MERIT SUBMISSION
CONCERNING COMPLIANCE WITH CLAUSE 32B
OF THE NORTH COAST REGIONAL ENVIRONMENTAL PLAN 1988

DOLPHIN BLUE DEVELOPMENT
YAMBA ROAD, YAMBA

Prepared for

NSW Department of Planning

On behalf of

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1 INTRODUCTION

This submission is to accompany a project application to the Minister under **Part 3A** of the **Environmental Planning and Assessment Act 1979** (the Act) for the Blue Dolphin Holiday Resort located on Yamba Road, Yamba (Lots 1&2 DP 706628) for the redevelopment of the existing holiday resort as a mixed use residential, serviced apartment and tourism project.

The purpose of the submission is to provide a justification with regard to the merit of the proposal for the project's proposed non-compliance with **Clause 32B(4)(b)** of the **North Coast Regional Environmental Plan** (REP).

While an objection made pursuant to **State Environmental Planning Policy 1 – Development Standards** (SEPP 1) is not required for the project as an application made under **Part 3A** of the Act, the submission makes use of the framework provided by SEPP 1 and **Draft State Environmental Planning Policy (Application of Development Standards)** for the merit assessment of non-compliance with development standards.

Pursuant to **Clause 32B(4)(b)** of the REP, the overshadowing development standard states that:

(4) The council must not consent to the carrying out of development:

...

(b) elsewhere in the region, if carrying out the development would result in beaches or waterfront open space being overshadowed before 3pm midwinter (standard time) or 7pm midsummer (daylight saving time).'

The submission seeks flexibility in the application of this standard in the circumstances of this particular case where the proposed development will only result in a marginal increase in overshadowing on some portions of the waterfront reserve when compared to the overshadowing already caused by the existing buildings and mature trees.

The shadow diagram analysis for the development prepared by Woodhead in Appendix 3 of the Main EA Report, demonstrates that no overshadowing will occur until after mid afternoon in midwinter with only an additional area of the waterfront reserve being affected from 3pm when compared to the overshadowing caused by the existing trees. A degree of overshadowing will occur in the summer after mid afternoon; however, overshadowing already occurs as a result of the existing buildings and evergreen trees throughout the year. Any additional overshadowing caused by the proposed development will be marginal when compared to the overshadowing already caused by existing trees and will be compensated by the provision of additional open space on the site itself and the provision of access to the existing landlocked waterfront reserve.

2 OBJECTIVES OF THE DEVELOPMENT STANDARD

The matters relating to the **Objectives of a Development Standard** are central to the consideration of a SEPP 1 Objection and are considered to be appropriate grounds to be addressed in this merit submission which, similarly, seeks to justify non-compliance with a development standard.

The development standard this merit submission is seeking to vary is set out at **Clause 32B(4)(b)** of the REP:

> *'(4) The council must not consent to the carrying out of development:*
>
> ...
>
> *(b) elsewhere in the region, if carrying out the development would result in beaches or waterfront open space being overshadowed before 3pm midwinter (standard time) or 7pm midsummer (daylight saving time).'*

In specific relation to SEPP 1 Objections, **Talbot J** in **Case No. 10286 of 1996** (*Lavender View Regency Pty Ltd –v- North Sydney Council, unreported)* stated the following:

> *"When considering an objection made pursuant to SEPP 1, it has been well established that it is necessary to have regard to a number of matters. Firstly, the aim and objective of the development standard must be understood. Once that has been appreciated, the effect of the non-compliance upon the purpose of the development standard needs to be assessed. The assessment takes account of whether the aim and objective will be achieved notwithstanding that the standard will not be complied with. In other words, it is not the standard itself that is important, but rather it is the purpose which it is designed to achieve. The circumstance of the case that renders the imposition of a development standard unreasonable or unnecessary is that the development will nevertheless meet the identified planning purposes of the standard."*

Further, Talbot J commented that:

> *"the purpose of the standard may be determined from the planning instrument or from an examination of the planning considerations which led to its formulation."*

The REP does not contain specific objectives for the overshadowing of development on beaches or waterfront open space, although part (b) of **Clause 30** is of relevance. It states that the objective in relation to coastal planning is to provide for the appropriate recreational use of beaches.

The strategic actions of the NSW Coastal Policy (1997) are also relevant in part, stating that:

Beaches and waterfront open space will be protected from overshadowing. The standard to be applied will vary according to local circumstances (our emphasis), however generally the standard to be applied is:

- *in cities or large towns, no overshadowing before 3pm midwinter and 6.30pm Summer Daylight Saving Time;*
- *elsewhere, no overshadowing before 4pm midwinter and 7pm Summer Daylight Saving Time.*

In addition, a further initiative of the NSW Coastal Policy is to ensure that *public access to beaches is not [to be] impeded by tourist resort developments (Section 1.4).*

Beaches and waterfront open space is not expressly defined in the REP, nor is there a distinction made between beaches and/or waterfront open space in relation to the ownership of such land, albeit public or private and/or the zoning of such land.

It can be assumed that the objectives of both the REP and NSW Coastal Policy are not seek to a diminished situation, whereby, new developments would result in a worse situation than currently exists, through strict compliance with REP and NSW Coastal Policy Objectives. If developments will result in additional benefits, which compensate for impacts such as a degree of overshadowing, then it can be argued that the variation in the overshadowing standard would not have an adverse impact on a site or surrounding area or indeed the applicability of the overshadowing standard along the North Coast as a whole.

Given that there is no complete set of objectives, they must be assumed, and are determined to be as follows:

- **To ensure the proposed development does not result in an unacceptable level of overshadowing on beaches and waterfront open space;**
- **To ensure that any overshadowing that occurs does not materially affect passive and active recreational areas;**
- **To ensure that public access to waterfront open spaces and beaches is not materially impeded by tourist resort developments;**
- **To ensure new developments do not result in a materially diminished situation compared to that which currently exists in terms of overshadowing; and**
- **To encourage development which is in context with the existing character of the locality – in this instance within the general tree line established by existing mature trees on the subject site and adjoining land.**

It is thus these assumed Objectives to which the merit test is sought to be applied in this instance.

3 EXISTING SITUATION

This section describes the existing situation at the Blue Dolphin Holiday Resort in terms of its use and the overshadowing currently experienced on the site and adjacent waterfront reserve.

At present, the site is in use as a holiday resort, containing tourist, recreation, commercial and residential uses, including a service station, convenience store and takeaway food outlet. The site contains a total of 235 holiday cabin and powered caravan and camping sites (which currently includes 92 manufactured one and two bedroom cabins) and contains mature trees. The existing structures and trees cause a degree of overshadowing on the site and adjacent waterfront reserve.

The site is located adjacent to a waterfront reserve and the Clarence River. The adjoining land and the waterfront reserve contain mature evergreen trees. The existing trees and development on the subject site result in overshadowing on the reserve itself and indeed the river beach. Given the evergreen nature of the trees, this overshadowing occurs all year round. This is illustrated in Drawing Ref. CP 008 and CP 009, prepared by Woodhead, which clearly shows the extent of overshadowing that occurs during both the summer and winter months.

The existing structures are one storey in height. The relevant LEP zones the subject site as a Residential Tourist 2(t) zone and the zone objectives seek to encourage high density residential and tourist accommodation. The subject site and project is of such a size that the 'concept plan' is designed to provide a specific set of envelopes and development parameters in lieu of the more general DCP provisions including the 9 metres height limit (measured from any point at ground level).

The proposed mixed residential, serviced apartment and tourist accommodation has been designed to generally fit with the predominant mature tree line on the subject site, waterfront reserve and adjoining land to the west of the subject site. A reduction in height level to the local government wide standard would result in a reduction in the density of dwellings and consequently result in a greater 'ecological footprint' on the subject site being required to accommodate the equivalent amount of accommodation.

A shadowing assessment assessed the proposal in relation to the overshadowing caused by the proposal at its current height varying across the site and at the DCP maximum height level of 9 metres in relation to the existing trees. This shadow assessment shows overshadowing will be marginal in both the summer and winter months when compared to the overshadowing currently caused by the existing buildings and trees. The overshadowing diagrams clearly show that the existing trees and buildings cause a greater degree of overshadowing at a greater frequency throughout the year.

The **North Coast REP** does not stipulate any maximum height limits for buildings. **Clause 51(2)** of the **North Coast REP** requires the concurrence of the Director for buildings of a height greater than 14 metres.

The site and adjacent waterfront reserve have an abundance of existing mature evergreen trees and the building height has therefore been designed to fit with the predominant mature tree line

on the subject site, waterfront reserve and adjoining land to the west of the subject site, as evidenced from the Shadow Diagrams (Drawing Ref. CP008 – 009), the Concept Elevations & Sections (Drawing Ref. CP 007) and the Perspective Views (Drawing Ref. CP 010), prepared by Woodhead (see Appendix 3 of the Main EA Report). The visual impact of the proposed buildings will therefore be minimised as result of this.

The North Coast REP or indeed the NSW Coastal Policy does not define a beach or waterfront open space nor does it distinguish between public or private waterfront open space. At present, there is limited pedestrian access to the water and the reserve located along the water. The concept plan includes direct public pedestrian access to the otherwise land locked waterfront reserve. In addition the concept plan includes substantial landscaped areas of waterfront open space along the western boundary of the subject site for the public at large and other landscaped waterfront open space within the project. This will more than compensate for any marginal overshadowing caused by the proposal when considered against the area of open space currently overshadowed by the existing trees.

4 JUSTIFICATION FOR VARIATION

This submission seeks to vary the overshadowing standard, due to the circumstances of the proposed project and its relationship with the surrounding area.

The marginal overshadowing caused by the proposed redevelopment of the existing holiday resort on the river beach and the waterfront open space is considered to be minor in the overall context of the proposed development and existing circumstances. It is clear from the Shadow Diagrams (CP008-009), prepared by Woodhead, that the existing mature evergreen trees causes a degree of overshadowing for a greater period of time throughout the year, at present, than the proposed project will. The marginal impact from the proposed project is considered minor in the context of the small number of hours and minor extent that the proposed development causes overshadowing throughout the year in comparison to the overshadowing caused by the existing buildings and trees. The proposal will cause a degree of additional overshadowing, however, non compliance with the overshadowing standard will not be so significant as to cause any adverse environmental or amenity impacts to the river beach or the waterfront open space. The concept plan and the proposed public pedestrian access to the landlocked waterfront reserve along the entire western boundary of the subject site will in fact result in the Waterfront Reserve being opened up to the public at large and will provide landscaped waterfront open space within the project for occupants of the project.

In terms of the assumed objectives for the overshadowing standard, non-compliance is justified as follows:

- **To ensure the proposed project does not result in an unacceptable level of overshadowing on beaches and waterfront open space**

The site is bounded by the Clarence Estuary Nature Reserve (to the north west), the Yamba Road (to the south west), the Moby Dick Motel (to the south east) and the Waterfront Reserve and Clarence River (to the north east). In order to assess the level of overshadowing the proposal causes, together with the impact of existing trees, a shadowing assessment was carried out. The assessment illustrates the shadows generated by the existing trees and the proposal at its current height varying across the site (the maximum height level being 19.9 metres). Existing mature evergreen trees situated adjacent to the site causes overshadowing throughout the year on the waterfront open space and river beach (see Drawing Ref. CP008-009). Given that the trees are evergreen; this situation does not change throughout the various seasons.

The shadow diagrams illustrate the overshadowing caused by the proposal at its current height varying across the site and at the DCP maximum height level of 9 metres in relation to the existing trees. The Winter Solstice 9am and 12 noon plates (of Drawing CP 009) demonstrate that the proposal will not cause any additional overshadowing on the waterfront reserve up until after mid afternoon midwinter. It is clear that the amount of overshadowing on the waterfront reserve at 3pm midwinter is limited, affecting a limited portion of that area, is irregular, and is not continuous, due to the deliberate separation of buildings. The overshadowing at 3pm midwinter does not encroach upon the high tide mark, the river beach or the Clarence River. The 9am, 12pm and 3pm Winter shadow diagrams do however clearly demonstrate that the

majority of the waterfront reserve is already overshadowed by the existing trees at this time of the year.

The Summer Solstice 9am and 12pm plates (of Drawing Ref. CP 008) demonstrate that the proposal will not cause any overshadowing on the waterfront reserve or indeed the Clarence River up until after mid afternoon in the summer months. The 3pm plate illustrates that a small degree of overshadowing occurs on the waterfront reserve when the buildings are at a maximum height level of 9 metres. There is only marginally more overshadowing when the buildings are illustrated at their proposed height varying across the site. In both instances, this overshadowing is limited, affecting a limited portion of that area. The overshadowing is irregular, and is not continuous, due to the deliberate separation of buildings. The shadow diagrams do however clearly demonstrate that a greater degree of overshadowing is caused by the existing trees than the proposal will cause at either height limits.

The 6pm Summer Solstice plate demonstrates the proposal with the maximum DCP height limit of 9 metres and with its proposed height varying across the site in relation to the existing trees at 6pm during the summer months. It is clear that whilst the proposal will cause a degree of additional overshadowing on the waterfront reserve and the Clarence river beach at either height levels at 6pm during the summer months that a far greater degree of overshadowing is already exerted by the existing trees.

The proposal will however result in the provision of pedestrian access to the existing landlocked waterfront reserve, which will increase the amount of open space available to the public. In addition, the proposal will result in the creation of open space on the site. Site coverage for the proposed buildings accounts for only 38%, with open space provision equating to over 48% (which is over and above the DCP requirements of 35%). Therefore, the development will more than replace the open space area already overshadowed by the existing trees and the proposal, by providing a substantially greater area of open space, while also providing pedestrian access to the adjacent waterfront reserve. In this sense, the proposal will create a greater material benefit in terms of open space provision.

The proposed project will therefore not result in an unacceptable level of overshadowing on beaches and waterfront open space throughout the year nor would a reduction in height limit to 9 metres result in an overall benefit in terms of reducing overshadowing.

- **To ensure that any overshadowing that occurs does not materially affect passive and active recreational areas;**

The waterfront reserve is a relatively small area, with limited access and use of the river beach, and is not contiguous with other public open space as part of a corridor. Although the foreshore reserve is not presently accessible to the public and is used only by visitors to the existing resort, pedestrian access will be provided as part of the redevelopment of the resort. Given the nature of the waterfront, it is likely that it will be used for passive recreation as opposed to active recreation.

The shadow diagrams demonstrate that even on a worst case basis, the proposal will not cast any additional shadows onto the river beach or waterfront reserve up until late afternoon during the winter months with no overshadowing occurring until late afternoon during the summer

months – an area which already experiences overshadowing from the existing mature trees. Although, the waterfront reserve will be overshadowed after 6pm during the summer months, in part, by the proposal, this area is already overshadowed by the existing trees. In addition, given the nature of the reserve and the time in the evening overshadowing will occur, it is unlikely that it will adversely affect any recreational areas.

In this regard, the proposed project will not detrimentally overshadow the active and passive recreation space of the Beach or waterfront.

- **To ensure that public access to waterfront open spaces and beaches is not materially impeded by tourist resort developments.**

The existing site is in use as a holiday resort, containing tourist, recreation, commercial and residential uses, including a service station, convenience store and takeaway food outlet. The proposal is seeking to upgrade the existing Yamba Foreshore Reserve in conjunction with the sites redevelopment. This will result in enhanced public access to the reserve as well as improved facilities and an increase in vegetation. Public access to the waterfront open spaces and river beaches will therefore not be impeded by the tourist resort development, but will in fact be enhanced.

- **To ensure new developments do not result in a materially diminished situation compared to that which already exists in terms of overshadowing**

The existing buildings on the site together with the existing mature evergreen trees cause overshadowing on the waterfront throughout the year. The amount of public open space available is limited at present, as a result of access to the waterfront being restricted due to land locking. Consequently access is restricted to the visitors of the holiday resort.

The proposal, through the use of higher buildings has minimised the footprints of the proposed buildings. The use of multiple storey buildings has resulted in a significant proportion of communal areas being provided (approximately 48% of the total site area, with over 44% provided in the Stage 1 development), which is over and the above DCP requirement of 35%. In addition, the proposal involves the creation of pedestrian public access to the waterfront reserve, which does not currently exist. The proposal will therefore result in a net increase in the amount of both private and public open space provided both on and adjacent to the site.

The degree of overshadowing the adjacent waterfront will experience as result of the proposed development will be restricted to no additional overshadowing occurring until after mid afternoon midwinter, with any additional overshadowing at this time of the year being marginal and restricted to a limited portion of the reserve.

This degree of overshadowing is repeated during the summer months, up until 6pm. It has however been demonstrated above that the amount of overshadowing caused by the proposal up until 3pm in comparison to the overshadowing caused by the existing buildings and evergreen trees is negligible. In any case, a far greater degree of overshadowing already exists as a result of the existing trees.

There is a minimal difference in the degree of overshadowing caused by the proposal whether at the DCP maximum of 9 metres or at its proposed height varying across the site. A greater degree of overshadowing is caused only by the existing trees. The higher height limit and the reduction in footprint of the buildings onsite has resulted in a density suitable to the site, and has also increased the amount of open space that can be provided on site.

The amount of private and public open space that will be provided as a result of the open space will more than compensate for the marginal amount of overshadowing that will occur as a result of the proposal. This benefit therefore far outweighs the effects of this additional overshadowing and therefore will not result in a diminished situation than currently exists.

- **To encourage development without significant visual intrusion into the beach areas.**

The proposal has been designed to ensure minimal visual intrusion on the beach whilst achieving the zone objective of high density development. Buildings exceeding 14 metres in height require the concurrence of the Minister. The proposed concept plan includes a range of building typologies and heights up to 11.1 metres to 19.9 metres.

A number of measures have been provided in the design to minimize visual intrusion of the project when viewed from the water. This includes the careful use of materials that are 'reflective of place', careful landscaping, generous setbacks and ensuring that the buildings generally respect the existing tree line.

It should be recognised that the subject site is zoned to encourage high density forms of residential and tourist accommodation. The design of the project has responded to this and has also located the higher buildings to maximize northern aspect, views and to create high levels of amenity within the site as well as not causing any loss of views or solar access to adjoining development and also minimizing any loss of amenity to beach and waterfront open space by increasing public access to these areas and incorporating a substantial increase of landscaped open space adjoining the waterfront reserve and nature reserve to the west. As already stated, the inclusion of multiple storey buildings in the high density zone enables significant areas of communal open space and landscaping to be provided onsite (a total of approximately 48% of the site). The building placement also provides for extensive setbacks to Yamba Road, ranging from 9 metres to 15 metres from the site boundary. In addition, the upper storeys of the proposed buildings have been recessed to minimise the building height plane on the foreshore boundary.

The proposed project balances the higher residential densities encouraged by the North Coast REP. The variation of the development standard in this instance will not undermine the integrity of the planning regime established by the **North Coast Regional Environmental Plan (REP)**, and will not cause an unacceptable overshadowing impact on the adjoining beach or waterfront open space.

5 DRAFT STATE ENVIRONMENTAL PLANNING POLICY (APPLICATION OF DEVELOPMENT STANDARDS)

Draft State Environmental Planning Policy (Application of Development Standards) (the Draft SEPP) was placed on public exhibition from **10 May 2004** to **18 June 2004**. Although the draft has limited weight, and does not, in any case, apply to a project application made pursuant to Part 3A of the Act, it has been considered.

The most relevant section of this draft is Clause 7(2) and as such the proposal has been assessed against it. This has been done in order to assure the consent authority that the design response for the site, notwithstanding the non-compliance with the overshadowing standard, satisfies the requirements of this draft SEPP.

Clause 7(2) asks the applicant to demonstrate *'that the proposed departure from the development standard will result in a better environmental planning outcome than that which could have been achieved on the site had the standard been complied with'.*

If a lower height limit and greater site coverage was applied to the proposal in order to avoid any further overshadowing, this would result in the reduction in the density of dwellings and consequently result in an underutilisation of the site in terms of its social, economic and environmental potential. In addition, it would result in a reduction in the amount of communal open space and landscaping being provided, contrary to the provisions of the Macleans LEP. If the proposal was not built, it would result in the loss of accommodation appropriate to the location in an existing urban area and indeed the loss of available private and public open space.

On this basis, the proposed project would meet the requirements of **Clause 7(2)** of the Draft SEPP.

6 CONCLUSION

In accordance with the foregoing, it is considered that strict compliance of the proposed project with the **'overshadowing'** standard at **North Coast Regional Environmental Plan (REP), 1988, Clause 32B(4)(b)** is unreasonable and unnecessary. In this case, it is considered that there will be no significant adverse environmental nor amenity impacts. In fact, it increases the amount of landscaped open space accessible to the public at large both within the subject site (western portion) and to the existing waterfront reserve.

The project has been considered both in isolation and cumulatively, and the following conclusions can be made:

- Minimal overshadowing will occur on the beach and waterfront open space during the winter months, where overshadowing already exists as a result of existing mature trees;
- The effect of the overshadowing that will occur after 6pm in the Summer months will be marginal given the current overshadowing caused by the existing mature trees. In addition, any marginal overshadowing will be compensated by the provision of additional open space on the site and indeed the provision of access to the waterfront open space;
- There will be no adverse impact on the recreational use of the reserve;
- Incorporating public pedestrian access to the otherwise landlocked waterfront reserve has significant public benefit;
- Providing additional private and public open space far outweighs the marginal proportion of overshadowing that will occur part of the year on the adjoining waterway; and
- A reduction in the height limit resulting in increased site coverage would not reduce the overshadowing that already exists along the waterfront reserve and on the waterway by existing vegetation, and would in fact reduce landscaped open space or reduce density in a zone which expressly encourages consolidation in the form of high density development objectives.

To permit a variation in the standard would have no adverse implications for the applicability of **Clause 32B(4)(b)** along the North Coast as a whole. The integrity of the planning regime will be upheld.

It is therefore requested that this submission made for variation to development standard Clause 32B(4)(b) be supported.