

**Submission
No 315**

**INQUIRY INTO PLANNING PROCESS IN NEWCASTLE
AND THE BROADER HUNTER REGION**

Organisation: Honeysuckle Residents Association Inc.

Date received: 28/10/2014

NSW Parliamentary Inquiry

Planning Process in Newcastle And the Broader Hunter Region

Honeysuckle Residents Association Submission:

Lynchs Site 292 Wharf Road Development of the
Foreshore Reserve by Newcastle City Council

Lot 1000 DP1087291



26th October 2014

Honeysuckle Residents Association

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1 Background

Honeysuckle Residents Association (HSRA) has approximately 50 members who are mostly residents or apartment owners from the Breakwater and Nautilus apartments on Wharf Road. The Breakwater is located adjacent to Lynchs site on the western side and Nautilus is directly opposite the site on the southern side of Wharf Road (refer aerial view below).



Aerial View of Lynchs Location

Lynchs is a small parcel of land (approx 380 sq m) on the harbour foreshore on Wharf Rd and is a gateway site with Honeysuckle development to the west and the Foreshore Park to the east. It is Operational land owned by Newcastle City Council and is zoned B4 Mixed Uses.

However, HSRA has ample evidence that shows that the site was acquired by Council specifically for the development of the Foreshore Park during the mid 1980's and was inappropriately classified as Operational land in 1994 under the Local Government Act when it should have been Community land.

It is also located within the area shown as The Foreshore reserve gazetted in 1989. There is a disused retail building and cold room storage on the site which was built in about 1986. The derelict building should be demolished as it is an eyesore on this sensitive gateway site.

We make this submission in regard to ongoing and persistent attempts by Newcastle City Council to develop this site without proper regard to the development controls which apply under NCC's DCP 2012 and LEP 2012.

We advise that Newcastle City Council has wasted well in excess of \$350,000 of ratepayers' money on the Lynchs site. Firstly, \$250,000 on the previous Elefteria DA (for a cafe/restaurant). This DA was rejected by the Land and Environment Court in 2008 for numerous non compliances to planning controls then Council spent approximately \$100,000 on its own DA for a four storey residential apartment block.

The latest DA was withdrawn in April 2014 following the advice from Council's independent Planners TCG that the development was non compliant and they would not recommend its approval.

We are concerned:

- That Council has needlessly wasted ratepayers' money promoting inappropriate, non complying developments on this site.
- That Council as the owner of the land and as the consent authority has failed in its responsibility to ensure that any development of this site is in accordance with its planning instruments. Despite their responsibility as consent authority Newcastle City Council has attempted to circumvent its own planning controls and push through developments which they were aware from the onset were inappropriate and non compliant. With respect to the most recent DA council was motivated to push through the development at all cost to maximise the return from the sale of the land to help repair its budgetary position.
- That Council has made misrepresentations to its Councillors and to ratepayers that the DA's were compliant when they were not compliant and were ultimately rejected for being inappropriate and non-compliant. In the case of the Elefteria DA Councillors voted to reject the development on grounds that it was an overdevelopment of the site.
- That Council advised HSRA that there were no planning controls applicable to this site, including site setbacks, building height and FSR. This is patently false as shown by the LEC judgement, the Statement of Evidence prepared by KG Nash and submitted on behalf of Council to the LEC and TCG's findings with respect to the Schreiber Hamilton (Council's) DA. These documents clearly indicate that development controls are applicable to the site. HSRA are also aware building height and FSR controls were applicable to the Lynchs site under LEP 2008. These controls were omitted by Council when converting LEP 2008 to LEP 2012. The error was not acknowledged by Council even when specifically questioned by HSRA about controls applicable to the site. Council also failed to advise Schreiber Hamilton of this error.
- That without resolution and acknowledgement of the Lynchs site's limitation and development controls that apply Newcastle City Council will continue to submit inappropriate DA's in the future.

We have provided a number of documents supporting our submission as well as references to various documents referred in our submission.

Details of the abovementioned DA's are as follows:

1.1 *Elefteria Pty Ltd DA for a Cafe/Restaurant*

In March 2003 Newcastle City Council City Strategy Group reported on options to redevelop the Lynchs site and recommended that Council proceed to expressions of interest for a small café restaurant or similar development.

In December 2004 Council consolidated four parcels of land comprising Lynchs into Lot 1000 DP1087291 and in 2007 called for expressions of interest for development of a small café restaurant.

Following two tender processes and a change to the assessment criteria Council awarded the tender to Page & Presland (Elefteria P/L). Council entered into a Deed of Agreement for a lease and granted authority to execute the deed under Council seal the same day the DA for a cafe restaurant was submitted for approval by Elefteria.

The development was for a two story café restaurant plus a basement and outdoor dining area. It was independently assessed by Planning Workshop Australia and reviewed by Council's Urban Design Consultative Group (UDCG). Both groups supported the development and recommended it be approved subject to minor amendments.

Objections from the public and Honeysuckle Residents Association were received by Council highlighting that the DA was a gross overdevelopment of the site, it did not comply with Council's LEPs and DCPs and encroached onto the Public Foreshore Promenade. An independent report to Council from Planning Workshop recommended approval of the DA.

However, at the Development Application Committee Meeting 1st July 2008 Councillors resolved to refuse the application on the basis that it was an overdevelopment of the site. Elefteria P/L then appealed the Council decision in the Land & Environment Court.

Council's Statement of Evidence to the LEC listed numerous items of non compliances of the DA with the LEP and DCP. ¹

The Land & Environment Court judgement handed down by Commissioner Hoffman on 31 December 2008 and upheld Council's refusal of the DA. ² In summary the LEC judgment included the following excerpts:

- Overdevelopment of a small site in a sensitive and important location, and are sufficient for its refusal
- Not consistent with LEP 2003
- Not consistent with LEP 2008
- The proposed development does not satisfy the objectives and provisions of cl 41 – Development within the coastal zone of the LEP 2008
- Non Compliance with DCP 2005 - does not allow for adequate building separation to maintain public view corridor and has inadequate setback of buildings to the foreshore promenade
- Non Compliance with DCP 2005 Honeysuckle Special Area [that requires 12m building setback from the harbour edge and an 8m promenade]
- Adverse impact on amenity of neighbourhood and foreshore
- Inadequate setbacks from Wharf Road and side boundary

¹ Statement of Facts and Contentions by Respondent Consent Authority. LEC 10680 of 2008. Respondent Newcastle City Council.

² Land and Environment Court of NSW, Elefteria Pty Ltd vs Newcastle Council [2008] NSWLEC 1510.

- The promenade is a major feature of the Honeysuckle area redevelopment. It is the principle public recreational access along the foreshore. It runs for kilometres and is a heavily used facility that must be expected to become more used in the future, as population

The development was deemed a gross over development of the site by the LEC it agreed with the statement of facts and contentions presented by NCC. They included the following. The DCP 2005 planning controls still apply in DCP 2012 and are there to establish the built form of the Honeysuckle Area.

Newcastle DCP 2005

8 The proposed development is not consistent with the objectives and specific provisions identified in the Newcastle Development Control Plan 2005.

(j) The proposed development is not consistent with the objective and specific provisions in 6.3.6(b)(i) and (v) because the design of the proposed development does not address the principle roads, has inadequate building articulation, lacks adequate pedestrian entry and will have adverse impacts on pedestrian and cycle access on the northern footpath of Wharf Road.

(k) The proposed development does not comply with the specific provisions in 6.3.6(b)(vi) relating to the public domain because the design of the proposed development does not provide adequate pedestrian access on Wharf Road does not allow for adequate building separation to maintain public view corridor and has inadequate setback of buildings to the foreshore promenade.

It must be noted that the provisions in 6.3.6(b)(vi) relate specifically to the Honeysuckle Special Area and stipulate the following:

(vi) Public Domain

- A linked pedestrian footpath should be provided throughout the area.
- Public open space should be high quality, providing a range of experiences and facilities,
- Development should allow for major view corridors (20m wide) and minor view corridors (10 or 15m wide) between buildings.
- **The setback of buildings should provide a minimum distance of 12m between the Harbour edge and the building line, including an 8m wide foreshore promenade.**

In relation to Public Interest the LEC's refusal referred to the following:

Public Interest

15 The proposed development is not in the public interest as evidenced by the objections submitted in response to the notification of the Development Application the principle concerns expressed in the submissions are as follows:-

- (iv) Adverse impact on amenity of neighbourhood and foreshore;*
- (xii) Inadequate setback from Wharf road and side boundary*
- (xii) Non-compliance with DCP 2005*

- (xiv) *Proposal inconsistent with the Concept Plan for site proposed as part of the Expressions of Interest process by Newcastle City Council*
- (xv) *Overdevelopment of the site.*

No contentions can be resolved by conditions of consent.

Council officers had permitted a non-compliant DA to proceed to Council when it was aware that it was non-compliant and this led ultimately to the refusal of the development in the Land and Environment Court.

The cost to Council for promoting this DA was a waste of at least \$250,000 of ratepayers' money.

1.2 Schreiber Hamilton Flagship DA for a 4 Storey Apartment Block

In early 2013 the Council's Asset Advisory Board recommended that tenders be called for the preparation of a DA for a residential development on the Lynchs site. The purpose was to sell the Lynchs site which was deemed to be surplus to need with an approved DA in order to maximise the land value. It was anticipated to sell the site in 2013/14 financial year to improve Council's budgetary position.

Tenders closed on 1st May 2013 and Council awarded the design and preparation of a development application to Schreiber Hamilton Architects. (SHA)

At its meetings with the SHA Newcastle City Council failed to define the planning controls which applied to the site (including setbacks, building height and FSR) proposing to assess the development under a "***Merits Based Assessment***" and thereby circumventing the defined planning controls for the area.

It should be noted that a meeting with a senior planner from NCC and HSRA Council emphatically stated that "***No Planning Controls***" applied to the site and that in the absence of planning controls a "***Merits based Assessment***" was appropriate. This view was subsequently expressed in an email from to HSRA from NCC.

1.2.1 JBA Planning Statement of Environmental Effects

The Statement of Environmental Effects for the development application prepared by JBA Urban Planning Consultants on behalf of SHA acknowledged that the development did not meet the numerical requirements of the DCP 2012 Honeysuckle Special Area and other controls.

The JBA Planning report stated the following.³

“the proposal does not meet with the numerical controls prescribed by the DCP in terms of site setbacks. However, if these were stringently applied any development for residential purposes on the site would remain unfeasible “

“the proposal will not achieve a 12m setback for the whole of the building to the edge of the promenade... ..Future widening of this promenade to match the existing alignment to the west by others will allow compliance with this setback requirement in time, but it is out of the realm of this project.”

“The site setbacks proposed have been determined in order to maintain the sites development feasibility”

Setbacks based on DCP 2012, 6.02.07 and neighbouring building alignment “result in a negligible usable area” and “is likely to result in a site which is unfeasible to develop”

In the JBA Planning SEE conclusions the following statements were made:

“It is therefore considered that there are sufficient environmental planning grounds to justify the contraventions to the DCP. The proposed building will exhibit design excellence, positively enhance the quality of building stock along the Newcastle foreshore promenade, and maintain the level of the amenity for surrounding and future residents.

The proposal is in keeping with, and sympathetic to, the use, scale, building heights and setback of neighbouring developments to the west and south. The current proposal has also been conceived to address the failings of the former development proposal for the site and the concerns raised by community stakeholders. Accordingly, in light of the merits of the proposal and in the absence of any significant adverse environmental, social or economic impacts, we respectfully request that the application be approved subject to reasonable and relevant conditions of consent”.

³ JBA Planning Statement of Environmental Effects, 292 Wharf Road Newcastle, 2300. Residential Development Submitted to Newcastle City Council on behalf of Schreiber Hamilton Architects.

The above indicates there is a lack of professionalism and independent critical assessment from the planning consultants engaged to assess this project evidenced by the biased statement from the Statement of Environmental Effects (SEE) report. The development was supported despite the obvious and significant non-compliance to development controls.

There was no consideration given that the built form of the Honeysuckle had already been established in this vicinity by the adjacent (Breakwater and Crowne Plaza Hotel) developments all complying with the DCP controls. These controls have already been used to define the built form for the area.

1.2.2 Urban Design Consultative Committee Assessment

Through the design stages of this development there were several meetings between the architect, council officers and the Urban Design Consultative Committee (UDCG).

In relation to the UDCG the architect reported to Council at the public voice meeting on 18th February 2014.

“the building has actually been amended gradually as it’s been going through the design Ah the information stage with Council’s DA the urban design consultative group gave us a resounding positive response to the project and how it was developed on the site they asked us to consider colour and materiality and we have introduced a sandstone base and a lighter external cladding which is obvious in these images.”

The UDCG only gave advice on a possible change in colour and materiality. No other design, planning or public interest concerns were identified for such things as building height, set-backs, sale of public promenade etc.

The effectiveness and detail of the assessment by the UDCG must be challenged given the non-conformances that existed and were not identified or acknowledged.

1.2.3 Honeysuckle Residents Association Submissions

HSRA and its members provided a number of submission opposed to the DA that highlighted the non-compliance with the planning controls particularly in regard to the following:

- 12 Setback from the harbour edge
- Inadequate separation between buildings
- 2m Setback from Wharf Road boundary
- The development was a gross over development for the site
- The development included land which onto the promenade
- In addition part of the site was required for widening of the promenade to meet the DCP controls for this area.

HSRA requested from the Architect 3D views of the development as viewed from the Foreshore Promenade. The architect was unable to provide them and HSRA prepared its own pictorials as shown below.



Flagship Development as viewed toward the west from the Foreshore Promenade



Flagship Development as viewed toward the east from the Foreshore Promenade

It was obvious that the development was a gross overdevelopment, not consistent with the existing built form and setback only 5m from the harbour edge imposing on the existing public domain promenade.

HSRA also raised the following issues about land acquisition for the site and the inclusion of the site in the Foreshore Reserve.

- Land was acquired by Council for the Harbour Foreshore Development Project.
- Includes Crown Land granted to Council at no cost due to the present and future requirements of the public, including general public recreation needs, the environment generally and access by fishermen to potential fishing grounds.⁴
- The area was included in the 1981 national competition for the landscaped design of the foreshore area (extending east from the former Fishermans Co-operative on Merewether Street Wharf opposite Argyle Street, approximately 100 metres west of Lynch's site).
- The site was shown in the Master Plan for the foreshore development as parkland.
- Included in The Foreshore area described by the Deputy Town Clerk in a letter 10/1/1984, to the Geographical Names Board. The letter also stated that *"it should be noted that the whole area will be made available as open space with council as the trustees"*.
- Included within one of the major Bicentennial Projects in May 1984 under the Federal Government's "Australian Bicentennial Authority Act, 1980.
- Part of the Harbour Foreshore Development Project funded by the NSW State and Federal Governments in conjunction with Newcastle City Council.
- Referred to by several council documents and senior council staff as being within the Foreshore Park.
- Included within the area gazetted by the Geographical Names Board in 1989 as The Foreshore and assigned the status of a reserve.

1.2.4 Public Voice Presentation

Despite all the evidence presented by HSRA that the DA was an overdevelopment of the site and non-compliant Schreiber Hamilton at the public voice meeting insisted that the DA was compliant with the development controls Council meeting record states:

Justin Hamilton and Chris Vlatko, Hamilton Schreiber Architects, spoke on behalf of the Applicant, expressing support for the proposed development in what they considered a quality development on the City's waterfront. They indicated that any suggestion the development application was non-compliant was incorrect.

⁴ 6-1-1984 NCC Road Closure Application to Department of lands for Lot 3193 DP704494.

1.2.5 TCG Planning Independent Assessment

After the public voice all DA documents and objection submissions were provided to the independent planner TCG planning who were commissioned to assess the DA

The findings from the independent planning assessor recommended the refusal of the DA. The assessment recommendations are summarised below.

1. State Environmental Planning Policy No 55 – Land Remediation – Unable to confirm that the site can be satisfactorily remediated.
2. Newcastle Local Environmental Plan 2012 – Development in the Coastal Zone – does not meet the objectives to protect the amenity and scenic quality and that the bulk, scale and size of the development did not meet the requirements.
3. Acid Sulphate Soils – further investigation would be required to enable a management plan to be developed.
4. Design Excellence – The development did not meet the provisions of form and external appearance, improve quality and amenity of the public domain or improve the bulk, massing and modulation of buildings in relation to impacts of the building as viewed from the Foreshore Park and Foreshore Promenade.
5. Proposal did not satisfy Newcastle Development Control Plan 2012 City Centre West in the following areas:
 - 6.02.01 Built Form (A. Floor Space Ratio and B Height)
 - 6.02.02 Pedestrian Amenity (G. Corners, gateways and landmarks)
 - 6.02.07 Honeysuckle Special Area (5. Public Domain: (e) the setback of buildings should provide a minimum distance of 12m between the Harbour edge and the building line, including an 8m wide foreshore promenade)
 - Section 5.02 Land Contamination SEPP No 55: Unable to confirm that the site could be satisfactorily remediated, further costly investigation is required.
 - Section 7.02 Landscaping, Open Space and Visual Amenity.
6. Having regard to the acceptable visual impacts on the public domain, the proposed development is not in the public interest [Section 79C (1) (e)]

The TCG Planning assessment indicated some conjecture as to whether the 12m setback from the harbour edge is applicable to the site as per DCP 2012 City Centre West.

However, in there draft report they concluded that regardless given the existing built form of the Breakwater apartments and the Crown Plaza hotel the 12m setback must apply to development.

1.2.6 NCC DCP 2012 City Centre West Honeysuckle Area

The conjecture over if Lynchs site is part of the Honeysuckle Area is unfounded. The NCC DCP 2012 City Centre West document, picture shown below clearly shows the Honeysuckle Area (hatched) with a caption to reference to Section 6.02.07 for the design guidelines.



Section 6.02.07 Honeysuckle Special Area includes all controls such as reference to 12m setbacks, separation between buildings, below ground car parking, public domain and foreshore promenade requirements. Lynchs site is within the hatched area and therefore these controls clearly apply.

1.2.7 Flagship Development, TCG Planning Recommended Refusal

Council received advice by email from TCG Planning that they were recommending refusal primarily on the grounds of unacceptable adverse visual/amenity impact on the adjacent foreshore public domain (promenade) due to the bulk and scale of the building at this location.

Based on this recommendation Council suggested to Schreiber Hamilton Architects that they withdraw the DA siting that the DA was unacceptable on the following grounds:

This assessment identified that the proposed residential apartment building is considered to be unacceptable essentially on the grounds of unacceptable built form (height, bulk and scale), inadequate setbacks to the harbourfront and the associated visual impact to the public domain, principally the Foreshore Park and harbourfront promenade adjacent to and within close proximity to the site.⁵

HSRA contends that Council was well aware that the site was undevelopable because of the requirements of their LEP and DCP and should not have proceeded with this fiasco.

⁵ Letter from NCC to Schreiber Hamilton Architects 27th March 2014.

1.2.8 NCC Council Accountability

Extraordinarily from minutes of the Asset Advisory Board Committee Meeting of April 2014 Council were still considering a scaled back development option for the site when clearly the setbacks made the site undevelopable.

Through our GIPA application \$90,000 has been spent in perusing this DA. This excludes internal staff costs and potentially other consultant's expenses which we are unable to verify as being included such as costs related to legal advice.

There is strong evidence to show this development was promoted by Council to proceed at all cost. In information obtained under a GIPA by HSRA Council budgeted \$200k for the project on a worst case scenario and they included the potential for another Land and Environment Court Case.

Why was Council as the land owner and consent authority budgeting its own developments on the basis that they may end up in the LEC?

This has clearly been a waste of Council funds. It is outrageous that as the consent authority Council have commissioned and promoted this non-compliant DA.

It is of concern that Council can present planning control requirements for a site to the LEC in one case and then claim they do not apply to another development on the same site.

2 Current Situation

In response to the withdrawn DA a confidential Council meeting on Tuesday 27th May 2014 Council made the following resolution.

"Council retain the asset and reclassify the land for alternative use" Carried.

The above resolution defines nothing; it is unclear and intentionally leaves the door open for future non-conforming development attempts.

After 30 years since the area was included as a major bicentennial project it still remains a Council site with a derelict building.

3 Recommendations

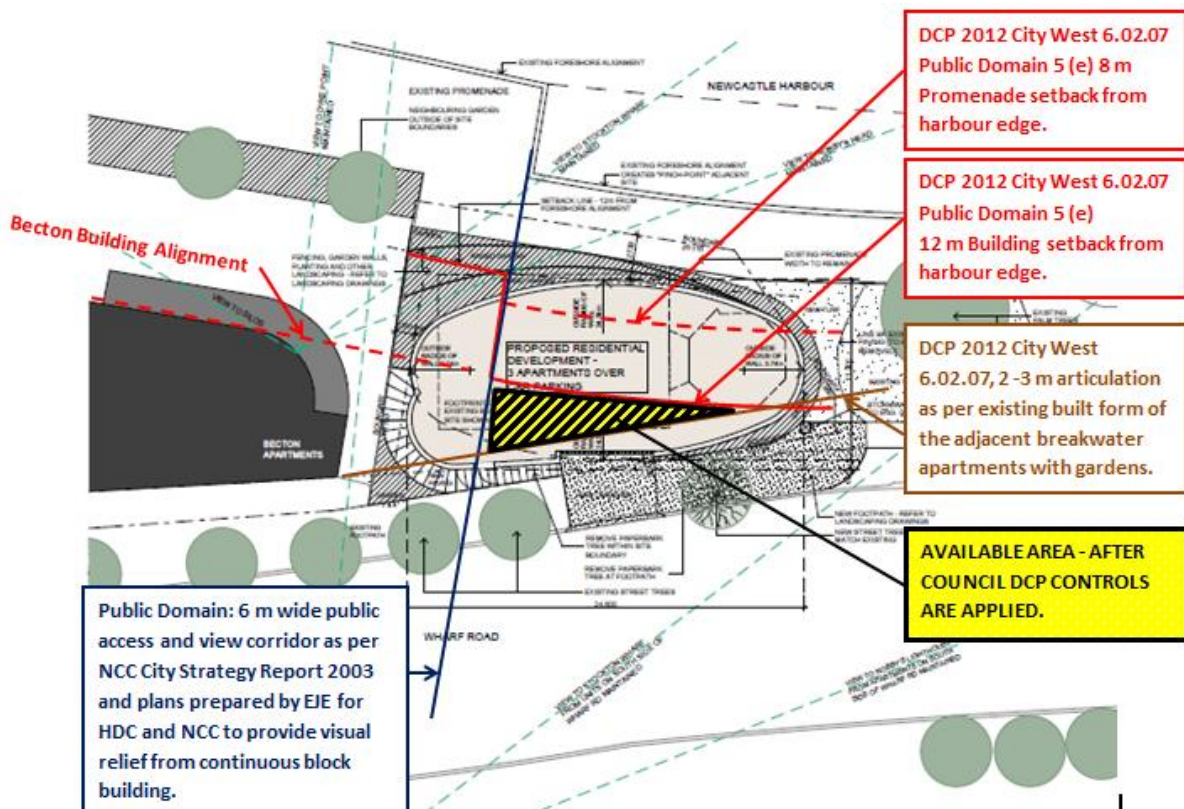
This inappropriate development saga has continued for ten years and has needlessly wasted ratepayer’s money. The site should be returned to community land.

The site should be used to widen the promenade. Council were looking at options to widen the width of the promenade by extending it over the water. This would be a very expensive option. It would not resolve the issue that building alignments must be set behind the existing building lines to reinforce the open view and public amenity along the foreshore and prevent a continuous built edge along the harbour.

The site should be included as it always was in the foreshore reserve, included in Councils plan of management for the foreshore. The existing derelict building should be removed immediately and Council should rehabilitate the site.

Given the setbacks that apply to this site and the LEP and DCP controls the diagram below shows the extent of developable area for the site.

Lynchs Site Area with Development Controls Applied



4 Confidential Report

Honeysuckle Residents Association has included as a separate document a confidential report of various concerning matters in relation to this DA. We request that this document remain confidential to this inquiry.

5 Associated Documents

The table below lists the associated documents submitted with this submission. These are all reports prepared by HSRA and or members of HSRA in response to various public comment opportunities sought from Council. The reports are tabled here in chronological order with the most recent report listed first.

Doc No	Date	Document Title	Precise
1	16/6/14	Lynchs \$350,000 Mismanagement	A summary of the most recent DA issues sent to the General Manager of NCC.
2	25/3/14	Honeysuckle Residents Association Inc Newcastle Revitalisation Submission	HSRA Response to NSW Planning and Infrastructure regarding Newcastle Urban Renewal and the Lynchs Site.
3	5/3/14	DA2013-1123 292 Wharf Road Honeysuckle Residents Association Additional Objections Letter	Additional critical objections with supporting evidence for the established planning controls applicable for the site.
4	18/2/14	General Report Sale of Land and Non-Conforming DA 292 Wharf Road	A report provided to all councillors and sought to be included as part of the Public Voice Meeting Minutes 18/2/14.
5	22/1/14	Honeysuckle Residents Association Newcastle 292 Wharf Road Development DA2013-1123 Report to Tim Owens	HSRA Submission to the then Minister Tim Owens regarding the State and Local Government Issues relating to NCC attempts to develop the Lynchs Prawn site.
6	21/10/13	Honeysuckle Residents Association Submission Objection Letter to DA 2013/1123	Letter and site plan of objection to DA from HSRA.
7a 7b	24/10/13	Letter of Objection and Comprehensive Report Opposing DA 2013/1123.	Detailed response to development application by Alistair Christie.

Doc No	Date	Document Title	Precise
8a 8b 8c	June 2009	Lynchs Prawn Site 292 Wharf Road Newcastle Incorrect and Improper Land Classification, Zoning and Exclusion from the Foreshore Plan of Management.	First major report written by HSRA after the first Elefteria P/L DA was rejected by the LEC. This report detailed the history of the site and the evidence that the site was always part of The Foreshore reserve.

Submission by: Honeysuckle Residents Association Inc.

Alistair Christie (Secretary)

Date 27th October 2014.