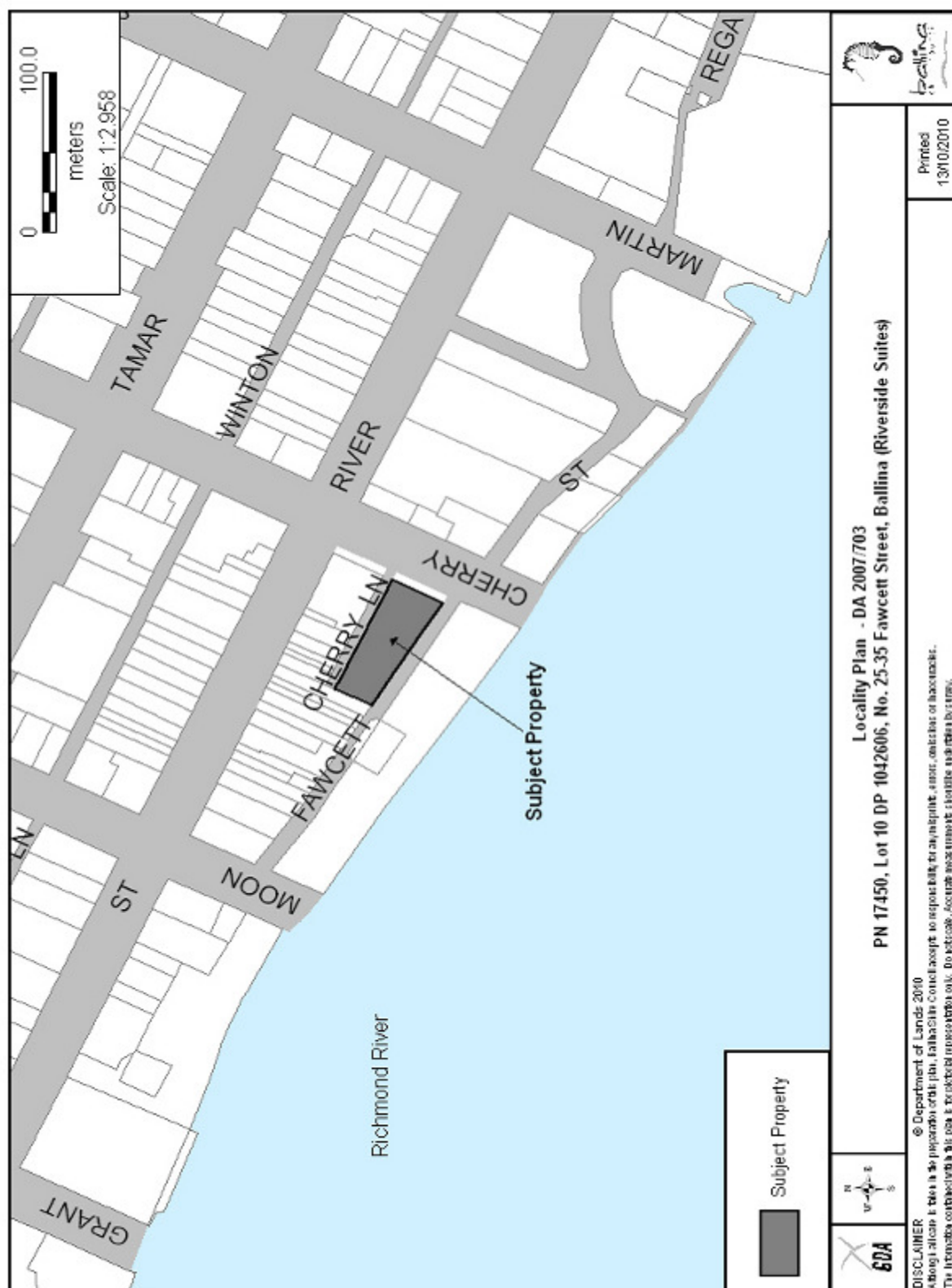


8.1 DA 2007/703 - Dual Key Arrangements - Riverside Suites



15 October 2010
Our Ref: SJC1236

The General Manager
Ballina Shire Council
PO Box 450
Ballina NSW 2478

Attention: Mr Anthony Peters

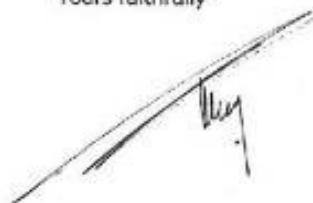
Dear Sir,

**Re: Development Application 2007/703 Proposed Dual Key Apartment
Usage, Riverside Suites, Fawcett Street, Ballina**

I refer to your recent correspondence and advice that the subject application is being considered for reporting to Council at its meeting of 28 October 2010. In order to properly address the matters you have raised and other issues associated with the position of the Body Corporate and the like, I have come to the view that a meeting of all of the relevant stakeholders is critical. Such a meeting cannot be arranged prior to Council's meeting of 28 October. Accordingly, I would be pleased if you could defer reporting the subject matter until Council's scheduled November meeting.

Thank you for your assistance in relation to this matter.

Yours faithfully



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DA 2007/703 - Unauthorised Dual Key Arrangements - Riverside Suites

File References	DA 2007/703
Applicant	sj Connelly Pty Limited (on behalf of the Body Corporate and owners of the non-commercial allotments)
Property	Lot 10 DP 1042606 (Lots 12,13,16, 21,22,25,30,31,34,37,38 SP 70891), No. 25-35 Fawcett Street, Ballina known as "Riverside Suites" (formerly "Riverside Ramada Hotel") Tourist Development
Proposal	DA 2007/703 - Change of Use and Structural/Layout Changes to allow "Dual Key" apartments (for 11 apartments)
Effect of Planning Instrument	The land is zoned Business under the provisions of the Ballina LEP
Locality Plan	The subject land is depicted on the locality plan attached

Background

The purpose of this report is to allow Council to make a determination in relation to the application seeking consent for the conversion of eleven (11) strata titled allotments to allow for their use for "dual key" tourist/hotel accommodation purposes.

The following assessments are made recognising that the building already exists and that, as a consequence, a range of development control criteria do not apply. Notwithstanding this, the building is also relatively new and substantially meets current building design and construction controls.

Cross reference will be made in this report to the relevant sections of the **attached** Briefing Paper. Although this report will duplicate some matters contained within the Briefing Paper, it is suggested the Briefing Paper and the recent submissions made by both the applicant and Hotel Management in response to the Briefing Paper be reviewed for the background on various issues prior to reading this report.

Additionally, the application's documentation is extensive. Councillors may make arrangements to examine the application, including detailed floor plans by contacting the Regulatory Services Group.

The Mayor, Cr Philip Silver, has declared a pecuniary interest in the proposal and has not been involved in any aspect of the processing of this application or in any enforcement action considerations or decisions.

Introduction

This proposal involves a Change of Use to allow continued utilisation of the eleven (11) subject apartments/hotel suites as "Dual Key" apartments as a Tourist Facility (i.e. short term tourist accommodation).

Council should note that the Construction Certificate plans (which allow the "dual key" floor layout to occur and upon which the applicant is relying) were approved by an Accredited Certifier and are considered by Council planners as not being consistent with the floor layout plans approved by the Council.

Whilst the development application relates to the Change of Use, the issue of the inconsistency of the construction certificate plans with the Council approved plans (different floor layouts and configurations for the "dual key" apartments) remains.

The construction and use of eleven (11) additional apartments is inconsistent with the plans approved by Council in the following respects:

- There are 11 more apartments/hotel suites than the number consented to by the Council that are capable of separate occupation by unrelated guests.
- The "dual key" apartments do not comply with the requirements of the Building Code of Australia in relation to fire separation, distance of travel to fire exits and whilst operational (i.e. prior to the issue of Orders for cessation of use) have posed a fire threat to occupants/tourists. Refer to Section 3.0 and Section 8.3 of the **attached** Briefing Paper for enforcement action previously undertaken by Council and to the BCA Section of this report.
- Apartments (inclusive of the "dual key" suites) do not comply with the Building Code of Australia in relation to bounding construction. Refer to BCA Section within this report.
- The basement carparking level is not functioning adequately due to the demands created by an additional 11 suites. Refer to Section 8.1 of the **attached** Briefing Paper and the Roads, Traffic and Parking Section of this report.
- No Noise Impact Assessment Report has been undertaken to assess the potential conflicts between the mixture of permanent and/or short term guests and other internal and external noise environments. Refer to Section 8.2 of the **attached** Briefing Paper and Noise Section of this report.
- Additional contributions may have to be paid as required by Section 64 Services Plans and Section 94 Contribution Plans due to additional demands. Refer to Section 8.4 of the **attached** Briefing Paper and the Contributions Section of this report.
- Due to the additional demands created by eleven (11) apartments, there are other impacts on facilities such as additional waste generation, private and landscaped open space etc. Refer to Sections

8.5 – 8.7 inclusive of the **attached** Briefing Paper for background information.

Consequently, the applicant has lodged the subject development application seeking consent to regularise the continued use of the 11 dual key apartments as separate hotel/tourist suites.

For further information about:

- the previously consented to development;
- what is actually built and operating;
- issues of non-compliance;
- enforcement action undertaken by Council;
- a history of previous Council resolutions; and
- investigation of the certification of the building by the Building Professionals Board.

Refer to the **attached** Briefing Paper.

Reportable Political Donations

The development application was lodged prior to this requirement.

Public Exhibition

The development application was placed on public exhibition in March/April 2008. Although no submissions were received directly in relation to this Development Application, concerns made within submissions received for Development Application 2007/704 that relate to the "dual key" suites are discussed in this report.

Of particular relevance are those from ground floor commercial tenancies and hotel management.

Relevant submissions raise the following points:

- Support for the approval of the "dual key" suites as additional short term tourist accommodation for the hotel;
- There is a threat to the liquor licensing arrangements for the ground floor Café 29 if the suites are not approved and are not restricted to being exclusively used for short term accommodation with consequential reduced business viability and employment loss;
- Council's authority and credibility is undermined if it allows developments to be changed after they are constructed in the way that this application seeks to do.

These matters will be addressed in this report.

Report

The following comments are made in relation to the Heads of Consideration of Section 79C of the Environmental Planning and Assessment Act 1979. Only

those pertinent matters and/or matters of contention will be specifically detailed in this report. Notwithstanding this, a copy of all the heads of consideration listed under Section 79C is **attached** to this report. These need to be considered by the Council in determining the application.

Ballina Shire Combined Development Control Plan

As the Riverside Apartments building is located in a 'C1' area under the provisions of the D.C.P., the development standards applying to built tourist facilities shall be determined on merit.

This does not allow a free for all for prospective developers because the development restrictions of the Ballina Shire Plan (particularly building height) and Chapter 2 (Ballina Town Centre) of the D.C.P. apply. Chapter 2 provides detailed design criteria for applications that address building use, height, bulk, setbacks, open space, landscaping, parking, etc.

The subject building is within the Fawcett Park Precinct of the Town Centre. Section 3.6.1 of Chapter 2 of the D.C.P. outlines the 'Desired Future Character' of this precinct. This advises that dwellings used for a mix of long-term and short-term accommodation are desired elements of the future character of this precinct.

The Land Use Objectives for the precinct are to facilitate flexible buildings that may be easily converted or adapted for a range of uses. The controls outline that one of the desired land uses for the Fawcett Park Precinct is residential development, at the second storey and above (as is proposed by this application). The D.C.P. defines "residential" to mean "dwellings that are used for both short and long term accommodation (i.e. includes residential units, apartments, tourist accommodation, serviced apartments, motels)".

The proposal is also consistent with the aims and provisions of Section 4.16 of this chapter of the plan namely 'Housing Choice'.

Approval of the development application would materially advance attainment of the land use objectives planned for this precinct.

There are, however, a range of development assessment matters (including deficiencies and departures from Council's current requirements) that need to be considered in determining this application. These include building construction problems, roads, traffic and parking, private open space (Section 4.18.6 of Chapter 2), and acoustic privacy (Section 4.18.3 of Chapter 2), and are canvassed in the following text.

Building Code of Australia (BCA)

The subject building currently has Building Code of Australia (BCA) mixed Building Classifications of Class 3, 5, 6, and 7a.

The building work that has already been undertaken that enables the subject units (Lots 12,13,16,21,22,25,30,31,34,37,38) to be used as "dual key" apartments is not consistent with the plans approved by Council. Although these works are detailed on the plans approved by the private certifier and issued with the Construction Certificate, such works are also non-compliant

with the BCA where such apartments are being used for the purposes of separate occupancies.

It should be noted that Council staff were not involved with the issue of the Construction Certificate and associated progress inspections on the construction of the building. Council staff were also not involved in the issue of any Final Occupation Certificate on the building. These functions were undertaken by a private certifier.

Required additional information and non compliant BCA matters in regard to the existing building have been assessed by Council's Building Surveyors as follows:

Distance of travel to exits

The deemed-to-satisfy provisions of the BCA require a maximum of 6 metres travel distance from the entrance doors of the sole occupancy units to the required fire exit, being the door to the fire isolated stairs. Some of the units have an existing travel distance of 10.5 metres.

The applicant has addressed this matter in the subject DA through the submission of a report from a consultant Fire Engineer who provides a range of technical information in regard to residential unit population densities, travel time and smoke relief that compensates for the additional travel distance and ensures appropriate egress time.

It must be noted that the BCA is a performance document wherein compliance can be achieved by supplying appropriate information to satisfy Performance Requirements. This is achieved by complying with the deemed-to-satisfy provisions of the BCA or the submission of an Alternative Solution, as has been done in this case.

The Alternative Solution has been submitted by a Fire Engineer duly accredited by the Building Professionals Board (BPB). Council's Building Surveyors have scrutinised the report and concur with the proposed Alternative Solution.

Bounding Construction of Residential Units

Existing window openings from sole occupancy units adjoining egress paths do not comply with Clause C3.11 of the BCA and would compromise the safety of persons egressing those parts of the building.

The Fire Engineer's report has specified that this area of non compliance must be rectified and Council's request for information on how it is proposed to rectify this matter has, to date, not been met. This information is vital to Council's assessment that the fire protection of the building is appropriate to both the new and existing uses and should be addressed prior to determination of the development application.

BASIX

The EP&A Regulations require BASIX affected development to be accompanied by a BASIX Certificate (i.e. with the submission of the Development Application). The EP&A Act defines BASIX affected

development to include certain works to a BASIX affected building (being any building that contains one or more dwellings and is not a hotel or motel) where the estimated cost is \$50,000 or more. Requests for such certificate(s) have not been satisfied by the applicant and determination of the development application should not take place until relevant certification covering each of the units subject to this application have been provided.

Fire and Sound Ratings to dividing walls within the Dual Key Units

The applicant has acknowledged that the walls separating the dual key apartments do not currently comply with the requirements of the BCA and, if approved by Council, will need to be reconstructed.

In relation to this matter, if Council resolves to approve the "dual key" apartments, it is considered appropriate to impose conditions of consent to ensure separating walls comply and to provide suitable fire and sound ratings for occupants.

Mechanical Ventilation

Council's assessment has identified concerns about the existing air handling systems that penetrate the existing walls proposed to be used as "dual key" apartment dividing walls and their compliance with the relevant provisions of the BCA.

This is a complex area that requires a suitably qualified Mechanical Engineer to address. This matter needs to be clarified prior to determination of the development application.

BCA Recommendations

It is recommended that the application should not be determined until the following information has been satisfactorily provided to Council.

1. Full details of the method of achieving compliance with Clause C3.11 (Bounding Construction) of the BCA to the affected sole occupancy units;
2. Provision of estimated construction costs and, if then needed, BASIX certification covering all the units the subject of this application;
3. Provision of a report from a suitably qualified Mechanical Engineer certifying that the existing air handling system complies with the BCA requirements for the proposed "dual key" use or detailing the works that would be required for compliance.

Roads, Traffic & Parking

Council's Civil Services Group advises:

External Roads and Traffic

The proposed change in use will result in a higher traffic generation at the site however the existing external road network is constructed to a suitable standard to service the proposed development. The development will

therefore not be required to undertake any road upgrade works within the adjoining street system.

The increase in trip generation associated with the proposed development will however require the payment of additional road contributions. Refer to the Development Contributions section of this report for further details.

Parking Design and Numbers

Council's parking requirements are described in:

- DCP Volume 1, Policy Statement No 2, Car Parking and Access.
- DCP Volume 2, Chapter 2 Ballina Town Centre

Given that this proposal requires a new development application for the site, a complete reassessment of the whole development site has been completed using contemporary car parking rates and assessment methods.

The car parking assessment completed under the original development application for the site (DA 2000/680) was calculated based on the requirements of Council's DCP in the year 2000. The DCP has since been amended in regards to the car parking requirements for commercial, retail and refreshment room uses within the Ballina CBD with a rate of 1 space per 25m² now applied to all of these uses.

The total car parking requirement for the ground floor commercial uses calculated under DA 2000/680 was 35.93 spaces. The total car parking requirement for the ground floor commercial uses based on Council's current DCP requirements is 34.32 spaces, based on a Gross Floor Area of 858m². The commercial Gross Floor Area of 858m² has been calculated based on the attached plan.

The car parking assessment under this application therefore benefits from the amendments to Council's DCP due to the reduction in car parking associated with the commercial component of the development.

In order to facilitate a comprehensive assessment of the proposal the car parking requirements for the following scenarios have been provided:

- All apartments approved as a residential flat building with dual key.
- All apartments approved as a tourist facility with dual key.
- Apartments approved as 2/3 residential flat building, 1/3 tourist facility with dual key.
- Apartments approved as 2/3 tourist facility, 1/3, residential flat building with dual key.

Scenario	All Residential Facility With Dual Key Approved (44 Residential Units)	All Tourist Facility With Dual Key Approved (44 Tourist Units)	Dominant Use Residential Facility With Dual Key Approved (29 Residential Units \ 15 Tourist Units)	Dominant Use Tourist Facility With Dual Key Approved (29 Tourist Units \ 15 Residential Units)
Description/Use	No of Spaces	No of Spaces	No of Spaces	No of Spaces
Basement Car Parking	0	0	0	0

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	Spaces	Spaces	Spaces	Spaces
Ground Floor				
Sub Total of Ground Floor	34.32	34.32	34.32	34.32
Sub Total for Unit spaces	53.3	53.3	53.3	53.3
Visitor Spaces for Units	8.8	0	5.8	2.9
Employee Spaces Units	0	7	3	5
Total Spaces for Units	62.1	60.3	62.1	61.2
Total Spaces for Site	96.4	94.6	96.4	95.6
Existing Spaces Provided				
Basement Car Park	57	57	57	57
Credit Cherry St Dedication	13	13	13	13
Contributions Paid	15	15	15	15
Total Spaces Provided	85	85	85	85
Total Additional Spaces Required	11.42	9.62	11.4	10.6

The proposal under DA 2007/703 is seeking approval for a change of use to allow certain apartments to operate as dual key tourist accommodation. From the table above the development would be required to provide an additional 11.42 spaces in addition to what was previously provided under consent DA 2000/680 to cater for the maximum parking demand at the site.

These calculations are based on the provision of 57 spaces on site as per the S96 modification of 13 May 2002. It was noted during an inspection of the site however that an electrical standby generator is located within one of the car spaces resulting in only 56 spaces being available at the site. The applicant shall be required to either ensure the provision of the 57 spaces on-site or pay a car parking contribution for an additional space above and beyond the number of spaces identified in the table above.

Whilst it is desirable that car parking be provided on site, Council's Development Control Plan Chapter 2 - Ballina Town Centre makes provision for parking within this precinct to be provided through the provision of monetary contribution in accordance with the Ballina CBD Car Parking Contribution Plan.

The only requirement of the DCP is that at least one space must be provided on-site for each tenancy within the development. Should the dual key apartments be approved, a condition of consent shall require that one car parking space be allocated to the two bedroom unit with the other allocated to the one bedroom apartment created as a result of the dual key arrangement.

Additional to the Civil Services Group's report, Council is advised that the applicant was requested to assess the additional traffic generated by the total development (inclusive of the total development and including the "gross floor area" of the ground floor area as defined in Council's DCP No. 1 – Policy Statement No. 2 – Carparking & Access).

This assessment was submitted in a Parking Generation Report dated July 2007 (prepared by Newton Denny Chapelle). Notwithstanding that this report, calculates that the proposed "dual key" apartments will generate the need for an additional ten (10) carparking spaces, the applicant submits that gross floor area calculations in relation to the commercial ground floor have no relevance to this application and the additional "dual key" apartments can be considered in isolation.

The applicant further contends that, even though the carparking requirements for the additional "dual key" apartments (in isolation) still do not comply with Council's DCP requirements, a "practical approach" via the use of Census Data should be adopted as the basis of this assessment and that on this basis, no additional parking should be required.

Council's Technical Officers do not agree with the applicant's submissions for the following reasons:

- Council needs to consider and assess the whole site (and not just the "dual key" apartments) having regard to traffic generation and carparking demand utilising current requirements/standards. Council applies this approach when assessing all development applications within the Shire that involve multiple tenancies and/or land uses. By assessing the entire site and/or all land uses within a development it ensures that sufficient on-site carparking is available for all of the existing/proposed uses at the site and not just a specific user(s), in this case the "dual key" apartment owner(s).
- The applicant's suggestion that carparking has not been impacted by the operation of the dual key apartments over the past 5 years has not been substantiated and is one opinion.
- Commercial tenants within this development have expressed concern via the public exhibition of the current proposals and verbally to Council Officers about the lack of available parking for the development. The lack of carparking and lack of functionality within the basement carpark has been evidenced by Council Officers during multiple site inspections, with owners placing signage and/or obstructions such as chairs and rope etc. across carparking spaces so that they cannot be readily utilised.
- On-street parking in this locality is highly utilised (is time limited during business hours to two (2) hours and therefore is not generally suitable for use by the development's residential occupants/users) and any additional demand associated with the proposed development would exacerbate this.
- The car parking rates set out in Council's Development Control Plan are generally based on the recommendations of the NSW Roads and Traffic Authority "Guide to Traffic Generating Developments". This guide is produced specifically for the purpose of assessing traffic generation and car parking requirements associated with specific types of developments. The rates within this guide are generally based on parking surveys and research conducted by the RTA. The RTA guide currently represents the most accurate source available to Council to

establish the car parking requirements for specific developments; not the 2006 census data for Ballina for motor vehicles associated with private dwellings as advocated by the applicant.

Developer Contributions

The proposed dual key apartments would result in the creation of 11 more units than was approved under DA 2000/680 requiring additional contributions payments as per Council's Contribution Plans.

The following contributions have been considered for application to the development:

s. 94: Roads, Open Space, Community Facilities, Parking

S 64: Sewer Servicing, Water Supply, Rous Water.

The table below sets out the applicable assessment weighting calculated for the development under Council's plan:

Development Type			OPEN SPACE, COMMUNITY FACILITIES, WUEA TRANSPORT			SEWERAGE & WATER SUPPLY	ROAD
		Number of Bedrooms	Number of Units/ lots	Equivalent Lots	Equivalent Allotments (minus Credit for existing allotment)	Equivalent tenements (minus Credit for existing allotment)	Standard Residential Allotments (Minus credit for existing allotment)
Dual Occupancy Development	Credit for existing allotment				0.000	0.000	0.000
	No. of Bedrooms in First Dwelling			0.000	0.000	0.000	0.000
	No. of Bedrooms in Second dwelling			0.000	0.000	0.000	0.000
Duplex Development	Credit for existing allotment				0.000	0.000	0.000
	No. of Bedrooms in first dwelling			0.000	0.000	0.000	0.000
	No. of Bedrooms in Second dwelling			0.000	0.000	0.000	0.000
Residential units - 3 or more dwellings	Credit for existing allotment				0.000	0.000	0.000
		1 bedroom	11	0.244	2.689	2.750	6.651
		2 bedroom	11	0.630	6.926	7.370	6.651
		3 bedroom or more	11	-1.000	-11.000	-7.370	-6.651

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		TOTAL UNITS	33				
SUBDIVISION	Credits - No of existing lots	Number of Lots			0.000	0.000	0.000
	Proposed Allotments	Number of lots			0.000	0.000	0.000
Non-residential	for use by development engineer for more multi use developments						
	Office space	square metres					
	Credits						
TOTAL					0.0000	2.7500	6.6512

Note: In regards to the Open Space and Community Facility contributions the 11 units paid a residential unit contribution under DA 2000/680. These units are 3 bedroom units and thus get a credit of 1.00 Equivalent Lot as per the above table. The dual key apartment proposal would create a two bedroom residential unit and a one bedroom tourist unit with the Equivalent Lots of 0.63 & 0.244 respectively. The development credit of 1 Equivalent Lot for the 3 bedroom apartment therefore exceeds the combined dual key Equivalent Lot of 0.87. The dual key proposal does not therefore attract any Open Space and Community payments.

Conclusion

It is concluded that with respect to servicing matters the proposed development can be supported subject to applying the following Engineering Conditions.

Contributions

The following contributions are to apply to the development:

s. 94: Roads, Parking,

S 64: Sewer Servicing, Water Supply, Rous Water

Details of the contributions are set out in the table below:

Contribution	Account -Unique No.after PLD 613 /9999	Contribution Unit	Rate per contribution Unit	Total Contribution Units Payable	TOTAL COST
Ballina Island Local Parks	51	per equivalent allotment	\$202.68	0.0000	\$0.00
Ballina District Parks	51	per equivalent allotment	\$814.67	0.0000	\$0.00

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Ballina Playing Fields	51	per equivalent allotment	\$1,061.05	0.0000	\$0.00
Regional Open Space Facilities	66	per equivalent allotment	\$782.68	0.0000	\$0.00
Open Administration Space	67	per equivalent allotment	\$28.67	0.0000	\$0.00
Ballina District Community Facilities	68	per equivalent allotment	\$1,544.08	0.0000	\$0.00
Regional Community Facilities	72	per equivalent allotment	\$2,705.29	0.0000	\$0.00
Community Facilities Administration	73	per equivalent allotment	\$52.49	0.0000	\$0.00
Ballina Island Roads	1	per equivalent residential allotment	\$1,572.00	6.6512	\$10,455.63
No WUEA Link Road Contribution Applicable					
No WUEA Transportation Works Contribution applicable					
Ballina Island Sewerage (DSP Area B)	41	per equivalent tenement	\$6,611.00	2.7500	\$18,180.25
Ballina Island Water (DSP Area B)	34	per equivalent tenement	\$3,052.00	2.7500	\$8,393.00
Rous Water	TT 9451	per equivalent tenement	\$3,600.00	2.7500	\$9,900.00
Ballina CBD Car Parking Contribution	25	per car park	\$25,750.00	11.4200	\$294,065.00
TOTAL					\$340,993.88

Conditions of Use During Occupation

- When both the "dual key" apartments are occupied by separate tenants, one on-site car parking space shall be allocated to each unit and respective tenant.

Noise

Refer to Section 8.2 of the attached Briefing Paper.

- External noise – This is a matter considered and properly dealt with in DA 2007/704 regarding the change of use to enable the residential occupation of all apartments.

- The dividing wall component of the issue is as referred to in the Building Surveyor Assessment provided earlier in this report.

On-Site Management

Contrary to the terms of the current development application seeking approval for use of the apartments for the purposes of short term tourist accommodation, it is appropriate for a suitable Plan of Management to be submitted which provides for the management of the tourist use of the premises 24 hours a day, 7 days a week or on-call.

Such a plan is considered necessary to allow for the immediate needs of guests to be serviced and for potential conflicts between guests and residents to be appropriately managed. If the two applications receive Council's consent, the development will have a substantial capacity involving up to 43 individual suites, restaurants and shops, potentially having a 24 hour demand for attention and service.

Economic Impact/Public Interest

This is an aspect of the application that Council has received public comment on. Generally, the business operators in the building support the approval of the "dual key" application as it will increase the flexibility and capacity of the available tourist accommodation and the client base of the businesses.

The apartments that are the subject of this application have not been separately utilised for "dual key" purposes since the issue of the Orders in July 2008.

The hotel management has recently advised that although the "dual key" apartments were popular, the occupancy rates over the past 6 months have been the highest on record.

Notwithstanding this, office hours and the business base of ground floor commercial tenancies may decline due to the reduced number of apartments and the loss of the smaller "dual key" suites from the letting pool.

At least three (3) of the eleven (11) current "dual key" apartment owners have not and do not currently intend to utilise the apartments for "dual key" purposes but are seeking consent to allow them to do so in the future.

It would be in the public interest to properly advance the objectives of Council's Strategic Planning for the Fawcett Park Precinct of the Ballina Town Centre.

Options

Essentially the Council has three options open to it in dealing with the application as it currently stands.

Option 1

Council could refuse the application on the grounds that it does not provide sufficient information and certainty in addressing the planning and development assessment issues identified in this report and for any other reasons that the Council considers are justified.

In the event that Council decides to refuse the application, the options open to Council for regularising the Riverside Suites and addressing the issues identified in this report and the Briefing Paper will need to be discussed in a separate report at another time.

Option 2

Council could defer the application on the grounds that there is insufficient information relating to the identified Building Code of Australia, Noise, and Management Plan issues to enable the application to be favourably determined at this time. In deferring the matter Council could invite the applicants to submit details addressing the identified matters. If Council was of the opinion that these can be suitably addressed by reasonable, conventional means, and that in such circumstances the application would warrant approval, it could also delegate to the General Manager the authority to determine DA 2007/703 following receipt and assessment of the required information.

Option 3

If Council is satisfied that the application as it currently stands sufficiently canvasses all the matters that need to be considered under the provisions of s79C of the Environmental Planning & Assessment Act, and is of the opinion that the proposal warrants approval and that a consent can be suitably conditioned, it can issue development consent to the application subject to the attachment of suitable conditions.

Conclusions

The subject development application seeks consent for the addition of 11 single occupancy hotel/tourist suites in the Riverside Apartments building by recommissioning the "dual key" apartments.

Assessment has concluded that:

- The additional suites would contribute materially to the capacity of the town's tourist accommodation and this would advance Council's strategic planning goals for the Town Centre and thus be in the public interest;
- The application's particular merit lies in the flexibility that the "dual key" configuration offers to building management in meeting the needs of a wider range of travellers and tourists;
- This application is generally supported by the ground floor commercial businesses that operate in the building and is not opposed in the submissions made to the public notification of the application;
- Detailed traffic and parking assessment identifies that there is a demand generated by this application for an additional 11.42 car parking spaces and that, due to the availability of Council's adopted

- parking contribution scheme, such can be met by payment to the parking fund;
- It is likely that reasonable and conventional building construction techniques can rectify the sound and smoke transmission failings of the existing apartment/suite dividing walls;
 - The bounding construction and travel distance fire safety issues need to be addressed for the residential/accommodation components of the building irrespective of the decisions taken for the two applications DA 2007/703 and 2007/704;
 - There has not been a genuine estimate of the construction costs of the work the subject of the application submitted that would enable the Council to confirm the need or otherwise for BASIX certification to accompany the application;
 - In terms of the tourist use of the dual-key suites in a predominantly tourist accommodation development, (i.e. the scope of this application) relevant noise and other tourist and mixed-use amenity issues would be addressed by BCA compliance and ready on-site management presence and planning;
 - External noise intrusion is more a factor to be addressed in the assessment and determination of DA 2007/704 as the building exists as a predominately tourist development, the dual-key suites are mainly internal rooms and short-term tourist accommodation can better tolerate/cater for such noise disturbance.

Option 1 is not supported. It is considered that, on face value, and subject to suitable conditioning, the addition of 11 single occupancy hotel/tourist suites to the accommodation capacity of the building by the recommissioning of the "dual key" apartments would materially advance the attainment of Council's strategic planning goals for the Fawcett Park Precinct of the Ballina Town Centre.

Given the current state of the application, *Option 2* is the preferred and recommended action. Whilst the application has been sufficiently notified to allow public submissions and comment to be made, and the assessment has identified that the merits of the case warrant approval being granted, the significance of the identified outstanding matters relating to BASIX, compliance with the BCA, and hotel management plan are such that the application's determination should be deferred pending the submission of these details. This course will give more certainty that any consent issued will be lawful and properly conditioned. The delegation of authority to the General Manager to determine the application following submission of satisfactory additional information would provide for an effective finalisation of the matter.

Option 3 is a more liberal alternative and is dependent upon Council agreeing with this report's assessment of the merits of the application, being satisfied that there is sufficient certainty that the identified outstanding matters can be addressed in reasonable, conventional ways, and being satisfied and that appropriate conditions of consent can be identified and applied. Option 3 is also dependent upon Council accepting, on the basis of current information, that the estimated cost of the requisite building construction work will be less than \$50,000 because no BASIX Certificate accompanies the development application.

Should the application (DA 2007/704) be refused, Council will have to turn its mind to how it would want to follow through the enforcement of the original terms of consent. This will need to include consideration of the need to challenge the issued construction and occupation certificates, how to clearly distinguish the level of residential occupation that would be allowed in the building, which apartments would be identified for such occupation, and how to achieve compliance with the identified BCA fire safety and construction matters. A new report having regard for the determination of DA 2007/704 would need to be prepared and considered at another meeting.

RECOMMENDATIONS

1. That the determination of Development Application No. 2007/703 be deferred pending the satisfactory submission to Council and assessment of the following additional information:
 - Full details of the methods of achieving compliance with Clause C3.11 (Bounding Construction) of the BCA to the affected sole occupancy units;
 - Estimated construction costs of the work that is the subject of, or that is needed in response to, the development application and, if then needed, BASIX certification covering all the suites that are included in the application;
 - A report from a suitably qualified mechanical engineer certifying that the existing air handling system complies with the BCA requirements for the proposed "dual key" use or detailing the works that would be required to achieve compliance; and,
 - A building management plan that comprehensively provides for meeting and responding to the behaviour, service needs and requests of guests, occupants of, and visitors to the building over 24 hour day, 7 day week, 52 week year periods.
2. That Council delegate to the General Manager the authority to determine the subject Development Application following the satisfactory receipt of the additional information required by Recommendation 1 above.

Attachment(s)

1. Locality Plan
2. Briefing Papers prepared for Councillors dated 11 December 2008
3. Submissions and responses to the Briefing Paper
4. Section 79C of the Environmental Planning & Assessment Act.

79C Evaluation

(1) Matters for consideration—general

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

- (a) the provisions of:
 - (i) any environmental planning instrument, and
 - (ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Director-General has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and
 - (iii) any development control plan, and
 - (iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and
 - (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and
 - (v) any coastal zone management plan (within the meaning of the *Coastal Protection Act 1979*),that apply to the land to which the development application relates,
- (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
- (c) the suitability of the site for the development,
- (d) any submissions made in accordance with this Act or the regulations,
- (e) the public interest.

Note. See section 75P (2) (a) for circumstances in which determination of development application to be generally consistent with approved concept plan for a project under Part 3A.

Note. The consent authority is not required to take into consideration the likely impact of the development on biodiversity values if:

- (a) the development is to be carried out on biodiversity certified land (within the meaning of Part 7AA of the *Threatened Species Conservation Act 1995*), or
- (b) a biobanking statement has been issued in respect of the development under Part 7A of the *Threatened Species Conservation Act 1995*.

(2) Compliance with non-discretionary development standards—development other than complying development

If an environmental planning instrument or a regulation contains non-discretionary development standards and development, not being complying development, the subject of a development application complies with those standards, the consent authority:

- (a) is not entitled to take those standards into further consideration in determining the development application, and
- (b) must not refuse the application on the ground that the development does not comply with those standards, and
- (c) must not impose a condition of consent that has the same, or substantially the same, effect as those standards but is more onerous than those standards,

and the discretion of the consent authority under this section and section 80 is limited accordingly.

(3) If an environmental planning instrument or a regulation contains non-discretionary development standards and development the subject of a development application does not comply with those standards:

- (a) subsection (2) does not apply and the discretion of the consent authority under this section and section 80 is not limited as referred to in that subsection, and
- (b) a provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied to the non-discretionary development standard.

Note. The application of non-discretionary development standards to complying development is dealt with in section 85A (3) and (4).

(4) Consent where an accreditation is in force

A consent authority must not refuse to grant consent to development on the ground that any building product or system relating to the development does not comply with a requirement of the *Building Code of Australia* if the building product or system is accredited in respect of that requirement in accordance with the regulations.

- (5) A consent authority and an employee of a consent authority do not incur any liability as a consequence of acting in accordance with subsection (4).

(6) **Definitions**

In this section:

- (a) reference to development extends to include a reference to the building, work, use or land proposed to be erected, carried out, undertaken or subdivided, respectively, pursuant to the grant of consent to a development application, and
- (b) *non-discretionary development standards* means development standards that are identified in an environmental planning instrument or a regulation as non-discretionary development standards.