

Fern Bay Seaside Village

State Significant
Development
Modification Assessment
(MP 06_0250 MOD 11)



April 2019

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Glossary

Abbreviation	Definition
Consent	Development Consent
Council	Port Stephens Council
Department	Department of Planning and Environment
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i>
EP&A Regulation	Environmental Planning and Assessment Regulation 2000
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 and Environment
SEPP	State Environmental Planning Policy
SSD	State Significant Development
WAD	Works Authorisation Deed



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1. Introduction

1.1 Background

This report is an assessment of an application seeking to modify an approved residential subdivision at Fern Bay in the Port Stephens local government area.

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

It seeks approval to remove the requirement to provide the northern extension of Seaside Boulevard, including an intersection with Nelson Bay Road, as part of Stage 14 of the development.

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 (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, including the Worimi Conservation Lands to the south which is 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

1.3 Approval History

1.3.1 Council Development Approval

On 29 September 1997, the Land and Environment Court granted approved to DA 7-1996-41299-1 for a 208-lot residential subdivision for part of the site area. The consent was been modified on five occasions. Ultimately, only 182 residential lots were completed under the approval as 26 residential lots were removed to create an asset protection zone and conservation areas. This development is known as Stages 1 to 3 of the overall Fern Bay subdivision.

1.3.2 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 was for a subdivision consisting of 947 residential lots, open space lots, a community nursery, conservation areas, recreational and commercial facilities, new public roads, fire trails, pedestrian trails, and asset protection zones (including the lots approved under the earlier development approval).

1.3.3 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 for the creation of 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

- creation of two sites for commercial areas 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 asset protection zones
- associated landscaping
- works to connect to reticulated services (water, sewerage, power and telecommunications).

The Project Approval has been modified on eight occasions as outlined in **Table 1** below:

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, provision of the plan detailing the location of detention basin 6, and provision of 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	To allow Council to accept security (e.g. a bond) in lieu of subdivision works.	-	75W	Not proceeded with
MOD 5	Undertake Stage 8 subdivision works within two stages, amend the provision of infrastructure and services; 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 from 473 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 relocation of a wastewater pump station.	IPC	75W	3 November 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

1.3.4 Delivery of the Northern Intersection

The original major Project Approval (MP 06_0250) required the northern extension of Seaside Boulevard including the intersection with Nelson Bay Road (northern intersection) to be delivered as part of Stage 14. Both the former Applicant, Aspen Group, and the current Applicant have sought to delay the provision of the northern intersection through various modifications. MOD 3 removed the need for the stages to be delivered in numerical order and as such, Stage 14 is now one of the last stages to be delivered on the site. MOD 9 then sought to change 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. The then Planning Assessment Commission refused the changes due to the importance of the northern access road as an emergency access, evacuation route and a local access road.



2. Proposed Modification

The original proposed modification sought approval to amend conditions which tie the delivery of the northern intersection to Stage 14 of the development (**Figure 3**). It did not propose an alternative timeframe or stage for the delivery of the northern intersection.

The original modification sought to amend the following conditions:

- A2 Staging – remove references to the extension of Seaside Boulevard and the northern intersection being provided as part of Stage 14
- B5 Construction of connection to Nelson Bay Road (at Stage 14) – remove references to the extension of Seaside Boulevard and the northern intersection being constructed as part of Stage 14
- E6 Roadworks and traffic control facilities on State roads – remove the reference that all roadworks be constructed prior to the issue of the subdivision certificate for the relevant stage.

The Applicant stated that the modification is required as Stage 14 construction works are complete, however, the subdivision certificate cannot be released until the northern intersection has been delivered. The Applicant indicated that it commenced discussions with RMS in early 2018 however, it has not yet gained approval to commence the road works.



Figure 3 | Location of the Seaside Boulevard extension and northern intersection in relation to the Stage 14



3. Statutory Context

3.1 Part 3A Transition to State Significant Development

The Project Application (MP 06_0250) was approved under Part 3A of the EP&A Act. On 1 March 2018, the transitional arrangements for Part 3A approvals ended. In order to modify a Part 3A approval, it must be declared SSD by the Minister for Planning and modified under section 4.55 of the EP&A Act.

Under clause 6 of Schedule 2 of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017, the Project Application was transitioned to SSD by Order, which took effect by publication in the NSW Government Gazette on 15 June 2018.

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 6 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 construction of the northern intersection. The Department notes that road works have been completed within the site and the proposal does not remove the need for the northern intersection. The Department has required the extension of Seaside Boulevard, including the northern intersection, be operational before 31 December 2019 or prior to the release of the subdivision certificates for Stages 18 and 19, whichever occurs first. 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 5 of this report.
d) any submission made concerning the proposed modification has been considered.	The Department received 29 public submissions, comprising 19 objections, nine in support and one comment, and four public authority submissions including an objection from Transport for NSW. Details of consideration of the submissions are provided in Section 5 and 6 of this report.

3.3 Environmental Planning Instruments (EPI)

The following EPIs are relevant to the application:

- 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 has considered the proposed modification against these above-mentioned EPIs in its original assessment. The Department considers the modification does not result in any significant changes that would alter the considerations and conclusions made as part of the original assessment.

State Environmental Planning Policy (Coastal Management) 2018 (Coastal SEPP)

The Department has also considered the proposal against the requirements of the Coastal SEPP which commenced on 3 April 2018. The Coastal SEPP consolidates and replaces SEPP 14 (Coastal Wetlands), SEPP 26 (Littoral Rainforests) and SEPP 71 (Coastal Protection). The Department considered the development against SEPP 71 in its original assessment.

The Coastal SEPP identifies the south-east corner of the site as located within the Coastal Environment Area and therefore clause 13 applies. The Department has considered the proposal against this clause and is satisfied that the proposal is consistent with the Coastal SEPP as the proposal does not seek to change the footprint of the development and would not have any additional coastal impacts beyond those already assessed and approved in the original assessment.

Port Stephens Local Environmental Plan 2013 (PSLEP 2013)

The Department has also considered the proposal against the requirements of the PSLEP 2013, which commenced 22 February 2014. The PSLEP 2013 replaced the Port Stephens Local Environment Plan 2000 (PSLEP 2000). The Department considered the development against PSLEP 2000 in its original assessment.

The site is zoned partly R2 Low-Density Residential, E2 Environmental Conservation and B2 Local Centre. The northern intersection is located on land partly zoned R2 Low-Density Residential and E2 Environmental Conservation. The Department has considered the proposal against the PSLEP 2013 and is satisfied that the proposal does not alter any physical elements of the northern intersection and continues to provide road access to service the existing and proposed low-density residential dwellings in the site.

3.4 Consent Authority

The Minister for Planning is the approval authority for the application. However, the Executive Director, Key Sites and Industry Assessments 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 an objection.



4. Engagement

4.1 Department's Engagement

4.1.1 Modification application

The Department notified the proposal for 15 days between Monday 29 October 2018 and Monday 12 November 2018. The proposal was made publicly available on the Department's website, notified to government agencies including Central Coast Council (Council) and landowners and occupiers of the Seaside Fern Bay development.

The Department received a total of 33 submissions, comprising four submissions from government agencies, including an objection from Transport for NSW (TfNSW), and 29 public submissions including 19 objections. A summary of the submissions is provided below, and a full copy of the submissions is provided in **Appendix A**.

4.1.2 Response to Submissions

On 17 December 2018, the Applicant provided a Response to Submissions (RtS) on the issues raised during notification. The RtS was made publicly available on the Department's website and referred to the government agencies for comment. **Section 4.4** of this report discusses the content of the RtS.

4.2 Public Authority Submissions

The issues raised by public authorities are summarised in **Table 3** below:

Table 3 | Summary of Public Authority Submissions

Council	
Modification Application	<p>Council did not object to the modification, however, provided the following comments:</p> <ul style="list-style-type: none">there is no objection to removing the requirement for the road construction to be complete prior to the issue of the subdivision certificate for Stage 14, subject to the required road construction being completed at a later stage.
RtS	<ul style="list-style-type: none">Subject to the Department being satisfied that Council's original comments have been addressed, no further comments are raised.
NSW Rural Fire Service (RFS)	
Modification Application	<p>RFS indicates the modification does not satisfy the aims and objectives of 'Planning for Bush Fire Protection 2006' (PBP 2006) as:</p> <ul style="list-style-type: none">details have not been provided of the commitment and timing of the construction of the northern intersectionthe current emergency access arrangements are not suitable, and the proposal should detail minimum design standards for the agency access if it is to be used during emergencies.
RTS	<p>The proposal does not satisfy the aims and objectives of PBP 2006 as:</p> <ul style="list-style-type: none">sufficient justification has not been provided for deferring construction of the northern intersection until after the subdivision certificates have been issued for Stage 14, noting the critical nature of the northern intersection for access/egress in a bushfire emergencyuntil the intersection works have been completed, emergency access should be maintained to Nelson Bay Road.

Roads and Maritime Services (RMS)

Modification Application

- RMS noted that the northern intersection is not needed from a traffic perspective, however, is needed for emergency access should a bushfire cause the primary access road to be closed
- The proposal does not provide alternative timing for delivery of the northern intersection.
- Monetary security required under the Works Authorisation Deed (WAD) relates to construction risk and is required following design acceptance prior to construction commencing.
- The WAD monetary security cannot be relied on to deliver the northern intersection works as stated in the proposal. Should the Applicant not undertake the works, RMS will not be responsible to deliver the works.
- The Department should be satisfied that appropriate security is held to deliver the works on behalf of the development which is to occur at no cost to the RMS, TfNSW or Council.

RTS

- RMS re-iterated its previous position.
- If the modification is supported, delivery of the intersection be should be triggered by a lot threshold rather than a stage.

TfNSW

Modification Request

- The current modification will also delay future bus routes servicing the site and currently prevents the existing bus service from adequately servicing the entire site.
- TfNSW supports maintaining condition B5 as approved and does not support the modification.

RTS

- TfNSW re-iterated its previous position
- If the modification is supported, delivery of the intersection should be triggered prior to an occupancy certificate being issued for lot 30 of Stage 14.

4.3 Summary of Public Submissions

The Department received 29 public submissions in response to notification of the proposal, including a submission of support from the Fern Bay/Fullerton Cove Progress Association. The majority of submissions (19 submissions) objected to the proposal.

Key concerns raised in the public objections include:

- the importance of a second road to allow emergency vehicles to access the site and to allow residents to leave the site during bushfires and medical emergencies, particularly if the primary road is blocked
- daily access issues including the Seaside Boulevard/Nelson Bay Road roundabout being busy during peak periods, the bus service not servicing the entire site and reduced internal connectivity
- increasing the potential that the northern intersection will not be built
- marketing material promoting the second access when residents originally bought into the site at the early stages has not been delivered
- an alternative time for delivery not being provided
- the construction cost of the northern intersection identified by the Applicant is not accurate.

Figure 4 identifies the issues raised in the public objections to the proposal.

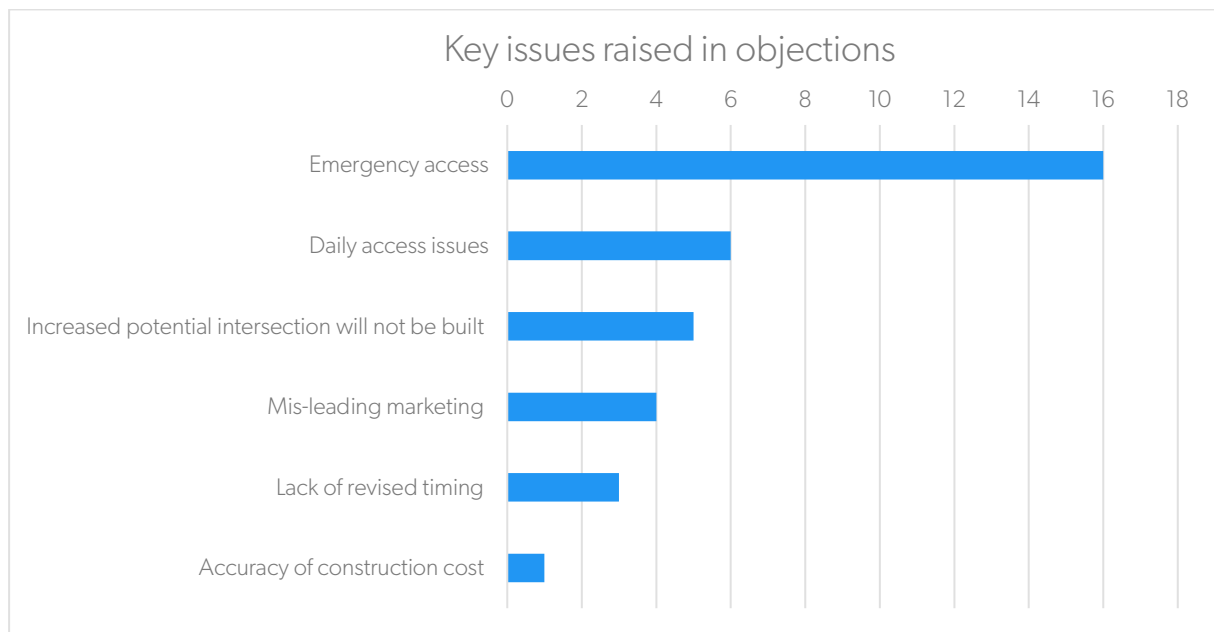


Figure 4 | Issues raised in public objections to the modification

The Department also received nine submissions in support of the modification. The key reason for support of the modification was the excessive time purchasers of Stage 14 have had to wait to receive subdivision certificates for the land. A number of the submissions requested that the Applicant be required to construct the northern intersection prior to the end of 2019 and provide a bond for the cost of the works.

4.4 Response to Submissions (RtS) and Additional RtS

In response to the issues raised by the public authorities and public during notification, the Applicant submitted an RtS on 17 December 2018 which:

- advised the northern intersection will be provided as part of Stage 19 and will take approximately 26 weeks to build once RMS approval is received
- confirmed that after receiving the submissions, including from RFS, the Applicant installed double locked gates and removed material stockpiles along the emergency access track
- clarified that the Applicant is not seeking to remove the requirement to construct the northern intersection and has completed internal road works associated with the extension of Seaside Boulevard on the site.

The Department raised concerns with the timing proposed, advising the Applicant that any alternative timing should not delay the provision of the northern intersection.

An additional RtS was submitted on 4 March 2019 and 5 March 2019, in which the Applicant clarified the terms of the proposed bond to the Department and RMS.



5. Assessment

In assessing the merits of the modification request, 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 environmental planning instruments, policies and guidelines
- the requirements of the EP&A Act.

The Department considers the key issue associated with the modification application is the potential delay to the provision of the northern intersection.

5.1 Delivery of the northern intersection

The original proposed modification sought approval to modify the condition of approval to remove the requirement for the northern intersection to be constructed as part of Stage 14. It did not provide an alternative timeframe for the delivery of the northern intersection.

The majority of public submissions objected to separating the delivery of the northern intersection from Stage 14, noting the importance of the road for emergency and general access. Public submissions also raised concern about the modification increasing the risk that the intersection would not be built and that current residents on the site were promised a second access when they purchased lots within the subdivision.

The Department also received submissions supporting the modification as some purchasers of lots within Stage 14 have been waiting several years for the release of the lots.

TfNSW objected to the proposal as it would delay buses servicing the site. RMS noted that the northern intersection is not needed to alleviate traffic congestion, however, it is required to provide emergency access should a bushfire block the primary road. RMS also advised that the monetary security provided to RMS through the WAD cannot be used to deliver the intersection, should the developer not complete the works. RFS advised that the modification did not comply with the aims and objectives of the PBP 2006 as the current emergency track did not meet minimum design standards. RFS also raised concern about a timeframe not being provided for the delivery of the intersection. Council did not raise any concerns about the proposal subject to the northern intersection being provided at a later stage.

In response to the concerns raised, the Applicant advised that:

- the northern intersection would be provided as part of Stage 19
- a bank guarantee for 100% of the construction cost of the intersection prior to the release of the subdivision certificate for Stage 14
- material stockpiled in the emergency access track had been cleared.
- the intersection will take six months to complete and reiterated the Applicant's commitment to delivering the road.

The response was referred to TfNSW, RFS and RMS for comment. The agencies reiterated their previous concerns given the Applicant's desire to again delay the provision of the access.

Department's consideration

The Department notes MOD 9 previously sought approval to change the northern intersection from a local road (which is open to the public) to an emergency only access road or, if this change was not acceptable, delay the delivery of the road until the release of a subdivision certificate for the 609th residential lot (of 631 lots). The Department, TfNSW and RFS did not support the proposed changes as it resulted in a negative outcome for the subdivision, particularly in the event of a bushfire emergency. As such, the proposal to delay the delivery of the northern intersection was refused as part of MOD 9.

The Department maintains its position that the northern intersection should be delivered as soon as possible, given it plays an important role as an emergency access, evacuation route and a local access road for existing and future residents. However, the Department acknowledges that since the determination of MOD 9, the Applicant has taken a number of positive steps towards delivering the intersection. The Applicant has now completed the extension of Seaside Boulevard up to the beginning of the required intersection onto Nelson Bay Road and sought approval for the intersection works from RMS. The Applicant has also advised that it would take approximately six months to complete the intersection works.

The Department considers the RMS approval for the intersection works should have been sought earlier, given it has been a requirement for Stage 14 since 2010. However, as the Applicant has not yet gained RMS approval for the works and it would still take approximately six months to construct the intersection (following any approval) the Department accepts the intersection cannot be physically delivered any earlier. The Department therefore considers it is reasonable to amend the trigger for the delivery of the intersection to allow Stage 14 to proceed, provided the intersection is delivered within six months. As this is the third time the intersection works have sought to be delayed, the Department considers a greater level of assurance and security is required to ensure the northern intersection is delivered. The Department therefore recommends that the conditions be strengthened to require:

- the northern intersection to be delivered prior to 31 December 2019 (six months plus two months buffer for potential construction delays) or prior to issue of the subdivision certificates for Stages 18 and 19, whichever occurs first.
- the Applicant to provide the Department with a bank guarantee for 150% of the construction cost of the intersection with Nelson Bay Road prior to the release of any subdivision certificate following approval of this modification. The bank guarantee may be reduced to 75% of the construction cost, once half of the value of the works have been completed and the remaining amount released once the works are fully completed. Note this bank guarantee is separate to the standard bond paid by all developers to the RMS for works within State road reserves.
- the Applicant to provide a temporary emergency road connecting to Nelson Bay Road prior to the release of the subdivision certificate for Stage 14. This emergency road must be in place at all times until the northern intersection has been opened to the public.

The Department considers the above conditions would address the TfNSW concerns as it would require delivery of the northern intersection before issue of the occupation certificate for lot 30 in Stage 14.

The Department also referred the revised conditions to the RFS for comment. RFS advised the conditions are acceptable subject to the emergency access being provided in accordance with the requirements of PBP 2006. The Department has incorporated RFS's comments in the recommended conditions accordingly.

Overall, the Department considers the recommended conditions would strike a reasonable balance between allowing Stage 14 to proceed while still ensuring the northern intersection is delivered as soon as possible. Subject to the recommended conditions, the Department considers the proposal is acceptable.



6. Evaluation

The Department has assessed the modification application and supporting information in accordance with the relevant requirements of the EP&A Act. The Department's assessment concludes that the proposed modification is appropriate as:

- the northern intersection cannot be delivered earlier as the Applicant has not obtained RMS approval for works within Nelson Bay Road
- condition B5 has been strengthened to require the works be provided prior to 31 December 2019 or prior to the release of the subdivision certificates for stage 18 and 19, whichever occurs first
- the Applicant is required to provide the Department with a bank guarantee for the works
- a temporary emergency access road connecting to Nelson Bay Road must be in place at all times, until the northern intersection is opened to the public, providing emergency access to and from the site
- it strikes a balance between delivering the northern intersection as soon as possible while alleviating the burden placed on the purchasers of Stage 14.

Consequently, the Department concludes the proposal is approvable, subject to the recommended conditions outlined in **Appendix B**.



7. Recommendation

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

- **considers** the findings and recommendations of this report;
- **determines** that the application MP 06_0250 MOD 11 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;
- **agrees** with the key reasons for approval listed in the draft notice of decision;
- **modify** the consent MP 06_0250; and
- **signs** the attached approval of the modification (Attachment B).

Recommended by:

Michelle Niles

Senior Planner
Regional Assessments

Recommended by:

Anthony Witherdin

Director
Regional Assessments



8. *Determination*

The recommendation is: **Adopted by:**

Anthea Sargeant

Executive Director

Key Sites and Industry Assessments



Appendices

Appendix A – List of Documents

- *MP 06_0250, Seaside Estate, Fern Bay, Modification Number 11* prepared by Monteath & Powys Pty Ltd dated 28 September 2018
- Response to Submissions prepared by Monteath & Powys Pty Ltd dated 17 December 2018
- Further information submitted by Rawson Communities dated 4 March 2019 and 5 March 2019

Appendix B – Modification Request

A copy of the Modification Request can be found on the Department's website at the following link:

http://www.majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=9672

Appendix C – Submissions

A copy of the Submissions received by the Department can be found on the Department's website at the following link:

http://www.majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=9672

Appendix D – Response to Submissions Report

A copy of the Applicant's Response to Submissions Report and additional information can be found on the Department's website at the following link:

http://www.majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=9672

Appendix E – Approval of the Modification Applicant

A copy of the draft Notice of Modification can be found on the Department's website at the following link:

http://www.majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=9672