

**IN THE LAND & ENVIRONMENT  
COURT OF NEW SOUTH WALES**

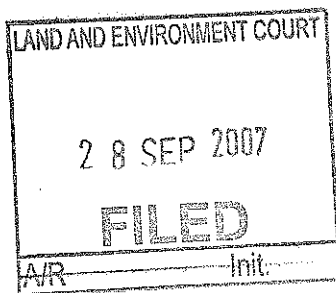
07/14/0785

**HASTINGS POINT PROGRESS  
ASSOCIATION INCORPORATED**  
Applicant

**TWEED SHIRE COUNCIL**  
First Respondent

**AEKLIG PTY LIMITED**  
Second Respondent

**APPLICANT'S AMENDED  
POINTS OF CLAIM**



Address for service:

Jessica Wood  
Senior Solicitor  
Environmental Defenders Office  
Limited  
PO Box 212  
LISMORE NSW 2480

1. The Applicant is an incorporated association incorporated under the Associations Incorporation Act 1984 (NSW).
2. The First Respondent is a Council for the local government area in which lot 1 DP 786570 (the subject property) is located.
3. The Second Respondent was the applicant for development consent, DA 0413/06 (the development consent) for a staged seniors living development on the subject property.
4. On or about 8 May 2007 the First Respondent granted the development consent to the Second Respondent for the staged seniors living development.
5. The subject property is zoned 2(c) Urban Expansion under Tweed Local Environmental Plan 2000 (LEP 2000).

6. The development application was made pursuant to State Environmental Planning Policy (SEPP) (Seniors Living) 2004.
7. The development was also a development to which ~~Tweed Local Environmental Plan~~LEP 2000 applied except to the extent of any inconsistency with SEPP (Senior's Living) 2004 (viz. cl5(3)).
8. Under clause 8 of ~~Tweed Local Environmental Plan~~LEP 2000 consent could only be granted to any development of land to which the LEP 2000 applied if:
  - (a) the ~~Council~~First Respondent was satisfied that the development was consistent with the primary objective of the zone within which the land is located; and
  - (b) the ~~Council~~First Respondent had considered other aims and objectives of the LEP of relevance to the development; and
  - (c) the ~~Council~~First Respondent was 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.
9. In granting consent to the development, the ~~Council~~First Respondent failed to consider the matters that it was required to consider pursuant to cl 8 and failed to be satisfied about those matters before it granted consent to the development.

#### Particulars

- (i) The Statement of Environmental Effects fails to make any reference to cl 8 of the ~~Tweed~~LEP 2000 or the objectives of the zone or the Plan (including clauses 4 and 5 of LEP 2000) and makes no assessment of the consistency or otherwise of the development with those requirements;

- (ii) The report to the Council-First Respondent on 8 May 2007 failed to make any reference to cl 8 of the Tweed Local Environmental Plan LEP 2000 or make any assessment of the matters required to be considered including or the objectives of the zone and aims and objectives of the Plan including clauses 4 and 5 of LEP 2000;
- (iii) There was no necessary-inconsistency between the provisions of clause 8 of Tweed LEP 2000 and SEPP (Seniors Living) and between the objectives of the zone and SEPP (Seniors Living) so as to cause SEPP (Senior's Living) to prevail over the provisions of Tweed LEP 2000 and avoid the need to consider the provisions of cl 8 or the zone objectives.

10. Further, in July 2005 the First Respondent resolved to prepare an amendment to LEP 2000 to restrict the height of development at Hastings Point south of Cudgera Creek, to two storeys. The Draft LEP was to be known as Draft Amendment No. 81 – Heights of Buildings, Hastings Point (Amendment No. 81).

#### **Particulars**

i. Agenda Report for First Respondent's Planning Meeting of 6 July 2005.

11. The First Respondent submitted Amendment No. 81 to the Director-General pursuant to s64 of the Environmental Planning and Assessment Act 1979 (EP&A Act) on or about March 2006.

#### **Particulars**

i. Letter dated 6 March 2006 from the First Respondent to the Regional Planning Coordinator NSW Department of Planning enclosing section 54(4) notification of advice.

12. Despite the First Respondent later resolving in December 2006 to defer the making of Amendment 81, the Director-General issued a section 65 certificate in respect of Amendment No. 81 authorising the First Respondent to exhibit Amendment No. 81.

**Particulars**

i. Letter dated 30 March 2006 from the Director-General to the First Respondent.

ii. Report to the First Respondent's dated 19 December 2006 recommending that Council abandon Amendment No. 81.

iii. Letter dated 20 March 2007 from the Director-General to the First Respondent enclosing section 65(1) certificate in respect of Amendment No. 81.

13. In breach of section 66 of the EP&A Act the Council failed to place Amendment No. 81 on public exhibition.

14. Further, even in the absence of public notification of Amendment No. 81, it was a relevant consideration pursuant to s79C(1)(e) of the EP&A Act.

15. The First Respondent failed to give any real, genuine or proper consideration to the provisions of Amendment No. 81.

16. In the circumstances, the Council-First Respondent failed to consider a matters of relevance under s79C of the Environmental Planning and Assessment Act 1979/EP&A Act.

17. Further, or in the alternative, in approving a development of three storeys in height, the First Respondent's decision to grant consent was manifestly unreasonable.

**Particulars**

- (i) Given the authorisation to exhibit Amendment No. 81, no reasonable decision maker could have approved a development of three storeys.
- (ii) Given the existing one and two storey character of Hastings Point, no reasonable decision maker could have concluded that a three storey development would maintain neighbourhood amenity and appropriate residential character and that the proposal would thus satisfy the requirements of clause 31 of SEPP (Senior's Living).
- (iii) Given the Director-General's expressed concern, about which the First Respondent was aware when it granted the consent, relating to the sensitive coastal location and that a reduction in building heights would better reflect the aims and objectives of the NSW Coastal Policy.
- (iv) Given the provisions of Tweed Shire 2000+ Strategic Plan adopted in December 1996 which proposed the initiation and evaluation of a two storey height limit for Hastings Point.

18. Accordingly, the development consent is void and of no effect.

19. In respect of the development consent, the Applicant seeks the relief in the Further Amended Class 4 Application.

20. In respect of the failure to exhibit Amendment No. 81 in breach of section 66 of the EP&A Act the Applicant seeks the making of an order that the Council exhibit Amendment 81, as sought in the Further Amended Class 4 Application.

21. Should the Court make any of the alternative orders pursuant to section 25B of the Land and Environment Court Act in respect of the development consent, the Applicant seeks an order that the First Respondent be ordered to exhibit Amendment No. 81 before any reconsideration of the development application the subject of these proceedings.

| Date: 28 September 2007

A handwritten signature in black ink, appearing to read 'Kirsty Ruddock', written over a horizontal dotted line.

Kirsty Ruddock  
Solicitor for the Applicant