



## Planning Assessment Report Development Application No. 201-8-2004

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### 1. SUMMARY

This report is an assessment of the proposed development the subject of Development Application number **201-8-2004**. The development application was lodged with the Department on 28 August 2004 in accordance with the *Environmental Planning and Assessment Act 1979* (the Act).

The application seeks consent for the subdivision of the site into 33 lots, including the construction of an access road from Eagle Avenue.

Pursuant to the Great Lakes Local Environmental Plan 1996 (the LEP), the land is zoned 2(a) Low Density Residential, 2(b) Medium Density Residential and 7(a) Wetland and Littoral Rainforest. There is no development proposed within the 7(a) zone and the proposed development is permissible in the 2(a) and 2(b) zones subject to development consent.

The Minister for Planning is the consent authority under clause 10 of State Environmental Planning Policy No 71 – Coastal Protection.

Issues relating to potential impacts on koalas, their habitat and the corridor located on and within the vicinity of the site were considered in this assessment and it is considered that the proposal is inconsistent with SEPP 44 and SEPP 71 in that there will be a significant effect on a threatened species (koala). The proposal is ecologically inappropriate and is likely to hinder the long-term recovery of a vulnerable species and endangered population.

It is recommended that the development application be determined by **refusing consent**.

### 2. THE SITE

#### 2.1 Site Context

The site is legally described as Lot 1 DP 546852 and Lots 6 & 7 DP 25955 and is located on Kingfisher Avenue, Eagle Avenue and Moira Parade Hawks Nest. Hawks Nest is located on the eastern side of the Myall River adjoining the north shore of Port Stephens on the NSW north coast in the Great Lakes Council local government area.

The site is located on Kingfisher Avenue (or alternately known as Myall Street), the main collector road from Tea Gardens, which is located on the opposite side of the Myall River. To the north of Kingfisher Avenue, is a 'Koala Zone' as well as a wetland, which comprises a portion of the site area, however, no development is proposed in this northern portion of the site. The immediate area surrounding the site is

characterised by low density detached dwellings, with a small commercial area located along Booner Street to the south of the site.

Large areas of the foreshore in the vicinity of the site are within reserves, including an area to the west of the site immediately beyond the Moira Parade boundary. Hawks Nest has boundaries to the Myall River, Port Stephens and the ocean. The site context is illustrated in the Figure 1: Locality Plan in **Appendix B**.

## **2.2 Subject Site**

The subject site, comprising three (3) separate parcels, consists of a total area of approximately 6.485 hectares. The site is bounded to the north by a reserve, to the east and south by Eagle and Flamingo Avenues and to the west by Moira Parade. Lot 1 comprises the majority of the site, while Lots 6 & 7 are located along the western elevation, facing Moira Parade.

The site is divided into two distinct portions resulting from the location of Kingfisher Avenue. The portion to the north of Kingfisher Avenue (the northern portion) contains a wetland listed under State Environmental Planning Policy No 14 – Coastal Wetlands, is zoned 7(a) and is listed as a ‘Koala Zone’. This portion of the site has an area of approximately 2.908 hectares and no development is proposed within this northern portion.

The southern portion, that area to the south of Kingfisher Avenue, consists of relatively flat land and contains a mix of cleared areas, exotic vegetation and native flora. The native flora is largely confined to the eastern portion, which is further addressed in this report with respect to core koala habitat. Improvements on the site consist of a dilapidated dwelling along the Moira Parade frontage. This southern portion is zoned 2(a) and 2(b), with the 2(b) portion located along the Moira Parade frontage, adjoining the foreshore.

There are several potential site constraints including the site being bushfire prone land for the purposes of Section 146 of the Act and flood prone, with several areas (on the eastern and southern sides of Eagle Avenue) below the 1 in 100 year Average Recurrence Interval. The site is not affected by acid sulphate soils and does not contain any visible signs or previous land uses which would indicate the site is contaminated. These issues have been considered in the assessment of this development application and are assessed in Section 7.2 of this report, where relevant.

The site contains habitat for the koala, which is listed as a vulnerable species on the Threatened Species Conservation Act 1995 (TSC Act) and the ‘Hawks Nest and Tea Gardens Koala Population’ is also listed as an endangered population on the TSC Act. The site is also considered to constitute core koala habitat as a result of the natural vegetation which exists on the site and the location of the site within an area of high activity for koalas. The presence of core koala habitat on the site has been documented by Ecotone Ecological Consultants (199), Harper Somers (2001), Phillips (2000), the Australian Koala Foundation (2002), the Myall Koala and Environment Support Group (2000), Payne & EDAW (2001) and the Land and Environment Court of NSW (these studies are further discussed in **Appendix D**).

A site visit was conducted by Urban Assessments officers and the site is illustrated in the Figure 2: Site Plan in **Appendix B**.

### **3. BACKGROUND TO THE APPLICATION**

#### **3.1 Site History**

Mr Brancourt, owner of the site, pleaded guilty to an offence under section 118D(1) of the *National Parks and Wildlife Act 1974* in proceedings in the Land and Environment Court of NSW (the court) in April 2003. The offence committed was in relation to the damaging of habitat of threatened species, population and/or ecological communities.

The clearing of vegetation by Mr Brancourt resulted in damage to the core habitat of a population of koalas on the subject site. The total area of land cleared was approximately 2.5 hectares, of which about 1.2 hectares was core koala habitat. Mr Brancourt pleaded guilty, which the Court held as an admission of all the elements of the offence and rendered proof of such elements of the offence, including the requisite defendant's knowledge, unnecessary. The parties reached an agreement whereby Mr Brancourt paid the prosecutor's costs, the required fine imposed by the court and agreed to the implementation of the Remediation Plan, titled 'Remediating the Impact of Clearing Activities on Koalas (*Phascolarctos cinereus*) at Hawks Nest, New South Wales' prepared by Mr Phillips dated March 2003.

This Remediation Plan contained four (4) recommendations which included the removal of weeds from the site, only qualified consultants to undertake the work and the replanting of a minimum of 150 individual plants in the central portion of the site in order to facilitate the reestablishment of a mid-stratum layer. To date, this remediation work has not been undertaken on the site, which is a matter currently being investigated by the Department of Environment and Conservation.

#### **3.2 Chronology of the Development Application**

The development application was lodged with the Department on 28 August 2004 in accordance with the Act (the proposal is described in section 4 of this report) and was referred to the relevant agencies including the Department of Environment and Conservation (DEC) and Great Lakes Council (the Council). Both agencies expressed concerns with the proposal in relation to the potential impact on koala habitat on the site in accordance with the TSC Act and State Environmental Planning Policy No 44 – Koala Habitat Protection (SEPP 44).

The applicant was advised of concerns with the proposal raised by DEC and the Council in a letter dated 12 November 2004. This letter stated that the Department was not opposed to the sensitive and well-planned development of the western half of the subject lands outside the koala habitat, and that DEC and Council strongly advocated that the current proposal was ecologically inappropriate, would result in unacceptable impacts on the Hawks Nest/Tea Gardens Endangered Koala Population and would seriously hinder the long-term recovery and restoration efforts for this population.

In a reply dated 8 December 2004, the applicant disputed these concerns, stating that their consultants were qualified and the information was sufficient. This

correspondence did not provide any additional or amended information for the Department to assess, notwithstanding that the Department requested the proposed subdivision be amended. The Council provided further comments on this response from the applicant in a letter dated 20 December 2004, where concern was still expressed for the potential impact on the koala habitat on the site.

The applicant was again requested by the Department in further correspondence dated 14 January 2005 to address the concerns regarding the potential impacts on the koala population. In particular, this correspondence requested the applicant to provide section 5A assessments on the koala as a vulnerable species as well as on the koala as an endangered population, a progress report of the rehabilitation works imposed by the court and an assessment of the impact of the proposal on the corridor values of the site. The applicant responded in correspondence dated 7 February 2005 which included a section 5A assessment on the Koala only and a copy of the remediation report prepared for the court proceedings.

The Department's ecologist then reviewed the proposal and carried out another s5A assessment which found that the proposal is likely to have a significant impact on the endangered population and therefore an Species Impact Statement (SIS) is required (contrary to the applicant's assessment). The applicant was informed of this assessment and requirement for an SIS in correspondence dated 23 February 2005. In this correspondence, the applicant was also encouraged to withdraw the current application and submit a revised subdivision layout (in a new DA) as discussed previously. In this regard, the Department reiterated that the eastern portion of the site should remain undeveloped while the western portion appeared to be suitable for some form of residential subdivision.

The applicant then began discussions with DEC (independent of the Department) regarding the potential impact on koala habitat and the need for an SIS. The DEC responded to the Department in correspondence dated 24 March 2006 that the revised Koala Plan of Management (KPoM) submitted to DEC for review from the applicant satisfied their concerns in relation to SEPP 44.

In summary, the Department has provided the applicant the opportunity on three separate occasions to address the Department's concerns in relation to this proposal. The applicant has opted to make no changes to the proposal and has submitted only minimal additional information. The applicant also spent approximately 12 months liaising directly with DEC on the revised Koala Plan of Management which the Department and the Council believe does not meet the requirements of SEPP 44. The Department specifically requested the proposed subdivision be amended to satisfy the concerns regarding the koala on two occasions, by stating that the eastern portion of the site should remain undeveloped and both times the applicant has not provided the necessary amendments.

#### **4. THE PROPOSED DEVELOPMENT**

The application seeks development consent for the subdivision of the existing three (3) allotments into thirty three (33) lots. The proposed subdivision consists of:-

- Proposed Lots 1 - 31 within land zoned 2(a) Low Density Residential with 6 lots having areas greater than 1000m<sup>2</sup> within a "Constrained

Development Precinct' as outlined in the KPoM (further discussed in **Appendix D**). The remainder consisting of between 450m<sup>2</sup> and 830m<sup>2</sup> located in the eastern side of the southern portion;

- Proposed Lot 32 within land zoned 7(a) Wetland and Littoral Rainforest to consist of an area of approximately 2.908 hectares where no development is proposed;
- Proposed Lot 33 within land zoned 2(b) Medium Density Development to consist of an area of approximately 5670m<sup>2</sup> located to the western side of the southern portion (a medium density development is assessed separately under DA 202-8-204);
- Construction of an internal through road to connect between Pelican Avenue (western end of Eagle Avenue) and Flamingo Avenue (northern end of Eagle Avenue); and
- Tree retention, corridors and a 'Constrained Development Precinct' are also proposed to

Subdivision works include connection of the proposed internal through road to existing public roads, an internal public road, stormwater drainage, landscaping and connection of utility services. The proposed lots are proposed to be provided with sewer, reticulated water supply, electricity and telecommunication facilities.

The proposed development is illustrated in Figure 3: Proposed Development in **Appendix B**.

#### **4.1 Additional Information**

On 8 December 2004, the applicant submitted a response to the Department's correspondence dated 12 November 2004, which raised concerns regarding the ecological significance of the site and a review of the ecological assessment and reporting. This correspondence did not provide any additional or amended information for the Department to assess.

On 7 February 2005, the applicant submitted a response to the Department's further request to respond to the ecological concerns with the proposal dated 14 January 2005. This response included a s5A assessment on the Koala and a copy of the remediation report prepared for the court proceedings.

The applicant was requested, in correspondence from the Department dated 23 February 2005, that a Species Impact Statement (SIS) was required as it was considered that the proposal would have a significant impact on the Koala population in the area. A SIS was not provided by the applicant.

On 6 March 2006, the applicant lodged a revised Koala Plan of Management dated February 2006.

This additional information does not change the proposed development which was originally proposed in the development application submitted and do not give rise to any additional impacts. Accordingly, these amendments were accepted as a replacement application in accordance with Clauses 55 and 90 of the *Environmental*

*Planning and Assessment Regulation 2000* (the Regulations). In accordance with Clause 90 of the Regulations, no further notification of the application was undertaken.

## **5. STATUTORY FRAMEWORK**

### **5.1 *Statement of permissibility***

The subject land is zoned 2(a) Low Density Residential, 2(b) Medium Density Residential and 7(a) Wetland and Littoral Rainforest under the LEP. The proposed development is permissible in the 2(a) and 2(b) zones subject to formal planning approval and no development is proposed in the 7(a) zone.

### **5.2 *Instrument of consent and other relevant planning instruments***

The development application is identified as significant coastal development pursuant to Part 3 of State Environmental Planning Policy No. 71 – Coastal Protection (SEPP 71) (as in force at the time of lodgement of this application) as the proposal involves the subdivision of land within a residential zone into more than 25 lots pursuant to Schedule 2 of SEPP 71. Accordingly, the application is State Significant development for the purposes of Section 79A of the Act, pursuant to clause 10(1) and the Minister is the consent authority for this development application pursuant to clause 10(2) of State Environmental Planning Policy No. 71 – Coastal Protection.

The land is also defined as a 'sensitive coastal location' as the site is located within 100 metres of an estuary (Myall River) and the site contains a wetland listed under State Environmental Planning Policy No 14 – Coastal Wetlands. A Master Plan under Part 5 of SEPP 71 must be adopted by the Minister or the requirement for a master plan waived by the Minister under Clause 18 of SEPP 71. In this instance, the applicant has requested the requirement for a master plan be waived. This waiver application is assessed in a separate assessment report (**MP 56-8-2004**) and has been granted by the Department under delegation.

The following Environmental Planning Instruments apply:

- State Environmental Planning Policy No 71 – Coastal Protection;
- State Environmental Planning Policy No 44 – Koala Habitat Protection;
- State Environmental Planning Policy No 14 – Coastal Wetlands;
- Hunter Regional Environmental Plan 1989; and
- Great Lakes Local Environmental Plan 1996.

An assessment of the proposal against the provisions of these Environmental Planning Instruments is outlined in **Appendix C**. The potential impacts on the koala and their habitat is assessed separately in **Appendix D**.

### **5.3 *Other provisions***

In addition to the Environmental Planning Instruments outlined in Section 5.2, the following Development Control Plans and policies apply:

- Great Lakes Council Development Control Plan 31 - Subdivision;
- Notification Policy for Planning Matters (June 1998);

- NSW Coastal Policy, 1997; and
- Coastal Design Guidelines of NSW, 2003.

An assessment of the proposal against the provisions of these Development Control Plans and policies are outlined in **Appendix C**.

## 6. CONSULTATION

### 6.1 Public consultation

The application was notified, in accordance with the Regulations and the Great Lakes Council's Notification Policy for a period of 30 days. A summary of the notification procedure as outlined below.

<b>Notifications – landowners/occupiers</b>	Fifty nine (59) notification letters were sent to adjoining and nearby landowners.
<b>Newspaper advertisements</b>	Advertised in the <i>Foster/Great Lakes Advocate</i> on 8 September 2004.
<b>Site notice</b>	Applicant requested to place site notice on site
<b>Exhibition dates</b>	Start: 9 September 2004 End: 11 October 2004.
<b>Exhibition venues</b>	<ul style="list-style-type: none"><li>▪ Department of Planning Information Centre - Ground Floor Henry Deane Building, 20 Lee Street Sydney;</li><li>▪ Department of Planning Hunter Regional – Level 4, 251 Wharf Road Newcastle;</li><li>▪ Great Lakes Council – Breese Parade Forster</li></ul>

A total of eight six (86) submissions were received from adjoining neighbours and a summary of submissions is at **Appendix E**. The submissions raised concerns regarding the impact on koalas in relation to habitat and corridors, compatibility with existing development, capacity of existing infrastructure (including roads), additional traffic generation, and the past illegal clearing of the site. The concerns raised in these submissions are discussed in detail in Section 7.2 of this report, where relevant.

### 6.2 External Referrals

#### 6.2.1 Great Lakes Council

The application was referred to Great Lakes Council on 2 September 2004 for comment and again on 10 December 2004 following a response from the applicant in relation to Council's initial comments. The Council responded, with the following concerns, stating that it strongly opposed to proposal:-

- *The ecological reporting does not address legislative requirements, particularly relating to Section 5A of the Environmental Planning and Assessment Act 1979;*
- *The ecological reporting is based on flawed assessment and inappropriate evaluation of relevant legislation because the methods and assumptions used are misleading, unsubstantiated and inaccurate;*
- *Any development proposal on the subject lands that has any potential to directly or indirectly modify those parts of the land containing Koala habitat must not be assessed in the absence of a Species Impact Statement;*

- *The development as currently proposed is likely to be associated with significant impacts on the Endangered Koala Population of Hawks Nest and Tea Gardens through:*
- *Significant depletion of known use trees and habitat through clearing and ongoing cumulative loss over time. At a local scale, the loss of almost fifty mature Swamp Mahogany trees would be potentially catastrophic as representation of preferred food trees is considered a limiting factor on the current population in urban Hawks Nest;*
- *Serious disruption of social structure and behavioural patterns;*
- *Further fragmentation of an area of habitat that is known to be a significant movement corridor for the local Koala population from the Koala Reserve. This would result from both road establishment and dwelling/ fence establishment;*
- *Increased risk of mortality from road kills (a new road across habitat parallel to Kingfisher Drive would be created), stress-related impacts and disease, vulnerability to predation, dog attacks, disintegration of established social structure, loss, fragmentation and isolation from food trees (starvation);*
- *The currently proposed protective safeguards appear ineffective in the rational and effective amelioration or mitigation of the likely negative impacts of the works;*
- *The ecological assessment exhibits a complete lack of reference to the determination of the Land and Environment Court (NSWLEC 81) in that Core Koala Habitat occurs within the subject lands and land-uses have depleted this resource illegally. The Court order pertaining to a Remediation Plan for the subject lands has never been implemented.*
- *The DA does not consider and is not consistent with the approved Recovery Plan for the Endangered Koala Population of Hawks Nest/ Tea Gardens (DEC, 2003). It lacks any vision pertaining to the need to manage and conserve known habitat such that the population may be eventually restored to a position of viability in nature.*
- *The DA has not referenced published material pertaining to the presence of Core Koala Habitat and significant movement corridors within the subject lands.*
- *The DA has not reviewed former development proposals that had identified the eastern portion of the lands as containing Core Koala Habitat and deserving of protection as specified within former development proposals in Ecotone Ecological Consultants (1999) and Harper Somers (2001).*
- *The NSW Scientific Committee determination suggested that Swamp Sclerophyll Forest on Coastal Floodplain has been extensively cleared and modified and that land clearing continues to threaten it. We suggest that this development proposal would cause the direct removal of an area of designated Endangered Ecological Community, without adequate consideration or amelioration, through the direct and indirect effects of filling, road construction, subdivision, tree removal, weed invasion, fragmentation, etc.*
- *A number of concerns with respect to drainage design and analysis and management of water quality issues.*

The Council was again consulted in April 2006 to provide comment on the revised Koala Plan of Management. The salient points from this advice include:-

- The legislative provisions of the revised KPoM have not been addressed and significant additional information and analysis is required to address the legal

requirements of SEPP 44 before this plan can be accepted as a valid and adequate document. The specific concerns include:-

- The plan fails to discuss and describe the illegal clearing and its implications to the presence of core koala habitat and koala activity patterns;
  - The plan explicitly facilitates and provides for residential development of recognised core koala habitat in direct conflict of SEPP 44 which aims to encourage the proper conservation and management of areas of natural vegetation that provide habitat for koalas and encourages the inclusion of such areas in environmental protection zones, protected from development;
  - The plan is not suitably precautionary and the development would likely facilitate irreversible and unacceptable damage to an area that has been recognised as core koala habitat by several agencies/authorities;
  - The plan states that the absence of detailed understanding of the demographics and conservation status of the Hawks Nest/tea Gardens koala population makes recommendations for future management on the site problematic. Further research is required or alternately in the absence of such information, a precautionary approach to development is required with respect to development of recognised core koala habitat, instead of advocating development as is currently proposed;
  - The plan incorrectly adopts activity level thresholds by way of the Spot Assessment Technique (SAT) and does not adequately consider the pressures which the local endangered koala population has been subjected to. The low to moderate activity levels noted in the plan are would almost certainly be a function of the wider population's decline and the influence of the illegal clearing rather than an assessment of the true relative habitat value. This technique is considered to be flawed and may result in an underestimate of the real value of the eastern portion of the site;
- The significant and serious concerns expressed to the Department in earlier correspondence have not been satisfied by the revised KPoM and remain outstanding;
  - There remains inadequate assessments of significance under s79C of the Act, an SIS has not been prepared and a valid KPoM has not been provided;
  - Support sensitive and well-planned development of western half of site outside the core koala habitat.

These issues are discussed in further detail in Section 7.2 and **Appendix D** of this report.

### **6.2.2 Department of Environment & Conservation**

The application was referred to the Department of Environment and Conservation (DEC) on 16 September 2004 for comment and the following comments were provided:-

- *No Koala Plan of Management has been prepared in accordance with State Environmental Planning Policy No 44 – Koala Habitat protection;*
- *This land is essential in providing a corridor that promotes the viability of the Hawks nest Koala Population, which is specifically listed as endangered under*

- the Threatened Species Conservation Act 1995;*
- *The importance of this area for Koalas has been recognised by the Land and Environment Court that has placed an order on the owner (Brancourt Nominees P/L) to rehabilitate habitat on site. This was consistent with earlier findings in the local Court that the owners had violated a Tree Preservation Order pertaining to the Hawks Nest area. Further destruction of habitat including the understorey and subsequent development in this area, particularly the construction of an additional access road, is considered to conflict with the Court's decision;*
  - *Any consent to the proposal should formalise the rehabilitation requirement;*
  - *DEC recommends that development be restricted to the minimal land that is necessary for the residential complex described under DA 202-8-2004. All remaining lands should be rehabilitated as Koala habitat and rezoned either for Environmental Protection or as Public Open Space. Transference of the latter land in Council control and its rehabilitation in accordance with the Court Order should be considered as part of any consent conditions relating to the residential complex.*

The DEC provided additional comments dated 24 March 2006 stating that their concerns raised in their correspondence dated 12 October 2004 have been resolved through the revised Koala Plan of Management dated 27 February 2006. These issues are discussed in further detail in Section 7.2 and **Appendix D** of this report.

### **6.2.3 Rural Fire Service (Integrated Development)**

The application is 'Integrated Development' under the *Rural Fires Act, 1997* and therefore the application was referred to the New South Wales Rural Fire Service (RFS) on 3 September 2004. The RFS deemed the proposal to be satisfactory and issued general terms of approval (to be included in the proposed conditions of development consent) by granting a Bush Fire Safety Authority for the proposed development.

### **6.2.4 Department of Natural Resources (then DIPNR) (Integrated Development)**

The application is 'Integrated Development' as the proposal requires a Part 3A Permit under the *Rivers and Foreshores Improvement Act 1948* and therefore the application was referred to the Department of Natural Resources (DNR) (was then the Department of Infrastructure Planning and Natural Resources) on 3 September 2004. The DNR deemed the proposal to be satisfactory and issued general terms of approval (to be included in the proposed conditions of development consent).

## **6.3 Internal Referrals**

The Hunter Regional Office was consulted regarding the application in a memo dated 2 September 2004, however, there were no comments received.

### Ecologists Comments

A Departmental Ecologist reviewed the proposal by completing an 8-part test for significant impact on the Koala and critically reviewing the same assessment provided by the applicant. This assessment stated that of the eight factors, factors (b), (c), (d) and (g) were the most relevant in this assessment and concluded that the proposal will

have a significant affect on the endangered population. It was also noted that the applicant did not provide separate 8 part tests for the species and the local population (listed as endangered) as requested.

The salient points from this advice are included in the Koala Assessment in **Appendix D**.

## **7. CONSIDERATION**

### **7.1 *The Environmental Planning & Assessment Act, 1979***

#### **7.1.1 *Section 79C – Matters for consideration***

In determining a development application, a consent authority is to take into consideration the following matters as they are relevant to the development the subject of the development application.

**(a) *Section 79C (1) (a) – Environmental Planning Instruments, Development Control Plans etc***

The environmental planning instruments, draft environmental planning instruments, and development control plans applicable to the land to which the development application relates, as outlined in Section 5.2 & 5.3 of this report, are assessed in relation to this proposal in **Appendix C** and, in relation to the koala, in **Appendix D**. The proposal is generally inconsistent with several aims, objectives and controls of the relevant planning instruments;

**(b) *Section 79C (1) (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***

These impacts are considered in detail in section 7.2 of this report and in relation to the potential impacts on koalas in **Appendix D**. The proposal is generally considered to have a significant impact on the habitat of the koalas, a vulnerable species and endangered population under the TSC Act.

**(c) *Section 79C (1) (c) – Suitability of the Site***

The issues relating to the site's suitability for the development proposed in the development application are considered in section 7.2 of this report. In general, the site is considered unsuitable for the development currently proposed given the presence of core koala habitat on the site. This is further discussed in **Appendix D**.

**(d) *Section 79C (1) (d) – Submissions***

The submissions received in response to the development application are outlined in Section 6.1 of this report and in **Appendix E**. The submissions are considered in detail in Section 7.2 of the Report, where relevant.

**(e) Section 79C (1) (e) – Public Interest**

The public interest has been considered in the assessment of this development application by considering the relevant planning instruments, the submissions in section 7.2 and the history of the site in section 3.1 of this report. The proposal is generally considered to be contrary to the public interest given the removal of core koala habitat and the resulting significant impact on the Tea Gardens/Hawks Nest koala population and the inconsistency of the proposal with the court-ordered Remediation Plan titled “Remediating the Impact of Clearing Activities on koalas (*Phascolarctos cinereus*) at Hawks Nest, New South Wales”, prepared by Steve Phillips (Biolink) dated March 2003.

**7.2 Issues**

The main issues with respect to the proposed development are discussed below.

**7.2.1 Impact on the Koala.**

*Issue:* The larger site contains areas of natural vegetation and areas of koala habitat.

*Raised by:* Great Lakes Council, DEC, Community submissions.

*Consideration:* This issue is discussed at **Appendix D** – Koala Assessment.

*Resolution:* This issue is unresolved and remains outstanding.

**7.2.2 Illegal Clearing/Court orders**

*Issue:* The site was the subject of Land and Environment Court of NSW proceedings relating to the removal of koala habitat on the site. The orders of the Court included that the owner of the site shall carry out the works described in and in accordance with the remediation plan prepared by Steve Phillips dated March 2003. This is further discussed in section 3.1 of this report.

*Raised by:* Great Lakes Council, DEC, Community submissions.

*Consideration:* The remediation works as required by the court have not been implemented on the site and the current proposal is inconsistent with this court ordered remediation work. It is a matter of public interest that such orders are complied with and the koala habitat which was illegally removed is replanted on the site.

*Resolution:* This issue is unresolved and remains outstanding.

**7.2.3 Visual Amenity**

*Issue:* The proposal will result in an adverse impact on the visual amenity of the area, particularly upon entry to Hawks Nest from Tea Gardens (via the Myall River bridge) and from the foreshore.

*Raised by:* Community submissions.

*Consideration:* The proposed development will not adversely affect the visual amenity in the area as the proposed subdivision is of a similar design and density to existing subdivision. It is considered that the

proposal will not adversely affect the visual amenity of the area.

*Resolution:* This issue has been considered in this assessment.

#### **7.2.4 Tree Removal**

*Issue:* There are several trees to be removed for the proposal and well as the Asset Protection Zone.

*Raised by:* Community submissions.

*Consideration:* The proposal removes trees which are considered to be core koala habitat. This issue is further discussed in section 7.2.1 of this report.

*Resolution:* This issue has been considered in this assessment.

#### **7.2.5 Infrastructure**

*Issue:* The capacity of existing infrastructure in the area to cope with the proposed additional development, including the road system.

*Raised by:* Community submissions, Great Lakes Council.

*Consideration:* The proposed development will be connected to an existing reticulated sewer system and will be provided with a reticulated water supply. The local road system is capable of absorbing the additional traffic generated by the development.

*Resolution:* The infrastructure is adequate for the development.

#### **7.2.6 Traffic Generation and Car Parking**

*Issue:* The proposed development will result in additional traffic being generated in the area and adequate car parking must be provided.

*Raised by:* Community submissions.

*Consideration:* The proposal involves the subdivision of vacant land for residential development within an area containing an established network of local roads. The Traffic Impact Assessment prepared by SKM (Appendix G of the application) concluded that the surrounding road network was capable of absorbing the additional traffic generated by the development. It is considered that the additional traffic generated by the development will not adversely affect the amenity of the area or the levels of service of the intersections on the surrounding road network.

*Resolution:* This issue has been considered in this assessment.

#### **7.2.7 Compatibility with the area & Overdevelopment**

*Issue:* The development is out of character with the area and results in an overdevelopment of the site.

*Raised by:* Community submissions.

*Consideration:* The proposal involves the subdivision of land into low density allotments in an area identified by the Council for low density development and in this way is consistent with the local planning controls. The proposal provides for adequate allotment sizes where car parking and open space can be provided for each dwelling on the site and will create additional housing choice in the area, close

to services. The proposed development is generally characterised by low density, detached housing, which is generally consistent with the existing development in the area. It is considered that the proposal is consistent with the character of the area and is not an overdevelopment of the site.

*Resolution:* This issue has been considered in this assessment.

### **7.2.8 Pedestrian Facilities**

*Issue:* The proposal provides presents hazards to pedestrians due to lack of pedestrian facilities in the area.

*Raised by:* Community submissions.

*Consideration:* The proposal involves the construction of pedestrian pathways along the proposed internal through road which will assist in improving pedestrian linkages in the area. The proposal will improve pedestrian access along the foreshore and generally within the locality.

*Resolution:* This issue has been considered in this assessment.

### **7.2.9 Acid Sulphate Soils**

*Issue:* The site is located in an area which may be affected by acid sulphate soils.

*Raised by:* Community Submissions.

*Consideration:* A detailed Geotechnical Urban Capability Assessment was prepared by Coffey Geosciences dated 10 June 2004 (Appendix D). This assessment concluded that no actual or potential acid sulphate soils are likely to be encountered on the site to a depth of 1.4 metres, however, for deeper excavations, the soils should be screened.

*Resolution:* This issue has been considered and appropriate conditions of development consent will be imposed if the proposal is supported.

### **7.2.10 Flooding**

*Issue:* The site is flood prone, being located below the 1 in 100 flood level.

*Raised by:* Community submissions.

*Consideration:* A Drainage Strategy was prepared by GHD dated August 2004 (Appendix F) and the Council has advised that the 1 in 100 flood level for the site is RL 2.1m, which combined with a freeboard of 500mm, sets a minimum habitable floor level of RL 2.6m AHD. The habitable floor levels of future dwellings will be assessed on individual DA's for dwellings in the future if the proposed development is supported.

*Resolution:* This issue has not been resolved and remains outstanding.

### **7.2.11 Stormwater & Water Quality of the Myall River**

*Issue:* The potential impact on the nearby Myall River from the proposed development.

*Raised by:* Community submissions.

*Consideration:* The proposed development will be connected to the Council's existing stormwater drainage system and will use rainwater tanks to minimise runoff. The proposed development is therefore unlikely to adversely affect the water quality of the Myall River.

*Resolution:* This issue has been considered and appropriate conditions of development consent will be imposed if the proposal is supported.

#### **7.2.12 Bushfire**

*Issue:* The site is classified as bushfire prone land.

*Raised by:* Community submissions.

*Consideration:* A Bushfire Protection Assessment prepared by Conacher Travers dated June 2004 (Appendix C of the application) was lodged with application which recommended Asset protection Zones and other requirements to mitigate the bushfire hazard to the proposed development. The RFS have assessed the proposal and have issued a Bushfire Safety Authority.

*Resolution:* This issue has been assessed and relevant conditions of development consent will be imposed if supported.

#### **7.2.13 Aboriginal Heritage**

*Issue:* The site may contain items of Aboriginal Heritage.

*Raised by:* Community submissions.

*Consideration:* An Aboriginal Heritage Assessment prepared by Insite Heritage (Appendix E of the application) concludes that the site may contain items of heritage and that further investigation may be required.

*Resolution:* This issue has been assessed and relevant conditions of development consent have been recommended to be imposed.

#### **7.2.14 Impact on Tourism**

*Issue:* The proposed development will adversely affect tourism.

*Raised by:* Community submissions.

*Consideration:* It is considered that the proposed development is compatible with its context and provides for improved pedestrian facilities in the area. It is considered that the proposal will not adversely affect tourism in the town.

*Resolution:* This issue has been considered in this assessment.

#### **7.2.15 Amenity**

*Issue:* The proposed development will adversely affect the amenity of adjoining and nearby development as a result of overshadowing and overlooking.

*Raised by:* Community submissions.

*Consideration:* This issue is relevant to DA 202-8-2004 and is discussed in a separate assessment report.

*Resolution:* This issue has been considered in this assessment.

**7.2.16 Access**

*Issue:* The proposed development involves access to the existing road system in a dangerous location.

*Raised by:* Community submissions.

*Consideration:* The Traffic Impact Assessment prepared by SKM (Appendix G of the application) concluded that the proposal will have minimal impact upon the local road network.

*Resolution:* This issue has been considered in this assessment.

## 8. CONCLUSION

The Minister for Planning is the consent authority.

The application has been considered with regard to the matters raised in section 79C of the *Environmental Planning & Assessment Act, 1979*, has been notified in accordance with the Regulations and all submissions received in the period prescribed by the Regulations have been considered.

The proposal is considered to be inconsistent with the aims and objectives of SEPP 71 and SEPP 44 and the matters for consideration under section 79C of the *Environmental Planning and Assessment Act 1979*. The proposal is ecologically inappropriate, associated with unacceptable impacts on the Hawks Nest/Tea Gardens Endangered Koala Population and would seriously hinder long-term recovery and restoration efforts of this population.

On balance, it is considered that the proposed development is unacceptable and should be determined by **refusing** consent.

## 9. RECOMMENDATION

It is recommended that the Minister for Planning pursuant to Section 80(1)(b) of the Environmental Planning and Assessment Act 1979 (as amended) and Clause 10(2) of State Environmental Planning Policy No 71 – Coastal Protection:

- (A) **Refuse** consent to the application (**Appendix A**), and
- (B) authorise the Department to carry out post-determination notification.

For Ministerial Approval

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