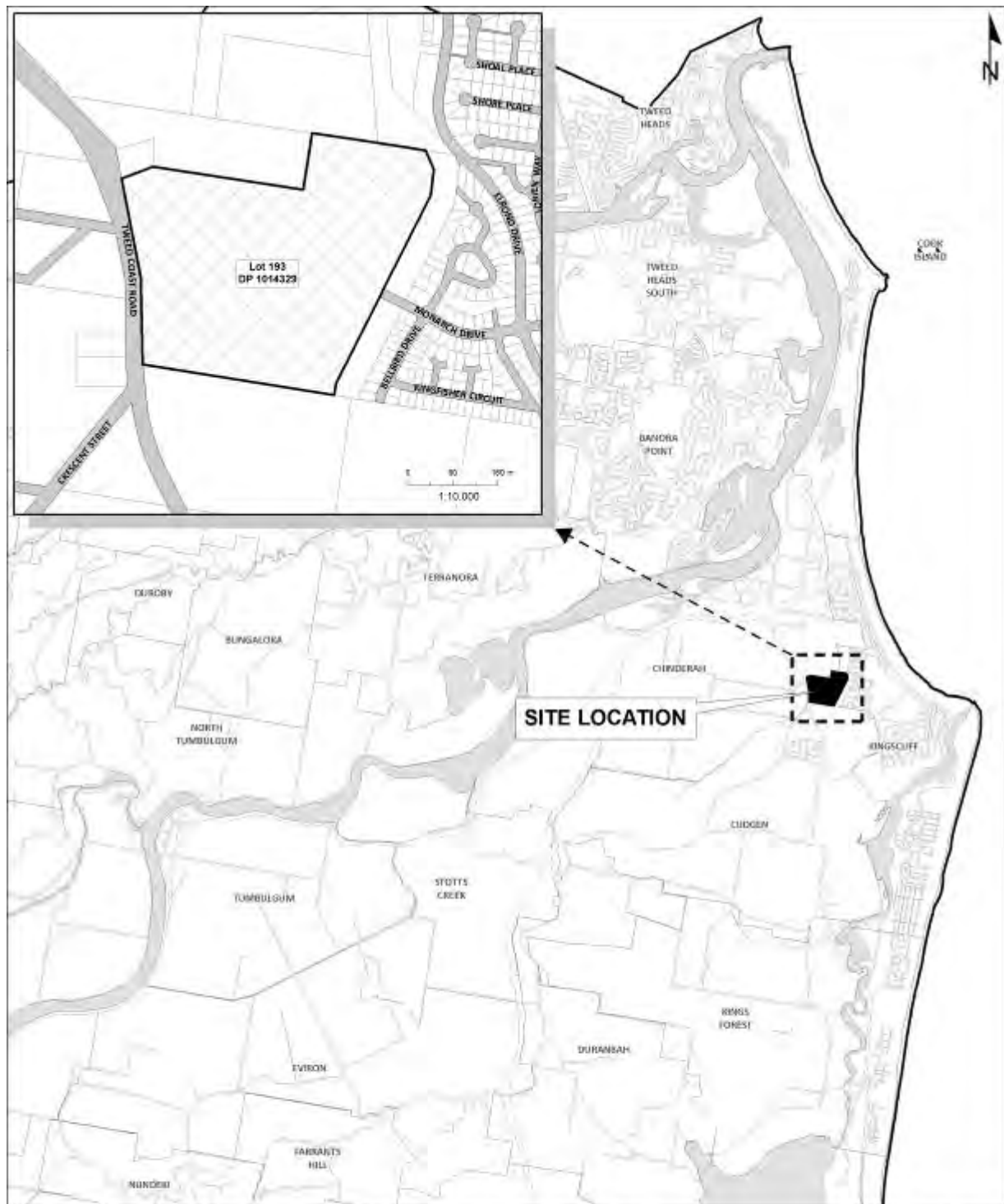
The proposal includes the construction of approximately 900 metres of private access road as well as 18 visitor car parking spaces (10 of which are located adjacent to the proposed single community recreation hall). Access to the site is currently from Monarch Drive. The proposed additional dwellings will use this access and continue through the existing internal road network, from Les Noble Drive along the north-west boundary and the northern perimeter of the lake.

The proposal includes filling around the north and western boundary of the lake to support the 900 metre long internal access road and to achieve a flat surface for dwelling platforms. Fill height ranges from approximately 6 metres at the lake edge to 1 metre to the northern boundary. Approximately 53,500m³ of solid fill material will be required to form and support the building platforms and private road.

Each of the 45 manufactured dwellings will be partially cantilevered over the existing lake and in part supported by fill material and retaining structures. The fill is required for dwellings to achieve Council's design flood level of 3.3m AHD. The fill is to be supported by retaining walls up to 6 metres in height (partly submerged in water), with the retaining foundations located in the lake itself. It is noted on figure 5.2 prepared by Opus Qantec McWilliam, dated May 2009 (refer below) that soil anchors are also specified on the retaining structures where the wall is submerged.



SITE DIAGRAM:



LOCALITY PLAN

Lot 193 DP 1014329
No.34 Monarch Drive, Kingscliff

Filename: z:\usr\planning\mch\A4F_S3\W SitePlan.mxd

Author: J.Baicheler - Planning Reform Unit

Date Printed: 05 August, 2010

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Coordinate System - MGA Zone 56
Datum - GDA 94



Cadastral: 05 August, 2010
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Civic and Cultural Centre
3 Tumbulgun Road
Mareeba NSW 2466
PO Box 816
Mareeba NSW 2464

T: (02) 6670 2400 / 1300 282 872
F: (02) 6670 2463
W: www.tweed.nsw.gov.au
E: planningreform@tweed.nsw.gov.au



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AERIAL PHOTOGRAPH:



AERIAL PHOTO - taken October 2009

Lot 193 DP 1014329
No.34 Monarch Drive, Kingscliff

Filename: z:\year\planning\msd\AAP_B&W SitePlan.mxd

Authors: J.Bachelor - Planning Reforms Unit

Date Printed: 05 August, 2010

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Civic and Cultural Centre
3 Tunbridge Road
Murrumbidgee NSW 2484
PO Box 815
Murrumbidgee NSW 2484
T: (02) 6670 2400 / 1300 292 872
F: (02) 6670 2485
W: www.tweed.nsw.gov.au
E: planning@tweed.nsw.gov.au



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**01 LAKESIDE ELEVATION
EAST ELEVATION**

- METAL CEILING ROOF AT 75 DEGREE WITH COLORBOND
- Ceiling LEVEL
- FLOOR LEVEL NOMINAL GROUND
- VINYL POST TO VERRAND PERIMETER PAINT FINISH
- WALLS STEEL OR TIMBER WALL PERIMETER PAINT FINISH
- ALUMINUM FRAMED GLAZING FLUOROCARBON FINISH
- RAILINGS ALUMINUM AND TYPICAL TABLE RAIL AT 900mm CENTRE
- LAKE

**02 SIDE ELEVATION
SOUTH ELEVATION**

- METAL CEILING ROOF AT 75 DEGREE WITH COLORBOND
- Ceiling LEVEL
- FLOOR LEVEL NOMINAL GROUND
- VINYL POST TO VERRAND PERIMETER PAINT FINISH
- WALLS STEEL OR TIMBER WALL PERIMETER PAINT FINISH
- ALUMINUM FRAMED GLAZING FLUOROCARBON FINISH
- TIMBER FLOORING AND STAIRS FOR ALL AT 900mm CENTRE TO BSA REQUIREMENTS
- LAKE

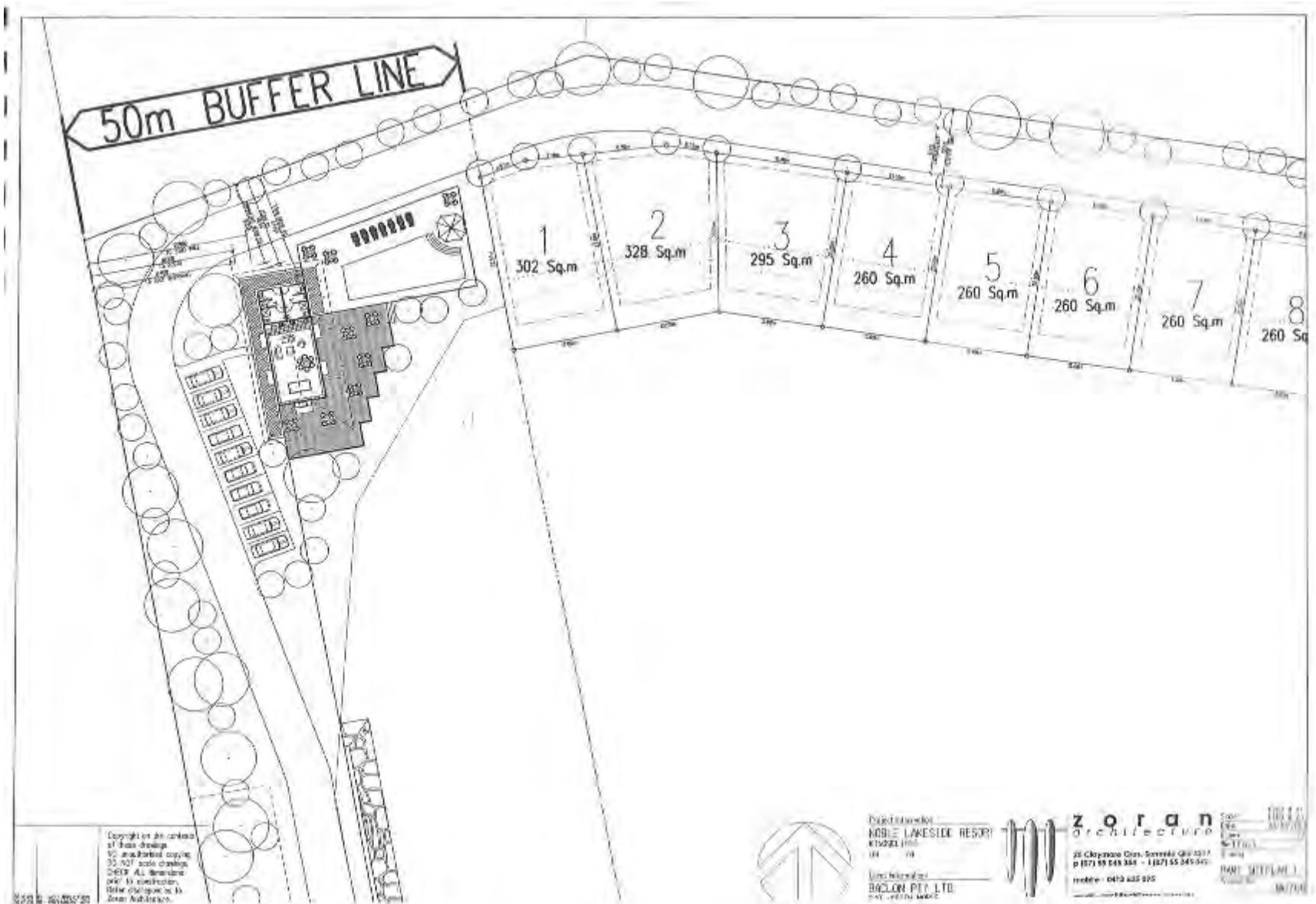
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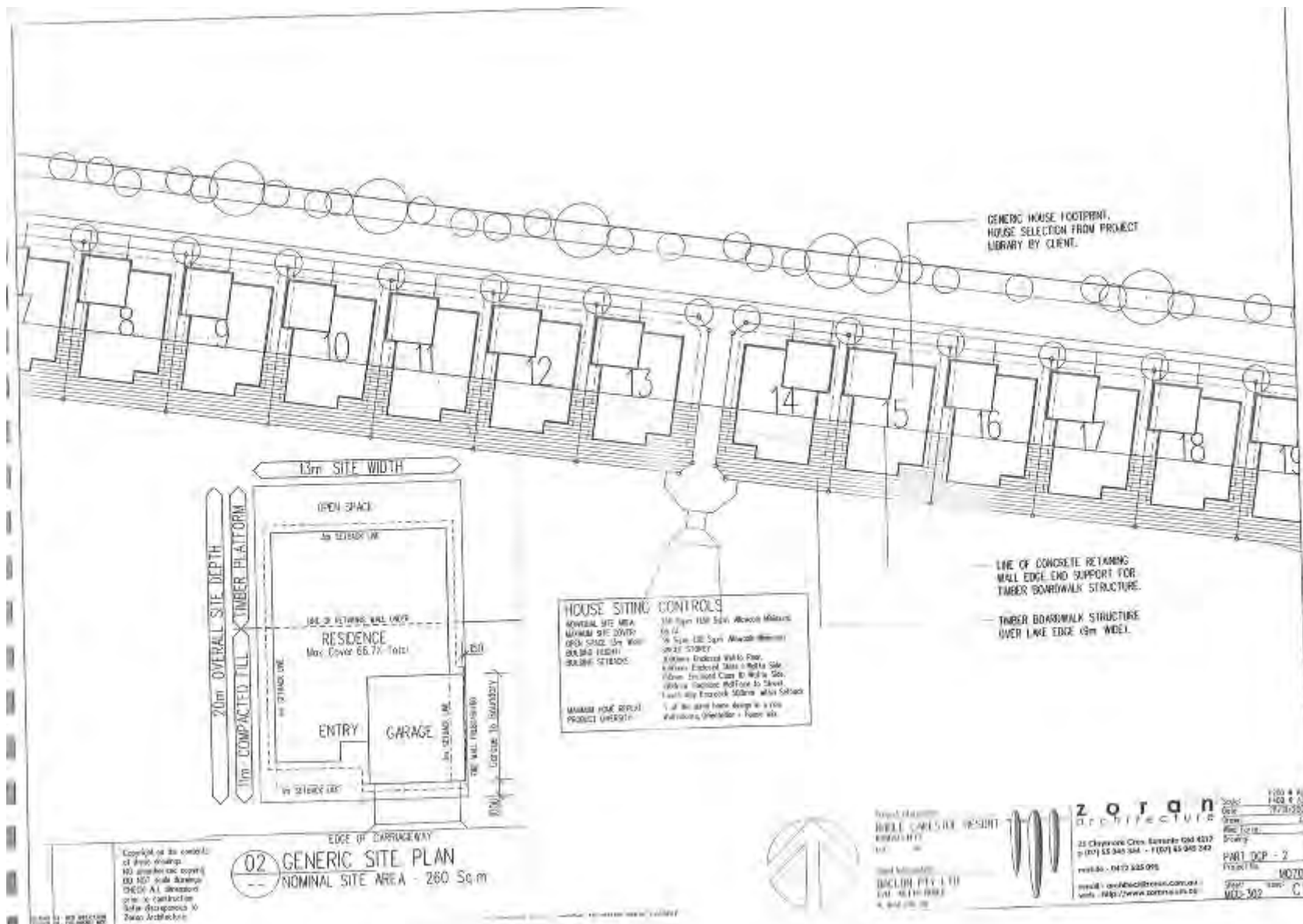
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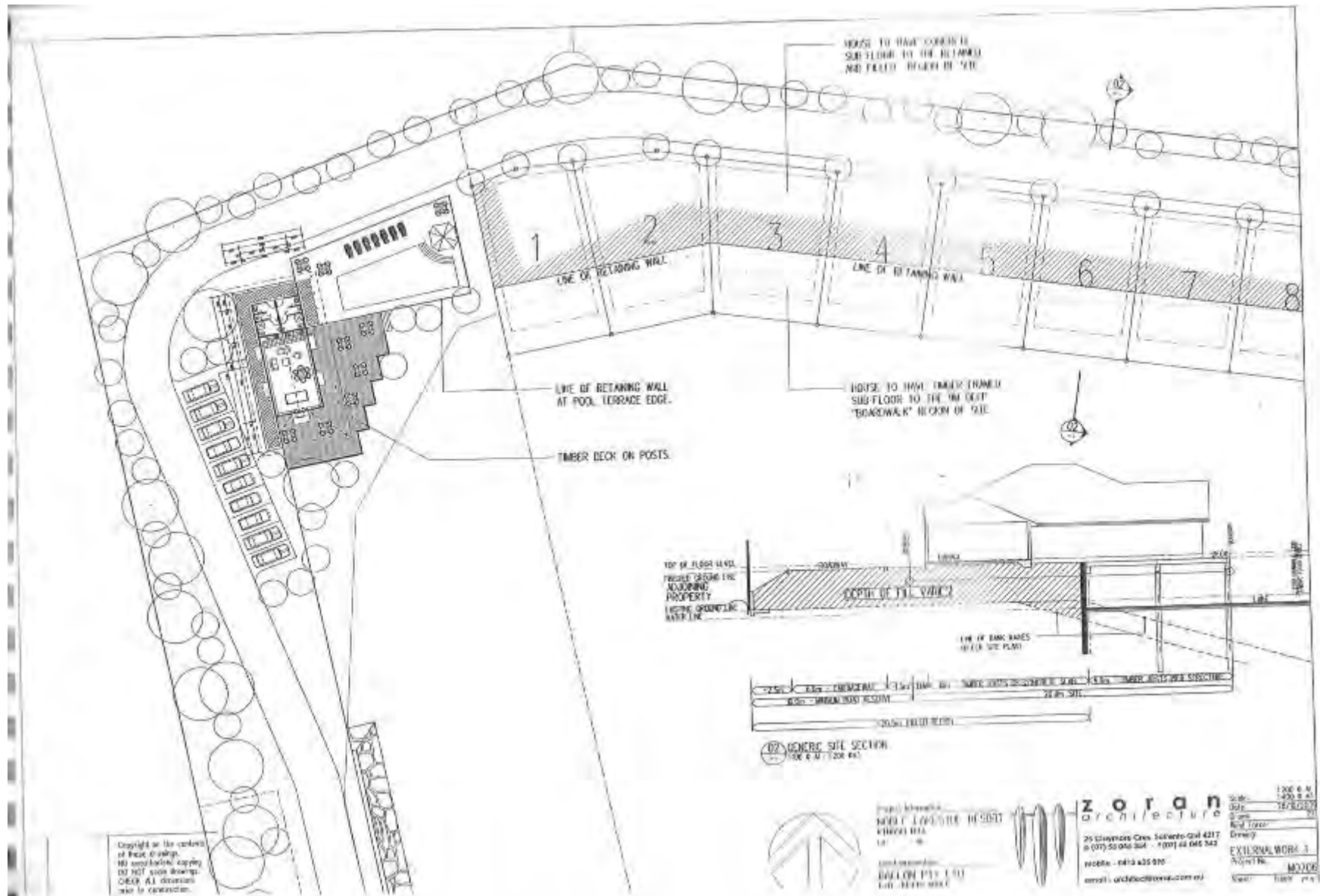
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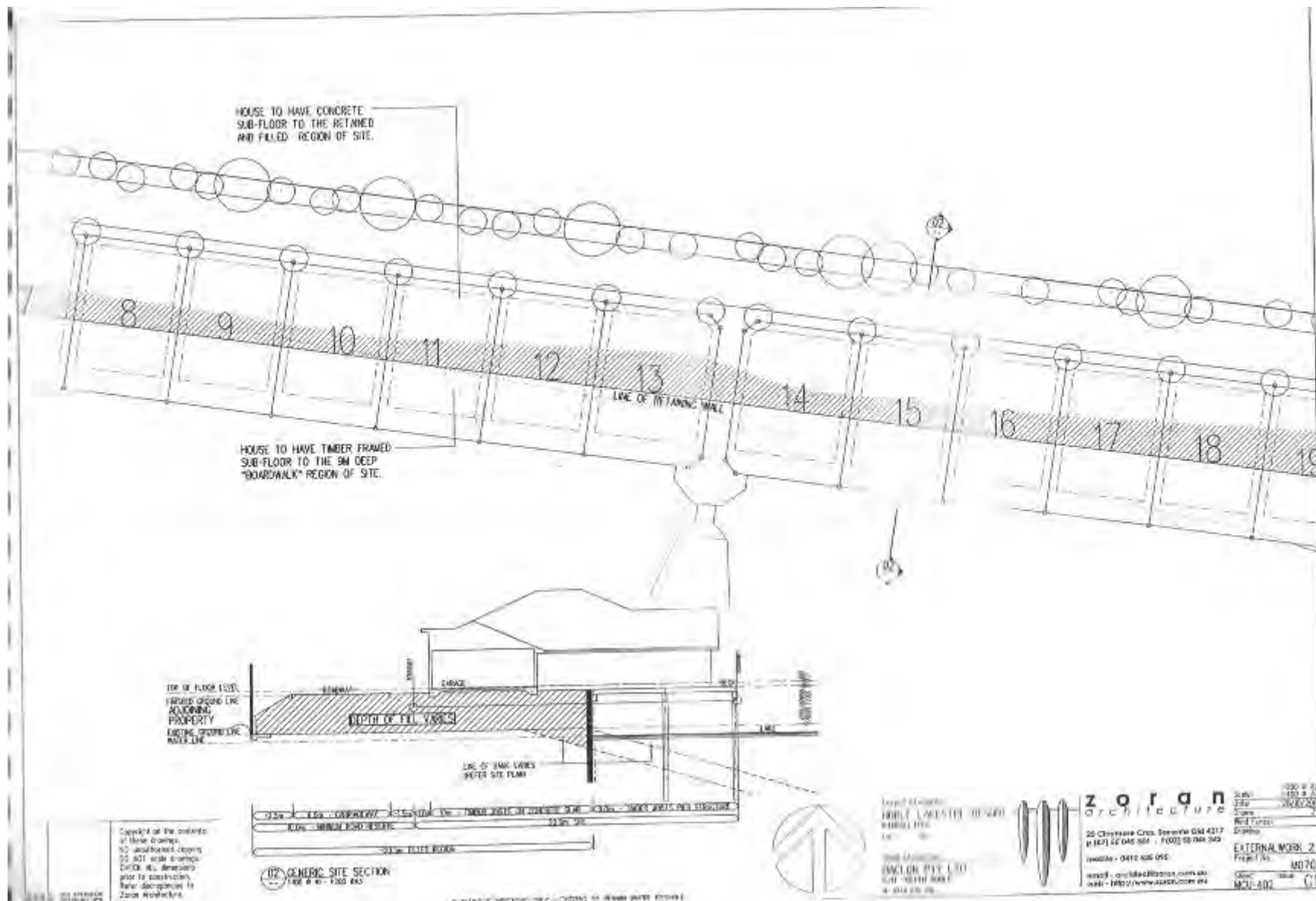
email - arch@zorancorp.com.au
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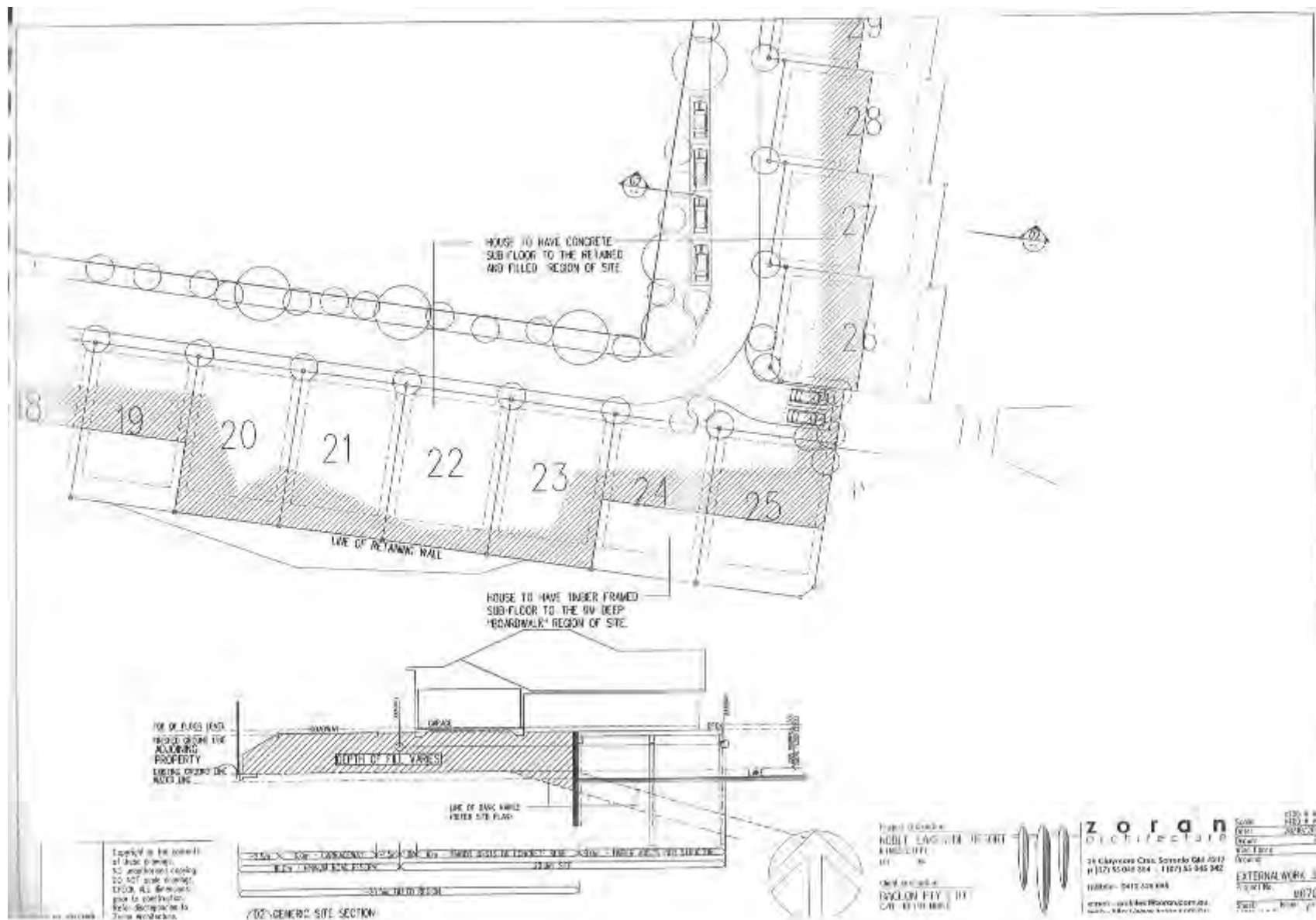
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 Checked by: JZ
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 Title: C-1

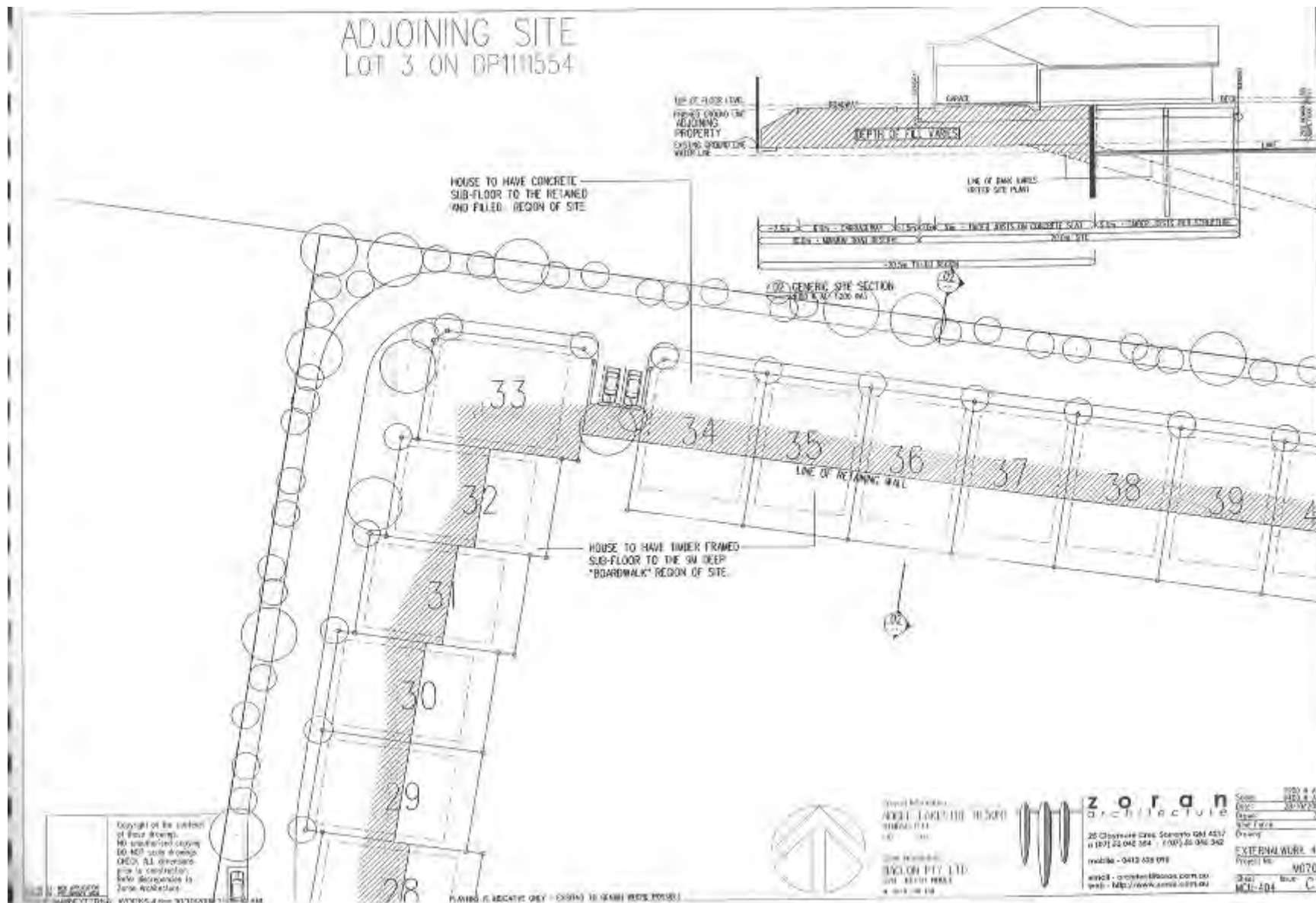


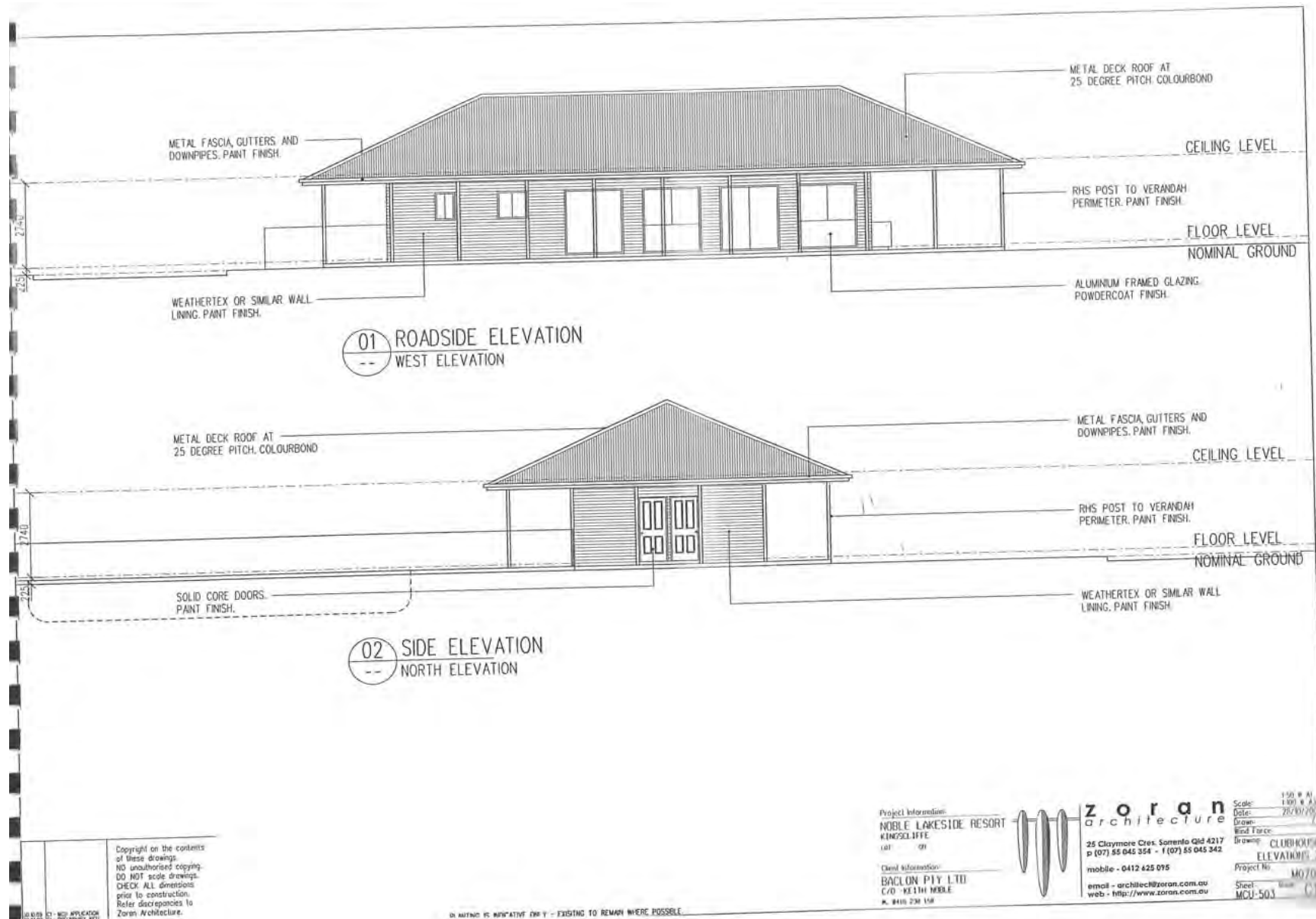












PERMISSABILITY AND EXISTING USE RIGHTS

The subject site is zoned 1 (a) Rural and under the current Tweed Local Environmental Plan, manufactured home estates are prohibited in the 1 (a) zone.

On 12 April 1996, development consent for a manufactured home estate (95/442) was approved (under the previous LEP), providing for 234 sites in 7 stages. As such, the proposal to construct an additional 45 manufactured homes on the site relies on existing use rights.

Notwithstanding the existing use rights for the manufactured home estate, Council officers initially raised concerns with the permissibility of the development and requested (in correspondence dated 31 December 2009) legal advice on the following matters.

Existing Use Rights: The Environmental Planning and Assessment Regulation 2000 (the Regulations) allows for enlargement, expansion or intensification of development with existing use rights but such must be carried out on the land on which the existing use was carried out on. In this case, do the existing use rights of the manufactured homes estate extend to the area on-site where the development is proposed? Reference should be made to relevant case law including Salvation Army v Newcastle City Council [2000] and Clause 42(2) of the Regulations.

Canal Estate Development: Council's records indicate the artificial waterbody was approved under separate consent (87/430 Noble Caravan Park Resort, comprising 396 caravan sites in six cluster locations, associated facilities and artificial lakes approved 7 March 1989) to the manufactured homes estate (95/442 Manufactured Home Estate approved 12 April 1996). Is the proposal defined as a canal estate pursuant to SEPP 50 - Canal Estate Development and if so, given the consent history, do existing use rights (if established in a. above) extend to the construction of a canal estate?

Applicable Provisions: Clause 108 of the Environmental Planning and Assessment Act 1979 (the Act) limits the ability of provisions that would derogate the incorporated provisions relating to existing use rights. To what extent do the existing use rights over-ride the provisions of the relevant environmental planning instruments and the Tweed Development Control Plan (DCP) (including permissibility and provisions in the SEPP 36 – Manufactured Homes Estate, SEPP 50 – Canal Estate Development, SEPP (Rural Lands) and the Tweed Local Environmental Plan 2000 (TLEP))? If none of these instruments apply, what should the proposal be assessed against?

Council officers requested that a Barrister be engaged to provide the abovementioned advice, as it was critical to the assessment.

Findings

The applicant complied with this request and provided advice from Mr Patrick Larkin (dated 28 April 2010). A summary of Mr Larkin's findings is provided below. Refer to Attachment 1 for the full advice.

Existing Use Rights

The existing use rights as a manufactured home estate extend to the area of the site where the development is proposed.

Canal Estate Development

The proposal is considered to be a canal estate as defined in SEPP 50 (Canal Estate Development). Through existing use rights, the proposal for the extension to the canal is not prohibited, despite the Tweed LEP or SEPP 50 (Canal Estate Development).

Applicable Provisions

All environmental planning instruments, including SEPP 36 (Manufactured Homes Estate), SEPP 50 (Canal Estate Development) and the current TLEP are of no force and effect if they derogate from clause 42 of the EPA Regulations.

Clause 42 of the Regulations is as follows:

42 Development consent required for enlargement, expansion and intensification of existing uses

(cf [clause](#) 40 of EP&A Regulation 1994)

(1) Development consent is required for any enlargement, expansion or intensification of an existing use.

(2) The enlargement, expansion or intensification:

(a) must be for the existing use and for no other use, and

(b) must be carried out only on the land on which the existing use was carried out immediately before the [relevant date](#).

That is, the clauses of any environmental planning instrument have no force. The clauses of any development control plan also have no force.

The assessment must be carried out under section 79C of the Environmental Planning and Assessment Act (EPA Act), without the influence of any provisions of the environmental planning instruments and development control plans.

Mr Larkin's findings are accepted and the proposal to extend the manufactured homes estate is considered permissible (through existing use rights) and assessment of the proposal is limited to those matters under section 79C, excluding those relating to the provisions of any environmental planning instrument or any development control plan.

Planning Principles: Assessment of proposals on land where existing use rights

In previous legal proceedings (Fodor Investments vs Hornsby Shire Council 2005) Senior Commissioner Roseth developed four guiding core principles that should be considered when undertaking a merit assessment of the proposed development with existing use rights.

The applicant was requested to deal with these principles and a summary of the response is provided below.

1. How do the bulk and scale (as expressed by height, floor space ratio and setbacks) of the proposal relate to what is permissible on surrounding sites?

Roseth commentary: "While the planning controls such as height, floor space ratio and setbacks do not apply to sites with existing use rights; they have relevance to the assessment of applications on such sites. This is because the controls apply to surrounding sites and indicate the kind of development that can be expected if and when surrounding sites are redeveloped. The relationship of new development to its existing and likely future context is a matter to be considered in all planning assessment".

The applicant addresses this principle by examining the existing and potential future land uses likely around the site. Adjoining sites are discussed according to labels in the diagram below.



The applicant's discussion on surrounding development is inserted below (Jim Glazebrook & Associates Pty Ltd correspondence dated 10 May 2010):

Sites 1 & 2 – These sites are presently zoned 1(a) Rural under the Tweed LEP 2000 (TLEP 2000) and proposed to be zoned RU2 Rural Landscape under the Draft Tweed LEP 2010 (Draft TLEP) which has recently been exhibited. Site 1 contains two buildings one of which is a dwelling and the other unknown. Site 2 contains two (2) dwellings, a number of rural buildings and a horse training track. Under the existing and proposed new zone the sites would be limited to one (1) dwelling (density of 1 dwelling per 40 hectares) but could also be used for other purposes permitted in the zone, including agricultural and tourist purposes. The height limit is 3 storeys (current) and 10 metres (proposed) under the Draft TLEP. The applicable DCP for this area is Tweed DCP Section B4 – West Kingscliff. It does not contain any height or density controls for these sites as they have not been identified for any specific type of development. The DCP essentially restricts any development of these sites because they are in the sewage treatment works buffer area. As the sewage treatment works has been relocated, the buffer is no longer applicable in this location. The DCP is therefore not up to date with the changes that have occurred in the area.

Tweed Coast Road setbacks for development of these sites are regulated by Clause 24 of the TLEP 2000. Depending on the proposed landuse the setbacks would need to be a minimum of 30 metres, which is less than that proposed by the application under consideration. It is unlikely that the density of any redevelopment of these adjacent sites would be as high as proposed by the current development application but the following facts are relevant in addressing suitability,

- The site already contains a Manufactured Home Estate and the proposal complies with the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005 (the MHE Regulation);
- Measures are proposed to manage impacts on these properties in relation to both construction and operational phases of the development. These measures include but are limited to,
 - flooding and drainage controls;
 - landscaping;
 - noise attenuation; and
 - erosion and sediment control etc.

Site 3 – This site is currently zoned 5(a) Special Uses (Sewage Treatment/Turf Farm) under the TLEP 2000. The sewage treatment plant has been relocated and the existing plant is to be decommissioned. It is proposed under the Draft TLEP to be zoned part IN1 General Industrial and part E2 Environmental Conservation. The part of this site which adjoins the proposed development is proposed to be zoned E2. Development on this site immediately adjacent to the proposed development is restricted by the current zoning and existing vegetation. There are no specific controls that apply to this site.

Sites 4 & 5 – These sites contain a drain. No development is expected to occur on these sites and there are no specific development controls that would need to be considered.

Site 6 – This is an existing developed residential precinct with a maximum density of 1 dwelling per 450m², setback of 6m from the front boundary and 900mm from side and rear boundaries. The height limit is three (3) storeys under the TLEP 2000.

Site 7 – This site is zoned part 1(a) Rural and part 7(l) Environmental Protection (Habitat) under the TLEP 2000. It is proposed to be RU2 Rural Landscape (immediately adjacent to the proposed development) and part E2 Environmental Conservation under the draft LEP 2010. The proposed development area for the

In considering the applicant's response above, it is noted that the majority of the surrounding land uses are of a rural or environmental character with significantly different permissible density. However, the existing manufactured home estate establishes an urban character on the southern side of the lake. The additional manufactured homes are in keeping with the established manufactured homes but extend the urban form to the north, adjacent to adjoining rural land. The applicant has argued that any conflict between adjoining agricultural or rural uses and the proposed extensions will be mitigated through the 1 metre high retaining wall proposed on the boundary, together with landscaping.

In terms of land use conflict, it is likely that the combination of the level differences between sites, landscaping and acoustic treatment of dwellings will successfully limit land use conflicts between the adjoining rural land and the proposed manufactured homes.

In terms of character difference, the interface area (on the northern side of the lake) is at the rear of the property and is unlikely to be visually prominent from Tweed Coast Road as it runs perpendicular to the road. Landscaping around the northern boundary will assist to soften the interface between the manufactured homes estate and the adjoining rural land.

2. What is the relevance of the building in which the existing use takes place?

This principle is not relevant as the proposal does not relate to a change of use or demolition.

3. What is the impact on adjoining land?

Roseth commentary: "The impact on adjoining land should be assessed as it is assessed for all development. It is true that where, for example, a development control plan requires three hours of sunlight to be maintained in adjoining rear yards, the numerical control does not apply. However the overshadowing impact on adjoining rear yard should be reasonable".

The applicant has acknowledged impacts on adjoining properties relating to drainage and flooding, erosion and sedimentation, impacts from construction and general amenity impacts such as privacy, noise, visual impacts and character. The Statement of Environmental Effects (SEE), concluded that these impacts were negligible or able to be managed.

Impacts on adjoining land are discussed in greater detail below. It is considered that impacts in terms of flooding, fill and ecological impacts can be suitably addressed through conditions.

4. What is the internal amenity?

Roseth commentary: "Internal amenity must be assessed as it is assessed for all development. Again, numerical requirements for sunlight access or private open space do not apply, but these and other aspects must be judged acceptable as a matter of good planning and design. None of the legal principles discussed above suggest that development on sites with existing use rights may have lower amenity than development generally".

There is potential for impacts on amenity of manufactured homes proposed from the adjoining rural use, particularly from the horse training track and noise from Tweed Coast Road.

The SEE included a noise impact assessment report which recommended mitigation methods to reduce noise impacts from the road through acoustic fencing. It also requested treatment of windows of proposed bedrooms facing the trotting track to limit potential noise impacts from the track. Council's Environmental Health Officer has also recommended a 1.8 metre high fence between the manufactured homes estate and the trotting track to limit impacts.

Impacts from dust and on visual character can be treated through the provision of landscaping.

Submissions have been received (discussed in further detail below) concerned that the internal amenity of the estate will be reduced through loss of the existing 'nature walk' around the northern edge of the lake. The applicant has argued that the provision of community and recreation facilities on the site exceed the requirements of the Regulations and are sufficient.

Whilst it is agreed that there is some loss of residential amenity in this regard, the amenity for residents remains acceptable, given access to the southern side of the lake, the proximity of walking areas in the surrounding locality and the additional on-site facilities proposed.

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

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

Tweed Local Environmental Plan 2000

Not applicable due to existing use rights, refer advice above.

State Environmental Planning Policies

Not applicable due to existing use rights, refer advice above.

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

Not applicable due to existing use rights, refer advice above.

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

Not applicable due to existing use rights, refer advice above.

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

Clause 92(a) Government Coastal Policy

It is considered that the proposal will be consistent with the Coastal Policy, subject to conditions in relation to flora and fauna, erosion and sediment control and flooding impacts.

Clause 92(b) Applications for demolition

No demolition is proposed.

Clause 93 Fire Safety Considerations

Not applicable, no change of use proposed within an existing building.

Clause 94 Buildings to be upgraded

Not applicable, all proposed buildings are new buildings.

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

Context and Setting

Despite the loss of vegetation proposed, the proposed additional manufactured homes are in keeping with the character of the existing manufactured home estate.

Whilst the character of the manufactured homes is in contrast to the adjoining rural land to the north and west of the site, the boundary between the adjoining rural site and the manufactured home site runs perpendicular to Tweed Coast Road and will not be visually prominent.

Access, Transport and Traffic

Access to the development is from Monarch Drive. Monarch Drive is a ten metre wide urban collector road with kerb and gutter. An internal private road network servicing the estate connects with Monarch Drive. Access to the additional proposed manufactured dwellings is located off the internal road system (Les Knoble Drive). A 900 metre long private road is proposed to service the additional dwellings and is located along the north western boundaries of the lake.

The new road is proposed to have a six metre pavement width within a ten metre road reserve for the allocation of services. The long section provided within the engineering report details the new road as relatively flat with gradients less than 0.7%.

The *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005* (The Regulations) is applicable for road design. The Regulations defines the proposed internal road as a major access road (as it services more than 30 dwelling sites). The Regulations require that major access roads are required to be two-way access with a paved width of 6 metres. The application complies with this requirement.

There is concern that the proposed internal road is too long given it is a cul-de-sac. Because it is a private road, there are limited policies that apply to the road except for the Regulations (which do not limit length of cul-de-sac roads). The applicant has proposed an emergency access road at the north-eastern corner of the site around the lake, as part of the bushfire management strategy.

Designated Roads

Tweed Coast Road is listed as a designated road within Council's LEP 2000. Clause 24 of the Tweed LEP requires moveable dwelling parks to have a minimum setback of 50 metres to designated roads. The proposed community building will have a setback of 20 metres to Tweed Coast Road. A temporary access is also proposed off Tweed Coast Road to facilitate construction.

Given existing use rights, setback requirements in Clause 24 are not strictly applicable. The applicant has nonetheless addressed the objectives of the setback requirement in the SEE.

The intent of the setback requirements is to ensure protection of visual amenity and adequate traffic safety and efficiency along designated roads.

In terms of the impact of the reduced setback, no engineering issues are raised in relation to impacts on the efficiency of Tweed Coast Road, or the temporary access proposed during construction.

In terms of visual impacts, the applicant has advised that the frontage of the site will be landscaped and fenced and will be suitably screened, limiting visual prominence from Tweed Coast Road.

The applicant also argues that the existing recreation hall is located a lesser distance to the frontage than the proposed community facility building.

The proposed setback is considered acceptable.

Bus routes / Shelters

A socio economic impact assessment was provided with the SEE. It identified that Surfside Buses service Kingscliff and Tweed Heads. Concern was raised in relation to public transport availability and the applicant was requested to provide further information on this matter.

The applicant subsequently advised that Surfside held a trial for approximately 6 months in 2009 where the bus would stop at the manufactured home estate adjacent to the office for pick up and set down five to six times a day.

Surfside buses advised that it would no longer continue the trial because the service was under utilised and consequently not viable. It is noted that the next public transport service is via a bus stop 200 metres from the entrance of the site. This is considered to be an adequate outcome.

Pedestrians / Footpaths / Cycleway

No footpaths, cycleways or internal pedestrian walkways have been documented within the application. It is proposed that pedestrian use the low-speed internal access roads.

Traffic Generation / Assessment

An engineering report has been submitted with the application prepared by Opus and dated 28 October 2009. The report provides a basic traffic assessment using traffic generation rates from the 'RTA Guide to traffic generating developments, volume 2.2' for a self contained dwelling with onsite community facilities.

The daily trip rate used from the RTA guide is 2.5 vehicles. The additional 45 manufactured dwellings will create an additional 113 vehicle trips per day. It is not considered the additional dwellings will affect the surrounding traffic network.

Construction Traffic

Construction traffic to the site will be approximately 50 trucks per day for a period of 7-8 weeks. This is based on 53,500 m³ of imported fill material with a truck and trailer capacity of 20m³ also including a 20% bulking factor on the fill material. One hundred truck movements (accounting for two way traffic movements, including the empty truck returning to the fill source) will occur every day to the estate to fill the site. This equates to one truck every 12.5 minutes. This will create temporary amenity and noise issues for the existing residents in the manufactured home estate.

The applicant has advised that the developer is only proposing to fill the site on weekdays between the times of 7am to 5pm. It is recommended that conditions are imposed to limit the impacts on the residents during construction. Construction vehicles will only access the site from a temporary point on Tweed Coast Road, further reducing the impacts on existing residential amenity.

Further information submitted from the applicant on the 10 May 2010 advised that the fill material is to be imported to the site. No details have been provided for where the fill is to be sourced from and conditions are recommended to ensure a suitable and approved fill source is utilised.

Parking / Manoeuvring

The Regulations provide visitor car parking rates for manufactured homes estates as follows:

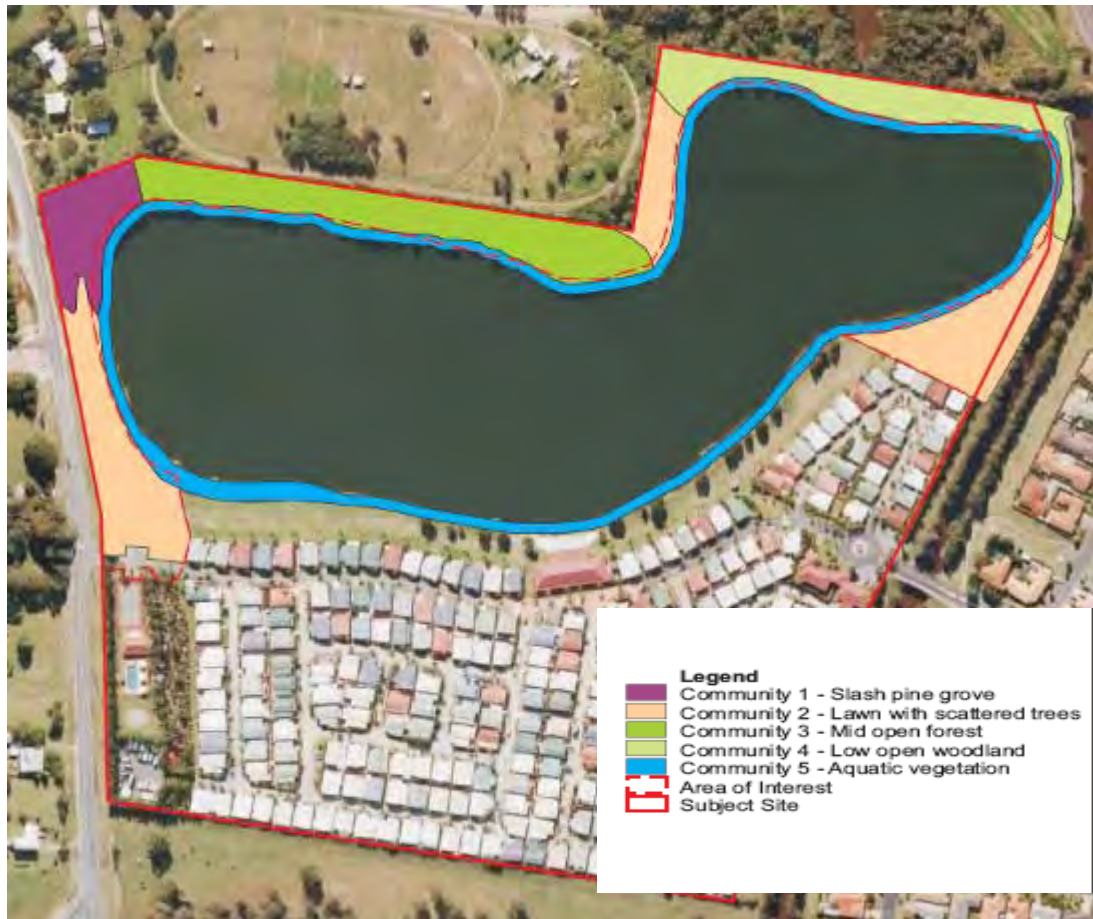
- 12 visitor spaces for a manufactured home estate containing more than 35 sites but not more than 70 sites. Minimum dimensions of 5.4m x 2.5m. Visitor parking spaces must be clearly identified as such.
- A caravan park or camping ground must contain at least one resident parking space for each dwelling or camp site.

The application provides for 18 visitor spaces with a single garage included in each manufactured home for residents. The proposal complies with the Regulations.

Flora and Fauna

The SEE includes a flora and fauna assessment (prepared by James Warren & Associates Pty Ltd, June 2009). The vegetation communities identified on site include Slash Pine Grove, Lawn with Scattered Trees, Mid Open Forest (including *Casuarina glauca* and *B. integrifolia*); Low Open Woodland and Aquatic Vegetation (refer below).

The SEE states that the proposal would result in the loss of all vegetation in the construction area, including loss of aquatic vegetation, however the report states that no threatened flora species were recorded on the site.



Appendix D of the SEE includes an Assessment of Significance (to determine if there is a significant impact) for four fauna species (two of which are possibly occurring on site and two of which have been sighted by residents. These species include the Black-necked stork (*Ephippiorhynchus asiaticus*), Comb-crested jacana (*Irediparra gallinacea*), Large footed myotis (*Pteropus poliocephalus*) and Osprey (*Pandion haliaetus*).

The findings of the Assessment of Significance were that the on-site vegetation habitat is artefact, small and fragmented in a local context and the proposed development will make a minor contribution towards loss of habitat in the region and an SIS was not required.

Council's Ecologist – Assessment and Applicant's Response

In considering the abovementioned information provided with the SEE, Council's Ecologist requested the following information (11 February 2010). A summary of the applicant's response to these issues follows each item.

- *"Detailed evidence to justify the statement that there are no Endangered Ecological Communities on the site, having regard to the Scientific Committee determinations for Swamp Oak Floodplain Forest of the NSW North Coast, Sydney Basin and South East Corner bioregions and Freshwater Wetlands on Coastal Floodplains of the NSW North Coast, Sydney Basin and South East Corner bioregions."*

The applicant submitted a 'Response Report' prepared by James Warren and Associates Pty Ltd (dated May 2010).

The Response Report included an assessment of each of the EEC's (Swamp she-oak and Freshwater wetlands) against the criteria contained in 'Identification Guidelines for Endangered Ecological Communities' (DECC 2007).

In terms of the Swamp oak, the Response Report states:

"The Swamp oaks on the site are not subject to the influence of saline (tidal) waters. The northern boundary of the site has a bund wall which precludes any tidal influence from a drain which connects eventually to the Tweed River. The Swamp oak on the subject site has recolonised in an area that may not have previously supported the community due to changes in drainage regime.

There is no strong indication that Swamp oak community on the subject site constitutes an EEC. There are no criteria in the DECC (2007) guidelines to assist in delineating between higher and lower quality remnants of this community type. The DECC (2007) Guidelines indicate that the Swamp oak occurring on the site could constitute a lower quality community."

In terms of the Freshwater Wetlands on Coastal Floodplain, the Response Report states: "the guidelines note that artificial wetlands created on previously dry land for various purposes are not regarded as part of this community".

- *"Consideration of the "maintain or improve ecological outcomes" premise of the Native Vegetation Act 2003 given that historical aerial photographs establish that native vegetation was present along the northern boundary of the site prior to 1990 and after the lake was excavated."*

The Response Report states that section 25(s) of the *Native Vegetation Act 2003* (NVA) excludes "any clearing carried out in accordance with a licence, permit, authority or approval under the *Water Management Act 1912* or the *Water Management Act 2000*. As the proposed development is integrated and a permit under the *Water Management Act 2000* is required, if the approval authority (Department of Environment Climate Change and Water) authorises the clearing a separate approval under the NVA is not required.

- *"Assessment of the impact of filling a tidal waterway containing significant riparian and aquatic habitat along the most northern boundary."*

The Response Report states that there is no tidal influence on the subject property. Tidally affected water occurs to the immediate north of the site however a bund wall prevents tidal water entering the property.

- *"Fauna survey should comply with the DECC guidelines for Threatened Species Survey and Assessment."*

The applicant's Response Report states that the field fauna survey requirements in the Guidelines have been met. It also argues that the site has been highly cleared and full survey is not warranted. It argues that a Habitat Assessment is sufficient, the aim of which is to assess habitat characteristics of the study area in terms of the habitat requirements of threatened animals known or likely to occur.

- *“Reconsideration of the Part 5A assessments is required to enable proper assessment of the application and should include:*
 - *explanation of what is considered to constitute a “viable local population” in relation to each species and how this was determined;*
 - *meaningful discussion on the stages of the life cycle of each species likely to be affected by the development considering the specific impacts of the development in relation to specific habitat requirements and including the impacts arising from filling the adjoining tidal waterway and permanent alterations to the lake edge as well as impacts arising from post construction occupation of the site;*
 - *consideration of habitat value in relation to adjoining habitat, particularly the riparian corridor and relationship on the floodplain to other areas of significant vegetation;*
 - *reconsideration of relevant floodplain Endangered Ecological Communities.”*

Reconsideration of the Part 5A test was provided and the report again concluded that a Species Impact Statement (SIS) is not required.

Council's Ecologist Final Assessment

In reviewing the Response Report, Council's Ecologist came to the conclusion that:

- *The site proposed for development is of ecological significance as part of a regional wildlife corridor and in providing habitat for wading birds and other wetland species, a number of which are listed as threatened on the Schedules of the Threatened Species Conservation Act 1995.*
- *All existing vegetation is proposed to be removed to enable the development to proceed; an existing natural drainage line as well as parts of the existing lake is proposed to be filled and little or no opportunity to compensate for loss of habitat will be available on site post development.*
- *The presence of vegetation communities conforming to the Scientific Committee determination for Swamp Oak Floodplain Forest of the NSW North Coast, Sydney Basin and South East Corner bioregions is agreed (with a second Council ecologist) and has been checked on site in terms of the suite of existing species, position on the floodplain and saline nature of surrounding waters and groundwater.*

- *The presence of vegetation communities conforming to the Scientific Committee determination for Freshwater Wetlands on Coastal Floodplains of the NSW North Coast, Sydney Basin and South East Corner bioregions is considered likely, however, is not certain due to the following statement within the Scientific Committee determination:
“Artificial wetlands created on previously **dry** land specifically for purposes such as sewerage treatment, stormwater management and farm production, are not regarded as part of this community, although they may provide habitat for threatened species” (my highlight). It is not certain where water bodies are created on formerly **wet** land as applies in this case, whether the EEC determination may be applied.*
- *Whether the amount of habitat and communities to be lost due to the proposed development is of a level of magnitude that would be regarded as a “significant impact” under Part 5A of the EP&A Act is not clear as the information provided has not satisfactorily addressed these issues. In any case, the habitat proposed to be removed is of significance for fauna species including threatened species and thus compensation for loss is a reasonable request.*

Council’s Ecologist has recommended deferred commencement conditions which require satisfactory compensation for loss of habitat of high ecological value as evidenced by a Habitat Restoration plan. It is also recommended that a Threatened Species Management Plan must be prepared to detail mitigation measures for wader birds and other aquatic or terrestrial threatened species known or predicted to occur on or adjacent to the site.

Additional conditions are recommended to protect any marine vegetation, including additional erosion and sediment controls.

Impacts of Fill and Retaining Walls

Geotechnical Considerations

Given the proposed retaining walls within the lake and the amount of fill proposed, Council Officers requested a geotechnical report that:

- Identifies the suitability of the site for fill and retaining structures;
- demonstrates proposed retaining walls and soil anchors are suitable within the lake; and
- determines that foundation material is suitable and any potential risk or problem areas are identified.

A complete geotechnical report was not submitted in response to this request, only details on 8 borehole logs taken along the northern lake boundary with a map detailing where the boreholes were taken.

The borehole logs show a sand profile up to depths of 12m with the water table recorded at 1.4m from the surface.

Consulting engineers Opus also provide the following response;

“Border Tech has drilled eight boreholes to identify the soil conditions on the existing sites (view attached the existing boreholes). From the boreholes attached it can be seen that the geotechnical profile of the existing site is sand, ranging from loose (0-1.5m), dense to very dense. There is no indication of soft clays, peats or estuarine mud deposits. We are of the opinion that a detailed geotechnical report is not required at this stage. This opinion is based on the data provided and our knowledge of the site from previous involvement in the existing development. There is no reason to believe that suitable retaining structures cannot be designed and certified and that such a condition would be normally imposed irrespective of any preliminary assessment.”

It is acknowledged that the borehole log profiles are mainly sand with no pockets of soft clay or peat. No geotechnical advice has been provided on the submergence of the proposed block concrete manufactured retaining walls and associated soil anchors required to pin the concrete blocks and soil into position for stability. The type of concrete block retaining walls specified in the application have been used in ‘The View’ subdivision located at Scenic Drive, Bilambil Heights and are manufactured by the developer Greenview Developments.

In order to address potential geotechnical impacts of the development, advice is required from a registered geotechnical engineer or suitably qualified person that the proposed manufactured block concrete retaining walls and associated soil anchors are suitable to be fully or partially submerged within the existing lake and support the proposed road, 45 manufactured homes and associated fill material.

The retaining structures should be certified by a registered structural and geotechnical engineer. Conditions of consent are recommended to include these requirements.

Impact of Retaining Walls

The application provides details of filling and retaining walls up to 6m in height to support 53,500m³ of solid fill material to support the road and proposed homes.

Council’s Development Design Specifications – (D6 Site Regrading) specifies that the maximum height of a retaining wall or batter is 2.4m.

The application is not in accordance with Council’s Development Design Specifications, due to the excessive height of the proposed fill material and retaining walls.

The applicant provided the following advice on 10 May 2010 in relation to the height of the walls;

“The average height of the retaining wall is 3.1m from the natural surface to the top of the wall. Filling is proposed up to RL 3.3m AHD. The water level of the lake is up to RL0.6m AHD. The maximum exposed wall height will be approximately 2.7m from the water level.”

It is considered that potential impacts from the proposed retaining walls can be addressed through conditions of consent if the proposal is approved for the following reasons:

- Conditions can require that retaining wall structures are certified by a registered structural engineer with CPEng Registration.
- The retaining walls will not become public infrastructure, representing low risk to Council in the event of failure.
- Visual impacts from the 6 m high retaining structures is reduced to 3 metres as 3 metres of the structures will be submerged.
- Council's Design specification D6 was introduced to limit the height of retaining walls due to the failure of retaining structures at boundaries, which has affected adjoining properties and public infrastructure (such as roads) in the past.
- The proposed retaining structures are located within the lake and the liability for failure to public infrastructure is reduced.

Flooding and Impact of Fill

In terms of flooding and fill, the following additional information was requested of the applicant:

"1) The assessment must include survey of the existing ground levels of the land to be filled between the northern site boundary and the lake, and include levels in adjoining land, to demonstrate that the proposed fill will not block existing flow paths, or result in ponding on adjoining land. Details of the existing spillway arrangement for the lake must also be provided to demonstrate that the fill will not obstruct flows discharging from the lake to the adjoining Kingscliff Drain.

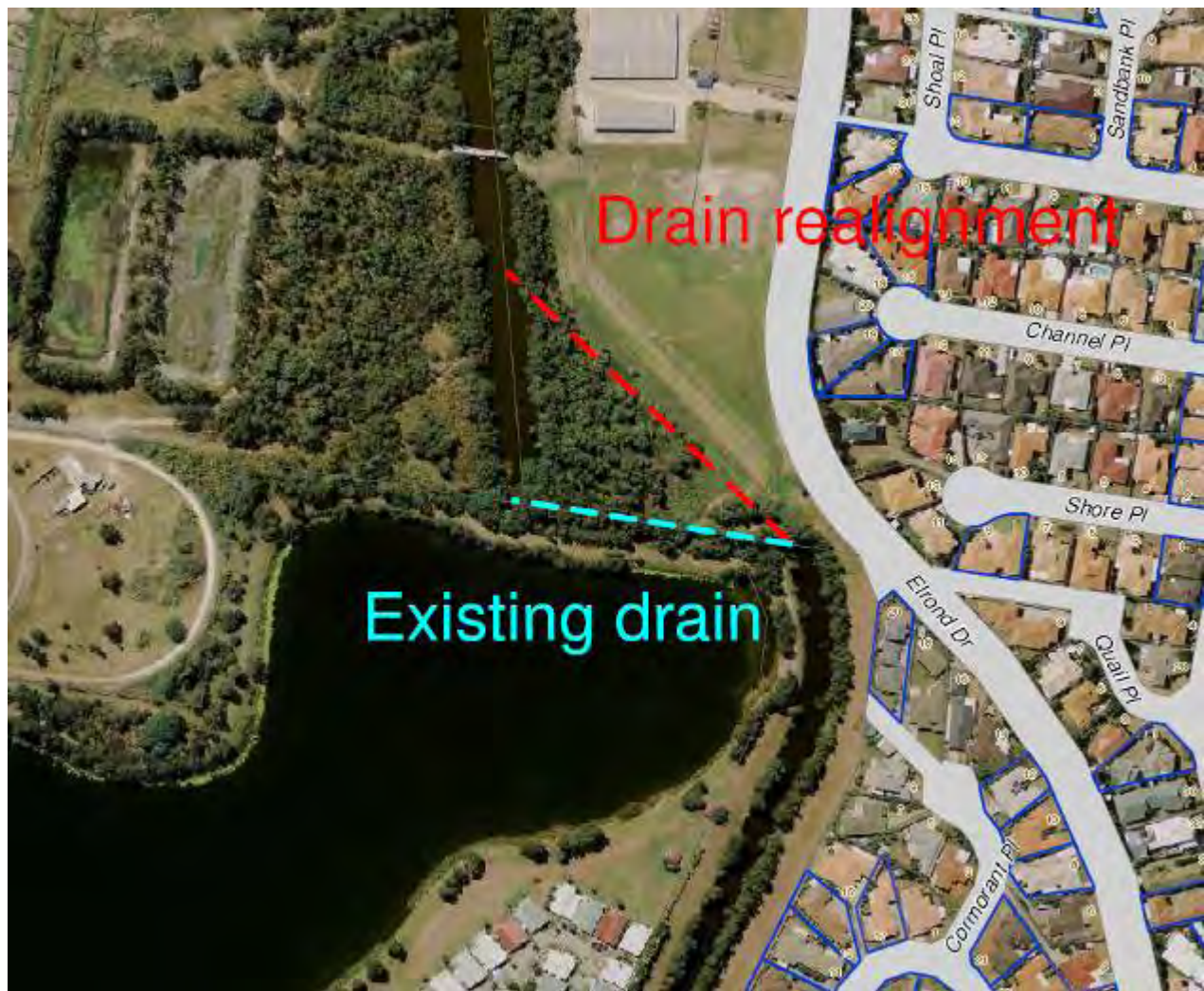
2) Map and survey a high level evacuation route from the proposed development to high land external to the site. A high level evacuation route is defined as a road whose entire length has a level (measured at top of kerb) of not less than the design flood level (RL 3.3m AHD) and which provides a route to enable people to evacuate to land above the PMF (RL 6.4m AHD), such as Marine Parade to the east. Provision of a compliant evacuation route is essential to compliance with DCP Section A3 - Development of Flood Liable Land."

The applicant has provided some survey data, and has described the local areas as being "flat including the adjacent properties. There is no indication that stormwater will flow from adjoining properties across the site and into the existing lake". The limited survey fails to adequately demonstrate this, with some levels on adjoining land being higher than the development site, however the surveyed extent is insufficient to depict prevailing topography. Data obtained by Council from an airborne laser scanning (ALS) project in

2007 generally confirms the level nature of the area, but is not of sufficient resolution to properly assess local drainage paths (0.5m contour interval).

The applicant's description of the local drainage behaviour and the interaction of the site with the public drainage system to the north east of the site is confusing and inaccurate.

In the current arrangement, there is an east-west aligned drain located within the north eastern corner of the site. This provides continuity of drainage between two much wider north-south aligned sections of canal, which is the main trunk drain for the West Kingscliff catchment. Filling of the drain within the subject land will sever the transmission of stormwater past the site, in the current arrangement.



Independent of the subject DA, Council has sought approval to realign this drainage "dog-leg" generally on the alignment of the 38m wide drainage easement shown on the survey plan. Once this has been constructed, filling of the east-west drain within the development site would not have any significant adverse impact on local drainage (note this assessment does not consider potential ecological impacts). However deferred commencement conditions are required to ensure that this drainage link is completed before filling of the drain is permitted.

Based on the survey, the lake overtops in a westerly direction to the existing canal, not in the manner described by the applicant's response. As such, filling along the northern boundary would not affect the lake overflow.

Despite the inadequate response from the applicant, it is considered that there are insufficient flooding grounds for refusal, and the matters of concern can be addressed by conditions of consent and deferred commencement.

Flood Evacuation Route

The applicant has nominated a flood evacuation route, along Monarch Drive, Elrond Drive and Beach Street to the high dune on Marine Parade. Again, the applicant has not provided the necessary level information to demonstrate that the evacuation route is at or above the design flood level.

Council's ALS data confirms, however that the evacuation route remains at or above 3.0m AHD for its length to Marine Parade. Despite the inadequate response from the applicant, consent conditions can be applied to address this issue.

General Comments on the Applicant's Response

As described above, the applicant's response to the information request is generally sub-standard and disappointing considering Council officers attended a meeting with the applicant and their consultants on 27 January 2010 to discuss the matters raised.

Deferred commencement is recommended to resolve the issue relating to the construction of the Kingscliff Drain to eliminate the "dog-leg" from the development site. The consent should not be issued unless realignment of Kingscliff Drain has occurred.

Socio Economic Impacts

The SEE included a socio-economic impact assessment (prepared by Jim Glazebrook and Associates Pty Ltd, November 2009). It identifies that the proposal would provide employment for the construction and housing industry and an additional stock of housing within close proximity to Kingscliff and the major centre of Tweed Heads. It also recognises that there would be an incremental increase in demand for services and facilities, most of which the proponent would contribute towards through section 94 contributions.

The socio – economic impact assessment argues that the proposed community facility will compensate for loss of foreshore area on the northern side of the lake. This area is currently used as a walking track for existing residents.

Further justification and analysis was requested in relation to the comparative value of the walking track and the foreshore area, compared to the facilities proposed within the new community building (which include a billiard table, lounge, deck and pool).

In response to this request, the applicant describes the existing community facilities including the following:

- Clubhouse overlooking the foreshore (area of 834m² including deck, seating for 200 people, lounge and dining, kitchen, bar, stage, games area);
- Swimming pool, bowling green and recreation building in the centre of the estate,
- Recreation precinct along the western boundary of the estate (tennis court, pool, BBQ, clubhouse and pitch / putt golf area),
- Informal walking area,
- Grassed landscaped foreshore open space and park area around the perimeter of the lake of approximately 3.92 ha and
- The lake itself.

These facilities are identified in the plan below.



The applicant identifies that the total area of open space and community facilities is 13.9ha or 63.5% of the total site area.

The proposed development will result in loss of approximately 1.62 ha of foreshore open space and walking area on the northern and western side of the lake. Residents currently refer to this as the 'nature walk'.

The applicant has identified that a designated walkway / cycleway is proposed as part of the proposed new road to link with the walking area on the eastern, western and southern sides of the lake. The applicant argues that the formal footpath will replace the existing informal 'nature walk' and will provide a

continual link around the park. This will be in addition to the new recreation hall and clubhouse proposed.

The applicant has argued that “the transfer of informal foreshore walking area by a formal path north of the proposed new dwelling is insignificant considering the quality and quantity of community facilities’ for the existing residents to use and the fact that significant area of foreshore walking area, approximately 850 metres in length, and associated landscaped / grassed open space will be retained.”

The applicant has argued that the Regulations require at least 10% (21,951.4m²) of the estate is to be reserved for recreational or communal activities and the proposed estate far exceeds this requirement as the proposal has approximately 63.5% of the site used for recreational and communal activities (including formal and informal areas, foreshore open space, the lake, recreational buildings, tennis court, swimming pools, bowls greens etc.).

Approximately 32,979m² of communal open space and recreation area has been provided excluding the lake area.

(c) Suitability of the site for the development

Surrounding Land uses/Development

As identified above, the proposal adjoins rural land. It is proposed to treat the interface between the manufactured homes and the rural land with landscaping, retaining walls and fencing. Potential noise impacts from the adjoining trotting track will be mitigated through acoustic treatment in the dwellings.

Flora and Fauna

Refer ecological comments above.

Topography

The site is relatively flat and slopes down to the existing lake. Council Officers requested detailed survey information and the applicant subsequently provided a survey plan prepared by Brown and Haan, dated 13 April 2010. The survey plan indicates spot levels over the areas works are proposed including the northern side of the lake and the adjoining drainage reserve.

Existing levels for the area works are proposed range from RL 1.8m AHD at the northern property boundary to Lot 1 DP227034 to RL 1.05m AHD at the northern edge of the lake.

The application states that the surface of the lake is between RL 0.2m AHD to RL 1.0m AHD.

Availability of Services

Council's reticulated potable water supply is available to the area and has adequate capacity to allow for the proposed additional manufactured homes. Recommended conditions of consent require the provision of service in accordance with Council's Standards. Telecommunication and electricity services are provided to the site.

It is necessary for the applicant to obtain a section 68 approval to construct and to operate a sewage ejection system.

It is proposed that a condition requiring a 68 approval also include the requirement to demonstrate that the total sewage ejection system from both the existing and proposed development will operate satisfactorily.

Existing Title Restrictions

The land is burdened by the following restrictions:

- 3 metre wide easement for rising main located in the north west corner;
- 1 meter and 3.75 metre easement for electricity purposes
- Right of carriageway with variable widths
- Restriction to user - direct vehicle access to Chinderah Road is prohibited other than occasional access for the purpose of moving manufactured homes.

Council's water and sewer systems engineer has advised that the easement for the rising main in the north-west corner is no longer required due to construction of the new sewerage treatment plant. A condition is imposed recommending that this be relinquished. No other modifications to the title are required.

Acid Sulfate Soils (ASS)

The site is class 3 on the Council's ASS Planning maps, which is relevant to works below 1 metre below the natural surface.

The SEE indicates that management of ASS will be required for excavation of the retaining wall footings below 0.7m AHD. It may also be necessary to test and treat soils excavated for placement of services such as sewer and water. A Preliminary ASS Management Plan was provided for consideration and the application states that a detailed ASS Management Plan will be provided prior to issue of a construction certificate.

Upon initial assessment of the SEE, Council Officers were unclear of the extent of investigations and consideration of ASS undertaken when existing site disturbances/filling took place. There was no evidence to say that actual and potential ASS did not exist above 0.7m AHD. Given it is usual practice to conduct soil analysis to determine appropriate liming rates and management measures, the applicant was requested to carry out soil testing in the location of the earthworks/filling and service trenching. .

The applicant was also requested to advise whether the site will need to be dewatered and if so, provide a dewatering management plan for consideration.

The applicant has responded to these issues as follows: "The Noble Lake and surrounds was the subject of intense scrutiny in regard to acid sulphate conditions during the development.....We consider that the existing Acid Sulfate Management Plan adequately covers the issue and further testing as proposed in the plan can be performed and managed prior to the issue of a construction certificate.'

The ASS Management Plan provided to Council contains only an overview of the basic standard management measures. It does propose to test soils required to be excavated for retaining wall footings. Council also requires that excavations for service placement at relevant depths also be tested.

The applicant has agreed that ASS are present and a condition will be applied requiring relevant soils testing to be completed and an ASS Management Plan be submitted for approval prior to issue of a Construction Certificate.

With respect to dewatering, the submission indicates that dewatering will not be required. This is contrary to advice provided by the NSW Industry and Investment (Division of Primary Industry) who consider construction of the retaining walls may require dewatering. Notwithstanding, a restrictive condition is recommended.

Contaminated land

The applicant was requested to provide information regarding decommissioning of the Old Cudgen Dip Site. An email has been provided from the Division of Primary Industries which confirms that the site has been remediated and is 'suitable for standard residential use'. There should therefore be no impact on the subject site.

Noise Assessment

A Noise Level Impact Assessment (NLIA) Craig Hill Acoustics, June 2009 was submitted for consideration. That NLIA considers noise levels from traffic along Tweed Coast Road and noise from the adjacent horse trotting track. Part 5.7.3 of the SEE indicates that 6 horses are trained from 6.00am to 7.00am. The operator of the horse training track, was interviewed on 25 November 2009 and indicated that horses are trained between 6.00am and 9.00am, however horses may be trained at any time of day dependant upon weather etc.

The NLIA indicates that noise levels will be within relevant limits subject to:

- A noise barrier along the Tweed Coast Road boundary and part of the northern boundary
- Building treatments to the west and south facades of the community hall

- Sound shell treatments to the dwellings on sites 1 & 2, and
- Installation of windows rated at 30Rw in bedroom windows to dwellings on sites 1- 33.

However, Table 5.1 of the Noise Level Impact Assessment (NLIA) Craig Hill Acoustics, June 2009 indicates noise from the adjacent trotting track will exceed background noise levels by 10dB(A). This exceedance does not satisfy the intrusive noise criteria set by Part 2 of the Industrial Noise Policy, NSW EPA, 2000. This exceedance is indicative of the need for an acoustic/visual barrier to be erected along the property boundary. The applicant was requested to provide further comment with respect to this matter.

The applicant does not wish to place an acoustic fence the full length of the boundary. It indicates that there will be a 1m high retaining wall along the boundary with a dense informal hedge planting. The bedroom windows will be treated to 30RW. It states that the plantings would create an acceptable visual environment and also act as a dust barrier.

It is the recommendation of the Environment and Health Unit that a condition be applied requiring an acoustic/visual barrier (lap and cap timber fence 1800mm high minimum effective height above finished ground level on the subject site) along the northern boundary prior to the placement of structures on any site. The fence shall extend the full length of the northern boundary adjacent to the proposed dwellings. A vegetative screen/barrier shall also be placed along the full northern boundary.

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

The development application was notified and advertised for a period of 30 days from 25 November 2009 to 29 December 2009. The advertising period was extended until 14 January 2010. A total of approximately 50 submissions were received. This includes two petitions, one with approximately 92 signatures and another with approximately 84 signatures. Main issues raised by the submitters, including a response from the applicant and Council Officers is summarised in the table below.

Issue	Applicants Response	Council Officer Comment
Area north of the lake was advertised as a nature walk and many residents purchased for this reason.	"It is always open for an owner to alter a development in response to changing circumstances. In this case it was the relocation of the Sewerage Treatment Works. As long as a development complies with relevant legislation and potential impacts can be satisfactorily managed, then there is no planning reason to restrict a development on this basis. The proposed development meets the criteria of complying with legislation and	The internal layout of the proposal was not part of an approved masterplan or concept plan. The Act allows for modifications, additions or extensions to existing use.

Issue	Applicants Response	Council Officer Comment
	satisfactorily managing impacts."	
<p>Loss of walking trail through natural area. Loss of health benefits associated with the nature trail.</p> <p>Amenity values associated with the lake and surrounds will be lost.</p>	<p>"The informal walkway north of the lake will be replaced by a pathway constructed as part of the new road. Therefore there will be no loss of exercise area and a continual link around the lake will be retained. Landscaping adjacent to the dwellings and along the northern boundary will result in a pleasant streetscape. There is ample open space on the site."</p>	<p>It is acknowledged that the 'nature trail' is highly valued and utilised by the residents and provides amenity values to the site.</p> <p>Notwithstanding, the loss of the nature trail and associated amenity is considered acceptable in this case given:</p> <ul style="list-style-type: none"> - the proposal complies with legislative open space / community facilities requirements. - Areas for walking are available around the southern side of the lake. - Areas for walking are also available in the surrounding locality. - The proposal includes additional provision of community facilities. - The amenity of the estate will continue to be of a high standard given the remaining open space and lake areas proposed to be maintained on the site. - Only private, not public open space areas are affected.
<p>Over-development of the site.</p>	<p>"The MHE Regulation requires that 10% of the site must be set aside for recreational or other communal activities. The proposal substantially exceeds this requirement. It therefore seems implausible to argue that the proposal is an overdevelopment of the site. Furthermore, Tweed DCP 2008 Section B4 – West Kingscliff indicates that special residential development (eg. MHE estates) generally have a density of 24 dwellings per hectare. This proposal would result in a density of 14.3 hectare, well within this standard."</p>	<p>Council officers agree with the applicant's comments on this matter.</p>
<p>The development is prohibited.</p>	<p>"The development is permissible with consent. Refer to legal advice.."</p>	<p>The proposal has existing use rights. Council officers accept the legal advice provided in this regard.</p>

Issue	Applicants Response	Council Officer Comment
The proposal is contrary to section 96 of the EP&A Act.	"This is not relevant. The application is not for modification of the consent."	Section 96 of the Act is not relevant to this proposal.
Flooding and drainage impacts on adjacent and surrounding land.	"These impacts can be satisfactorily managed. Refer to Engineering Impact Assessment in SEE and attached letter from Opus."	Conditions are recommended to ensure that impact of filling is minimised. Traverse drainage (to accommodate 100 year flood levels) are required to be provided at all locations where the fill obstructs flow paths. Easements benefiting upstream land shall be created over such flow paths and structures. Detailed engineering plans of fill levels, perimeter and transverse drainage shall be submitted for council approval. Refer to condition 22.
Impacts on water quality.	"These impacts can be satisfactorily managed. Refer to Engineering Impact Assessment in SEE and attached letter from Opus."	Several conditions are recommended to ensure management of erosion and sediment control and waste and potential pollutants. Refer to conditions 75, 79, 80 & 81.
Effect on flora and fauna.	"Refer to Flora & Fauna Assessment and additional information provided by James Warren & Associates (attached). This issue is satisfactorily addressed."	It is recommended that deferred commencement conditions require compensatory habitat planting. Refer to Schedule A of the recommendation.
Noise impact on residents during construction.	"As with any construction work that could potentially create noise impacts, it is expected that conditions of consent would limit construction hours and require maximum noise limits for construction machinery / vehicles."	Conditions are recommended to reduce impacts from construction, through limited hours and noise levels. Refer to conditions 46 & 47.
Require buffer of 50m between 1(a) zoned rural land and urban land. Impact of noise on livestock from construction and residents. Impact on rural amenity.	"This is a unique situation where existing use rights apply. There are no planning controls applying to the site which require a specific buffer. Therefore, the development must be assessed on merits. As potential impacts can be satisfactorily managed, no increase in setbacks is seen as justified."	The conflict between rural and urban land uses can be addressed through provision of level distances, landscaping and acoustic treatment of dwellings. The impact of noise on livestock from the development is considered to be negligible given the traffic noise levels already coming from Tweed Coast Road.
Visual impacts on views across the lake.	"It is acknowledged that the outlook across the lake would alter. However this is not expected to be detrimental."	The comments made by the applicant are accepted. Impacts on views are reduced

Issue	Applicants Response	Council Officer Comment
	The distance between the existing dwellings on the site and the proposed new dwellings varies from 130m to 200m (approximately). The proposed dwellings are low set, well designed and of high quality finishes. The visual impact would be acceptable."	given the distance between the existing residents and the proposed dwellings. Further, it is noted that the lake is privately owned and not part of a foreshore or waterbody adjoined by public open space.
<p>Increase in traffic within Noble Park and surrounding streets.</p> <p>Concern with one way in and one way out.</p>	<p>"Concern is raised regarding potential noise increase from additional vehicles within the estate and associated traffic / pedestrian conflicts, as well as potential impacts on surrounding streets. The design of roads within Noble Lakeside Park results in such low traffic speed environment that there would be negligible impact on amenity. There are no upright kerbs so pedestrians can easily move off the road when vehicles approach. The Engineering Impact Assessment in the SEE demonstrates that the traffic increase will not impact on the functional capacity of the surrounding streets."</p>	<p>The width of the proposed road complies with the requirements of the Regulations for the number of dwellings it services.</p> <p>Council's standards do not apply to the internal road layout. The applicant has identified that emergency access will be provided in the north-eastern corner around the lake to the south.</p>
Concerns with the consultation process.	The applicant advised that plans of the proposed development were made available in the site office for residents to view. Residents were advised that if the majority supported the proposal and it was approved, funds would be available to upgrade existing facilities in the park. However, for this to occur, the applicant advised that the rentals must be upheld at market value to ensure costs of maintaining the facilities are met.	The application was notified and advertised in accordance with the requirements under the Environmental Planning and Assessment Act.

Agency Submissions

Office of Water

The application is integrated development due to proposed works within close proximity of a waterway.

The Office of Water provided a 'Stop the Clock' letter requesting further information on the impact of fill and the maintenance of wooden decking proposed over the lake.

The Office of Water reviewed response information provided by the applicant and has provided General Terms of Approval (refer to recommended conditions).

Rural Fire Service

The proposal is located in a bushfire prone area and the Rural Fire Service has assessed the proposal and provided conditions. Conditions require an inner asset protection zone with the following widths:

- 12 metres to the north of proposed dwellings 33-45
- 10 metres to the north of proposed dwellings 1-24; and
- 10 metres to the west of proposed villas 26-33.

Refer to recommended conditions.

Industry and Investment – Division of Primary Industries, Aquatic Habitat Protection

The application was referred to Industry and Investment (I&I) for potential impact of the proposal on fish habitats. I&I concluded that the proposed development is not considered to directly impact on key fish habitat. Notwithstanding, various recommendations were made to assist Council in assessment including the following:

- Consideration of stormwater
- Consideration of a dewatering plan
- Opportunities for riparian vegetation to re-establish
- Management of waste and other rubbish occurring in the lake.

A copy of the agency's submission is provided in Attachment 2.

Conditions are recommended to ensure that marine habitat is protected, particularly to reduce erosion and sediment. A condition is recommended to ensure that dewatering does not occur without relevant approvals.

Department of Planning (DOP)

The application was referred to the DOP in relation to SEPP 71 – Coastal Protection clause 11, which requires the application is referred to the Director General where works are proposed within 100 metres below the mean high water mark.

The DOP has confirmed that referral is not required in this instance because clause 11 relates to the sea, a bay or an estuary (refer to Attachment 2).

No further comment on the proposal was provided.

(e) Public interest

There are no other matters of public interest considered applicable.

LOCAL GOVERNMENT (MANUFACTURED HOME ESTATES, CARAVAN PARKS, CAMPING GROUNDS AND MOVEABLE DWELLINGS) REGULATION 2005 (LGMHER)

Clause 6 of the Regulation requires that the estate comply with Division 3 of the Regulation and Council is not to issue a Section 68 approval where compliance does not exist. The applicant states that the 'proposal complies with the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005. A suitable condition will be applied requiring a Section 68 approval to be obtained prior to installation of any structures and compliance with the Regulations.

OPTIONS:

1. Refuse the application
2. Approve the application subject to deferred commencement conditions requiring compensatory habitat for loss of habitat of high ecological value.

LEGAL/RESOURCE/FINANCIAL IMPLICATIONS:

The applicant has the ability to appeal the decision made by the Joint Regional Planning Panel in the NSW Land and Environment Court.

POLICY IMPLICATIONS:

Nil.

CONCLUSION:

Council has received a development application for 45 additional manufactured homes at the existing estate at Lot 193 DP1014329, situated at 34 Monarch Drive Kingscliff.

The main issues associated with the proposal are potential for impacts from flooding, fill and on-site vegetation.

Deferred commencement conditions are recommended to ensure that any impact on significant habitat is compensated and that the Kingscliff drain is realigned prior to commencement of the consent.

UNDER SEPARATE COVER/FURTHER INFORMATION:

To view any "non confidential" attachments listed below, access the meetings link on Council's website www.tweed.nsw.gov.au or visit Council's offices at Tweed Heads or Murwillumbah (from Friday the week before the meeting) or Council's libraries (from Monday the week of the meeting).

1. Legal advice from Patrick Larkin of Nigel Bowen Chambers
2. Responses from Public Authorities.

RECOMMENDATION:

That Development Application DA09/0727 for additions to existing manufactured home estate (Noble Lakeside Park) including 45 new manufactured home sites construction of a community hall and facilities and extension of internal roads (JRPP) at Lot 193 DP 1014329, No. 34 Monarch Drive Kingscliff approved subject to the following conditions: -

"DEFERRED COMMENCEMENT"

This consent shall not operate until the applicant satisfies the consent authority by producing satisfactory evidence relating to the matters set out in Schedule "A". Such evidence is to be provided within six months of the date of notification.

Upon the consent authority being satisfied as to compliance with the matters set out in Schedule "A". The consent shall become operative and take effect from the date of notification under Section 67 of the Environmental Planning and Assessment Regulations subject to the conditions set out in Schedule "B".

SCHEDULE "A"

Conditions imposed pursuant to Section 80(3) of the Environmental Planning and Assessment Act, 1979 and Section 67 of the Regulations as amended.

1. The development approval shall not commence until drainage realignment works are completed to the satisfaction of Council's General Manager, or his delegate, to divert the West Kingscliff drain outside of the subject land.
2. Satisfactory compensation for loss of habitat of high ecological value, evidenced by a Habitat Restoration Plan prepared in accordance with Council's draft *Guideline for the preparation and implementation of Habitat Restoration Plans* relating to a specific offset site and approved by Council's General Manager or his delegate which demonstrates adequate replacement on a 2 gained for 1 lost basis of the Swamp Oak Floodplain Forest and the freshwater wetlands vegetation communities impacted by the proposed development. The Habitat Restoration Plan must include:
 - a schedule and timing of on-ground works to be undertaken
 - a signed contract or other evidence of commitment by the consent holder to fund the proposed habitat restoration works for a minimum period of five years and that the works will be completed by qualified and experienced ecological restoration personnel.
 - evidence as to how the agreed offset site will be protected from future development.

SCHEDULE B

NOTE: THIS PART OF THE CONSENT WILL NOT BECOME OPERABLE UNTIL COUNCIL ADVISES THAT THE MATTERS CONTAINED IN SCHEDULE A ARE SATISFIED.

GENERAL

1. The development shall be completed in accordance with the Statement of Environmental Effects and correspondence dated 10 May 2010 prepared by Jim Glazebrook & Associates Pty Ltd, and plans listed in the table below, except where varied by the conditions of this consent.

Title	Date	Author	Drawing / Issue Number
Housing Types	12/03/10	Zoran Architecture	MCU-601 C2
Master Plan	28/10/09	Zoran Architecture	MCU – 101 C1
Site Layout and Asset Protection Zones	July 2009	Bushfiresafe (Aust) P/L	9030
Part Site plan 1	28/10/09	Zoran Architecture	MCU-201 C1
Part Site plan 2	28/10/09	Zoran Architecture	MCU – 202 C1
Part Site plan 3	28/10/09	Zoran Architecture	MCU – 203 C1
Part Site plan 4	28/10/09	Zoran Architecture	MCU – 204 C1
Part Site plan 5	28/10/09	Zoran Architecture	MCU – 205 C1
Part DCP – 1	28/10/09	Zoran Architecture	MCU – 301 C1
Part DCP – 2	28/10/09	Zoran Architecture	MCU – 302 C1
Part DCP – 3	28/10/09	Zoran Architecture	MCU – 303 C1
Part DCP – 4	28/10/09	Zoran Architecture	MCU-304 C1
Part DCP - 5	28/10/09	Zoran Architecture	MCU – 305 C1
External Work 1	28/10/09	Zoran Architecture	MCU-401 C1
External Work 2	28/10/09	Zoran Architecture	MCU-402 C1
External Work 3	28/10/09	Zoran Architecture	MCU-403 C1
External Work 4	28/10/09	Zoran Architecture	MCU-404 C1
External Work 5	28/10/09	Zoran Architecture	MCU-405 C1
Clubhouse Plan	28/10/09	Zoran Architecture	MCU-501 C1
Clubhouse Elevations 1	28/10/09	Zoran Architecture	MCU-502 C1
Clubhouse Elevations 2	28/10/09	Zoran Architecture	MCU-503 C1
Housing Types	28/10/09	Zoran Architecture	MCU-601 C1
Proposed Development Detail CH 0-380	May 2009	Opus Qantec McWilliam	Figure 4.2
Proposed Development Detail CH 380-780	May 2009	Opus Qantec McWilliam	Figure 4.3
Development Cross Section A-A	May 2009	Opus Qantec McWilliam	Figure 5.1
Development Cross Section B-B	May 2009	Opus Qantec McWilliam	Figure 5.2
Development Cross Section C-C	May 2009	Opus Qantec McWilliam	Figure 5.3
Longitudinal Section	April 2009	Opus Qantec McWilliam	Figure 6.1
Longitudinal Section	April 2009	Opus Qantec McWilliam	Figure 6.2
Longitudinal Section	April 2009	Opus Qantec McWilliam	Figure 6.3
Earthworks and Erosion Control Proposed Filling	May 2009	Opus Qantec McWilliam	Figure 7.1
Earthworks and Erosion Control Proposed Filling	May 2009	Opus Qantec McWilliam	Figure 7.2
Proposed Drainage Plan	May 2009	Opus Quantec McWilliam	Figure 8.1
Proposed Drainage Plan Detail	May 2009	Opus Quantec McWilliam	Figure 8.2
Proposed Drainage Plan Detail	May 2009	Opus Quantec McWilliam	Figure 8.3
Proposed Water	May 2009	Opus Quantec	Figure 9.0

Reticulation		McWilliam		
Proposed Sewer Plan	May 2009	Opus McWilliam	Quantec	Figure 10.1
Proposed Sewer Plan	May 2009	Opus McWilliam	Quantec	Figure 10.2
Proposed Sewer Plan Detail	May 2009	Opus McWilliam	Quantec	Figure 10.3

[GEN0005]

2. The use of crushing plant machinery, mechanical screening or mechanical blending of materials is subject to separate development application.

[GEN0045]

3. The issue of this Development Consent does not certify compliance with the relevant provisions of the Building Code of Australia.

[GEN0115]

4. Approval is given subject to the location of, protection of, and/or any necessary approved modifications to any existing public utilities situated within or adjacent to the subject property.

[GEN0135]

5. The development is to be carried out in accordance with Councils Development Design and Construction Specifications.

[GEN0265]

6. The manufactured home estate shall be designed, constructed and maintained in accordance with the relevant requirements the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005.

7. All sites shall be numbered, identified and the site boundaries conspicuously identified.

8. A minimum of three parking spaces for people with disabilities shall be provided within the manufactured home estate and they shall comply with Clause 24 of the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005.

9. A 1.8m high fence between the recreation hall and proposed site 1, shall be provided to the satisfaction of the General Manager or his delegate. The fence must be effective in screening site 1 from noise impacts associated with recreational activities.

10. A maximum of two bedrooms are permitted in each manufactured home

[GENNS01]

11. Electrical supply shall comply with the requirements of Clause 30 of the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005. Prior to placement of structures on any site or erection of any building, Council shall be provided with a validation statement regarding electrical supply from a suitably qualified person.

12. Fire hydrants shall be installed and maintained in accordance with AS2419.1-2005 Fire Hydrant Installations and AS1851-2005 Maintenance of Fire Protection Systems and Equipment. Hydrants shall be a double-headed pillar-type hydrant and no part of a dwelling site shall be situated more than 90m from a hydrant. Prior to placement of structures on any site or erection of any building, Council shall be provided with a validation statement regarding fire hydrants to the satisfaction of the General Manager or his delegate from a Hydraulics Engineer which confirms compliance.
12. Prior to the placement of any manufactured homes or placement of structures a Section 68 approval to operate the relevant section of the estate shall be obtained from Council.
13. The placement and positioning of manufactured homes on sites shall comply with the provisions of Clause 47 of the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005. In this regard, prior to the placement of any manufactured homes on any sites a site plan shall be provided to Council for consideration which clearly indicates compliance with Clause 47.

[GENNS03]

PRIOR TO ISSUE OF CONSTRUCTION CERTIFICATE

14. Any car parking floodlighting shall not spill beyond the boundaries of the site. Lighting shall comply with AS 4282 and other relevant Australian Standards. A plan of the lighting shall be approved by the Principal Certifying Authority PRIOR to the issue of a Construction Certificate.

[PCC0055]

15. Section 94 Contributions

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

Pursuant to Clause 146 of the Environmental Planning and Assessment Regulations, 2000, a Construction Certificate shall NOT be issued by a Certifying Authority unless all Section 94 Contributions have been paid and the Certifying Authority has sighted Council's "Contribution Sheet" signed by an authorised officer of Council.

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

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

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

**(a) Tweed Road Contribution Plan:
175.5 Trips @ \$861 per Trips**

\$151106

(\$782 base rate + \$79 indexation)

S94 Plan No. 4

Sector6_4

Heavy Haulage Component

Payment of a contribution pursuant to Section 94 of the Act and the Heavy Haulage (Extractive materials) provisions of Tweed Road Contribution Plan No. 4 - Version 5.1.1 prior to the issue of a construction certificate or subdivision certificate, whichever occurs first. The contribution shall be based on the following formula:-

$$\text{\$Con}_{\text{TRCP - Heavy}} = \text{Prod.} \times \text{Dist} \times \text{\$Unit} \times (1 + \text{Admin.})$$

where:

\\$Con_{TRCP - Heavy} heavy haulage contribution

and:

Prod. projected demand for extractive material to be hauled to the site over life of project in tonnes

**Dist. average haulage distance of product on Shire roads
(trip one way)**

\\$Unit the unit cost attributed to maintaining a road as set out in Section 6.4 (currently 2.5c per tonne per kilometre)

Admin. Administration component - 5% - see Section 6.5

- (b) West Kingscliff - Drainage:**
1.93931 HA @ \$42720 per HA \$82846.9
(\$2980.1 base rate + \$39739.9 indexation)
DCP Section B4
S94 Plan No. 7
- (c) West Kingscliff – Open Space:**
31.875 ET @ \$2386 per ET \$76054
(\$1849 base rate + \$537 indexation)
DCP Section B4
S94 Plan No. 7
- (d) Shirewide Library Facilities:**
31.875 ET @ \$792 per ET \$25245
(\$792 base rate + \$0 indexation)
S94 Plan No. 11
- (e) Bus Shelters:**
31.875 ET @ \$60 per ET \$1913
(\$60 base rate + \$0 indexation)
S94 Plan No. 12

- (f) **Eviron Cemetery:**
31.875 ET @ \$120 per ET **\$3825**
(\$101 base rate + \$19 indexation)
S94 Plan No. 13
- (g) **Community Facilities (Tweed Coast - North)**
31.875 ET @ \$581 per ET **\$18519**
(\$581 base rate + \$0 indexation)
S94 Plan No. 15
- (h) **Extensions to Council Administration Offices
& Technical Support Facilities**
31.875 ET @ \$1759.9 per ET **\$56096.81**
(\$1759.9 base rate + \$0 indexation)
S94 Plan No. 18
- (i) **Cycleways:**
31.875 ET @ \$447 per ET **\$14248**
(\$447 base rate + \$0 indexation)
S94 Plan No. 22
- (j) **Regional Open Space (Casual)**
31.875 ET @ \$1031 per ET **\$32863**
(\$1031 base rate + \$0 indexation)
S94 Plan No. 26
- (k) **Regional Open Space (Structured):**
31.875 ET @ \$3619 per ET **\$115356**
(\$3619 base rate + \$0 indexation)
S94 Plan No. 26

[PCC0215/PSC0175]

[PCC0215]

16. **A certificate of compliance (CC) under Sections 305, 306 and 307 of the Water Management Act 2000 is to be obtained from Council to verify that the necessary requirements for the supply of water and sewerage to the development have been made with the Tweed Shire Council.**
Pursuant to Clause 146 of the Environmental Planning and Assessment Regulations, 2000, a Construction Certificate shall NOT be issued by a Certifying Authority unless all Section 64 Contributions have been paid and the Certifying Authority has sighted Council's "Contribution Sheet" and a "Certificate of Compliance" signed by an authorised officer of Council.

Annexed hereto is an information sheet indicating the procedure to follow to obtain a Certificate of Compliance:

Water DSP5: 27 ET @ \$11020 per ET \$297540

Sewer Kingscliff: 33.75 ET @ \$5295 per ET \$178706.3

These charges to remain fixed for a period of twelve (12) months from the date of this consent and thereafter in accordance with the rates applicable in Council's adopted Fees and Charges current at the time of payment.

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

Note: The Environmental Planning and Assessment Act, 1979 (as amended) makes no provision for works under the Water Management Act 2000 to be certified by an Accredited Certifier.

[PCC0265/PSC0165]

- 17. Prior to the issue of a Construction Certificate, a cash bond or bank guarantee (unlimited in time) shall be lodged with Council for an amount based on 1% of the value of the works as set out in Council's fees and charges at the time of payment.**

The bond may be called up at any time and the funds used to rectify any non-compliance with the conditions of this consent which are not being addressed to the satisfaction of the General Manager or his delegate.

The bond will be refunded, if not expended, when the final Subdivision/Occupation Certificate is issued.

[PCC0275]

- 18. In accordance with Section 109F(i) of the Environmental Planning and Assessment Act 1979 (as amended), a construction certificate for SUBDIVISION WORKS OR BUILDING WORKS shall NOT be issued until any long service levy payable under Section 34 of the Building and Construction Industry Long Service Payments Act, 1986 (or where such levy is payable by instalments, the first instalment of the levy) has been paid. Council is authorised to accept payment. Where payment has been made elsewhere, proof of payment is to be provided.**

[PCC0285]

- 19. All imported fill material shall be from an approved source. Prior to issue of a construction certificate details of the source of the fill, nature of material, proposed use of material and confirmation that further blending, crushing or processing is not to be undertaken shall be submitted to the satisfaction of the General Manager or his delegate.**

Detail of the proposed haul route is also to be submitted to Council for approval. Once the approved haul route has been identified, payment of the Heavy Haulage Contribution calculated in accordance with Section 94 Plan No 4 will be required prior to commencement of works.

[PCC0465]

- 20. Notwithstanding any other condition of this consent separate construction certificates for bulk earthworks / retaining structures / civil works and for building works may be issued and the carrying out of the bulk earthworks / retaining structures / civil works approval may be commenced prior to the issue of a Construction Certificate for building works where it can be demonstrated all works are compatible and relevant conditions for that work have been satisfied.**

[PCC0495]

21. A detailed plan of landscaping containing no noxious or environmental weed species and with a minimum 80% of total plant numbers comprised of local native species is to be submitted and approved by Council's General Manager or his delegate prior to the issue of a Construction Certificate. The landscaping shall demonstrate effective screening between proposed dwellings 1 - 45 and adjoining rural land. The landscaping plan shall also demonstrate that species provide visual screening of the fence provided between Tweed Coast Road and the development. The proposed landscaping shall also be consistent with the Asset Protection Zone requirements of the Rural Fire Service. [PCC0585]
22. All dwelling sites shall be filled to a minimum of the design flood level (RL 3.3m AHD). Site filling and associated drainage is to be designed to address drainage on the site as well as existing stormwater flows onto or through the site, and minimising the impact of filling on local drainage. Transverse drainage, sized to accommodate the 100 year ARI runoff event, shall be provided at all locations where the fill formation obstructs flow paths. Easements benefiting upstream land shall be created over all such flow paths and structures. Detailed engineering plans of fill levels, perimeter and transverse drainage shall be submitted for Council approval as part of the s68 Stormwater Application. [PCC0675]
23. Design detail shall be provided to address the flood compatibility of the proposed structure including the following specific matters:
- (a) Subject to the requirements of the local electricity supply authority, all electrical wiring, outlets, switches etc. should, to the maximum extent possible be located above the design flood level. All electrical wiring installed below the design flood level should to suitably treated to withstand continuous submergence in water and provide appropriate earth leakage devices.
 - (b) Define adequate provision for the flood free storage for goods and equipment susceptible to water damage. [PCC0705]
24. A traffic control plan in accordance with AS1742 and RTA publication "Traffic Control at Work Sites" Version 2 shall be prepared by an RTA accredited person and shall be submitted to the Principal Certifying Authority prior to issue of the Construction Certificate. Safe public access shall be provided at all times. [PCC0865]
25. Prior to the issue of a Construction Certificate for civil works the following detail in accordance with Councils Development Design and Construction Specifications shall be submitted to the Principal Certifying Authority for approval.
- (a) copies of compliance certificates relied upon
 - (b) four (4) copies of detailed engineering plans and specifications. The detailed plans shall include but are not limited to the following:
 - earthworks
 - roadworks/furnishings
 - stormwater drainage

- water supply works
- sewerage works
- landscaping works
- sedimentation and erosion management plans
- location of all service conduits (water, sewer, electricity supply and telecommunication infrastructure)

The Environmental Planning and Assessment Act, 1979 (as amended) makes no provision for works under the Water Management Act 2000 and Section 138 of the Roads Act to be certified by an Accredited Certifier.

[PCC0985]

26. Permanent stormwater quality treatment shall be provided in accordance with the following:

- (a) The Construction Certificate Application shall include a detailed stormwater management plan (SWMP) for the occupational or use stage of the development prepared in accordance with Section D7.07 of Councils *Development Design Specification D7 - Stormwater Quality*.
- (b) Permanent stormwater quality treatment shall comply with section 5.5.3 of the Tweed Urban Stormwater Quality Management Plan and Councils *Development Design Specification D7 - Stormwater Quality*.
- (c) The stormwater and site works shall incorporate water sensitive design principles and where practical, integrated water cycle management.
- (d) Specific Requirements to be detailed within the Construction certificate application include:
 - (i) Shake down area along the haul route immediately before the intersection with the road reserve.

[PCC1105]

27. A construction certificate application for works that involve any of the following:-

- connection of a private stormwater drain to a public stormwater drain
- installation of stormwater quality control devices
- erosion and sediment control works

will not be approved until prior separate approval to do so has been granted by Council under S68 of the Local Government Act.

- a) Applications for these works must be submitted on Council's standard s68 stormwater drainage application form accompanied by the required attachments and the prescribed fee.
- b) Where Council is requested to issue a construction certificate for civil works associated with a subdivision consent, the abovementioned works can be incorporated as part of the construction certificate application, to enable one single approval to be issued. Separate approval under section 68 of the LG Act will

then NOT be required.

[PCC1145]

28. Erosion and Sediment Control shall be provided in accordance with the following:
- (a) The Construction Certificate Application must include a detailed erosion and sediment control plan prepared in accordance with Section D7.07 of *Development Design Specification D7 - Stormwater Quality*.
 - (b) Construction phase erosion and sediment control shall be designed, constructed and operated in accordance with *Tweed Shire Council Development Design Specification D7 - Stormwater Quality* and its Annexure A - "Code of Practice for Soil and Water Management on Construction Works".

[PCC1155]

29. An application shall be lodged together with any prescribed fees including inspection fees and approved by Tweed Shire Council under Section 68 of the Local Government Act for any water, sewerage, on site sewerage management system or drainage works including connection of a private stormwater drain to a public stormwater drain, installation of stormwater quality control devices or erosion and sediment control works, prior to the issue of a construction certificate.

[PCC1195]

30. Prior to release of the construction certificate an acid sulphate soil management plan prepared in accordance with the Acid Sulfate Soil Manual (ASSMAC 1998), including soil testing of all relevant excavations depths, shall be submitted to the satisfaction of the General Manager. All works shall comply with the approved plan.
31. A Threatened Species Management Plan must be prepared in accordance with Council's draft Guidelines for *Threatened and Significant Flora and Fauna Species Management Plans* and approved by the General Manager or his delegate to detail mitigation measures for wader birds and other aquatic or terrestrial threatened species known or predicted to occur on or adjacent to the site.

[PCCNS01]

32. Prior to the issue of a construction certificate the private certifier or Council shall be provided with a report from a suitably qualified person which reviews the requirements of the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005 and confirms compliance with those requirements. The report should review the entire Regulation, but also specifically address Clauses referenced in the consent by relevant conditions.

PCCNS02]

33. All dwelling sites created by the development must be serviced by a high level evacuation route, as defined by Council's Development Control Plan Section A3 - Development of Flood Liable Land. The construction certificate application must provide a plan of the identified route, including surveyed levels by a registered surveyor at representative locations and at appropriate intervals not exceeding 100m, demonstrating compliance to the satisfaction of Council's General Manager, or his delegate. If compliance cannot be demonstrated, the

applicant shall undertake upgrades of Council roads and/or stormwater drainage so as to achieve a compliant high level evacuation route. These works may require separate approval(s), which must be obtained from Council prior to issue of a Construction Certificate for the development.

[PCCNS03]

34. Prior to the issue of a Construction Certificate the applicant shall submit design detail including surcharge loads for the retaining structures to be erected on the site in accordance with AS 4678. A registered qualified structural engineer and a registered qualified geotechnical engineer shall provide the following details prior to approval;

- 1) Design detail for the retaining structures is to be supported by certification of adequacy of design from a qualified structural engineer.
- 2) A qualified geotechnical engineer shall also provide a certification of adequacy to support the design of the proposed manufactured block concrete retaining walls and soil anchors based on the subsurface conditions of the lake, exported fill material, AS3798, AS4678 and any other geotechnical requirements.

[PCCNS04]

35. Prior to the issue of a Construction Certificate, supporting evidence (including testing results) from the manufacturer or suitably qualified person that the block concrete retaining structures are suitable to be fully or partially submerged long term within the existing lake to support the proposed road, fill material and 45 manufactured homes.

[PCCNS05]

PRIOR TO COMMENCEMENT OF WORK

36. Prior to the commencement of works, the applicant shall ensure that a Site-Specific Safety Management Plan and Safe Work Methods for the subject site have been prepared and put in place in accordance with either:-

- (a) Occupation Health and Safety and Rehabilitation Management Systems Guidelines, 3rd Edition, NSW Government, or
- (b) AS4804 Occupation Health and Safety Management Systems - General Guidelines on Principles Systems and Supporting Techniques.
- (c) WorkCover Regulations 2000

[PCW0025]

37. The erection of the Community Recreation Hall, terrace & swimming pool in accordance with a development consent must not be commenced until:

- (a) a construction certificate for the building work has been issued by the consent authority, the council (if the council is not the consent authority) or an accredited certifier, and
- (b) the person having the benefit of the development consent has:
 - (i) appointed a principal certifying authority for the building work, and
 - (ii) notified the principal certifying authority that the person will carry out the building work as an owner-builder, if that is the case, and

- (c) the principal certifying authority has, no later than 2 days before the building work commences:
 - (i) notified the consent authority and the council (if the council is not the consent authority) of his or her appointment, and
 - (ii) notified the person having the benefit of the development consent of any critical stage inspections and other inspections that are to be carried out in respect of the building work, and
 - (d) the person having the benefit of the development consent, if not carrying out the work as an owner-builder, has:
 - (i) appointed a principal contractor for the building work who must be the holder of a contractor licence if any residential work is involved, and
 - (ii) notified the principal certifying authority of any such appointment, and
 - (iii) unless that person is the principal contractor, notified the principal contractor of any critical stage inspection and other inspections that are to be carried out in respect of the building work.
- [PCW0215]
38. Prior to work commencing, a "Notice of Commencement of Building or Subdivision Work and Appointment of Principal Certifying Authority" shall be submitted to Council at least 2 days prior to work commencing.
- [PCW0225]
39. A temporary builder's toilet is to be provided prior to commencement of work at the rate of one (1) closet for every fifteen (15) persons or part of fifteen (15) persons employed at the site. Each toilet provided must be:-
- (a) a standard flushing toilet connected to a public sewer, or
 - (b) if that is not practicable, an accredited sewage management facility approved by the council
- [PCW0245]
40. Where prescribed by the provisions of the Environmental Planning and Assessment Regulation 2000, a sign must be erected in a prominent position on any site on which building work, subdivision work or demolition work is being carried out:
- (a) showing the name, address and telephone number of the principal certifying authority for the work, and
 - (b) showing the name of the principal contractor (if any) for any building work and a telephone number on which that person may be contacted outside working hours, and
 - (c) stating that unauthorised entry to the site is prohibited.
- Any such sign is to be maintained while the building work, subdivision work or demolition work is being carried out, but must be removed when the work has been completed.
- [PCW0255]
41. The proponent shall provide to the PCA copies of Public Risk Liability Insurance to a minimum value of \$10 Million for the period of commencement of works until the completion of the defects liability period.
- [PCW0835]

42. Prior to commencement of work on the site all erosion and sedimentation control measures are to be installed and operational including the provision of a "shake down" area where required to the satisfaction of the Principal Certifying Authority.
In addition to these measures the core flute sign provided with the stormwater approval under Section 68 of the Local Government Act is to be clearly displayed on the most prominent position of the sediment fence or erosion control device which promotes awareness of the importance of the erosion and sediment controls provided.

This sign is to remain in position for the duration of the project.

[PCW0985]

43. An application to connect to Council's sewer or carry out plumbing and drainage works, together with any prescribed fees including inspection fees, is to be submitted to and approved by Council prior to the commencement of any building works on the site.

[PCW1065]

44. Commencement of works in accordance with the approved Habitat Restoration Plan must be demonstrated prior to clearing of the Swamp Oak Floodplain Forest or freshwater wetland vegetation within the development site.

[PCWNS01]

DURING CONSTRUCTION

45. All proposed works are to be carried out in accordance with the conditions of development consent, approved construction certificate, approved management plans, drawings and specifications.

[DUR0005]

46. Construction and/or demolition site work including the entering and leaving of vehicles is limited to the following hours, unless otherwise permitted by Council: -

Monday to Saturday from 7.00am to 6.00pm, except trucks hauling fill which is to be limited to 7.00am to 5.00pm.

No work to be carried out on Sundays or Public Holidays

The proponent is responsible to instruct and control subcontractors regarding hours of work.

[DUR0205]

47. All reasonable steps shall be taken to muffle and acoustically baffle all plant and equipment. In the event of complaints from the neighbours, which Council deem to be reasonable, the noise from the construction site is not to exceed the following:

A. Short Term Period - 4 weeks.

$L_{Aeq, 15 \text{ min}}$ noise level measured over a period of not less than 15 minutes when the construction site is in operation, must not exceed the background level by more than 20dB(A) at the boundary of the nearest likely affected residence.

B. Long term period - the duration.

$L_{Aeq, 15 \text{ min}}$ noise level measured over a period of not less than 15 minutes when the construction site is in operation, must not exceed

the background level by more than 15dB(A) at the boundary of the nearest affected residence.

[DUR0215]

48. All building work (other than work relating to the erection of a temporary building) must be carried out in accordance with the requirements of the Building Code of Australia (as in force on the date the application for the relevant construction certificate was made).

[DUR0375]

49. Building materials used in the construction of the building are not to be deposited or stored on Council's footpath or road reserve, unless prior approval is obtained from Council.

[DUR0395]

50. The Principal Certifying Authority is to be given a minimum of 48 hours notice prior to any critical stage inspection or any other inspection nominated by the Principal Certifying Authority via the notice under Section 81A of the Environmental Planning and Assessment Act 1979.

[DUR0405]

51. It is the responsibility of the applicant to restrict public access to the construction works site, construction works or materials or equipment on the site when construction work is not in progress or the site is otherwise unoccupied in accordance with WorkCover NSW requirements and Occupational Health and Safety Regulation 2001.

[DUR0415]

52. No filling is to be placed hydraulically within twenty metres (20m) of any boundary that adjoins private land that is separately owned. Fill adjacent to these boundaries is to be placed mechanically. No filling of any description is to be deposited, or remain deposited, within adjacent properties.

[DUR0765]

53. Proposed earthworks shall be carried out in accordance with AS 3798, "Guidelines on Earthworks for Commercial and Residential Developments".

The earthworks shall be monitored by a Registered Geotechnical Testing Consultant to a level 1 standard in accordance with AS 3798. A certificate from a registered Geotechnical Engineer certifying that the filling operations comply with AS3798 shall be submitted to the Principal Certifying Authority upon completion.

[DUR0795]

54. The use of vibratory compaction equipment (other than hand held devices) within 100m of any dwelling house, building or structure is strictly prohibited.

[DUR0815]

55. No soil, sand, gravel, clay or other material shall be disposed of off the site without the prior written approval of Tweed Shire Council General Manager or his delegate.

[DUR0985]

56. The surrounding road carriageways are to be kept clean of any material carried onto the roadway by construction vehicles. Any work carried out by Council to remove material from the roadway will be at the

Developers expense and any such costs are payable prior to the issue of a Subdivision Certificate/Occupation Certificate.

[DUR0995]

- 57. All work associated with this approval is to be carried out so as not to impact on the neighbourhood, adjacent premises or the environment. All necessary precautions, covering and protection shall be taken to minimise impact from: -**

- Noise, water or air pollution**
- dust during filling operations and also from construction vehicles**
- material removed from the site by wind**

[DUR1005]

- 58. The burning off of trees and associated vegetation felled by clearing operations or builders waste is prohibited. Such materials shall either be recycled or disposed of in a manner acceptable to Councils General Manager or his delegate.**

[DUR1015]

- 59. All practicable measures must be taken to prevent and minimise harm to the environment as a result of the construction, operation and, where relevant, the decommissioning of the development.**

[DUR1025]

- 60. Where the construction work is on or adjacent to public roads, parks or drainage reserves the development shall provide and maintain all warning signs, lights, barriers and fences in accordance with AS 1742 (Manual of Uniform Traffic Control Devices). The contractor or property owner shall be adequately insured against Public Risk Liability and shall be responsible for any claims arising from these works.**

[DUR1795]

- 61. Any damage caused to public infrastructure (roads, footpaths, water and sewer mains, power and telephone services etc) during construction of the development shall be repaired in accordance with Councils Development Design and Construction Specifications prior to the issue of a Subdivision Certificate and/or prior to any use or occupation of the buildings.**

[DUR1875]

- 62. The developer/contractor is to maintain a copy of the development consent and Construction Certificate approval including plans and specifications on the site at all times.**

[DUR2015]

- 63. Swimming Pools (Building)**

- (a) The swimming pool is to be installed and access thereto restricted in accordance with Australian Standard AS 1926.1 – 2007 & AS 1926.3 -2003. (Refer Council's web site www.tweed.nsw.gov.au)**
- (b) Swimming pools shall have suitable means for the drainage and disposal of overflow water.**
- (c) The pool pump and filter is to be enclosed and located in a position so as not to cause a noise nuisance to adjoining properties.**
- (d) Warning notices are to be provided in accordance with Part 3 of the Swimming Pool Regulations 2008.**

[DUR2075]

64. Backwash from the swimming pool is to be connected to the sewer in accordance with Australian Standard AS 3500.2 Section 10.9. [DUR2085]
65. The spa filter and any pumps or aerators are to be enclosed and located in a position so as not to cause a noise nuisance to any residential site. [DUR2135]
66. The builder must provide an adequate trade waste service to ensure that all waste material is contained, and removed from the site for the period of construction/demolition. [DUR2185]
67. Regular inspections shall be carried out by the Supervising Engineer on site to ensure that adequate erosion control measures are in place and in good condition both during and after construction. Additional inspections are also required by the Supervising Engineer after each storm event to assess the adequacy of the erosion control measures, make good any erosion control devices and clean up any sediment that has left the site or is deposited on public land or in waterways.
- This inspection program is to be maintained until the maintenance bond is released or until Council is satisfied that the site is fully rehabilitated. [DUR2375]
68. The site shall not be dewatered, unless written approval to carry out dewatering operations is received from the Tweed Shire Council General Manager or his delegate. [DUR2425]
69. All waters that are to be discharged from the site shall have a pH between 6.5 and 8.5 and suspended solids not greater than 50mg/l. The contractor shall nominate a person responsible for monitoring of the quality of such discharge waters on a daily basis and the results recorded. Such results shall be made available to Council's Environmental Health Officer(s) upon request. [DUR2435]
70. Council is to be given 24 hours notice for any of the following inspections prior to the next stage of construction:
- (a) internal drainage, prior to slab preparation;
 - (b) water plumbing rough in, and/or stackwork prior to the erection of brick work or any wall sheeting;
 - (c) external drainage prior to backfilling.
 - (d) completion of work and prior to occupation of the building. [DUR2485]
71. Plumbing
- (a) A plumbing permit is to be obtained from Council prior to commencement of any plumbing and drainage work.
 - (b) The whole of the plumbing and drainage work is to be completed in accordance with the requirements of the NSW Code of Practice for Plumbing and Drainage. [DUR2495]
71. Back flow prevention devices shall be installed wherever cross connection occurs or is likely to occur. The type of device shall be determined in accordance with AS 3500.1 and shall be maintained in

working order and inspected for operational function at intervals not exceeding 12 months in accordance with Section 4.7.2 of this Standard.

[DUR2535]

72. All new hot water installations shall deliver hot water at the outlet of sanitary fixtures used primarily for personal hygiene purposes at a temperature not exceeding:-
- * 43.5°C for childhood centres, primary and secondary schools and nursing homes or similar facilities for aged, sick or disabled persons; and
 - * 50°C in all other classes of buildings.

A certificate certifying compliance with the above is to be submitted by the licensed plumber on completion of works.

[DUR2555]

73. All works shall comply with the recommendations of the Noise Level Impact Assessment Craig Hill Acoustics, June 2009. The noise barrier along Tweed Coast Road shall be installed to the satisfaction of the General Manager before any buildings or homes are placed on the site. Attenuation measures shall be installed in the community hall, dwellings on sites 1 & 2, and 30Rw windows in dwellings on sites 1-33 during their construction or placement on site. Validation of these requirements from a suitably qualified person shall be provided to a Council officer upon request.
74. An acoustic barrier (1800mm high minimum effective height above finished ground level on the subject site) shall be erected along the northern boundary to the satisfaction of the General Manager prior to the placement of structures on any site. The fence shall extend the full length of the northern boundary adjacent to the proposed dwellings to the satisfaction of the General Manager. The fence shall comply with 'Planning for Bushfire 2006' requirements.

[DURNS01]

75. All works shall comply with the Balcon Pty Ltd Engineering Impact Assessment, Opus, October 2009 including the Soil & Water Management Plan. Adequate management measures shall be implemented to prevent pollution of waters or unreasonable amenity impacts from noise or dust.

[DURNS02]

76. The retaining structures are to be designed, inspected and certified by a qualified structural engineer.

[DURNS03]

77. Vegetation clearing at all locations shall be limited to the minimum necessary for the developments to proceed, and all works sites, stockpile areas, storage facilities and vehicle parking and maintenance areas shall be located on already disturbed land, avoiding any necessity for the clearing of vegetation for these activities. The applicant is to demonstrate that the trees being retained on the site and on any adjacent land have been protected in accordance with Australian Standard AS 4970-2009 *Protection of trees on development sites*.

78. A permit under s205 of the Fisheries Management Act 1994 for harm to marine vegetation (seagrass, mangroves, kelp, saltmarsh) must be obtained prior to commencement of the works should any marine vegetation require removal or be impacted such as by filling.
79. Environmental safeguards (silt curtains, booms etc.) are to be utilised during retaining wall construction to ensure there is no escape of turbid plumes into the aquatic environment. Erosion and sediment controls must be in place prior to commencing, during and after works.
80. Sand, gravel, silt, topsoil or other materials must not be stockpiled within 50 metres of the water unless surrounded by sediment control measures.
81. All works involving soil or vegetation disturbance shall be undertaken with adequate measures to prevent soil erosion and the entry of sediments into any river, lake, waterbody, wetland or groundwater system.

[DURNS04]

PRIOR TO ISSUE OF OCCUPATION CERTIFICATE

82. A person must not commence occupation or use of the whole or any part of a new building or structure (within the meaning of Section 109H(4)) unless an occupation certificate has been issued in relation to the building or part (maximum 25 penalty units).
83. Prior to the occupation or use of any building and prior to the issue of any occupation certificate, including an interim occupation certificate a final inspection report is to be obtained from Council in relation to the plumbing and drainage works.
84. An Occupation Certificate will not be issued by the General Manager until such time as all conditions of this Development Consent have been complied with.
85. The existing easement for rising main 3m wide (created under DP 836315) located in the north west corner is to be extinguished. Documentary evidence for the extinguishment of the easement is required prior to the issue of the Occupation Certificate.
86. A qualified structural engineer shall provide engineering certification for the retaining structures prior to the issue of an Occupation Certificate.
87. Certification by a qualified engineer that the civil and road works have been performed under their supervision in accordance with the approved engineering plans and specifications prior to the issue of an Occupation Certificate.

[POC0205]

[POC1045]

[POCNS01]

[POCNS02]

[POCNS03]

[POCNS04]

88. Primary weeding and/or planting and establishment must be completed in accordance with the approved Habitat Restoration Plan prior to issue of any Occupation Certificate for the site.

[POCNS05]

USE

89. The use to be conducted so as not to cause disruption to the amenity of the locality, particularly by way of the emission of noise, dust and odours or the like.

[USE0125]

90. Except as may be expressly provided in a licence approval under the Protection of the Environment Operations Act 1997 (POEO) Act, the licence holder must comply with section 120 of the POEO Act 1997 prohibiting the pollution of waters.

[USE0155]

91. The $L_{Aeq, 15 \text{ min}}$ noise level emitted from the premises shall not exceed the background noise level (L_{Aeq}) in any Octave Band centre frequency (31.5 Hz - 8KHz inclusive) by more than 5dB(A) between 7am and 12 midnight, at the boundary of any affected residence. Notwithstanding the above, noise from the premises shall not be audible within any habitable room in any residential premises between the hours of 12 midnight and 7am weekdays and 12 midnight and 8am weekends.

[USE0165]

92. All externally mounted artificial lighting, including security lighting, is to be shielded to the satisfaction of the General Manager or his delegate where necessary or required so as to prevent the spill of light or glare creating a nuisance to neighbouring or adjacent premises.

[USE0225]

93. The premises shall be operated in accordance with the *Public Health (Swimming Pools and Spa Pools) Regulation 2000* and the current NSW Health Public Swimming Pool and Spa Pool Guidelines.

[USE0985]

94. Swimming Pools (Building)

- (a) It is the responsibility of the pool owner to ensure that the pool fencing continues to provide the level of protection required regardless of and in response to any activity or construction on the adjoining premises. Due regard must be given to the affect that landscaping will have on the future effectiveness of the security fencing. (Section 7 Swimming Pool Act 1992).
- (b) The resuscitation poster must be permanently displayed in close proximity to the swimming pool. (Section 17 Swimming Pool Act 1992).
- (c) Warning notices required under Part 3 of the Swimming Pool Regulations 2008 shall be maintained at all times.

[USE1295]

95. Timber decks over the existing lake shall be constructed of hardwood and shall not be treated with oils, paints, detergents or other chemicals.

[USENS01]

96. All retaining walls in excess of 1.2m are to be certified by a suitably qualified geotechnical/structural engineer. The certification is to be submitted with the Occupation Certificate application and shall state that

the retaining walls have been designed and constructed in accordance with AS4678-2002 Earth Retaining Structures and are structurally sound. In addition to the above certification, the following is to be included in a Section 88B Instrument.

- (a) A restriction to user for each lot that has the benefit of a retaining wall that prevents any cut or fill greater than 0.3m in vertical height within a zone adjacent to the wall that is equal to the height of the wall.
- (b) Each lot burdened and or benefited by a Type 1 wall as defined in AS4678-2002 Earth Retaining Structures, shall contain a restriction to user advising the landowner of the need to maintain the wall in accordance with that standard.

Tweed Shire Council is to be nominated as the authority empowered to release, vary or modify the restrictions.

[PSC0785]

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

- (a) Easements for sewer, water supply and drainage over ALL public services/infrastructure on private property.

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

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

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

[PSC0835]

GENERAL TERMS OF APPROVAL UNDER FOR A CONTROLLED ACTIVITY UNDER THE WATER MANAGEMENT ACT



**Office
of Water**

General Terms of Approval – for works requiring a Controlled Activity Approval under the Water Management Act 2000

Our Reference	30 ERM2009/1234	File No:	9052911
Site Address	34 Monarch Drive, Kingscliff		
DA Number	DA09/0727		
LGA	Tweed Shire Council		
Number	Condition		
Plans, standards and guidelines			
1	<p>These General Terms of Approval (GTA) only apply to the controlled activities described in the plans and associated documentation relating to DA09/0727 and provided by Council and as described in correspondence from Opus dated 8 July 2010.</p> <p>Any amendments or modifications to the proposed controlled activities may render these GTA invalid. If the proposed controlled activities are amended or modified the NSW Office of Water must be notified to determine if any variations to these GTA will be required.</p>		
2	<p>Prior to the commencement of any controlled activity (works) on waterfront land, the consent holder must obtain a Controlled Activity Approval (CAA) under the Water Management Act from the NSW Office of Water. Waterfront land for the purposes of this DA is land and material in or within 40 metres of the top of the bank or shore of the lake (identified).</p>		
3	<p>The consent holder must prepare or commission the preparation of:</p> <ul style="list-style-type: none">(i) Erosion and Sediment Control Plan(ii) Soil and Water Management Plan(iii) Structural Design and specification (note: NOW will not support the use of gabions)		
4	<p>All plans must be prepared by a suitably qualified person and submitted to the NSW Office of Water for approval prior to any controlled activity commencing. The plans must be prepared in accordance with the NSW Office of Water guidelines located at www.dwa.nsw.gov.au/water_trade/rights_controlled.shtml</p> <ul style="list-style-type: none">(i) Vegetation Management Plans(iii) Outlet structures		
5	<p>The consent holder must (i) carry out any controlled activity in accordance with approved plans and (ii) construct and/or implement any controlled activity by or under the direct supervision of a suitably qualified professional and (iii) when required, provide a certificate of completion to the NSW Office of Water.</p>		
Rehabilitation and maintenance			
6	<p>The consent holder must carry out a maintenance period of two (2) years after practical completion of all controlled activities, rehabilitation and vegetation management in accordance with a plan approved by the NSW Office of Water.</p>		
7	N/A		

www.water.nsw.gov.au | NSW Office of Water is a separate office within the Department of Environment, Climate Change and Water
 Room 2, 135 Main Street MURWILLUMBAH 2484 - PO Box 796 MURWILLUMBAH NSW 2484
 t + 61 2 66767350 f + 61 2 66767388 e information@water.nsw.gov.au | ABN 47 851 556 763

Our Reference:	30 ERM2009/1234	File No:	9052911
Site Address	34 Monarch Drive, Kingscliff		
DA Number	DA09/0727		
LGA	Tweed Shire Council		
Number	Condition		
Reporting requirements			
8	The consent holder must use a suitably qualified person to monitor the progress, completion, performance of works, rehabilitation and maintenance and report to the NSW Office of Water as required.		
Security deposits			
9	N/A		
Access-ways			
10	N/A		
11	N/A		
Bridge, causeway, culverts, and crossing			
12	N/A		
13	N/A		
Disposal			
14	The consent holder must ensure that no materials or cleared vegetation that may (i) obstruct flow, (ii) wash into the water body, or (iii) cause damage to river banks, are left on waterfront land other than in accordance with a plan approved by the NSW Office of Water.		
Drainage and Stormwater			
15	The consent holder is to ensure that all drainage works (i) capture and convey runoffs, discharges and flood flows to low flow water level in accordance with a plan approved by the NSW Office of Water; and (ii) do not obstruct the flow of water other than in accordance with a plan approved by the NSW Office of Water.		
16	The consent holder must stabilise drain discharge points to prevent erosion in accordance with a plan approved by the NSW Office of Water.		
17	The consent holder must ensure that the works associated with the controlled activity do not impede the free drainage of flood waters or stormwater runoff from any neighbouring properties.		
Erosion control			
18	The consent holder must establish all erosion and sediment control works and water diversion structures in accordance with a plan approved by the NSW Office of Water. These works and structures must be inspected and maintained throughout the working period and must not be removed until the site has been fully stabilised.		
Excavation			
19	The consent holder must ensure that no excavation is undertaken on waterfront land other than in accordance with a plan approved by the NSW Office of Water.		
20	The consent holder must ensure that any excavation does not result in (i) diversion of any lake (ii) bed or bank instability or (iii) damage to native vegetation within the area where a controlled activity has been authorised, other than in accordance with a plan approved by the NSW Office of Water.		
Maintaining river			
21	N/A		

Our Reference	30 ERM2009/1234	File No:	9052911
Site Address	34 Monarch Drive, Kingscliff		
DA Number	DA09/0727		
LGA	Tweed Shire Council		
Number	Condition		
22	N/A		
River bed and bank protection			
23	N/A		
24	N/A		
Plans, standards and guidelines			
25	N/A		
26	N/A		
27	N/A		
28	N/A		
END OF CONDITIONS			

GENERAL TERMS OF APPROVAL UNDER SECTION 100B OF THE RURAL FIRES ACT 1997

Asset Protection Zone

The intent of measures is to provide sufficient space and maintain reduced fuel loads so as to ensure radiant heat levels of buildings are below critical limits and to prevent direct flame contact with a building.

1. At the commencement of building works and in perpetuity the property to the north of proposed villas 33-45 for a distance of 12 metres shall be managed as an inner protection area (IPA) as outlined within section 4.1.3 and Appendix 5 of 'Planning for Bush Fire Protection 2006' and the NSW Rural Fire Service's document 'Standards for asset protection zones'.
2. At the commencement of building works and in perpetuity the property to the north of proposed villas 1-24 for a distance of 10 metres shall be managed as an inner protection area (IPA) as outlined within section 4.1.3 and Appendix 5 of 'Planning for Bush Fire Protection 2006' and the NSW Rural Fire Service's document 'Standards for asset protection zones'.
3. At the commencement of building works and in perpetuity the property to the west of proposed villas 26-33 for a distance of 10 metres shall be managed as in inner protection area (IPA) as outlined within section 4.1.3 and Appendix 5 of 'Planning and Bush Fire Protection 2006' and the NSW Rural Fire Service's document 'Standards for asset protection zones'.

Water and Utilities

The intent of measures is to provide adequate services of water for the protection of buildings during and after the passage of a bush fire, and to locate gas and electricity so as not to contribute to the risk of fire to a building.

4. Water, electricity and gas are to comply with sections 4.1.3 and 4.2.7 of 'Planning for Bush Fire Protection 2006'.

Access

The intent of measures for internal roads is to provide safe operational access for emergency services personnel in suppressing a bush fire, while residents are accessing or regressing an area.

5. Internal roads shall comply with section 4.2.7 of 'Planning for Bush Fire Protection 2006'.

Evacuation and Emergency Management

The intent of measures is to provide suitable emergency and evacuation (and relocation) arrangements for occupants of special fire protection purpose developments.

6. Arrangements for emergency and evacuation are to comply with section 4.2.7 of 'Planning for Bush Fire Protection 2006'.

Design and Construction

The intent of measures is that buildings are designed and constructed to withstand the potential impacts of bush fire attack.

7. Roofing shall be gutterless or guttering and valleys are to be screened to prevent the build up of flammable material. Any materials used shall have a Flammability Index of no greater than 5 when tested in accordance with Australian Standard AS1530-2-1993 'Methods for Fire Tests on Building Material, Components and Structures - Test for Flammability of Materials'.
8. All new fencing shall be non-combustible.
9. New construction of proposed villas 33-45 shall comply with Australian Standard AS3959-1999 'Construction of buildings in bush fire-prone areas' Level 3 except for the southern elevation which shall comply with AS3959-1999 'Construction of buildings in bush fire-prone areas' Level 2.
10. New construction of proposed villa 32 shall comply with AS3959-1999 'Construction of buildings in bush fire-prone areas' Level 2.
11. New construction of proposed villas 1-31 and the recreation hall shall comply with AS3959-1999 'Construction of buildings in bush fire-prone areas' Level 1.

Landscaping

- 12. Landscaping to the site is to comply with the principles of Appendix 5 of 'Planning for Bush Fire Protection 2006'.**
-

NOBLE MANUFACTURED HOME ESTATE

ADVICE

Overview

This Advice is arranged as follows:

- A. Advice Sought
- B. Summary of Advice
- C. Existing Use Rights for a manufactured home estate?
- D. Canal estate development?
- E. Applicable Provisions

A. Advice Sought

1. Baclon Pty Ltd ("Baclon") has submitted DA 09/0727 ("the Current Development Application") to Tweed Shire Council ("the Council"), seeking consent to construct an additional 45 villas upon part of the land known as Lot 193 DP 1014329, located near Monarch Drive and Tweed Coast Road, Kingscliff ("the Property"), to become part of the existing Noble Lakeside Park manufactured home estate. The land is zoned 1(a) Rural under *Tweed Local Environmental Plan 2000* ("the Current LEP"). Under the Current LEP, manufactured home estates are prohibited in the 1(a) zone. Prior to determination of the Current Development Application, the Council has asked for an independent barrister's advice to address a number of issues of concern to the Council.
2. This advice is intended to address those issues. Although I have been instructed to provide this Advice by solicitors acting for Baclon and have met with officers of Baclon, this Advice is provided from a completely independent perspective, uninfluenced by the wishes of Baclon as to its content.

3. The questions to be addressed are:

- a. Existing Use Rights: ... In this case, do the existing use rights of the manufactured home estate extend to the area of the site where the development is proposed? Reference should be made to relevant case law including *Salvation Army v Newcastle City Council* [2000] 107 LGERA 40 and cl.42(2) of the *Environmental Planning & Assessment Regulation* ("EPA Regulation").
- b. Canal Estate Development: ... Is the proposal defined as a canal estate development pursuant to SEPP 50 ... and if so, given the consent history, do existing use rights ... extend to the construction of a canal estate?
- c. Applicable Provisions: ... To what extent do the existing use rights over-ride the provisions of the relevant environmental planning instruments and the Tweed Development Control Plan (DCP) (including ... SEPP 36 ... , SEPP 50 ... and the Current LEP). If none of those instruments apply, what should the proposal be assessed against?

B. Summary of Advice

4. For the reasons set out in detail in this advice, my opinions are as follows.
5. Existing Use Rights: Existing use rights as a manufactured home estate, for the purposes of cl.42 of the *EPA Regulation*, extend to area of the site where the development is proposed under the Current Development Application.
6. Canal Estate Development: The proposal in the Current Development Application is canal estate development as defined in SEPP 50, as that instrument, inter alia, defines such development to have an extended meaning, including development which "incorporates" a "constructed ... waterbody". By reason of the existing use rights, cl.42 authorises the grant of consent to the Current Development Application. But for existing use rights, the proposal would already be prohibited by the Current LEP. An additional prohibition in a different environmental planning instrument such as SEPP 50 does not alter the position that, but for existing use rights, the proposal would be prohibited. Thus,

the real issue is how should the existing use rights be characterised and how far do they extend? For the reasons set out below, in my opinion, even if the proposal would be prohibited by SEPP 50 in the absence of existing use rights, the proposal in the Current Development Application, for the purposes of cl.42 of the *EPA Regulation*, enjoys existing use rights over the whole of the Property and nothing in SEPP 50 derogates from the operation of cl.42, which authorises the grant of consent.

7. Applicable Provisions: In relation to environmental planning instruments, all such instruments, including SEPP 36, SEPP 50 and the Current LEP, are of no force and effect to the extent that they derogate from cl.42 of the *EPA Regulation*. Derogation involves any “taking away from” or “detracting from” that which would otherwise exist under cl.42. It involves any “impairment” of or “lessening of the effect of” cl.42.
8. In relation to development control plans, by operation of s.108(2) of the *EPA Act*, the incorporated provisions (including cl.42) are taken to be incorporated into every environmental planning instrument. Accordingly, all development control plans are of no effect to the extent that they are inconsistent with cl.39-46 of the *EPA Regulation*: s.74C(5) of the *EPA Act*. Even in the absence of direct inconsistency, care should be taken in the application of any development control plan which has the effect of restricting the application of the incorporated provisions, because, by reason of s.74C(1), such a development control plan may only be made “to make more detailed provision with respect to development to achieve the purpose of an environmental planning instrument applying to the land concerned”. By operation of s.108(2), the only provisions of an environmental planning instrument which apply to land the subject of existing use rights in this case are the incorporated provisions. Hence, unless the development control plan was, in fact, made for the purpose specified by s.74C(1) (rather than to advance general purposes of the Current LEP as reflected in its other provisions, which, by reason of s.108(3), are inapplicable), then the development control plan may be invalid to the extent of its application to the Property. As I am informed that the proposal in the proposal in the Current Development Application complies with the Tweed Development Control Plan in any event, it is not necessary to explore this possibility further.

9. The assessment must be carried out under s.79C of the *EPA Act*, having regard to each of the matters set out in s.79C, in a manner which is informed by the objects of the *EPA Act* as set out in s.5, but without the influence of any of the provisions of the environmental planning instruments and development control plans which are, for the reasons described in this Advice, inapplicable.

C. Existing Use Rights for a manufactured home estate?

10. The Property has a total area of 21 hectares. The Property contains a substantial artificial lake, known as Noble Lake, which appears to have an area of about 9 hectares. Noble Lake occupies much of the northern half of the Property. All of the existing buildings associated with the Noble Lakeside Park manufactured home estate have been constructed upon those parts of the Property to the south of Noble Lake.
11. The Current Development Application seeks consent to construct 45 villas, along the northern shore of Noble Lake.
12. So far as is relevant, “existing use” is defined by s.106 of the *Environmental Planning & Assessment Act* (“EPA Act”) to mean “the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for Division 4A of Part 3 or Division 4 of this Part, have the effect of prohibiting that use”.
13. Noble Lake is a “work” for the purposes of this definition. Obviously, the Property, including Noble Lake, is “land”.
14. The Current Development Application seeks an enlargement, expansion or intensification of what Baclon claims is an existing use for a manufactured home estate. Clause 42(2) of the *EPA Regulation* stipulates the only circumstances in which the Council might grant consent to such an application, as follows:

“The enlargement, expansion or intensification:

- (a) must be for the existing use and for no other use, and

- (b) must be carried out only on the land on which the existing use was carried out immediately before the relevant date”.

15. Thus, the Council has no power to approve of the Current Development Application, unless there is an existing use for “the existing use and no other use” (cl.42(2)(a)) and that use must have been “carried out” before the relevant date upon those parts of the Property upon which it is now proposed to construct the villas (cl.42(2)(b)).
16. There are two potential existing uses to which the Council, in the questions asked of me, has referred: a manufactured home estate and a canal estate development. I will deal with the issues relating to canal estate development later in this Advice.
17. So far as any manufactured home estate use is concerned, the “relevant date” for the purposes of cl.42(2) is the date of commencement of the Current LEP, namely 7 April 2000: (see cl.39(a) of the *EPA Regulation* and see below). Hence, it is necessary to enquire into whether or not there was a lawfully existing use for the purpose of a manufactured home estate applicable to the relevant parts of the Property, immediately prior to 7 April 2000.
18. Immediately prior to 7 April 2000, *Tweed Local Environmental Plan 1987* (“the Old LEP”) applied to the Property. Under the Old LEP, the Property was also zoned rural 1(a), but a manufactured home estate was not prohibited. Rather, it was permissible with consent, as it was an innominate use (see cl.9 and the zoning table for the 1(a) zone in the Old LEP). Hence, for there to be a lawful manufactured home estate use in respect of the relevant part of Property immediately prior to the commencement of the Current LEP, in the circumstances of this case, it is necessary to show either that the use pre-dated the commencement of the Old LEP and had not been abandoned, or that a consent was granted for such a use under the Old LEP.
19. In this case, there is no possibility that any relevant use pre-dated the commencement of the Old LEP. Hence, if there is an existing use for the purpose of a manufactured home estate in respect of the relevant part of the Property, in this case, it must be derived from a consent.

20. Accordingly, the first question asked of me involves two components derived from cl.42(2): First, is there an existing use derived from any consent that can be properly characterised as a use for the purpose of a manufactured home estate? Second, was that use carried out *on the relevant part of the Property* as at the relevant date?
21. Where the existing use relied upon flows from a development consent, characterisation of the use is to be determined in accordance with the terms and conditions of that consent: *House of Peace v Bankstown City Council* (2000) 48 NSWLR 498; *Meriton Apartments v Fairfield Council* (2004) 137 LGERA 35.
22. So far as any manufactured home estate use is concerned, as I shall explain, the only potentially relevant consent is the consent granted on 12 April 1996 (“1996 Consent”) to the development application, DA 95/442 (“1995 Application”). That consent, in terms, describes the use of which it approves as a “manufactured home estate”. Analysis of the 1995 Application, the conditions of the 1996 Consent and the plans approved by it (see below) all confirm that the use approved of was a manufactured home estate. Thus, there is no difficulty with the first component referred to in cl.42(2) so far as any manufactured home estate use is concerned: In my opinion, “the existing use” derived from the 1996 Consent, for the purposes of cl.42(2), is a manufactured home estate.
23. In the course of preparing this advice, I was also asked to consider whether any difficulty might arise in this case as a result of the decision of the Court of Appeal *Botany Bay City Council v Workmate Abrasives* (2004) 138 LGERA 120 and its recent application by the Land & Environment Court in *Botany Bay City Council v Parangool* [2009] NSWLEC 198. Those cases have determined that, in applying or purporting to apply *House of Peace*, a more confined approach is required to the characterisation of an existing use based upon a consent than the approach which is applicable to the characterisation of an existing use derived from lawful commencement prior to planning controls. In essence, those cases require that, for an existing use derived from a consent, the use is not to be characterised as described in earlier cases dealing with existing uses pre-dating the commencement of planning controls, including *Shire of Perth v O’Keefe* (1964) 110 CLR 529 and *Royal Agricultural Society of NSW v Sydney City Council* (1987) 61 LGRA 305. Rather, the existing use must be determined by reference only to the correct construction

of the relevant consent. In my view, these decisions present no difficulty in the circumstances of this case. Construing the 1996 Consent and the use derived there from it in the more narrow manner advocated by *Workmate Abrasives* and *Parangool*, in my opinion, the Current Development Application proposes a use which is the same as the existing use. Upon the correct construction of the 1996 Consent, in my opinion, the use approved of was a manufactured home estate.

24. The question raised by the second component of cl.42(2) of the *EPA Regulation* requires deeper analysis. For the purposes of cl.42(2), is it correct to say that, immediately before the relevant date, the use as a manufactured home estate was lawfully “carried out” on the relevant part of the Property, being the area near the northern shore of Noble Lake?
25. The leading case in the Court of Appeal concerning this issue is *Lemworth v Liverpool City Council* (2001) 53 NSWLR 371. In that case, a brothel had been conducted pursuant to a consent on the first floor of a two storey commercial building in Liverpool. Subsequently, use for the purposes of a brothel became prohibited on the entire allotment upon which the building had been erected. Hence, there was an existing use for the purposes of a brothel on at least a part of the allotment. A development application was lodged seeking, inter alia, to use the ground floor of the building for the purposes of a brothel.
26. Many years before the decision in *Lemworth*, the High Court considered the extent of the land to which existing uses attach in *Parramatta City Council v Brickworks* (1972) 128 CLR 1 and *Eaton & Sons v Warringah Shire Council* (1972) 129 CLR 270. Subsequently, the legislation was amended, by the introduction of ss.107(2) and 109(2) of the *EPA Act* so as impose precise limitations on operational and spatial aspects of the conduct of existing uses, including by restricting the enlargement or intensification of such uses: see *Vaughan-Taylor v David Mitchell-Melcann* (1991) 25 NSWLR 580. One of the issues in *Lemworth* was whether the reasoning of the High Court in *Brickworks* and *Eaton & Sons* remained applicable after these amendments to the legislation. Stein JA (with whom Hodgson CJ in Eq agreed) held (at [25]):

“Brickworks and Eaton were both concerned with ordinances which restricted the enlargement or extension of existing uses to the *land* on which the existing use

was carried out at the relevant date. To this extent, they provide some guidance on the construction of the word 'land' in cl.42 {of the *EPA Regulation*}”.

27. Accordingly, the “existing use” to which cl.42 refers is not precisely restricted as to its operational and spatial aspects in the manner referred to in ss.107(2) and 109(2) of the *EPA Act*. To the extent referred to in *Lemworth*, the reasoning in *Brickworks and Eaton & Sons* remains applicable to the construction of clause 42(2) of the *EPA Regulation*: see the concise summary in the reasoning of Hodgson CJ in Eq in *Lemworth* at [71]-[73], set out later in this Advice.
28. Stein JA considered and approved of certain decisions of the Land & Environment Court which had considered the correct approach to cl.42(2), including *Scully v Leichhardt Council* (1994) 85 LGERA and *Salvation Army v Newcastle City Council* [2000] 107 LGERA 40. I am asked to specifically refer to the decision in *Salvation Army* in giving this Advice. Of these cases Stein JA, with the agreement of Hodgson CJ in Eq, held:

“30 The regulation was considered by Pearlman J in *Scully v Leichhardt Council* (1994) 85 LGERA 109. There it was submitted on behalf of the Council that 'land', having regard to the change in the regulation, was restricted to the footprint of the particular building. Her Honour rejected the submission. In considering the meaning of 'land' in the relevant statutory context, she said (at 111):

In my opinion, the inquiry must as a consequence be directed to the particular existing use. What is the nature and extent of the particular existing use? The facts and circumstances which establish the particular existing use will set the parameters for the 'land' which is referred to in cl.41(2). Those facts and circumstances might show that the 'land' in the particular case is in fact the footprint of a particular building; or it might show that it is the whole of the deposited plan allotment upon which the building is erected; or it might show that it is an area larger than the footprint but smaller than the allotment.

...

32 The most recent decision (leaving aside that of Cowdroy J subject to appeal) is the *Salvation Army*. This case was also concerned with regulations 40(2)(b) and 42(2)(b), which are in relevantly identical terms.

33 Pearlman J referred to a statement of Meagher JA in *Steedman v Baulkham Hills Shire Council* (1991) 87 LGERA 26 at 27 to the effect that the correct approach

to the determination of the existence of existing use rights was as explained in *Brickworks* and *Eaton*, that 'if the land is rightly regarded as a unit and it is found that part of its area was physically used for the purpose in question it follows that the land was used for that purpose'. Her Honour rightly qualified this statement by noting that Walsh J in *Eaton* (at 278) said that plainly, in some cases, the physical use for a particular purpose of a small portion of a large building would not warrant a finding that the whole area was used for that purpose.

34 Her Honour then referred to *Mobil* and noted that wording of the relevant regulation applicable in that matter had been changed from 'allotment' to 'only on the land'.

35 Pearlman J concluded that the facts did not warrant a finding that the whole of the land was used for the purpose of panel beating and spray painting. Nor could it be regarded as a 'unit' simply because it formed one allotment of land. Nor was the part not being so used held in reserve for future expansion. Referring to Barwick CJ in *Eaton* at 273, her Honour held that the total area of the land 'was disproportionate to the nature of the business intended to be conducted'.

...

38 *Eaton* applied *Brickworks* to the effect that a physical use was not an indispensable element. The judgment of Walsh J is of some assistance. His Honour said (at 278):

For the practical working out of the provisions of the Ordinance it is important that the area of land which should be regarded as brought by an existing use within the operation of cl.30 should be capable as far as is possible of being identified in a way which avoids detailed investigations and complicated disputes of fact. It is clear, in my opinion, that it will not be possible in all cases to avoid the difficulty of resolving questions of fact and of degree or to avoid the necessity of drawing a line to mark off one area from another within land within the same ownership. It seems plain that in some cases the physical use for a particular purpose of a small portion of a large holding would not warrant a finding that the whole area was used for that purpose.

39 In concluding his reasons for judgment Walsh J said (at 279):

Finally, I think that the fact that in 1955 the appellant applied for an approval for the use of the whole of the land as one unit for a specified purpose and that the respondent granted that approval is a fact which,

although not decisive, tends to support the conclusion that the allotment should be treated as one piece of land.

40 In the subject appeal, the appellant applied for a development approval to use the first floor as a 'unit' for the purposes of a brothel. That is the application which the Council granted. Applying Walsh J's observations in *Eaton*, referred to above, this is not decisive but it supports the conclusion that the 'land' is confined to the first floor.

41 Gibbs J referred to whether the land can be rightly regarded as a 'unit' (at 281). If it was so rightly regarded, it would follow that the land was used for the particular purpose.

42 Here it cannot be said that the whole of the land can be regarded as a 'unit' for the purpose of the brothel use. Nor can the ground and first floor of the building together be so regarded, leaving aside whether the ground floor was being held in reserve for the brothel use. The unit of land was plainly the first floor, for which development consent was sought and granted for the brothel use.

43 Stephen J (at 291) said:

Where a claimed existing use is of a kind which involves active physical use nice questions of fact and degree may arise when the claimant's land contains some areas of apparently unused land. In many instances commercial and industrial sites will no doubt contain small areas of unused land. Only by first ascertaining the characteristics of the particular purpose of use claimed and comparing that with the evidence concerning the relevant land, regard being had to the absolute and relative sizes, locations and, perhaps, pattern of distribution of unused land, will it be possible to conclude whether all the land should be viewed as one whole, used for the claimed use or, on the contrary, as distinct portions, some of which have not shared in the claimed use.

44 When regard is had to this statement, it will be seen that the whole of the land was not used for the brothel purpose, nor was the ground floor. Rather, a distinct portion of the land (the first floor) was so used at the relevant date.

45 It seems to me that, in the circumstances of this case, the 'land' in question is the first floor of the building. There are a number of reasons to so conclude.

46 The first floor was the subject of the appellant's development application and the development consent granted by the Council.

47 Secondly, the first floor is easily definable, see *Eaton* at 278.

48 Thirdly, the first floor is a unit and the ground floor, or part of it, is not part of that unit simply because it is in the same building. Certainly, the whole of the land is not the unit, nor in my view is the building as a whole.

49 Fourthly, the first floor has been used for the purposes of a brothel, which is the existing use saved since the prohibition of brothels in the Business zones by the LEP.

50 Lastly, there is no evidence, at least at this stage, that the ground floor, or any part of it, was being held in reserve for the existing use of a brothel.

51 This conclusion may mean that, on the facts of this case, there is only room for an intensification of the use within the first floor, or its enlargement (if that is possible) within that area. An expansion to the ground floor would not be possible. That does not mean that the regulation does not have work to do in other factual situations or where it can be established that land is being held in reserve for the existing use."

29. Hodgson CJ in Eq agreed with Stein JA, and also provided a concise summary of the approach that should be taken to cl.42(2):

"71 As noted by Stein JA, the cases of *Parramatta City Council v. Brickworks* (1972) 128 CLR 1 and *Eaton & Sons v. Warringah Shire Council* (1972) 129 CLR 270 concerned town planning Ordinances which in effect permitted the enlargement or extension of existing uses within the land on which the relevant existing use was carried out at the relevant time. They decided in effect that this land was not restricted to the area of land actually physically and lawfully used at the relevant time, but extended to so much land as could be regarded as being used for the relevant purpose: questions of fact and degree could arise in particular cases as to whether areas not physically used for the purpose at the relevant time should reasonably be regarded as included in a whole area of land used for the purpose, or rather regarded as distinct areas not used for the purpose.

72 The effect of introducing provisions to the effect of s.107(2)(b) and s.108(1) was to limit the statutory entitlement to continue an existing use to land physically used for that purpose at the relevant time, but to authorise the making of regulations pursuant to which the use could be enlarged or expanded onto additional land. The current regulations are in a form introduced in 1994. Prior to 1994, the regulations authorised the granting of development consents to enlarge or expand existing uses up to the extent of the allotments or allotments on which the use was carried out at the relevant time. Under those regulations, development consent could be granted to enlarge or expand the use over the whole of the allotment or allotments

on which the use was carried out, no matter how small the area was on which the use was physically carried out, and no matter that other uses had been carried out on other areas of the allotments at the relevant time.

73 The 1994 Regulations substituted the term 'land' for the expression 'allotment or allotments'. In my opinion, the effect of this change was that the approach of the High Court in *Brickworks* and *Eaton* was to be applied to determine the extent of the area into which an existing use could be permitted to expand pursuant to development consent.

74 Applying that to this case, the question is, what was the land on which the use as a brothel was carried out at the relevant time? This certainly included the land actually physically and lawfully used as a brothel at that time. The question would be whether any more of the property 233-239 Northumberland Street, Liverpool was so used at that time. It would be relevant to consider whether some other part of the property was held in reserve for that use, what use or uses if any were being made of other parts of the property, and also the physical set up of the property and title boundaries. The ultimate question would be that contemplated by the decisions in *Brickworks* and *Eaton*, namely to this effect: is there some area of land including the first floor of the premises but extending beyond it that can fairly be regarded as a whole area used for the relevant purpose at the relevant time?"

30. *Lemworth* and the cases which it approved of, including *Salvation Army*, demonstrate that it is necessary to pay particular attention to the characteristics of the particular purpose of use claimed and other physical aspects concerning the relevant land, including whether it is used as one planning unit: see in particular the reasoning of Stephen J in *Eaton* extracted in paragraph [43] of the judgment of Stein JA, above. Since I was asked to provide particular commentary upon *Salvation Army*, it is appropriate to refer to the physical characteristics of the land and the alleged existing use under consideration in that case. Pearlman CJ decided the case in the following manner:

"34. Turning now to the facts of this case, the determinative matters seem to me to be as follows:

(1) The land on which the existing use of panel beating and spray painting was carried out immediately prior to 5 June 1987 and indeed since 1974 was the land occupied by the brooder shed and its frontage to Lake Road. That was the only land which the owner of the whole of No 128 - 136 leased to the respective tenants for that purpose;

(2) The development application sought consent to the use of an existing building for 'panel beating and spray painting'. That existing building was delineated on the accompanying plans as being the brooder shed and its frontage to Lake Road. The fact that it was an 'existing' building was noted twice, once on the development application form and once on one of the accompanying plans;

(3) The development for which consent was granted was 'panel beating and spray painting workshop'. The reference to 'workshop' can be understood, having regard to the development application and its accompanying plans, as the brooder shed and its frontage to Lake Road. Despite a general reference to 'pt Lot 4', the development consent must be regarded as relating to that part of 'pt Lot 4' which comprised the brooder shed and its frontage to Lake Road, since the accompanying plans make it clear that no use of any other part of 'pt Lot 4' was contemplated;

(4) Consistently with that construction of the development consent, the development application showed that the remainder of No 128 - 136 Lake Road was used for the purpose of grazing, and that fact was confirmed by the evidence of Mr Matthews.

35. Those facts would not warrant a finding that the whole of No 128 - 136 was used for the purpose of panel beating and spray painting. The identification of the brooder shed and its frontage to Lake Road as the land to which existing rights attach does not require a detailed investigation and a complicated dispute of facts. Nor could it be said that the whole of No 128 - 136 should be regarded as a unit simply because it formed one allotment of land in a subdivision. The facts are to the contrary. One distinct part of No 128 - 136 was used on the relevant date for the purpose of panel beating and spray painting and another part of No 128 - 136 was used on the relevant date for the purpose of grazing of livestock (as well, of course, as a dwelling house). Furthermore, there is no evidence that the part of No 128 - 136 which was not used for the purpose of panel beating and spray painting was being held in reserve for future expansion. Indeed, to adopt the words of Barwick CJ in *Eaton* at p 273, the total area of No 128 - 136 'was disproportionate to the nature of the business intended to be conducted'. It would beggar belief to imagine that the whole of 1.93 hectares was being held in reserve for the future expansion of a panel beating and spray painting operation which had for the previous 13 years been carried out in a single shed.

36. It follows from the findings I have made that the applicant has failed to establish existing use rights in relation to the whole of No 128 - 136, and that, accordingly, in view of the matters I have mentioned in par 17, development consent must be refused."

31. These authorities have confirmed the approach that should be taken to the determination of which "land" an existing use applies to for the purposes of cl.42(2). With these matters

in mind, careful attention must now be given to the history of the use of the Property, and the particular circumstances of this case.

32. At the outset, in relation to the manufactured home estate use, I observe that the sequence in which the development consents were granted in this case tends to direct attention away from the crucial issues concerning the 1996 Consent. In relation to the manufactured home estate use, the crucial consent is the 1996 Consent. However, I will give attention to the other consents and explain what role they have played in the history of development at the Property, particularly as the other consents are of potential relevance in relation to the question asked of me concerning canal estate development.
33. In 1987, a development application, DA 87/430 ("1987 Application") was made seeking approval to construct 396 caravan sites in six cluster locations, associated facilities and artificial lakes upon the Property. Much of the Property at that time was low lying, and below the 1:100 year flood level. A document entitled "Noble Park Caravan Report" prepared by Brown and Haan Pty Limited appears to have been lodged in support of the 1987 Application. According to that document (at p20):

"The lake formed after the hydraulic dredging will become one of the main features of the resort. Besides providing the fill for the residential areas, it will be one of the scenic and recreational attractions ..."

34. In essence, the 1987 Application proposed excavation of a lake to provide the fill for the building platforms for the caravan resort. The building platforms were to be filled to bring them above the 1:100 year level (see p2 of the "Noble Park Caravan Resort Report"). Runoff from the built up areas was to be directed to the proposed lake, which would provide storage to prevent the filling from having an adverse impact on downstream lands (see pp 2, 19-21, and p2 of Appendix B, of the "Noble Park Caravan Resort Report"). The lake was then to become a recreational feature of the resort, as indicated in the text to which I have referred and elsewhere. For example, in Appendix 2 to the "Noble Park Caravan Resort Report", there is a schematic drawing of the Property, with the lake labelled "LAKE – CANOES, PADDLE BOATS, ETC".

35. On 7 March 1989, development consent 87/430 ("1989 Consent") was granted by the Minister in relation to the Property. The cover page of the 1989 Consent described the development as "396 caravan sites in six cluster locations, associated facilities and artificial lakes (in accordance with Appendices B and C of the Noble Park Caravan Resort report)".
36. Noble Lake was built, largely pursuant to the 1989 Consent, and building platforms were established. The remainder of the caravan park proposal was never constructed.
37. As has been noted, the construction of the lake was an integral part of the construction of the building platforms for the proposed caravan sites. After its construction, the lake was to physically be used for the purposes of the caravan park, by capturing run-off and providing a recreational facility. The lands south of the lake but within the Property, were plainly used for active recreation by the occupants of the resort. Those lands, together with the smaller lands surrounding the lake on its northern shore were to be landscaped and provide a visually appealing setting for the resort. Having regard to these aspects of physical use and the relevant sizes of the various parts of the land, in my opinion, immediately after the physical commencement of the 1989 Consent, it was correct to characterise the use of the *whole* of the Property as being for the purpose of a caravan park resort.
38. In early March 1992, a further development application, DA92/353 ("1992 Application"), was lodged, which sought, inter alia, to fill certain land to the east of the Property. Those lands were then in the same ownership as the Property. The 1992 Application sought approval to fill the lands to the east, to alter certain existing drainage channels on that land and to construct new perimeter drainage channels on the land to the east. The fill to be utilised had been derived from the excavation of Noble Lake, as there was excess fill available above that required for the filling of the Property. The proposal was designated development, and it was accompanied by an environmental impact statement (EIS). The EIS stated (at p6) that the purpose of filling the lands to the east of the Property was to facilitate their ultimate residential development, although no consent for such use, nor subdivision to facilitate such use, was sought at that time. The EIS described (at p21 and in Appendix E) the proposed final drainage pattern for the lands to the east of the

Property. In essence, those lands would drain independently of the Property, to the drainage channels described above. The EIS also explained (at pp5-6) that, by 1992, there were certain changes proposed to the zoning of the lands in the vicinity, including the Property.

39. The EIS stated (at p7) that there had been negotiations with the Council which enabled the re-location of a sewerage line and a consequential alteration to the shape of Noble Lake to create “a more efficient lake design”. The EIS explained (at p7) that these works had already been done, and that “the current application does not seek to extend or deepen the ... lake”.
40. The EIS also explained (at p7 and Appendix F) that the owner's plans for the Property had changed since the grant of the 1989 Consent. A concept plan for a “mobile home development” of the Property was provided (see sheet 3 of 3 in Appendix F), taking advantage of the building platform which had been constructed under the 1989 Consent for the caravan resort. Consent for that use was not sought at that time.
41. In essence, the 1992 Application sought approval to provide an appropriately engineered setting, in terms of building platforms and drainage works, for subsequent residential development to the east. It also foreshadowed a manufactured home estate use of the property. It did not seek approval for those subsequent uses.
42. Consent was granted by the Minister to the 1992 application on 30 March 1993 (“1993 Consent”). The 1993 Consent contained a condition (condition 2) which required surrender of the 1987 Consent. The 1993 Consent also provided what it described as “retrospective recognition of an existing lake”, namely Noble Lake, and required the preparation of a “Lake Management Plan” (condition 10) to regulate the future management of the lake. Such a plan was subsequently provided, and it contained provisions for the management of water quality in Noble Lake.
43. In fact, the 1993 Consent could not provide retrospective authorisation for the construction of the lake which had already taken place (see *Windy Dropdown, v Warringah Council* [2002] NSWLEC 240; *Kendall Street Developments v Byron Shire Council* (No. 2) (2004) 138 LGERA 360). I do not read the 1993 Consent as attempting

to do so. Despite the use of the word “retrospective”, in my view, upon its correct construction, the 1993 Consent merely recognised the physical existence of the lake and provided conditions for its future management. It was open to the 1993 Consent to lawfully do these things.

44. The 1989 Consent was surrendered, by an instrument which had been signed on 7 January 1993, by Les Noble Pty Ltd, which was the owner of the Property at that time.
45. As mentioned, the work which is Noble Lake had been constructed primarily under the 1989 Consent, but also with the modification apparently agreed to by the Council following the re-location of the sewerage line. The surrender of a consent does not operate retrospectively. Hence, the surrender did not affect the lawfulness or otherwise of the construction of Noble Lake prior to that time. To the extent that the lake had been lawfully constructed, the surrender did not require that any further consent be obtained in order for the lake to remain, passively, in existence. However, the 1993 Consent provided authority for the ongoing management of the lake, in the form that the lake was then configured, including with the amendment consequent upon the relocation of the sewer line. The 1993 Consent authorised use of Noble Lake as a facility to drain and detain waters running off from the balance of the Property and especially the building platforms which had been constructed, should these be subsequently developed.
46. The primary effect of the surrender was to extinguish any ongoing right to use the Property for any purpose, or carry out any further building works, which would have been authorised by the 1989 Consent. Hence, after the surrender, there was no use of the Property as a caravan park resort. The authorised use of Noble Lake under the 1993 Consent was limited in the manner indicated.
47. The next relevant application is the 1995 Application, which was expressed to apply to the Property. The Statement of Environmental Effects (SOEE) demonstrates, in my opinion, that consent was sought for the use of the whole of the Property as a manufactured home estate.
48. The SOEE for the 1995 Application contains the following:

"2.0 DESCRIPTION OF PROPOSAL

...

2.3 THE DEVELOPMENT

The development is to create 234 manufactured home sites, an administration centre and shop, a manager's residence and community facilities. The individual sites will provide tourist and long stay rental accommodation.

The general development for the manufactured home sites and ancillary facilities will occur in the southern portion of the site. The existing Noble Lake is situated on the northern sector of the site.

The site has an area of 21.17 Ha of which the lake occupies approximately 9 Ha. The remainder of the site will generally comprise of; approximately 7.43 Ha for manufactured home sites and approximately 4.74 Ha for open space and community facilities.

...

Open space for recreation will generally be provided for in the two pocket parks, and around the perimeter of the lake.

The open space and community facilities will generally comprise of:

...

F. Landscaping

G. Lake and surrounds

...

The overall site will generally be landscaped throughout, and in particular the boundaries. The landscaping will generally screen the carparking and amenities building and increase the amenity and privacy of the residents. The landscaping will also screen the development from adjoining properties. Drawing No NK.01 indicates the landscaping concept.

...

3.1.1 EARTHWORKS

...

It is proposed that earthworks will generally grade and drain the site away from its boundaries towards the lake.

Only that portion of the site to be developed for the Manufactured Home Estate will be subject of the earthworks to result in the minimum level of RL 3.4m AHD for the

individual sites. This area is a majority of the site south of the lake. The remainder of the site outside of the lake and Manufactured Home Estate development site (ie. around the perimeter of the lake and immediately adjacent to Cinderah Road) will generally remain below RL 3.4 AHD. Figure 3.0 indicates existing surface levels, and the general extent of earthworks.

...

3.1.3 EROSION CONTROL

...

The lake is private and will remain so. To maintain its quality, the stormwater outlets into the lake from the sites will be designed to incorporate sediment and trash removal devices. The existing vegetation around the perimeter of the lake can also be expanded in the vicinity of the stormwater outlets to macrophyte filter capacity.

The lake is self contained with no discharge into adjacent public waterways. The drainage report (Appendix A) shows that the lake has a detention capacity for at least a 100 year ARI 2 hour storm event. Storms of greater duration will result in flooding from external sources.

...

3.2 DRAINAGE

3.2.1 PROPOSED DRAINAGE NETWORK

The site will be graded so that the open space, roadways and developed site areas all drain away from the adjacent land and into the lake. No external catchment contributes to the site. The lake has detention capacity (for a 100 year ARI 2 hour duration storm) for all the site, inclusive of the closed road reserve.

The lake can overflow into the drainage channel via a broad crested rock gabion weir. The weir level is set at RL 1.0m AHD.

...

The development will not have any increased hydraulic effect on the downstream drainage network, as the lake will perform as a detention basin for the site. The lake currently does not discharge into the north-south drainage channel system.

3.2.2 DRAINAGE IMPACT

We conclude that there will be no impact on the downstream drainage system. Nobel Lake has adequate detention capacity, inclusive of the 100 year ARI storm event."

49. These extracts from the SOEE demonstrate, in my opinion, that approval was sought for the use of Noble Lake and its surrounds for the purpose of the manufactured home estate. In particular, the land around the perimeter of the lake was proposed to become "open

space for recreation” for the proposed manufactured home estate development. Near the site boundaries, including the north shore of Noble Lake, landscaping was proposed. The lake was to provide a visually appealing setting for the manufactured home estate. The lake was also designed to receive all runoff from the site and act as a detention basin, to prevent downstream impacts, up to and including a 100 year ARI 2 hour duration storm. That is, Noble Lake and the area around its north shore was to proposed to be physically used for the purpose of the manufactured home estate development.

50. Consent was granted to that proposal. I have already observed that the 1996 Consent describes the use of which it approved as a “manufactured home estate”. Significantly, the 1996 Consent was expressed to apply to the Property. Condition 1 required the development to be carried out “generally in accordance with” the SOEE, thus incorporating into the 1996 Consent the statements in the SOEE including those concerning open space for recreation, landscaping and the role of Noble Lake as set out above. Condition 1 also specifically incorporated a landscaping plan prepared by Anne Hibbard dated December 1995, which contains annotations pointing to the northern shore of Noble Lake, and a key requiring vegetation to be “supplemented as noted on plan”. The notations pointing to the northern shore of the lake include a requirement to plant *Banksia Integrifolia* to “provide screen between the S T W and home sites”, and “slash pine to be removed in say 5 years when banksias provide a more complete screen than at present”. Condition 27 specifically required, inter alia, that these “perimeter plantings ... be completed prior to the use or occupation of Stage 1”. Condition 29(vii) required the provision of a “Soil and Water Management Plan”, providing for “appropriate pollution and erosion control measures including a water quality monitoring program ... during both construction and operations phases ...”. In the sense referred to in *Lemworth* and *Salvation Army*, the 1996 Consent treated the Property functionally as one unit.
51. Applying the reasoning of the Court of Appeal in *Lemworth* and the Land & Environment Court in *Salvation Army*, in my opinion, in the facts of this case, the use authorised by the 1996 Consent is as a manufactured home estate and it applied to the whole of the Property, including the area near the northern perimeter of the Property and the north shore of Noble Lake.

52. I am instructed that the 1996 Consent was constructed. Accordingly, for the purposes of cl.42(2)(b), in my view, an existing use, being a manufactured home estate, was “carried out” immediately before the relevant date upon the whole of the Property, including that part of the Property the subject of the Current Development Application.

D. Canal estate development?

53. I am asked to advise whether or not the Current Development Application proposes a canal estate development within the meaning of *State Environmental Planning Policy 50 – Canal Estate Development* (“SEPP 50”). If so, given the consent history, do the existing use rights extend to the construction of a canal estate?

54. For the reasons which follow, in my opinion both of these questions should be answered affirmatively.

55. However, I am of the opinion that these questions do not address the key issue to which attention should be given. In the circumstances of this case, the fact that the current proposal can so be described is not the pertinent or ultimate issue. But for existing use rights, the proposal would already be prohibited by the Current LEP. An additional prohibition in a different environmental planning instrument, such as SEPP 50, does not alter the position that, but for existing use rights, the proposal would be prohibited.

56. Thus, the real issue is how should the existing use rights be characterised and how far do they extend? Or, to put the converse question, is there any development proposed by the Current Development Application:

(a) other than as a manufactured home estate (which, for the reasons set out above, has existing use rights for the purposes of cl.42), and

(b) which is not itself an existing use for the purposes of cl.42,

that might possibly be prohibited by SEPP 50?

57. To understand the reason why I regard this as a more fundamental question, it is necessary to pay attention to s.108 of the *EPA Act*. Section 108, so far as is relevant, provides:

“108 (1) The regulations may make provision for or with respect to existing use and, in particular, for or with respect to:

(a) the carrying out of alterations or extensions to or the rebuilding of a building or work being used for an existing use, and

(b) the change of an existing use to another use, and

(c) the enlargement or expansion or intensification of an existing use.

(2) The provisions (in this section referred to as 'the incorporated provisions') of any regulations in force for the purposes of subsection (1) are taken to be incorporated in every environmental planning instrument.

(3) An environmental planning instrument may, in accordance with this Act, contain provisions extending, expanding or supplementing the incorporated provisions, but any provisions (other than incorporated provisions) in such an instrument that, but for this subsection, would derogate or have the effect of derogating from the incorporated provisions have no force or effect while the incorporated provisions remain in force.”

58. Clause 42 of the *EPA Regulation* is one of the “incorporated provisions” made under s.108. SEPP 50 is an “environmental planning instrument”. Hence, the provisions of SEPP 50 cannot derogate from cl.42 in its application to an existing use.

59. In *Carden v Willoughby Municipal Council* (1985) 56 LGRA 366, the Court of Appeal considered what was meant by the term “derogate” in s.108. Kirby P held (at 368) that “‘derogation’ involves, relevantly, nothing more than ‘taking away from’ or ‘detracting from’ that which would otherwise exist.”

60. In *Fabcot v Hawkesbury City Council* (1997) 93 LGERA 373, Lloyd J also made observations in relation to the interpretation of the term “derogate” in s.108 (at 378):

“Section 108(3) uses the word ‘derogate’ the ordinary meaning of which is ‘to repeal or abrogate in part; to destroy or impair the force or effect of; to lessen the extent of; to detract from; to disparage, to depreciate’ (The Shorter Oxford Dictionary). In the Macquarie Dictionary the word is defined in the sense of ‘to detract’.”

61. The operative provision of SEPP 50 is cl.5, which prohibits canal estate development. This provision clearly “derogates” from the operation of cl.42 in relation to any existing use. Accordingly, the provisions of SEPP 50 have no role to play in the assessment of the Current Development Application, unless there is a use proposed by the Current Development Application that not an existing use for the purposes of cl.42.
62. For the reasons already given, in my view there is an existing use for the purpose of a manufactured home estate which is applicable to the whole of the Property, for the purposes of cl.42 of the *EPA Regulation*.
63. The Current Development Application does not propose any works of substance to alter the existing lake. According to the statement of environmental effects for the Current Development Application, the houses will be installed on piers approximately 9 metres over the existing lake (see p3). Fill will be placed outside of the current lake shore line at the northern end of the proposed houses (p3, Appendix A and Appendix E, section 7.1.1-7.1.2). In short, there is no use or works proposed by the Current Development Application which can be characterised as anything other than a manufactured home estate.
64. Since that use is an existing use, in my opinion, by reason of s.108(3) of the *EPA Act*, SEPP 50 does not operate to affect the Council's power under cl.42. A fortiori, it cannot prevent the grant of consent to the Current Development Application.
65. For completeness, however, I will explain my views concerning the specific questions asked of me. SEPP 50 defines canal estate development as follows:
- “3. In this Policy, 'canal estate development' means development that:
- (a) incorporates wholly or in part a constructed canal, or other waterway or waterbody, that is inundated by or drains to a natural waterway or natural waterbody by surface water or groundwater movement (not being works of drainage, or for the supply or treatment of water, that are constructed by or with the authority of a person or body responsible for those functions and that are limited to the minimal reasonable size and capacity to meet a demonstrated need for the works), and
 - (b) includes the construction of dwellings (which may include tourist accommodation) of a kind other than, or in addition to:

- (i) dwellings that are permitted on rural land, and
- (ii) dwellings that are used for caretaker or staff purposes, and

(c) requires or includes:

(i) the use of a sufficient depth of fill material to raise the level of all or part of that land on which the dwellings are (or are proposed to be) located in order to comply with requirements relating to residential development on flood prone land, or

(ii) excavation to create waterways primarily for the purposes of providing water access to dwellings,

or both.”

66. The Current Development Application includes “the construction of dwellings” of a kind or in addition to the two nominated exceptions (cl.3(b) of SEPP 50).

67. The Current Development Application also “requires or includes ... the use of a sufficient depth of fill material to raise the level of ... part of that land on which the dwellings are (or are proposed to be) located in order to comply with requirements relating to residential development on flood prone land” (cl.3(c) of SEPP 50).

68. The remaining question is whether the development proposed by Current Development Application “incorporates wholly or in part a constructed ... waterbody” of the nominated type.

69. The required type of constructed waterbody is one:

- (a) that “drains to a natural waterway or natural waterbody by ... groundwater movement”; and
- (b) “(not being works of drainage ... are constructed by or with the authority of a person or body responsible for those functions and that are limited to the minimal reasonable size and capacity to meet a demonstrated need for the works”.

70. Noble Lake is such a waterbody: It drains “by groundwater movement” ultimately to the Tweed River and the Pacific Ocean, both of which are natural waterbodies. As has been seen, it was not designed “to the minimal reasonable size and capacity to meet a

demonstrated need for the {drainage} works”, because it was designed to be of such a size as to also facilitate an additional purpose, namely to provide fill for building platforms both on the Property, and, possibly, on the land to the east.

71. The final issue raised by cl.3(a) of SEPP 50 is whether, in circumstances where Noble Lake has long existed, does the development the subject of the Current Development Application “incorporate” the lake?

72. It must be borne in mind that “development” is defined by s.4 of the *EPA Act*, to mean, so far as is relevant:

“(a) the use of land, and

...

(d) the carrying out of a work, and

...”

73. It is not proposed to carry out a work, being a constructed waterbody, as part of the development proposed by the Current Development Application. It is, however, proposed to use land which is a constructed waterbody as part of the development proposed by the Current Development Application. The relevant use of the constructed waterbody is as a manufactured home estate. Hence, this development does “incorporate” a constructed waterbody in this sense, and in my opinion, it does so within the meaning of cl.3(a) of SEPP 50, read in light of s.4 of the *EPA Act*.

74. Accordingly, in my opinion, the Current Development Application proposes a “canal estate development” within the meaning of SEPP 50. However, for the reasons already given, the relevant use is an existing use within the meaning of s.108 of the *EPA Act* and cl.42 of the *EPA Regulation*.

75. These observations are sufficient to resolve the questions asked of me. However, it is worth adding a few remarks concerning the dual categorisation of single uses, and dealing with the consequences of the possibility (with which I do not agree) that more than one use is proposed by the Current Development Application.

76. SEPP 50 differs in an important respect from the structure of the Current LEP. The Current LEP adopts the structure that many, if not most, local environmental plans adopt to distinguish between prohibited and permissible developments. Clause 11 of the Current LEP, together with item 4 in the table for the 1(a) zone, provides that “development for the *purpose* of” manufactured home estates is prohibited. Such a clause requires that the *purpose* of the development be ascertained. The ascertainment of the purpose of a development involves the familiar task of characterisation: see, for example, *Foodbarn v. Solicitor General* (1975) 32 LGRA 157 and *Baulkham Hills SC v O'Donnell* (1990) 69 LGRA 404.
77. SEPP 50 does not refer to the “purpose” of development. In effect, it states that if any development meets the particular description specified in cl.3(a)-(c), then unless there are existing use rights, that development is prohibited, regardless of how it might be characterised under a local environmental plan. This is because SEPP 50 prevails over all other environmental planning instruments (see cl.7 of SEPP 50).
78. For example, a development might be for the purpose of a tourist facility, a marina, or, as in this case, a manufactured home estate under a local environmental plan, yet it might also meet the description of a canal estate development within the meaning of SEPP 50. If so, unless there are existing use rights, it will be prohibited, regardless of what any local environmental plan might say. If there were no existing use rights, it would not be to the point to say that the canal estate development aspect was subservient to or ancillary to the purpose of a use permitted under a local environmental plan, such as a marina or tourist facility, or a manufactured home estate.
79. There are several cases in which a single use has been characterised as being simultaneously for two purposes or as falling into two categories defined in an environmental planning instruments. The decision of the Court of Appeal in *C.B. Investments v. Colo Shire Council* (1980) 41 LGRA 270 is one of the leading examples. In that case, an environmental planning instrument provided that development could be carried out “only” for a nominated purpose, namely agriculture. Development for all other nominated purposes was prohibited. The trial judge, Waddell J, held that, although it was correct to say that the single use proposed was for the purpose of agriculture, it was

also for the purpose of an extractive industry. It fell into both categories. The Court of Appeal upheld the decision of Waddell J. Hope JA held (at 271-272):

“I will assume ... that the proposed activities could properly be regarded as the carrying out of a work for the purpose of agriculture ... This circumstance would not entitle the Council to give its consent to the activities, if, as well as having that character, they were also a use of land for a non-agricultural purpose. I see no reason why, in a particular case, an activity cannot have such a double character. I do not think that the activities of man upon land are always required to, or always do, fit exclusively into one only of the various categories which planners devise. I do not think that the proposed activities are required so to fit in the present case, and on the assumption which I have made that they would constitute a work for the purpose of agriculture, I think that they would fit into more than one category. The other of those categories is the use of the land for the purpose of extractive industry, and hence the Council cannot give its consent to the appellant's application.”

To similar effect, Reynolds JA held (at 276):

“ ... I am content to decide this case on the simple basis that a development was involved and that his Honour was correct in holding that the development was not only for the purpose of agriculture and that for that reason it is not a development which can properly be the subject of ... consent ...”

80. In essence, the Court of Appeal held that merely because one use may be properly characterised as falling wholly within one category of purpose established by an environmental planning instrument, it was not thereby precluded from also being properly characterised as falling within another category of purpose.
81. A further example is provided by the decision of the Court of Appeal in *Macquarie International Health Clinic v. University of Sydney* (1998) 98 LGERA 218. There, the proposal involved a single use for the purpose of a teaching hospital. The proposal straddled a zone boundary between an education zone (in which use for the purpose of education was permissible, and use for all other purposes was prohibited) and a hospital zone (in which use for the purpose of a hospital was permissible, and use for all other purposes was prohibited). The Court of Appeal held that the single use should properly be characterised both as a use for the purpose of education, and as a use for the purpose of a hospital. Hence, upon the true construction of the environmental planning instrument involved in that case, it was permissible in both zones.

82. To similar effect is the decision in *Friends of Pryor Park v. Ryde Council* [1995] NSWLEC 160 (Bignold J, 25 September 1995). There, the relevant development consent approved a use for the purpose of a child care centre, in an open space zone. The relevant instrument permitted, among other things, use for the purpose of “Community facilities” in the open space zone, and prohibited uses for all purposes not specifically permitted. The instrument had a specific, separate definition of “Child care facilities”, which was employed in relation to other zones. The single use involved was properly characterised both as for the purpose of “Child care facilities” and for the purpose of “Community facilities”. Hence, on the true construction of the instrument, the use was authorised as being for the purpose of “Community facilities” even though it was also correctly characterised as being for the purpose of “Child care facilities”.
83. Given the origin and functions of Noble Lake as revealed in the consents to which I have referred, in my opinion, the Current Development Application proposes a development which may be regarded as both a manufactured home estate and a canal estate development. Despite this dual character, in my opinion, in the facts of this case, one use only is proposed, which falls within both categories. That single use, in my view, enjoys existing use rights.
84. It may be that concern relating to canal estate development raised by the Council reflects the possibility that the use of Noble Lake and associated drainage works are of sufficient scale and extent to be an independent use of land to the manufactured home estate use. In other factual contexts, this has been a common occurrence. There have been many cases where, on proper analysis, development applications have proposed two uses. In *Baulkham Hills Shire Council v. O'Donnell* (1990) 69 LGRA 404, the Meagher JA held (at 409-410):
- “Notwithstanding the principles laid down in *Foodbarn*, it does not follow that a use which can be said to be ancillary to another use is thereby automatically precluded from being an independent use of the land. It is a question of fact and degree in all the circumstances of the case whether such a result ensues or not. ... but when one use of the land by reason of its nature and extent is capable of being an independent use it is not deprived of that quality because it is 'ancillary to' or related to, or interdependent with, another use.”

85. If it is assumed that the lake and associated drainage works, by reason of their “nature and extent” are an “independent use” of land, then, in my opinion, they also enjoy existing use rights, derived from the operation of the 1993 Consent. The 1993 Consent, for the reasons set out above, authorised the future use of the lake in its current configuration as a facility to drain and detain waters running off from the balance of the Property. Noble Lake will continue to perform this function. If there is any independent use of the lake, other than as a manufactured home estate, then it is not one proposed by the current Development Application, but is derived from the 1993 Consent, and is both an existing use and protected by s.109B of the EPA Act, which provides:

“Nothing in an environmental planning instrument prohibits, or requires a further development consent to authorise, the carrying out of development in accordance with a consent that has been granted and is in force.”

86. . There is nothing in SEPP 50 that prohibits or restricts the grant of a further consent to take advantage of, or alter, expand or intensify, the use authorised provided by the 1993 Consent.
87. Hence, on any view of the matter, in my opinion, the development proposed by the Current Development Application enjoys existing use rights for the purposes of cl.42 of the *EPA Regulation*. The provisions of SEPP 50 do not derogate from the operation of cl.42.

E. Applicable Provisions

88. I am asked to advise to what extent do existing use rights over-ride the provisions of the relevant environmental planning instruments and the Tweed Development Control Plan.
89. The extent to which the provisions of environmental planning instruments and development control plans are “over-ridden” in the case of applications under cl.42 of the *EPA Regulation* differ.

90. Section 108(3) of the *EPA Act* provides that any provisions of an environmental planning instrument that would derogate or have the effect of derogating from the incorporated provisions have no force or effect while the incorporated provisions remain in force.
91. Obviously, SEPP 36 – Manufactured Homes Estate, SEPP 50 – Canal Estate Development, SEPP (Rural Lands) and the Current LEP are all environmental planning instruments for the purposes of s.108.
92. I have already drawn attention to the meaning of “derogate” in s.108: see the reasoning in *Carden* and *Fabcot* set out above. Derogation involves any “taking away from” or “detracting from” that which would otherwise exist. It involves any “impairment” of or “lessening of the effect of” cl.42 of the *EPA Regulation*. To the extent that any of the environmental planning instruments derogate from the operation of cl.42 of the the *EPA Regulation*, they are of no effect in this case.
93. The position of development control plans is different. Obviously, a development control plan is not an “environmental planning instrument” for the purposes of s.108(3) of the *EPA Act*: see s.4. Accordingly, a development control plan is not directly subject to the operation of s.108(3).
94. However, s.108(2) provides that the incorporated provisions, including cl.42 of the *EPA Regulation*, “are taken to be incorporated in every environmental planning instrument”, including the Current LEP. Section 74C(5) of the *EPA Act* provides:
- “A provision of a development control plan (whenever made) has no effect to the extent that:
- ...
- (b) it is inconsistent with a provision of any ... {environmental planning} instrument or its application prevents compliance with a provision of any such instrument.”
95. Accordingly, in my opinion, to the extent that any development control plan is inconsistent with the cl.42 of the *EPA Regulation*, it is of no force or effect.

96. Inconsistency is a more stringent requirement than derogation. In this field of the law, for there to be “inconsistency”, there must be a direct collision or incompatibility in the operation the relevant provisions.
97. Depending upon the circumstances surrounding the making of a development control plan, there may be a wider inability of the plan to affect assessment under the incorporated provisions. Section 74C(1) limits the purposes for which a development control plan may be lawfully made. Section 74C(1) provides, so far as is relevant:
- “The relevant planning authority may prepare a development control plan (or cause such a plan to be prepared) if it considers it necessary or desirable:
- (a) to make more detailed provision with respect to development to achieve the purpose of an environmental planning instrument applying to the land concerned ...”
98. In the case of an existing use, a development control plan may only be made to achieve the “purpose of an environmental planning instrument applying to the land”. In this case, the only relevant provisions of the Current LEP, from which such purpose can be ascertained, are the incorporated provisions.
99. Hence, unless the development control plan was, in fact, made for the purpose specified by s.74C(1), (rather than to advance general purposes of the Current LEP as reflected in its other provisions, which, by reason of s.108(3), are inapplicable), then the development control plan may be invalid to the extent of its application to the Property. As a development control plan is not protected by the time limitation applicable to challenges to environmental planning instruments s.101, care must be taken in the application of any such plan.
100. As I am informed that the proposal in the Current Development Application complies with the Tweed Development Control Plan in any event, it is not necessary to explore this possibility further.
101. The assessment must be carried out under s.79C of the *EPA Act*, having regard to each of the matters set out in s.79C, in a manner which is informed by the objects of the *EPA Act* as set out in s.5, but without the influence of any of the provisions of the

environmental planning instruments and development control plans which are, for the reasons described above, inapplicable.

28 April 2010

A handwritten signature in black ink, appearing to read 'P. W. Larkin'.

Patrick Larkin

Nigel Bowen Chambers

Tel: 9930.7971

Fax: 9223.2177

Email: p.larkin@nigelbowen.com.au



Industry & Investment

Our Ref: TRIM 09/877
INW09/22813; OUT09/16552

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

LN: 43367

TWEED SHIRE COUNCIL	
FILE NO:	DA09/0727 PT.1
DOC NO:	
RECEIVED:	17 DEC 2009
ASSIGNED TO: MICHEL, R	
HARD COPY <input checked="" type="checkbox"/>	IMAGE <input type="checkbox"/>

11 December 2009

Attention: Ms Rowena Michel

Dear Ms Michel

Re: DA 09/0727 – additions to existing manufactured home estate (Noble Lakeside Park) including 45 new manufactured home sites at Lot 193 DP 1014329 No. 34 Monarch Drive Kingscliff

-9335940

Thank you for your letter of 25 November 2009 requesting Industry & Investment NSW (I&I NSW) provide General Terms of Approval on the above mentioned development application.

Receipt of the proscribed \$250 fee under the *Environmental Planning and Assessment Act 1979* is acknowledged.

I&I NSW is responsible for ensuring that fish stocks are conserved and that there is "no net loss" of key fish habitats upon which they depend. To achieve this, the Aquatic Habitat Protection Unit assesses activities under Part 5 of the *Environmental Planning and Assessment Act 1979* in accordance with the objectives of the *Fisheries Management Act 1994*, the aquatic habitat protection and threatened species conservation provisions in Parts 7 and 7A of the Act, and the associated *Policy and Guidelines for Aquatic Habitat Management and Fish Conservation*. In addition I&I NSW is responsible for ensuring the sustainable management of commercial, quality recreational fishing and viable aquaculture within NSW.

The proposed development is not considered to directly impact on key fish habitat. Consistent with I&I NSW's policy the proposal will not require permits or authorities under the *Fisheries Management Act 1994*. I refer you to Key Fish Habitat Maps that were provided to Council during the early stages of the LEP reform process.

Division of Primary Industries, Aquatic Habitat Protection Unit
1243 Bruxner HWY WOLLONGBAR NSW 2477
Tel: 02 6626 1397 Fax: 02 6626 1377
www.industry.nsw.gov.au

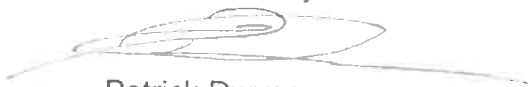
Noble Lake is an artificially constructed lake and the waterway is not habitat for any threatened fish species. The waterway is however partially connected to the Tweed River via the Kingscliff Drain's floodgates at Chinderah. Several interested members of the community have highlighted to the Aquatic Habitat Protection Unit the value of the Lake for fishing and expressed their concern about this proposal. In addition Council and I&I NSW are working to minimise existing downstream impacts from Kingscliff Drain with the likely outcome involving greater tidal flushing via the floodgates at Chinderah. A consequence will be more fish moving into the drain and possibly the Lake. Cognisant of this the following recommendations are made to assist Council in their assessment of the proposal:

- The proposal presently incorporates no stormwater management strategies. Stormwater runoff is directed into the Lake and then eventually into the Tweed River. Adoption of techniques to minimise run off through rainwater tanks and improve water quality via detention is recommended. The Aquatic Habitat Protection Unit understand that stormwater treatment is also required under Council's Tweed Urban Stormwater Quality Management Plan;
- Construction of the retaining wall footings below 0.7 m AHD in addition to ASS risk will necessitate an effective dewatering management plan. Of particular concern is appropriate treatment of filterwater during the dewatering operation to ensure that water qualities within the Lake are not diminished and a fish kill does not result.
- There will be limited opportunity for riparian vegetation to re-establish along the banks of the Lake as dwelling are proposed to extend 9 metres out into the Lake; and
- Consideration be given to strategies to ensure how, if the project is approved, residents avoid inappropriately dispose of waste and other rubbish materials into the Lake. This is likely to be a particular challenge for cleaning materials and detergents used to clean decks and other exterior parts of the units that overhang the waterway. Management of this issue is particular important considering the limited flushing that occurs within the Lake.

Finally the assertions within the development application that the proposal does not constitute a canal estate and trigger SEPP 50 should be supported by a considered legal opinion. It is the understanding of the Aquatic Habitat Protection Unit that the proposed filling of some of the Lake foreshore and reclamation of portion of the Lake represent modification sufficient to capture the proposal within SEPP 50.

If you have any further enquiries please contact me on (02) 6626 1397.

Yours sincerely



Patrick Dwyer
Fisheries Conservation Manager (North)

Division of Primary Industries, Aquatic Habitat Protection Unit
1243 Bruxner HWY WOLLONGBAR NSW 2477
Tel: 02 6626 1397 Fax: 02 6626 1377
www.industry.nsw.gov.au



Planning

Contact: Jenny Gwynne
Phone: 02 6641 6600
Fax: 02 6641 6601
Email: northcoast@planning.nsw.gov.au

Mr M Rayner
General Manager
Tweed Shire Council
PO Box 816
MURWILLUMBAH NSW 2484

Our ref: 09/00615
Your ref: DA09/0727

2 December 2009

LN: 43367

TWEED SHIRE COUNCIL	
FILE No:	DA09/0727 PT 1
DOC. No:	
REC'D:	- 3 DEC 2009
ASSIGNED TO:	MICHEL, R
HARD COPY <input checked="" type="checkbox"/>	IMAGE <input type="checkbox"/>

Dear Mr Rayner

(NC34)

Subject: PROPOSED ADDITIONS TO EXISTING MANUFACTURED HOME ESTATE AT LOT 193 DP 1014329, MONARCH DRIVE, KINGSCLIFF AND CONSIDERATION OF PROVISIONS OF SEPP 71 – COASTAL PROTECTION.

9336976
I refer to your letter dated 25 November 2009 concerning the additions to the development of the above land in accordance with clause 11 of State Environmental Planning Policy (SEPP) No. 71 – Coastal Protection.

Clause 11 refers to development that is included in Clause 9(1)(c) regarding development within 100m below mean high water mark of the sea, a bay or an estuary.

As the lake contained within Lot 193 DP 1014329 is not below high water mark of the sea, a bay or an estuary, Clause 11 of SEPP 71 does not apply to this development.

Yours sincerely

Jenny Gwynne
Local Planning Officer
(Northern Region)