



Land and Environment Court
New South Wales

Case Name:	Rise South West Rocks Pty Ltd v Kempsey Shire Council
Medium Neutral Citation:	[2025] NSWLEC 1663
Hearing Date(s):	7, 8, 9, 10 April 2025
Date of Orders:	11 September 2025
Decision Date:	11 September 2025
Jurisdiction:	Class 1
Before:	Washington C
Decision:	The Court orders: (1) The appeal is dismissed. (2) Development application DA2300926 is determined by way of refusal. (3) All exhibits are retained.
Catchwords:	CONCEPT DEVELOPMENT APPLICATION — stormwater and groundwater impacts — appeal
Legislation Cited:	Environmental Planning and Assessment Act 1979 (NSW), ss 4.22, 4.24 Kempsey Local Environmental Plan 2013 State Environmental Planning Policy (Resilience and Hazards) 2021, ss 2.8, 2.10
Cases Cited:	The Uniting Church in Australia Property Trust (NSW) v Parramatta City Council [2018] NSWLEC 158
Category:	Principal judgment
Parties:	Rise South West Rocks Pty Ltd (Applicant) Kempsey Shire Council (Respondent)

Representation:	Counsel: R Lancaster SC (Applicant) H Irish (Respondent)
	Solicitors: Mills Oakley (Applicant) Local Government Legal (Respondent)
File Number(s):	2024/252212
Publication Restriction:	Nil

JUDGMENT

- 1 To the western end of the coastal town of South West Rocks, part-way between the village centre and the historic Trial Bay Gaol lies an undeveloped parcel of land: Lot 2, DP 1091323, Phillip Drive, South West Rocks. Rise South West Rocks Pty Ltd (Rise) have made a concept development application (DA2300926) for a two-stage, mixed-use development on this site, incorporating residential, commercial and retail units in buildings between 3-5 storeys, with associated landscaping and infrastructure (the concept application). Kempsey Shire Council (the Council) have refused this application, and it is from this refusal that these proceedings arise.
- 2 The surrounding area is a mix of zones (see Figure 1), but the subject site is, in isolation, zoned R3 Medium Density Residential pursuant to the Kempsey Local Environmental Plan 2013 (KLEP). An initial stage of development has been approved on this site for townhouses, multi-dwelling housing and commercial premises, and is described as Stage 1. The proposed two stage development which is the subject of this application occupies the remainder of the subject site (see Figure 2).

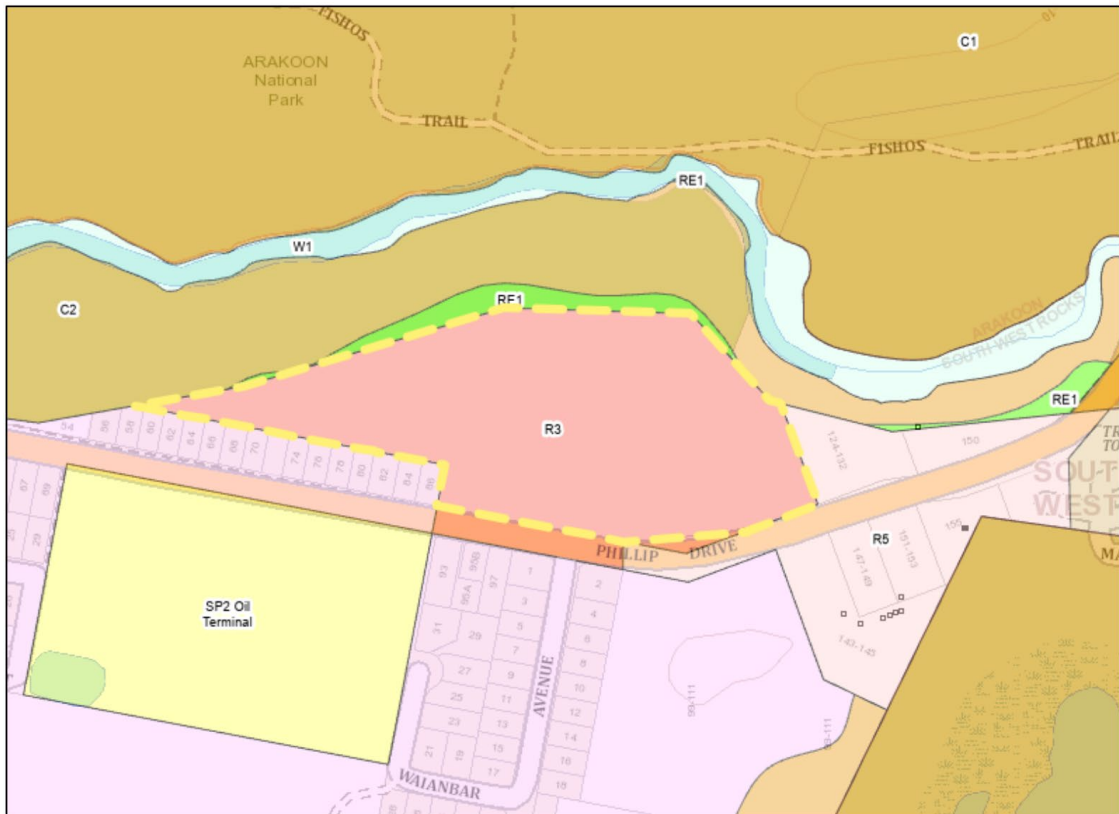


Figure 1: Extract from KLEP Zoning Map (source: Exhibit A)

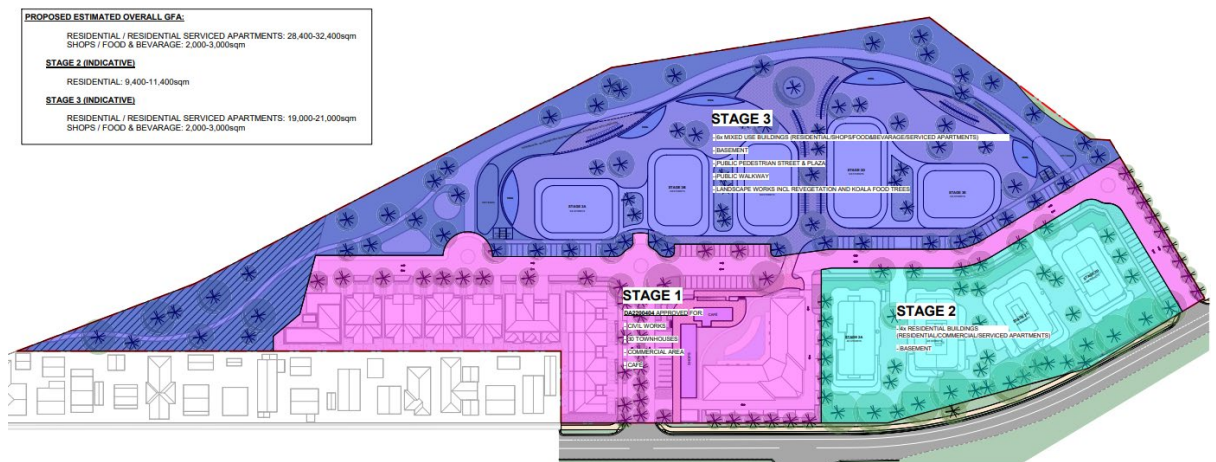


Figure 2: Extract from staging plan drawing DA-CST2&3-04.02

- 3 In their refusal of this concept application, the Council contend issues relating to density and character, visual impact, ecology, hydrology, traffic, and public interest. The application has been amended twice with leave of the Court, substantially narrowing the Council's contentions.

- 4 At the conclusion of the hearing, the remaining points of disagreement between the parties can be loosely grouped as:
- (1) Density and scale of the development;
 - (2) Visual impact;
 - (3) Stormwater management;
 - (4) Ecological impacts; and
 - (5) Parking provision.
- 5 For the following reasons, I find that the proposed concept application does not adequately demonstrate that it meets the tests in the relevant statutory instruments regarding stormwater and groundwater management, and the subsequent potential impacts on the adjacent wetland. As these tests are jurisdictional matters that enliven my power to grant consent, I find that the appeal should be dismissed, and as a result, I have not considered the balance of contentions raised in the proceedings in this judgment.

The site and surrounds

- 6 The site is located approximately 1.7km to the east of the main town of South West Rocks, positioned along a suburban stretch towards Arakoon. To the south lies existing low density residential land with Saltwater Lagoon beyond. To the north lies coastal wetland that leads to Saltwater Creek, then Arakoon National Park, and finally to Front Beach and Trial Bay.
- 7 In planning terms, the site is positioned at the confluence of several land use zones, as demonstrated in the extract from the KLEP land zoning map at Figure 1. The mix of zones includes R1 General Residential and a discreet area of SP2 Infrastructure containing an oil terminal towards the south of the site. To the east of the site are small areas of R5 Large Lot Residential and RU2 Rural Landscape. To the north, east, and south beyond the R1 area extend C1 National Parks and Nature Reserves, denoting Arakoon National Park, and some areas marked C2 Environmental Conservation. The northern rim of the site has a thin strip of RE1 Public Recreation land.
- 8 The site itself has an area of 4.819ha and is irregular in shape, stretching along a 284m frontage to Phillip Drive. It is currently vacant of both structures and, for the most part, vegetation. It is subject to a range of environmental sensitivities

relating to bushfire, ecology, and koalas. Of particular relevance to the findings of this judgment is the proximity to the coastal wetland to the north of the site, which supports the threatened species of the Wallum Froglet (*Crinia tinnula*).

Public submissions

- 9 This concept application was submitted to the Council on 14 November 2023. It was adequately notified in accordance with the Council's policy from 23 November 2023 to 20 December 2023, during which time 424 unique objections were made. Seven residents, or representatives thereof, gave oral submissions on site at the commencement of proceedings, having been briefed on the applicant's intended further amendment to the application.
- 10 A range of issues were raised in these submissions, which included concerns relating to impacts on the adjacent wetland. On the basis of my conclusion in this judgment, I have not explicitly addressed these submissions in any detail as they are largely reflected the Council's contentions.

The proposed development

- 11 The application proposes the following:
 - (1) Stage 2 comprises 4 x residential flat buildings of up to 4 storeys, including residential / commercial / serviced apartments, with 10% affordable housing, basement, and associated landscape works.
 - (2) Stage 3 comprises 6 x mixed use buildings of up to 5 storeys including residential / commercial / serviced apartments, plus a basement, public pedestrian street and plaza, public walkway, and associated landscape works.
- 12 The concept application seeks to secure the following elements, as defined on the set of drawings that forms Exhibit D:
 - (1) Building envelopes for Stages 2 and 3;
 - (2) Maximum building heights for Stage 2 of 22.025m plus lift overrun;
 - (3) Maximum building heights for Stage 3 of 24.6m plus lift overrun;
 - (4) Maximum GFA for Stage 2 of 12,000m²;
 - (5) Maximum GFA for Stage 3 of 21,000m² for residential purposes;
 - (6) Minimum GFA for Stage 3 of 3,000m² for non-residential purposes;
 - (7) Minimum 50% open space / landscaping provision, including minimum deep soil to 20% of the site area;

- (8) Car parking rates of:
 - (a) Maximum 181 parking spaces for Stage 2; and
 - (b) Maximum 345 parking spaces for Stage 3.
- 13 Given the nature of the concept application, the drawings proposed for consent under this application are appropriately conceptual in nature, and the detailed basement layout is caveated on drawing DA-CST2&3-05.01 as 'indicative and subject to change during detailed DA stage.'
- 14 The submitted reference scheme upon which this concept application is tested includes approximately 99 residential apartments in Stage 2, plus approximately 143 residential and serviced apartments in Stage 3. The application does not seek to fix a number of dwellings or mix of apartment types at this stage.
- 15 Stage 1, as approved under DA2200404 comprises 18 two-storey townhouses, multi-dwelling housing of 12 two-storey units, 6 retail tenancies and a café, and civil works.

The issue of stormwater and groundwater management

- 16 The site is mapped as land in proximity to coastal wetlands pursuant to s 2.8 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP R&H). Section 2.8 reads:

2.8 Development on land in proximity to coastal wetlands or littoral rainforest

Note—

The *Coastal Wetlands and Littoral Rainforests Area Map* identifies certain land that is inside the coastal wetlands and littoral rainforests area as “proximity area for coastal wetlands” or “proximity area for littoral rainforest” or both.

(1) Development consent must not be granted to development on land identified as “proximity area for coastal wetlands” or “proximity area for littoral rainforest” on the *Coastal Wetlands and Littoral Rainforests Area Map* unless the consent authority is satisfied that the proposed development will not significantly impact on—

- (a) the biophysical, hydrological or ecological integrity of the adjacent coastal wetland or littoral rainforest, or
- (b) the quantity and quality of surface and ground water flows to and from the adjacent coastal wetland or littoral rainforest.

(2) This section does not apply to land that is identified as “coastal wetlands” or “littoral rainforest” on the *Coastal Wetlands and Littoral Rainforests Area Map*.

17 Section 2.10 of the SEPP R&H reads:

2.10 Development on land within the coastal environment area

(1) Development consent must not be granted to development on land that is within the coastal environment area unless the consent authority has considered whether the proposed development is likely to cause an adverse impact on the following—

- (a) the integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment,
- (b) coastal environmental values and natural coastal processes,
- (c) the water quality of the marine estate (within the meaning of the *Marine Estate Management Act 2014*), in particular, the cumulative impacts of the proposed development on any of the sensitive coastal lakes identified in Schedule 1,
- (d) marine vegetation, native vegetation and fauna and their habitats, undeveloped headlands and rock platforms,
- (e) existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,
- (f) Aboriginal cultural heritage, practices and places,
- (g) the use of the surf zone.

(2) Development consent must not be granted to development on land to which this section applies unless the consent authority is satisfied that—

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

(3) This section does not apply to land within the Foreshores and Waterways Area within the meaning of *State Environmental Planning Policy (Biodiversity and Conservation) 2021*, Chapter 6.

18 The Council contends that the Court could not be satisfied that the proposal will not significantly impact on the biophysical, hydrological or ecological integrity of the coastal wetland adjacent to the northern site boundary, or the quantity and quality of surface and groundwater flows to the coastal wetlands, in contravention of s 2.8 of the SEPP R&H. They also contend that the Court could not be satisfied that the development is designed, sited and will be managed to avoid an adverse impact referred to in s 2.10(1). Primarily, this is

because the Council's experts remain unconvinced that the engineering design of the stormwater and groundwater infrastructure is technically feasible.

19 Extensive evidence was provided on the topics of hydrology, ecology, and civil engineering in both written and oral evidence by the following experts:

20 For Rise:

- Lange Jorstad (Groundwater)
- Damian McCann (Wetlands)
- Scott Sharma (Civil Engineering)
- Karl Robertson (Ecology)
- Catherine Walker (Flooding)

21 For the Council:

- Erin Holton (Groundwater and Wetlands)
- Blake Stephens (Civil Engineering)
- David Havilah (Ecology)

22 Oral evidence, and the additional joint reporting on the topics of stormwater and groundwater was given by Mr Sharma, Ms Holton, and Mr Stephens.

23 Written evidence on this issue was given through the South West Rocks Hydraulic Regime Assessment by ADP Consulting dated 8 April 2025 (HRA) (Ex G), an initial Joint Expert Biophysical, Hydrological and Ecological Report dated 26 March 2025 (Ex 10) and two supplementary joint reports in response to amendments during the course of proceedings: the first dated 8 April 2025 (Ex 11) and the second dated 9 April 2025 (Ex 17). Finally, a supplementary joint report on Ecology was filed dated 8 April 2025 (Ex 13).

24 I note that the information relating to the design and modelling of the stormwater and groundwater infrastructure was amended multiple times prior to, and during the course of the hearing, to which Council's experts endeavoured to respond.

25 Water quality and groundwater management was generally agreed to in joint reporting, subject to conditions (noting the further oral evidence given by Ms Holton, discussed below). This is managed through a network of detention,

retention, and treatment systems that includes green roofs, rainwater storage and water recycling, and infiltration trenches along the northern portion of the site.

- 26 Stormwater, which was the focus of the oral evidence during the hearing, is proposed to be managed through above-ground on-site detention (OSD), with overflow and dispersal from the north of the site to adjacent land across a weir and level spreader. Mr Sharma states in evidence that in a storm event, water will collect in the OSD basins and slowly disperse through infiltration or piped systems, and any overflow will sheet over the top of the OSD across an 8m weir somewhere along the northern edge of the site. This is documented on the amended diagrams appended to Ex 17.
- 27 The experts agree that the purpose of an OSD system is to manage peak flow of water in 5 – 100 year storm events, to ensure pre-development flows from the site are maintained in the post-development scenario. Mr Sharma states that the construction of the above ground OSD system is to replicate the pre-development scenario, and that any ponded water in these OSDs will dissipate through free-draining material underlying the natural basin form, and also through accompanying subsoil drainage. He states that ‘the inflow seepage rate of the basin with both of these systems working concurrently is unknown, and can be defined as part of a future detailed development application’ (Ex 17, p 5) but nonetheless anticipates that any above ground ponding during peak events would be short – a matter of hours and no longer than 24 hours. He further proposes a ‘low-flow’ pipe to seep any additional water away from the basin for the full length of the OSD berm, but notes this would achieve the same design intent of the subsoil seepage system (Tcpt, 10 April 2025, p 167 (40)).
- 28 In response, the Council’s Civil Engineering expert Mr Stephens identified an issue with the hydrological modelling and peak flow mitigation. In Mr Stephens’ opinion, the OSD system will result in a volume of stormwater being artificially detained on site in a storm event, and that this water is not accounted for in the modelling for the downstream receiving environment. Despite Mr Sharma’s assurances regarding subsoil drainage or low-flow pipe systems to drain this

water, Mr Stephens states that these systems were not accounted for in the modelling and that it is therefore impossible to accurately assess the peak flows that would result from proposed system (Tcpt, 10 April 2025, p169 (6)).

- 29 Importantly, the above-ground OSD would also be positioned above infiltration trenches, which are designed to capture and treat water, and allow treated water to infiltrate to groundwater through a system of buried cells. This creates a layering of infiltration systems whereby, in a storm event, both the infiltration trenches and OSDs above seep water into the ground. Some of this water will be treated and some is direct, untreated runoff.
- 30 Mr Stephens raised further concerns that the reliance on infiltration does not account for saturated soil, nor recognise that there is only a shallow layer of free-draining material between the base of the OSD and the infiltration tanks for the stormwater to infiltrate into. As demonstrated in Mr Stephens' schematic diagrams appended to Ex 17, the result of this is that in a circumstance where one storm fills the system to capacity, if a second storm occurs before the water from storm one has dissipated from the OSD then the peak flow levels will be much higher than anticipated or currently modelled.
- 31 In Mr Stephens' evidence, which I accept, the result of this is that the modelling gives an incorrect understanding of peak flow volumes leaving the site and travelling into the coastal wetland, and that without a holistic understanding of these outflows – water that both seeps and flows overland – there is no way to ascertain whether it is having an impact on this adjacent wetland. He suggests that on this basis, the proposed design does not demonstrate that the stormwater system meets peak flow management requirements for all storms of between 1:5 to 1:100 year events.
- 32 In addition, although Ms Holton had concluded, on the basis of amended information and the MUSIC model, that the proposed groundwater management is acceptable, she subsequently identified a further issue. In oral evidence, she stated given the conflict between water infiltration from above ground OSDs and the groundwater infiltration tanks below that was identified by Mr Stephens in oral evidence, her acceptance of the groundwater volumes entering the wetland may not stand (Tcpt, 10 April 2025, p 180(20)).

- 33 Both Mr Stephens and Ms Holton confirm that, in their opinion, there is no way to be satisfied on the evidence that the proposed development will not significantly impact on the biophysical, hydrological or ecological integrity, or the quantity and quality of surface and ground water flows to and from the adjacent coastal wetland.

Assessment of stormwater and groundwater management

- 34 Section 4.22 of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) provides for concept development applications as follows:

4.22 Concept development applications (cf previous s 83B)

(1) For the purposes of this Act, a **concept development application** is a development application that sets out concept proposals for the development of a site, and for which detailed proposals for the site or for separate parts of the site are to be the subject of a subsequent development application or applications.

(2) In the case of a staged development, the application may set out detailed proposals for the first stage of development.

(3) A development application is not to be treated as a concept development application unless the applicant requests it to be treated as a concept development application.

(4) If consent is granted on the determination of a concept development application, the consent does not authorise the carrying out of development on any part of the site concerned unless—

(a) consent is subsequently granted to carry out development on that part of the site following a further development application in respect of that part of the site, or

(b) the concept development application also provided the requisite details of the development on that part of the site and consent is granted for that first stage of development without the need for further consent.

The terms of a consent granted on the determination of a concept development application are to reflect the operation of this subsection.

(5) The consent authority, when considering under section 4.15 the likely impact of the development the subject of a concept development application, need only consider the likely impact of the concept proposals (and any first stage of development included in the application) and does not need to consider the likely impact of the carrying out of development that may be the subject of subsequent development applications.

Note—

The proposals for detailed development of the site will require further consideration under section 4.15 when a subsequent development application is lodged (subject to subsection (2)).

- 35 And further at EPA Act, s 4.24:

4.24 Status of concept development applications and consents (cf previous s 83D)

(1) The provisions of or made under this or any other Act relating to development applications and development consents apply, except as otherwise provided by or under this or any other Act, to a concept development application and a development consent granted on the determination of any such application.

(2) While any consent granted on the determination of a concept development application for a site remains in force, the determination of any further development application in respect of the site cannot be inconsistent with the consent for the concept proposals for the development of the site.

(3) Subsection (2) does not prevent the modification in accordance with this Act of a consent granted on the determination of a concept development application.

Note—

See section 4.53(2) which prevents a reduction in the 5-year period of a development consent.

- 36 Pursuant to s 4.22(3), Rise have requested this application be treated as a concept development application.
- 37 Section 4.22(5) states that I need only consider the likely impact of the concept proposals, and do not need to consider the likely impact of the carrying out of development that may be the subject of subsequent development applications. On this basis, Rise submit that many of the issues discussed in evidence in these proceedings are of a level of detail that relates to the next stage of the development application, not the current concept application. However, I consider that the stormwater management system is designed as a site-wide system that results from the building envelopes and layout proposed in the concept application, and although additional detail is required at the next stage of consent to confirm the detailed design of the system, this is a valid consideration under this application. Rise submit in closing that assessing this level of detail in a concept development application is inappropriate, and that it is important to keep in mind the distinction in EPA Act s 4.22(5) between ‘the likely impacts of the concept proposals’ and ‘the likely impact of carrying out of development that may be the subject of subsequent development applications.’ They submit that it is not necessary for the Court to resolve the issue of stormwater finally, and it should not count against the approval of the concept application.

38 The Council submit that consideration of matters such as the stormwater proposals to the level of detail given in evidence is not only appropriate, but it is consistent with relevant caselaw. In their submission, consistent with *The Uniting Church in Australia Property Trust (NSW) v Parramatta City Council* [2018] NSWLEC 158 ("Uniting Church") at [48], they state that it is relevant for the consent authority to consider construction-related impacts that are likely to be incurred in the actual carrying out of the development the subject of the concept application.

39 The Council further submit that:

“In the case of the current concept development application, the ‘development’ as defined in s 1.5(1) of the EPA Act, in respect of which the Court is to consider the likely impacts under s 4.15, is ‘the erection of a building’ by proposed building envelopes within which buildings could be erected (after the grant of consent to subsequent development applications) and ‘the use of land’ being the use of different parts of the buildings for the purposes shown in the indicative land use mix.” (Respondent’s Written Submissions, par (9))

40 In consideration of the level of detail required in this application, I note that the concept application sets the parameters for any future detailed development application. Any such detailed application, if consistent with a consent granted under this concept application, would have some impacts that are apparent and able to be considered at this conceptual stage. One of these impacts is on hydrology: both stormwater and groundwater.

41 I also note the level of agreement between the experts regarding matters of hydrology that may be resolved by condition or in the next stage of development application. The stormwater proposals in the HRA at Ex G and as amended in Ex 17 are schematic, and detailed elements such as the location of the proposed 8m weir, subsoil drainage and low flow pipes is not fully resolved. Not only do these stormwater proposals not represent a detailed design, one is not requested by the Council. They are conceptual, and are provided to form the basis of an assessment of the impacts of the proposed concept development.

42 To support this assessment, modelling to demonstrate the technical feasibility of the proposed stormwater system is required by the Council at this concept stage. As this concept application functions as a masterplan for the remaining

two stages of the site and the stormwater system applies to both, it is appropriate that a holistic stormwater management plan be assessed and tested for feasibility at this stage. More detailed designs are required for these systems at a later stage, however in this concept application, I accept the evidence of the Council's experts that Rise have not demonstrated the technical feasibility of the proposed conceptual stormwater system.

- 43 Given this finding, pursuant to the SEPP R&H, s 2.8, I am not satisfied that the proposed development will not significantly impact on the biophysical, hydrological or ecological integrity of the adjacent coastal wetland. Further, in considering Ms Holton's concerns in oral evidence in response to additional stormwater management issues, I also do not accept that the applicant has adequately demonstrated that the development will not significantly impact on the quantity and quality of surface and ground water flows to the adjacent coastal wetland.
- 44 Further, I am not satisfied that the development is designed, sited, and will be managed to avoid an adverse impact on the integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment of the coastal environment area pursuant to the SEPP R&H s 2.10(1)(a). Given the position taken by Rise to the contrary, I have no evidence to demonstrate that adverse impacts have been avoided, minimised, or managed as per s 2.10(2).

Conclusion

- 45 As these matters are jurisdictional thresholds to which the application must meet in order to enliven my power to grant consent to this application, and I have determined they have not been met, the appeal must be dismissed.
- 46 As I have determined that I do not have power to grant consent to the concept application, it is not necessary for me to consider the balance of contentions raised in the proceedings.

Orders

- 47 The Court orders:
- (1) The appeal is dismissed.

- (2) Development application DA2300926 is determined by way of refusal.
- (3) All exhibits are retained.

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E Washington

Commissioner of the Court

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