

**JOINT REGIONAL PLANNING PANEL  
(Northern Region)**

<b>JRPP No</b>	<b>2012NTH020</b>
<b>DA Number</b>	<b>DA12/0364</b>
<b>Local Government Area</b>	<b>Tweed Shire</b>
<b>Proposed Development</b>	<b>Construction of tourist accommodation development comprising of 355 tourist units, ancillary communal recreational facilities, on-site carparking for 375 vehicles and associated bulk earthworks, with access from the western extension of Kirkwood Road connecting to Fraser Drive.</b>
<b>Street Address</b>	<b>Firetail Street, Tweed Heads South</b>
<b>Applicant/Owner</b>	<b>Proportional Property Investment Ltd Atf PPI Wholesale Property Trust No 1</b>
<b>Number of Submissions</b>	<b>Three</b>
<b>Recommendation</b>	<b>Refusal</b>
<b>Report by</b>	<b>Colleen Forbes, Coordinator Development Assessment</b>
<b>Report date</b>	<b>6 May 2014</b>

---



## **Assessment Report and Recommendation**

**FILE NO: DA12/0364**

### **REPORT TITLE:**

Development Application DA12/0364 for a construction of tourist accommodation development comprising of 355 tourist units, ancillary communal recreation facilities, onsite carparking for 375 vehicles and associated bulk earthworks, with access from the western extension of Kirkwood Road connecting to Fraser Drive (JRPP) at Lot 1 DP 1168904; Firetail Street TWEED HEADS SOUTH

### **SUMMARY OF REPORT:**

The proposed development is for the construction of a tourist accommodation development involving 355 units, communal facilities, carparking with access proposed from the western extension of Kirkwood Road connecting to Fraser Drive.

The subject site is part zoned 2(e) Residential Tourist and part zoned 6(b) Recreation.

The site is heavily covered with mature vegetation and the south eastern portion of the site incorporates a SEPP 14 Wetland.

The proposed development includes extensive bulk earthworks to gain access from the Kirkwood Road extension as well as to provide a development platform. The earthworks propose a maximum 27m cut from the central portion of the site, which will result in the loss of the mature vegetation located across the proposed development footprint.

The purpose of this report is to have the application determined by the Northern Region Joint Regional Planning Panel, due to the capital investment value of the proposed development exceeding \$20,000,000.

The initial assessment of the proposed development raised a number of significant issues in relation to: cultural heritage matters; landforming and access matters; aircraft and road noise impacts; as well as flora and fauna impacts. A complete cultural heritage assessment had not been undertaken for the proposal and insufficient information was provided in relation to the matters raised above.

In light of the applicant's reluctance to withdraw the application and that the proposal could not be supported with regard to Cultural Heritage issues without a site survey and complete cultural heritage assessment being undertaken, Council did not issue a further information request with regard to the outstanding issues raised within the report. It was not considered appropriate to request further design details (which could potentially cost the applicant a significant amount of money) if the application was going to be recommended for refusal. As such, an initial assessment of the proposal was undertaken against the information originally submitted with the development application, with the proposal being recommended for refusal.

At the request of the applicant, the Panel resolved on 22 February 2013 to defer the determination of the development application to allow *"...sufficient time for the applicant to prepare a cultural heritage assessment and for the applicant to respond to the issues raised in council's assessment report."*

Following the Panel's deferment, the applicant was provided with a further information request letter on 22 March 2013, which highlighted outstanding issues requiring further detail / modification from the applicant.

The applicant submitted a revised Bushfire Assessment Report on 28 May 2013, which was forwarded to the Rural Fire Services (RFS) for assessment. In order to complete a Cultural Heritage Assessment, clearing of the non-native understorey vegetation was required. Access to the site for this purpose was delayed by persistent wet weather, as advised by the applicant on 24 June 2013.

A response to Council's request for further information was submitted by the applicant on 13 September 2013. The following report has been based upon the latest information provided by the applicant.

Following assessment of the resubmitted plans by all relevant external authorities and Council officers against all applicable environmental planning instruments, the Tweed Development Control Plan and various policies, the proposed development is recommended for refusal.

**REPORT:**

**Applicant:** Proportional Property Investment Ltd PPI Wholesale Property Trust No.1

**Owner:** Proportional Property Investments Ltd

**Location:** Lot 1 DP 1168904; Firetail Street TWEED HEADS SOUTH

**Zoning:** 2(e) Residential Tourist and  
6(b) Recreation

**Cost:** \$30,000,000

**BACKGROUND:**

The subject site is described as Lot 1 DP1168904 and is located in Tweed Heads South on the western side of the Pacific Highway (Motorway) and is to be accessed from a new section of Kirkwood Road connecting to Fraser Drive to the west of the site.

The site is irregular in shape with a northern frontage of 347.555m to Kirkwood Road, an eastern frontage of 614.680m to the Motorway, a southern boundary of 758.861m and a western boundary of 529.758m, as shown in Figure 1 below. This results in a total site area of 18.02ha.



**Figure 1: Aerial photo of subject site**

The site is vacant with a large portion covered by mature native vegetation. The site landform comprises a central ridge which crosses the site in an east – west direction. Site levels fall to the north and to the south of the central ridge. A State Environmental Planning Policy (SEPP) No 14 Wetland is located in the south east portion of the site.

The surrounding area comprises a mixture of vacant urban release land, the Pacific Highway corridor and medium density residential development.



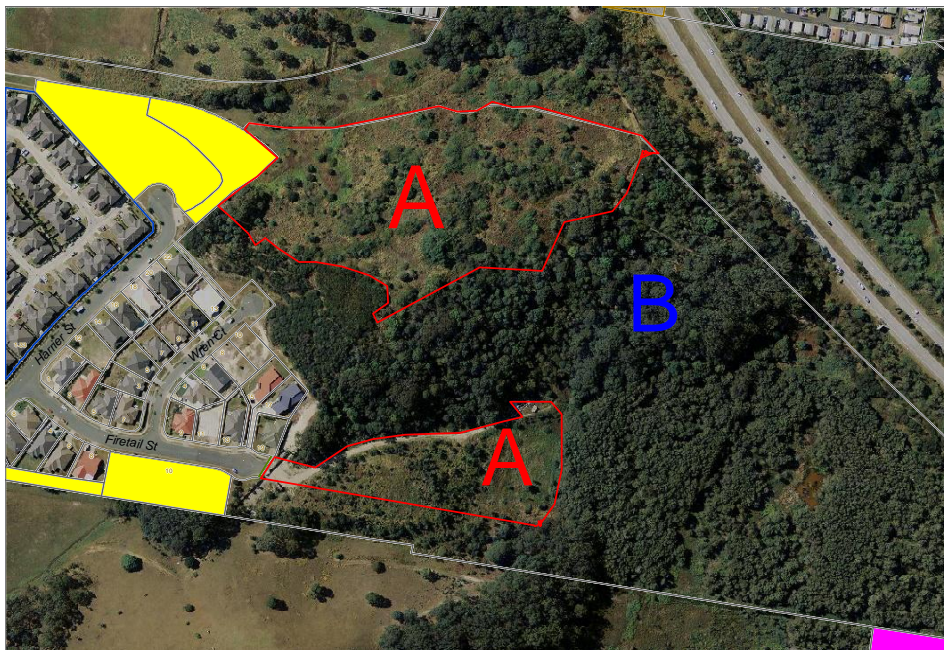
The area to the north of the site is the unformed road reserve of Kirkwood Road. Council has recently finished the construction of the eastern extension of Kirkwood Road which involved a borrow pit on the western extension. The borrow pit is located directly adjacent to the northern boundary of the site. To the east of the site is the Tweed Heads Bypass of the Pacific Highway (Motorway).

To the south is a large rural property, which operates as a function centre and offers farm stay accommodation. To the south east is an industrial area associated with the South Tweed trade and commerce area.

The area to the west incorporates detached residential dwellings in Firetail Street and a medium density townhouse development.

As the site is quite heavily vegetated, a development application (DA11/0388) was submitted for the removal of exotic understorey vegetation to allow for a detailed cultural heritage site inspection / investigation to be undertaken for the subject application.

DA11/0388 proposed to remove the exotic undergrowth by mechanical means. The application was approved, with heavy or tracked machinery only permitted in certain areas of the site, as shown below in Figure 2. It was also conditioned that weed control works within Area "B" may be undertaken only in a manner sensitive to the ecological values of the site using recognised bushland regeneration techniques.

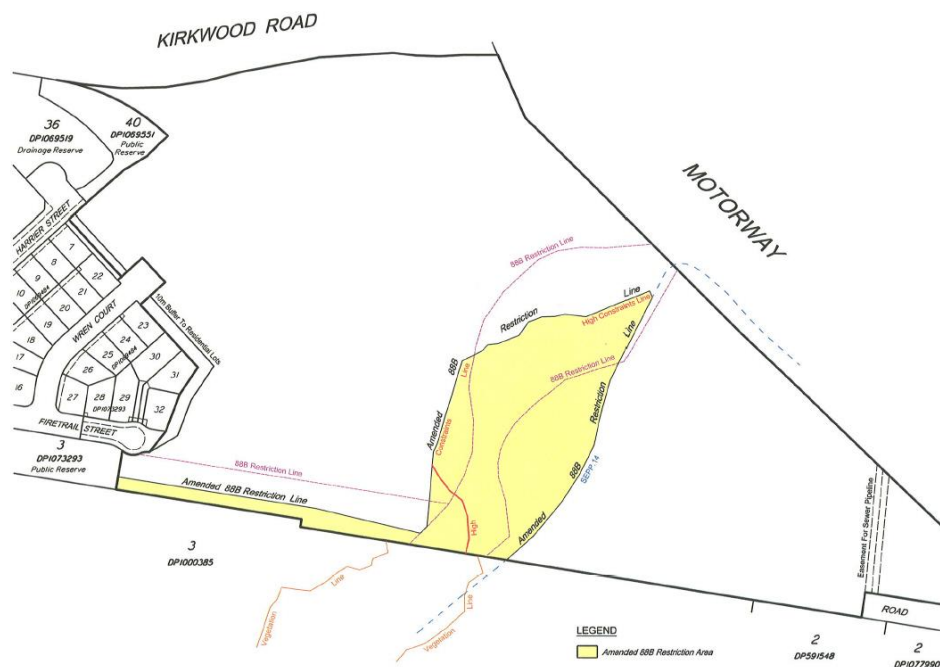


**Figure 2: Understorey clearing using heavy machinery or tracked machinery must be limited to the red polygon areas marked as A. No heavy or tracked machinery is permitted within the higher ecological value and conservation areas marked as B.**

A subdivision application (33 lots – K98/0011) was approved in 1998 over the western part of the (originally larger) allotment (originally comprised of Lot 9 and 10 DP 822830). A flora and fauna assessment undertaken at that time recognised significant ecological values over the site, including occupied Koala habitat. In the conclusions of the 1998 report, James Warren & Associates state:

*“An extensive rehabilitation and regeneration program of mixed Eucalypt species (containing a high density of Koala food trees) should be carried out on the adjacent Lot 10 (amended to Lot 33 DP 1073293, now Lot 1 DP 1168904 – the subject site) and linked with buffer zone planting around the Proposed Development. This program will conserve approximately 2 hectares of forest comprised of 1.25 hectares of existing Blackbutt forest, 0.3 hectares of Swamp Sclerophyll Forest and 0.3 hectares of grassland to be regenerated as mixed Eucalypt forest. This program will eventually increase the amount of Koala habitat available to Koalas in the South Tweed area.”*

Consent conditions for K98/0011 included a requirement for a conservation zone through the central portion of the subject site, for the purposes of conservation and rehabilitation. The footprint of the proposed development appears to slightly overlap a portion of the zone. In this regard, the proponent has proposed to amend the conservation zone to more accurately align the conservation areas with the high conservation areas of the site. The revised conservation zone appears to be clear of the proposed development footprint, as shown in Figure 3 below.



**Figure 3: Proposed revised covenant areas over the subject site.**

A subdivision certificate (SSC11/0032) for road widening was granted over the site in 2011 to facilitate the construction of the Kirkwood Road extension (which was granted approval via PTV10/0032). The PTV application covered the extension of Kirkwood Road from its junction with Falcon Way to the east of the Pacific Highway and from Fraser Drive to the west. The proposal included the provision of access to and from the Pacific Highway via southbound on and off ramp and via a northbound off ramp. This application created current Lot 1 DP 1168904.





## PROPOSAL:

The initial proposed development comprised a total of 355 tourist accommodation units to be provided in a series of one, two and three storey structures. The proposal incorporated seven different types of units, as follows:

- 71 x Type A units (1 bed dwelling – two storeys);
- 32 x Type B units (2 bed dwelling – two storeys);
- 16 x Type C units (2 bed dwelling (alternate design) – two storeys);
- 5 x Type D units (1 bed disabled dwelling – one storey);
- 22 x Type RV-A units (1 bed RV space dwelling – two storeys);
- 7 x Type RV-B units (2 bed RV space dwelling – two storeys); and
- 9 x Type E (2 bed duplex dwelling – three storey).

Each of the two storey buildings contain two units (one per floor). Each of the proposed three storey units contain six accommodation units, with two units per floor.

The proposal also incorporated a communal facilities building located adjacent to the site entry which included swimming pools, barbeques, a kiosk, dining area, games room and administration offices.

The site would contain 375 car spaces, including open car spaces and car ports for the storage of RV's and motor home vehicles. Within the site, the accommodation units are accessed via the internal driveway network and car parking is provided adjacent to each unit.

In order to access the site, the initial proposal intended to construct a portion of the proposed extension to Kirkwood Road. The proposal also incorporated extensive earthworks, including maximum cuts in the order of 27m in the centre of the site, to provide a developable area.

The proposed earthworks would necessitate the removal of vegetation from the north western part of the site.

The capital investment value of the proposed development has been estimated at, \$30,000,000 which results in this assessment report being forwarded to the Northern Region Joint Regional Planning Panel (JRPP) for determination.

Following a detailed assessment of the initial proposal, Council officers recommended the following reasons for refusal:

1. *The development application is contrary to Clause 4 of the Tweed Local Environmental Plan 2000, in that the proposed development does not meet the aims of the plan.*
2. *The development application is contrary to Clause 5 of the Tweed Local Environmental Plan 2000, in that the proposed development would have an unacceptable adverse impact on the natural environment.*
3. *The development application is contrary to Clause 8(1) of the Tweed Local Environmental Plan 2000, in that: the proposed development is not considered to be consistent with the primary objective of the 6(b)*

*Recreation zone; the proposed development is not considered to have satisfactorily considered the aims and objectives of other relevant clauses of the Tweed Local Environmental Plan; and the proposed development is considered to have an unacceptable cumulative impact upon the surrounding environment.*

- 4. The development application is contrary to Clause 32(3) of the Tweed Local Environmental Plan 2000, in that the proposed development is of a nature that is inappropriate within the 25 or higher ANEF contour.*
- 5. The development application is contrary to Clause 44(1) of the Tweed Local Environmental Plan 2000, in that the proposed development has not satisfactorily assessed how the development will affect the conservation of the site and any relic known or reasonably likely to be located at the site.*
- 6. The development application is contrary to Clause 8 (d), (l) and (n) of the State Environmental Planning Policy No 71 - Coastal Protection, with regard to suitability and cultural heritage.*
- 7. The development application is contrary to Clause 101 and 102 of the State Environmental Planning Policy (infrastructure) 2007, in that the proposed development does not satisfactorily address potential impacts of road noise.*
- 8. The development application does not comply with Section 79C (1) (b) of the Environmental Planning and Assessment Act 1979 as it relates to the likely impacts of the development - there is no certainty that the development will not have an adverse impact on the locality.*
- 9. The development application does not comply with Section 79C (1) (c) of the Environmental Planning and Assessment Act 1979, in that the development is not considered to be suitable for the subject site.*
- 10. The development application is not considered to be in the public interest.*

At the request of the applicant, the Panel resolved to defer the determination of the application to allow time for the applicant to prepare a cultural heritage assessment and respond to other issues raised by Council's assessment report.

Following the deferment of the determination of the application and in response to issues raised by Council, the applicant submitted additional information on 13 September 2013. The submission included amended and addendum technical reports and plans in response to the issues raised in Council's information request, submissions and Council's initial assessment report. The applicant identified only minor amendments to the proposed development as follows:

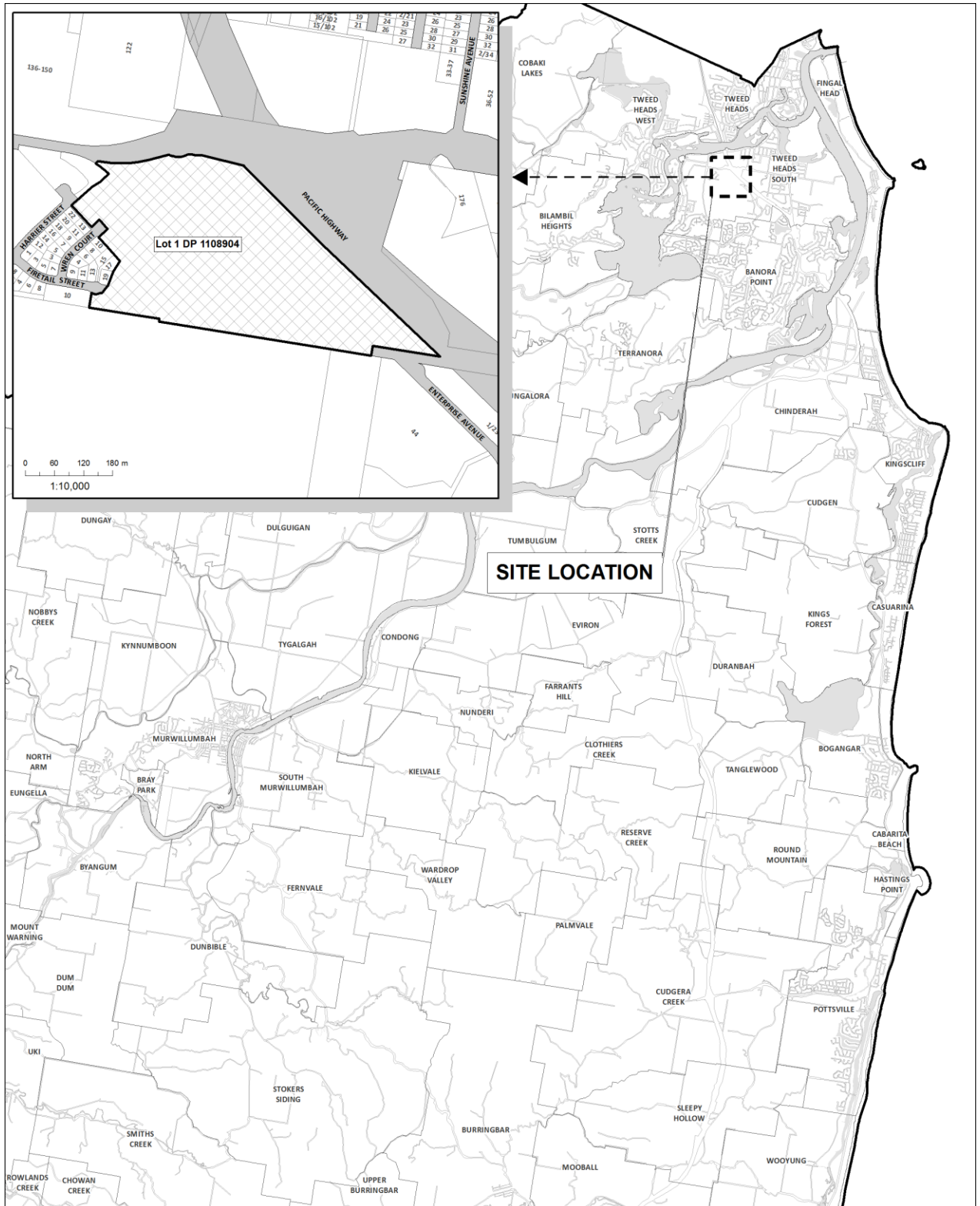
- **Design amendment to Communal Facilities Building** – a minor amendment has been made to the Floor Plan of the Communal Facilities building in relation to an internal reconfiguration of the reception, administration area and kitchen

area. External changes to the western side of the building include addition of a freezer, coolroom and delivery bay;

- **Waste Storage Areas** – arrangements for waste storage and collection have been refined. The Site Plan has been amended to include six bin enclosures around the site. The enclosures will be roofed and incorporate masonry block walls and sliding louvered panel gates;
- **Service Vehicle Area** – the plans have been amended to provide a service / delivery bay, to cater for a heavy rigid vehicle (HRV); and
- **Amended Stormwater Management Basins** – amendments have been made to the detail of the proposed stormwater detention basins “A” and “B”, in relation to the configuration of the basins and the measures to control discharge water.

The following report is an assessment of the proposed development, based on the latest information provided by the applicant.

**SITE DIAGRAM:**



## Locality Plan

Lot 1 DP 1168904  
Firetail Street, Tweed Heads South

Disclaimer: While every care is taken to ensure the accuracy of this data, Tweed Shire Council makes no representations or warranties expressed or implied, statutory or otherwise, about its accuracy, reliability, completeness or suitability for any particular purpose and disclaim all responsibility and all liability (including without limitation, liability in negligence) for all expenses, losses, damages (including indirect or consequential damage) and costs which may be incurred as a result of data being inaccurate in any way and for any reason. This information is supplied for the general guidance and is to be considered indicative and diagrammatic only. It should not be used for survey or construction purposes and prior to any excavations a "Dial before You Dig" enquiry must be made by calling 1100. The information contained on this document remains valid for 30 days only from the date of supply.

Cadastre: 04 February, 2013  
© Land and Property Management Authority (LPMA) & Tweed Shire Council.  
Boundaries shown should be considered approximate only.

0 1 2 Km  
1:125,000 @ A4 Portrait  
DO NOT SCALE  
COPY ONLY - NOT CERTIFIED

Map Projection: Universal Transverse Mercator  
Horizontal Datum: Geodetic Datum of Australia 1994  
Grid: Map Grid of Australia, Zone 56

Author: C. Lees - Information Technology Unit

Civic and Cultural Centre  
3 Tumbulgum Road  
Murwillumbah NSW 2484

PO Box 816  
Murwillumbah NSW 2484

T | (02) 6670 2400 | 1300 292 872  
F | (02) 6670 2429

W | [www.tweed.nsw.gov.au](http://www.tweed.nsw.gov.au)  
E | [planningreforms@tweed.nsw.gov.au](mailto:planningreforms@tweed.nsw.gov.au)



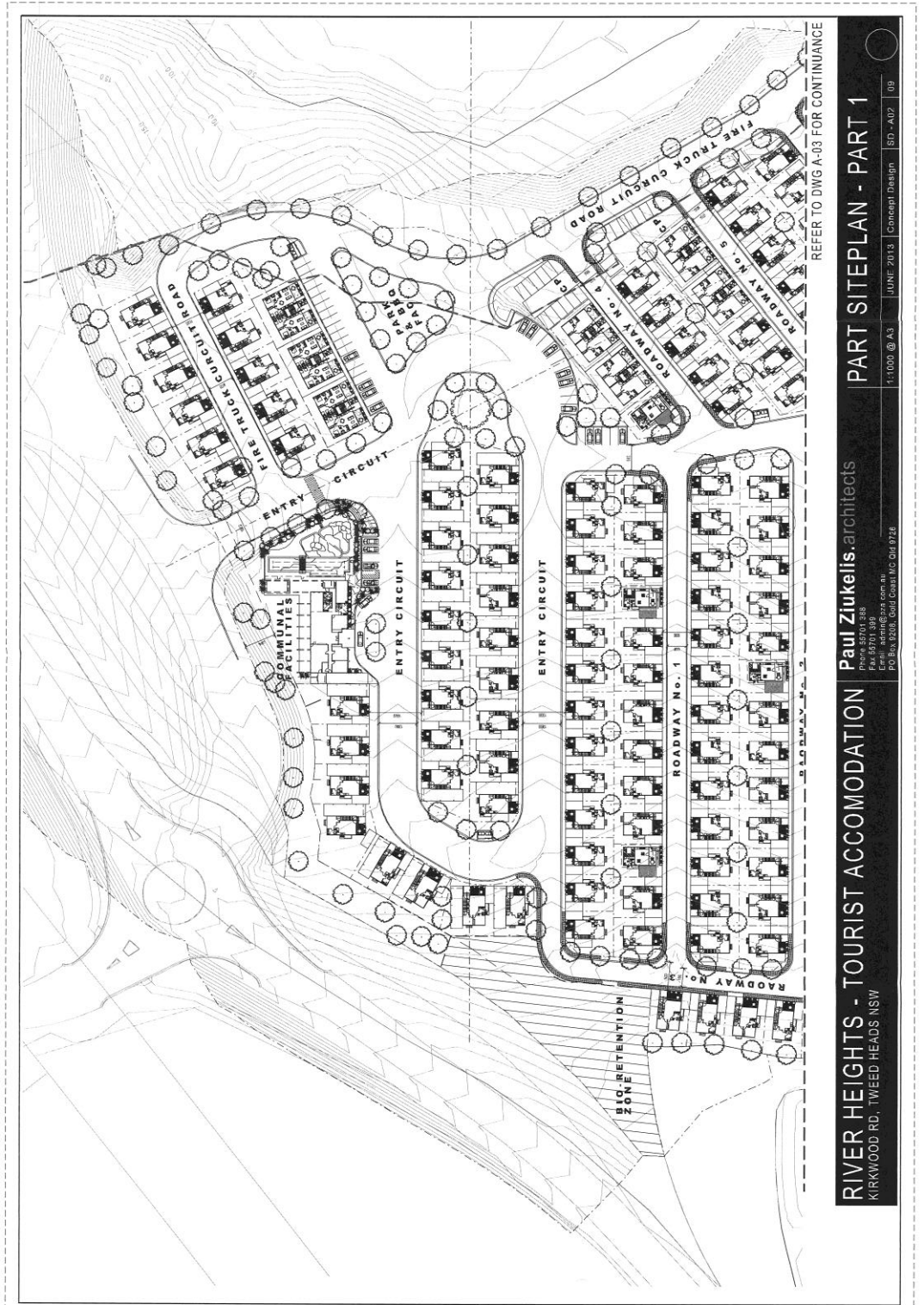
**TWEED**  
SHIRE COUNCIL

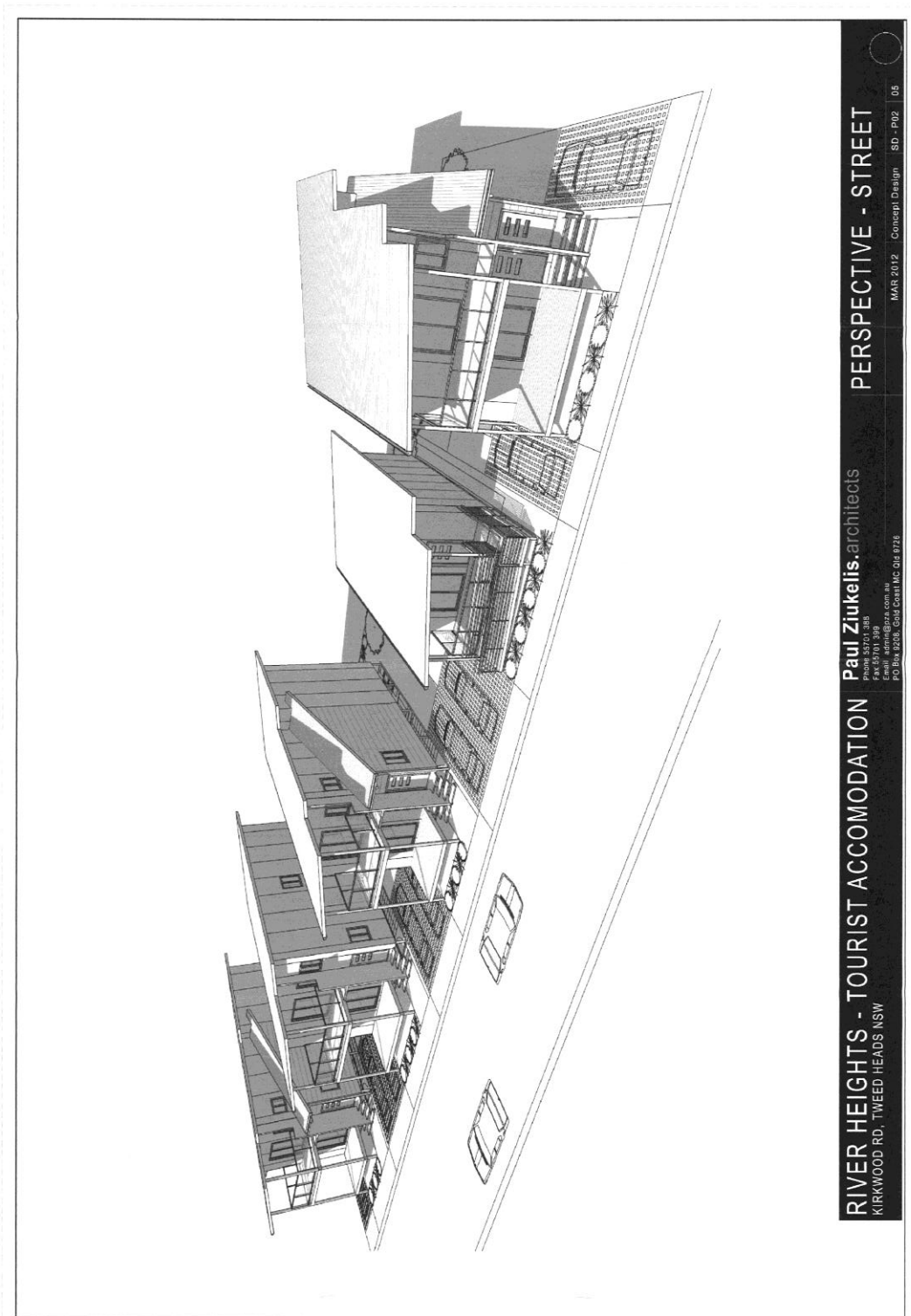
Date Printed: 04 February, 2013



JRPP (Northern Region) Business Paper – Item # - Date of Meeting – JRPP Reference 2012NTH020 Page 14







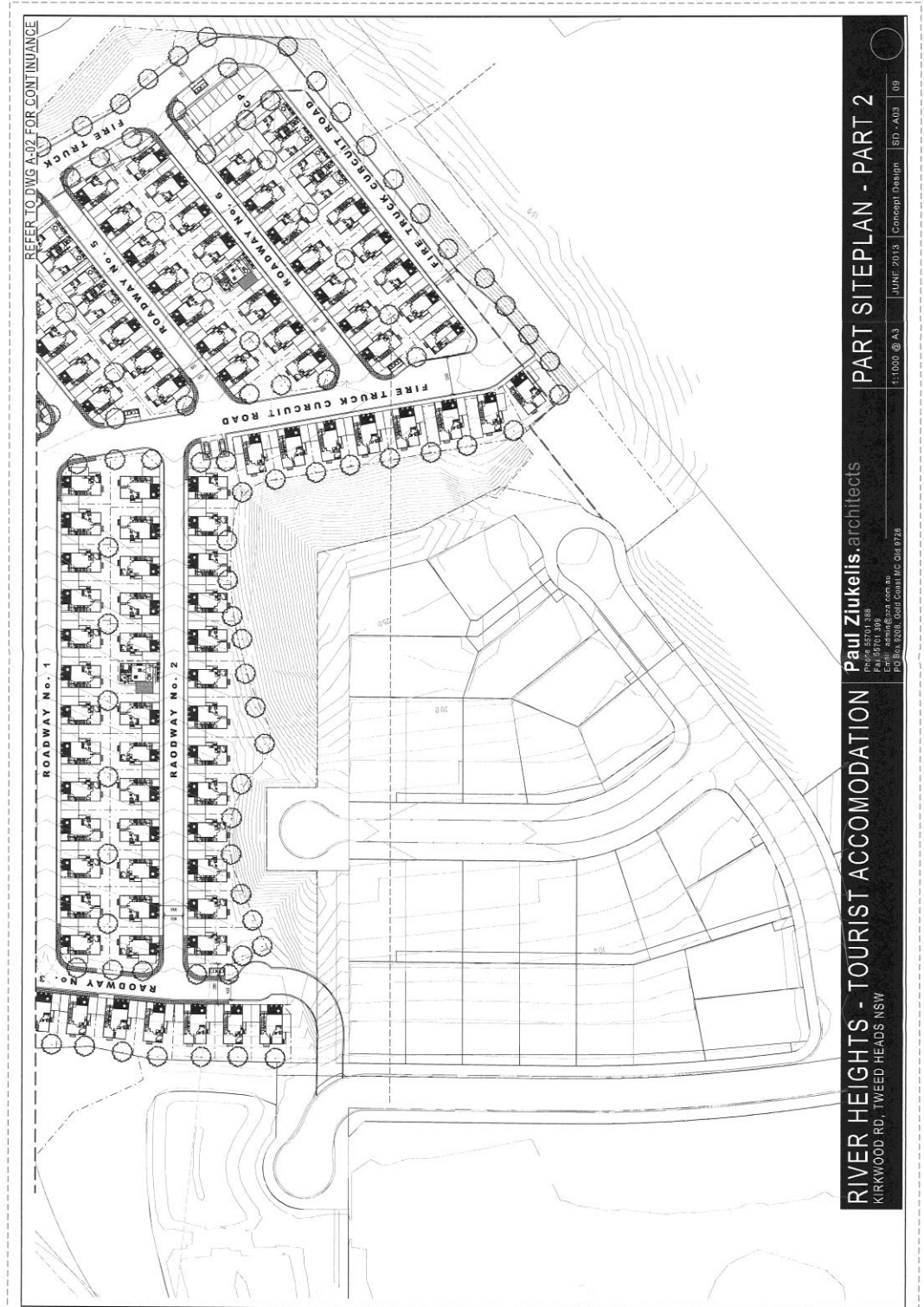
PERSPECTIVE - STREET

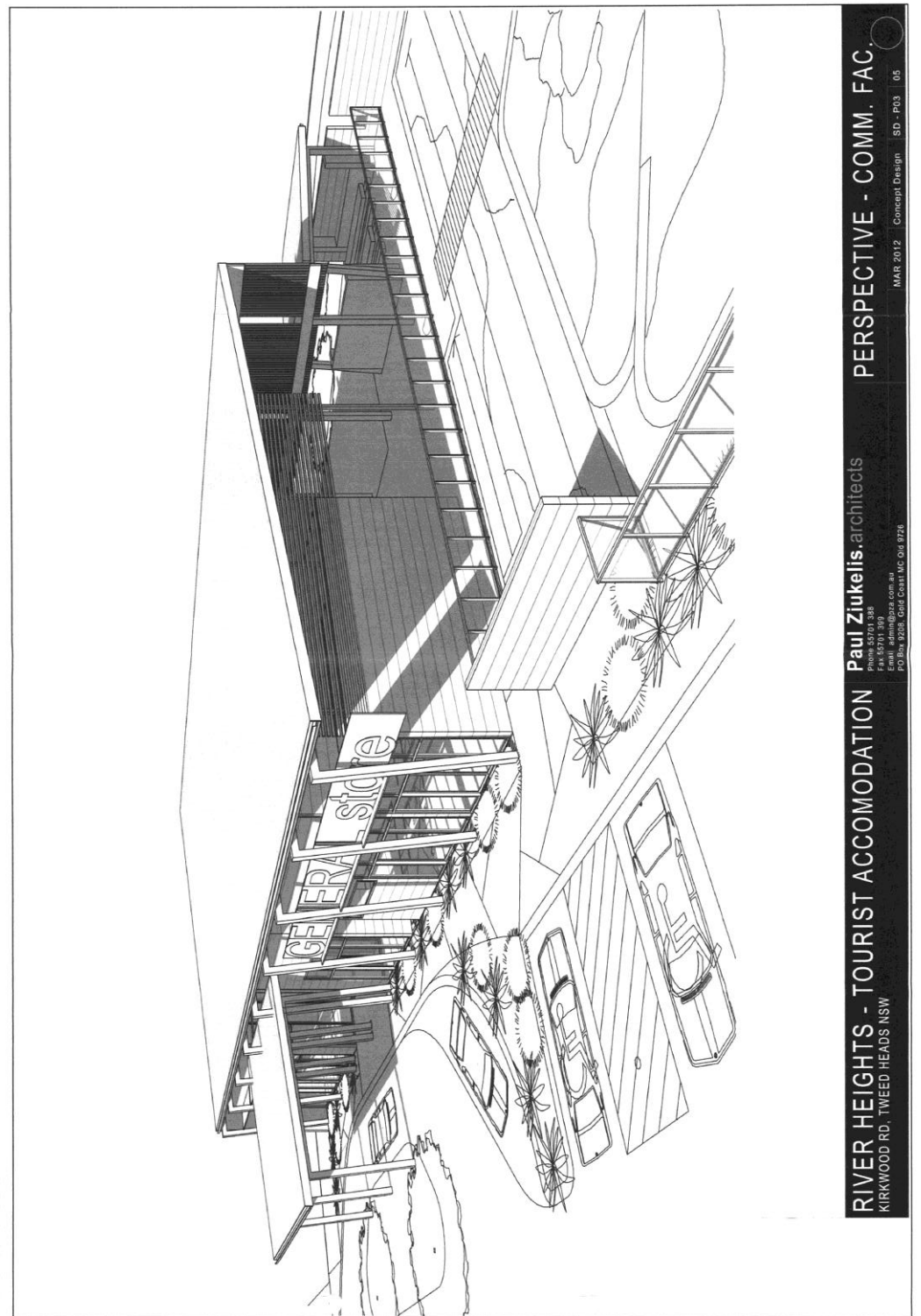
Paul Ziukelis.architects  
Phone 53701 335  
Fax 53701 339  
www.pziukelis.com.au  
PO Box 32258, Gold Coast MC Qld 9726

RIVER HEIGHTS - TOURIST ACCOMODATION  
KIRKWOOD RD, TWEED HEADS NSW

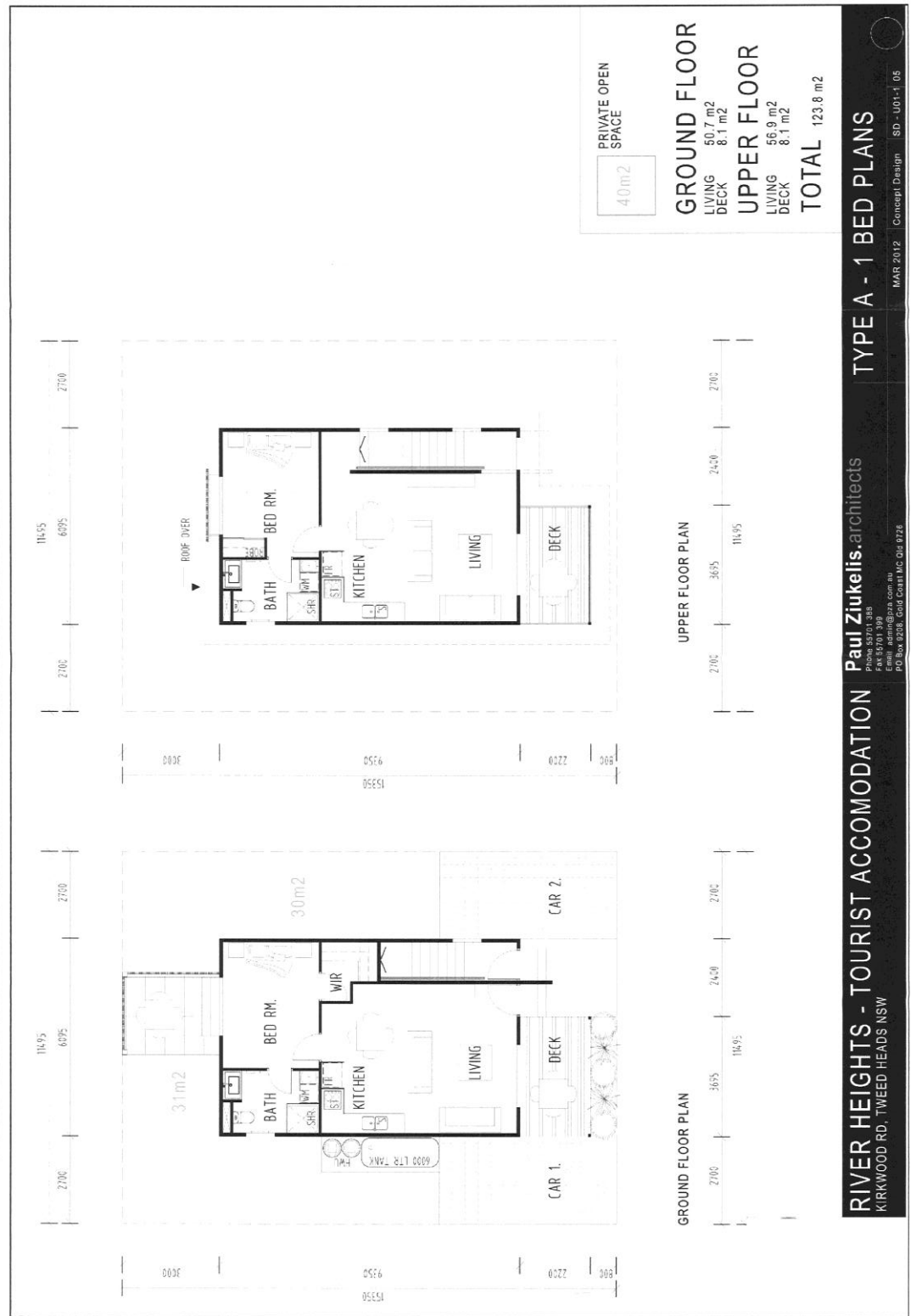
MAR 2012 Concept Design SD - P002 05











# TYPE A - 1 BED PLANS

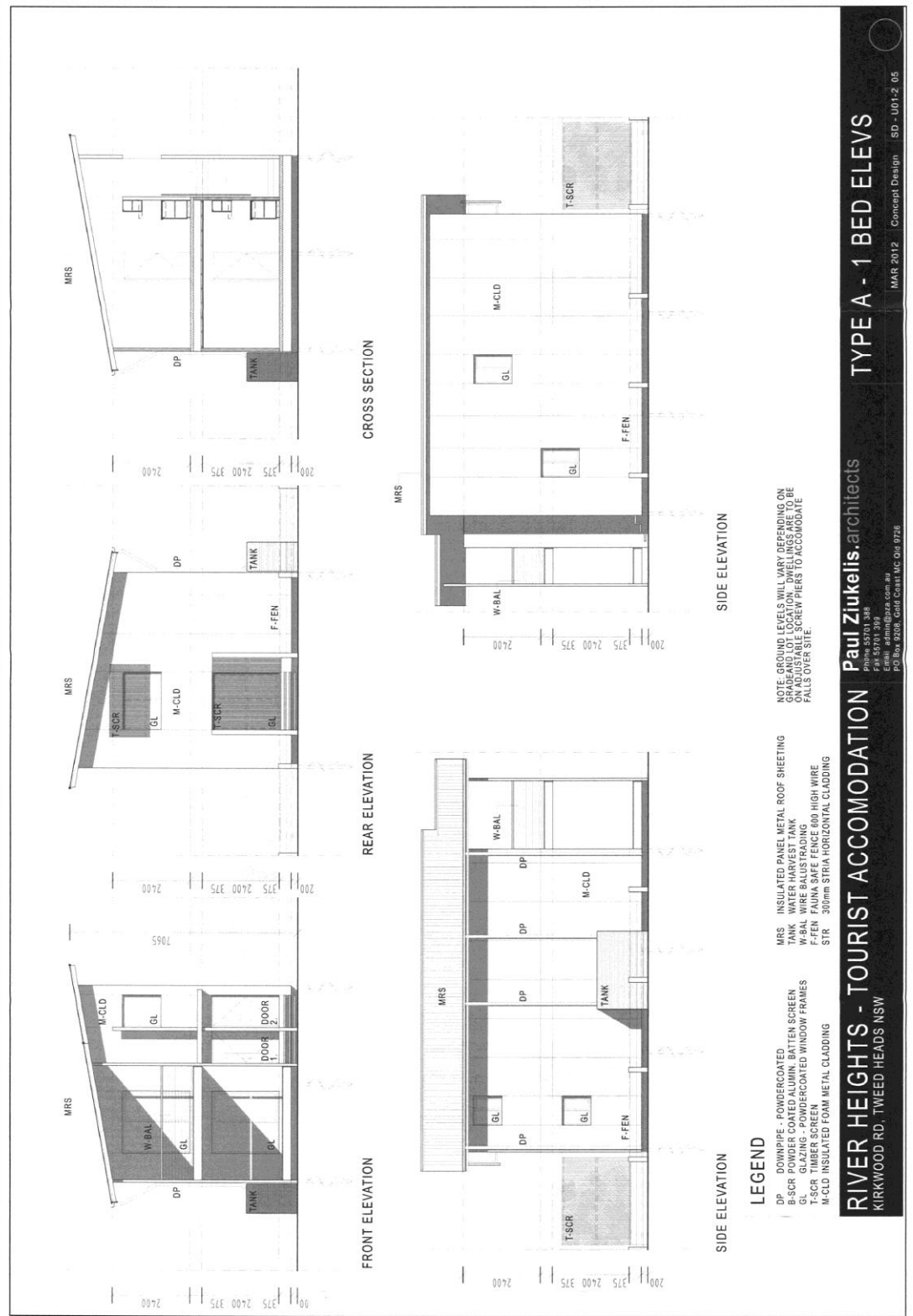
Paul Ziukelis architects

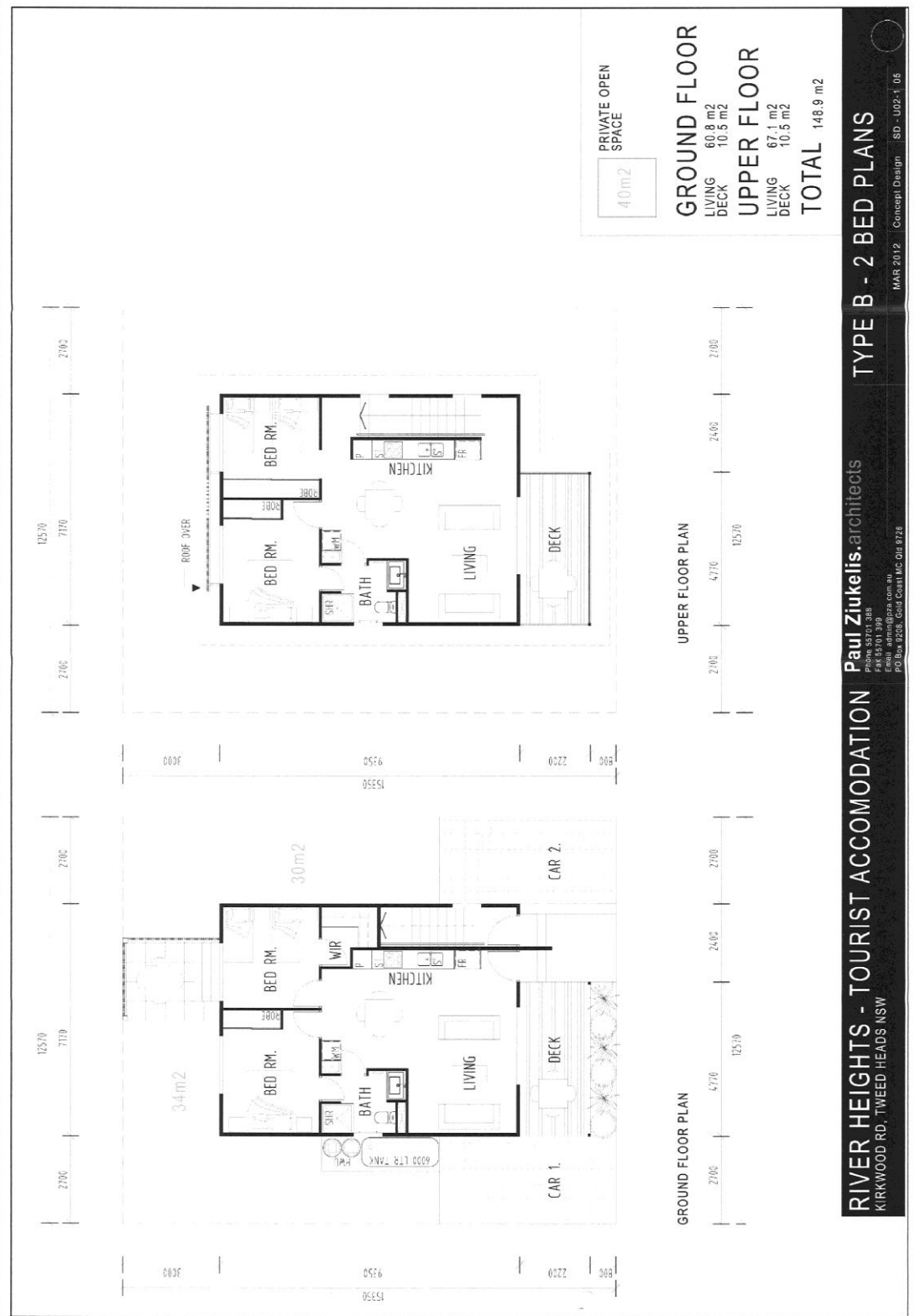
RIVER HEIGHTS - TOURIST ACCOMMODATION

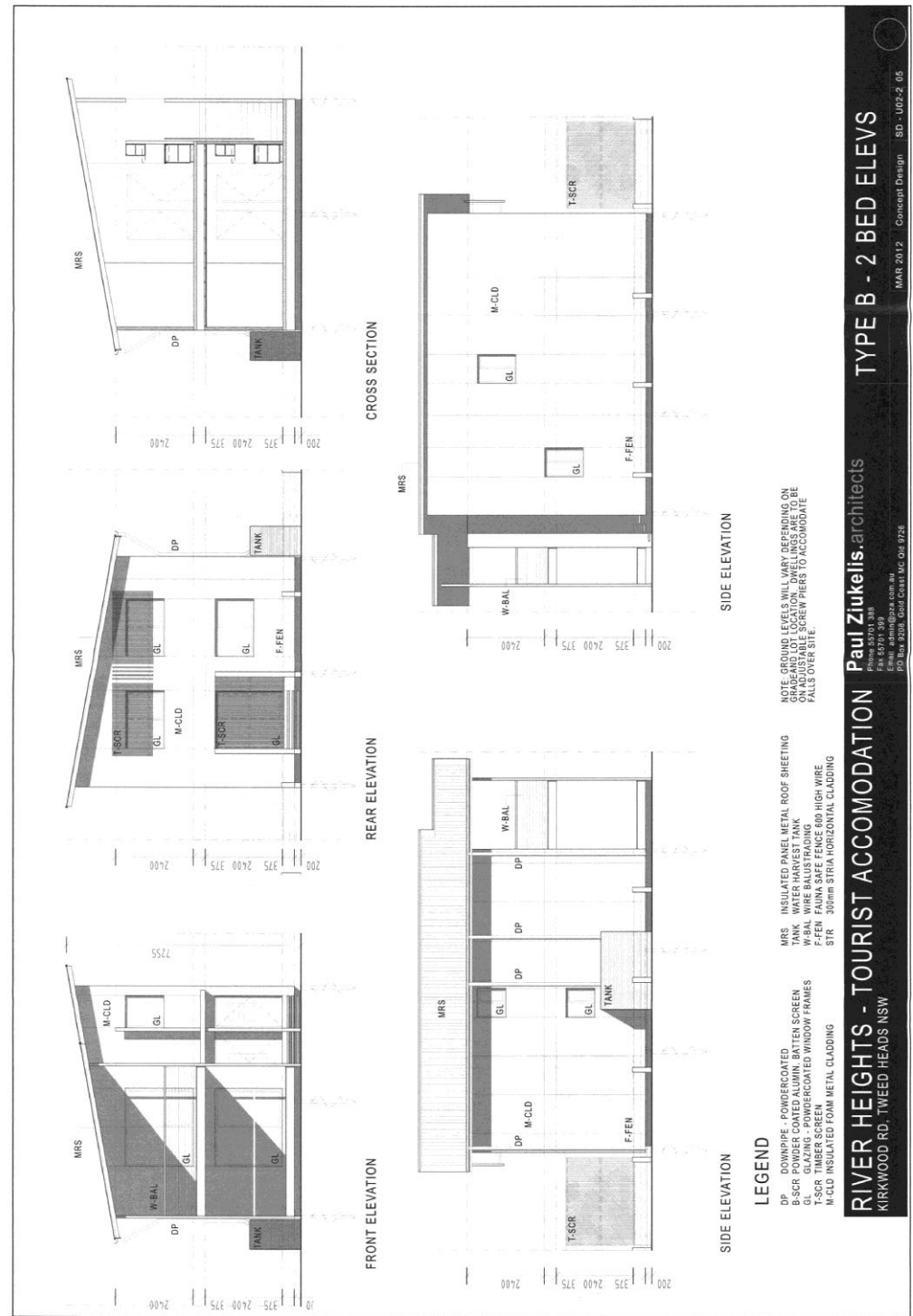
KIRKWOOD RD, TWEED HEADS NSW

Phone 55701 385  
Fax 55701 398  
Email paul@ziukelis.com.au  
PO Box 8208 Gold Coast MC Qld 4728

MAR 2012 Concept Design SD - U01-1 05

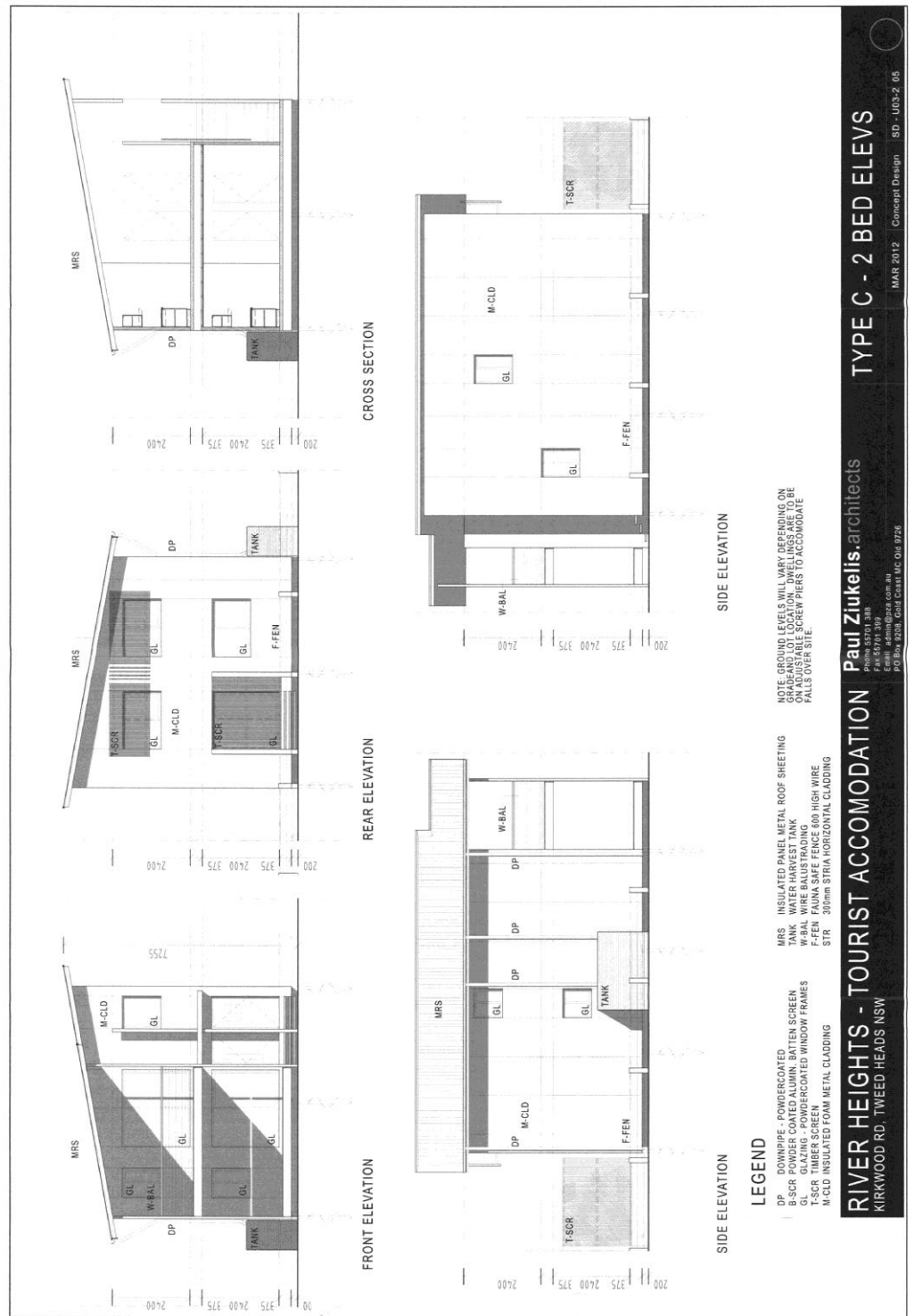




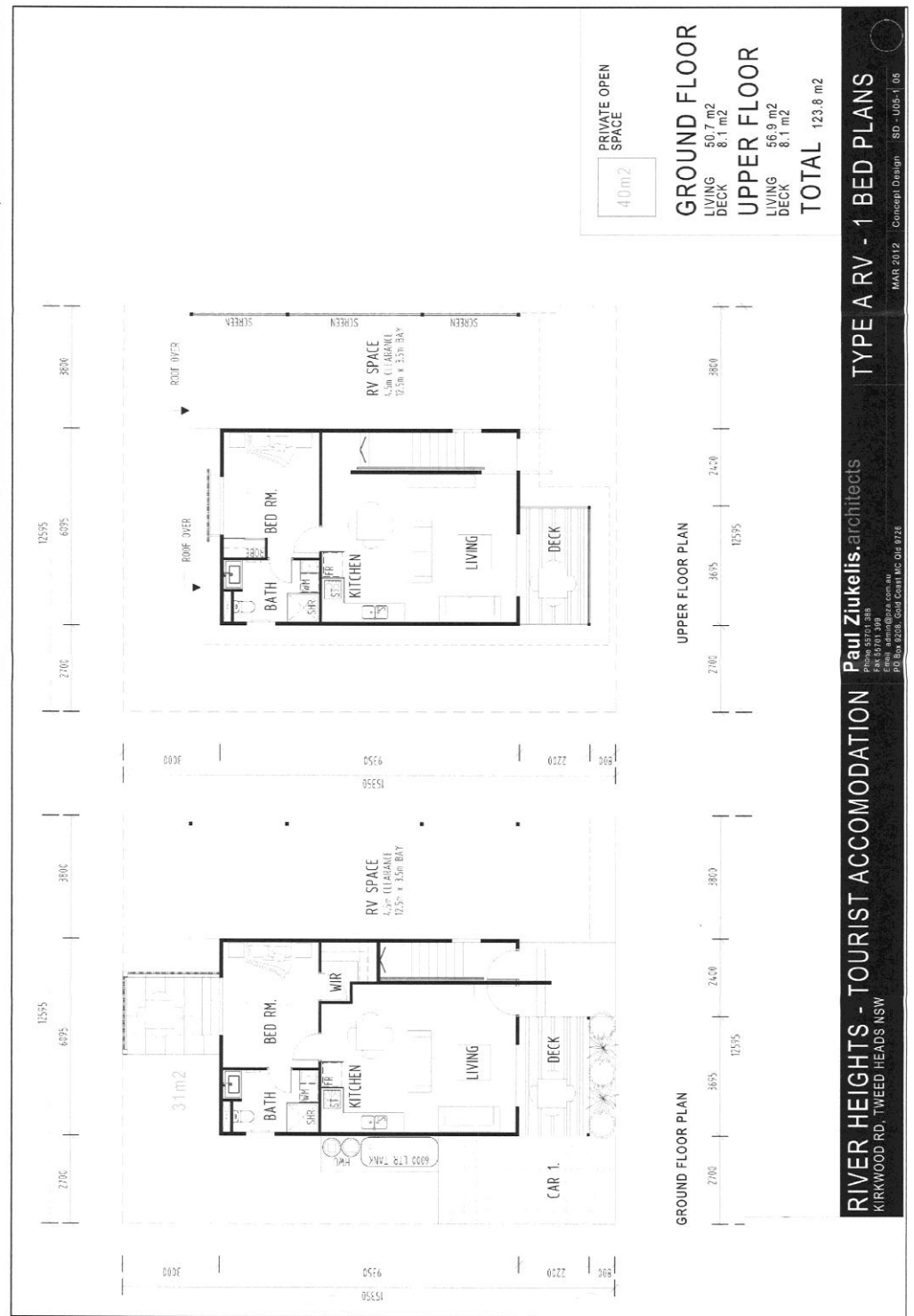


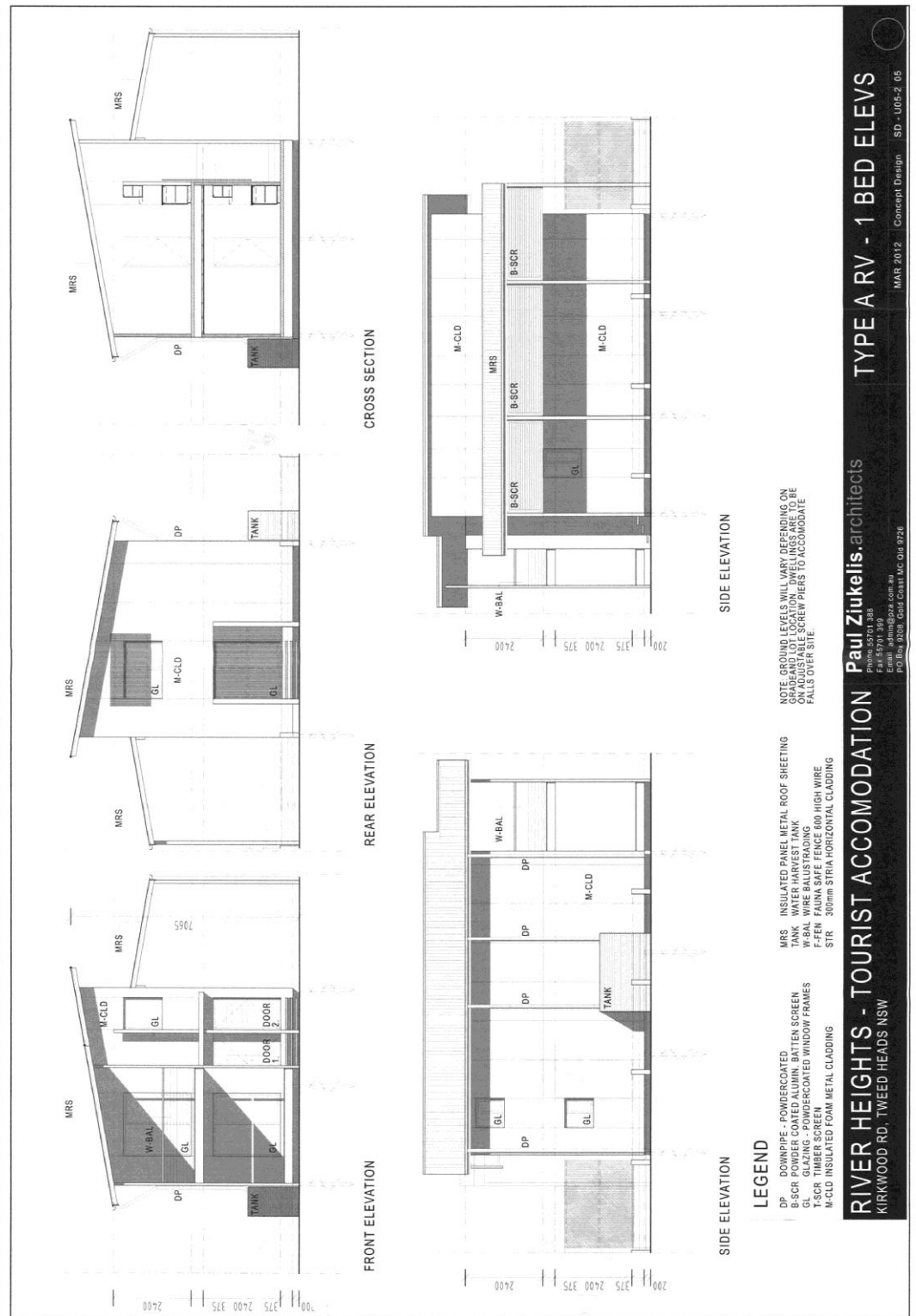


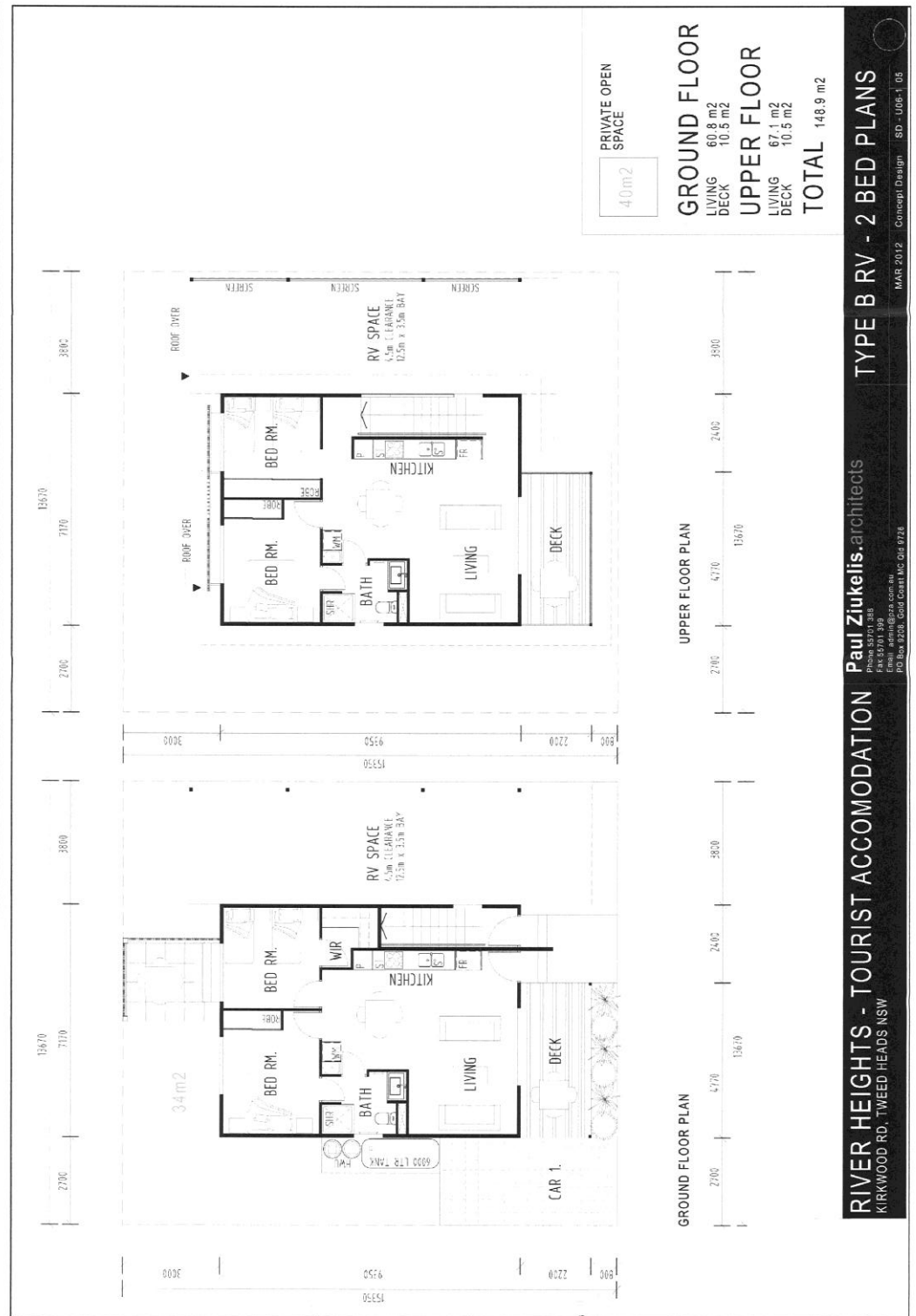






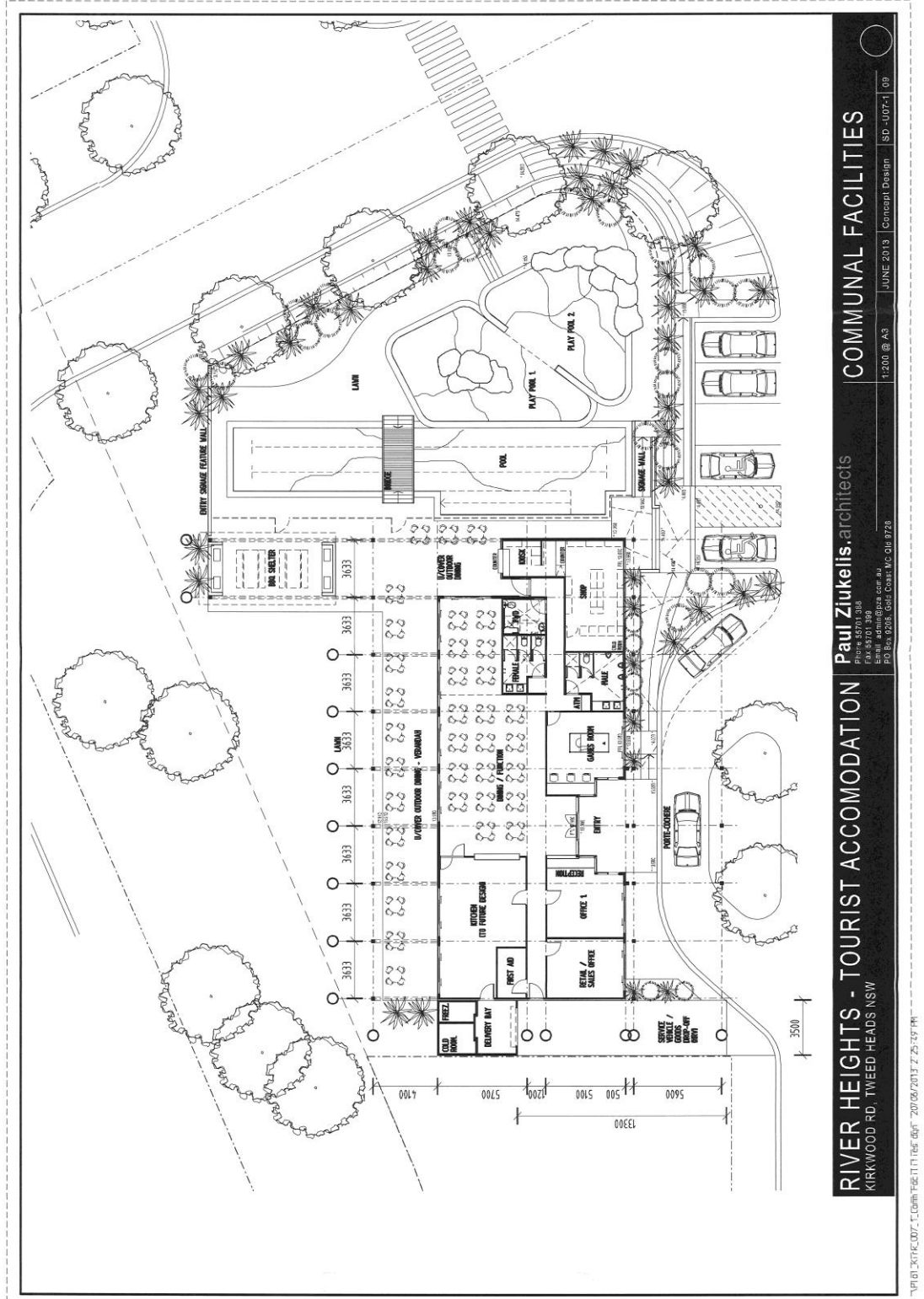


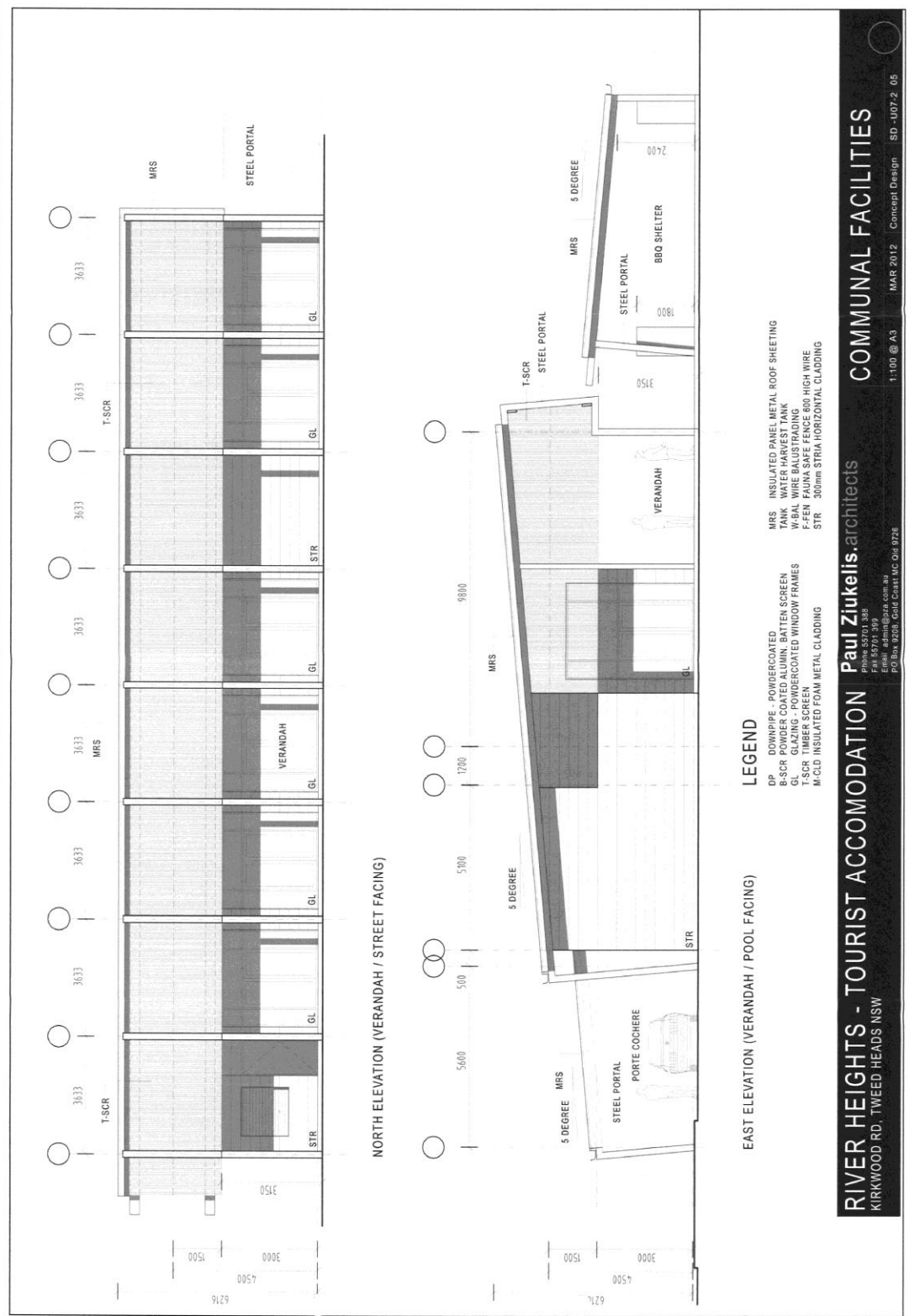




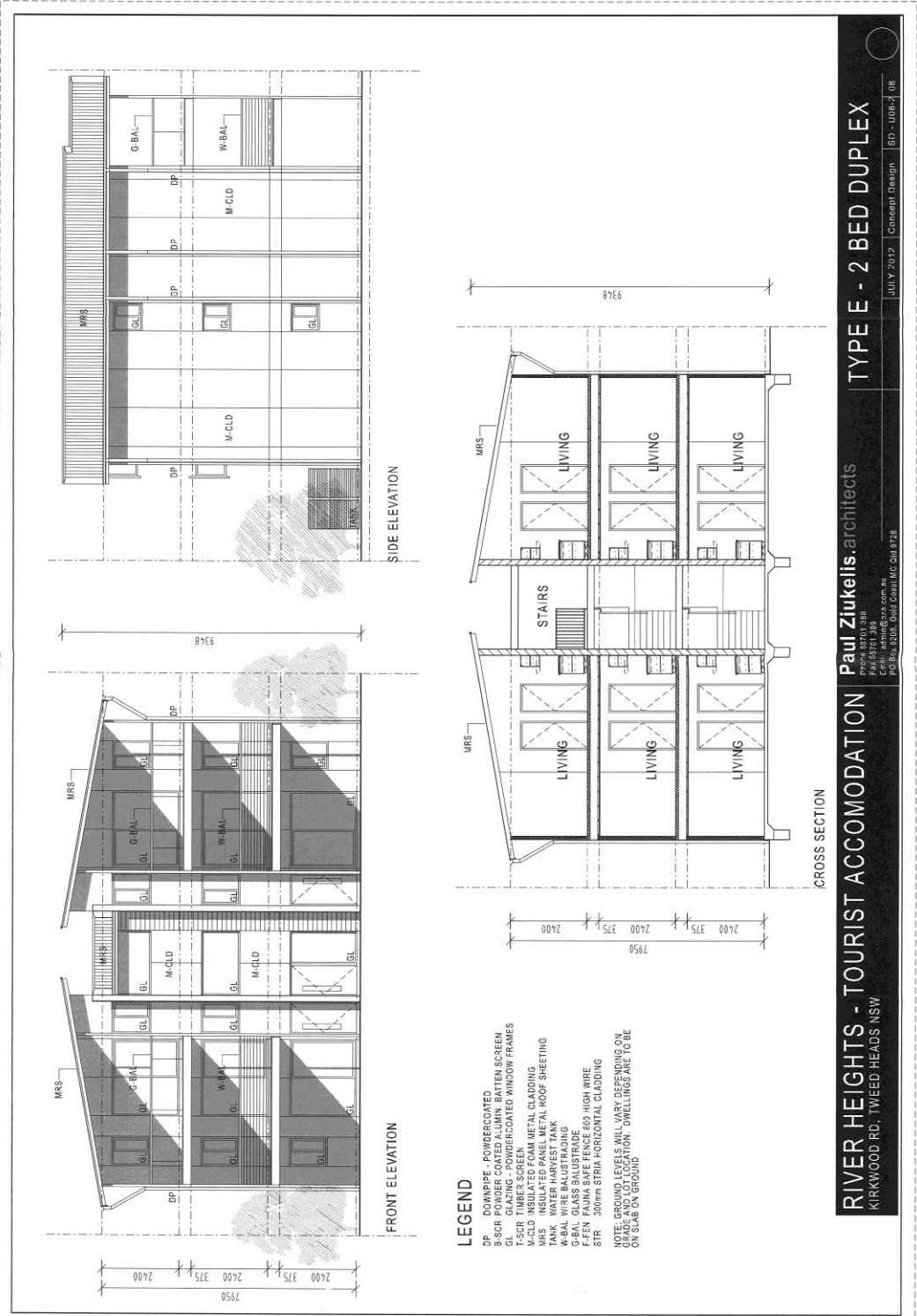












## CONSIDERATIONS UNDER SECTION 79C OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979:

### (a) (i) **The provisions of any environmental planning instrument Tweed Local Environmental Plan 2000**

#### Clause 4 - Aims of the Plan

Clause 4 illustrates that the aims of the TLEP 2000 are to give effect to the desired outcomes, strategic principles, policies and actions of the Tweed Shire 2000+ Strategic Plan. The vision of the plan is *“the management of growth so that the unique natural and developed character of the Tweed Shire is retained, and its economic vitality, ecological integrity and cultural fabric is enhanced”*. Clause 4 further aims to provide a legal basis for the making of a DCP to provide guidance for future development and land management, to give effect to the Tweed Heads 2000+ Strategy and Pottsville Village Strategy and to encourage sustainable economic development of the area which is compatible with the Shire’s environmental and residential amenity qualities.

Council’s initial assessment of the development application considered that the proposal did not meet the provisions of Clause 4 of the LEP, as the proposed development was not considered to be suitable for the subject site. The character of the Tweed was not retained and the development was not considered to be compatible with the Shire’s environmental qualities.

The applicant has provided a response as follows:

*“The site is located within the urbanised area of Tweed Heads South and the locality is characterised as “developed” rather than “natural”.*

*The proposal seeks to make an effective use of the available zoned land while minimising impacts on good quality native vegetation and conserving all EEC’s on the site, plus a buffer.*

*The DCP that relates to the locality specifically indicates that the site is intended to be used as tourist accommodation.*

*The Strategic Plan provides encouragement for tourism and the proposal is considered to strike an appropriate balance between social, economic and environmental considerations.*

*In this regard the proposal is considered to be consistent with Clause 4 of Tweed LEP 2000.”*

Although the surrounding locality is urbanised, the subject site incorporates a large vegetated ridge, visible from adjoining allotments and the wider Tweed Heads area, which is characteristic of the Tweed. It is not considered that the development minimises impacts on the site and the balance between social, economic and environmental considerations is not considered to be appropriate in this instance. Accordingly, the proposal is not considered to meet the provisions of Clause 4, with the

development not considered to be compatible with the environmental and amenity qualities of the Tweed, as detailed later in this report.

#### Clause 5 - Ecologically Sustainable Development

Clause 5 of the LEP relates to ecologically sustainable development. The TLEP aims to promote development that is consistent with the four principles of ecologically sustainable development, being *the precautionary principle, intergenerational equity, conservation of biological diversity and ecological integrity and improved valuation, pricing and incentive mechanisms.*

Council's initial assessment of the proposed development considered that the proposal did not meet the provisions of Clause 5, with inadequate assessment undertaken to determine the full extent of potential impact upon the environment and surrounding locality.

The applicant has provided a response as follows:

*"The applicant has provided a Revised Stormwater Management Plan, Ecological Assessment and Visual Impact Assessment to provide additional information for Council's assessment. Each of these reports indicate that the impacts of the development are able to be mitigated and in the case of visual impact is compatible with the character of the surrounding area. In our opinion the proposed earthworks will improve the existing situation where a very high concrete wall exists in a highly visible area at the northern boundary."*

Having undertaken a detailed assessment of the latest proposal and as noted within the body of this report, the proposed development is not considered to meet the provisions of Clause 5, particularly given the likelihood of negative ecological impacts associated with the application.

#### Clause 8 – Consent Considerations

- (1) This clause specifies that the consent authority may grant consent to development (other than development specified in Item 3 of the table to clause 11) only if:
  - (a) *it is satisfied that the development is consistent with the primary objective of the zone within which it is located, and*
  - (b) *it has considered that those other aims and objectives of this plan (the TLEP) that are relevant to the development, and*
  - (c) *it is satisfied that the development would not have an unacceptable cumulative impact on the community, locality or catchment that will be affected by its being carried out or on the area of Tweed as a whole.*

Council's initial assessment concluded that the proposed development is not supported as it does not meet the provisions of Clause 8(1)(a), 8(1)(b) or 8(1)(c).

In response to Council's initial comments, the applicant noted the following:

*"Clause 8 contains matters for the Consent Authority, however we do not agree with the conclusions in relation to the consistency with the zone objectives and other clauses of the LEP (refer below).*

*The cumulative impacts of the development do not appear to be fully considered and balanced with potential positive cumulative impacts which may include:*

- *The long term retention and maintenance of the ecologically significant parts of the site and the proposed ecological buffers including removal of weeds.*
- *Reduction of the visual impact presented by the existing 27-28m high batter to the north by regrading the site, resulting in batters at the western boundary ranging in height from only 4m to 10m in height.*
- *The creation of an economic use of the land which will make a positive contribution to the tourist market in the area and the local economy generally."*

Having undertaken a further assessment of the latest proposal, it is noted that in this instance, the subject site is part zoned 6(b) Recreation and part zoned 2(e) Residential Tourist, the primary objectives of which are outlined in Clause 11 assessment below. Assessment against Clause 11 concludes that the proposed development is consistent with the primary objective of the 6(b) zone.

Other relevant clauses of the TLEP have been considered elsewhere in this report and it is not considered that the proposed development complies with the aims and objectives of each.

The positive impacts have been taken into consideration however, it is considered that the negative impacts far outweigh the positive outcomes, as noted later in this report. Therefore, the proposal is considered to have an unacceptable cumulative impact on the locality and community in general.

#### Clause 11 - Zone objectives

The subject site has two zonings. The majority of the site is zoned 6(b) Recreation and a small part of the site in the south western portion is zoned 2(e) Residential Tourist.

The primary objective for land zoned 6(b) Recreation is:

- *to designate land, whether in public or private ownership, which is, or may be used primarily for recreational purposes*

The primary objective for land zoned 2(e) Residential Tourist is:

- *to encourage the provision of family orientated tourist accommodation and related facilities and services in association with residential development including a variety of forms of low and*



*medium density housing and associated tourist facilities such as hotels, motels, refreshment rooms, holiday cabins, camping grounds, caravan parks and compatible commercial services which will provide short-term accommodation and day tourist facilities.*

The initial assessment acknowledged that the proposed development is best defined as Tourist Accommodation, pursuant to the provisions of the Tweed LEP 2000. However, despite Tourist Accommodation being permissible with consent in both zones, the proposed development was not considered to meet the primary objective of the 6(b) zone. In terms of the 2(e) zone, the proposal was considered to be consistent with the primary zone objectives.

The applicant has provided a response as follows:

*"In relation to compliance with the zone objectives we submit that Tourist Accommodation is a recreational use in itself (ie. it is an activity that holiday makers partake in, on vacation). For example, visitors may rest and recreate in the accommodation and facilities provided on the site. This interpretation is the same basis on which other accommodation uses for tourists, such as caravan parks, have been approved by Council on other sites zoned 6(b).*

*The tourist accommodation use is 'not antipathetic' to the zone objectives. Refer to Schaffer Corporation Ltd v Hawkesbury City Council (1992) 77 LGRA 21. The tourist accommodation use is consistent with the elements considered in Gillespies v Warringah Council (2002) 124 LGERA 147, (ie. '1. agreeing or accordant; compatible; not self-opposed or selfcontradictory; 2. consistently adhering to the same principles, course etc.').*

*We are also aware of a tourist accommodation development approved by Council also on land zoned 6(b) to the north of the site (0006/2001DA).*

*We are aware of a recent (December 2012) rezoning of land to the north of the site from 2(a) to 6(b) for the purpose of facilitating a Motel development.*

*The Locality Plan in Tweed DCP 2008, Section B3 clearly shows the site as being required for Tourist Accommodation.*

*Accordingly we do not accept that the proposed tourist accommodation use is inconsistent with the zone objectives. This is supported by Council's previous approvals of similar developments on land zoned 6(b)."*

Following a review of the applicant's latest proposal, the development is considered to meet the provisions of the zone. As such, Clause 11 is satisfied.

#### Clause 15 - Essential Services

Clause 15 of the TLEP requires that Council be satisfied that the subject land has the benefit of essential services before issuing consent. Issues

raised in this regard are discussed later in this report. In summary, Council's initial assessment considered that insufficient information was provided for Council to be satisfied that the provisions of Clause 15 have been met.

In response, the applicant noted the following:

*“The advice from the Project Engineer is that they have had extensive consultation with Council Engineers and concluded that the site can be adequately serviced by all normal urban infrastructure.”*

Council's Water Unit has undertaken an assessment of the latest proposal and has advised that the proposal has not addressed previous concerns in relation to water and sewer supply. As such, it is not considered that the provisions of Clause 15 have been met.

#### Clause 16 - Height of Building

Clause 16 of the TLEP requires development to be carried out in accordance with the height limitation plan. The subject land is identified as having a three storey height limit, with an objective to ensuring that *the height and scale of development is appropriate to its location, surrounding development and the environmental characteristics of the land.*

The proposed development is considered to comply with the height provisions of Clause 16 in that one, two and three storey buildings are proposed.

#### Clause 17 - Social Impact Assessment

Clause 17 of the TLEP relates to social impact assessment, with the objective to ensure proper consideration of development that may have a significant social or economic impact. The initial assessment of the proposed development considered that proper consideration of the social impacts arising from the development had not been undertaken. Further detail is provided in this regard under the DCP A13 heading. In summary, it is considered that the applicant's latest proposal satisfies Clause 17.

#### Clause 22 – Development Near Designated Roads

Clause 22 of the TLEP applies to the proposed development, because the subject site has frontage to a designated road (Pacific Highway / Motorway). The initial assessment of the proposal against the provisions of Clause 22(4) considered the development to be acceptable, with the exception of Clause 22(4)(e) and 22(4)(f), as noted below:

- (e) the development is of a type that is not sensitive to traffic noise or, if it is, it is located or adequate measures are included to ameliorate any potential noise impact, and*

The proposed development is considered to be of a type that is sensitive to traffic noise. Although the applicant proposes to incorporate appropriate noise attenuation measures in the construction of the units,

the applicant's initial proposal was considered to have insufficient information with regard to Clause 22(4)(e) have been met.

- (f) *the development would not detract from the scenic values of the locality, particularly from the point of view of road users, and*

The applicant's initial application stated that the '*proposed development will incorporate contemporary design and quality landscaping which will not detract from the scenic amenity of the locality.*' This statement was not supported. The proposed development incorporated extensive cut of the site (27m) which would remove the majority of the mature trees covering the hilltop. The proposed 'quality landscaping' was not considered to be adequate in terms of the loss of vegetation, with the large rock batters on the northern, western and southern portions of the site having limited opportunity for plantings.

Following the deferment of determination, the applicant provided a response as follows:

*"We note that Council has no issue with the access, parking, or future upgrade requirements of this Clause. The road traffic noise issue has been dealt with separately by the Acoustic Engineer. Council indicates that the proposal will adversely impact upon the scenic amenity from the point of view of road users. It appears that Council have not considered the following points:*

- *The existing 27m-28m high batter located immediately to the north of the site (Kirkwood Road project) will be reduced to a batter approximately 4m to 10m in height and landscaped.*
- *The proposed batters at the western (high) side of the site will range from 4m to 10m in height, at a slope of 1:2 and will be vegetated at the top, bottom and where possible on the face.*
- *The existing vegetation at the western side (skyline) 10m in depth will be retained.*
- *The high conservation value vegetation and a 50m ecological buffer will be retained.*

*In addition a Visual Impact Assessment has been prepared to further assist Council in the assessment of visual impact. The report concludes that the visual impacts of the proposal are considered to be compatible with the existing visual context."*

With regard to Clause 22(4)(e), the applicant has provided additional information in relation to noise attenuation measures. The additional information is considered to satisfy Clause 22(4)(e).

As noted within the visual impact assessment later in this report, the proposed extent of cut and loss of vegetation from the site is not considered to meet the provisions of Clause 22(4)(f), in that it is considered to detract from the scenic values of the locality.

Whilst the visual impact of the existing shotcrete wall is acknowledged, it is not considered acceptable to balance this with the proposed extent of earthworks and subsequent loss of vegetation from the subject site. The potential visual impacts would not only be seen from the Motorway approaches, but also from other main roads in the surrounding locality, such as Kennedy Drive and from Boyd's Bay bridge (refer to Figure 4 below).



**Figure 4 – view of site (circled in red) from Boyd's Bay bridge**

#### Clause 23 – Control of Access

The objective of Clause 23 is to control access to designated roads. As noted in the initial assessment, the proposed development does not initially involve any access to or from the Motorway. Direct access is proposed via the western Kirkwood Road extension, which will eventually incorporate an interchange with the Motorway. The RMS has raised no objection to the long term access provisions, thereby satisfying Clause 23.

#### Clause 32 – Aircraft Noise

Clause 32 provides objectives to prevent certain noise sensitive developments from locating in proximity to the airport and its flight path, as well as to minimise the noise impact from the operation of the airport on development in its vicinity. Clause 32 applies to land within the 20 or higher ANEF contour. The subject site is mapped as being located within the 25 – 30 ANEF contour and as such, Clause 32 is applicable to the proposed development. Clause 32(3) is considered relevant to the assessment of this application.

*(3) Consent must not be granted to development for the purpose of a caravan park, child care centre, hospital or educational establishment or for residential development (including subdivision for residential purposes, but not including the erection or use of a dwelling house) within the 25 or higher ANEF contour.*

Council's initial assessment of the proposal found that the development was considered to be more characteristic to residential development than that of a hotel, motel or hostel. As such, it was considered that the development did not meet the provisions of Clause 32(3).

Following deferment of the determination of the proposal, the applicant provided the following response:

“Council has made an assessment that the proposal is of residential character and therefore Clause 32(3) applies. We do not agree for the following reasons:

- The proposal is development for the purpose of tourist accommodation.
- Residential development is prohibited on the site.
- The buildings are to be constructed with appropriate acoustic treatments.
- Tourist accommodation visitors do not require the same level of acoustic amenity as a residential use.
- Note that as per Hotels, Motels and Hostels, the proposed Tourist Accommodation buildings are capable of being acoustically treated.”

An assessment of the latest proposal was undertaken against the provisions of Clause 32(3) of the Tweed LEP 2000.

Council officers remain of the opinion that despite that proposal being defined as tourist accommodation, the nature of the proposal is more characteristic to that of residential development. As such, Clause 32(3) is considered to be applicable and accordingly, the application should not be granted consent. To do otherwise is considered to be a breach of duty of care for future occupants of the development, with particular regard to amenity issues arising from the proposal's locality.

This issue was raised in *Port Stephens Shire Council v Booth & Ors*; *Port Stephens Shire Council v Gibson & Anor* [2005] NSWCA 323 , whereby it was noted that:

*“Council failed to do what s90 of the EPA Act required because of an “uninformed and mistaken understandings of the implications of the 2002 ANEF in respect of which they had taken no appropriately qualified advice”, including that the Panel inappropriately used the concept of a tourist facility when the development proposal “incorporated many characteristics of residential development” and was for substantially increased intensity of development at odds with the situation within the 25 contour.”*

In terms of use it was noted that:

*“the proposed use of the cabins for up to 150 days “encroaches upon residential use”.”*

In addition, the court ruling noted that:

*“The nature of the proposed Fisherman's Village, as known to the Council, was closer to that of a residential development than the building type hotels, motels and hostels, as is evident from the permissible occupation for 42 consecutive days or an aggregate of 150 days in any twelve months.”*

Tweed Council's standard condition for short term tourist accommodation is as follows:

*"The occupancy of the development is restricted to short-term tourist accommodation only. For the purposes of this development, short-term accommodation means temporary accommodation for holiday or tourist purposes which for any one person is restricted to a period of accommodation not exceeding forty two (42) consecutive days with an interval of at least fourteen (14) days between occupancies and not exceeding a total of ninety (90) days in any twelve (12) month period."*

Despite the fact that Council's overall limit (90 days) is lower than the 150 day limit dealt with in the Court case mentioned above, the principle is still the same. That is, the proposed development is considered to be more characteristic to residential development than that of a hotel, motel or hostel.

As such, it is considered that the consent authority has a duty of care to treat the development as a type of residential development within the 25 – 30 ANEF contour. Therefore, the proposed development is not considered to meet the provisions of Clause 32(3).

It is also noted that the Gold Coast Airport Pty Ltd does not support the proposed development, regarding it as an inappropriate activity for the site and that consent should not be granted. More detailed comments from the GCAPL are provided later in this report, as is a detailed assessment with regard to potential noise impact from aircraft noise.

#### Clause 34 - Flooding

Clause 34 of the TLEP provides objectives to minimise future potential flood damage by ensuring only appropriate compatible development occurs on flood liable land. Whilst 34% of the subject site is identified as being prone to flooding, this relates to the lower SEPP 14 area. The proposed tourist accommodation is proposed above the flood design level. Council's initial assessment found that no further action is required in this regard.

#### Clause 35 - Acid Sulfate Soils

Clause 35 relates to Acid Sulfate Soil (ASS) management. Council's GIS indicates that the site is classified as Class 2 and Class 5 soils. The applicant's initial proposal included an Acid Sulfate Soil Management Plan for the proposed development. Council's Environmental Health Unit raised no objections to the proposal in this regard, subject to conditions being applied if the application is to be approved.

#### Clause 38 – Future Road Corridors

The objective of this clause is to cater for the alignment of and development in proximity to, future roads. Consideration must be given to the effect of development on the future alignment of the road corridor.



Council's initial assessment raised concerns with land forming and cultural heritage issues, which would likely impact upon the proposed access to the site.

The applicant's latest proposal makes no changes to the proposed development in terms of landform and cultural heritage issues remain unresolved. As such, it is considered that the proposed development has not satisfied Clause 38.

#### Clause 39 - Remediation of Contaminated Land

The objective of Clause 39 is to ensure that contaminated land is adequately remediated prior to development occurring. The applicant initially provided a Preliminary Contaminated Land Investigation report. Based on the investigation, the majority of the site appears to have been used for cattle grazing and banana cultivation in the 1960's. The report recommended that a detailed site contamination investigation be undertaken.

As such, a Detailed Site Contamination report was prepared for the applicant's initial proposal. This report concluded that in consideration of the potential soil contamination associated with the former landuse, the site is considered suitable for the proposed tourist accommodation land use and that no further investigation or remediation is required.

Council's Environmental Health Unit's initial assessment raised no objections to the proposal in this regard.

#### Clause 39A Bushfire Protection

The entire site is mapped as being bushfire prone, due to the existing vegetation located on the site. The intent of this clause is to minimise bushfire risk to built assets and people and to reduce bushfire threat to ecological assets.

A Bushfire Threat Assessment report was initially provided by the applicant. Being Integrated development (tourist accommodation), the application was referred to the Rural Fire Services (RFS) for assessment. The RFS did not initially provide a Bushfire Safety Authority, requiring further information on a range of issues.

The applicant's latest proposal was again referred to the RFS and a subsequent Bushfire Safety Authority has been issued, subject to compliance with conditions.

Despite the RFS providing a Bushfire Safety Authority, it is also noted that the Planning for Bushfire Protection guidelines require the identification of any significant features on the property, threatened species and Aboriginal relics. As noted elsewhere in this report, the matter of cultural heritage and impact upon threatened species remains unresolved.

As such, it is not considered that the proposal satisfactorily complies with the bushfire protection clause.

#### Clause 44 – Development of Land Within Likely or Known Archaeological Sites

Clause 44 relates to the development of land that is likely or is a known archaeological site, and has specific requirements for the consent authority.

- (1) The consent authority may grant consent to the carrying out of development on an archaeological site that has Aboriginal heritage significance (such as a site that is the location of an Aboriginal place or a relic within the meaning of the National Parks and Wildlife Act 1974), or a potential archaeological site that is reasonably likely to have Aboriginal heritage significance only if:*
  - (a) it has considered an assessment of how the proposed development would affect the conservation of the site and any relic known or reasonably likely to be located at the site prepared in accordance with any guidelines for the time being notified to it by the Director-General of National Parks and Wildlife, and*
  - (b) except where the proposed development is integrated development, it has notified the local Aboriginal communities (in such a way as it thinks appropriate) of the development application and taken into consideration any comments received in response within 21 days after the notice was sent, and*
  - (c) it is satisfied that any necessary consent or permission under the National Parks and Wildlife Act 1974 has been granted.*

Council's initial assessment considered that the proposal did not comply with the provisions of Clause 44, given that a thorough cultural heritage assessment was not undertaken.

The Panel resolved to defer the determination of the application to allow the applicant to undertake the assessment.

In response, a Cultural Heritage Assessment and Test Excavation Report was submitted by the applicant in September 2013, with the applicant concluding that *"...the site does not contain any evidence of cultural or physical heritage significance. The project will not impact on any features of high intangible (non-physical) cultural significance and there will be no impacts to physical cultural heritage (Aboriginal objects) if the project were to proceed."*

As noted later in this report, the applicant's latest proposal was forwarded to the NSW Office of Environment & Heritage (OEH), particularly in relation to Clause 44(1)(c). OEH have since advised that they are *"...not in a position to provide comment on the need or otherwise for any approvals under the NPW Act for this proposal. The decision is the responsibility of the proponent."*

It is also noted that the Tweed Byron Local Aboriginal Land Council (TBLALC) has raised concerns with the applicant's disregard for the cultural importance of the site and the community consultation associated with the applicant's Cultural Heritage Assessment. OEH has noted that the cultural significance and management requirements should be considered by the consent authority.

Whilst the cultural heritage expertise of those involved with the applicant's Cultural Heritage Assessment is recognised, the issue of proper community consultation is unresolved, as is the issue of (intangible) cultural significance. As such, it is not considered that the provisions of Clause 44 have been satisfied.

#### Clause 47 Advertising Signs

Council's initial assessment noted that the applicant has not directly acknowledged any signage for the proposed development. However, development plans did identify two large signage walls at either end of the pool, as well as signage for the shop within the communal facilities. No details were provided to allow further assessment of the application against the provisions of Clause 47.

In response, the applicant has advised that no signage is proposed as part of this development application and that a separate application will be submitted for signage at a later date.

#### State Environmental Planning Policies

##### **SEPP (North Coast Regional Environmental Plan) 1988**

#### Clause 32B: Coastal Lands

The proposal is considered to comply with clause 32B as it does not impede on access to the foreshore and does not result in any shadow on the foreshore.

#### Clause 75: Tourism development

Council's initial assessment of the proposed development raised several concerns with the proposal's compliance with Clause 75. The issues of concern related to: site access provisions; scenic impacts associated with the proposed earthworks; water and sewer concerns; and the lack of sensitivity to environmental features on the site.

The applicant's latest proposal incorporates the following comments with regard to Clause 75:

*“(a) - The landforming and cultural heritage issues have been previously discussed. The proposal provides suitable access.*

*(b) – Not Applicable.*

*(c) – The visual impact of the proposal has previously been discussed. The proposal will improve the existing situation by removing the very high concrete retained structure to the north. Appropriate measures are*

*proposed to mitigate impacts on the natural environment including minimising impact on native vegetation and preserving the EEC vegetation on the site.*

*(d) – The Engineering Report indicates that all normal urban services may be provided to the development.*

*(2) – The proposed earthworks are required to provide practical access to the site from the extensive earthworks that has already been undertaken immediately to the north of the site. The proposal will retain existing vegetation at the top of the proposed batter and the proposed buildings will be positioned below the skyline. It is considered that the proposal represents an appropriate balance between the need to conserve vegetation, improve visual amenity of the area and deliver a positive economic outcome for the locality.*

*(3) – Not applicable.*

*In summary, the proposed development is considered to be not inconsistent with the relevant considerations under Clause 75 of the North Coast REP 1988.”*

It is not considered that the applicant's latest proposal adequately satisfies Clause 75. Landforming, cultural heritage and access issues remain unresolved. The applicant's visual impact assessment is not concurred with. Council's Water Unit is not satisfied with the proposal in terms of essential services. The proposal is not considered to be sensitive to environmental features or maintain vegetated ridges. As such, it is not considered that the proposal meets the provisions of Clause 75.

### **SEPP No. 14 - Coastal Wetlands**

As noted above and as shown below in Figure 5, the southern eastern portion of the site incorporates a mapped SEPP 14 Wetland.



**Figure 5: Mapped SEPP 14 Wetland (shown in blue hatch)**

Restrictions of the SEPP are as follows:

- (1) *In respect of land to which this policy applies, a person shall not:*
  - (a) *clear that land,*
  - (b) *construct a levee on that land,*
  - (c) *drain that land, or*
  - (d) *fill that land,*

The applicant's initial proposal noted that "...No draining, filling or levee works are proposed within the mapped area. Accordingly, no further assessment or referral is required."

Council's initial assessment acknowledged that no proposed works are actually carried out within the mapped SEPP 14 area and as such, concurrence from the Director-General and referral to the Director of the National Parks and Wildlife is not required. However, although not directly carrying out works within the mapped area, it was considered that the proposal would impact upon the SEPP 14 wetlands.

Following deferment of the determination of the proposal, the applicant provided the following response:

*"Additional information in relation to the access and rates of discharge from the stormwater detention indicate that they are serviceable and will not increase the predevelopment peak discharge rates. The detention basin for Catchment B on the southern side of the site is located in the existing flow path from the site and incorporates measures to disperse the flow of detained water such that erosion of the SEPP 14 wetland will not occur as a result of the proposed development."*

Council's Natural Resource Management (NRM) Unit undertook an assessment of the applicant's proposal, noting the following:

*"The applicant was requested to carefully consider both stormwater quality and quantity post development where it was to be discharged into the SEPP14 wetland area and peripheral vegetated buffer recognised as an EEC. In response a dual purpose bioretention / bioretention basin has been proposed (Basin 2) to service the southern draining sub-catchments to be situated within an area currently occupied by an existing dam and area of regenerating wetland. Whilst the sizing of the basin may be sufficient to manage flow volumes and treat water to an acceptable standard for discharge into aquatic environments (in accordance with Councils Tweed Urban Stormwater Quality Management Plan and Development Design Specification D7 Stormwater Quality subject to assessment by Councils Engineering Unit), there has been no baseline monitoring conducted on the SEPP wetland area to determine assimilation capacity / conditions to ensure post development flows will not interrupt or have a detrimental impact on*

*the integrity and function of the wetland. This would be considered to be particularly important given the extensive degree to site modification, proposed loss of heavily vegetated areas of the site (predominantly within the southern sub-catchment) replaced with impervious service and areas of limited water-holding capacity.*

*Furthermore the current proposal involves construction of weir and scour protection to be situated immediately adjacent to the EEC community with negligible setback as shown on layout plan and further detailed on Dwg. No. P044 Issue A.*

*The Ecological Assessment dedicates a section to wetland management however does not appear to provide any meaningful strategies/planning considerations or management options for the wetland. The section summary states that 'a number of management issues have the potential to impact on the wetland in the future', however prescriptive avoidance or mitigations measures have not been proposed. It is noted that Banora Point Tweed Heads DCP B3.11.6 requires applicants to address the impact of stormwater runoff to SEPP 14 Wetland whereby sufficient water quality control techniques and consideration to native vegetation within the buffer are incorporated into an approved water quality control plan which fully satisfies the Tweed Urban Stormwater and Management Plan.*

*As such NRM consider the SMP to be deficient and cannot be confident that that the proposal will not have a negative impact on the SEPP 14 wetland area and surrounding EEC without providing an adequate setback and in the absence of detailed and comprehensive analysis of existing wetland conditions."*

### **SEPP No. 36 - Manufactured Home Estates**

Concern was raised during the pre-lodgement meeting with respect to the proposal being a manufactured home estate, which would be prohibited due to aircraft noise provisions under Clause 32 of the Tweed LEP 2000.

In this regard, the applicant's initial proposal noted the following:

*"The construction methodology of the proposed units will include on-site construction of the units. The proposed buildings will require Construction Certificates and do not comprise 'manufactured homes' and the proposed development is not a 'manufactured home estate'."*

As such, SEPP 36 does not apply to the proposed development.

### **SEPP No. 44 - Koala Habitat Protection**

The applicant's initial proposal noted that SEPP 44 applies to the proposed development as the subject site has an area greater than 1 hectare. The applicant also noted that the vegetation on the site

comprises less than 15% native vegetation suitable for Koala habitat and therefore a Koala Plan of Management was not required under SEPP 44.

Council's initial assessment considered that further assessment was required with regard to the presence of potential and core Koala habitat, in light of Council's mapping system identifying the presence of Secondary A koala habitat adjacent to the SEPP 14 wetland and Secondary B habitat on the hill.

Following deferment of the determination of the proposal, the applicant provided the following response:

*"A detailed consideration of the provisions of State Environmental Planning Policy No. 44 has been provided and it is concluded that the site does not comprise "potential koala habitat" or "core koala habitat" as defined in the SEPP."*

In light of the applicant's SEPP 44 assessment and surveys undertaken on behalf of Council for the Kirkwood Road Upgrade, Council's NRM Unit noted the following:

*"Given the perceived low Koala feed tree density on site, absence of Koala trace, lack of other evidence of Koala activity both on and offsite (within areas considered to be representative of potential habitat) and considering the relatively well documented gradual decline of the Koala within local area, NRM concur with the applicant that there is a low likelihood of occurrence and as such a Koala Plan of Management is not required."*

#### **SEPP No. 55 - Remediation of Land**

As noted above, the applicant's initial proposal provided a Detailed Site Contamination report, which concludes that the site is considered suitable for the proposed tourist accommodation land use. No further investigation or remediation is required.

#### **SEPP No. 64 – Advertising and Signage**

As noted above, the applicant has advised that there is no signage associated with this development application.

#### **SEPP No 71 – Coastal Protection**

The proposed development is located within coastal zone and therefore relevant provisions of the SEPP apply.

Council's initial assessment of the proposed development, in relation to Clause 8 (Matters for Consideration) of the SEPP raised concerns with: suitability of the proposal; impact upon threatened species; and cultural heritage impact.

The applicant's latest proposal is not considered to have adequately addressed the applicable provisions of Clause 8, as noted below:



- (d) *The suitability of the development given its type, location and design and its relationship with the surrounding area*

As detailed throughout this report, the proposed development is not considered to be suitable for the subject site, given its type, location, design and relationship with the surrounding area.

- (g) *measures to conserve animals (within the meaning of the Threatened Species Conservation Act 1995) and plants (within the meaning of that Act), and their habitats*

As noted later in this report, it is considered that the proposal poses an unacceptable risk to the local population of Threatened Species.

- (l) *measures to protect the cultural places, values, customs, beliefs and traditional knowledge of Aboriginals*

Whilst a Cultural Heritage Assessment has been undertaken by the applicant, the outcome and general community consultation process taken is disputed by the TBLALC. As such, this component of Clause 8 is not considered satisfied.

- (n) *the conservation and preservation of items of heritage, archaeological or historic significance*

As noted above, the conclusions and general processes undertaken in terms of community consultation have been questioned by the TBLALC. Therefore, this component of Clause 8 remains unresolved.

In light of the above, the application is not considered to adequately satisfy the matters for consideration under SEPP 71.

### **SEPP (State and Regional Development) 2011**

As originally noted by the applicant, the proposal is not a State Significant Development of Infrastructure as mandated by Schedule 1 or 2.

Part 4 of the Policy deals with Regional Development, for which the Joint Regional Planning Panel is the consent authority. The SEPP refers to Schedule 4A of the Environmental Planning and Assessment (EP&A) Act.

The proposal has a capital investment value of \$30 million. Under Schedule 4A of the EP&A Act, the proposal meets the criteria of 'General Development Over \$20 million'. Therefore, the proposal is properly categorised as Regional Development and the application has been lodged accordingly.

### **SEPP (Infrastructure) 2007**

The proposed development is considered to be a traffic generating development. As such, referral to the Roads and Traffic Authority (now known as Roads and Maritime Services (RMS)) is triggered, in accordance with Column 2 of Schedule 3 of the SEPP.

RMS was provided with a copy of the initial proposal, with RMS noting that assessment against the provisions of Clause 101 and 102 of the

Infrastructure SEPP was required, given the site's location adjacent to a classified road (Motorway).

Council's initial assessment of the development against Clauses 101 and 102 found that the proposal did not satisfy these clauses, with particular regard to traffic noise.

In response to Council's further information request with regard to traffic noise, the applicant's latest proposal incorporated a detailed response within the Acoustic Report, which noted that *"...the acoustic building treatments required for aircraft noise will surpass the treatments required to address road traffic noise."*

Council has undertaken an assessment of the latest proposal, against the provisions of Clauses 101 and 102. Clause 101 relates to ameliorative measures against potential traffic noise within the site arising from the adjacent classified road. Clause 102 of the SEPP includes a requirement for acoustic measures relating to building that are for residential use.

As noted above, the applicant's acoustic assessment has determined that the treatment required for aircraft noise will address any acoustic requirements relating to traffic noise satisfying Clause 101. Although the assessment does not specifically address Clause 102 requirements, it would appear that the measures proposed for aircraft noise would cater for road traffic acoustic requirements.

Council's Environmental Health Unit has raised no further concerns with the proposed development in terms of traffic noise intrusion. With regard to Clause 102, a condition of consent could be applied (if the application was to be approved) requiring a detailed analysis prior to the issue of a Construction Certificate and a Post Construction Noise Impact Compliance Assessment report, to ensure that the provisions of Clause 102 are met.

Clause 104 of the Infrastructure SEPP relates to traffic generating development. Council's initial assessment of the proposal against Clause 104 of the SEPP considered that a more detailed assessment was required with regard to site access.

As discussed later in this report, Council's Planning & Infrastructure Engineer has noted that the applicant's latest proposal makes no changes to the proposed site access. As such, the initial concerns raised by Council remain outstanding and the proposal is not considered to have satisfied Clause 104 of the SEPP.

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

##### **Draft Tweed Shire Local Environment Plan 2012**

It is noted that the draft Tweed Local Environmental Plan 2012 was gazetted (as amended) on 4 April 2014 as the Tweed Local Environmental Plan 2014. The subject application is assessed against the provisions of the Tweed Local Environmental Plan 2014 below:

## **Part 1 Preliminary**

### **1.2 Aims of Plan**

The aims of this plan as set out under Section 1.2 of this plan are as follows:

- (1) *This Plan aims to make local environmental planning provisions for land in Tweed in accordance with the relevant standard environmental planning instrument under section 33A of the Act.*
- (2) *The particular aims of this Plan are as follows:*
  - (a) *to give effect to the desired outcomes, strategic principles, policies and actions contained in the Council's adopted strategic planning documents, including, but not limited to, consistency with local indigenous cultural values, and the national and international significance of the Tweed Caldera,*
  - (b) *to encourage a sustainable, local economy, small business, employment, agriculture, affordable housing, recreational, arts, social, cultural, tourism and sustainable industry opportunities appropriate to Tweed Shire,*
  - (c) *to promote the responsible sustainable management and conservation of Tweed's natural and environmentally sensitive areas and waterways, visual amenity and scenic routes, the built environment, and cultural heritage,*
  - (d) *to promote development that is consistent with the principles of ecologically sustainable development and to implement appropriate action on climate change,*
  - (e) *to promote building design which considers food security, water conservation, energy efficiency and waste reduction,*
  - (f) *to promote the sustainable use of natural resources and facilitate the transition from fossil fuels to renewable energy,*
  - (g) *to conserve or enhance the biological diversity, scenic quality, geological and ecological integrity of the Tweed,*
  - (h) *to promote the management and appropriate use of land that is contiguous to or interdependent on land declared a World Heritage site under the Convention Concerning the Protection of World Cultural and Natural Heritage, and to protect or enhance the environmental significance of that land,*
  - (i) *to conserve or enhance areas of defined high ecological value,*
  - (j) *to provide special protection and suitable habitat for the recovery of the Tweed coastal Koala.*

The proposed development is not considered to be in accordance with the aims of this plan having particular regard to: cultural heritage matters; visual impacts; energy efficiency; scenic quality; and ecological impact.

### **1.4 Definitions**

Under this Plan, the proposed development would be defined as 'tourist

and visitor accommodation’.

#### 1.8A Savings provision relating to development applications

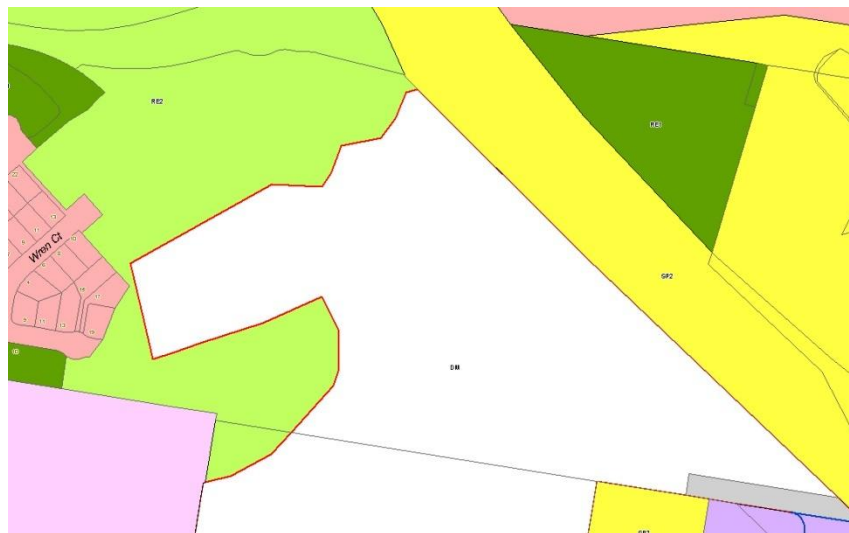
This clause states that if a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced.

With respect to this it is noted that the subject application was lodged with Council in August 2012, before the Tweed Local Environmental Plan 2014 was gazetted on 4 April 2014 and as such this clause is applicable to this development application. Notwithstanding this, the subject application must have regard to the provisions of this document as a proposed instrument pursuant to s79C (1) (a) (ii) of the Environmental Planning and Assessment Act.

### Part 2 Permitted or prohibited development

#### 2.1 Land use zones

The subject site is part zoned as RE2 – Private Recreation under the provisions of this plan. The remainder of the site (shown in white in Figure 6 below) was proposed as an Environmental zone and as such is a Deferred Matter under the new LEP 2014. Until such time that NSW Planning & Infrastructure have finalised their review of Environmental zones on the North Coast, the deferred matter reverts back to the Tweed LEP 2000 zone.



**Figure 6 – LEP 2014 Zoning Map**

#### 2.3 Zone objectives and Land Use Table

The Draft Tweed Local Environmental Plan (LEP) 2012 zones the subject site RE2 Private Recreation. The objectives of the RE2 Zone are as follows:

- *To enable land to be used for private open space or recreational purposes.*

- *To provide a range of recreational settings and activities and compatible land uses.*
- *To protect and enhance the natural environment for recreational purposes.*

Similar to that of the LEP 2000 zoning provisions, the proposed development is permissible with consent in the RE2 zone, and it is considered that the zone objectives are met by the proposal.

#### **Part 4 Principal development standards**

##### **4.3 Height of buildings**

The objectives of this clause include provisions to establish the maximum height for which a building can be designed and ensure that building height relates to the land's capability to provide and maintain an appropriate urban character and level of amenity.

This clause states that the height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map. In this instance the site has a maximum building height of 10m as identified on the building height map.

The three storey buildings (Type E units) are proposed to have a maximum height of 9.348m, which complies with Clause 4.3 of the Draft LEP.

#### **Part 5 Miscellaneous provisions**

##### **5.6 Architectural roof features**

*(1) The objectives of this clause are as follows:*

*(a) to provide high quality urban form for all buildings,*

*(b) to provide flexibility in building height to promote architectural merit and visual interest of roof forms.*

As noted later in this report, the proposed roof forms of the proposed development do not provide sufficient variety or visual interest. Accordingly, the proposed development is not considered to meet the provisions of Clause 5.6 of the Draft LEP.

##### **5.10 Heritage conservation**

*(8) Aboriginal places of heritage significance*

*The consent authority must, before granting consent under this clause to the carrying out of development in an Aboriginal place of heritage significance:*

*(a) consider the effect of the proposed development on the heritage significance of the place and any Aboriginal object known or reasonably likely to be located at the place by means of an adequate investigation and assessment (which may involve consideration of a heritage impact statement), and*

*(b) notify the local Aboriginal communities, in writing or in such other manner as may be appropriate, about the application and take into*

*consideration any response received within 28 days after the notice is sent.*

As noted elsewhere in this report, the matter of cultural heritage impact is unresolved and as such it is not considered that the provisions of Clause 5.10(8) have been satisfied.

## **Part 7 Additional local provisions**

### **7.2 Earthworks**

*(3) Before granting development consent for earthworks (or for development involving ancillary earthworks), the consent authority must consider the following matters:*

*(a) the likely disruption of, or any detrimental effect on, drainage patterns and soil stability in the locality of the development,*

*(b) the effect of the development on the likely future use or redevelopment of the land,*

*(c) the quality of the fill or the soil to be excavated, or both,*

*(d) the effect of the development on the existing and likely amenity of adjoining properties,*

*(e) the source of any fill material and the destination of any excavated material,*

*(f) the likelihood of disturbing relics,*

*(g) the proximity to, and potential for adverse impacts on, any waterway, drinking water catchment or environmentally sensitive area,*

*(h) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development,*

*(i) the proximity to, and potential for adverse impacts on, any heritage item, archaeological site, or heritage conservation area.*

As noted later in this report, there are considerable issues in relation to proposed landforming, as well as potential impact upon the SEPP 14 wetlands, and cultural heritage issues. As such, the proposed development is not considered to meet the provisions of Clause 7.2(3) of the Draft LEP.

### **7.9 Development in areas subject to aircraft noise**

*(1) The objectives of this clause are as follows:*

*(a) to prevent certain noise sensitive developments from being located near the Gold Coast Airport and its flight paths,*

*(b) to assist in minimising the impact of aircraft noise from that airport and its flight paths by requiring appropriate noise attenuation measures in noise sensitive buildings,*

*(c) to ensure that land use and development in the vicinity of that airport do not hinder or have any other adverse impacts on the ongoing, safe and efficient operation of that airport.*

*(2) This clause applies to development that:*

*(a) is on land that:*

*(i) is near the Gold Coast Airport, and*

*(ii) is in an ANEF contour of 20 or greater, and*

*(b) the consent authority considers is likely to be adversely affected by aircraft noise.*

*(3) Before determining a development application for development to which this clause applies, the consent authority:*

*(a) must consider whether the development will result in an increase in the number of dwellings or people affected by aircraft noise, and*

*(b) must consider the location of the development in relation to the criteria set out in Table 2.1 (Building Site Acceptability Based on ANEF Zones) in AS 2021—2000, and*

*(c) must be satisfied the development will meet the indoor design sound levels shown in Table 3.3 (Indoor Design Sound Levels for Determination of Aircraft Noise Reduction) in AS 2021—2000.*

As noted elsewhere in this report, whilst the proposed development may be able to achieve the applicable acoustic measures for aircraft noise, the type of development (being characteristic of residential development) is considered to be unsuitable development within the 25-30 ANEF contour. In addition, the Gold Coast Airport does not support the proposed development, as it is considered to be an inappropriate land use in that location. Accordingly, the proposed development is not considered to comply with the provisions of Clause 7.9 of the Draft LEP.

#### 7.10 Essential services

*Development consent must not be granted to development unless the consent authority is satisfied that any of the following services that are essential for the development are available or that adequate arrangements have been made to make them available when required:*

*(a) the supply of water,*

*(b) the supply of electricity,*

*(c) the disposal and management of sewage,*

*(d) stormwater drainage or on-site conservation,*

*(e) suitable vehicular access.*

As noted under the LEP 2000 assessment, Council's Water Unit is not satisfied with the proposed development with regard to water and sewer supply. Accordingly, the proposal is not considered to comply with the provisions of Clause 7.10 of the Draft LEP.

As the Draft LEP is now considered to be *certain and imminent*, the application is not supported. The proposal is not considered to meet the aims of the plan and has multiple non-compliances with applicable clauses of the draft LEP.



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

Tweed Development Control Plan

Section A1-Residential and Tourist Development Code

Council's initial assessment identified a number of issues with the proposal with regard to Section A1 (Part C – Residential Flat Buildings) of the DCP. The applicant has since provided a response to those issues raised, as noted below.

**1. Variation to Chapter 2, Design Control 1 – Public Domain Amenity (Streetscape)**

***Control E Facades visible from the public domain are to be well designed.***

Council's Initial Comment:

Whilst the proposed development could be justified against the individual components of this control, Council's initial assessment raised concern with the overall streetscape when looking at the development as a whole. The design of each type is very similar and there is very little architectural variation, particularly when you are looking at a length of two storey units on either side of the street. Figure 7 below provides an example of this. It is considered that a better design could have been incorporated to provide different architectural features for each building type to break up the streetscape and provide different points of interest.



**Figure 7 – Elevation of internal street indicating the similar design of each unit.**

Applicant's Response:

The applicant provided the following response:

*“As indicated the proposal is justified against the individual components of the control.*

*The proposal includes multiple design options to provide disparity between building forms. For example there are 7 building types: 1 bed disabled (single storey), 1 bed (2 storey), 2 bed (2 storey), 1 bed RV (2 storey), 2 bed RV (2 storey), 2 bed (alternative 2 storey option) and 2 bed (3 storey) product.*

*Of these 7 designs, there are 4 colour schemes. Therefore there is potential for 28 different options using the drawings as they stand.*

*There are 180 individual buildings and therefore the maximum repetition of each option would be limited to 6 of each throughout the entire site.*

*The streetscape elevation offered in Council's Assessment Report is an extract from the Landscape Plan, and no consideration is shown in the image to colour variation.*

*In such a case, all 4 buildings would receive differing colour schemes, including various roof colours.*

Council's Final Comment:

A variation in colour is only one consideration for a development incorporating 355 units of similar design. A variety of materials and roof designs should also be incorporated to provide an acceptable level of variation to the streetscape. As such, the applicant's request for a variation is not supported.

**2. Variation to Chapter 2, Design Control 1 – Public Domain Amenity (Public Views and Vistas)**

**Control A**      *The location and height of new developments is not to significantly diminish the public views to heritage items, dominant landmarks or public buildings from public places.*

Council's Initial Comment:

As noted elsewhere in this report, the issue of heritage items on the site was resolved at the time of the initial assessment. As such, it could not be determined if the site contained any heritage items.

Applicant's Response:

The applicant provided the following response:

*"A detailed Cultural Heritage Assessment and Test Excavations have been undertaken on the site.*

*Those Reports conclude that there is no evidence to suggest that the site has cultural or physical heritage significance."*

Council's Final Comment:

The issue of cultural heritage remains unresolved, with the applicant concluding that the site has no cultural significance, yet the TBLALC have raised significant concerns in this regard.

The adjoining earthworks (associated with the Kirkwood Road Upgrade) are considered to be important infrastructure works. It should be noted that the shotcrete wall was undertaken as a consequence of earthworks coming across supposed artefacts on the site.

**3. Variation to Chapter 2, Design Control 1 – Public Domain Amenity (Public Views and Vistas)**

**Control B**      ***The location and height of new developments is to be designed so that it does not unnecessarily or unreasonably obscure public district views of major natural features such as the water, ridgelines or bushland.***

Council's Initial Comment:

Whilst it was acknowledged in the initial assessment that the southern part of the site was being retained, insufficient information was provided with regard to cultural heritage issues and impact upon flora and fauna. The proposal will remove the ridgeline and bushland as a result of the proposed extensive earthworks.

Applicant's Response:

The applicant provided the following response:

*"The natural visual qualities of the site have been significantly compromised by the significant earthworks and visually intrusive shotcrete retaining created by Tweed Shire Council road works on the northern side.*

*A Visual Impact Assessment has been prepared by LVO Architecture which provides photomontages from the relevant observation points (Annexure 8). The report concludes that 'the visual impacts of the proposal are considered to be compatible with the existing visual context.'"*

Council's Final Comment:

The applicant's conclusion that the proposal is "...compatible with the existing visual context" is not concurred with. The issue of visual impact is further addressed later in this report. As such, the proposed variation is not supported.

**4. Variation to Chapter 2, Design Control 2 – Site Configuration (Landscaping)**

**Control A**      ***Retain existing landscape elements on sites such as natural rock outcrops, watercourses, dune vegetation, indigenous vegetation and mature trees.***

Council's Initial Comment:

The applicant's comments that "...the existing high conservation vegetation will be retained in the south eastern part of the site" were not considered to justify the non-compliance with this control. Whilst the SEPP 14 area and buffer area is being maintained, Council's initial assessment found that insufficient information was provided to determine the full impact upon the native vegetation and mature trees across the site and as such the non-compliance is not supported.

Applicant's Response:

The applicant provided the following response:

*“Additional Ecological Assessment has been undertaken to determine the impacts on the vegetation contained on the site, including mapping of mature vegetation.*

*The Revised Ecological Report confirms that the development is not likely to have a “significant effect”. The site is relatively isolated in terms of connections to other vegetated areas, being adjacent to the Pacific Highway and in proximity to a number of other designated roads.*

*Adequate ameliorative measures are proposed to offset the loss of mature vegetation which is required to facilitate the development of the site as anticipated by the Locality Plan contained in TDCP B3, Banora Point West – Tweed Heads South.”*

Council's Final Comment:

Council's latest assessment of the proposal, in terms of ecological impact, does not support the proposed development. Accordingly, the proposed variation is not supported.

**5. Variation to Chapter 2, Design Control 2 – Site Configuration (Landscaping)**

***Control C      Locate and design the building footprint to enable the retention of existing trees.***

Council's Initial Comment:

As noted elsewhere in this report, cultural heritage, landforming and flora and fauna issues were unresolved in the initial assessment of the development.

Applicant's Response:

The applicant provided the following response:

*“As previously mentioned, detailed Cultural Heritage Assessments and Ecological Assessments have been completed. The site does not contain any evidence of cultural significance and the ecological impacts are considered to be justified in the context that minimal impacts will be created on the good quality native vegetation on the site and all vegetation comprising an Endangered Ecological Community (EEC) will be retained with buffers.”*

Council's Final Comment:

As noted elsewhere, cultural heritage matters have not been satisfactorily resolved. In addition, the applicant's ecological assessment is not concurred with. As such, the proposed variation is not supported.

**6. Variations to Chapter 2, Design Control 2 – Site Configuration (Topography, Cut and Fill)**

- Control A**      ***Building siting is to relate to the original form of the land.***
- Control E**      ***Site excavation / land forming is to be kept to a minimum required for an appropriately designed site responsive development.***
- Control F**      ***The maximum level of cut is 1m and fill is 1m except for areas under Control J.***

Council's Initial Comment:

The applicant's initial comments were not considered to adequately justify the proposed major variations to these controls. Given the landforming impacts (as discussed later in this report), the proposed variations were not supported. The proposal was not considered to be an appropriately designed site responsive development.

Applicant's Response:

The applicant provided the following response:

*"Council Officers acknowledged from the pre-lodgement stage that significant variations to the landforming controls of TDCP A1 would be required in order to provide access from Kirkwood Road and develop the site.*

*The scale and topography of the site is such that 1m cut and fill control is not realistic.*

*The proposed landforming of the site will achieve practical access and a commercially viable yield from the site. Notwithstanding this, the proposal has been designed to maintain appropriate residential amenity to properties to the west and minimise impacts on good quality native vegetation."*

Council's Final Comment:

Whilst it is acknowledged that 1m of cut / fill is not realistic in this instance, earthworks up to 27m in depth are not considered to be acceptable, in that: the proposal does not relate to the original form of the land; and excavation is not kept to a minimum.

Although the proposed design may be 'commercially viable', the overall impact as a result of the proposed earthworks is not considered to be acceptable. As such, the proposed variation is not supported.

**7. Variation to Chapter 2, Design Control 2 – Site Configuration (Topography, Cut and Fill)**

- Control N**      ***Proposed variations to the controls must demonstrate that the excavation or filling of the site is in harmony with the natural landform / environment and will not adversely affect the adjoining properties.***

Council's Initial Comment:

Given the number of potential impacts and suitability issues raised elsewhere in this report, the initial assessment of the proposed development considered that the development did not meet the provisions of this control in that the excavation is not in harmony with the natural landform / environment.

Applicant's Response:

The applicant provided the following response:

*"The harmony of the natural landform has been compromised by the significant earthworks undertaken at the northern side of the site as part of the Kirkwood Road Extension project. Previous road works for the Pacific Highway have also provided cuts on the eastern side.*

*The proposed earthworks will not adversely affect the adjoining properties to the west as a 10m buffer of vegetation is to be retained along that boundary. In addition, the earthworks will not be visible from the residential properties to the west.*

*The proposal will also remove the unsightly shotcrete retaining structure of the 20m+ high cut located immediately to the north of the site and instead provide a lower, landscaped batter up to the ground levels at the western boundary.*

*Although the earthworks are significant it will represent an improvement on the existing stark appearance of the large shotcrete batter."*

Council's Final Comment:

As noted previously, the use of shotcrete on the adjoining allotment was a direct result of earthworks uncovering Aboriginal artefacts. The original intention was to bench the earthworks and incorporate considerable landscaping to minimise visual impact.

It is not considered acceptable to use the earthworks relating to important infrastructure (Kirkwood Road Upgrade) for the Shire as an excuse for the extent of proposed earthworks. Whilst the proposed development may not adversely affect the adjoining properties to the west, the proposal is not considered to be 'in harmony' with the landform / environment. As such, the proposed variation is not supported.

**8. Variation to Chapter 2, Design Control 9 – External Building Elements (Roofs, Dormers and Skylights)**

**Control A** *Relate roof design to the desired built form by:*

- *using a compatible roof form. Slope, material and colour to adjacent buildings.*

Council's Initial Comment:

Similar to that discussed in Variation 1, the initial assessment considered that the proposed development incorporated a roof design for each building type which was very similar with very little architectural variation,

particularly when you are looking at a length of two storey units on either side of the street. It was considered that a better design could have been incorporated to provide different architectural roof features for each building type to break up the streetscape and provide different points of interest.

Applicant's Response:

The applicant provided the following response:

*"We refer to the above response discussing the variation in building form being up to 28 different design/colour variations over 180 individual buildings, meaning there will only ever be a maximum of 6 buildings of each type that are exactly the same.*

*In relation to the roof theme It is noted that the roof form is intentionally consistent as the proposal is part of a single tourist accommodation development. This is deemed to be a positive, not negative aspect to the design.*

*The roofs have been designed to achieve: a high level of acoustic treatment; positioning of solar panels; and, efficient capture and storage of rainwater.*

*There are 3 different roof colour options provided for variation."*

Council's Final Comment:

Whilst it is acknowledged that the proposal incorporates three different roof colours, it is not considered to be a positive architectural outcome to have 355 units with the same / similar roof design. Therefore, the proposed variation is not supported.

**9. Variation to Chapter 2, Design Control 9 – External Building Elements (Elevations visible from the Public Domain)**

**Control A**      ***Design important elements such as front doors and building entry areas to have prominence in the building elevation and to be clearly identifiable from the street.***

Council's Initial Comment:

Council's initial assessment raised concerns with the applicant's application of this control to the overall site. It was considered appropriate to apply this control to the individual buildings within the site, as a similar design for each building does not allow the units to have prominence or be clearly identifiable.

Applicant's Response:

The applicant provided the following response:

*"The controls of the DCP relate to a residential flat building that would normally have "frontage" to a public road. The proposal is a tourist accommodation project with 180 detached structures to an internal private driveway, not a "street". Unlike a Residential Estate*

*where distinct individual character is sought to encourage visual simplicity for the identification and 'ownership' of property, a Tourist Accommodation Development relies on design characteristics such as symmetry, similarity, cohesion and uniformity to maintain a trademark image, or 'development-specific vernacular' associated to the commercial intent and marketability of its trade – in this case being 'recreational accommodation'. Tourist Accommodation requires a holistic design style for ultimate visual interpretation which extends to, and defines, the limits of the site. It is not unusual for the architecture of such facilities to be similar in appearance of materials, building scale, and site arrangement. The development should not be assessed in relation to residential development. The design is fluent and consistent throughout the development. Issues such as identification can be resolved, not only through the already provided 28 variations in the visual appearance, but also through way-finding signage, street naming and building numbering. It is anticipated that each of the 180 buildings will receive an individual 'botanical' name, based on local and native species from the immediate area. Internal street names are to receive local indigenous names for native North Coast NSW animals."*

Council's Final Comment:

Whilst it is acknowledged that the proposed units will not be located on a public street, it is considered appropriate that a certain degree of variation could be incorporated in the design to allow identification of the individual units, without affecting the design characteristics of this type of development. As such, the proposed variation is not supported.

In summary, the applicant has also noted the following:

*"In addition, although the Development Application was lodged prior to the commencement of Section 79C(3A) of the Environmental Planning and Assessment Act 1979 (as amended), the proposed variations are consistent with the requirements of the amended Act, which require Consent Authorities "to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development"."*

Whilst it is acknowledged that DCP provisions are now considered to be guidelines to provide more flexibility in development, the proposed variations are not considered to be "reasonable alternative solutions" that achieve the objective of the Section A1 controls. As such, the proposed variations are not supported. It is considered that the non support of the proposed variations provides further indication that the proposed development is not suitable for the subject site.

Section A2-Site Access and Parking Code

For Tourist Accommodation, Section A2 of the DCP requires one space per unit and one space per staff. With 355 units being proposed and a



maximum of 20 staff, the proposed development generates a requirement of 375 car spaces. One additional HRV space is also required for service deliveries.

Council's initial assessment noted that the proposed development incorporates 375 car spaces, which complies with the provisions of DCP A2. However, it was considered that the application did not address the issue of service vehicle /delivery space required for the communal facilities associated with the development.

The applicant's response noted the following:

*"Council has requested that the applicant demonstrates full compliance with this DCP with regard to the requirement for a service / delivery space for the communal facilities building.*

*This matter has been addressed by amending the Application Plan to provide a HRV loading bay at the western end of the communal facilities building.*

*The balance of the development maintains compliance with the numerical parking requirements of Council's Code."*

The amendments proposed under the latest proposal are considered to be acceptable. As such, the development is considered to comply with the parking requirements of Section A2 of the DCP.

#### Section A3-Development of Flood Liable Land

As noted above, the subject site is mapped flood prone land. Whilst 34% of the subject site is identified as being prone to flooding, this relates to the lower SEPP 14 area. The proposed tourist accommodation is proposed above the flood design level. As such, the proposed development is considered to comply with Section A3 of the DCP.

#### Section A4-Advertising Signs Code

As noted previously, signage is not being proposed as part of this application.

#### Section A11-Public Notification of Development Proposals

The proposal was originally notified for a period of 14 days from 26 September 2012 to 11 October 2012. During this time, a total of two submissions were received. The latest proposal was re-notified from 9 October 2013 to 23 October 2013, during which there were two objections and one late submission. The issues raised by the latest proposal are provided later in this report.

#### Section A13-Socio-Economic Impact Assessment

Given that the proposed development incorporates more than 50 beds, a socio-economic impact assessment is required pursuant to the provisions of Section A13 of the DCP.

Council's initial assessment of the proposal noted that the applicant's Socio Economic Impact Statement was acceptable in terms of the potential

positive economic outcomes. However, potential social impacts to neighbouring properties were identified as a concern, such as amenity and landforming impacts. It was considered that insufficient information was provided by the application to conclude that the proposed development would result in a positive social outcome.

The applicant provided the following updated response:

“Council’s assessment accepts the positive economic impacts but considers that inadequate social impact assessment has been undertaken (in relation to impacts on adjoining residential uses).

- Measures to mitigate the amenity issues between the proposal and the residential uses to the west include the following:
- A 10m wide vegetated buffer is located at the top of the proposed batter slope (to the east of the residential uses to the west) and the proposed development.
- The residential uses are at a higher level than the proposed tourist accommodation uses.
- The proposed tourist accommodation units will be located approximately 30m away from the residential uses to the west, due to the width of the vegetated buffer and the batter slope.
- The project does not utilise the local road network associated with the residential development to the west (other than a statutorily required alternate access for emergency vehicles only).”

Following an assessment of the latest proposal, it is considered that the applicant has provided sufficient detail to allow the development to be considered as compliant with the provisions of Section A13 of the DCP.

### Section B3-Banora Point West- Tweed Heads South

This section of the DCP identifies precincts for different development types within the area covered by the controls. The subject site is located within Precinct 2 which is earmarked in the policy for tourist development and private open space.

The proposed accommodation units are being proposed within the area mapped as tourist development. As such, the provisions of B3.7.2 Guidelines apply to the development.

Council’s initial assessment identified a number of provisions of B3.7.2 Guidelines that were not considered to have been adequately addressed by the applicant. These were in relation to: car parking; noise abatement; impact upon the neighborhood; and visual amenity.

The applicant’s latest proposal noted the following:

*“The proposed development, which due to its location has been designed to provide budget family style accommodation with appropriate on site recreation facilities, is considered to be consistent*

*with the Layout Plan and objectives of the DCP for the nominated Tourist Accommodation land.”*

The applicant provided an assessment of the proposed development against the guidelines, concluding that the development is “...*entirely consistent with Council’s longstanding Development Control Plan that applies to the site, both in terms of the type of development and in terms of meeting the relevant development guidelines.*”

Council’s assessment of the latest proposal does not concur with the applicant’s conclusions. Whilst the subject site is nominated as a Tourist Accommodation site within DCP B3, the proposed development does not adequately address the provisions of the DCP guidelines for tourist accommodation. As noted elsewhere in this report, noise and overall amenity impacts have not been satisfactorily addressed.

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

Clause 92(a) Government Coastal Policy

The subject land is affected by coastal policy. The proposed development is not considered to be in conflict with the policies and strategies contained within the NSW Coastal Policy 1997.

Clause 92(b) Applications for demolition

This clause is not applicable as the proposal does not incorporate any demolition works.

Clause 93 Fire Safety Considerations

This clause is not applicable as the proposal does not incorporate any change of use in an existing building.

Clause 94 Buildings to be upgraded

This clause does not apply as the proposal does not involve the rebuilding, alteration, enlargement or extension of an existing building.

**(a) (v) Any coastal zone management plan (within the meaning of the [Coastal Protection Act 1979](#))**

Tweed Shire Coastline Management Plan 2005

This Plan applies to the Shire’s 37 kilometre coastline and has a landward boundary that includes all lands likely to be impacted by coastline hazards plus relevant Crown lands. The subject site is not mapped as being within the current coastal hazard lines. As such, the Tweed Shire Coastline Management Plan 2005 is not applicable to the proposed development.

Tweed Coast Estuaries Management Plan 2004

This Plan relates to the Cudgen, Cudgera and Mooball Creeks and is therefore not applicable to the proposed development.

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

This Plan relates to the Cobaki and Terranora Broadwater and is therefore not applicable to the proposed development.

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

Flora and Fauna

Council's initial assessment of the proposal did not support the development with regard to potential impact upon flora and fauna. The application was recommended for refusal on the grounds of: the development not being suitable for the site; a real potential to cause actual environmental harm; insufficient assessment of SEPP 44; and insufficient assessment of Threatened Species Conservation Act.

The applicant's latest proposal included a revised Ecological Assessment which responds to the issues raised by Council.

Council's NRM Unit undertook a detailed assessment of the latest documentation supporting the proposed development, noting the following conclusions:

*"It is not considered that negative ecological impacts likely to be associated with the proposed development could be avoided or minimised and managed to an acceptable level through conditions of approval without significant modifications to the development layout. It is understood that this would be then considered to be a substantially different development and as such could not proceed.*

*As such NRM recommends refusal based on the following grounds:*

- The application proposes the removal of approximately 11.08ha (based on NRM figures) of predominantly native vegetation. 3.36ha was evaluated as achieving 'Very High' ecological significance status comprising one state and federally flora species (*Cryptocarya foetida*) whilst supporting a high density of hollow bearing trees that have the potential to provide refuge and roosting/nesting resource to a suite of both threatened (in particular hollow dependent microchiroptean bats) and common/locally significant fauna species.

*The clearing of vegetation, loss of hollow bearing trees and fragmentation of populations are key threatening actions listed under Schedule 3 of the TSC Act 1995. Given the known (2 listed bird*

*species and 4 listed mammals) and moderate likelihood of occurrence of a number of threatened species (19 species comprising birds and mammals) both reliant on hollows and/or habitat provided onsite, NRM consider that where the proposal were to proceed activities required during both the construction and long term operational phase of the development would pose an unacceptable risk to the local population of threatened species and as such the development could not be supported in its current form.*

- The loss of remnant vegetation immediately to the edge of a candidate Endangered Ecological Community (EEC) listed under the TSC Act 1995 being Lowland Rainforest in the NSW North Coast and Sydney Basin bioregions would likely have an adverse impact on the integrity and function of the community in the short to medium term. Furthermore negligible buffers have been proposed to the candidate EEC Swamp Sclerophyll forest on coastal floodplains of the NSW North Coast, Sydney Basin and South East Corner bioregions. As a result the community would also likely experience edge effects leading to decline in the condition/integrity of the remnant.*
- The proposal does not provide sufficient evidence (baseline data) to indicate that the development would not have a negative impact on the SEPP 14 wetland comprising remnant EEC Swamp Sclerophyll forest on coastal floodplains of the NSW North Coast, Sydney Basin and South East Corner bioregions and EEC Freshwater wetlands on coastal floodplains of the NSW North Coast, Sydney Basin and South East Corner bioregions as the result of alteration to existing hydraulic regime.*
- The proposed land-use is inconsistent with the intent of the E2 Environmental Conservation zone designated under the draft LEP 2012 and would involve the removal of vegetation currently protected under provision of a statutory Section 88B instrument (Conveyancing Act 1919) secured for conservation and ecological rehabilitation purposes.*

*In the case where the proposal were to be deferred in order to address Council concerns, NRM would only be willing to offer support for the proposal where the following (but not strictly limited to) general layout modifications were made and relevant investigations undertaken to demonstrate that the development may proceed without unacceptable impact on the sites significant ecological values.*

- 1. Demonstrate that all areas of native vegetation occurring within the general E2 Environmental Conservation zone as shown on the draft LEP 2012 land-use map and any connected/contiguous broader remnant unit will not be*

*negatively impacted by the proposed development in the short or long term and retained and protected under an appropriate management arrangement.*

2. *Ensure adequate setback distance/s is maintained to any candidate Endangered Ecological Community (i.e. stormwater/infrastructure).*
3. *Commit to undertaking ecological restoration within degraded areas of the site.*
4. *Ensure stormwater discharged from the site maintains pre-development flow regime and meets water-quality parameters to maintain healthy wetland in the long term based on baseline wetland monitoring data and best practice guidelines.”*

### Noise Impact

Council’s initial assessment of the application raised issues in relation to potential noise impact arising from the proposed development’s location adjacent to the Pacific Highway and directly under the flight path for aircraft approaching and departing the Gold Coast Airport. Further information was considered necessary prior to the determination of the application.

In terms of aircraft noise, the applicant provided the following comments: *“This issue is addressed in the detailed response prepared by CRG Acoustic Consultants Pty Ltd, which is attached at Annexure 12.*

*In summary, additional octave band measurements have been undertaken at the site and examples of building materials which satisfy the required sound transmission loss have been provided to demonstrate that compliance with AS2021 is achievable.*

*To enable suitable flexibility in the implementation of the consent, a condition which allows a selection of a building material of equivalent performance is preferred rather than specifying a single product.”*

With regard to road noise, the following response was provided by the applicant:

*“Again, this issue is addressed in the detailed response prepared by CRG Acoustic Consultants Pty Ltd, which is attached at Annexure 12.*

*While the requested additional information is provided, it is noted that the acoustic building treatments required for aircraft noise will surpass the treatments required to address road traffic noise.”*

Council’s Environmental Health Unit undertook a further assessment of the development, based on the latest documentation submitted by the applicant. With regard to road noise, the Environmental Health Unit were satisfied that the third floor units of the development were assessed, but the results not presented in the applicant’s noise impact report, as the aircraft noise far exceeded the requirements for noise control.

In terms of aircraft noise, Council's Environmental Health Unit was generally satisfied with the applicant's response to the request for further information, with regard to achieving compliance with Australian Standard AS2021 requirements.

However, upon advice from Council's Development Assessment Unit that (from a planning perspective) the proposed development is considered to be of residential nature, Environmental Health Unit advised that they are *"...unable to support the development application in accordance with the relevant provisions of the Tweed LEP 2000 and Draft Tweed LEP 2012"* in terms of aircraft noise.

### Cultural Heritage

As noted previously, Council's initial assessment of the proposed development raised major concerns with the application, given that a thorough Cultural Heritage Assessment had not been undertaken.

During the construction for the Kirkwood Road extension (May 2012), several stone axes were identified either within or immediately adjacent to the northern boundary of the site. The existence of the stone axes resulted in Council modifying the batter design around the location of the axes, so as to leave the area with minimal impact.

Council initially requested withdrawal of the application, as the proposal did not include a cultural heritage assessment of the site, particularly given that Aboriginal artefacts had been found on the adjoining property / boundary of the site.

The applicant advised that they would not be withdrawing the application. The response was accompanied by a Cultural Heritage Due Diligence Assessment, which is largely a desk top study of the proposal against the relevant registers, databases maps etc, as required by the *Code of Practice for Archaeological Conduct in New South Wales 2010*. The assessment incorporates a number of recommendations, the first of which is the clearing of exotic vegetation from parts of the site.

The applicant's response also noted that...*'Council had adequate information in which to undertake an assessment of the development application'* and they requested that Council continue with the processing of the application. As such, assessment of the application has been undertaken on the information provided to date, with no further information requests being issued.

In February 2013, the Panel resolved to defer the determination of the application, to allow the applicant sufficient time to undertake a cultural heritage assessment. In September 2013, the applicant provided the following summation:

*"A Cultural Heritage Assessment has been completed for the site including completion of surface clearing and a comprehensive set of archeological test excavations of the parts of the site which were most likely to contain relics.*

*In summary, the Cultural Heritage Assessment concluded that no physical Aboriginal cultural heritage was identified within the project*

*area. Therefore there will be no impacts to physical cultural heritage (Aboriginal Objects) if the Project is to proceed."*

As noted previously, the applicant's Cultural Heritage Assessment and the Test Excavation Report were provided to the OEH for consideration. In addition the TBLALC was invited to provide comment on the matter of cultural heritage.

Although the applicant's Cultural Heritage Assessment concluded that there was no physical Aboriginal cultural heritage identified, the issues raised by the TBLALC cannot be discounted by the consent authority, as noted by the OEH.

### Visual Amenity

Council's initial assessment of the proposed development identified potential visual amenity concerns arising from the extensive cut from the existing hillside and resulting loss of the mature vegetation from the development footprint. It was considered that insufficient information was provided to undertake a full assessment in this regard.

The applicant's latest proposal noted the following:

*"A Visual Impact Assessment has been undertaken by LVO Architecture and is attached at Annexure 8. The assessment concludes that the visual impacts of the proposed development are considered to be compatible with the existing visual context and satisfy the objectives of the Tweed Local Environmental Plan.*

*As previously mentioned the visual quality of the northern side of the site has been significantly compromised by the extensive excavation and unsightly shotcrete retaining structure constructed by Tweed Shire Council as part of the adjoining Kirkwood Road Project.*



**Photograph 1 – Shotcrete Retaining along the northern side of site as viewed from the Pacific Highway**

*The proposed development will remove the shotcrete structure and reduce the stark visual appearance of the existing situation.*

*Instead, the proposal will provide the appearance of a tourist accommodation development, with the change in grade battered to the west in a north-south direction so that it will not be as visually*



*prominent. The proposed batter on the western side will be lower, will be battered at a lesser angle and will be provided with landscaping.”*

The applicant's visual amenity assessment has focused on views of the development in close proximity to the subject site. Along with visual impact close to the development site, Council is concerned with views of the development from a distance within the wider Tweed Heads area (for example along Kennedy Drive and from Boyds Bay Bridge – see Figure 8 below).

Tree lined ridges are important characteristics of the Tweed Shire. It is considered that the proposed development will result in the loss of this characteristic and therefore will impact upon the visual amenity of the area.



**Figure 8 – View from Boyd's Bay Bridge looking west**

#### Overall Amenity Impact

It is considered that the proposed locality of such a development is inappropriate and would result in an unacceptable amenity impact that is not considered to be acceptable in terms of promoting the Tweed to tourists. As noted elsewhere, the noise, visual and ecological impacts are considered to result in a development that is not acceptable from an overall amenity aspect.

The proposed acoustic mitigation measures will require units to have all windows and doors closed, in order to achieve acceptable aircraft noise protection. This outcome is not considered to be acceptable for the Tweed climate. Tourists should be able to have open windows and doors to enjoy the summer breezes etc, rather than having to rely on air conditioning for comfort, which also raises energy efficiency concerns.

#### **(c) Suitability of the site for the development**

##### Topography

Council's initial assessment identified concerns in relation to the extent of landforming required to undertake the tourist development, and associated stormwater management and landscaping issues. These concerns were also linked with issues regarding cultural heritage, which would likely limit the developer's ability to undertake the earthworks if they were unable to be resolved, thereby rendering the proposal unfeasible on the site.

Following deferment of the determination of the application, the applicant was issued with a further information request in relation to landforming matters. The applicant's latest proposal included a response to the issues raised.

The following comments were provided by Council's Planning and Infrastructure Engineer:

*"The applicant has responded to the subsequent request for information from Council. Assuming that the cultural heritage issues are resolved satisfactorily (to be assessed by others), the applicant's responses have been assessed as follows:*

### **Response to Request for Information**

1. *The applicant is required to provide additional information to justify the requested variation to landforming controls in DCP-A1. Amended plans shall be provided to optimise the landforming design in order to:*
  - *Preserve the existing landform to the maximum extent possible;*
  - *Minimise batter heights at site boundaries and other interfaces, and provide typical section details at these locations;*
  - *Ensure stormwater treatment and detention areas are feasible and permanently accessible for construction and maintenance;*
  - *Maintain adequate internal and external road access, including for service and emergency vehicles;*
  - *Consider road and/or pedestrian connectivity to the adjoining residential streets to the west (Wren Court, Firetail Street and Harrier Street);*
  - *Address all constraints imposed by cultural heritage assessments and approvals;*
  - *Address all constraints imposed by ecological assessments;*
  - *Address any impacts of the proposed development on noise exposure to adjoining residential properties (i.e. from the Pacific Highway);*

### **Applicant's Response September 2013**

#### **Further Information Response Report (Darryl Anderson Consulting)**

- *Significant variations to DCP-A1 are required to provide access from Kirkwood Road;*
- *The scale and topography of the site is such that 1m cut and fill control is not realistic;*

- *Landforming achieves a practical access and a commercially viable yield;*
- *The proposal has been designed to maintain appropriate residential amenity to properties to the west, with a 10m vegetated buffer along the boundary;*
- *Impacts on good quality native vegetation have been minimised;*
- *Natural landform has already been compromised by Kirkwood Road and Pacific Highway earthworks;*
- *Works will remove unsightly shotcrete batter and replace with lower landscaped batter, which is an improvement.*

#### *Knobel Consulting Response Letter*

- *Maintaining existing site levels would not allow suitable vehicle access, internal vehicle movement or construction of dwellings;*
- *No changes recommended by Visual Assessment, Cultural Heritage Assessment, Ecological Assessment, or Acoustics Report, so no changes have been made to the original earthworks design;*
- *33% of the site requires cut in excess of 5m, 10% in excess of 20m;*
- *Batters are not considered excessive and will have landscaped buffers;*
- *Engineering report demonstrates integration to natural ground levels and adjoining properties;*
- *A maintenance path is provided to each stormwater basin;*
- *Additional road accesses have not been investigated further, based on previous discussions with Council;*

*Amended plans were also submitted to accompany the response to RFI, although as stated above, landforming plans have not been varied significantly.*

#### *Assessment and Actions*

*As there are no material changes to the earthworks plans, my previous assessment still applies.*

*Where controls are proposed to be varied (in this case controls relating to the scale and extent of earthworks) DCP-A1 requires a detailed site analysis demonstrating why the controls cannot be met and how the alternate proposal achieves the planning and design objectives and principles. The initial application and the subsequent response to RFI (which proposed no change) does not, in my opinion provide this justification.*

*The Amended Architectural Plans (Annexure 1) provide a range of building perspectives, which are generally all based on a flat*

*landform (despite statements in the engineering report regarding pier and beam construction). As such, it is reasonable to conclude that the extent of landforming is not only about achieving feasible access from Kirkwood Road (which is acknowledged and generally accepted), but to provide terraced, level building pads (less than 10% according to the engineering report, but as shown on the plans most sites have been modified to have 0.5-1.0m fall across them), which is contrary to the principles of DCP-A1 - development should suit the site rather than modify the site to suit the development. Street elevations in the Statement of Landscape Intent (Annexure 2, LSK0 9A) show small retaining walls on site boundaries to achieve level changes, while A1 advocates these level changes being taken up by the buildings.*

*The Statement of Landscape Intent shows narrow planting at the top and bottom of excavated batters, with scattered plantings "where possible" in "soil pockets" in the rock. A planted buffer is shown on the western boundary, however this could be in conflict with bushfire APZ requirements (to be assessed by others).*

*While the development is not a subdivision and Development Design Specification D6 - Site Regrading does not apply, the subject development is of a scale commensurate with a subdivision, and significantly exceeds bulk earthworks criteria in D6 regarding the proportion of the site under deep excavation (max 10% > 5m cut/fill) and perimeter batter heights. This suggests excessive earthworks and a design that is not sympathetic to the natural landform.*

*2. An amended stormwater management plan is required to address:*

- Any changes from the landforming review in (1);*
- The addition of stormwater detention facilities in the southern catchment (Catchment B) to comply with the requirements of the Ecological Assessment with regard to protecting the hydraulic regime in the adjacent SEPP14 wetland. This must include discharge controls that ensure dispersed and not concentrated discharge to the wetland;*
- The impacts of excavating large portions of the site down to rock, in terms of runoff assumptions, limited "deep soil zones", and the feasibility and design of bio-filtration basins for the development;*
- The design of basins to provide combined treatment and detention facilities, given different design events and risks of damage to treatment facilities in the absence of high flow bypasses.*

### *Applicant's Response*

#### *Knobel Consulting Response Letter*

- *No changes to landform are warranted, so no change to SWMP;*
- *Modelling has been undertaken for the catchment B treatment basin to assess detention requirements. The outlet is located in an existing gully thereby protecting the wetland from erosion;*
- *Stormwater design assumptions are valid for the excavated site, topsoil will be applied to the excavated rock surface to aid runoff absorption, and basins are located in lower portions of the site unaffected by bulk earthworks.*

#### *Assessment and Actions*

*Based on the amended stormwater report, the development will not have significant impacts on post-development flow rates. Overall, increases in urban runoff appear to be largely offset by reductions in site slope. Modelling of the treatment basin proposed for Catchment B shows that it performs satisfactorily as a detention storage, however my previous concerns regarding high flow bypasses and remobilisation of captured pollutants has not been addressed.*

*Overall, the stormwater management regime appears satisfactory (subject to conditions), if the excessive landforming is deemed appropriate for the site.*

3. *An amended landscaping plan is required to address:*
  - *Any changes in landscaping design from the landforming review in (1);*
  - *The impacts of excavating large portions of the site down to rock, in terms of reinstating and retaining topsoil and viability of proposed plantings, particularly on batters as visual screening.*

#### *Applicant's Response*

*Addressed in earthworks comments.*

#### *Assessment and Actions*

*For assessment by others, however successful landscaping treatments appear highly constrained due to the extent of excavation down to rock surfaces.*

#### **Conclusion**

*The site's topography presents a significant constraint to urban development. It is acknowledged that in order to obtain adequate vehicular access from the future Kirkwood Road alignment, significant earthworks and landforming would be required. However it appears that the applicant has extended these extensive*

*excavations across the entire site in order to achieve near-level building areas. This has led to undesirable edge batters and a total change to the natural landform, which is inconsistent with Council's adopted landforming principles. The applicant has not satisfactorily demonstrated that this degree of variation to landforming controls is warranted or desirable, even though supporting investigation reports indicate that impacts to adjoining land are not significant.*

*It is considered that the extent of non-compliance warrants refusal, subject to further assessment of A1 and urban design principles by PRD."*

#### Access, Transport and Traffic

Council's initial assessment of the proposed development identified concerns with regard to access to the site, noting the following:

*"The road access issues are linked strongly with the proposed landforming, and as such, until such time as the landforming design can be validated, there is insufficient information to confirm that site access is satisfactory. A more detailed traffic assessment can be undertaken should the landforming issues be resolved."*

Following a review of the applicant's latest proposal, Council's Planning and Infrastructure Engineer noted that the proposal did not change any of the external road arrangements and as such, the original concerns remain valid.

#### Water / Sewer Supply

The initial assessment of the proposed development identified issues with the applicant's calculations with regard to water and sewer capacity calculations.

A further review of the applicant's latest proposal was undertaken by Council's Water Unit, with the following comments noted:

*"The Water Unit has assessed DA12/0364 and the following comments are provided in response to the information contained within Engineering Report (Annexure 6) as part of the Further Information Response Report from 28 August 2013. The information relating to Water and Sewerage services (chapters 4 and 5) does not contain any updated information from the original 20 July 2012 Engineering Report (Annexure 3) from the Statement of Environmental Effects. Therefore the developer has neglected to respond to Council's concerns regarding mistakes made in their Engineering report regarding Sewer and Water ET calculations.*

*Furthermore, no information has been provided about the pools and the filter system proposed for the pools. Information listed below is also required:*

- How much water is estimated to be used to initially fill pools and then fill/ backwash/ top up the pool per year in kL/a.
- Estimation of the volume of backwash/ empty the pool per year - how much flow will go to the sewer each year in kL/a?

*On this basis an additional RFI would be required before the Water Unit could complete the assessment for DA12/0364.”*

### Waste Management

Council's initial assessment of the proposed development identified that further information was required with regard to Waste Management. These include details of waste and recycling facilities proposed and location of these facilities, as well as written confirmation from Solo Resource Recovery that the site can be adequately accessed and serviced. It was also noted that similar access issues were raised by the Roads and Maritime Services, in terms of adequate access and internal road network for waste services.

The applicant's latest proposal noted the following:

*“By applying the rates provided in Council's DCP, Section A15 – Waste Minimisation and Management, the waste generated at the site is estimated by applying the “motel” rate to the proposed tourist units (rate of 5L per bed space per day). For the proposed 519 bedrooms in the development we estimate that the tourist accommodation development would require waste storage as follows:*

- ☐ *18,165L per week of general waste*
- ☐ *3,633L per week of recyclable waste*

*The proposed waste generated from the development is to be stored in bulk bins located at six locations around the site.*

*The bin storage areas are to comprise a roofed, block work structure with sliding louver panel doors. The enclosures will be of sufficient size to accommodate a 3000L bulk bin for general waste plus a recycling bin. The storage areas will be sufficient for weekly collection (assuming full occupancy). If necessary, the bins may be collected on a more frequent basis by the waste contractor. The arrangements may be monitored by the park operator to ensure that the bins are appropriately maintained and managed to reduce potential nuisance from odour, visual impact or access for birds or other wildlife.*

*The location and details of the proposed bin storage areas are shown on the amended Application Plans at Annexure 1. As*

*previously mentioned a letter from Solo Resource Recovery (confirming serviceability) is attached at Annexure 3.”*

Council's Waste Management Unit provided the following comments on the applicant's response to issues raised by Council:

*“The applicant has failed to provide a suitable waste management plan for the proposed development. Consequently, Council is unable to determine if the development will have adequate provision for waste and recycling services which will comply with section 15 of the TSC DCP (Waste Management). In order for Council to determine if the proposal will be able to manage waste and recycling for the proposed development a waste management plan would be required.”*

#### Food Handling:

Council's initial assessment of the proposal noted that no detail was provided for the proposed general store / shop, kiosk and dining facilities. Further information would be required (were the application to be approved).

The applicant's most recent proposal requested that the requirement for further information be conditioned.

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

The initial proposal was originally notified for a period of 14 days, with a total of two submissions. The latest proposal was re-notified from 9 October 2013 to 23 October 2013, during which there were two objections and one late submission.

The issues raised by the latest submissions are summarised and addressed in the table below.

<b>Issue</b>	<b>Officer Comment</b>
<b>Use of Site</b> – There is no infrastructure in the area to support a tourist development of this scale. The area is not situated close to any tourist parks. It stands to reason that the facility will be used for permanent residents rather than tourist accommodation.	An assessment has been undertaken on the proposed development, being tourist accommodation. The proposal is not supported for a number of reasons. However, if the application is supported a condition of consent would prohibit the use of the development for the purposes of permanent residential occupation.
<b>Amenity</b> – loss of amenity to neighbouring properties who had the expectation at the time of their purchase that their neighbouring land was zoned 6(b) (Private Open Space – Private recreation golf course).	Loss of amenity has been raised as an issue within the body of this report. As noted above, zoning of the land under the provision of the Tweed LEP 2000 is 2(e) Residential Tourist and 6(b) Recreation. The reference to the Private Recreation Golf Course relates



Issue	Officer Comment
	to DCP B3. In any case, the area directly adjoining the existing residences is mapped as Tourist Accommodation on Map 2, rather than Private recreation golf course.
<p><b>Tourist Accommodation</b> – if Council continues to permit permanent residents to live in tourist accommodation, developers will continue to bypass normal residential building controls, which require:</p> <ul style="list-style-type: none"> <li>Basix certification</li> <li>Aircraft noise intrusion abatement</li> <li>Adequate car parking</li> <li>Compliance with bulk earthworks limits</li> </ul> <p>If approved, the proposal should be conditional upon the developer to provide an annual report justifying that the proposal satisfies the continuing requirement of a Tourist Accommodation development and not that of low priced permanent accommodation.</p>	<p>Council must assess the development applications as they are proposed, which in this instance is for tourist accommodation. If the application were to be recommended for approval, appropriate conditions of consent would be applied with regard to the short term use of the development and aircraft noise abatement.</p> <p>Car parking has been assessed against the relevant provisions of DCP A2.</p> <p>Bulk earthworks / landforming issues have been raised within the body of this report.</p> <p>If the application were approved and Council became aware of any tourist accommodation being used for permanent residential purposes, appropriate compliance action would be taken.</p>
<p><b>Traffic</b> – Council staff have advised that access via Firetail Street will not be permitted. For the sake of neighbouring residences, temporary access should not be provided.</p> <p>Before the applicant's proposal to construct any part of the western alignment of the Kirkwood Road extension to gain access to the development is considered, appropriate approvals for Kirkwood Road extension Stage 1B should be obtained.</p>	<p>The proposed development proposes access only via the Kirkwood Road access point. Access from Firetail street has not been proposed, with plans suggesting that access from Firetail Street and Wren Court not achievable due to slope constraints.</p> <p>In terms of construction of the western extension of Kirkwood Road, the applicable Part V approval has been granted (as part of the approval for the eastern extension). No other approvals are necessary, as the works to be carried out are Permissible without consent under the provisions of the Infrastructure SEPP. Construction</p>

Issue	Officer Comment
	<p>timeframes are unknown at this stage, with funding being a major contributor.</p> <p>It is noted below in the Roads and Maritime Services comments that the Kirkwood Road intersection at Fraser Drive (roundabout) will need to be in place prior to operation of the tourist facility, if the application was being supported.</p>
<p><b>Public Transport</b> – Submission raises concern with the bus routes proposed, noting that route 607 is approximately 2km from the project site. It is also noted that the applicant states that Tweed City Shopping Centre is 1.6km from the proposed development site. The submission notes that the actual walking distance is 4.5 or 5km, depending on which path you take.</p>	<p>The only bus route considered within an acceptable distance is route 604, which runs along Fraser Drive to the west of the site. Route 607 is not considered to be acceptable.</p> <p>Council's mapping system confirms that the applicant's assessment of the distance to the Tweed City Shopping Centre is "as the crows flies" – measured in a straight line rather than the actual walking path that a pedestrian would have to take.</p>
<p><b>Aircraft noise</b> – Concern is raised with regard to noise impact from aircraft, recommending that appropriate construction materials be used. Noise from the highway and overhead aircraft heard through open windows should be taken into account.</p>	<p>The issue of aircraft and traffic noise is addressed within the body of this report.</p>
<p><b>Koala Habitat</b> – Concern is raised with regard to whether an accurate study of the koala habitat under SEPP 44 and raises the issue of legislative requirements under the EPBC.</p>	<p>The issue of Koala habitat and SEPP 44 assessment is addressed within the body of this report, with Council satisfied that a Koala Plan of Management is not required under SEPP 44.</p>
<p><b>Acid Sulfate Soils</b> – The submission notes that a ASS Management Plan should be required for the construction of the half width of Kirkwood Road being proposed for access to the site.</p>	<p>If the application were to be approved, appropriate conditions of consent would require an ASSMP for the proposed construction works associated with Kirkwood Road.</p>
<p><b>Aboriginal Cultural Heritage</b>– There appeared to be no Aboriginal presence with the latest study and an absence of Aboriginal community</p>	<p>Aboriginal Cultural Heritage issues have been addressed within the body of this report.</p>

Issue	Officer Comment
comment. It is recommended that the Aboriginal Cultural Heritage be re-exhibited for consideration.	
<b>Stormwater Management</b> –Concern is raised with regard to impact upon the SEPP 14 Wetland, as a result of extensive cut and fill earthworks.	The issue of stormwater management, land forming and impact upon the SEPP 14 area is addressed within the body of this report.
<b>Change of Use</b> – How will Council ensure that the use of the land will not change illegally ‘down the track’ to permanent rentals as opposed to holiday rentals, as has happened in other areas of the Shire.	If approved, appropriate conditions of consent would be applied with regard to the ongoing use of the development. Upon evidence that an unlawful use of the site, appropriate compliance action would be undertaken.

### Roads and Maritime Services

The initial proposal was forwarded to the RMS for consideration. Concerns were raised with regard to potential impact to adjoining residential development, service vehicle access and assessment against Clauses 101 and 102 of the Infrastructure SEPP.

The applicant's latest proposal was forwarded to RMS for further consideration. The following response was received:

*“Occupation and operation of the tourist facility in the short term will require construction of connections to Fraser Drive along the proposed Kirkwood Road west extension. It is noted the Kirkwood Road intersection at Fraser Drive is dependant on roundabout control to adequately provide for development traffic. These works will need to be in place prior to operation of the tourist facility and would be the responsibility of the proponent.*

*As it has now been made clear that the connection to Harrier Street is for emergency purposes, no further traffic assessment is considered necessary. To prevent development traffic accessing Harrier Street and impacting on the neighbourhood amenity, the control of access to Harrier Street from the proposal needs to be specified.*

*The development proposal is adjacent to the Pacific Highway. Council is reminded of its obligations under State Environment Planning Policy Infrastructure, to ensure that the impacts of road traffic noise and vibration from the current highway and future road connections are considered in the design and construction of the proposal. Any mitigation measures for road noise or vibration are to be at no cost to Roads and Maritime.”*

### Rural Fire Services (RFS)

The initial proposal was forwarded to the RFS for approval. Concerns were raised with regard to asset protection zones, effective slope for vegetation, construction standards and the proposed controlled access point at Harrier Street.

The applicant provided a 'Bushfire Threat Assessment Additional Information Report' in May 2013. This information was forwarded to the RFS for further consideration. Based on the additional information, a Bushfire Safety Authority was issued by the RFS in July 2013. Following the submission of the latest proposal in September 2012, the applicant's submission was forwarded to RFS again for final approval. Accordingly, a revised Bushfire Safety Authority was issued in November 2013, with conditions of consent relating to Asset Protection Zones, Design and Construction requirements, Access, Water and Utilities as well as Evacuation and Emergency Management requirements.

#### Gold Coast Airport Pty Ltd (GCAPL)

The GCAPL provided detailed comment on the initial proposal, as a key stakeholder. In light of the potential adverse impact on the health and lifestyle of future residents due to unavoidable aircraft noise, GCAPL advised that they were of the opinion that *"...tourist accommodation, particularly in view of the very substantial scale of the proposed development, represents an inappropriate activity for the subject land and accordingly that consent should not be granted."*

However, it was also acknowledged that the proposed development is permissible. Accordingly, the comments included recommended acoustic conditions, on the basis that the proposed buildings are to be used for temporary tourist occupation, with an appropriate time limit placed on maximum length of stay, to avoid permanent or quasi-permanent use.

Following the submission of the latest proposal by the applicant the GCAPL provided additional comment:

*"We have reviewed the supplementary reports lodged by the proponents, and it has been determined that the previous GCAPL submission dated 24 October 2012 will continue to represent GCAPL's views in respect of the application. A copy of that letter is enclosed for your information."*

*GCAPL considers that the proposed tourist accommodation complex represents an inappropriate land use in the location, in view of the substantial effect on the subject site by aircraft noise, and in that regard believes that the application should be refused.*

*In the event that approval is proposed to be granted, it will be important that effective conditions be imposed so as to reduce the adverse impacts of aircraft noise, and draft conditions which GCAPL recommends be imposed are included in the original submission. The conditions are explicit, and structured in such a way as to unequivocally ensure that the internal noise levels required for*

*compliance with AS2021-2000 will be achieved, and to confirm this through inspections and testing both during and after construction. In that way, ambiguity is avoided and the intent of the conditions cannot be circumvented. The end performance of noise amelioration is stipulated, rather than predicting types of materials and treatment which would be appropriate, based on what may or may not be accurate forecasts of noise levels.*

*The proponents submitted results of on-site aircraft noise measurement, and that report was provided to our independent acoustic expert consultants, Wilkinson Murray. A copy of their comments on the results is attached, and you will note that they consider the prediction of noise levels to be based on inappropriate aircraft types. They correctly point out that account should be taken of those aircraft which would potentially generate maximum noise levels, rather than those represented in the very limited noise measurements carried out by the proponent's consultants. In our consultants' opinion, acoustic treatment based on those readings would be likely to result in internal noise levels exceeding those required by AS2021-2000, with degradation of acoustic amenity."*

#### NSW Police

The initial proposal was referred to the Tweed Byron Local Area Command for comment. The NSW Police provided a response, noting that they would not be making comment on the proposal.

The latest proposal was also forwarded to Tweed Byron Local Area Command for comment. No response has been received to date. It is considered that the NSW Police will not be making further comment on the basis of their initial assessment.

#### Tweed Byron Local Aboriginal Land Council (TBLALC)

A copy of the initial proposal was referred to the Tweed Byron Local Aboriginal Land Council (TBLALC) for comment. Despite several attempts to obtain written comments from the TBLALC, no submissions were received at the time of writing the initial assessment report.

A copy of the latest proposal was also forwarded to TBLALC for comment. The following response was received:

*"Tweed Byron Local Aboriginal Land Council (Tweed Byron LALC) would like to submit the following comments to the above listed DA.*

*Whilst Tweed Byron LALC has conveyed that development of appropriate areas for urban settlement is acceptable to us, it is our view that the consultation for the Cultural Heritage investigation was inadequate and flawed and we therefore feel that our culture and heritage within this development area will not be afforded satisfactory consideration and protection.*

*Tweed Byron LALC makes the point that the nature of the development proposal has changed significantly since consultations*

*commenced. In particular, the suggestion that the land be excavated to a depth of up to 27 metres, destroying the ridgeline, was only belatedly put to Aboriginal stakeholders. It has been strenuously rejected.*

*As you may be aware Tweed Byron LALC were stakeholders on the Kirkwood Road project, which adjoins the River Heights property, of which our onsite representatives made it very clear to Tweed Shire Council that the crest of the ridgeline was to be protected.*

*Tweed Byron LALC are also extremely concerned that due process was not followed regarding the discovery of a possible grinding dish and a number of stone arrangements, of which have now been disturbed, damaged and removed.*

*Tweed Byron LALC is concerned that this proposed development will have a negative impact on an important cultural site and objects. Tweed Byron LALC therefore cannot support the proposed development until an adequate Cultural Heritage Assessment has been undertaken.”*

#### Office of Environment & Heritage (OEH)

The latest proposal was forwarded to the NSW Office of Environment & Heritage (OEH) for comment on the application, with particular regard to Clause 44 of the Tweed LEP 2000 and issued raised by the TBLALC. The following comments were provided by OEH:

*“The identification and assessment of Aboriginal objects for development proposals is the responsibility of proponents and constitutes a form of due diligence which is embedded in the development assessment process usually as a component of a Statement of Environmental Effects. Consideration of such matters is the responsibility of the consent authority in accordance with the EP&A Act.*

*OEH has reviewed the documents provided by Tweed Shire Council regarding Aboriginal cultural heritage and advises that the with respect to Clause 44(1)(c) of the Tweed Local Environmental Plan 2000 it is not in a position to provide comment on the need or otherwise for any approvals under the NPW Act for this proposal. The decision is the responsibility of the proponent.*

*OEH notes that Tweed Byron Local Aboriginal Land Council (TBLALC) identifies that the proposal has undergone significant changes since consultation with the Aboriginal community occurred. OEH advises that any major changes to the proposal should trigger further consultation with relevant stakeholders to ensure that previous advice or commitments remain valid for the new proposal. Although the requirement for consultation at this stage of the proposal is not mandatory, OEH recognises that it is best practice and helps create positive working relationships between proponents*

*and stakeholders. The consent authority may advise what level of consultation is necessary for this matter.*

*OEH further notes that some of the concerns raised by TBLALC refer to the cultural significance of landscaped features which may be affected by the proposal. OEH advises that such intangible cultural values, whilst recognised, are not protected by the provisions of the NPW Act unless those values have been recognised through the Aboriginal Place (AP) gazettal process. The landscape feature in question (ridgeline) is not a registered AP and therefore falls outside of the regulatory jurisdiction of OEH. OEH recommends that its significance and management requirements are considered by the consent authority, with reference to the EP&A Act."*

**(e) Public interest**

The proposed development is considered to be inconsistent with relevant environmental planning instruments and Council policy requirements. The proposal is considered unsuitable and inappropriate for the subject site.

The proposal is considered to impact significantly upon the subject site in terms of potential cultural heritage issues, extensive bulk earthworks, noise impact with regard to aircraft and traffic noise, loss of existing mature vegetation from the site and possible impact upon the SEPP 14 Wetland located on the site.

Based on the latest information provided by the applicant, it is considered that the proposal is unsuitable for the site. This unsuitability is reflected in the proposal's non compliance with the statutory and strategic framework applicable to the application.

As such, the application is not considered to be in the public interest and is recommended for refusal.

**OPTIONS:**

That the Panel:

1. Refuses this application in accordance with the recommendation for refusal; or
2. Grants in-principle support for the proposal, and that officers bring back a further report to the JRPP with possible conditions of development consent.

The Council officers recommend Option 1.

**LEGAL/RESOURCE/FINANCIAL IMPLICATIONS:**

Should the applicant be dissatisfied with the determination they have the right to appeal the decision in the NSW Land & Environment Court.

**POLICY IMPLICATIONS:**

Not applicable.

## **CONCLUSION:**

The proposed tourist accommodation development is considered to create an unacceptable level of impact with particular regard to cultural heritage, landforming, flora and fauna, noise and visual amenity, resulting in an overall amenity which is not considered to be appropriate for tourist development in the Tweed. Given that the subject site is not considered to be suitable for such a large scale tourist accommodation development, the proposal is not supported and is therefore recommended for refusal.

## **UNDER SEPARATE COVER:**

Nil

## **RECOMMENDATION:**

That Development Application DA12/0364 for a construction of tourist accommodation development comprising of 355 tourist units, ancillary communal recreation facilities, onsite carparking for 375 vehicles and associated bulk earthworks, with access from the western extension of Kirkwood Road connecting to Fraser Drive (JRPP) at Lot 1 DP 1168904; Firetail Street TWEED HEADS SOUTH, be refused for the following reasons: -

1. The development application is contrary to Clause 4 of the Tweed Local Environmental Plan 2000, in that the proposed development does not meet the aims of the plan.
2. The development application is contrary to Clause 5 of the Tweed Local Environmental Plan 2000, in that the proposed development would have an unacceptable adverse impact on the natural environment.
3. The development application is contrary to Clause 8(1) (b) and (c) of the Tweed Local Environmental Plan 2000, in that: the proposed development is not considered to have satisfactorily considered the aims and objectives of other relevant clauses of the Tweed Local Environmental Plan; and the proposed development is considered to have an unacceptable cumulative impact upon the surrounding environment.
4. The development application is contrary to Clause 32(3) of the Tweed Local Environmental Plan 2000, in that the proposed development is of a nature that is inappropriate within the 25 or higher ANEF contour.
5. The development application is contrary to Clause 44(1) of the Tweed Local Environmental Plan 2000, in that the proposed development has not satisfactorily assessed how the development will affect the conservation of the site and any relic known or reasonably likely to be located at the site.



6. The development application is contrary to Clause 8 (d), (g), (l) and (n) of the State Environmental Planning Policy No 71 - Coastal Protection, with regard to suitability and cultural heritage.
7. The development application is contrary to Clause 104 of the State Environmental Planning Policy (infrastructure) 2007, in that the proposed development does not satisfactorily address site access provisions.
8. The development does not satisfy Section 79C of the Environmental Planning and Assessment Act, particularly Section (a)(ii) - *the provisions of any Draft Environmental Planning Instruments* in that the development does not satisfy all relevant provisions of the Draft LEP 2012.
9. The development application does not comply with Section 79C (1) (b) of the Environmental Planning and Assessment Act 1979 as it relates to the likely impacts of the development - there is no certainty that the development will not have an adverse impact on the locality.
10. The development application does not comply with Section 79C (1) (c) of the Environmental Planning and Assessment Act 1979, in that the development is not considered to be suitable for the subject site.
11. The development application is not considered to be in the public interest.