

DISTRICT COURT
OF QUEENSLAND
= 4 SEP 2020
FILED
MAROOCHYDORE

In the Planning and Environment Court
Held at: Maroochydore

No D205 OF 2019

Between: **Friends of Buddina Ltd** Applicant
And: **Sunshine Coast Council** First Respondent
And: **Pacific Diamond 88 Pty Ltd** Second Respondent

AMENDED ORIGINATING APPLICATION

Filed on 4 September 2020.

Filed by: P&E Law
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Friends of Buddina Ltd, c/- P&E Law of 4/59 The Esplanade, Maroochydore in the State of Queensland applies to the Planning and Environment Court at Maroochydore under s 11 of the *Planning and Environment Court Act 2016* for the following declarations and order in relation to a decision made by the First Respondent (**Council**) on 30 April 2019 under s 62(2) of the *Planning Act 2016 (PA)* and a subsequent decision made on 10 September 2019 under s 76 of the PA to approve the Second Respondent's code assessable application for a material change of use for 73 multiple dwelling units and a shop (**the development**) at 2 & 6 Talinga Street, 84 & 85 Pacific Boulevard and 61 & 63 Iluka Avenue, Buddina, being land described as Lot 1 on RP 201319 and Lots 280, 281, 282, 310 & 311 on B 92911 (**the land**) and a decision made on 23 July 2020 under s 81A of the PA to approve the Second Respondent's minor change application for the development:

1. Declaration that the Council's negotiated decision notice issued on 12 September 2019 approving a development application for a code assessable material change of use application for 73 multiple dwelling units and a shop at 2 & 6 Talinga Street, 84 & 85 Pacific Boulevard and 61 & 63 Iluka Avenue, Buddina (**negotiated decision notice**) is invalid, and of no legal effect; and
2. Declaration that the Council's decision notice issued on 30 July 2020 approving the Second Respondent's minor change application to change conditions 54, 63, 69, 70, 73 and Advice Note 23 and include additional Condition 70A for the negotiated decision notice is invalid and of no legal effect; and
3. Order Council's decisions;
 - (a) of 30 April 2013 2019 and 10 September 2019 approving the development and the Council's decision of 12 September 2019 to issue the negotiated decision notice; and

AMENDED ORIGINATING
APPLICATION
Filed on behalf of the Applicant
Form PEC-2
Planning Act 2016

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Amended this 4th day of September pursuant to paragraph two of the Order of this Court on 21 August 2020.

(b) of 23 July 2020 approving the minor change application and Council's decision of 30 July 2020 to issue a decision notice approving the minor change application for the development.

be set aside and the development application remitted to Council to reconsider according to law.

The grounds relied on are:

1. On 19 July 2018 the Second Respondent lodged with Council a development application under the PA for a material change of use for 107 multiple dwelling units and a shop (corner store) on land at 2-6 Talinga Street, 84-86 Pacific Boulevard and 61-65 Iluka Avenue, Buddina.
2. On 11 December 2018 the Second Respondent changed the application to reduce the scale and number of units. After this change it proposed a material change of use for 73 multiple dwelling units and a shop (corner store) (**the development**) on land at 2 & 6 Talinga Street, 84 & 85 Pacific Boulevard and 61 and 63 Iluka Avenue, Buddina (**the land**).
3. The land is comprised of 6 lots, the real property descriptions of which are Lot 1 on RP 201319 and Lots 280, 281, 282, 310 & 311 on B 92911.
4. The land currently has residential houses on it and is separated from the Pacific Ocean by only a road (Pacific Boulevard), a vegetated dune area and Buddina Beach.
5. The development comprises three 21m high buildings. It contains two levels of basement carparking (188 cars) with dual access from both Iluka Avenue (primary access) and Talinga Street.
6. The proposed unit configuration is as follows:
 - (a) 66 x 3 bedroom units (including split level villas fronting Pacific Boulevard); and
 - (b) 7 x 4 bedroom penthouse units on the upper levels.
7. On the side facing the Pacific Ocean (next to Pacific Boulevard) the development comprises 8 levels in total:
 - (a) two levels of carparking beneath the ground (basement and level 1);
 - (b) a ground level of two-story villas (levels 2-3);
 - (c) three levels of single-story units (levels 4-6); and
 - (d) penthouses with a mezzanine level (levels 7-8).
8. The land is included in the High Density Residential Zone under the *Sunshine Coast Planning Scheme 2014* (**the planning scheme**).
9. A material change of use for multiple dwelling units (of any number or scale) in the High Density Residential Zone is code assessable and the assessment



benchmarks are set out in *High Density Residential Zone Code* and other applicable development codes.

10. While the development was code assessable, the Council accepted and considered 84 submissions and a petition containing 228 1,016 signatures from the public in making its decision.
11. The concerns raised by submitters included environmental impacts to the adjacent Buddina Beach, which is a known turtle nesting beach. The environmental impacts raised were from increased human disturbance, including light spill which may deter turtles or impact on turtle nesting.
12. The assessment benchmarks for the development relevantly included Performance Outcome 12 (PO12) in Table 8.2.5.3.2 (Performance outcomes and acceptable outcomes for assessable development) of the *Coastal Protection Overlay Code* in the planning scheme. That performance outcome states:

Performance Outcomes		Acceptable Outcomes	
Protection of Sand Dunes and Coastal Creeks			
PO12	Development:- (a) maintains dune crest heights and minimises and mitigates the risk to development from wave overtopping and storm tide inundation; and (b) maintains or enhances coastal ecosystems and natural features such as coastal creeks, mangroves and coastal wetlands, particularly where these features protect or buffer communities and infrastructure from sea-level rise and coastal inundation impacts.	AO12	No acceptable outcome provided.

- 12A. The assessment benchmarks for the development relevantly included the overall outcome stated in s 8.2.5.2(2)(i) of the Coastal Protection Overlay Code in the planning scheme. That overall outcome states:

“development adjacent to beachfront areas is located and designed to protect the character of the beachfront when viewed from the beach and integrates with the surrounding natural landscape and skyline vegetation.”

13. The protection of the environment, including turtles, was also a relevant assessment benchmark for the code assessment of the development under:

(a) the *High Density Residential Zone Code*, in which overall outcome (j) requires that:

“development avoids as far as practicable, or where avoidance is not practicable, minimises and otherwise mitigates, adverse impact on ecologically important areas, including creeks, gullies, waterways, wetlands, coastal areas, habitat and vegetation through location, design, operation and management”; and



(b) the *Kawana Waters Local Plan Code*, in which overall outcome (s) requires that:

“development is designed and sited to protect and enhance the natural environmental and scenic values of the local plan area ...”

14. The assessment benchmarks also include in s 6.2.3.2(2)(f)(iii) of the *High Density Residential Zone Code* that development protect views and vistas from surrounding premises as follows:

6.2.3.2 Purpose and overall outcomes

...

(2) The purpose of the High density residential zone code will be achieved through the following overall outcomes:-

...

(f) development ensures that there is no unreasonable loss of amenity for surrounding premises having regard to:-

- (i) microclimate impacts, including the extent and duration of any overshadowing;
- (ii) privacy and overlooking impacts;
- (iii) impacts upon views and vistas; and
- (iv) building massing and scale relative to its surroundings;

...

15. On 30 April 2019 the Council approved the application under s 60(2) of the PA subject to conditions (**the original decision**).

16. On 6 June 2019 the Second Respondent made representations to the Council under s 75 of the PA to change the original decision.

17. On 10 September 2019 the Council approved a change application under s 76 of the PA (**the change negotiated decision**).

18. On 12 September 2019 the Council issued a negotiated decision notice under s 76 of the PA replacing the decision notice for the original decision (**the negotiated decision notice**).

19. The negotiated decision notice imposed a number of conditions, including in relation to lighting and mitigating the impacts on turtles, in conditions 62-63 and 68-72, together with advisory notes 23 and 29.

20. Conditions 62-63 of the negotiated decision notice provided:

Lighting Devices

62. Lighting associated with the use must be designed, sited, installed and tested to comply with Tables 3.2 & 3.3 for Zone A3 of AS 4282 - Control of the obtrusive effects of outdoor lighting”.

63. Certification must be submitted to council from a qualified person* that all lighting devices comply with the requirements of this development approval.

*(Refer to Advisory Note)



21. Conditions 68-72 of the negotiated decision notice provided:

ECOLOGY**Turtle Lighting**

68. To minimise the impact of the development on turtle nesting, and the sea-finding behaviour and ocean orientation of hatchlings, the following actions are required to be undertaken during construction of the development:
- (a) construction works are to be restricted to daylight hours during the turtle nesting and hatching season (October – May) in addition to any further restriction imposed as part of the Operational Works approval.
 - (b) flood lighting must not be used from October – May (turtle nesting and hatching season).
69. At all times, the development must demonstrate that they maintain the existing established sky glow values under identical conditions (i.e. clear sky). The developer is to engage a consultant to prepare a pre and post construction Artificial Light at Night Survey to determine changes to light emissions from the development to the adjacent turtle nesting beach generally in accordance with the methodology and equipment described in Sunshine Coast Council and Moreton Bay Council's Benchmark Artificial Light at Night Survey 2017.
- (a) the pre-construction Light Survey is to be undertaken prior to any site works commencing on site.
 - (b) the post-construction Light Survey is to be undertaken by the Developer on completion of the development
 - (c) the Light Surveys are to be submitted to Council officers for their review and assessment. Should the post construction 'as built' audit identify that correctional actions are required, these are to be undertaken by the Developer.
*(Refer to Advisory Note)
70. Internal and external lighting and signage must be positioned and operated to minimise disruption to adjacent turtle breeding grounds. All lighting must be managed to reduce sky glow and light spill onto the beach: reduced intensity, long wavelength lights; shielded, low to the ground, directed onto areas of interest, low reflectance building surfaces and paint, tinted windows. Details as follows:
- (a) all windows facing the beach must have 15% visible light transmittance window tinting.
 - (b) all windows facing the beach must be fitted with opaque blinds where not already screened by opaque external screens or opaque fixed louvres under Condition 31 of this development approval.
 - (c) indoor and outdoor paint/surfaces/fixtures must be matte and dark in colour and have a maximum reflectance value of 30%.
 - (d) all outdoor lights must have a maximum of 2700 K correlated colour temperature (CCT). All indoor lights must have a maximum of 3000 K CCT. All lighting (interior and exterior) must avoid the use of halogen, metal halide, or fluorescent lights.
 - (e) amber LED (590-610 nm) or low pressure sodium lighting must be used as a standard. Warm white is to be used only where colour rendition is required. LED lights must not contain short wavelength blue light and supplier should be asked to provide spectral power curve of requested LEDs to prove the absence of short wavelengths.
 - (f) the number and wattage of lights must be minimised.
 - (g) all lights must be recessed into structures and roof, and directed away from the turtle nesting habitat.
 - (h) no lighting is permitted on the roof of the building.



- (i) all outdoor lights, including balcony lights, must be turned off when not in use between 8:00 pm and sunrise during turtle nesting and hatching season (October – May).
 - (j) external feature lighting to the building must be positioned below 10 metres in height and turned off between 8.00 pm and sunrise during turtle nesting and hatching season (October – May).
 - (k) no upward lights or vertical illumination of the building, vegetation or other structures using lighting that shines into the sky to be used during the nesting and hatching season (October – May).
 - (l) where lighting is required for safety purposes (including all corridors above ground level, stairwells, entry points etc.), the lighting of these areas must be activated by proximity sensors or motion detectors with an associated deactivation of the lighting after no more than 10 minutes during turtle nesting and hatching season (October – May). For lighting in other areas, timers, proximity or motion activated light sensors must be used wherever possible.
 - (m) smart lighting technology (including dimming control) must be incorporated in all storeys above the 1st storey in order to allow the body corporate and residents the ability to reduce light emissions during critical turtle breeding periods (October – May).
 - (n) no decorative outdoor lighting is to be fitted to the buildings, open space or recreation areas (e.g. Fairy/Christmas lights) during nesting and hatching season (October – May).
 - (o) pool lighting must be switched off after 8:00 pm during nesting and hatching season (October – May).
 - (p) any external signage on the eastern (seaward) side of the development must not be illuminated during nesting and hatching season (October – May).
 - (q) any lighting in recreation areas within the development must be switched off and operate on proximity sensors after 8:00 pm during nesting and hatching season (October – May).
 - (r) all lighting within the development (interior and exterior) must be shielded by a minimum of 30 cm vertical shielding.
 - (s) visual screening through vegetation screens must be applied to all lighting towards the coastline and sky.
 - (t) reflective materials must be used to delineate pathways, and embedded lighting must be used wherever possible. If lights are used they are to be amber in colour, max. 2700 K CCT, as low as possible, intermittent flashing only, facing away from the beach and to be fitted with 30 cm vertical shades to contain light spill.
71. The applicant must prepare and submit to Council for endorsement a resident information package regarding turtles use of the adjacent Buddina Beach. The package must:
- (a) provide background information on the turtle species that nest on the beach at Buddina and the Sunshine Coast, the threats they face and their status as matters of national environmental significance
 - (b) highlight the conditions of this development approval regarding the design and operation of lighting (including within individual dwelling units and on balconies)
 - (c) outline measures to mitigate the impacts of lighting on turtle nesting and hatchling sea finding behaviour, including the months of the year when external lighting should be minimised and suggested mitigation measures (e.g. turning off lights when not in use and closing blinds/curtains after dark during turtle nesting and hatching season (October – May)).



72. All clauses and by-laws of the proposed Community Management Statement must accord with the requirements of this development approval. In particular, the Community Management Statement must include a clause requiring:
- the body corporate for the development retain a copy of the endorsed resident turtle information package that is prepared in accordance with the Turtle conditions of this notice
 - that a copy of the endorsed resident turtle information package be provided to each unit owner (including to the new owner/s each time a unit is sold)
 - that a copy of the endorsed resident turtle information package is prominently displayed in the communal area at all times and available for reading by residents and visitors.

22. Advisory note 23 to the negotiated decision notice provided as guidance for the meaning of "qualified person" in condition 63 that:

23. For the purpose of certifying lighting devices for the development, a qualified person is considered to be either:
- a Registered Professional Engineer of Queensland (RPEQ);
 - an environmental or electrical design consultant with a minimum of three (3) years current experience in the field of outdoor lighting.

23. Advisory note 29 to the negotiated decision notice provided as guidance for the light surveys in condition 69 that:

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Light surveys

28. The only instruments that can be used in a field setting to measure sky glow on the nesting beach are, a hand held Sky Quality Meter (SQM, Unihedron) or digital cameras based technology. While both measure sky glow at low detection limits the digital camera approach provides the more detailed and reliable data, using CCD technology with a fish eye lens to capture whole-of-sky, biologically meaningful light emissions. This technology quantifies light in magnitudes/arcsec², a unit of measurement that is emerging as a global standard (Bara 2017; Jerchow et al. 2017; Zotti 2007; Aube 2016; Falchi et al. 2016; Pendoley et al. 2015; Kyba et al. 2011; Falchi 2011; Rabaza et al. 2010; Kollath 2010). It is noted that Council has engaged Pendoley Environmental to undertake assessment of existing sky glow values for the area and the results of this study should be referred to for further light measurements.

Errors related to PO12 in original decision and negotiated decision

24. The Council's original decision and negotiated decision were affected by jurisdictional error and errors of law, and the procedures that were required by law to be observed in connection with the making of the decisions were not observed by:

- failing to take into account a relevant consideration by failing to consider the assessment benchmark in PO12 of the *Coastal Protection Overlay Code* and, in particular, whether the development maintains or enhances coastal ecosystems including turtle nesting habitat on Buddina Beach;
- erroneously construing the assessment benchmarks in the *Coastal Protection Overlay Code* as only involving considerations of coastal hazards such as erosion and storm surge and not considering it to require the development to maintain or enhance coastal ecosystems including the nesting habitat on Buddina Beach; and/or



- (c) erroneously construing PO12 and, consequently, the assessment benchmarks for the purposes of ss 60(2) and 76(1) of the PA, on the basis that it could approve impacts on turtles due to light from the development by imposing conditions that mitigated these impacts the assessment benchmarks required impacts of the development on coastal ecosystems merely to be reduced and mitigated, rather than, as required by PO12, maintaining or enhancing the coastal ecosystem, including for turtles.

Errors related to conditions in negotiated decision

25. In making the change negotiated decision, Council relevantly changed condition 70(b) (as shown in bold and tracking below) at the Second Respondent's request because of doubts over the ability for it (and condition 69) to be fully complied with and that it may potentially require onerous supervision:

70. Internal and external lighting and signage must be positioned and operated to minimise disruption to adjacent turtle breeding grounds. All lighting must be managed to reduce sky glow and light spill onto the beach: reduced intensity, long wavelength lights; shielded, low to the ground, directed onto areas of interest, low reflectance building surfaces and paint, tinted windows. Details as follows:
- (a) all windows facing the beach must have 15% visible light transmittance window tinting.
 - (b) all windows facing the beach must be fitted with opaque blinds **where not already screened by opaque external screens or opaque fixed louvres under Condition 31 of this development approval**, ~~to be drawn from 8 pm during turtle nesting and hatching season (October – May).~~

...

26. Even after the changes made by Council to condition 70(b) at the Second Respondent's request, there are were a number of significant uncertainties in the conditions imposed by the Council for lighting under the negotiated decision notice. These are Prior to being remedied through a minor change application addressed in grounds 34-37 below, these uncertainties were:

- (a) Conditions 62 and 63 required "Lighting associated with the use must be designed, sited, installed and tested to comply with [an Australian standard]" and certification submitted to Council. It is uncertain how often they must be tested and how often it must be certified (e.g. once only or annually forever).
- (b) Condition 69 stated that "At all times, the development must demonstrate that they (sic) maintain the existing established sky glow values under identical conditions (i.e. clear sky)." The condition then goes on to require a pre and post construction survey but the first sentence, particularly the reference to "At all times ..." indicates that the development must comply with the requirement of maintaining the existing sky glow values forever. The condition is, therefore, uncertain.
- (c) Condition 70 imposes a number of requirements that are deeply uncertain in what they require and from whom, such as:
 - (i) 70 (a) does not make certain whether it prohibits windows from being opened in a way that allows light spill to reach the beach without passing through a window with 15% visible light transmittance window tinting;



- (ii) 70 (b) does not make certain the extent, if any, that the opaque blinds, opaque external screens or opaque fixed louvres on all windows facing the beach can be opened;
- (iii) 70 (e) does not make certain whether it applies to internal or external lighting or both;
- (iv) 70 (e) does not make certain whether the supplier of lights should be asked to provide the spectral power curve of requested LEDs to prove the absence of short wavelengths:
 - (A) only at the initial construction; or
 - (B) forever whenever any LED lighting is purchased by or on behalf of an owner, occupier or the body corporate for any use at any location on the land;
- (v) 70 (f) provides no objective standard against which compliance can be assessed with the requirement that “the number and wattage of lights must be minimised”;
- (vi) 70 (g), on its face, applies to all lights, including lamps on stands and decorative indoor lighting (e.g. Fairy/Christmas lights) and handheld lights (e.g. torches) at all times and, if that is the proper construction, it is uncertain what “directed away from the turtle nesting habitat means”, particularly for a light that cannot be directed in any particular direction (e.g. Fairy/Christmas lights);
- (vii) 70 (g) is uncertain whether it prohibits all lights at all times that do not comply with its requirements, including decorative indoor lighting (e.g. Fairy/Christmas lights) and handheld lights (e.g. torches);
- (viii) 70 (i) provides no certainty on whether the owners, occupiers or body corporate are responsible to ensure “all outdoor lights, including balcony lights, must be turned off when not in use between 8:00pm and sunrise during turtle nesting and hatching season (October – May)”;
- (ix) 70 (i) provides no objective standard or certainty for what “not in use” means;
- (x) 70 (i) provides no minimum timeframe or objective standard for which a light must be “not in use” before it must be switched off;
- (xi) 70 (j) is uncertain as to whether the owners, occupiers or body corporate are responsible to ensure external feature lighting to the building is turned off between 8.00 pm and sunrise during turtle nesting and hatching season (October – May);
- (xii) 70 (l), on its face, requires lighting in all “other areas”, including internal rooms (e.g. bedrooms), to be fitted with timers, proximity or motion activated light sensors but, if that is the correct construction, there is no objective standard for what “wherever possible” means;
- (xiii) 70 (l) is uncertain whether it requires lighting in all “other areas”, including internal rooms (e.g. bedrooms), to be fitted with timers,



proximity or motion activated light sensors and, if so, what “wherever possible” means for such areas;

- (xiv) 70 (m) is uncertain whether, and, if so, to what extent, the body corporate and residents are required to use smart lighting technology (including dimming control) to reduce light emissions during critical turtle breeding periods (October – May);
- (xv) 70 (n) is uncertain whether the prohibition on decorative outdoor lighting being “fitted” to the buildings, open space or recreation areas (e.g. Fairy/Christmas lights) during nesting and hatching season (October – May) includes lights:
 - (A) merely hung over existing structures or hooks (without being fixed or “fitted”);
 - (B) on a Christmas tree or other free-standing structure; or
 - (C) on a balcony of any penthouse or other unit;
- (xvi) 70 (o) is uncertain whether the owners, occupiers or body corporate are responsible for switching off pool lighting after 8:00pm during nesting and hatching season (October – May);
- (xvii) 70 (s), on its face, requires all lighting, including internal lighting on the penthouse level, emitting light (directly or indirectly) towards the coastline and sky to have visual screening through vegetation screens applied to it but, if that is the correct construction, it is uncertain what visual screening is required; and
- (xviii) 70 (s) provides no objective standard for what visual screening through vegetation screens must be applied to all lighting towards the coastline and sky.

27. Prior to being remedied through a minor change application addressed in grounds 34-37 below, The the difficulties in enforcing condition 70, and the uncertain scope of it means meant that it is was likely to impose an unreasonable burden upon Council and to be unworkable, therefore, as neither Council nor people bound by the condition can could know with certainty what it means meant, it:

- (a) ~~contravenes~~ contravened the requirements in s 65(1) of the PA that conditions “must ... not be an unreasonable imposition on, the development or the use of premises as a consequence of the development ... or be reasonably required in relation to the development or the use of premises as a consequence of the development”;
- (b) ~~contravenes~~ contravened the requirements in ss 20(2)(e) and 23(h) of the *Judicial Review Act 1991* that the making of an administrative decision under an enactment, including ss 60(2) and 76(1) the PA, not be an improper exercise of the power conferred by the enactment by exercising the power in such a way that the result of the exercise of the power is uncertain; and/or
- (c) should not have been imposed at least as an exercise of a discretion under ss 60(2) and 76(1), proper town planning practice and principle, and considering the duty in s 5 of the PA.



- ~~28. Condition 70 imposes requirements on future owners and occupiers and the body corporate to do things, such as turning off lights after 8pm for eight months of the year during turtle nesting and hatching season (October – May), to achieve compliance with the performance benchmarks.~~
- ~~29. Condition 70 contravenes the prohibition in s 66(1)(a) of the PA against conditions that “require a person other than the applicant to carry out works for the development.”~~

Errors related to views and vistas in original decision and negotiated decision

30. The original decision and the ~~change~~ negotiated decision were affected by an error of law that “it is also a feature of the zoning of the site that there is no express protection reflected in the relevant use code [the *High Density Residential Zone Code* of views for surrounding properties].”
31. That was an error of law as s 6.2.3.2(2)(f)(iii) of the *High Density Residential Zone Code* required development to ensure that there is no unreasonable loss of amenity for surrounding premises having regard to impacts upon views and vistas.

Errors related to protecting the character of the beachfront

- 31A. The Council’s original decision and negotiated decision were affected by jurisdictional error and errors of law, and the procedures that were required by law to be observed in connection with the making of the decisions were not observed by:
- (a) failing to take into account a relevant consideration by failing to consider the assessment benchmark stated in the overall outcome in s 8.2.5.2(2)(i) of the *Coastal Protection Overlay Code* of the planning scheme, namely:
- “development adjacent to beachfront areas is located and designed to protect the character of the beachfront when viewed from the beach and integrates with the surrounding natural landscape and skyline vegetation.”
- (b) erroneously construing the assessment benchmarks in the *Coastal Protection Overlay Code* and, consequently, the assessment benchmarks for the purposes of ss 60(2) and 76(1) of the PA, as not requiring the development adjacent to beachfront areas to be located and designed to protect the character of the beachfront when viewed from the beach and integrating with the surrounding natural landscape and skyline vegetation.
32. As a consequence of the errors set out in the preceding grounds, the original decision and the ~~change~~ negotiated decision were affected by legal error and jurisdictional error in that:
- (a) the procedures that were required by law to be observed in connection with the making of the decisions were not observed;



(b) the making of the decisions involved improper exercises of the power conferred by the enactment in pursuance of which it was purported to be made, including by:

- (i) failing to take a relevant consideration into account in the exercise of a power;
- (ii) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and/or

(c) the decisions involved an error or errors of law.

33. As a consequence of these errors, subject to the remedy to part of the errors made through a minor change application addressed in the grounds that follow, the negotiated decision notice should be set aside and the matter remitted to the Council to reconsider according to law.

Minor change application and approval

34. On 8 April 2020, after the Originating Application was filed and had been set down for hearing, the Second Respondent applied to Council under s 78 of the PA to change conditions 54, 63, 69, 70 and 73 and add a new condition 70A to the negotiated decision notice to remedy the errors related to conditions identified above in grounds 25-27 (minor change application).

35. On 23 July 2020 the Council decided under s 81A of the PA to approve the minor change application (minor change approval) to:

- (a) change conditions 54, 63, 69, 70, 73 and Advice Notice 23; and
- (b) include an additional condition 70A.

36. On 30 July 2020 the Council issued a decision notice under s 83 of the PA for the minor change approval (decision notice for the minor change approval).

37. The amendments made to conditions 54, 63, 69, 70 and 70A, as contained in the decision notice for the minor change approval, adequately remedied the errors in conditions referred to in grounds 26-27 and 32(b)(ii) above.

Errors related to PO12 not corrected by the minor change approval

38. The minor change approval did not consider or address PO12 of the Coastal Protection Overlay Code or re-exercise the Council's decision-making under s 60(2) of the PA for the development application.

39. The minor change approval did not remedy the errors in the original decision and the negotiated decision identified in grounds 24 and 32(a), (b)(i) and (c) above.



Errors related to views and vistas not corrected by the minor change approval

40. The minor change approval did not consider or address the requirements of s 6.2.3.2(2)(f)(iii) of the High Density Residential Zone Code or re-exercise the Council's decision-making under s 60(2) of the PA for the development application.
41. The minor change approval did not remedy the errors in the original decision and the negotiated decision identified in grounds 30, 31 and 32(a), (b)(i) and (c) above.

Errors related to protecting the character of the beachfront not corrected by the minor change approval

42. The minor change approval did not consider or address the overall outcome in s 8.2.5.2(2)(i) of the Coastal Protection Overlay Code or re-exercise the Council's decision-making under s 60(2) of the PA for the development application.
43. The minor change approval did not remedy the errors in the original decision and the negotiated decision identified in grounds 31A and 32(a), (b)(i) and (c) above.

Relief

44. As a consequence of the Council not remedying the errors in the original decision and negotiated decision identified in grounds 38 – 43 above, the minor change approval and the decision-making process as a whole was affected by legal error and jurisdictional error as identified in ground 32(a), (b)(i) and (c) above.
45. As a consequence of these errors, the decision notice for the minor change approval should be set aside and the matter remitted to the Council to reconsider according to law.

P & E Law
 P&E Law
 Solicitors for the Applicant
 Dated: 4 September 2020

This Amended Originating Application is filed pursuant to the orders made by the Court on 21 August 2020.

~~This application is to be heard by the Court at Maroochydore on the ... day of
 2019 at 9.15 am.~~

.....
 Registrar



~~NB: If you are named as a respondent in this proceeding and wish to be heard in this application you must:~~

~~(a) within 10 business days after being served with a copy of this Originating Application, file an Entry of Appearance in the Registry where this application was filed or where the court file is kept; and~~

~~(b) serve a copy of the Entry of Appearance on each other party.~~

~~The Entry of Appearance should be in Form PEC—5 for the Planning and Environment Court.~~

~~If you are entitled to elect to be a party to this application and you wish to be heard in this application you must:~~

~~(a) within 10 business days of receipt of this Originating Application, file a Notice of Election in the Registry where this application was filed or where the court file is kept; and~~

~~(c) serve a copy of the Notice of Election on each other party.~~

~~The Notice of Election should be in Form PEC—6 for the Planning and Environment Court.~~

