

Metropolitan and Regional Projects North, Development Assessment & Systems Performance

Director-General's Report

Application to Modify the Minister's Consent for a Residential Subdivision at Angels Beach Drive, East Ballina

DA 188-08-2004 MOD 3

1.0 BACKGROUND

On 18 November 2007, the Executive Director, Major Project Assessment granted consent to DA 188-08-2004 for a residential subdivision at Angels Beach Drive, East Ballina. Development consent was granted for:

- 61 Torrens title lots;
- 2 Torrens title lots for future cluster housing;
- 2 parkland areas;
- a natural conservation area;
- a cultural conservation area;
- internal access roads; and,
- associated drainage, civil and subdivision works.

The subject site is located at Lot 208 DP 851318 – Angels Beach Drive, East Ballina and covers an area of approximately 10.52ha. The Ballina central business district is located some 5km to the south-west of the site. Low density residential development is located immediately to the south. To the north and west of the site is rural land with an existing Crown Road reserve running along the site's western boundary. Angels Beach is situated approximately 600m east of the site. **Figure 1** below illustrates the subject site in context to the surrounding site features.



Figure 1: Site Location (source: Google)

The project has been modified on two separate occasions:

- On 24 June 2010, the Acting Director, Regional Projects granted Section 96(1) approval involving the removal of a requirement to provide a grade separated crossing at Angels Beach Drive to be replaced with a signalised pedestrian crossing; and,
- On 2 September 2010, the Acting Director, Regional Projects granted Section 96(1A) approval involving a requirement for all civil infrastructure works to be provided in conjunction with the release of lots for residential housing, or within a nine month timeframe.

2.0 PROPOSED MODIFICATION

On 20 September 2010, GSA Planning (on behalf of the Applicant – North Angels Beach Development (Ballina) Pty Ltd) submitted to the Director-General a request for modification of DA 188-08-2004. Specifically, the proposed modification involves the deletion of Condition E5 – *Monetary Contributions*. The Applicant considers the required Section 94 monetary contributions are unreasonable and unnecessary in light of works that have already been undertaken. The monetary contributions in accordance with Condition E5 total \$249,318. This includes a contribution of \$66,836 for community facilities; \$23,018 towards open space; and, \$159,464 towards road infrastructure. These are the rates applicable at the time of determination in 2007. The contributions are required to be indexed in accordance with the latest annual valuations, as required as part of Condition E5 – *Monetary Contributions*.

3.0 ASSESSMENT PROCESS

Pursuant to Clause 8J(8)(c) of the EP&A Regulation, any modification to the development consent is to be dealt with as a Section 75W of the EP&A Act modification. Under Section 75W(2) of the Act, an Applicant may request the Minister to modify the Minister's approval for a project. This section also states that the Minister's approval is not required if the project as modified will be consistent with the existing approval under this Part. It is considered that the proposed modifications are not consistent with the Minister's approval and are therefore the subject of an application for modification.

Section 75W(3) of the Act provides that the Director-General may notify the Applicant of environmental assessment requirements (DGRs). Following an assessment of the modification request, it is considered that DGRs are not required for this application.

The following report describes the Department's assessment of the requested modifications and supporting documentation as provided by the Applicant. It is recommended the proposed modification request be disapproved.

4.0 CONSULTATION AND EXHIBITION

Under Section 75W of the Act, it is at the Department's discretion as to whether a modification is required to be publicly exhibited. Given the nature of the modification public exhibition was not undertaken. Notwithstanding, under Section 75X(2)(f) of the Act, the Director-General is to make publicly available requests for modifications of approvals given by the Minister. In accordance with Clause 8G of the *Environmental Planning and Assessment Regulation 2000*, the request for the modification was placed on the Department's website.

4.1 Ballina Shire Council

The modification request was referred to Ballina Shire Council (Council) for comment. Legal advice on behalf of Council was received by the Department on 28 October 2010. This advice formed the basis of Council's response to the modification and indicated that Council is strongly opposed to the modification and respectfully requests the application be refused. The basis of Council's argument is discussed further in **Section 5.0** below. A copy of the response received from Council's lawyers is included at **Appendix C**.

5.0 ASSESSMENT

The Applicant seeks to delete Condition E5 – *Monetary Contributions* from the conditions of consent for DA 188-08-2004. The Applicant forms the argument that 'in kind' contributions have been provided in respect to the North Angels Beach Estate (the Estate), and the requirement to provide further monetary contributions is considered by the Applicant to be both unreasonable and unnecessary. The Applicant's modification request is provided at **Appendix B**.

A copy of Condition E5 – *Monetary Contributions* is provided below. The consolidated consent for DA 188-08-2004 is included at **Appendix D**. The arguments of both the Applicant and Council have been considered in the assessment of the modification application.

E5 Monetary Contributions

In accordance with Division 6 of Part 4 of the Act, the Applicant shall pay the following monetary contributions:

Amount of Contribution

Contribution Category	Rate of Contribution	Amount
Community Facilities	\$1078.00 per additional lot	\$66,836.00
Open Space	\$675.00 per additional lot	\$41,850.00 less \$18,832.00 credit for direct provision \$23,018.00
Road Infrastructure	\$2572.00 per additional lot	\$159,464.00
TOTAL		\$249,318.00

Timing and Method of Payment

The contribution shall be paid in the form of cash or bank cheque, made out to Ballina Shire Council. For accounting purposes, the contribution may require separate payment for each of the categories above and you are advised to check with Ballina Shire Council.

Evidence of the payment to Ballina Shire Council shall be submitted to the Certifying Authority prior to the issue of the Subdivision Certificate.

Indexing

The contribution for land will be adjusted in accordance with the latest annual valuations.

Applicant's Position

The Applicant claims to have provided \$10,480,930 in contributions towards the development that go above and beyond the contributions required by Council through the standard Section 94 contributions. A summary of what the Applicant considers to be 'in kind' contributions (including the estimated cost to provide these services and facilities) is outlined in **Table 1** below.

Table 1: 'In Kind' Contributions made by the Applicant – North Angels Beach Estate

Category	Contribution Made	Estimated Cost
Community Facilities	Cycleway	\$150,000
	Dedication of Lot 23 for an Aboriginal keeping place	\$3,200,000
	Cultural interpretation and associated works within Lot 23	\$100,000
Open Space	Dedication of Lot 22, 25 & 26	\$6,058,930
	Embellishment of Lots 22, 25 & 26	\$352,000
Road Infrastructure	Dual lane roundabout	\$620,000
TOTAL		\$10,480,930

Community Facilities

In regards to the provision of community facilities, the Applicant claims to have spent \$150,000 on the construction of a cycleway along the southern side of Angels Beach Drive, as well as dedicating Lot 23 (Aboriginal keeping place) with an estimated land value of \$3.2 million to Council. A further \$100,000 towards cultural interpretation and associated works with Lot 23 has been provided.

In total, the Applicant claims to have provided \$3.45 million of 'in kind' contributions towards community facilities and considers this contribution adequately meets the required amount of contributions under the *Ballina Community Facilities Contribution Plan (1993)* (Community Facilities CP).

Open Space Dedications

In regards to the dedication of land for public open spaces purposes, the Applicant has dedicated Lots 22, 25 and 26 to Council, with a combined total area of 11,370m². The Applicant has estimated the value of this land to be \$6,058,930. In addition, these lots have been embellished with a variety of works including landscaping, environmental repair, footpaths, picnic shelters, furniture and playground, as shown in **Figures 2 and 3** below. The estimated value of embellishment works within Lots 22, 25 and 26 is \$352,000. The Applicant considers the dedication of land for the purpose of open space and subsequent embellishment works are in excess of Council's open space requirements and that further monetary contributions as required under the *Public Garden and Recreation Space Enhancement Contribution Plan (1993)* (Recreation CP) is unnecessary and unreasonable.

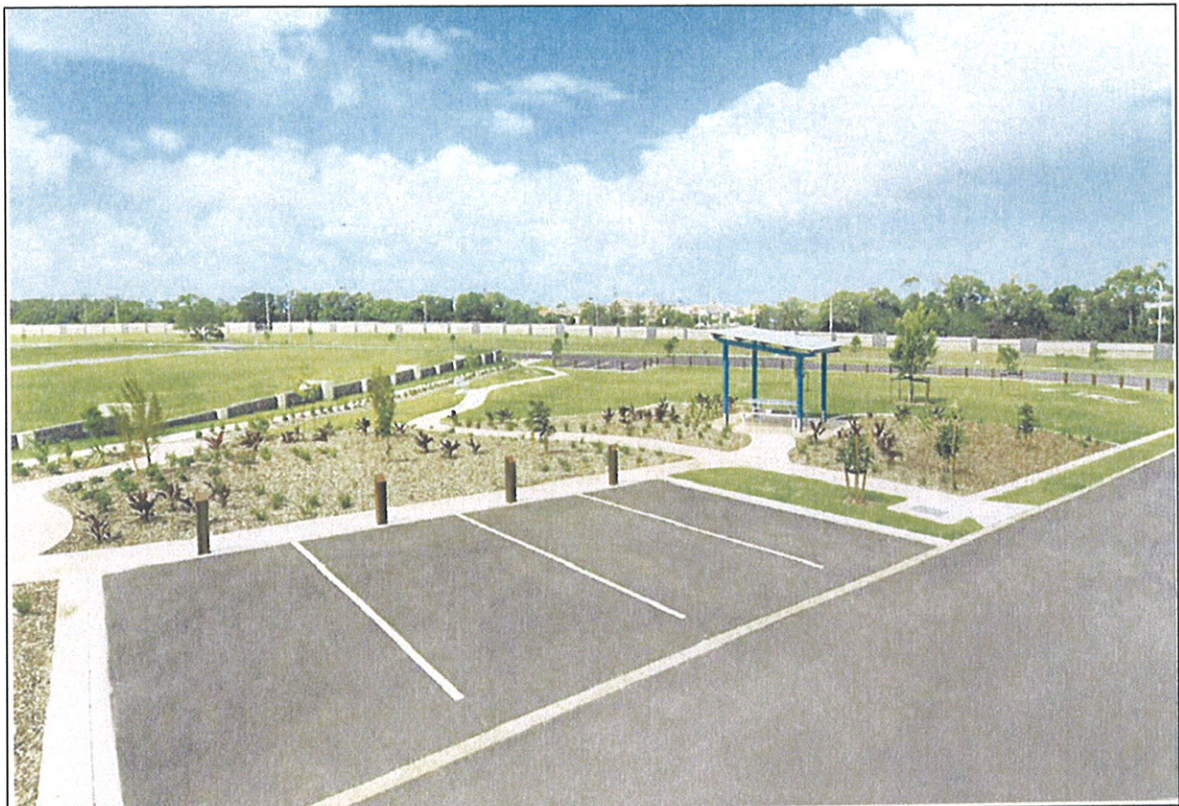


Figure 2: Landscaping Works at Lot 25 (source: Modification Report)



Figure 3: Playground Facility at Lot 26 (source: Modification Report)

Road Infrastructure

In regards to road infrastructure, the Applicant has provided a dual-lane roundabout at the intersection of the Coast Road and Angels Beach Drive – these works are not listed as works to be undertaken in accordance with the *Ballina Road Contribution Plan (2002)* (Roads CP). Condition B5(1) of the conditions of approval require the Applicant to provide a single lane roundabout. The Applicant has advised that at Construction Certificate stage, Council insisted this be upgraded to a dual lane roundabout. Subsequently, an additional lane was constructed at an estimated cost of \$620,000. The Applicant considers the additional road works to be a significant improvement to the local road network and is in excess of the amount required as a Section 94 contribution under the Roads CP.

Council's Position

Council is strongly opposed to the proposed modification and considers the arguments presented by the Applicant are misconceived. Council subsequently sought independent legal advice on the matter. It is Council's view that the proposed 'works in kind' and dedication of land for which credit is being sought relates to either:

- essential infrastructure works required to service the development;
- intrinsic constraints forced upon the development through the master planning process which identified protection of culturally and ecologically significant land; and/or,
- enhanced amenity and aesthetic features to improve the commercial viability of the land.

These are discussed in further detail below.

Essential Infrastructure Works

- Council considers the relevant road works, provision of drainage reserves and the cycleway are all essential works directly required to service the development.
- Construction of the new roundabout on the Coast Road was required to specifically service the Estate and was a requirement of the development consent. The change in design from a single-lane to a dual-lane roundabout was undertaken to provide a better level of service to

the development site. Council considers that the Applicant should not receive any credit for these works.

Intrinsic Constraints

- The dedication of Lot 22 (natural conservation lot) and Lot 23 (cultural conservation lot) was a result of detailed site analysis and constraints mapping undertaken by the Applicant when determining the preferred land-use layout for the site.
- Both Lots 22 and 23 were areas initially proposed for dedication by the Applicant, prior to any approval being given. These areas of land were dedicated given the cultural heritage and ecological sensitivity and were not appropriate for development in the first instance.
- Lots 25 and 26 are local parks within the Estate for which credit has already been given and are considerably in excess of the area required for local open space under the *Ballina Open Space Strategy 2008*.

Enhanced Amenity

- The provision of additional community infrastructure by way of land dedication and embellishment (including landscaping, environmental works, footpaths, picnic shelters, furniture and playground) is all part of the design of the residential estate to increase the site's amenity and marketability. The works undertaken by the Applicant go beyond Council's requirements, and this should not be in lieu of contributions required for other necessary facilities.

Department's Consideration

In accordance with Condition E5 of the conditions of consent, the Applicant is required to provide a total of \$249,318 in Section 94 contributions prior to the issue of a subdivision certificate. The applicable contributions plans and amount payable at the time of determination (November 2007) includes:

- Ballina Community Facilities Contribution Plan (1993) - **\$66,836.00**
- Public Garden and Recreation Space Enhancement Contribution Plan (1993) - **\$41,850.00**
- Ballina Road Contribution Plan (2002) - **\$159,464.00**

It is understood that Council has issued Subdivision Certificates for Stage 1 (21 lots) and Stage 2 (21 lots), comprising 42 lots in total. Subsequently, the Applicant has already provided Council with a total of \$202,760.50 in Section 94 contributions under the plans listed above (indexed rates). The Department has considered the arguments presented by both the Applicant and Council, and these are discussed further below.

Community Facilities

The Applicant argues that the cycleway constructed at an estimated cost of \$150,000 should be provided as a credit towards the total contribution required under the Community Facilities CP. In accordance with Appendix A of the Community Facilities CP (Inventory of Community Facilities), the plan specifically provides for the funding of child-care facilities, before and after school care, pre-school, vacation care facilities, neighbourhood centres, community halls, libraries, youth facilities, surf lifesaving facilities and aged persons facilities. It is considered that the constructed cycleway is local infrastructure which will ensure safe and efficient access to and from the Estate, and is not a community facility in the sense referred to in the Community Facilities CP. The Department considers the cycleway is not essentially a community facility as outlined in Appendix A of the Community Facilities CP and therefore no credit should be provided to the Applicant for its construction. The cycleway will predominately be utilised by those living within the Estate and does not contribute to the wider community as a regional recreation facility – such as those facilities listed under Appendix A of the Community Facilities CP. Furthermore, the cycleway is identified on plans submitted by the Applicant and subsequently approved as part of the original application.

Dedication of Land – Cultural Conservation Lot

The dedication of Lot 23 (cultural conservation lot) to Council was for the purpose of conserving the significant cultural heritage value of the land, and was the result of initial site analysis and assessment undertaken as part of the master planning process under *State Environmental Planning Policy No. 71* (SEPP 71). The final layout for the site was approved by the Minister in November 2007, and since that time it is understood that there has been no material change of circumstance in relation to the cultural heritage value of this land.

The Applicant has outlined in the modification report that the value of Lot 23 is worth \$3.2 million. This figure has been provided despite the fact that there is no future development potential due to the significant cultural heritage constraints that Lot 23 contains. The Department considers the request for a credit under the Community Facilities CP for the dedication of Lot 23 is not a Section 94 matter on the basis that;

1. the land was not suitable for development in the first instance due to cultural heritage constraints, and this was acknowledged by the Applicant prior to the development being approved;
2. the Applicant offered to dedicate Lot 23 to Council as part of the original application, which the Minister subsequently approved;
3. Condition E2 of the consent stipulates that the Conservation Areas (both natural and cultural) shall be dedicated to Council free of cost; and,
4. it is common practice for developers to dedicate land that is unsuitable for development due to various constraints (eg. cultural heritage, ecological constraints) for open space purposes (or other purposes such as drainage).

Should the Applicant wish to review the use of Lot 23, a modification to the Masterplan and conditions of consent would need to be sought with the Department, subsequently allowing an opportunity for interested stakeholders (including Council and the local Aboriginal community) to comment on the proposal. It is noted that this development has had a history of legal challenges regarding the assessment of Aboriginal cultural heritage and it is unlikely that an approval would be granted to any future proposal to develop Lot 23.

Dedication of Land and Embellishment Works – Natural Conservation Lot and Local Parks

Under the SEPP 71 approved Masterplan, Lots 22, 25 and 26 were identified for reservation and dedicated to Council. Similar to the situation with Lot 23 (cultural conservation lot), Lot 22 was dedicated to Council free of cost due to ecological constraints (threatened flora species) which rendered the lot inappropriate for development purposes. The area was designated as a 'natural conservation area' to be dedicated to and managed by Council. Lots 25 and 26 with a combined total area of 4,713m² comprise two local parks (eastern park and western park) within the subdivision layout and were also dedicated to Council – refer **Figures 2 and 3** above which shows both parks with new playground and landscaping works. **Figures 4 and 5** below are the approved landscape plans for both the eastern and western parks (Lots 25 and 26). It is noted that the approved landscape plans show features including a playground, putting green, barbecue and picnic facilities, landscaping, art sculptures, and seating which were all proposed by the Applicant for Lots 25 and 26 at the time the application was lodged.

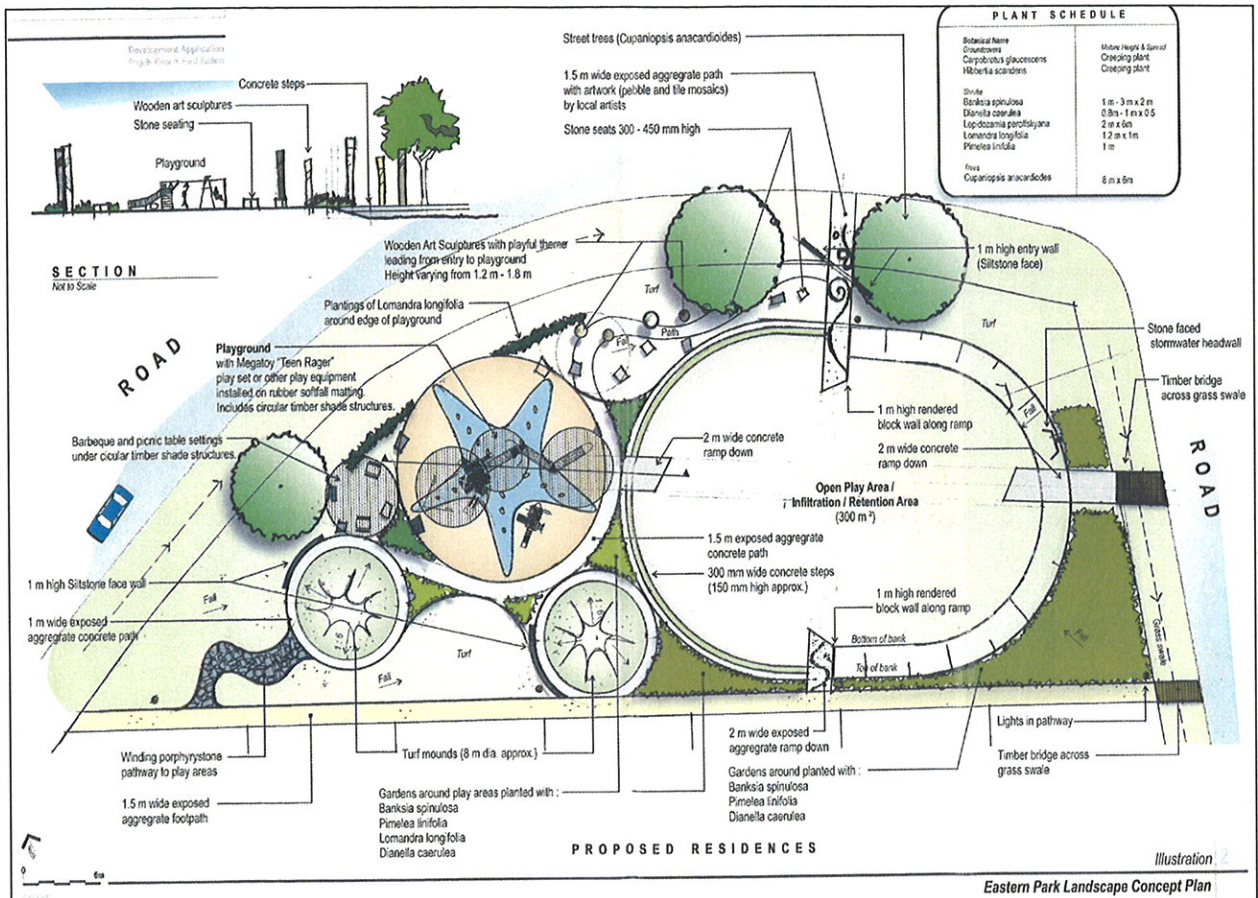


Figure 4: Approved Eastern Park Landscape Concept Plan

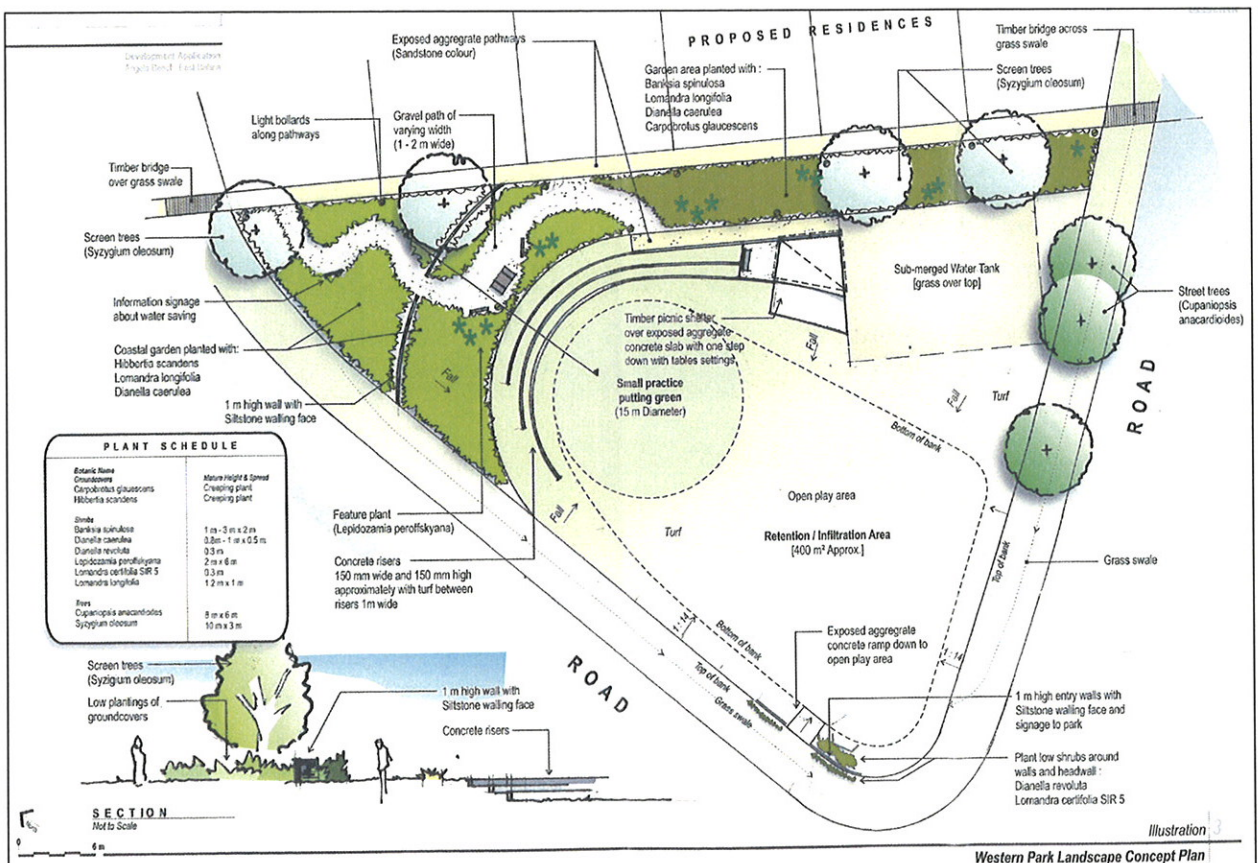


Figure 5: Approved Western Park Landscape Concept Plan

The Applicant argues that in addition to the dedication of 11,370m² of land (Lots 22, 25 and 26 combined) worth a combined value of approximately \$6.6 million; this land has been substantially embellished with landscaping and environmental repair works, footpaths, picnic shelters, furniture and playground. The value of these embellishment works is estimated at \$352,000. The Applicant states that Council has not made any allowance for the dedication of these three parcels of land for the purpose of open space and dual purpose of drainage.

In regards to Lot 22 (natural conservation lot), it is the Department's view that no credit is entitled to the Applicant given the ecological significance of this area prevents any future development of the land; and, the lot was originally proposed for dedication to Council prior to the application being approved by the Minister. Furthermore, Condition E2 stipulates that *the Conservation Areas (both natural and cultural) and the two open space areas shall be dedicated to Council free of cost*. As is the case with Lot 23 (cultural conservation lot), should the Applicant wish to review the use of Lot 22, a modification to the Masterplan and conditions of approval is required, with an opportunity for interested stakeholders to comment.

In regards to Lots 25 and 26, these are essentially local parks within the Estate and are in excess of the area required for local open space provisions under the *Ballina Open Space Strategy 2008*, or any accepted standard of provision. Council has previously granted the Applicant an \$18,832 reduction in total Section 94 contributions. The \$18,832 credit was given against the open space contribution in the Recreation CP and was reflected in the original consent. As outlined in the Recreation CP, it is Council policy to use cash income from contributions to embellish district and local level open space. The contributions received are funded towards landscaping, pedestrian and cycleway improvements, and recreation related facilities. Lots 25 and 26 were dedicated to Council as local parks and it is considered that it is Council's task to undertake the necessary embellishment works using monetary funds obtained through Section 94 contributions. The embellishment works within Lots 25 and 26 were undertaken by the Applicant at their own discretion and are considered to contribute directly to the Estate's aesthetic appeal and marketability. It is noted that the approved landscape plans show features including a playground, putting green, barbecue and picnic facilities, landscaping, art sculptures, and seating were all proposed by the Applicant at the time the application was lodged.

The Applicant makes note of environmental repair works on Lots 22, 25 and 26, and categorises this as 'embellishment works'. Council's acceptance of these parcels of land was on the condition that revegetation and rehabilitation works be undertaken to minimise future maintenance requirements. This is reflected in Condition C2 which requires the Applicant to prepare a Vegetation Management Plan for the natural conservation lot requiring revegetation works to be carried out. Thus, embellishment works as described by the Applicant within Lot 22 are in fact works required to be undertaken in accordance with the conditions of consent. The Department therefore considers that no credit is warranted for the revegetation and rehabilitation works.

Road Infrastructure

The roundabout at the intersection of the Coast Road and Angels Beach Drive was constructed in order to provide access to the Estate. The change in design from a single-lane roundabout (in accordance with Condition B5(1)) to a dual-lane roundabout is understood to have resulted after Council insisted at Construction Certificate stage for the roundabout to be upgraded to provide a greater level of service to the Estate and surrounding road network. The change in layout resulted in a marginal increase in the overall pavement footprint of the roundabout, with a decrease in the size of the concrete median islands. Other necessary items such as lighting, drainage, traffic control, signage, and the level excavation works remained unchanged. Council have advised that at the time of agreement the cost differential in providing a dual-lane carriage compared to a single-lane carriage was minimal. The Applicant on the other hand has advised that a further \$620,000 has been spent on the upgrade, and as a result has contributed to increased capacity of the road network and therefore credit is sought for costs otherwise required under the Roads CP. An aerial view of the dual-lane roundabout as constructed is displayed in **Figure 6** below.



Figure 6: Development Site with the Coast Road – Angels Beach Drive roundabout (source: Google)

The Department notes that the requirement to construct the roundabout was applied as a condition of approval in accordance with Condition B5(1). The roundabout is not identified under the schedule of required new roadworks under the Roads CP (Table 5.1 of the Roads CP); and thus is not a requirement under the Section 94 plan. Notwithstanding, the Applicant agreed to Council's request to upgrade the roundabout to a dual-lane facility, despite the Condition B5(1) clearly stating that the intersection of the proposed entry road and Angels Beach Drive be constructed to a single-lane roundabout.

6.0 CONCLUSION

It is the Department's view that removing the requirement to provide section 94 contributions in accordance with Condition E5 is not in the public interest. The arguments presented by the Applicant are not supported by the Department on a number of grounds, including;

- the cycleway was constructed as a direct result of the development and is not a Section 94 matter;
- no credit should be entitled for either Lots 22 or 23 (natural and cultural conservation lots) as the Applicant offered to dedicate these lots to free of cost to Council and these lots were originally identified as constrained land and therefore unsuitable for development prior to the Minister approving the application;
- no credit should be entitled for embellishment of Lots 25 and 26 as the embellishment works were undertaken by the Applicant to enhance the Estate, and these works were clearly identified on the approved landscaping plans; and,
- no credit should be entitled for the change in design from a single-lane roundabout to a dual-lane roundabout at the Coast Road as the Applicant agreed to undertake the additional works. Furthermore, the roundabout was a requirement of the conditions of consent and is not a Section 94 matter.

The proposed modification is therefore not supported by the Department and it is recommended that the modification request be disapproved.

RECOMMENDATION

It is recommended that the Director, Metropolitan and Regional Projects North, as delegate for the Minister for Planning (under delegation issued on 25 January 2010), disapprove under Section 75W(4) of the Act the proposed modification submitted by GSA Planning on behalf of North Angels Beach Development (Ballina) Pty Ltd by **signing** the attached instrument of refusal (**Appendix A**).

Prepared by:



Brent Devine
Environmental Planner
Metropolitan and Regional Projects North

Endorsed by:



Joanna Bakopanos
Team Leader
Metropolitan and Regional Projects North

Approved by:



Heather Warton
Director
Metropolitan and Regional Projects North


ED MPA

8-8-11