



Sunshine Bay Residential Subdivision

*Section 4.55(1A)
Modification
Assessment
(MP05_0029 MOD 1)*

March 2020

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Glossary

Abbreviation	Definition
Applicant	Telmen Holding Pty Ltd
BAM	Biodiversity Assessment Method
BC Act	<i>Biodiversity Conservation Act 2016</i>
BCD	Biodiversity and Conservation Division of Department of Planning, Industry and Environment
BC Regulation	Biodiversity Conservation Regulation 2017
BDAR	Biodiversity Assessment Report
BOS	Biodiversity Offsets Scheme
CIV	Capital Investment Value
Consent	Development Consent
Council	Eurobodalla Shire Council
Department	Department of Planning, Industry and Environment
EIS	Environmental Impact Statement
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i>
EP&A Regulation	Environmental Planning and Assessment Regulation 2000
EP&A (ST&OP) Regulation	Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017
EPI	Environmental Planning Instrument
ESD	Ecologically Sustainable Development
LEP	Local Environmental Plan
LGA	Local Government Area
Minister	Minister for Planning and Public Spaces
RFS	Rural Fire Service
RtS	Response to Submissions
Secretary	Secretary of the Department of Planning, Industry and Environment
SEPP	State Environmental Planning Policy
SSD	State Significant Development



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1. Introduction

1.1. Background

This report provides an assessment of an application to modify the approval for a residential subdivision at Sunshine Bay (MP05_0029).

The application seeks approval to amend the site layout to create seven additional residential lots by:

- converting approximately 2,662m² of drainage reserve land (that was to be dedicated to Council) into four new residential lots
- reconfiguring two large lots (Lot 192 – 2,229m² and Lot 184 – 1,598m²) to create five smaller lots.

The application has been lodged by Telmen Holdings Pty Ltd (the Applicant) pursuant to section 4.55(2) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*.

1.2. Subject site

The subject site is located off Freycinet Drive, Sunshine Bay on the NSW South Coast, approximately six kilometres south of Batemans Bay within the Eurobodalla Shire Local Government Area (**Figure 1**). The site has a total area of 17ha and the Applicant has commenced the subdivision of the site into 138 residential lots (in accordance with this approval - MP05_0029).

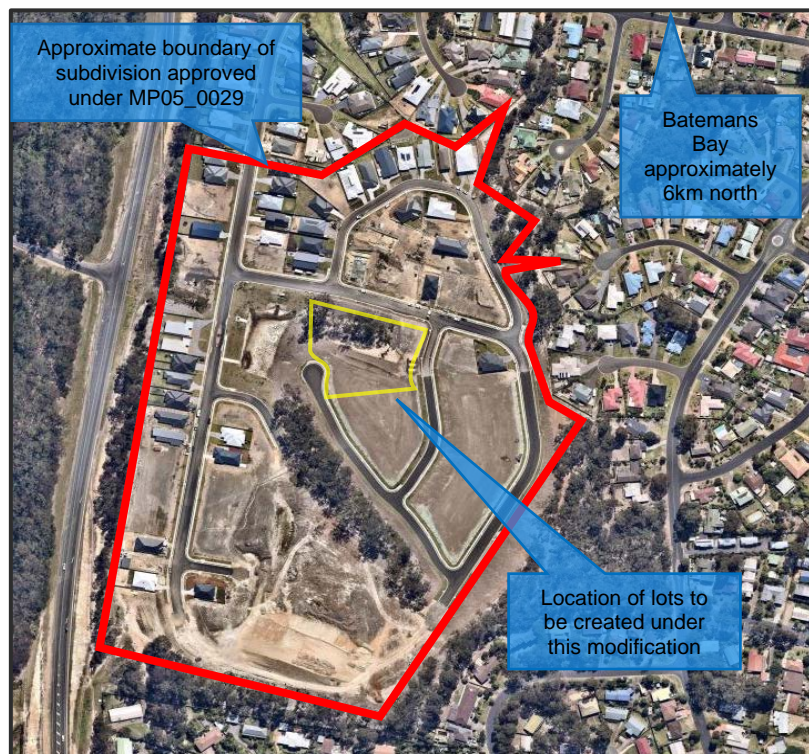


Figure 1 | Subject site (in red) and modification site (in yellow) (Source: SIX maps 2019)

The proposed modification relates to an area of the subject site comprising land cleared for residential lots and a drainage reserve containing approximately 35 Spotted Gum and Blackbutt trees (**Figure 1**).

The subject site is bound to the north, east and south by residential lots, being the wider suburb of Sunshine Bay. Sunshine Bay has gradually developed in accordance with the Sunshine Bay Masterplan (**Figure 2**) since the mid-1980s, with previous stages having been approved by Council. The modification relates to the final stage in the masterplan.

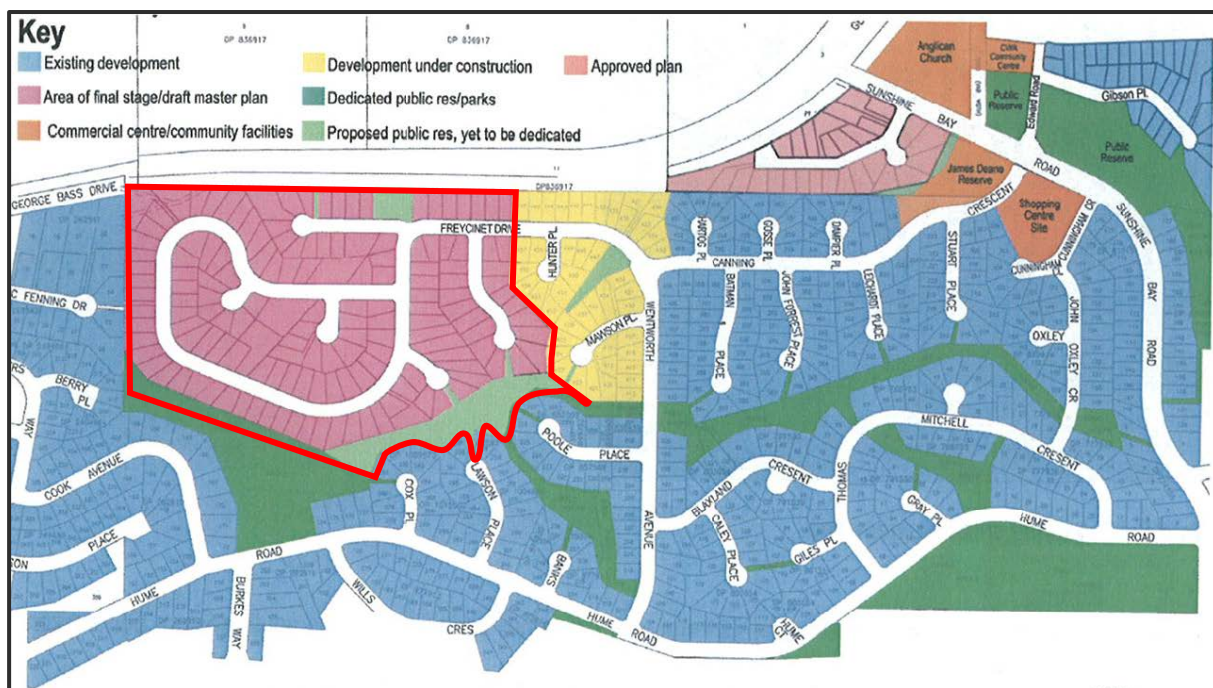


Figure 2 | Sunshine Bay Masterplan, with the subject site shown in red (Source: Applicant's original environmental assessment)

1.3. Approval History

On 6 June 2010, the then Deputy Director-General, Development Assessment and Systems Performance, as delegate for the then Minister for Planning, granted project approval for the subdivision of the subject site into:

- 138 residential lots
- one lot for stormwater drainage
- one lot for public recreation
- one lot to contain a sewage pumping station.

The approval was granted under Part 3A of the EP&A Act and has not been modified.



2. Proposed Modification

2.1. Modification as exhibited

On 10 December 2018, the Applicant lodged an application to modify the approval under section 4.55(2) of the EP&A Act (MP05_0029 MOD 1).

The application, as notified, sought to create eight additional lots (from 138) by (**Figure 3**):

- converting approximately 2,662m² of drainage reserve land into five residential lots
- reconfiguring two large lots into five smaller lots.

2.2. Modification as revised

Due to the challenging topography of one of the proposed lots (Lot 701), the Applicant revised the modification to create seven additional residential lots (from 138) by (**Figure 3**):

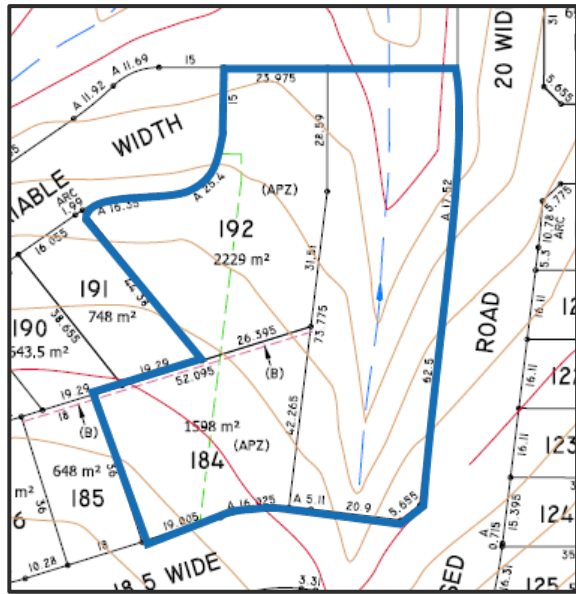
- converting approximately 2,662m² of drainage reserve land into four residential lots
- reconfiguring two large lots into five smaller lots.

Figure 3 shows a comparison of the approved, originally proposed and revised subdivision layouts.

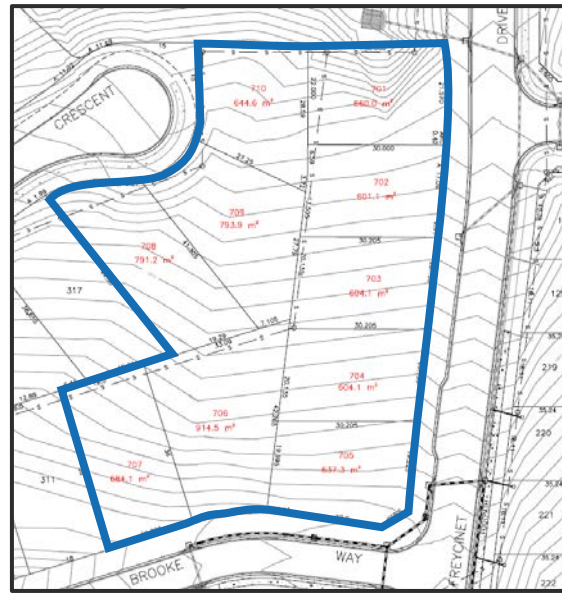
2.3. Applicant's justification

In support of the proposal, the Applicant contends that the drainage reserve land was initially to be dedicated to Eurobodalla Shire Council (Council), however Council have advised that, due to the maintenance costs and the reserve's unstructured and steep topography, it would prefer not to accept ownership of the land.

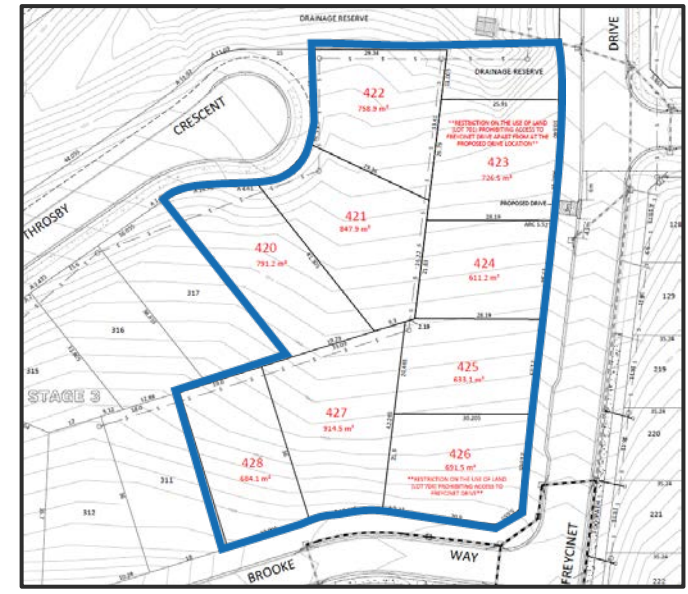
The proposal involves the removal of approximately 0.212ha of Spotted Gum and Blackbutt trees that are located in a natural gully within the drainage reserve allotment (**Figure 4**). This gully is proposed to be filled and levelled to accommodate the residential lots. The Applicant contends that the tree removal has been the subject of an assessment under the *Biodiversity Conservation Act 2016* and appropriately offset by credits in accordance with that Act.



Approved layout



Ordinally proposed layout



Revised proposed layout

Figure 3 | Comparison showing the approved (left), originally proposed (centre) and revised proposed subdivision layouts (right) (Source: Applicant provided)



Figure 4 | Approved drainage reserve to be filled and subdivided into residential lots (Source: Department site inspection photo 2019)



3. Statutory Context

3.1. Part 3A Transition to State Significant Development

This project approval (MP05_0029) was originally granted under Part 3A of the EP&A Act. This means the project satisfied the definition of a 'transitional Part 3A project' under clause 2(1) Schedule 2 to the Environmental Planning & Assessment (Savings, Transitional and Other Provisions) Regulation 2017 (ST&OP Regulation), which came into effect on 1 March 2018.

Under the ST&OP Regulation, projects the subject of existing Part 3A approvals remain transitional Part 3A projects until they are transitioned to State significant development (SSD) (clause 3(1)-(2), Schedule 2). As of 1 March 2018, new proposals to modify existing Part 3A project approvals can only be determined once the project has been declared to be SSD by the Minister for Planning, and the relevant provisions to modify an SSD consent under Part 4 of the EP&A Act apply.

On 28 November 2018, the Director, Regional Assessments (as delegate of the Minister for Planning), made an order under clause 6 of Schedule 2 to the EP&A (ST&OP) Regulation declaring the development the subject of project approval to be SSD. The order was published in the NSW Government Gazette No 130 on 30 November 2018 and took effect from that date.

The effect of this order is that the project approval is taken to be a development consent under Part 4 of the EP&A Act for the carrying out of the development and the modification request is taken to be an application to modify under section 4.55 of the EP&A Act.

3.2. Scope of Modifications

While the application was originally lodged under section 4.55(2) of the EP&A Act, the Applicant requested that it be assessed and determined under section 4.55(1A) of that Act. The Applicant contends that due the exploratory and field work devoted to the modification application and the recommendations arising from the bio-diversity report and the absence of agency objection, there would be very little justification for the modification to be determined under section 4.55(2) of the EP&A Act.

Section 4.55(1A) of the EP&A Act outlines the matters that a consent authority must take into consideration when determining an application that seeks to modify an SSD consent and results in substantially the same development.

The matters for consideration under section 4.55(1A) of the EP&A Act that apply to the modification of the consent (MP 05_0029 MOD 1) have been considered in **Table 1**.

Table 1 | Section 4.55(1A) Other Modifications

Section 4.55(1A) Evaluation	Consideration
a) the proposed modification is of minimal environmental impact	<p>Section 5 of this report provides an assessment of the impacts associated with the proposal.</p> <p>The original approval allowed the removal of dense bush to provide 138 new residential lots and associated infrastructure and services on the site.</p> <p>This modification application involves the further removal of approximately 0.2 ha of spotted gums (35 trees), within a central and isolated area of the site, to provide an additional seven lots.</p> <p>Due to the scale of the modifications relative to the original approval, as well as the biodiversity offsets outlined in the Biodiversity Development Assessment Report (BDAR) and required through condition, the Department considers the modification application to be of minimal environmental impact.</p>
b) development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all)	<p>While the overall number of lots is proposed to increase by seven, the development as modified would remain substantially the same development as approved being a large coastal residential sub-division.</p>
c) the application has been notified in accordance with the regulations	<p>The modification application has been notified in accordance with the EP&A Regulations. Details of the notification are provided in Section 4 of this report.</p>
d) any submission made concerning the proposed modification has been considered	<p>The Department received submissions from Rural Fire Service (RFS), Biodiversity Conservation Division (BCD), and Council. These are considered in Section 4 of this report.</p>

3.3. Mandatory Matters for Consideration

Section 4.55(3) of the EP&A Act provides that in determining a modification application, the consent authority must take into consideration any relevant matters in section 4.15(1) of the EP&A Act. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.

The relevant consideration under Section 4.15(1) of the EP&A Act in relation to the proposal is whether the impacts of the amendments upon the existing environment are acceptable. As assessed in detailed in **Section 5**, the Department supports the proposal as it will not result in additional adverse impacts on the existing environment when compared to the approved development.

Under section 4.15 of the EP&A Act, the consent authority must take into account the relevant provisions of any Environmental Planning Instrument (EPI) or Development Control Plan (DCP) that applies to the carrying out of the proposal. The following EPIs apply to the proposal.

Table 2 | Relevant EPIs

Current EPI	EPI applicable at the time of approval
State Environmental Planning Policy (Coastal Management) 2018	State Environment Planning Policy No. 71 Coastal Protection
State Environmental Planning Policy (State Significant Precincts) 2005	State Environmental Planning Policy (Major Projects) 2005
Eurobodalla Local Environmental Plan 2012	Eurobodalla Urban Local Environmental Plan 1999

The Department undertook a comprehensive assessment of the development against the EPIs applicable at the time of its original assessment. The Department is satisfied the modification does not result in any inconsistency with the current EPIs that have replaced them (**Table 2**).

3.4. Biodiversity Conservation Act 2016

Section 1.7 of the EP&A Act requires the application of the Biodiversity Conservation Act 2016 (BC Act) in connection with the terrestrial and aquatic environment. The Biodiversity Offsets Scheme (BOS) applies when:

- the amount of native vegetation being cleared exceeds a certain threshold area outlined in Clause 7.2 of the *Biodiversity Conservation Regulation 2017* (BC Reg), or
- the impacts occur within an area mapped on the Biodiversity Values Map (BVM) published by the Minister for Environment, or
- a significant impact is likely according to a 'test of significance' carried out as per section 7.3 of the BC Act, or
- the works are carried out in a declared area of outstanding biodiversity value.

The Applicant prepared a BDAR in accordance with the Biodiversity Assessment Method (BAM) to establish the offsets applicable under the BOS.

3.5. Consent authority

The Minister for Planning and Public Spaces is the consent authority for the application. However, the Director, Regional Assessments, may determine the application under delegation as:

- Council has not made an objection
- a political donation disclosure has not been made
- no public submissions were received.



4. Engagement

4.1. Department's Engagement

The Department notified the modification request for 14 days from 28 January 2019 to 11 February 2019. It was made publicly available on the Department's website, and notified to Council, relevant State agencies and surrounding landowners.

The Department received three submissions, being from Council, the BCD and RFS. No public submissions were received. A summary of the submissions is provided in **Table 3** below, and a link to the submissions is provided in **Appendix A**.

4.2. Summary of Submissions

Table 3 | Summary of Submissions

Council

Council noted that the Applicant lodged the modification request as Council did not wish to accept the dedication of the drainage reserve. Council also noted the proximity of a potential driveway of Lot 701 to a road intersection and a proposed stormwater pit.

Biodiversity and Conservation Division (BCD)

BCD provided input into the finalisation of the BDAR, and in particular that it incorrectly discounted the presence of a particular flora species (the leafless tongue orchid) and that it did not address the relevant 'avoid and minimise' principles.

NSW Rural Fire Service (RFS)

RFS did not object to the proposal and advised they had no specific recommendations in relation to bushfire protection.

4.3. Response to Submissions (RtS)

In response to comments from BCD, the Applicant provided a revised BDAR adding the leafless tongue orchid and reference to the avoid and minimise principles outlined in the BAM. The BCD reviewed the response and advised it was satisfied that the BDAR amendments addressed their submission.

The issue raised in Council's submission relating to the driveway location of Lot 701 has been resolved through the revised lot layout (**Figure 3**). The final lot layout was also referred to Council who advised that it would accept a small parcel of land being incorporated into the larger drainage reserve to the north-east.



5. Assessment

In assessing the merits of the proposed modification, the Department has considered:

- the modification application and associated documents
- the Environmental Assessment and conditions of the project approval, as modified
- all submissions received on the proposal
- relevant EPIs, policies and guidelines
- the requirements of the EP&A Act.

The Department considers the key assessment issue relates to the impact on biodiversity. Other issues associated with the proposal are considered in **Table 4**.

5.1. Impact on biodiversity

The proposal replaces approximately 2,662m² of a tree lined gully/drainage reserve with residential lots. This results in the removal of approximately 35 Spotted Gum and Blackbutt trees (**Figure 4**) and the gully would be filled and levelled. Although an isolated tree clump, these trees have potential to provide foraging habitat or habitat connectivity for various species of bats and birds.

The BC Act is the principle Act providing for land management, biodiversity offsets and biodiversity conservation in NSW.

In support of the proposal, the Applicant provided a BDAR prepared in accordance with the BC Act. This report assesses the impacts of the proposal on biodiversity values, including threatened species communities and their habitats.

The BDAR concluded that no threatened environmental communities were identified on the affected area and an area of retained native vegetation provides better east-west habitat connectivity through the site (**Figure 5**).

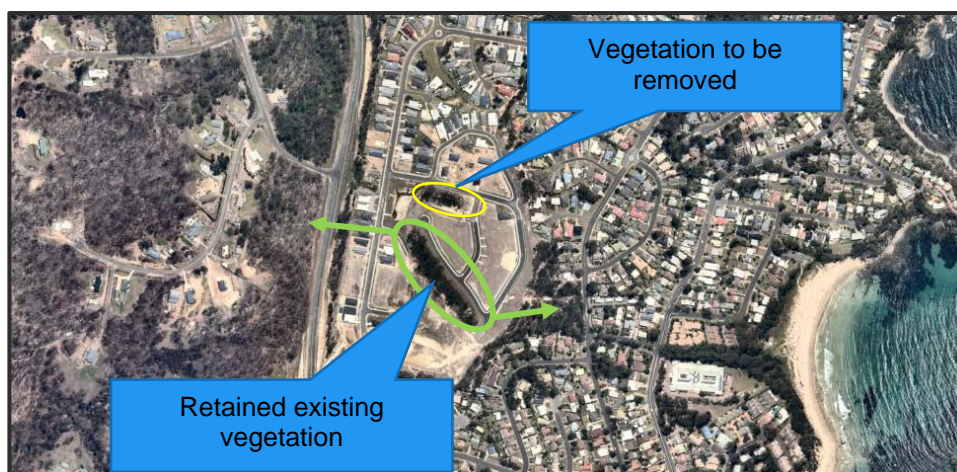


Figure 5 | Subject site showing potential habitat connectivity

Other additional measures in place to mitigate biodiversity impacts include the reuse of hollow bearing trees in local landscaping and the installation of three habitat nest boxes to compensate for the removal of a hollow bearing tree.

Based on the advice of the BCD and the BDAR, the Department is satisfied that biodiversity impacts of the proposal have been appropriately assessed and offset and would therefore constitute a minimal environmental impact. Conditions are recommended to incorporate the BDAR into the consent and ensure the offsets are undertaken, including physical offsets as well as the purchase of biodiversity credits as calculated within the BDAR.

5.2. Other matters

Table 4 | Assessment of other matters

Issue	Consideration	Recommendation
Revised lot layout	<ul style="list-style-type: none"> The proposal seeks to amend the lot layout, creating an additional four lots from the approved drainage reserve as well as three additional lots by subdividing two large lots into five smaller lots (Figure 3) as the APZ on these lots is no longer required. The site is zoned R2 low density residential under the Eurobodalla Local Environmental Plan 2012. The new lots range in size from 611m² to 914m² which comply with the minimum lot size requirements in the LEP. Council supports the amended lot layout as the approximately 2650m² drainage gully would be expensive to maintain, and the quality of the open space would be compromised due to the steep topography. The revised lot layout includes a small residual portion of the drainage gully to be dedicated to Council (approximately 276m²), this would be incorporated in the overall drainage reserve area to the west. Council advised that they have no objection to this land being integrated into the larger drainage reserve. Based on the advice of Council and noting that the proposed lots comply the minimum sizes in the ELEP, the Department agrees that the use of this land for residential lots is a more effective use of this part of the site. 	Conditions recommended to reflect the revised subdivision plan and reduced drainage reserve.
Drainage	<ul style="list-style-type: none"> As the proposal seeks to remove the drainage reserve/gully, the Department has considered the importance of this drainage reserve to water cycle management. The drainage gully to be filled in a minor tributary feeding into the larger bioretention system. The modification proposes to alter stormwater infrastructure, including incorporation of new pits, as well altering land contours to direct overland stormwater flows appropriately into the stormwater system. The Department considers the measures in place to manage stormwater are adequate to ensure stormwater is directed into 	No additional conditions or amendments to existing necessary

	the amended system and managed accordingly without negative impact to the lots.	
Vehicle access	<ul style="list-style-type: none"> • Council initially provided advice on the original lot layout that, due to the proximity of an intersection, lot 701 should be accessed via a battle-axe arrangement from the south (Throsby Crescent). • This has been addressed in the revised lot layout by reducing the lot yield from the drainage reserve from five, as initially proposed, to four. The revised layout positions the driveway an adequate distance from both the intersection and the stormwater pit (6m and 4.3m respectively), and includes a note that a restriction will be placed on the lot specifying the required vehicle access arrangements. • Council were provided with the revised lot layout and advised that they did not have any objections. 	No additional conditions or amendments to existing necessary
Developer contributions	<ul style="list-style-type: none"> • Council contributions under Section 7.11 (previously Section 94) as well as water and sewer contributions are regulated under the original consent at Conditions E14 and E15. • Under these conditions, the required contributions are based on lot numbers. • Notwithstanding the proposed increase in lot numbers, these existing conditions provide an adequate framework for requiring contributions. 	No additional conditions or amendments to existing necessary



6. Evaluation

The Department has assessed the proposal in accordance with the relevant requirements of the EP&A Act. The Department's assessment concludes the proposal is acceptable as:

- impacts to biodiversity have been appropriately assessed and offset in accordance with the Applicant's BDAR and as agreed by the BCD
- the modification would have minimal environmental impact and the proposal would remain substantially the same as approved
- the amended lot layout allows better utilisation of land for additional lots on land that Council preferred not take ownership of due to high ongoing maintenance costs
- the amended design remains compliant with the relevant planning instruments and controls.

Overall, the Department is satisfied that the proposal is suitable for the site and in the public interest. The Department therefore recommends that the application be approved subject to the recommended conditions (**Appendix B**).



7. Recommendation

It is recommended that the Director, Regional Assessments, as delegate of the Minister for Planning:

- **considers** the findings and recommendations of this report
- **determines** that the application MP05_0029 MOD 1 falls within the scope of section 4.55(1A) of the EP&A Act
- **accepts and adopts** all of the findings and recommendations in this report as the reasons for making the decision to grant approval to the application
- **modifies** the consent MP05_0029 MOD 1
- **signs** the attached Modification of Development Consent (**Appendix B**).

Recommended by:

Robin Ward
Planning Officer
Alpine Resorts Team


Daniel James
Team Leader
Alpine Resorts Team



8. *Determination*

The recommendation is: **Adopted by:**

25 March 2020

Brendon Roberts
Acting Director
Regional Assessments



Appendices

Appendix A – Relevant Supporting information

1. Modification Request
2. Submissions
3. Response to Submissions

<https://www.planningportal.nsw.gov.au/major-projects/project/13346>

Appendix B – Modification of Development Consent

The Modification of Development Consent can be found at the Department's website, at the following link:

<https://www.planningportal.nsw.gov.au/major-projects/project/13346>