



Fern Bay Seaside Village

*State Significant
Development
Modification
Assessment*

(MP 06_0250 MOD 12)

December 2019

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Glossary

Abbreviation	Definition
Consent	Development Consent
Council	Port Stephens Council
Department	Department of Planning, Industry and Environment
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i>
EPI	Environmental Planning Instrument
LEP	Local Environmental Plan
Minister	Minister for Planning
PBL 2006	Planning for Bush Fire Protection 2006
RMS	Roads and Maritime Services
RtS	Response to Submissions
Secretary	Secretary of the Department of Planning, Industry and Environment
SEPP	State Environmental Planning Policy
SSD	State Significant Development
WAD	Works Authorisation Deed



1. Introduction

1.1 Background

This report is an assessment of an application to modify the development consent (MP 06_0250) for a residential subdivision at Fern Bay.

The proposal seeks to amend the timing for the delivery of the northern intersection with Nelson Bay Road, remove the requirement that the northern intersection be fully constructed prior to the release of subdivision certificates for Stages 18 and 19 and remove an option to reduce the bank guarantee.

The proposal has been lodged by Fern Bay No.1 Pty Ltd (the Applicant) pursuant to section 4.55(1A) of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

1.2 Subject site

The subject site covers an area of 205 hectares and is located off Nelson Bay Road in Fern Bay, approximately 18 kilometres north of Newcastle, in the Port Stephens local government area (see **Figures 1 and 2**).

The site is located between two key coastal features being the Hunter River to the west and Stockton Bight to the east. The site is surrounded by naturally vegetated land on all sides. To the south of the site is the Worimi Conservation Lands, a regional conservation park managed by National Parks in conjunction with the Worimi Aboriginal Traditional Owners. The site and surrounding areas form part of the Newcastle Bight dune barrier system and incorporates key wildlife corridors.



Figure 1 | Site Location

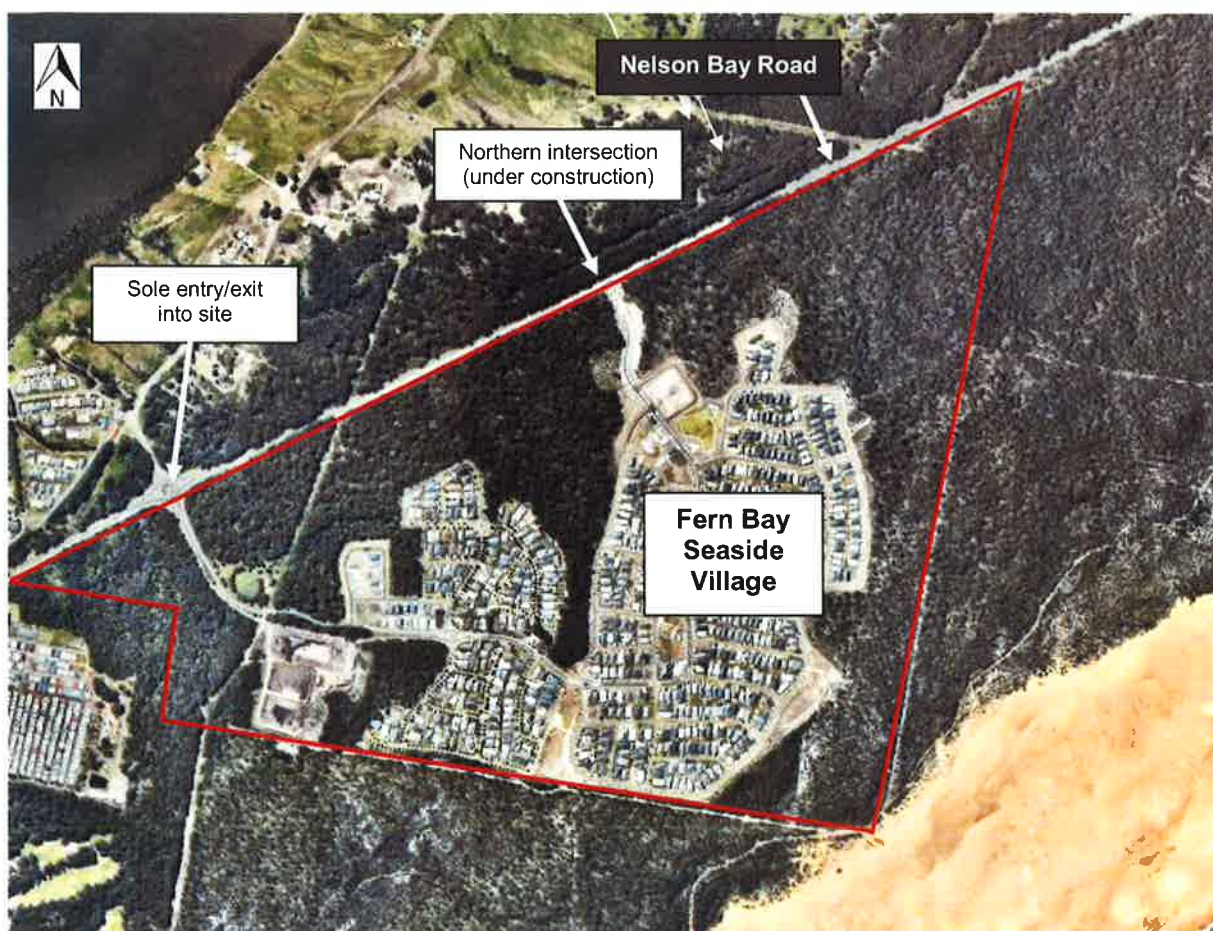


Figure 2 | Subject site shown in red

1.3 Approval history

Council development approval

On 29 September 1997, the Land and Environment Court approved DA 7-1996-41299-1 (Council DA) for a 208-lot residential subdivision on part of the site. The consent has been modified on five occasions. 182 residential lots have been completed and 26 residential lots have been removed to create an asset protection zone (APZ) and conservation areas. This part of the development is known as Stages 1 to 3 of the Fern Bay subdivision.

State Environmental Planning Policy No.71 – Coastal Protection (Master Plan)

On 8 August 2006, the then Minister for Planning adopted a Master Plan (20-4-2005) for the site, prepared in accordance with clause 18 of *State Environmental Planning Policy No.71 – Coastal Protection*. The Master Plan provided for subdivision into 947 residential lots, open space lots, a community nursery, conservation areas, recreational and commercial facilities, new public roads, fire trails, pedestrian trails and APZs (and includes lots approved under the Council DA).

Major project approval

On 28 June 2010, the then Deputy Director-General, Development Assessments and Systems Performance, approved MP 06_0250 for a 411-lot residential subdivision to be constructed across 17 stages (Stages 4 to 20). The approval included:

- bulk earthworks and vegetation clearing
- subdivision of land to create 411 lots under a Community Title scheme (including 370 residential lots, 38 super lots, two commercial lots and one community lot)
- creation of ecological conservation areas to be managed as Community Conservation Lands (under the community lot)
- creation of a recreational and open space network, including formal parks and an Aboriginal cultural heritage reserve, and a recreational/community centre area
- construction of a road network, including internal roads, pedestrian pathways and a shared footpath/cycleway on part of Nelson Bay Road
- construction of stormwater management measures
- creation of APZs
- associated landscaping
- works to connect services (water, sewerage, power and telecommunications).

This approval has been modified on nine occasions, as outlined in **Table 1**:

Table 1 | Summary of Modifications

Mod No.	Summary of Modifications	Approval Authority	Type	Approval Date
MOD 1	Amend the timing for the construction of the cycleway/footpaths, provide a plan detailing the location of detention basin 6, and provide landscaping and revegetation plans for individual stages.	Minister	75W	1 April 2011
MOD 2	Remove the requirement for an Aboriginal Reserve Cultural Heritage Management Plan.	-	75W	Withdrawn
MOD 3	Amend the subdivision layout to incorporate stormwater detention basin 6 within the development footprint.	Department	75W	1 May 2012
MOD 4	Allow Council to accept security (e.g. a bond) in lieu of subdivision works.	-	75W	Not Progressed
MOD 5	Undertake Stage 8 subdivision works within two stages, amend the provision of infrastructure and services, and amend the subdivision and road network layout.	Department	75W	1 April 2014
MOD 6	Amend the requirement for a shared footpath/cycleway and a Dune Restoration/Stabilisation Management Plan.	Department	75W	2 June 2015
MOD 7	Increase lot yield to 580 lots and reconfigure the subdivision layout in Stages 8B, 10 and 13 to 17.	Department	75W	22 June 2015
MOD 8	Subdivide one of the super lots (Lot 56) into 29 residential lots.	Department	75W	16 December 2015
MOD 9	Modifications to Stages 18, 19 and 20 comprising a subdivision of super lots, revised subdivision layouts and	IPC	75W	3 November

	relocation of a wastewater pump station.			2017
MOD 10	To correct an error in Condition A2(18)(c) that references construction of a park in Stage 20, which was removed as part of a previous modification.	Department	4.55 (1)	26 June 2018
MOD 11	Amend the timing for the provision of the northern intersection from Stage 14 to Stages 18 and 19 or 31 December 2019, whichever occurs first.	Department	4.55 (1A)	30 April 2019

Delivery of the northern intersection

Relevant to the subject modification, the project approval (MP 06_0250) required the northern extension of Seaside Boulevard and intersection with Nelson Bay Road (northern intersection) be delivered as part of Stage 14. However, the following modifications have sought to amend or delay the delivery of the northern intersection:

- MOD 3 removed the requirement for stages to be delivered in numerical order, and as such the stages requiring the delivery of the northern intersection are now the last stages to be delivered on the site
- MOD 9 sought to amend the northern intersection from a public road to emergency only track or if this was not acceptable, delay its delivery until to the last stage of the development. The Department recommended this component of MOD 9 be refused due to the importance of the northern access road as an emergency access, evacuation route and a local access road. The then Planning Assessment Commission agreed with the Department's assessment and recommendation, and did not support these components
- MOD 11 amended the delivery of the northern intersection from Stage 14 to prior to release of the subdivision certificates for Stages 18 and 19 (the last two stages of the development) or 31 December 2019, whichever occurred first. The modification was approved, as the Applicant provided the Department with a bank guarantee for 150% of the works (to enable the Department to complete works if the Applicant failed to do so).



2. Proposed Modification

On 14 October 2019, the Applicant lodged a modification application (MP 06_0250 MOD 12) seeking approval to:

- amend the timing for the delivery of the northern intersection with Nelson Bay Road from prior to the release of the subdivision certificates for Stages 18 and 19 or 31 December 2019, whichever occurs first, to 31 March 2020
- remove the requirement that the northern intersection be fully constructed prior to release of the subdivision certificates for Stages 18 and 19
- delete an option for the Applicant to reduce the bond (in Condition E23)
- administrative changes to Conditions A2 and E6 and Statement of Commitment (SoC) 31 to reflect the revised intersection delivery timeframe.

The Applicant contends that since determination of MOD 11, a Works Authorisation Deed (WAD) with Roads and Maritime Services (RMS) has been finalised and a contractor appointed. It also contends that construction works commenced on 8 July 2019 and works are approximately 85% complete (**Figures 3 and 4**). The Applicant also notes:

- while physical construction works are scheduled for completion by the end of 2019, the construction program does not provide for delays due to weather, unexpected finds or the RMS verification/certification process (which takes between one and three months)
- the Department and RMS hold adequate bank guarantees to ensure works can be finalised should the Applicant not complete the road
- temporary emergency access is provided for the duration of construction and the Rural Fire Service (RFS) advised the Applicant that use of the temporary emergency road will not result in additional risk to the public or firefighters
- release of Stages 18 and 19 will not lead to additional residents on the site due to the time it takes to gain further approvals and construction of dwellings.



Figure 3| Construction looking south-west along Nelson Bay Road (Source: Applicant)



Figure 4| Construction of the Seaside Boulevard and Nelson Bay Road (Source: Applicant)



3. Statutory Context

3.1 Part 3A transition to State significant development

The project approval (MP 06_0250) 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 15 June 2018, an Order was published in the New South Wales Government Gazette transitioning the Part 3A project approval (MP 06_0250) to SSD. The application has been lodged under section 4.55(1A) of the EP&A Act for a modification involving minimal environmental impact.

3.2 Scope of modifications

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 application and results in minor environmental impacts.

The matters for consideration under section 4.55(1A) of the EP&A Act that apply to the modification of the project approval have been considered in **Table 2**.

Table 2 | Section 4.55(1A) modification involving minimal environmental impact

Section 4.55(1A) evaluation	Consideration
a) that the proposed modification is of minimal environmental impact, and	Section 5 of this report provides an assessment of the impacts associated with the proposal. The Department is satisfied that the proposed modifications will have minimal environmental impacts.
b) 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), and	The proposed modification seeks approval to change the timing for the delivery of the northern intersection. The Department notes that construction of the northern intersection is nearing completion, and the proposal does not remove the delivery of the road. On this basis, the proposal would result in development that is substantially the same as the originally approved development.

- | | |
|--|---|
| c) the application has been notified in accordance with the regulations, and | The modification application has been notified in accordance with the regulations. Details of the notification are provided in Section 4 of this report. |
| d) any submission made concerning the proposed modification has been considered. | The Department received seven public submissions, comprising three objections, three in support and one comment, and three public authority submissions. Consideration of submissions is provided in Section 4 and 5 of this report. |

3.3 Environmental Planning Instruments (EPI)

The Department considered the original project application against the following EPIs in its assessment:

- State Environmental Planning Policy (Infrastructure) 2007
- State Environmental Planning Policy No. 44 – Koala Habitat
- State Environmental Planning Policy No. 55 – Remediation of Land.

The Department considers the proposed modification does not result in any significant changes that would alter the conclusions made as part of the original assessment.

The Department has also considered the proposed modification against the State Environmental Planning Policy (Coastal Management) 2018 (Coastal SEPP) and Port Stephens Local Environmental Plan 2013 (PSLEP 2013), which have come into effect since the Department's original assessment. As the proposal seeks to change the timing for the delivery of the approved northern intersection, and not further development or construction, the Department is satisfied that the proposal is consistent with these EPIs.

3.4 Consent authority

The Minister for Planning and Public Spaces is the approval authority for the application. However, the Executive Director, Compliance, Industry and Key Sites may determine the application under the delegation as:

- the local council has not made an objection
- a political disclosure statement has not been made
- there are less than 25 public submissions in the nature of objections.



4. Engagement

4.1 Department's engagement

The Department notified the proposal between 22 October 2019 and 5 November 2019 (15 days). It was made publicly available on the Department's website, notified to public authorities, including Port Stephens Council (Council) and the RFS, and landowners of the Fern Bay Seaside Village.

The Department received 10 submissions, comprising seven public submissions and three submissions from public authorities, including an objection from Transport for NSW (TfNSW). RFS did not provide comments on the proposal.

A summary of the submissions is provided below, and a link to the submissions is provided in **Appendix A**.

4.2 Public authority submissions

The submissions received from public authorities are summarised in **Table 3** below:

Table 3 | Summary of public authority submissions

Council

Council advised that it had reviewed the proposal and did not identify any significant issues.

RMS

RMS advised that it did not object to the proposed amendments.

TfNSW

TfNSW objected to the release of the subdivision certificates for Stages 18 and 19 prior to completion of the northern intersection, and raised the following concerns:

- requirements (in Condition B5) that are proposed to change were specifically inserted in MOD 11 to ensure the timely delivery of the northern intersection
- if the northern intersection is not completed, bus services cannot be extended further into the development or additional routes introduced.

4.3 Summary of public submissions

The Department received seven public submissions, comprising three objections, three submissions in support and one comment.

Key concerns raised in objections include:

- the importance of a second road for emergency vehicle access and to allow residents to leave the site during bushfire emergencies

- daily traffic access, including the only site access (being the Seaside Boulevard/Nelson Bay Road roundabout) being busy during peak periods
- marketing promoting connectivity of the estate when residents originally bought into the development
- previous modification (MOD 11) was objected to by the community
- Stages 18 and 19 are not ready to be released as roads and footpaths are not complete
- the Applicant has a record of being fined and not delivering on requirements.

The key reasons for supporting the proposal include:

- ensure enough time available to construct the intersection in a safe manner
- alleviate the financial burden to residents in Stages 18 and 19
- allow residents to commence construction on lots
- residents would not move in prior to the northern intersection being completed.

4.4 Response to Submissions (RtS)

On 28 November 2019, the Applicant submitted a response to submissions (RtS) which noted that:

- the Applicant is committed to delivering the intersection as soon as practicable and since the modification was lodged works are now approximately 85% complete
- it would be financially unviable for the Applicant to not complete the road due to the amount of bank guarantees provided (approximately \$6m)
- Stages 18 and 19 are scheduled for completion by December 2019, and it is unreasonable to require future residents to have to wait until the northern intersection is complete and these residents would not be living in the development before the northern intersection is complete
- the northern intersection is left in/left out and therefore, would not impact on journey times on Nelson Bay Road.



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 issues associated with the proposal is the timing for the delivery of the northern intersection. All other assessment issues are considered in **Table 4** below.

5.1 Delivery of the northern intersection timing

The proposal seeks to amend the date for the delivery of the northern intersection from 31 December 2019 to 31 March 2020 and delete the requirement that the intersection is delivered prior to the release of subdivision certificates for Stages 18 and 19.

The Applicant contends that, while construction is approximately 85% complete, the State holds adequate financial security (of approximately \$6m) to ensure the works are completed. The Applicant also contends that completing the works prior to 31 December 2019 would compromise on-site safety and the construction program does not provide for delays due to weather, unexpected finds or the RMS verification/certification process (which takes between one and three months). RFS have also advised the Applicant that extended use of the temporary emergency road would not result in additional risks to firefighters or the public.

Public submissions were a balance of support (43%) and objections (43%) to the proposal. Submissions objecting to the modification noted the repeated delays to delivering the intersection, the importance of the intersection for emergency access, promises for improved access and that stages 18 and 19 do not appear to be finished. Submissions received in support noted that delays are required to ensure safety, quality of work and would alleviate the financial burden on residents of Stages 18 and 19.

Council and RMS advised they did not have any concerns regarding the proposal. TfNSW objected to the proposal noting that the extended bus service into the site would be impacted should the northern intersection not be completed.

The Department has carefully considered the proposal, and the comments raised in submissions, and maintains its position that delivery of the intersection is important as an emergency access, evacuation route and a local access road for existing and future residents. A greater level of assurance for the

timely delivery of the intersection (in form of a completion date, linking delivery of the road with stages and a bank guarantee) were therefore important requirements in MOD 11, as it was the third time the delivery of the intersection was sought to be amended.

It is noted that a key concern from RFS during MOD 11 was the provision of a temporary emergency road, and a temporary emergency road has been provided as required by MOD 11. The Applicant also noted that RFS has advised use of the temporary emergency road would not result in additional risk to firefighters or public.

Noting the above, the Department therefore considers it reasonable to amend the date for the delivery of the northern intersection from 31 December 2019 to 31 March 2020 and allow Stages 18 and 19 to be released ahead of the completed intersection. In particular, the Department notes:

- since MOD 11 construction works have commenced and the intersection is 85% complete
- the Department (and RMS) hold bank guarantees to complete the works or make improvements should the intersection not be completed
- programing for the completion of the intersection by 31 December 2019 does not contemplate potential delays for unexpected events, such as delays due to weather, or the time needed for RMS to certify the roadworks
- Stages 18 and 19 will not be occupied before the intersection is complete, as these are still subject to relevant approvals and the construction of dwellings.

The Department therefore recommends that Condition B5 be updated to ensure a Notice of Practical Completion is obtained for the northern intersection from RMS prior to 31 March 2020.

5.2 Other issues

Table 2 | Summary of other issues

Issue	Findings	Recommended Condition
Financial security requirements	• The proposal seeks to amend Condition E23(2a) to delete the option for the Applicant to reduce the bank guarantee by 50% once 50% of the value of works has been completed. • The Applicant notes that this will allow the State to hold the full 150% held by the Department (under Condition E23) and 100% held by RMS (standard when undertaking works on RMS owned roads). • The Department supports this component of the proposal, as it means that the guarantee held by the Department and RMS cannot be reduced and these State agencies will continue to hold adequate guarantee for the delivery of the intersection should this not be completed to satisfactory standards by the Applicant.	Delete Condition E23(2a).
Administrative	• The application also proposes amendments to two existing conditions and the Statement of Commitments (SoC), to	Propose changes to Conditions A2

changes

reflect the proposed changes to the timing for the delivery of the intersection, namely:

12(c), E6 and the SoC.

- Condition A2 12(c) to remove a requirement for the northern extension of Seaside Boulevard and the northern intersection to be completed in Stage 14
- Condition E6 requiring all roadworks affecting a State road, including the northern intersection, to be completed prior to the release of the subdivision certificate for the stage they are part of
- SoC to update the date of the document and update SoC 31 to delete reference to the northern intersection being completed as part of Stage 14.
- For the reasons discussed in **Section 5.1**, the Department supports the proposed changes to Condition A2 12(c) and the SoC in relation to the northern extension of Seaside Boulevard and the northern intersection. Recommended changes to Condition B5 appropriately address requirements for the delivery of the northern extension of Seaside Boulevard and the northern intersection by 31 March 2020.
- As the northern intersection is no longer required as part of Stage 14, the Department also recommends amendments to Condition E6 to clarify its delivery in accordance with Conditions B5 and E23.



6. Evaluation

The Department has assessed the proposal in accordance with the relevant requirements of the EP&A Act. The Department considers the proposal is acceptable on the basis that:

- the Applicant has substantially commenced construction works associated with the northern intersection and it is 85% complete
- the northern intersection cannot be delivered to the public any earlier as the Applicant is required to receive RMS certification of the roadworks which typically takes between one to three months
- the mid-works bond reduction option has been deleted, allowing the Department to hold 150% of the northern intersection construction costs until the Applicant receives a Notice of Practical Completion from the RMS
- a temporary emergency access road connecting to Nelson Bay Road is in place until the northern intersection is opened to the public, providing emergency access to and from the site
- the modified proposal would be substantially the same as the original consent.

The Department is satisfied that the modification is approvable, subject to the recommended conditions (see **Appendix D**).



7. Recommendation

It is recommended that the Executive Director, Compliance, Industry and Key Sites, as delegate of the Minister for Planning and Public Spaces:

- **considers** the findings and recommendations of this report
- **determines** that the application MP 06_0250 MOD 12 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
- **modify** the consent MP 06_0250
- **signs** the attached approval of the modification (**Attachment B**).

Recommended by:

Brendon Roberts

Acting Director

Regional Assessments



8. Determination

The recommendation is: **Adopted by:**

Sargeant

Anthea Sargeant

20/12/19

Executive Director

Compliance, Industry and Key Sites



Appendices

Appendix A – Statement of Environmental Effects/ Environmental Assessment

<https://www.planningportal.nsw.gov.au/major-projects/project/25546>

Appendix B – Submissions

<https://www.planningportal.nsw.gov.au/major-projects/project/25546>

Appendix C – Submissions Report

<https://www.planningportal.nsw.gov.au/major-projects/project/25546>

Appendix D – Notice of Modification

see attached