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+ MODIFICATION OF MAJOR PROJECT APPROVAL NO. MP05_0198 (MOD5)
PROPOSED 84 LOT RESIDENTIAL SUBDIVISION
**AT LOT 1 DP 134787, LOT 1 DP 167380, LOT 2 DP 961928 & LOT 5 DP 1117326 WALMSLEYS ROAD
& STOTT STREET, BILAMBIL HEIGHTS**

• Prepared For: **WDLC Pty Ltd, M Walmsley, R Walmsley, H Mabbut, V Bailey & D Millar** | • Prepared by: **DAC Planning Pty Ltd** | • May 2019 |

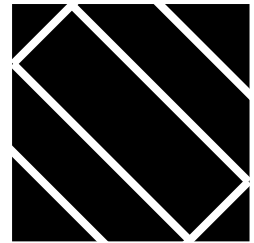


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1.0 INTRODUCTION

The owners of the subject land have instructed DAC Planning Pty Ltd to prepare and lodge a Modification Application in relation to Major Project Approval No. MP05_0198 (MOD5) to modify Condition A2(1A) to state that survey work and geotechnical work that does not require tree removal are excluded from the need to meet the requirements outlined in the condition.

2.0 BACKGROUND

On 2 August 2012, the Planning and Assessment Commission (PAC) issued Major Project Approval No. 05_0198 for an 84 lot subdivision of the subject land. A copy of the Approval is attached at **Annexure A**.

On 5 June 2017, the Approval was modified (MOD1). A copy of the Modified Approval is contained at **Annexure B**.

On 12 October 2017, the Director of Modification Assessments modified the Project Approval (MOD2) by amending Condition A6 to extend the lapse date to 2 August 2018. A copy of the Modified Approval is contained at **Annexure C**.

On 6 July 2018, the Approval was modified (MOD3) to extend the lapse date to 2 August 2019. A copy of the Modified Approval is contained at **Annexure D**.

On 1 August 2018 Modification Application No. 4 was lodged via the Department's Online Lodgement Portal. MOD4 requests amendment of Conditions B24 and E7 as the conditions cannot be complied with in their current form. On 17 August 2018, Tweed Shire Council made a submission in relation to MOD4 relating to ecological and bushfire issues.

Negotiations are continuing with Tweed Shire Council and the Rural Fire Service to try and resolve the ecological and bushfire issues arising from the current Project Approval. In summary, it is not possible to comply with the terms of the current Project Approval without potentially losing a substantial number of approved allotments. Obviously, we are attempting to avoid the loss of any allotments, however that is taking considerable time and despite co-operation from Tweed Shire Council Officers, in our view, it is highly unlikely that we will be able to resolve these issues, obtain approval of MOD4, obtain a Construction Certificate and commence the project prior to 2 August 2019. This is particularly the case as Tweed Shire Council has to sign off on the Management Plans, the bushfire issue will require an engineered solution and Rural Fire Service sign off and ultimately, it is possible that the MOD may need to be reported to the IPC for determination if we cannot obtain agreement from Council.

On 7 March 2019, the Department was consulted by email in relation to options available to enable preliminary work on the project to be commenced.

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On 15 April 2019, the Department suggested that submitting a further Modification Application to modify the wording of Condition A2 to state that survey works that do not require tree removal are excluded from needing to meet the requirements outlined in the Condition would be the preferred option.

3.0 IMPLEMENTATION OF MAJOR PROJECT APPROVAL NO. 05_0198

Action has been taken by the proponent to implement the approval including:

- ♦ Lodgement of Construction Certificate Application No. 17/0329 with Tweed Shire Council on 30 June 2017 and appointment of Tweed Shire Council as the PCA for the preliminary works authorised by Condition A2(1A).

The Tree Removal Plan (TRP) required by Condition A2(1A) has been submitted to the Department of Planning and Environment (DoPE) for approval, however the Department advised by email on 19 October 2017 that, if the Vegetation Management Plan (VMP) is approved by Tweed Shire Council, then the Department can consider the TRP.

A VMP was submitted to Tweed Shire Council on 27 October 2017, however Council has requested further investigations and amendment of the Plan. Amendment of the Plan is in progress.

- ♦ Lodgement of Construction Certificate Application No. 17/0640 with Tweed Shire Council on 16 November 2017 and appointment of Council as the PCA for subdivision works pursuant to Major Project Approval No. 05_0198.

The Major Project Approval is dependent on Development Consent No. DA15/0042 and Construction Certificate No. 17/0726 lodged with Tweed Shire Council on 11 December 2017 for subdivision work pursuant to that consent, which is for a 20 lot subdivision on land to the immediate south of the Major Project site, because both projects involve common sewer infrastructure and fill material for the Major Project site is to be obtained from the Development Consent site.

Tweed Shire Council has issued Requests for Further Information (RFIs) in relation to the Construction Certificates and a response will be submitted to Council as soon as possible.

In summary, the Project Approval is complex and includes many conditions which need to be complied with prior to the issue of Construction Certificate No. 17/0329 (for preliminary works) and/or Construction Certificate No. 17/0726 for subdivision work. In addition, Construction Certificates No. 17/0726 and 17/0640 need to be assessed and issued concurrently because of the common sewer infrastructure and transfer of fill from one site to the other.

However, the Construction Certificates cannot be issued until Conditions B24 and E7 are amended as proposed in the MOD4 Application.

4.0 THE ENVIRONMENTAL PLANNING AND ASSESSMENT REGULATION 2000

Pursuant to Clause 115 of the Regulation, an application for modification of a development consent is required to contain information as discussed below.

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a) **The Name and Address of the Applicant**

The applicants for this Section 4.55(1A) Application are WDLC Pty Ltd, M Walmsley, R Walmsley, V Bailey, H Mabbut & D Millar. Additional details are provided on the Application Form.

b) **The Development to be Carried Out Under Major Project Approval No. MP05_0198**

On 2 August 2018, Major Project Approval No. MP05_0198 was issued for an 84 lot residential subdivision. A copy of the Approval and Approved Plans are attached at **Annexure A**.

c) **Address and Formal Particulars of Title of the Land**

The site is legally described as Lot 1 DP 134787, Lot 1 DP 167380, Lot 2 DP 961928 and Lot 5 DP 1117326 Walmsleys Road and Stott Street, Bilambil Heights.

d) **Description of the Proposed Modification to Major Project Approval No. MP05_0198**

Condition A2(1A) of the Project Approval (as modified) is in the following terms:

A2 Staging

The project is to be constructed in seven (7) stages, generally in accordance with Revision L of Plan 35054 dated 24.03.16 prepared by Landsurv Pty Ltd, incorporating the lots as follows:

(1A) Stage 1A Preliminary Works Stage comprising:

- Removal of the existing trees within and adjacent to the alignment of approved Roads 3 and 5. Prior to removing any trees within or adjacent to approved Roads 3 and 5 the Proponent shall:
 - submit a Tree Removal Plan for the approval of the Secretary identifying all trees proposed to be removed within Stage 1A; and*
 - provide a copy of the approved Tree Removal Plan to the PCA prior to the issue of a Construction Certificate authorising any tree removal works**
- Surveying of all proposed road alignments including placing pegs, observing levels and preparing spatial data.*
- The following conditions of approval shall be complied with prior to commencing the preliminary works stage: conditions C1 to C4, Condition C10, and conditions C12 to C14."*

To enable preliminary works, including placing pegs on the proposed road alignments and drilling geotechnical bore holes on the proposed road alignments, to be carried out on grassland only, it is proposed to amend Condition A2(1A) as follows:

A2 Staging

The project is to be constructed in seven (7) stages, generally in accordance with Revision L of Plan 35054 dated 24.03.16 prepared by Landsurv Pty Ltd, incorporating the lots as follows:

(1A) Stage 1A Preliminary Works Stage comprising:

- Removal of the existing trees within and adjacent to the alignment of approved Roads 3 and 5. Prior to removing any trees within or adjacent to approved Roads 3 and 5 the Proponent shall:

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- submit a Tree Removal Plan for the approval of the Secretary identifying all trees proposed to be removed within Stage 1A; and
 - provide a copy of the approved Tree Removal Plan to the PCA prior to the issue of a Construction Certificate authorising any tree removal works
 - Surveying of all proposed road alignments including placing pegs, observing levels, preparing spatial data **and drilling geotechnical bore holes on road alignments. Survey work and geotechnical work that does not require tree removal is excluded from the need to meet the requirements outlined in this Condition.**
 - The following conditions of approval shall be complied with prior to commencing the preliminary works stage: conditions C1 to C4, Condition C10, and conditions C12 to C14.

e) Effect of Proposed Modification

The modification is intended to enable preliminary work to commence in grassland areas of the site without the need to comply with the prerequisite conditions relating to tree removal.

In this regard, the proposed modification is to be made pursuant to Section 4.55(1A) of the Environmental Planning and Assessment Act, 1979.

f) Description of Expected Impacts of the Modification

Having regard to the administrative nature of the proposed modification, it is not expected that the modified project will have any additional adverse impacts as the preliminary work will be limited to grassland areas of the site.

In granting approval for the original Project Application, the Planning and Assessment Commission has accepted that the potential impacts associated with the proposal were not unreasonable.

g) An undertaking to the effect that the development (as to be modified) will remain substantially the same as the development that was originally approved

As indicated in Section 5.0, the modification as proposed will not result in any physical changes to the project as approved. Therefore, as modified, the project will remain substantially the same as that originally approved.

h) If the applicant is not the owner of the land, a statement signed by the owner of the land to the effect that the owner consents to the making of the application (except where the application for the consent the subject of the modification was made, or could have been made, without the consent of the owner)

Owner's Consent is **attached**.

i) A statement as to whether the application is being made to the Court (under section 96) or to the consent authority (under section 96AA), and, if the consent authority so requires, must be in the form approved by that authority.

The application is made to the DoPE as the Consent Authority. The relevant form is attached to the application.

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5.0 ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (AS AMENDED) & ENVIRONMENTAL PLANNING AND ASSESSMENT (SAVINGS, TRANSITIONAL AND OTHER PROVISIONS) REGULATION, 2017

Clause 3BA of Schedule 2 of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation, 2017 (the Regulation) provides that a Project Approval cannot be modified under Section 75W of Part 3A (as saved for transitional projects) after 1 March 2018. Therefore, this Modification Application is lodged under Section 4.55(1A) of the Environmental Planning and Assessment Act (EPAA), on the basis that it will involve minimal environmental impact.

Section 4.55(1A) of the Act relates to modifications involving minimal environmental impact and is in the following terms:

“(1A) Modifications involving minimal environmental impact

A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

- (a) it is satisfied that the proposed modification is of minimal environmental impact, and*
- (b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and*
- (c) it has notified the application in accordance with:*
 - (i) the regulations, if the regulations so require, or*
 - (ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and*
- (d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.*

Subsections (1), (2) and (5) do not apply to such a modification.”

With regard to Section 4.55(1A)(a), the proposed modification to the project is unlikely to create more than minimal environmental impact given that it only involves administrative amendments to Conditions A2 to state that survey and geotechnical work that does not require tree removal are excluded from the need to meet the requirements in the Condition. No changes to the design of the project or conditions of approval (other than B24 and E7) are proposed.

Pursuant to Section 4.55(1A)(b), before the consent authority can modify the consent, it must be satisfied in relation to the threshold requirement that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted.

The Land and Environment Court has made a number of decisions in relation to this threshold question, as discussed in the following sections.

In *Moto Projects (No. 2) Pty Ltd v North Sydney Council (1999)* Bignold J described the following test in determining the threshold question:

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"The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified. The result of the comparison must be a finding that the modified development is "essentially or materially" the same as the (currently) approved development.

The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified where that comparative exercise is undertaken in some type of sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development consent was granted)."

Further, in *Wolgan Action Group Incorporated v Lithgow City Council* (2001) Talbot J addressed the question of "substantially the same development" in the context of Section 4.55.

In forming his view, Talbot refers to case law as follows (note relevant definitions underlined):

*"In Vacik Pty Limited v Penrith City Council (Stein J, NSWLEC, 18 February 1992, unreported), Stein J adopted a meaning for "substantially" where used in the earlier s 102(1)(a) of the EP&A Act as "essentially or materially or having the same essence". In *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 97 LGERA 433 at 440, Mason P expressly agreed with the view taken by Stein JA. Mason P also said, at p 439, that in the context of s 102 the verb modify meant "to alter without radical transformation" (see *Sydney City Council v Ilenace Pty Ltd* (1984) 3 NSWLR 414 at 421)". In *Standley* Stein JA also reiterated the view he expressed in *Vacik*.*

In *Standley* Stein JA also reiterated the view he expressed in *Vacik*.

Following on from the tests established in these cases and based on numerous Land and Environment Court decisions, it is apparent that the following key principles apply:

- The comparison is undertaken at a general level rather than between detail;
- The question is whether the development as a whole is essentially or materially similar to the originally approved development;
- If the impacts of the modifications are minor, the modified development is more likely to be essentially or materially the same development;
- It is relevant to consider the magnitude of any physical changes to the development and any changes to the use of the land.

Having regard to the fact that the operational details of the development will not change and the key principles discussed above, it is submitted that the threshold question is satisfied on the basis that:

- The development as a whole, being for an 84 lot subdivision, will remain unchanged.
- The proposed modification will not alter the statutory or policy compliance of the proposal, create any other material difference and does not give rise to any significant environmental impacts.

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- The likely impact of the modification is minor.
 - No changes to the nature, scale, intensity and lot layout of the development will occur.

Accordingly it is submitted that the proposed modification will not represent a substantial change to the originally approved development and that the proposed modification to the Approval will represent substantially the same development as the development for which the Approval was originally granted.

Pursuant to Section 4.55(1A)(c), public notification of the proposed modification to the Approval is to be in accordance with the Regulation. Clause 117(2) of the Regulation states that the notification of Section 4.55(1A) Applications are to be in accordance with a Development Control Plan.

Clause 4.0 of the relevant Tweed Development Control Plan 2008, Section A11 – Public Notification Policy, states that the Plan only applies to modifications of Approvals under Section 4.55(2) of the EP&A Act 1979. Accordingly there is no requirement to advertise the subject application.

In considering an application to modify an Approval under Section 4.55(1A) of the Act, Section 4.55(3) requires the consent authority to take into account relevant Section 4.15(1) matters.

Relevant Section 4.15(1) matters are addressed as follows:

a) the provisions of:

i) Any Environmental Planning Instrument

MP05_0198 was approved based on the planning controls contained in Tweed Local Environmental Plan 2000 (TLEP2000). Condition A4 of the Approval requires the project to be undertaken in accordance with the Environmental Assessment Report dated November 2006, as revised in June 2009, prepared by Darryl Anderson Consulting Pty Ltd.

Figure 1 contained in the Environmental Assessment shows the zoning of the land as mainly 2(c) Urban Expansion together with an area zoned 7(d) Environmental Protection (Scenic Escarpment).

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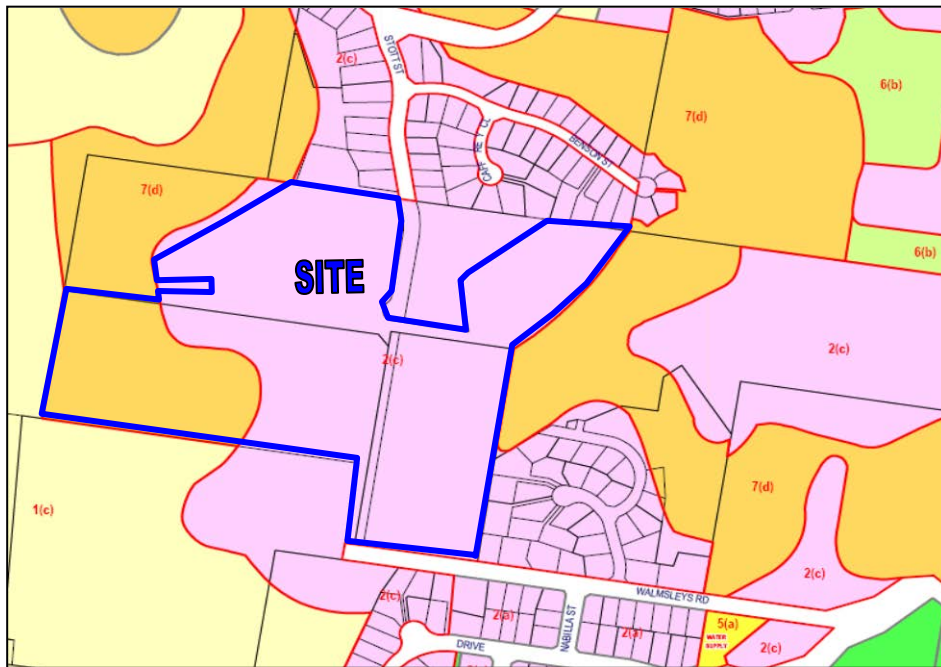


Figure 1 – Site Location and Zoning
 Source: Figure 1 of Environmental Assessment, DAC, November 2006

On 4 April 2014, TLEP2000 was replaced by Tweed Local Environmental Plan 2014 (TLEP2014). Under the provisions of TLEP2014, the land previously zoned 2(c) Urban Expansion is now zoned R1 General Residential, as indicated on **Figure 2**.

The remaining land is a Deferred Matter and therefore retains the 7(d) zoning under TLEP2000.

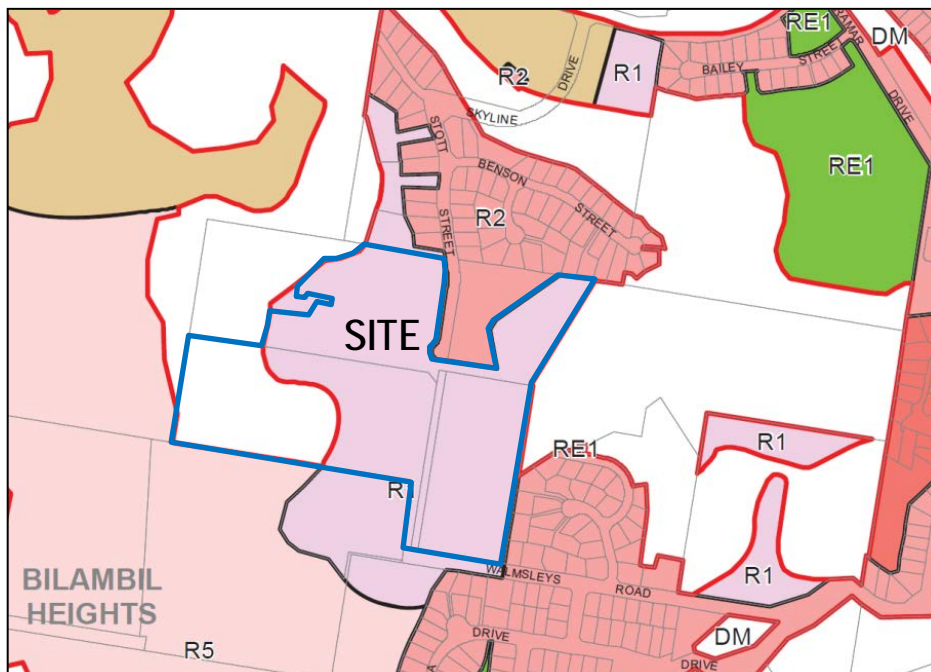


Figure 2 – Zoning Map
 Source: Tweed Local Environmental Plan 2014

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A minimum lot size of 450m² continues to apply to the R1 zoned land and the approved residential lots comply with this requirement.

In summary, the Project Approval, as proposed to be modified, is not inconsistent with the provisions of TLEP2014 or TLEP2000.

ii) Any Exhibited Draft Planning Instrument

Not applicable.

iii) Development Control Plans

Tweed Development Control Plan 2008 contains various controls. Given that there will be no change to the layout and operational details of the Approval, it is considered that modification of the Approval, as proposed, will not be inconsistent with any relevant provisions of Tweed Development Control Plan 2008.

iiia) Planning Agreements

Not applicable.

iv) Provisions of the Regulations.

Not applicable.

v) Any coastal zone management plan.

Not applicable.

b) Likely Impacts of the Development

Given the administrative nature of the proposed modification, no significant impacts are likely to occur.

c) The Suitability of the Site for the Development

As acknowledged when the project was originally approved, the site was and remains, suitable for the proposed development.

d) Any Submissions Made In Accordance With the Act or Regulations

It is a matter for the Department to consider any submissions made in respect of the Modification Application.

e) The Public Interest

Under the provisions of the Far North Coast Regional Strategy (FNCRS) 2006-2031, that part of the site zoned R1 is within the existing urban footprint.

Under the North Coast Regional Plan 2036 (NCRP), that part of the site zoned R1 remains in the urban growth area footprint (Figure 18).

In summary, the project is not inconsistent with the NCRP or the FNCRS.

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As there has been no change in the statutory or strategic planning regime for the site since the original project was approved and as there are no physical changes to the scale, layout or intensity of the development, it is submitted that modification of Condition A2(1A) would not be inconsistent with the public interest and would not give rise to any significant adverse environmental impacts.

6.0 SUMMARY AND CONCLUSIONS

In summary, approval of this Modification Application will enable the project to be commenced prior to 2 August 2019 and proceed to the construction stage, when all relevant prerequisite conditions have been complied with, such that additional lots are provided to meet the continuing demand for housing in the northern sector of Tweed Shire.

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