

Cabarita Beach Mixed Use Development Modification 7

Cabarita Beach Mixed Use Development Council Contribution Amounts
Recalculation
State Significant Development Modification Assessment
(MP 07_0179 MOD 7)

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Glossary

| Abbreviation | Definition |
|----------------------------|--|
| CPP | Community Participation Plan |
| Council | Tweed Shire Council |
| Department | Department of Planning and Environment |
| EP&A Act | <i>Environmental Planning and Assessment Act 1979</i> |
| EP&A Regulation | <i>Environmental Planning and Assessment Regulation 2021</i> |
| EPI | Environmental Planning Instrument |
| LEP | Local Environmental Plan |
| Minister | Minister for Planning |
| SEPP | State Environmental Planning Policy |
| SSD | State Significant Development |

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1 Introduction

This report provides the NSW Department of Planning and Environment's (the Department's) assessment of an application to modify the State significant development (**SSD**) consent for the Cabarita Beach mixed use development at 39 Tweed Coast Road, Bogangar.

The modification application seeks approval for the recalculation of Council contributions amounts.

The application was lodged on 28 June 2022 by Joanne Kay (the Applicant) pursuant to Section 4.55(1) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**).

1.1 Background

The site is located in Cabarita Beach/Bogangar in the Tweed Shire local government area, between Tweed Coast Road and Hastings Road. The site is legally known as Lot 1 DP 1185345, has frontages to Hastings Road to the west and Tweed Coast Road to the east and a site area of 5,485 square metres (**Figure 1** and **Figure 2**). The Applicant operates a retail space and supermarket at the site as approved in Stage 1 of this development.

Cabarita Beach/Bogangar is a coastal village approximately 12 kilometres (km) south of the New South Wales/Queensland state border. The subject site is centrally located within the Cabarita/Bogangar business area and approximately 200 metres (m) from Cabarita Beach. Tweed Coast Road is the main arterial road servicing coastal settlements from the Tweed Heads district to the north.



Figure 1 | Regional Context Map (Source: Appendix A of Modification 6 Report (2020) – Additional Locality Plan)



Figure 2 | Local Context Map (Source: Appendix A of Modification 6 Report (2020) – Additional Locality Plan)

1.2 Approval history

On 2 December 2009, the then Director General, as delegate for the then Minister for Planning approved the development application under Part 3A of the EPA Act. The project comprised of the following development:

- Ground level commercial floor space comprised of 2310m² supermarket and 1106m² of retail specialty shops;
- 40 residential apartments (shop-top housing);
- A ground level public forecourt;
- Pedestrian thoroughfare;
- Site landscaping;
- Basement and surface car parking comprised of 204 car parking spaces and loading facilities;
- Three access points from Hastings Road;
- Excavation works; and
- Signage.

The development consent has been modified on five occasions (see **Table 1**).

Table 1 | Summary of Modifications

| Mod No. | Summary of Modifications | Approval Authority | Type | Approval Date |
|----------------|--|--------------------------------|-------------|----------------------|
| MOD 1 | Increased size of supermarket and decrease area of specialty retail space, allow staged development and modifications to approved unit layout to reduce number of units from 40 to 38. | Minister | Part 3A Mod | 21 December 2011 |
| MOD 2 | Extension to the approved hours of operation of the commercial premise to 7.30am to 9pm 7 days a week for retail uses and 7am to 6pm Monday to Saturday for deliveries. | Planning Assessment Commission | Part 3A Mod | 8 December 2012 |
| MOD 3 | Withdrawn | - | - | 19 April 2014 |
| MOD 4 | Modification of the terms of Schedule 1 and Conditions A2 and B22(4) of the Project Approval to include Lots 1 and 2 in DP 772172, and Lots 188, 189 and 190 in DP 259164 within the approved project area at the request of Tweed Shire Council to finalise dedication of the public laneway. | Minister | Part 3A Mod | 19 December 2014 |
| MOD 5 | Amendment of Condition B22 (4) to correct a minor error in the wording of this condition. | Minister | Part 3A Mod | 15 April 2015 |
| MOD 6 | Modification to correct wording to reflect approved plans, update the monetary contributions and seek minor design changes. | Minister | SSD Mod | 19 February 2021 |

2 Proposed modification

The modification application seeks to amend Condition B29 – Section 94 Monetary Contributions and Condition B30 – Section 64 Monetary Contributions to correct a perceived miscalculation of contributions provided to the Department by Council during the assessment of Modification 6.

The proposed modification requests the recalculation of Section 94 and Section 64 contributions to reflect the base rates at the time of the original consent and the recalculation of trip numbers and Equivelant Tenement (ET) amounts to reflect the reduction in units and bedroom numbers from the original consent to Modification 6.

Since determination of the original consent, EP&A Act has been amended and Section 94 contributions are now referred to as Section 7.11 contributions. For consistency with the consent and previous assessments, these plans will be referred to as Section 94 contribution plans in this assessment.

Condition B29 – Stage 2 Section 94 Monetary Contributions

The proposed modification seeks to modify the contribution amounts of all Section 94 contribution plans for the residential component (Stage 2) to either increase or decrease the amounts to reflect the plan in force at the time of original consent.

The contribution plans proposed to be increased are:

- S94 Plan No.5 Open Space (Casual)
- S94 Plan No.5 Open Space (Structured)
- S94 Plan No.13 Environ Cemetery
- S94 Plan No.16 Emergency Facilities (Surf Lifesaving)
- S94 Plan No.18 Extensions to Council Administration Offices and Technical Support Facilities

The contribution plans proposed to be decreased are:

- Tweed Road Contribution Plan No.4
- S94 Plan No.11 Shire Wide Library Facilities
- S94 Plan No.12 Bus Shelters
- S94 Plan No.15 Community Facilities (Tweed Coast – South)
- S94 Plan No.22 Cycleways
- S94 Plan No.26 Regional Open Space (Casual)
- S94 Plan No.26 Regional Open Space (Structured)

The Applicant also proposes that the trip numbers and ET amounts for the contributions have been not been amended correctly to reflect the reduction in units from 40 to 38 during Modification 6. The Stage 2 Tweed Road Contribution Plan No.4 is calculated off of trip numbers, with 3.9 trips generated by each unit. The remaining Stage 2 Section 94 contribution plans are calculated based on ETs.

Condition B30 – Section 64 Monetary Contributions

The proposed modification seeks to amend the schedule of Section 64 contributions in Condition B30 to reflect the correct number of units, in line with the reduction from 40 to 38 units. The Applicant acknowledges that the Section 64 contributions applicable are subject to the plan in force at the date of payment and therefore is subject to the current contribution amounts for both sewer and water. Therefore, the modification seeks a recalculated schedule of Section 64 contributions, in line with the current plan and correct number of units.

3 Statutory context

3.1 Scope of modifications

The Department has reviewed the scope of the modification application and considers that components of the application, as outlined in **Section 5.1**, can be characterised as a modification involving minor error, misdescription or miscalculation as the proposal corrects transcription errors of contribution ETs and miscalculations as a result of the modification to the by Council.

Therefore, the Department is satisfied the proposed modification is within the scope of Section 4.55(1) of the EP&A Act and does not constitute a new development application. Accordingly, the Department considers that the application should be assessed and determined under Section 4.55(1) of the EP&A Act rather than requiring a new development application to be lodged.

3.2 Consent authority

The Minister for Planning is the consent authority for the application under Section 4.55(1) of the EP&A Act. However, in accordance with the Minister's delegation, the Director, Regional Assessments, may determine this application as:

- A political disclosure statement has not been made;
- There are less than 15 public submissions (other than a council) in the nature of objections; and
- The council has not made a submission by way of objection under the mandatory requirements for community participation in Schedule 1 of the Act.

3.3 Mandatory matters for consideration

3.4 Part 3A transition to State significant development

This project was originally approved under the former section 75J of the EP&A Act and was a transitional Part 3A project under Schedule 2 of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 (EP&A (ST&OP) Regulation).

Following amendments to the EP&A Act and the commencement of the associated EP&A (ST&OP) Regulation on 1 March 2018, the power to modify Part 3A project approvals under former section 75W is no longer available for modifications submitted after 1 March 2018. In order to modify a transitional Part 3A project approval, the Minister for Planning and Public Spaces can declare the development to be SSD by order under clause 6 of Schedule 2 of the EP&A (ST&OP) Regulation. If a declaration is made the project approval becomes a development consent which can be modified under Part 4 of the EP&A Act if it meets the relevant criteria.

On 8 October 2020 the Director of Regional Assessments (as delegate of the Minister for Planning and Public Spaces), made an order under clause 6 of Schedule 2 to the EP&A (ST&OP) Regulation

declaring the development the subject of the project approval to be SSD. The order was published in the NSW Government Gazette on 16 October 2020 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
- The modification request is taken to be an application to modify under Section 4.55 of the EP&A Act.

4 Engagement

4.1 Department's engagement

The *Environmental Planning and Assessment Regulation 2021* (EP&A Regulation) does not contain notification requirements for Section 4.55(1) modifications. As per the Department's Community Participation Plan formal exhibition is not a requirement. Accordingly, the application was not notified or advertised. However, it was referred to Tweed Shire Council for comment and made publicly available on the Department's website and no public submissions were received.

4.2 Summary of submissions

On 15 July 2022 Council provided comments regarding the following:

- The calculation of Stage 2 Section 94 contributions during MOD 6 was correct and the process of indexation and adjustment of contribution rates current at the time of payment
- Acknowledgement of transcription error in MOD 6 for the Section 94 Plans (Plans 5, 11, 12, 13, 15, 16, 18, 22 & 26) ET amounts (no impact on contribution amounts)
- Correct ET amounts for the Section 94 Plans (Plans 5, 11, 12, 13, 15, 16, 18, 22 & 26) ET amounts
- The calculation of Section 64 contributions during MOD 6 were correct
- Provision of the current Section 64 contributions

4.3 Additional Council Comments

The Department requested additional information from Council on 5 August 2022. Council provided the additional information on 11 August 2022 including:

- Contribution notes from the time of calculation for both the original consent and MOD 6
- Comments on the method of calculation of ETs for Section 94 contributions in 2009 and currently
- Correction of error in calculations of Section 94 Plan 18 in previous comments provided 15 July 2022
- Correction of Section 64 contributions in previous comments provided on 15 July to reflect the updated commercial floor areas as approved in MOD 1

The Department requested further additional information from Council on 15 August 2022. Council provided the additional information on 22 August 2022 including:

- Confirmation of method of calculation of Tweed Road Contribution Plan 4 for original consent and the exclusion of the kiosk area

- Confirmation of payment of Stage 1 contributions on 20 May 2013
- Correction of error in calculations of Section 94 Plan 18 in previous comments provided 11 August 2022 to reflect the updated commercial floor areas as approved in MOD 1

The Department also referred the draft Condition 29 and Condition 30 to Council for review on 24 August 2022. Council confirmed that the ETs, rates and contribution amounts in the draft conditions were correct and provided the correct contribution amount for Plan 18 on 25 August 2022.

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 approval for the original application and subsequent modifications;
- requirements of the EP&A Act and Regulations.

5.1 Scope of Section 4.55(1) Modification

In the modification application, the Applicant asserts that MOD 7 is made under s 4.55(1) 'to correct a miscalculation in terms of Section 64 and Section 7.11 contributions'.

Through consultation with Council and the Applicant, it was concluded that not all of the proposed modifications fall within the scope of a 4.55(1) modification application. This is due to the asserted miscalculation not constituting a clear minor error or miscalculation and is rather a product of difference in opinion on the application of Council contributions plans.

Therefore, after consultation with the Applicant, the Department has excluded the components of the modification which aimed to modify the consent to revert to the base rates at the time of original consent, as these do not fall within the scope of a Section 4.55(1) modification.

The proposal will move forward as a Section 4.55(1) modification application to only correct clear minor errors or miscalculations by Council.

The modification application therefore will correct the following errors:

- Correction of transcription errors in MOD 6 for the Section 94 Plans (Plans 5, 11, 12, 13, 15, 16, 18, 22 & 26) ET amounts as outlined in Section 5.3;
- Correction of Section 94 Plan 18's ET to 15.9471 ET to correct Council's error in not accounting for the correct credit after the modification of the commercial element in MOD 1; and
- Section 64 contributions as outlined in **Section 5.4**.

5.2 Tweed Road Contribution Plan No.4

The proposal seeks modification to Condition B29's Tweed Road Contribution Plan No. 4 (TRCP 4) due to the increase in trips from the original consent to MOD 6, despite the reduction in units from 40 to 38.

Council has provided the Department with the contribution notes from the time of calculation for both the original consent and MOD 6. The composition of trips numbers (between the commercial and residential components) is outlined in **Table 2**.

Table 2 | Composition of Trip Numbers for TRCP 4

| Consent | Commercial Trips (Stage 1) | Residential Trips (Stage 2) | Total Trips | Units |
|-----------------|---------------------------------------|--|--------------------|--------------|
| Original | 291.333 | 156 | 447.333 | 40 |
| MOD 1 | 321.773 | 156 | 477.773 | 40 |
| MOD 6 | 321.773 | 148.2 | 469.973 | 38 |
| Change | + 30.44 | -7.8 | + 22.64 | -2 |

The overall increase in total trips from the original consent to MOD 6 is due to the increase in trips for Stage 1 between the original and MOD 1.

The Stage 1 fees have been paid and this part of the condition has therefore been satisfied.

The residential component of the trip composition is calculated as 3.9 trips per unit. The original consent included 40 units and therefore 156 trips. The reduction in 2 units translates to a 7.8 trip reduction as per the MOD 6 consent.

Therefore, the trip numbers for the residential component have reduced from 156 to 148.2 when the units were reduced from 40 to 38. The current approved consent includes the correct trip numbers for the approved residential component (Stage 2) of the development. The Department considers that the consent does not require modification.

5.3 Recalculation of Section 94 Contribution ET Amounts

Plans 5, 11, 12, 13, 15, 16, 18, 22 & 26

As part of MOD 6, Council provided the Department with contributions for the approved apartment mix (24 x 1 bed units and 14 x 2 bed units) as well as the proposed unit mix (22 x 1 bed mix and 16 x 2 bed mix) using the current contribution rates. No change was made to the trip generation for the commercial element. The Department approved the contributions provided by Council for the proposed (now approved) unit mix of 22 x 1 bed and 16 x 2 bed.

The proposed modification outlines that the ET amounts provided and subsequently approved were incorrectly amended to reflect the reduction in units from 40 to 38 units.

The Department referred this matter to Council who provided comments that the rates and total amounts provided were correct, although Council acknowledges that there was a transcription error in the ET amounts.

Council has provided the correct ET amounts for Stage 2. The ET's have reduced in accordance with the reduction in units.

The Department has reviewed Council's comments and the calculations and are satisfied that the calculations, and therefore the dollar amounts for each Section 94 contribution plan (with the exception of TRCP 4 and Plan 18) are correctly calculated based off the correct ET amounts and do no warrant modification.

The Department recommends a modification to the consent to reflect the correct ET amounts to correct the transcription error, to prevent any misunderstandings or miscalculations in future, including when applying for Occupation Certificate.

Plan 18

The modification sought a recalculation of Plan 18 as part of the recalculation of all Section 94 contribution amounts. During consultation with Council, Council have identified a error with the calculation of Plan 18 *Extensions to Council Administration Offices & Technical Support*.

When calculating contributions, the development site had a credit of 9ET. When the development was amended to introduce a staged development during MOD 1, no charges for Plan 18 were imposed for the commercial component of the development (Stage 1). During MOD 1, the overall Plan 18 ET's (charged to Stage 2) was modified from 18.7255 ET to 18.751 ET. Council has advised that this is likely due to a change in the method of calculation of ET's.

During MOD 1, the commercial element was modified, with a reduction in floor space and change in composition of commercial elements (specialty retail, supermarket etc.). This change in commercial element would have impacted on the credit applied to the residential element (Stage 2). The reduction in floor area should have translated to a reduction in the amount of credit (of the 9ET site credit) that the commercial element would have consumed, therefore reducing the Plan 18 charges for the residential element. This reduction was not done as part of MOD 1, and Council have acknowledged that this was an error.

Council have provided the correct calculations for Plan 18 as follows:

- Plan 18 site credit = 9ET
- Commercial (Stage 1) Plan 18 charges = $3392\text{sqm (total commercial floor area)} / 300\text{sqm} = 11.3066 \text{ units} \times 0.15028 (\$338.45 / \$2,252.11) = 1.6991\text{ET}$
- Plan 18 credit available for Stage 2 = $9\text{ET} - 1.6991\text{ET} = 7.3008\text{ET}$
- Plan 18 residential charges = $23.248\text{ET} - 7.3008\text{ET (credit)} = 15.9471\text{ET}$

Therefore, the correct credit for Plan 18 for the residential component (Stage 2), as per the approved commercial element is 1.6991 ET.

Therefore, the correct ET, after this correction is 15.9471 ET and the dollar amount to be \$35,914.62. This is a reduction from the original and MOD 1, to reflect the correction as outlined above, as well as the reduction in units from 40 to 38.

The Department is satisfied with Council's calculations and has recommended a modification to the consent to correct this miscalculation by Council.

5.4 Section 64 Contributions

The proposal includes modification to the Section 64 contributions as the ET's have increased, even though the dwellings and bedroom numbers have decreased from the original to MOD 6.

For the Section 64 contribution charges, Council as part of MOD 6 outlined the updated charges based on the approved unit mix and the proposed unit mix.

Council provided comments regarding the calculation of these Section 64 contributions, noting that due to the lack of evidence how the entitlements were previously calculated during the original assessment and MOD 6, the entitlements have been recalculated using the most current methods.

The original Section 64 contributions, as per the original consent, are as follows:

Table 2 | Section 64 Contributions in Original Consent

| | ET | Fee | Total |
|--------------------------------|--------|----------|-------------|
| Water Developer Charges | 6.4952 | \$10,709 | \$69,557.10 |
| Sewer Developer Charges | 14.779 | \$5,146 | \$76,052.73 |

The current Section 64 contributions, as per MOD 6, are as follows:

Table 3 | Section 64 Contributions in MOD 6

| | ET | Fee | Total |
|--------------------------------|--------|----------|--------------|
| Water Developer Charges | 6.510 | \$11,268 | \$73,358.30 |
| Sewer Developer Charges | 14.859 | \$7,288 | \$108,292.40 |

Council has provided the new recalculation amounts, to be included in MOD 7, as follows:

Table 4 | Section 64 Contributions recalculated for MOD 7

| | ET | Fee | Total |
|--------------------------------|--------|----------|--------------|
| Water Developer Charges | 5.7772 | \$11,728 | \$67,775.00 |
| Sewer Developer Charges | 13.692 | \$7,585 | \$103,853.80 |

These ET amounts both reflect a reduction in ET from the original to reflect the reduction in units from 40 to 38.

The Department is satisfied with Council's calculations and has recommended a modification of the consent to reflect the new calculations.

6 Evaluation

The Department has assessed the proposed modification, including supporting information, in accordance with the relevant requirements of the EP&A Act. The Department considers the proposed modification, subject to conditions of consent, as appropriate as the modification corrects the miscalculation of Council contribution amounts.

The Department is satisfied that the modification can be approved, subject to the recommended conditions (**Appendix C**).

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 Cabarita Beach Mixed Use Development Modification 7 falls within the scope of Section 4.55(1) 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 approve the modification
- modify the consent MP07_0179
- signs the attached approval of the modification (**Appendix C**).

Recommended by:



Tahlia Sexton
Senior Planning Officer
Regional Assessments

Recommended by:



Christopher Eldred
Acting Team Leader
Regional Assessments

8 Determination

The recommendation is **Adopted** by:

A handwritten signature in blue ink, consisting of the letters 'K' and 'T' followed by a long horizontal stroke.

Keiran Thomas

Director

Regional Assessments

as delegate of the Minister for Planning

Appendices

Appendix A – Modification Report

<https://www.planningportal.nsw.gov.au/major-projects/projects/cabarita-mixed-use-development-mod-7-contributions-recalculation>

Appendix B – Council Submissions

<https://www.planningportal.nsw.gov.au/major-projects/projects/cabarita-mixed-use-development-mod-7-contributions-recalculation>

Appendix C – Instrument of Modification

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