



Planning

## ASSESSMENT REPORT

### RESIDENTIAL SUBDIVISION AT 'BLACK ROCKS ESTATE', OVERALL DRIVE POTTSVILLE SECTION 96 MODIFICATION OF DEVELOPMENT CONSENT DA 243-10-2004

#### 1. BACKGROUND

The subject site has a total size of 42.15 and is bounded to the east by Mooball creek, to the north by completed stages of Black Rocks Estate, to the south by rural grazing land (Dunloe Park) and to the west by vacant rural land (**Figure 1**). There are four distinct landscape features that characterise the subject site, tidal drains, the western paperbark wetland, the lowland grasslands and the north/south central dunal ridge. Subdivision works on the site including filling, roads, infrastructure, cycleway, playing field, parks and open space are currently nearing the final stages of completion. The site is described as Lot 232 DP 1072665 and Lot 183 DP 1034824 Overall Drive Pottsville and is owned by Black Rocks Estate Pty Ltd.



Figure 1: Subject at Pottsville in the Tweed Shire

## 2. DEVELOPMENT HISTORY – DA 243-10-2004

### DA 243-10-2004 (Original DA)

On 9 January 2006, the Acting Deputy Director-General, as delegate of the Minister for Planning, granted consent for development application DA 243-10-2004 for residential subdivision at Overall Drive, Pottsville in the Tweed local government area, subject to conditions

### MOD 76-6-2006

On 28 October 2006 the Executive Director under delegation granted consent to an application to modify conditions of consent relating to the location of the approved cycleway, condition G2 requiring compliance reports and an amendment to condition H2 regarding maintenance of asset protection zones.

### DA 243-10-2004 MOD 2

On 19 March 2008 the Executive Director under delegation granted consent for an application to modify the wording of condition B6 pertaining to details and specification of the playing fields within the consent.

### DA 243-10-2004 MOD 3

On 2 October 2008 the Acting Executive Director under delegation granted consent for an application to amend the approved lot layout to include an addition five lots including one duplex lot.

### DA 243-10-2004 MOD 4

On 9 December 2009 the Acting Director, Regional Projects under delegated authority granted consent for an application to amend condition H2A of the consent in relation to bushfire asset protection zones. The amended condition permitted a reduction in width of the asset protection zone (APZ) along the subdivision's north-west perimeter from 35m to 22m.

## 3. PROPOSED MODIFICATIONS

### DA 243-10-2004 MOD 5

On 15 December 2009, Darryl Anderson Consulting Pty Ltd (on behalf of Black Rocks Estate Pty Ltd) lodged Modification 5 to modify the development consent to permit staging of the subdivision to allow lots to be released into five sub-stages as follows:

| Staging   | No. of lots |
|-----------|-------------|
| Stage 13  | 28 lots     |
| Stage 14  | 14 lots     |
| Stage 14B | 4 lots      |
| Stage 14C | 16 lots     |
| Stage 14D | 11 lots     |

The main purpose of the proposed Modification 5 is to provide flexibility to the developer in the staged implementation and release of lots to meet market conditions. The proposed staging plan does not alter lot sizes, infrastructure, roads or open space areas. A plan of the proposed staging plan is included at **Figure 2**.

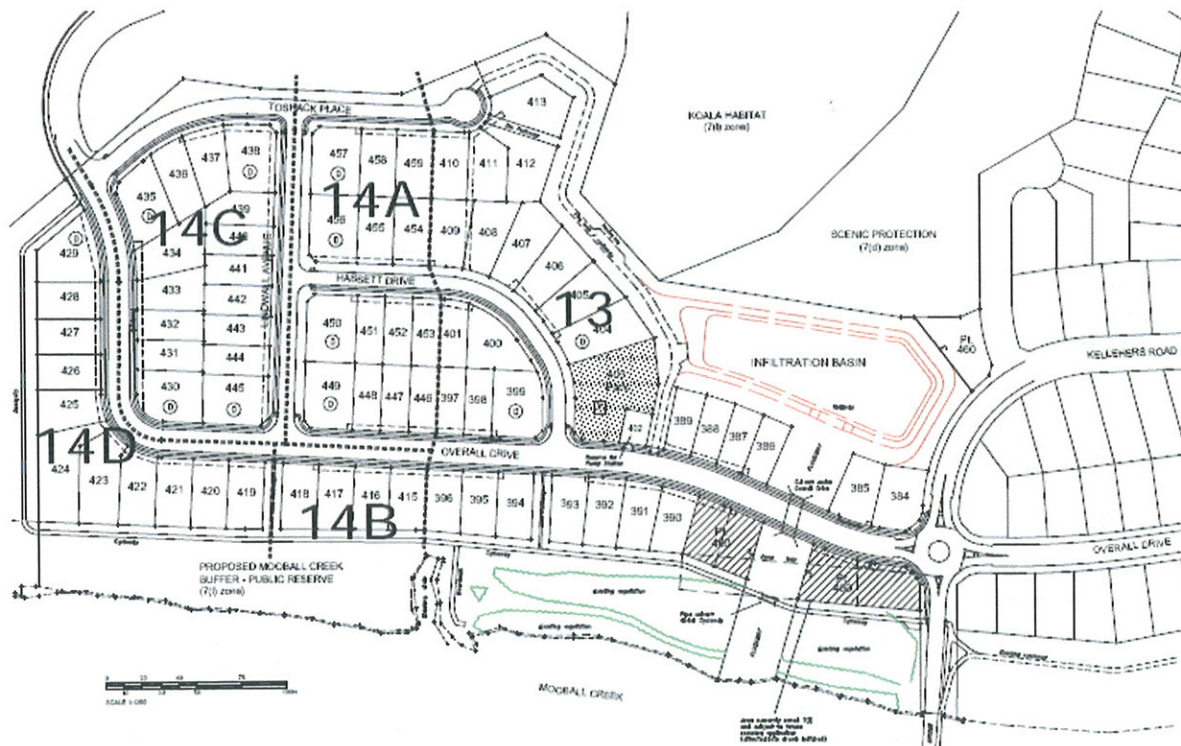


Figure 2: Proposed staging plan

#### DA 243-10-2004 MOD 6

Subsequent to approval of Modification 4, the NSW Rural Fire Service (RFS) wrote to the Department in relation to its most recent re-issued General Term of Approval (GTA) for that application. In its correspondence dated 18 December 2009, the RFS provided a supplementary GTA with further specification with regards to compliance requirements under the *Planning for Bushfire Protection 2006* (PBP 2006) for Condition H2A of the approved development consent.

#### 4. STATUTORY CONTEXT

##### Environmental Planning and Assessment Act 1979

Under section 96 of the *Environmental Planning and Assessment Act 1979* (the Act), a consent authority may modify a development consent if it is satisfied that the proposed modification is of minimal environmental impact, and that the development to which the consent as modified relates is substantially the same development for which the consent was originally granted. The Department has considered the proposed modifications against such criteria, and is satisfied that both applications may be determined in accordance with section 96 of the Act and the *Environmental Planning and Assessment Regulation 2000* (the Regulation). An assessment of the proposal against the relevant statutory requirements can be found at **Appendix 1**.

##### Consent Authority

The original development application was identified as state significant development under Schedule 2 of *State Environmental Planning Policy No. 71 Coastal Protection* (SEPP 71). Pursuant to Clause 10(2) of SEPP 71 the Minister is the consent authority. The original development was classed as integrated development under section 91 of the Act and approval was required from Tweed Council under section 138 of the *Roads Act 1993*, from NSW Fisheries under sections 201 and 205 of the *Fisheries Management Act 1977* and from the RFS under section 100B of the *Rural Fires Act 1997*.

##### Consultation

In accordance with clause 117 of the Regulation the Department is not required to publicly exhibit the proposed modifications. The proposed modifications were however referred to the two following agencies for comment.

## NSW Rural Fire Service

On 18 December 2009 the RFS provided advice to the Department in relation to APZ requirements for the site under the PBP 2006 guideline. The RFS comments are discussed in further detail in **Section 6**.

## Tweed Council

The staging plan proposed as part of Modification 5 was referred to Council for comment on 23 December 2009, a response was subsequently received on 8 January 2010. Council raised two issues relating to developer contributions and the proposed layout of the staging plan. These issues are further discussed in **Section 6**.

## **6. COMMENTS/ISSUES**

### **Bushfire Protection**

By way of background, the site's perimeter is identified as bushfire prone primarily due to contiguous open forest vegetation in the subject locality. Modification 4 (DA 243-10-2004 MOD 4) sought an amendment to the approved development's required APZs in accordance with guidelines established under the PBP 2006. The applicant's justification for this APZ reduction primarily related to changes in the threshold requirements of the PBP 2006 guideline as opposed to the superseded *Planning for Bushfire Protection 2001* (PBP 2001) which guided the assessment of the original Development Application (DA). Modification 4 therefore was referred to the RFS for comment and a subsequent response was received recommending the proposed APZ reduction subject to the imposition of an updated GTA.

Upon determination of Modification 4 it became apparent to the Department that the updated GTA provided by the RFS was difficult to interpret and further improvement to its drafting was necessary. In addition, the updated GTA incorrectly refers to the site's southern APZ and does not clearly specify which allotments the amended APZs apply to. Therefore on 16 December 2009 the RFS was consulted on the matter and as a result the following updated GTA was provided:

#### **Asset Protection Zone**

*The intent of measures is to provide sufficient space and maintain reduced fuel loads so as to ensure radiant heat levels of buildings are below critical limits and to prevent direct flame contact with a building.*

*At the issue of subdivision certificate and in perpetuity, the land surrounding the development shall be managed as follows as outlined within Appendices 2 & 5 of Planning for Bush Fire Protection 2006 and the NSW Rural Fire Service's document Standards for asset protection zones:*

- *West along the full length of the development boundary for a minimum distance of 17 metres as an inner protection area and 5 metres as an outer protection area, including that area proposed as an infiltration pond and the northern aspects of Lots 404 to 407, 412 & 413; an*
- *South for a distance of 20 metres as an inner protection area, along the full length of the development boundary.*

As evident in the above updated GTA, the site's APZ requirements as issued under the PBP 2006 differ considerably to that of the superseded PBP 2001. In particular, the PBP 2001 guideline required the site's north APZ to include a total APZ of 35m which differs somewhat from the new APZ requirement of 22m. The applicant responsible for lodging Modification 4 (Lyn Dickinson) was consulted on the latest GTA provided by the RFS and indicated support for the maximum possible APZ buffer distance between residential lots and forest vegetation on the north-west perimeter of the site. In relation to Ms Dickinson's comments, consideration was given to increasing the 17m Inner Protection Area (IPA) to 20m in accordance with the original DA, however in this instance the 17m IPA is assessed as being adequate. It should also be noted that the updated GTA has been drafted under the established scientific methodology set in the PBP 2006 policy and that amending the APZ to provide additional protection is unjustified and outside the general scope of the Department's assessment.

## Developer Contributions

In its submission to the Department, Council advised that based on the developer contributions applicable for the existing consent, the developer contributions as approved should be amended as per the proposed staging plan. In addition, Council suggested that staging the contributions will provide a clearer guidance to the developer as to what contributions are payable at the time of lodging subdivision plans which also makes the process easier for Council's administration purposes. In this regard, the Department notes Council's advice in relation to staging contributions in accordance with the proposed staging plan for the development. However, considering the minor nature of this application amending the existing conditions for this purpose is not considered to be necessary in this instance.

## Layout of staging plan

The original proposed staging plan submitted as part of Modification 5 created an additional residential allotment on the north-east portion of the subject site. Prior to lodgement of the subject modification, this lot formed part of the existing Lot 460 residual adjacent to the site's infiltration basin. In effect, the proposed staging plan (as lodged) created an additional residential allotment which could potentially create a number of complications on the site. As a result, this issue was raised with the applicant and on 15 January 2010 an amended staging plan was provided with corrected allotment detail corresponding with the existing approval.

## Conclusion

The proposed development as modified is considered to be substantially the same development as that originally approved. The two applications have been considered with regard to the statutory requirements of section 96 of the Act and provisions of the Rural Fires Act 1997. On balance, it is considered that the proposed development as modified is acceptable and should be approved.

## Delegation

On 4 March 2009, delegation was given to the Director, Regional Projects to determine an application to modify a development under either section 96 (1) or section 96 (1A) of the Act.

This delegation extends to applications where:

- a) there are less than 10 public submissions in respect of the application; and
- b) the cost of the development subject to the modification is less than \$5 million.

No public submissions have been received in respect of the application and the cost of the development subject to this modification is estimated to be less than \$1000.00. Subsequently, it is considered appropriate for the Director, Regional Projects to determine the modifications under delegation pursuant to section 96(1) and section 96(1A) of the Act.

## 7. RECOMMENDATION

It is recommended that the Director, Regional Projects, as delegate of the Minister:

- **note** the information provided in this report;
- **approve** Modification 5 (DA 243-10-2004 MOD 5) to DA 243-10-2004 by signing the attached modifying instrument (**Tag A**); and
- **approve** Modification 6 (DA 243-10-2004 MOD 6) to DA 243-10-2004 by signing the attached modifying instrument (**Tag B**);



Sebastian Tauni  
Environmental Planner  
Regional Projects



Stuart Withington  
A/Team Leader  
Regional Projects



Alan Bright  
A/Director  
Regional Projects

## APPENDIX 1

### STATUTORY CONSIDERATION - SECTION 96 OF THE ACT

Under section 96(1) of the Act, a consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

| Provision                                                                                                                                                                                                                                                                                                                                                                                                 | Comment                                                                                                                                                                                                            |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (1) A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify a development consent granted by it to correct a minor error, misdescription or miscalculation. Subsections (1A), (2), (3), (5), (6) and (7) do not apply to such a modification. | The proposed Modification 5 (DA 243-10-2004 MOD 5) relates to correcting the drafting of a condition in the existing consent as the relevant condition is poorly worded and currently results in a misdescription. |

Under section 96(1A) of the Act, a consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

| Provision                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Comment                                                                                                                                                                                                                                                                     |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| a) it is satisfied that the proposed modification is of minimal environment impact.                                                                                                                                                                                                                                                                                                                                                                         | The proposed Modification 6 (DA 243-10-2004 MOD 6) relates to modifying the development consent to permit staging of the subdivision to allow lots to be released into five sub-stages. The Department is satisfied that it is of minimal environmental impact.             |
| b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all).                                                                                                                                                                                              | The development is substantially the same development for which consent was originally granted for DA 243-10-2004. The proposal as modified remains residential development. The proposed staging plan does not alter lot sizes, infrastructure, roads or open space areas. |
| c) it has notified the application in accordance with:<br>i) the regulations, if the regulations so require, or<br>ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent                                                                                                                   | The Department was not required to notify this application.                                                                                                                                                                                                                 |
| d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be. it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all). | N/A                                                                                                                                                                                                                                                                         |