

Dunford v Gosford City Council - [2015] NSWLEC 1016

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Land and Environment Court

New South Wales

Case Name: Dunford v Gosford City Council

Medium Neutral Citation: [2015] NSWLEC 1016

Hearing Date(s): 9,10,11 December 2014

Decision Date: 14 January 2015

Jurisdiction: Class 1

Before: Brown C

Decision:

1. The appeal is upheld.
2. DA 45125/2014 for the demolition of an existing dwelling and the construction of a new dwelling and basement car parking at 23B Ocean View Drive, Wamberal is approved subject to the conditions in Annexure A.
3. The exhibits are returned with the exception of exhibits 6, 14, A and B.

Catchwords:

DEVELOPMENT APPLICATION: demolition of an existing dwelling and the construction of a new a dwelling – whether coastal hazard processes will result in unacceptable property damage and loss – public interest

Legislation Cited:	<a href="#">Coastal Protection Act 1979</a> , <a href="#">Environmental Planning and Assessment Act 1979</a> , Gosford Planning Scheme Ordinance Gosford Local Environmental Plan 2014 State Environmental Planning Policy No 1 State Environmental Planning Policy No 71
Cases Cited:	<a href="#">Re Drake v Minister for Immigration and Ethnic Affairs (No.2) (1979) 2 ALD 634</a> , <a href="#">Tenacity Consulting v Warringah [2004] NSWLEC 140</a> , <a href="#">Zhang v Canterbury City Council (2001) 115 LGERA 373</a> ,
Category:	Principal judgment
Parties:	Esther Dunford (Applicant) Gosford City Council (Respondent)
Representation:	Counsel: Mr P Tomasetti SC (Applicant) Ms A Hemmings, Counsel (Applicant) Mr M Fraser, Barrister (Respondent)  Solicitors: Hicksons (Applicant) Gosford City Council (Respondent)
File Number(s):	10636 of 2014
Publication Restriction:	No

## JUDGMENT

- COMMISSIONER:** This is an appeal against the refusal of DA 45125/2014 by Gosford City Council (the council) for the demolition of an existing dwelling and the construction of a new dwelling and basement car parking at 23B Ocean View Drive, Wamberal (the site).

2. The council maintains that the application should be refused because:

- the construction of the dwelling does not sufficiently avoid or minimise the potential risk of coastal erosion, and
- the construction of the dwelling is not in the public interest as it will be impacted by coastal hazard processes resulting in property damage and loss.

### The site and its coastal context

3. The site is Lot 2 in DP 8854. It has a western frontage to Ocean View Road of 16.48 m, a northern side boundary of 49.91 m and a southern side boundary of 55.66 m. The eastern beachfront boundary of 16.71m adjoins Wamberal Beach.
4. Existing ground levels vary from approximately 4.5 m AHD at the beachfront boundary increasing to about 5.7 m AHD within a distance of 6-8m of the beachfront boundary along an area vegetated with grasses and shrubs, continuing to the footprint of the existing dwelling house, before falling to approximately 2.9 m AHD at the Ocean View Drive frontage. The site is lightly landscaped with some shrubbery around the site and a large expanse of lawn area between the house and the beachfront boundary. The predominant form of development in the immediate area is detached residential dwellings.
5. The council area is bounded, to the east, by 14 km of coastal beaches extending from Patonga in the south to Forresters Beach in the north. Historically, coastal processes have threatened sections of the coast. In particular, Wamberal Beach experienced severe erosion in 1974, 1978, 1986 and 1997. In May-June 1974 many houses were threatened and in June 1978 beach and dune erosion undermined and destroyed two houses, including a house on the site of this appeal.
6. The risk to development along the coast is projected to increase due to projected sea level rises. In August 2013, the council endorsed a number of climate change scenarios relating to the Central Coast region. The climate change scenarios are intended to present a plausible future state of the climate in the region at different time periods and form the basis for risk assessment. The council's adopted sea level rise planning benchmarks are 0.40 m by 2050 and 0.9 m by 2100. Due to the higher sea level rise planning benchmarks than those adopted for previous studies, projected shoreline recession on open coast beaches is expected to increase typically by some 7 m for the 50 years projections and, for the 100 years projections, by some 14 m (Exhibit 2, Tab 6, p1).

### Relevant planning controls

7. The site is currently within Zone R2 Low Density Residential under *Gosford Local Environmental Plan 2014* (LEP 2014) which was gazetted on 11 February 2014. A dwelling is a permissible use with consent in this zone.
8. Clause 2.3(2) states:

(2) The consent authority must have regard to the objectives for development in a zone when determining a development application in respect of land within the zone.
9. The R2 zone objectives are:

- To provide for the housing needs of the community within a low density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To ensure that development is compatible with the desired future character of the zone.
- To encourage best practice in the design of low-density residential development.
- To promote ecologically, socially and economically sustainable development and the need for, and value of, biodiversity in Gosford.
- To ensure that non-residential land uses do not adversely affect residential amenity or place demands on services beyond the level reasonably required for low-density housing.

10. Clause 1.8A of LEP 2014 is relevant in this case and states:

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

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.

11. The development application was lodged around 20 January 2014 and determined by refusal on 13 May 2014 and as such, had not been “finally determined” at the coming into effect of LEP 2014 on 11 February 2014. Consequently, cl 1.8A applies.
12. The environmental planning instrument in existence prior to the coming into effect of LEP 2014 was *Gosford Planning Scheme Ordinance* (the Ordinance) where the site was zoned 2(f) Residential (Beach Frontage). A dwelling house is a permissible use with consent in this zone.
13. The objective of the 2(f) zone is:

The objective of Zone No. 2(f) is to ensure that low scale development on land situated in proximity to public areas or identified as being subject to hazard from coastal erosion and storms (or both) is located and constructed so as to avoid or minimise the potential hazard and minimise visual impact.

14. Clause 10(3) and cl (4) of the Ordinance state:

(3) The Council must not grant consent for development on land within a zone unless it has taken into consideration the objectives of the zone and the consistency of that development within those objectives as well as the objectives of the [Local Government Act 1993](#) relating to ecologically sustainable development.

(4) The Council must not grant consent for development unless it has taken into consideration the character of the development site and the surrounding area, where, for the purpose of this provision, character means the qualities that distinguish each area and the individual properties located within that area.

15. Given cl 1.8A, it was agreed that the principal environmental planning instrument for the assessment of the development application is the Ordinance.
16. *Gosford Development Control Plan 2013* (DCP 2013) came into effect with LEP 2014 on 11 February 2014. Clause 6.2 addresses Coastal Frontage. Clause 6.2.3 provides objectives which state:
  - a. Minimise the risk to life and property associated with development and building on land which has a coastal beach and/or cliff frontage.
  - b. Provide guidelines for the development of land within the coastal frontage area.
17. Clause 6.2.5 identifies Gosford City Open Beaches, with Wamberal Beach identified on Sheet 2. Clause 6.2.5.1 provides Development Exceptions with specific requirements for Wamberal Beach at cl 6.2.5.1(d). The relevant parts of cl 6.2.5.1 are:

#### **6.2.5.1 Development Exceptions**

Council will not permit buildings or building structures to be constructed on, over or below the land which has been identified by the Coastal Management Plan for Gosford City Open Beaches as subject to designated coastal hazards except permitted below:

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d. On Wamberal Beach building will be permitted seaward of the 2045 erosion line but landward of the proposed revetment subject to the following:

- i. adequate foundation treatment designed to withstand the stormwave erosion.
- ii. that the building shall be set back from the alignment of the proposed revetment as required by Council.
- iii. the owner executing a positive covenant as detailed in subclause 6.2.5.1(f).
- iv. The development will not give rise to any increased hazard.
- v. Council will not permit any buildings or building structures to be constructed on, over or below the land identified as being within 3 metres landward of the proposed revetment.

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h. Major investment in redevelopment of existing buildings in areas to be protected by the revetment wall will not be permitted unless the existing structure has adequate foundations or adequate foundations are provided so that loss will not occur in the event of a major storm event occurring prior to the provision of the revetment structure. Any major investment in this area must also provide evidence that the proposed development will not give rise to any increased hazard.

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j. Building design and structural design shall take into account that storms greater than the storms causing the predicted hazards can occur and that erosion and run-up could occur to a greater extent than the predictions.

k. The coastal, geotechnical and structural considerations shall not cease because the building is just landward of the hazard line. Any Major Investment or Minor Investment and their foundations shall be designed to withstand the effects of larger storm events than the predicted storm event.

l. Where structural consideration of coastal forces is required the engineer shall take into account the forces generated by coastal attack, possible dune slumping, loss of support, slope readjustment, changing water table as well as the normal structural and foundation considerations, including reduced foundation capacities. Foundation design shall extend beyond the reduced foundation capacity zone of influence.

o. Any suitable sand excavated during the course of building and re-development work shall have all deleterious material removed and shall be placed on the adjacent beach at a location approved by the Council.

18. Prior to DCP 2013, the relevant development control plan was *Gosford Development Control Plan No 125 - Coastal Frontage* (DCP 125). DCP 125 became effective on 27 January 2000. The objectives for DCP 125 are:

(a) Minimise the risk to life and property associated with development and building on land which has a coastal beach and/or cliff frontage.

(b) Provide guidelines for the development of land within the coastal frontage area.

19. Wamberal Beach is included by way of cl 1. Clause 8.1 provides Development Exceptions with specific requirements for Wamberal Beach at cl 8.1.4. The relevant parts of cl 8.1 are:

### **8.1 Development Exceptions**

Council will not permit buildings to be constructed on land which has been identified by the Coastal Management Plan for Gosford City Open Coast Beaches as subject to designated coastal hazards except where permitted below:

**8.1.3** All structures constructed in the coastal frontage zones shall:

(a) be compatible with the coastal hazards identified;

(b) be set back as far landward as practicable;

(c) not give rise to any increased hazard;

(d) be designed to not be damaged by the designated hazard;

- (e) give consideration to the effects of larger events than the designated hazard;
- (f) be constructed in a manner or to a level which overcomes any problem from the coastal hazards of run-up and inundation.

**8.1.4** On Wamberal Beach building will be permitted seaward of the 2045 erosion line but landward of the proposed revetment subject to the following:

- (a) adequate foundation treatment designed to withstand the stormwave erosion;
- (b) that the building shall be set back from the alignment of the proposed revetment as required by Council;
- (c) an indemnity being provided as detailed below.

**8.1.7** Major investment in redevelopment of existing buildings in areas to be protected by the revetment wall will not be permitted unless the existing structure has adequate foundations or adequate foundations are provided so that loss will not occur in the event of a major storm event occurring prior to the provision of the revetment structure.

**8.1.15.** Any suitable sand excavated during the course of building and re-development work shall have all deleterious material removed and shall be placed on the adjacent beach at a location approved by the Council.

20. There was some dispute over whether DCP 125 or DCP 2013 was the applicable development control plan (DCP) although it was agreed that the relevant requirements were so similar and it was not a matter that was critical in the consideration of the contentions. Mr Tomasetti SC, for the applicant, maintained that DCP 2013 was the appropriate DCP as the words “Gosford Planning Scheme Ordinance” are included in cl 1.1.2 (Where this Plan applies). A reference to the “Gosford Planning Scheme Ordinance” as being applicable is also made in cll 1.1.1, 1.1.3 and 1.1.4 where reference is also made to Interim Development Order 122 (IDO 122); a planning document made under the Ordinance.
21. In agreeing that the relevant provisions in DCP 2013 and DCP 125 are similar, I am inclined to accept that the relevant DCP is DCP 125. With the coming into effect of LEP 2014, and contrary to the submission of Mr Tomasetti, not all areas covered by the Ordinance were repealed by LEP 2014 (see cl 1.3(1A) of LEP 2014). It follows that the areas identified in cl 1.3(1A) as “Deferred Matter” would be still subject to the provisions of the Ordinance (or IDO 122) with all other areas under the control of LEP 2014. Hence a reference to the Ordinance (or IDO 122) in DCP 2013 does not mean that DCP 2013 applies to the whole area of the Ordinance. It follows, in my view, that as the Ordinance is the principal environmental planning instrument for the assessment of the application, then the DCP that applied to the site at the time of the Ordinance, being DCP 125, should also apply, although I have made reference to DCP 2013 in the judgment, where appropriate.

## Relevant coastal protection documents



22. The *Coastal Protection Act 1979* (the *CP Act*) applies. The *CP Act* provides objects at cl 3 and requirements for coastal zone management plans at Part 4A. Section 55B provides Requirement for coastal zone management plans, s 55C provides Matters to be dealt with in coastal zone management plans and s 55E provides for Public consultation.
23. On 22 August 1995, the council adopted the *Coastal Management Study and Coastal Management Plan* (the 1995 Management Plan) prepared by WBM Oceanics Australia and Planning Workshop. The 1995 Management Plan was prepared “in accordance with the requirements of the Coastline Management Manual prepared by the New South Wales Government September 1990” (p4). The 1995 Management Plan states “a review of coastal processes is to be undertaken when new data is available, no later than year 2012, leading to a Management Plan review by year 2015” (p20). The 1995 Management Plan identifies Wamberal Beach as Precincts III and IV. The Specific Problems for Wamberal Beach are identified as:

Severe storm erosion in the past has resulted in *ad hoc* protection works being initiated by the beachfront property owners. Such protection is of uncertain but doubtful effectiveness, would detract from the visual beach amenity and interferes with beach processes. They may also increase erosion of neighbouring properties.

As well, protective action taken in the 1970's has led to the vacant 'Pye' properties (Lots 10-11, DP 12022 No.s 71 and 69, Ocean View Drive, Terrigai) now owned by Council consisting of solid fill rather than dune sand. This would be exposed and act as a solid barrier in the event of dune erosion and recession.

Studies undertaken show that should the Central Coast experience a severe 'design' storm event, virtually the entire dune system of Wamberal Beach between the lagoons' entrances would be under threat of erosion. With shoreline retreat over time, this could result in breakthrough of the dune system to the hind-dune residential and lagoon areas.

As a result of past erosion and the loss of the beachfront reserve, much of the beachfront is within private ownership. Public beach access needs to be addressed in considering management options. Also, expanded car parking facilities would be required to cater for a growing pressure on beach usage.

24. Tables 4.5 and 4.6 provide a discussion on feasible erosion hazard and management options and Table 4.7 provides recommended actions. The relevant parts of Table 4.7 state:

The back-beach dune ridge and properties on and behind the dune are to be protected in accordance with the following procedures and conditions:

- (i) A formal terminal protection line is to be determined and approved by Council, coinciding more or less with the line of the erosion scarp as created during storm events in 1974/1978.
- (ii) A terminal protection structure in the nature of a buried rock revetment is to be designed and constructed \* \* to the satisfaction of Council and NSW Public Works, such construction to occur as soon as practicable and in an orderly, co-ordinated manner along the extent of the approved line.

(iii) New buildings and additions to / existing buildings on the beach front properties may be constructed in accordance with normal Council by-laws and subject to conditions as follows:

- set back from the protective structure line by a distance to be determined as part of the structure design to facilitate maintenance;
- the maximum practicable quantity of sand behind the seawall' to be excavated and placed on the beach;
- sand thus removed may be replaced by other suitable foundation material
- any structure erected within the 20 year erosion hazard zone prior to construction of the protective revetment must be set back from the designated protective structureline as provided above and designed to withstand the design storm wave erosion, as certified by appropriately qualified coastal and foundation engineers

\* \* The protective revetment may be constructed in sections to suit practical and funding constraints.

25. The implementation priority for these recommendations is shown as “H” (high) although the 1995 Management Plan acknowledges that the decision on the final options “rests with the Council and these may vary somewhat from those listed herein” (p73).
26. On 9 December 2014, the council resolved to publically advertise the *Open Coast and Broken Bay Beaches - Coastal Zone Management Study – Draft* (the draft CZMS) between 15 January 2015 and 15 February 2015.

Clause 2.3.8 addresses the historical setting and cl 5.9.10 provides a coastal hazard risk assessment for Terrigal - Wamberal Beach. Recommended management options for Terrigal - Wamberal Beach are at cl 8.10. These are identified as:

Reviewing the design and environmental assessment for the Wamberal Terminal Protection Structure, and securing funding for its construction;

In the interim, prior to construction of the Terminal Protection Structure (TPS), modifying the Gosford DCP to not allow new development seaward of the *Immediate) Zone of Slope Adjustment*, or defining a new foreshore building line landward of the *Immediate Zone of Slope Adjustment*, requiring that any new development be piled into the *2700 Stable Foundation Zone*;

Should funding not be able to be secured or the TPS not go ahead, voluntary purchase of the individual properties where buildings are located seaward of the *Immediate Zone of Slope Adjustment* could be offered - it is estimated based on data available at [www.onthehouse.com.au](http://www.onthehouse.com.au) that individual properties are valued at \$4 million each. This could be coupled with application of the

Gosford DCP on the same basis as what has been applied to the rest of the beaches in the LGA - i.e. locating new development landward of the 2050 *Zone of Slope Adjustment* and requiring piling into the 2700 *Stable Foundation Zone*. This would effectively disallow new development on the existing lots, thereby not increasing the value of properties currently at risk of erosion.

27. *State Environmental Planning Policy No 71 – Coastal Protection* (SEPP 71) applies to land the whole or any part of which is within the coastal zone (cl 4(1)). Clause 7(b) states that the matters in cl 8 are to be taken into account by a consent authority when it determines a development application.

### **The expert coastal engineering evidence**

28. Expert evidence for the council was provided by Mr Douglas Lord and for the applicant by Mr Lex Nielsen. Mr Trevor Clack, a civil engineer, also provided evidence for the applicant on the structural integrity of the proposed dwelling, particularly in times of potential coastal erosion. His conclusion that the design of the dwelling “meets, and in some cases exceeds the structural integrity required to resist coastal erosion in accordance with DCP 125” was not challenged by Mr Lord.
29. Mr Lord states that while the dwelling as proposed conforms to the recommendation of the the 1995 Management Plan, it does not satisfy the intent of that plan. Without a properly designed and implemented revetment wall constructed along the alignment chosen and a strategy for current and ongoing beach nourishment in place, the security and use of the dwelling as proposed cannot be guaranteed and is inappropriate.
30. The zones used for siting the dwelling in the interim, pending the construction of the revetment wall and nourishment of the beach have not been updated, meaning that the erosion of the beach at present could expose the foundations and structural elements of the dwelling to wave erosion. During such an event there would be erosion of the beach area and potentially, impacts on erosion of the adjacent properties. While the construction of the revetment wall was recommended as a high priority by the 1995 Management Plan, little progress has been made in implementing this essential element of the strategy.
31. The council, through the draft CZMS, are currently reviewing the viable options for future management of Wamberal Beach. The outcome at this time is unknown and the construction of a revetment wall and beach nourishment, as envisaged in 1995 may not eventuate.
32. At present, Mr Lord considers it would be inappropriate to approve development applications that place new development at risk and may limit the implementation of appropriate long term adaptation options for what can only be considered a high hazard coastal area.
33. Mr Nielsen comes to a different conclusion. He disagrees that the proposed dwelling seeks to move the building line seaward rather than landward with the consequence of buildings being located on the "zone of wave impact". The zone of wave impact delineates an area where any structure or its foundations would suffer direct wave attack during a severe coastal storm. It is that part of the beach that is seaward of the beach erosion escarpment. The proposal has its piling foundations located beyond the existing zone of wave impact. However, with the passage of time until the terminal revetment is built, which is expected to be by 2045 given that, in accordance with DCP 125 and DCP 2013, Mr Nielsen accepts that proposed residences need to be secured

against erosion until that time, there is the possibility that the piling may come under wave loading sometime in the future.

34. Such an advancement of the building line would put it in a position comparable with that of the 16 properties on the dune father to the south and the 48 properties on the dune father to the north. The existing two properties adjacent to the south and the one property remaining adjacent to the north can advance to such a new building line when they are re-developed. Virtually every one of the 64 dwellings fronting Wamberal Beach would have its footprint located in the potential 2045 zone of wave, if not already in that zone. In recognising this, new dwellings have been approved being secured on deep piling foundations specially designed for this condition. Hence, while for a short time during a severe erosion event, the foundation piling may become exposed to some wave action, the wave forces on the piling would not cause foundation failure. It is noted that the foundation piling would be located within the zone of wave only at times when there was a severe storm causing erosion at the lot before the revetment wall was constructed by 2045.
35. On any lots that are impacted by a zone of wave impact by 2045, as are those fronting Wamberal Beach, the coastal hazards to a dwelling and the risk to life and property associated with the hazards would be minimised significantly, if not eliminated by the development being secured on deep piling foundations with floor levels raised above the reach of wave impact, as is proposed in this application.

## Findings

36. The significant difference between Mr Lord and Mr Nielsen was whether there was a need for the revetment wall (or Terminal Protection Structure (TPS) as described in the draft CZMS). Essentially, Mr Lord maintained that there should be no development, such as that proposed, until the revetment wall was constructed whereas Mr Nielsen maintained that a dwelling could be constructed, with an appropriate design that would sufficiently minimise the potential risk from coastal erosion, without the revetment wall. In his opinion, the proposed development satisfies this test.
37. In balancing the different approaches, I agree with Mr Nielsen for a number of reasons. First, the relevant planning documents support the approval of the dwelling. A dwelling house is permissible under both LEP 2014 and the Ordinance. More importantly, DCP 125 and DCP 2013 contain detailed requirements for the development of the coastal area and support the approval of the application. While Mr Lord maintained that there should be no approval until the revetment wall is constructed, this is not an approach adopted by DCP 125 or DCP 2013. These documents **explicitly** allow development prior to the revetment wall, subject to the satisfaction of certain matters (see cl 8.1.4 and 8.1.7 of DCP 125 and cl 6.2.5.1(d),(h),(i),(k) and (l) of DCP 2013). There was no disagreement from either Mr Lord or Mr Nielsen that the proposed development satisfied those matters identified by DCP 125 or DCP 2013 as allowing development prior to the construction of the revetment wall.
38. It is trite, but necessary to say that the consideration of relevant DCP's is a mandatory consideration under s 79C(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* (the *EPA Act*). Also of importance is that DCP 2013 became operational on 11 February 2014 and the latest amendment was on 29 October 2014 so the contents of cl 6.2.5.1 clearly represent the council's most recent approach to the erection of a dwelling at Wamberal Beach.

39. Mr Lord states that while the dwelling as proposed conforms to the recommendations of the the 1995 Management Plan, it does not satisfy the intent of that plan. It is unclear how the proposed development does not satisfy the intent of the 1995 Management Plan. I note that cl 3 of DCP 125 under the heading of Purpose of Plan, acknowledges that DCP 125 has been prepared to take into account the “Coastal Management Studies and Coastal Process Investigations that were carried out by Council between 1993 and 1999”. It must be accepted that the council’s approach (whether or not strictly in accordance with the 1995 Management Plan) is best reflected in the provisions of DCP 125, that includes the ability to be able to construct a dwelling in the absence of the revetment wall. This approach was confirmed with the coming into effect of DCP 2013 and has remained unchanged at the time of the hearing.

40. The general public should be able to rely on the adopted policies of the council, which are reflected in LEP’s and DCP’s. The integrity and consistency in policy-making is addressed by Brennan J in *Re Drake v Minister for Immigration and Ethnic Affairs (No.2)* (1979) 2 ALD 634 at 640 where His Honour states:

Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is the better assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an adopted policy can diminish inconsistencies which might otherwise appeared in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrator process.

41. Second, I do not accept the submission of Mr Fraser that the imminent exhibition of the draft CZMS should somehow create a barrier or a moratorium to the consideration of the development application. The EPA Act , the Ordinance, LEP 2013, DCP 125, DCP 2013, the 1995 Management Plan and SEPP 71 provide a more than suitable framework for the consideration of the application without the finalisation of the draft CZMS.

42. I am not satisfied that the council resolution of 25 March 2014 helps in determining the development application. The council resolution sought to “formalise Council’s decision making to provide guidance to staff” for development applications at Wamberal Beach (Exhibit 3, Tab 11, p1) to provide an interim solution until the draft CZMS is adopted. The report to the council on 25 March 2014 noted that at the Strategy/Policy workshop on 18 February 2014, the following direction was agreed to (at p3):

A. Maintain the current policy framework and require development specific and current advice from an independent coastal engineer for properties on the Wamberal Beach coastal frontage on the basis of lack of certainty on the construction of the Terminal Protective Structure.

B. Meet with and request applicants of the identified Development Applications in Oceanview Drive, Wamberal, seeking their agreement to withdraw the applications until the Coastal Zone Management Plan for Gosford’s Beaches is adopted in June 2014.

43. The council on 25 March 2014 adopted the following recommendation:

A. Council note the meeting outcome of the 6 March 2014 between the General Manager, Director Environment & Planning and applicants, indicating their reluctance to withdraw the development applications.

B. All developments with frontage to the Wamberal Beach foreshore be referred to Council for determination until Council adopts new planning guidelines for the guidance of staff.

44. Given recommendation B of the council, it was not clear from the documentation whether direction A from the Strategy/Policy workshop on 18 February 2014 was also adopted. In any event, it is not a matter of great importance. If recommendation B of the Strategy/Policy workshop was adopted, in that the approach to development applications was to “maintain the current policy framework and require development specific and current advice from an independent coastal engineer for properties on the Wamberal Beach coastal frontage”; then this reflects the requirements of DCP 125 and DCP 2013 (being the “current policy framework”). If recommendation B was not adopted, then DCP 125 (in this case) or DCP 2013 still applies. There is nothing within Strategy/Policy workshop on 18 February 2014 or the council meeting of 25 March 2014 that purports to amend DCP 2013 so it must remain as a “fundamental element in, or a focal point to”, the decision-making process (*Zhang v Canterbury City Council* (2001) 115 LGERA 373 (at [75])),
45. Third, the revetment wall has been a consistent and on-going solution in the documents that seek the protection of Wamberal Beach from erosion. It is identified as a potential solution to erosion problems at Wamberal Beach in the 1995 Management Plan, DCP 125, DCP 2013 and the draft CZMS. The council has a design for the revetment wall and as recently as March 2014, sought funding to review the design, impacts and costs. The draft CZMS describes the Wamberal Beach TPS as “currently the Council’s preferred protective strategy for Wamberal Beach” (p269),
46. The draft CZMS, at cl 8.10, has a recommended management option for Terrigal - Wamberal Beach as “Reviewing the design and environmental assessment for the Wamberal Terminal Protection Structure, and securing funding for its construction”. I note that the draft CZMS has been reviewed and amended by the council’s Coast and Catchment Committee and the Coastal sub-committee prior to advertising,
47. Fourth, the evidence indicates the on-going search for funding for the revetment wall by the council (Exhibit II) however I do not accept that the lack of funding, at present, is a sufficient reason to adopt the approach suggested by Mr Fraser of refusing the application because of the uncertainty of funding. It would seem that the council currently (and at the time of the hearing) addresses this issue by providing the option in DCP 125 and DCP 2013 of allowing the construction of a dwelling, without the revetment wall, but subject to other requirements. Clearly, the funding and apportionment of costs for the revetment wall is a difficult task however in all the documentation and reports over the last 20 years, there does not appear to be any other practical way of dealing with the long-term issue of beach erosion at Wamberal Beach. The option in the draft CZMS of property acquisition is an alternate option to the revetment wall but based on the costings in the draft CZMS, this option is significantly more expensive than the construction of a revetment wall. I also note that the 1995 Management Plant (at Table 4.7) provides the option for the construction of the revetment wall in stages,
48. Fifth, I am satisfied that the matters in cl 8 of SEPP 71 have been properly taken into account in determining that development consent can be granted, particularly

(a) the aims of this Policy set out in clause 2, (specifically, cl 2.1(f) to protect and preserve beach environments and beach amenity, and cl 2.1(l) to encourage a strategic approach to coastal management.)

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

(j) the likely impact of coastal processes and coastal hazards on development and any likely impacts of development on coastal processes and coastal hazards,

49. Given that there was no dispute that the proposed development satisfies the requirements in DCP 125 and DCP 2013 for the construction of a dwelling without a revetment wall, it cannot be reasonably argued that the development does not properly address “the likely impact of coastal processes and coastal hazards on development”. For reasons set out later in the judgment “the suitability of development given its type, location and design and its relationship with the surrounding area” was not in dispute. Similarly, there was no issue with “beach environments and beach amenity”, except in times of high erosion (see par 55).
50. Sixth, I am satisfied that the [CP Act](#) has only a minor role, at best in the determination of the application. The [CP Act](#) is a broad strategic planning document and its principal role in the proceedings was to provide information on the ongoing requirements for a coastal zone management plans at Part 4A where s 55B provides requirement for coastal zone management plans, s 55C provides matters to be dealt with in coastal zone management plans and s 55E provides requirements for public consultation. I did not understand there to be any submissions to suggest that the [CP Act](#) had any specific role in the determination of a development application.
51. Seventh, and while Contention 1(b) states that the development is “contrary to the aims and objectives of the Gosford Planning Scheme Ordinance”, the contention does not specify why the development is in conflict. I take it that the reference to “the aims and objectives of the Gosford Planning Scheme Ordinance” is a reference to the 2(f) zone objective as the Ordinance appears not to have overall aims and objectives.
52. In any event, sub cl 10(3) and (4) place an obligation on the Court to make a positive finding that firstly, “it has taken into consideration the objectives of the zone and the consistency of that development within those objectives as well as the objectives of the [Local Government Act 1993](#) relating to ecologically sustainable development and secondly, “it has taken into consideration the character of the development site and the surrounding area”. A negative finding, on either matter must see the development application refused.
53. The objective of the 2(f) zone is:

The objective of Zone No. 2(f) is to ensure that low scale development on land situated in proximity to public areas or identified as being subject to hazard from coastal erosion and storms (or both) is located and constructed so as to avoid or minimise the potential hazard and minimise visual impact,

54. While the council maintained that the proposed development did not “avoid or minimise the potential hazard”, compliance with DCP 125 and DCP 2013 is a clear indicator, in my view, that the development will “minimise the potential hazard”, particularly given that the purpose of DCP 125, in part, states (at cl 3):

The purpose of this plan is to provide more detailed guidelines for the development of the land having regard to minimizing the risks associated with building on land which has frontage to a coastal beach or cliff.

55. The matter of “visual impact” was not a specific contention raised by the council and the acceptance by the expert town planners, Mr Doug Sneddon, for the applicant and Mr Garry Fielding, for the council to increased height and FSR supports the design, in its context. There was some suggestion that in severe erosion events, the piles supporting the dwelling and the basement wall would be visible (absent the revetment wall) and while this may be correct, it is not a reason that would support the refusal of the application.
56. The purpose of the *Local Government Act 1993* (the *LG Act*) relating to ecologically sustainable development (ESD) is found in s 7(e) and states:

(e) to require councils, councillors and council employees to have regard to the principles of ecologically sustainable development in carrying out their responsibilities.

57. The councils charter, at s 8(1) relevantly states:

to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development

58. The Dictionary to the *LG Act* provides a definition of “principles of ecologically sustainable development”.
59. As the principles of ESD were not identified as a specific contention and were not addressed by the experts, I have taken this to mean that ESD is not “a principally contested issue” in the proceedings even though it was mentioned by Mr Fraser in his submissions.
60. In relation to cl 10(4) and the need to consider “the character of the development site and the surrounding area”; the expert planners raised no concern over the relationship of the proposed dwelling with other development in the surrounding area. I concur with this conclusion.
61. In accordance with cll 10(3) and cl (4) there are no reasons why development consent cannot be granted.
62. Clause 2.3(2) of LEP 2014 provides a less onerous task than cll 10(3) and (4) of the Ordinance in that it is only necessary to have regard to the zone objectives when determining a development application. Given the broad nature of the zone objectives and the specific and narrow nature of the dispute, it cannot be said that the zone objectives create any reason to refuse the development application.

## Height and floor space ratio



63. Under cl 30AB of the Ordinance, the site has a maximum height of 7 m. The proposed dwelling has a height of 8.6 m. An objection under *State Environmental Planning Policy No 1 – Development Standards* (SEPP 1) was provided (Appendix C, Tab 2, Exhibit B) that concluded that strict compliance with the 7 m development standard was unreasonable and unnecessary, in the circumstances of the case.
64. Under LEP 2014, cl 4.3(2) provides for a maximum building height of 8.5 m the proposed dwelling has a maximum height of around 10.1 m because of different method of calculating height compared to the Ordinance. The breach is shown diagrammatically in Annexure C, Exhibit C. Clause 4.4(2) provides for a maximum FSR of 0.5:1. The proposed dwelling has an FSR of 0.74:1. Clause 4.6 provides exceptions to the development standards and the opportunity, through a written request, to vary these standards. A written request was provided for the height and FSR developments standards and concluded that strict compliance was unreasonable and unnecessary, in the circumstances of the case (Exhibit C).
65. Mr Sneddon provided the SEPP 1 objection to the height development standard in the Ordinance and for abundant caution, the written requests for the variation to the height and FSR development standards under LEP 2014.
66. Mr Fielding accepted that the SEPP 1 objection to the maximum height of 7 m maximum height in cl 30AB of the Ordinance was well founded and after a reading of the SEPP 1 objection, I agree with the conclusions of Mr Sneddon and Mr Fielding that the variation to the height standard is well founded and that strict compliance is unreasonable and unnecessary, in the circumstances of the case.
67. I also agree with Mr Sneddon and Mr Fielding that the variations to the height and FSR development standards in LEP 2014 are acceptable after consideration of the matters identified in cl 4.6.

## View loss

68. View loss created by the proposed dwelling was an issue raised by the owners of the adjoining property to the south. Their property, including the interior of their dwelling was inspected and an assessment made of the likely impact of the proposed dwelling.
69. Mr Sneddon and Mr Fielding also considered the potential view loss from the adjoining property and concluded that “there is no reasonable basis for the contention that the proposed development results in catastrophic view loss of available coastal scenic views enjoyed from the neighbouring residence”.
70. Mr Sneddon and Mr Fielding also agree that the proposed development provides for reasonable view sharing with both neighbours, as established in *Tenacity Consulting v Warringah* [2004] NSWLEC 140.
71. With the benefit of the site inspection and an understanding of the plans, I concur with the conclusions of Mr Sneddon and Mr Fielding.

## Orders

72. The orders of the Court are:

- (1) The appeal is upheld.
- (2) DA 45125/2014 for the demolition of an existing dwelling and the construction of a new dwelling and basement car parking at 23B Ocean View Drive, Wamberal is approved subject to the conditions in Annexure A.
- (3) The exhibits are returned with the exception of exhibits 6, 14, A and B.

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G T Brown

Commissioner of the Court

[10636 of 2014 Slip Rule 24 April 2017- Annexure A \(Conditions of Consent\) http://www.caselaw.nsw.gov.au/asset/59002562e4b058596cba6217.pdf](http://www.caselaw.nsw.gov.au/asset/59002562e4b058596cba6217.pdf)

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## Amendments

26 April 2017 - Orders corrected pursuant to Slip Rule 36.17 on 24 April 2017 - Conditions

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## Cited by:

[Dunford v Gosford City Council \(No 3\) \[2015\] NSWLEC 96 \(12 June 2015\) \(Sheahan J\)](#)

22. In his detailed reasons for upholding Dunford's Class 1 appeal, Brown C said ([2015] NSWLEC 1016, at [38] to [54] – some emphasis added):

36 The significant difference between Mr Lord and Mr Nielsen was whether there was a need for the revetment wall (or Terminal Protection Structure (TPS) as described in the draft [Coastal Zone Management Study] (CZMS)). Essentially, Mr Lord maintained that there should be no development, such as that proposed, until the revetment wall was constructed whereas Mr Nielsen maintained that a dwelling could be constructed, with an appropriate design that would sufficiently minimise the potential risk from coastal erosion, without the revetment wall. In his opinion, the proposed development satisfies this test.

37 In balancing the different approaches, I agree with Mr Nielsen for a number of reasons. First, the relevant planning documents support the approval of the dwelling. A dwelling house is permissible under both LEP 2014 and the Ordinance. More importantly, DCP 125 and DCP 2013 contain detailed requirements for the development of the coastal area and support the approval of the application. While Mr Lord maintained that there should be no approval until the revetment wall is constructed, this is not an approach adopted by DCP 125 or DCP 2013. These documents explicitly allow development prior to the revetment wall, subject to the satisfaction of certain matters (see cl 8.1.4 and 8.1.7 of DCP 125 and cl 6.2.5.1(d),(h),(i),

(k) and (l) of DCP 2013). There was no disagreement from either Mr Lord or Mr Nielsen that the proposed development satisfied those matters identified by DCP 125 or DCP 2013 as allowing development prior to the construction of the revetment wall.

38 **It is trite, but necessary to say that the consideration of relevant DCP's is a mandatory consideration** under s. 79C(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* (the *EPA Act*). Also of importance is that DCP 2013 became operational on 11 February 2014 and the latest amendment was on 29 October 2014 so the contents of cl 6.2.5.1 clearly represent the council's most recent approach to the erection of a dwelling at Wamberal Beach.

39 Mr Lord states that while the dwelling as proposed conforms to the recommendations of the the 1995 Management Plan, it does not satisfy the intent of that plan. It is unclear how the proposed development does not satisfy the intent of the 1995 Management Plan. I note that cl 3 of DCP 125 under the heading of Purpose of Plan, acknowledges that DCP 125 has been prepared to take into account the "Coastal Management Studies and Coastal Process Investigations that were carried out by Council between 1993 and 1999". **It must be accepted that the council's approach (whether or not strictly in accordance with the 1995 Management Plan) is best reflected in the provisions of DCP 125, that includes the ability to be able to construct a dwelling in the absence of the revetment wall. This approach was confirmed with the coming into effect of DCP 2013 and has remained unchanged at the time of the hearing.**

40 **The general public should be able to rely on the adopted policies of the council, which are reflected in LEP's and DCP's.** The integrity and consistency in policy-making is addressed by Brennan J in *Re Drake v Minister for Immigration and Ethnic Affairs* (No.2) (1979) 2 ALD 634 at 640 where His Honour states:

Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is the better assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an adopted policy can diminish inconsistencies which might otherwise appeared in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrator process.

41 Second, I do not accept the submission of Mr Fraser that the imminent exhibition of the draft CZMS should somehow create a barrier or a moratorium to the consideration of the development application. **The EPA Act, the Ordinance, LEP 2013, DCP 125, DCP 2013, the 1995 Management Plan and SEPP 71 provide a more than suitable framework for the consideration of the application without the finalisation of the draft CZMS.**

42 I am not satisfied that the council resolution of 25 March 2014 helps in determining the development application. The council resolution sought to "formalise Council's decision making to provide guidance to staff" for development applications at Wamberal Beach (Exhibit 3, Tab II, p1) to provide an interim solution until the draft CZMS is adopted. The report to the council on 25 March 2014 noted that at the Strategy/Policy workshop on 18 February 2014, the following direction was agreed to (at p3):

A. Maintain the current policy framework and require development specific and current advice from an independent coastal engineer for properties on the Wamberal Beach coastal frontage on the basis of lack of certainty on the construction of the Terminal Protective Structure.

B. Meet with and request applicants of the identified Development Applications in Oceanview Drive, Wamberal, seeking their agreement to withdraw the applications until the Coastal Zone Management Plan for Gosford's Beaches is adopted in June 2014.

43 **The council on 25 March 2014 adopted the following recommendation:**

A. Council note the meeting outcome of the 6 March 2014 between the General Manager, Director Environment & Planning and applicants, indicating their reluctance to withdraw the development applications.

**B. All developments with frontage to the Wamberal Beach foreshore be referred to Council for determination until Council adopts new planning guidelines for the guidance of staff.**

44 Given recommendation B of the council, it was not clear from the documentation whether direction A from the Strategy/Policy workshop on 18 February 2014 was also adopted. In any event, it is not a matter of great importance. If recommendation B of the Strategy/Policy workshop was adopted, in that the approach to development applications was to “maintain the current policy framework and require development specific and current advice from an independent coastal engineer for properties on the Wamberal Beach coastal frontage”; then this reflects the requirements of DCP 125 and DCP 2013 (being the “current policy framework”). If recommendation B was not adopted, then DCP 125 (in this case) or DCP 2013 still applies. **There is nothing within Strategy/Policy workshop on 18 February 2014 or the council meeting of 25 March 2014 that purports to amend DCP 2013 so it must remain as a “fundamental element in, or a focal point to”, the decision-making process** (*Zhang v Canterbury City Council* [“Zhang”] (2001) 115 LGERA 373 (at [75])).

45 Third, **the revetment wall has been a consistent and on-going solution in the documents that seek the protection of Wamberal Beach from erosion.** It is identified as a potential solution to erosion problems at Wamberal Beach in the 1995 Management Plan, DCP 125, DCP 2013 and the draft CZMS. **The council has a design for the revetment wall and as recently as March 2014, sought funding to review the design, impacts and costs.** The draft CZMS describes the Wamberal Beach TPS as “currently the Council’s preferred protective strategy for Wamberal Beach” (p269).

46 The draft CZMS, at cl 8.10, has a recommended management option for Terrigal - Wamberal Beach as “Reviewing the design and environmental assessment for the Wamberal Terminal Protection Structure, and securing funding for its construction”. I note that the draft CZMS has been reviewed and amended by the council’s Coast and Catchment Committee and the Coastal sub-committee prior to advertising.

47 Fourth, the evidence indicates the **on-going search for funding for the revetment wall** by the council (Exhibit 11) however I do not accept that the lack of funding, at present, is a sufficient reason to adopt the approach suggested by Mr Fraser of refusing the application because of the uncertainty of funding. It would seem that the **council currently (and at the time of the hearing) addresses this issue by providing the option in DCP 125 and DCP 2013 of allowing the construction of a dwelling, without the revetment wall, but subject to other requirements.** Clearly, the funding and apportionment of costs for the revetment wall is a difficult task however in all the documentation and reports over the last 20 years, there does not appear to be any other practical way of dealing with the long-term issue of beach erosion at Wamberal Beach. The option in the draft CZMS of property acquisition is an alternate option to the revetment wall but based on the costings in the draft CZMS, this option is significantly more expensive than the construction of a revetment wall. I also note that the 1995 Management Plant (at Table 4.7) provides the option for the construction of the revetment wall in stages.

48 Fifth, I am satisfied that the matters in cl 8 of SEPP 71 have been properly taken into account in determining that development consent can be granted, particularly

(a) the aims of this Policy set out in clause 2, (specifically, cl 2.1(f) to protect and preserve beach environments and beach amenity, and cl 2.1(l) to encourage a strategic approach to coastal management.)

...

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

(j) the likely impact of coastal processes and coastal hazards on development and any likely impacts of development on coastal processes and coastal hazards,

49 Given that there was no dispute that the proposed development satisfies the requirements in DCP 125 and DCP 2013 for the construction of a dwelling without a revetment wall, it cannot be reasonably argued that the development does not properly address” the likely impact of coastal processes and coastal hazards on development”. For reasons set out later in the judgment “the suitability of development given its type, location and design and its relationship with the surrounding area” was not in dispute. Similarly, there was no issue with “beach environments and beach amenity”, except in times of high erosion (see par 55).

50 Sixth, I am satisfied that the CP Act has only a minor role, at best in the determination of the application. The CP Act is a broad strategic planning document and its principal role in the proceedings was to provide information on the ongoing requirements for a coastal zone management plans at Part 4A where s 55B provides requirement for coastal zone management plans, s 55C provides matters to be dealt with in coastal zone management plans and s 55E provides requirements for public consultation. I did not understand there to be any submissions to suggest that the CP Act had any specific role in the determination of a development application.

51 Seventh, and while Contention 1(b) states that the development is “contrary to the aims and objectives of the Gosford Planning Scheme Ordinance”, the contention does not specify why the development is in conflict. I take it that the reference to “the aims and objectives of the Gosford Planning Scheme Ordinance” is a reference to the 2(f) zone objective as the Ordinance appears not to have overall aims and objectives.

52 In any event, sub cl 10(3) and (4) place an obligation on the Court to make a positive finding that firstly, “it has taken into consideration the objectives of the zone and the consistency of that development within those objectives as well as the objectives of the *Local Government Act 1993* relating to ecologically sustainable development and secondly, “it has taken into consideration the character of the development site and the surrounding area”. A negative finding, on either matter must see the development application refused.

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The objective of Zone No. 2(f) is to ensure that low scale development on land situated in proximity to public areas or identified as being subject to hazard from coastal erosion and storms (or both) is located and constructed so as to avoid or minimise the potential hazard and minimise visual impact.

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Dunford v Gosford City Council (No 3) [2015] NSWLEC 96 (12 June 2015) (Sheahan J)  
Dunford v Gosford City Council [2015] NSWLEC 1016.

12. Brown C reserved judgment, but he decided to uphold the applicant's appeal, and grant approval on conditions. He published extensive reasons on 14 January 2015: *Dunford v Gosford City Council* [2015] NSWLEC 1016 .