



Planning & Environment

ASSESSMENT REPORT

Section 75W Modification Bay Ridge Estate Residential Subdivision, Eurobodalla Local Government Area (DA 172-7-2005 MOD 3)

1. BACKGROUND

This report is an assessment of a request to modify the Project Approval for the Bay Ridge Estate residential subdivision at North Batemans Bay in the Eurobodalla Local Government Area (LGA) (DA 172-7-2005 MOD 3). The request has been lodged by Canberra Investment Corporation Australia Pty Ltd (the Proponent) pursuant to Section 75W of the *Environmental Planning and Assessment Act 1979* (the EP&A Act). The application seeks to revise the lot layout and staging arrangements for Stage 2B of the project to take advantage of increased densities permitted under the *Eurobodalla Local Environmental Plan 2012* (Eurobodalla LEP).

2. SUBJECT SITE

The Bay Ridge Estate is located immediately north of Batemans Bay on the NSW south coast, approximately 280 kilometres (km) south of Sydney. The site is approximately 88 hectares (ha) in area.

Clyde Road and the Benadarah State Forest are located to the north of the site, large lot residential developments are located to the east of the site, the Clyde River and the Batemans Bay Regional Centre are to the south, and the Kings Highway is located to the west of the site (see **Figure 1**). Site access is via the corner of the Kings and Princess Highways (see **Figure 2**).



Figure 1: Location of the Bay Ridge Estate

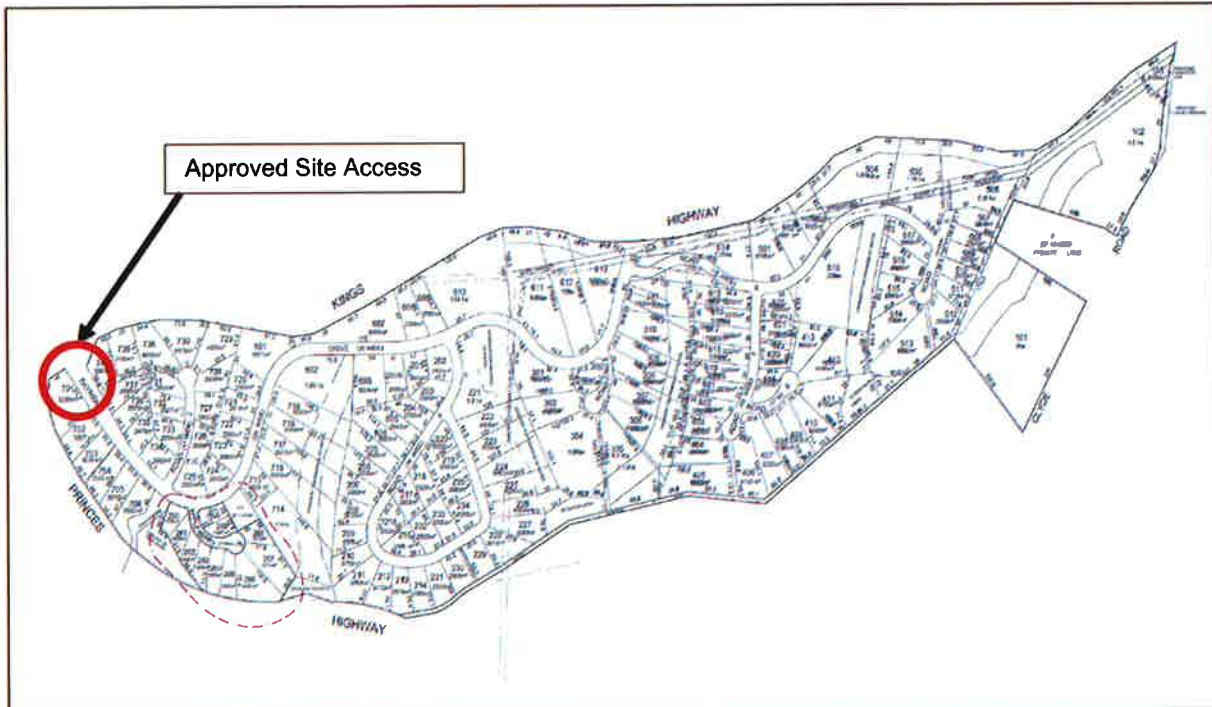


Figure 2: Site Access Arrangements

3. SITE HISTORY

In June 2004, the then Deputy Director-General, Sustainable Assessments and Approvals, as delegate of then Minister for Infrastructure and Planning, adopted the North Batemans Bay Masterplan pursuant to clause 18 of *State Environmental Planning Policy No. 71 – Coastal Protection* (SEPP 71). The Masterplan provides for the future redevelopment of the site into 150 rural residential lots ranging in size between 2,500 m² and 31,811 m².

On 7 December 2006, the then Minister for Planning approved DA172-7-2005 for the subdivision of the site into 142 lot residential lots pursuant to section 80(1)(a) and 80A of the EP&A Act.

The approval permitted:

- the creation of 142 residential lots ranging in size between 2,500 m² and 31,811 m² to be subdivided over eight stages;
- building envelopes for each lot, generally 400 m² in size;
- visual buffers along the Kings and Princes Highways;
- vegetation buffers within the site;
- an internal road system and pedestrian/cycle network;
- installation of water, sewer, stormwater, electricity and telecommunications infrastructure;
- the establishment of asset protection zones for allotments adjoining vegetation buffers; and
- the construction of a temporary sales office.

The application has been modified on two occasions to:

- increase the number of lots from 142 to 147;
- reduce the number of stages from eight to seven; and
- realign Road 6.

In addition, the Proponent has advised that it has obtained a Construction Certificate for the bulk earthworks required to facilitate the construction of the internal road network. To date,

all clearing required to undertake the road works has been completed, and the Proponent is undertaking the physical road works on a staged basis.

4. PROPOSED MODIFICATION

The modification request seeks approval to:

- create 10 additional lots within Stage 2B;
- reconfigure the road layout in Stage 2B;
- undertake the subdivision works within Stage 2B in two stages (Stage 2B1 and 2B2); and
- amend the building envelopes within stage 2B.

The proposed modifications to the approved plan of subdivision are depicted in **Figure 3** below.

The Proponent has advised that the modification is required to respond to the demand for smaller residential lots in the locality, as well as to provide consistency with the minimum lot sizes permitted under the Eurobodalla LEP.

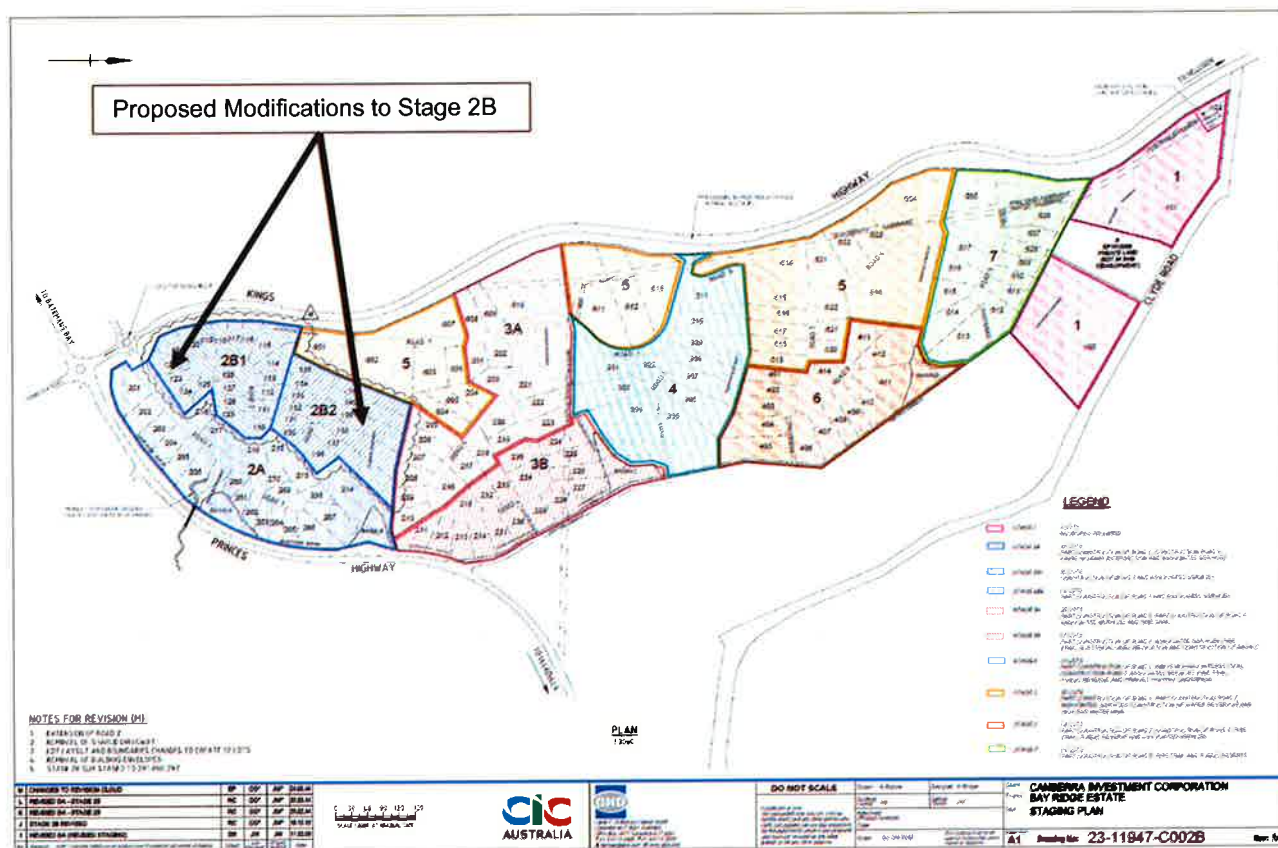


Figure 3: Proposed Modifications to the Lot Layout and Staging Arrangements for Stage 2B

5. STATUTORY CONTEXT

5.1 Approval Authority

On 16 February 2015, the then Minister for Planning delegated responsibility for the determination of section 75W modification requests to executive directors who report to the Deputy Secretary, Planning Services where:

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

As the Proponent has made a reportable political donation, the modification request cannot be determined under the Instrument of Delegation dated 16 February 2015. Accordingly, it is recommended that the modification request be referred to the Planning Assessment Commission (PAC) for determination.

5.2 Section 75W

Part 3A of the EP&A Act, as in force immediately before its repeal on 1 October 2011, and as modified by Schedule 6A, continues to apply to section 75W modifications to State significant development applications transitioned to Part 3A of the EP&A Act pursuant to clause 8J(8)(c) of the EP&A Regulation.

The Department of Planning and Environment (the Department) is satisfied that the proposed changes constitute a modification to the original development consent and are within the scope of section 75W of the EP&A Act as:

- the primary function and purpose of the approved development would not change as a result of the proposed modification; and
- the environmental impacts associated with the development remain unchanged, and can be appropriately managed through the existing or modified conditions of approval.

Accordingly, the Department considers that the modification request can be determined under section 75W of the EP&A Act.

5.3 Consultation

The Department referred the modification request to the Eurobodalla Shire Council (the Council), the NSW Rural Fire Service (the RFS), and the Office of Environment and Heritage (the OEH) for comment. Given the minor nature of the modification request, it was not publicly exhibited.

Submissions were received from the Council, the RFS and the OEH. No public submissions were received. A summary of the issues raised in the submissions is provided below.

The **Council** advised that the application may result in lots 115-122 and 136-141 being prone to an increased level of bushfire attack in comparison to the approved development (Bushfire Attack Level (BAL) 29 originally assessed, and BAL 40 calculated by the Council). In order to address this issue the Council requested the imposition of a condition requiring all lots within the site to achieve a BAL of 40 or lower.

In order to verify the bushfire attack level for each lot within Stage 2, the Department requested that the Proponent revise its bushfire compliance advice. The findings of the supplementary bushfire compliance advice are discussed in greater detail in **Section 5.4** and **6.2** of this report.

The **RFS** requested modifications to the existing conditions of approval to ensure all roads, car parking and landscaped areas and any reciprocal easements comply with the standards outlined in *Planning for Bushfire Protection 2006* (PBP 2006). The Department has recommended revisions to the conditions of consent to ensure the application is consistent with the requirements of PBP 2006.

The **OEH** advised that it had the following concerns:

- the application does not specify whether any additional clearing is required to facilitate the proposed lot configuration and building envelopes. In addition, the application does not specify the extent of clearing required to provide appropriate asset protection zones if lots 115-122 and 136-141 need to be modified to comply with PBP 2006;
- the OEH and the Batemans Bay Local Aboriginal Land Council (BBLALC) have received no evidence that the Proponent has complied with Condition 1.13 of the existing approval, which requires the submission of a report on all actions undertaken in accordance with the previous section 90 permit for the site; and
- as the Section 90 permit has now expired, the Proponent will need to obtain a new section 90 permit prior to the removal of any Aboriginal artefacts of PADs.

The Department requested that the Proponent address these issues in its Response to Submissions (RTS).

5.4 Response to Submissions

On 7 July 2014, the Proponent lodged a RTS to address the agency submissions. The RTS contained additional information, including:

- a supplementary bushfire assessment to verify the level of bushfire threat for the proposed lots within Stage 2B;
- updated drawings to clarify that no additional clearing is required to establish the APZs for lots 115-122 and 136-141; and
- correspondence demonstrating compliance with the Section 90 permit.

The Department referred the RTS to the OEH and the RFS for comment. A summary of the comments provided by the OEH and RFS is provided below.

The **OEH** requested that the Department impose conditions to ensure all future dwellings are constructed to a higher bushfire attack level to avoid the need for additional clearing. In addition, the OEH reiterated that it has no record of any on-site salvage works undertaken by the Proponent in accordance with Section 90 Permit 2099.

In September 2014, the Proponent provided an Archaeological Site Assessment Report which outlined the extent of works undertaken in accordance with the previous section 90 permit. In this regard, the OEH advised that subject to the subdivision works within Stage 2B being restricted to the Aboriginal cultural heritage sites that have already been disturbed, a new section 90 permit is not required for any works within Stage 2B.

Notwithstanding, the OEH advised that a new a section 90 permit is required for any subdivision works that will disturb potential relics outside of Stage 2B that were not previously removed under Section 90 Permit 2099. The Department has recommended conditions to ensure the Proponent obtains appropriate approvals from the OEH and the Department prior to undertaking any excavation works that will disturb any potential relics outside of Stage 2B.

The **RFS** accepted the recommendations of the supplementary bushfire assessment, and recommended that the Department require the provision of increased APZs for lots 115-122

and 136-141. As these APZs will not require any additional clearing, the Department has recommended conditions to ensure the APZs comply with the requirements of PBP 2006.

6. ASSESSMENT

The Department has considered the following in its assessment of the modification application:

- the modification request, RTS and supplementary information provided to support the proposed modification (see **Appendix B**);
- all submissions received by the Department (see **Appendix C**); and
- the Director-General's assessment reports for the original development application and previous modification requests.

Based on the above, the Department considers the key issues for assessment are:

- revisions to the lot layout and staging arrangements within Stage 2B;
- compliance with the North Batemans Bay Masterplan;
- bushfire protection; and
- aboriginal cultural heritage.

These issues are discussed in **sections 6.1 to 6.3** below.

6.1 Revisions to the Lot Layout and Staging Arrangements within Stage 2B

The modification request seeks approval to increase the number of lots within Stage 2B from 22 to 32 lots. In addition, the application seeks approval to:

- specify that the building envelopes for lots within stage 2B can be less than 400 m², provided that they meet the performance criteria contained in the *Eurobodalla Residential Zones Development Control Plan*; and
- undertake the subdivision works within Stage 2B in two stages (stages 2B1 and 2B2).

The proposed modifications are depicted in **Figure 4** overleaf.

As previously outlined, Proponent has advised that the proposed modifications are sought to respond to the demand for smaller lots within the locality, and to provide consistency with the minimum lot sizes permitted under the Eurobodalla LEP.

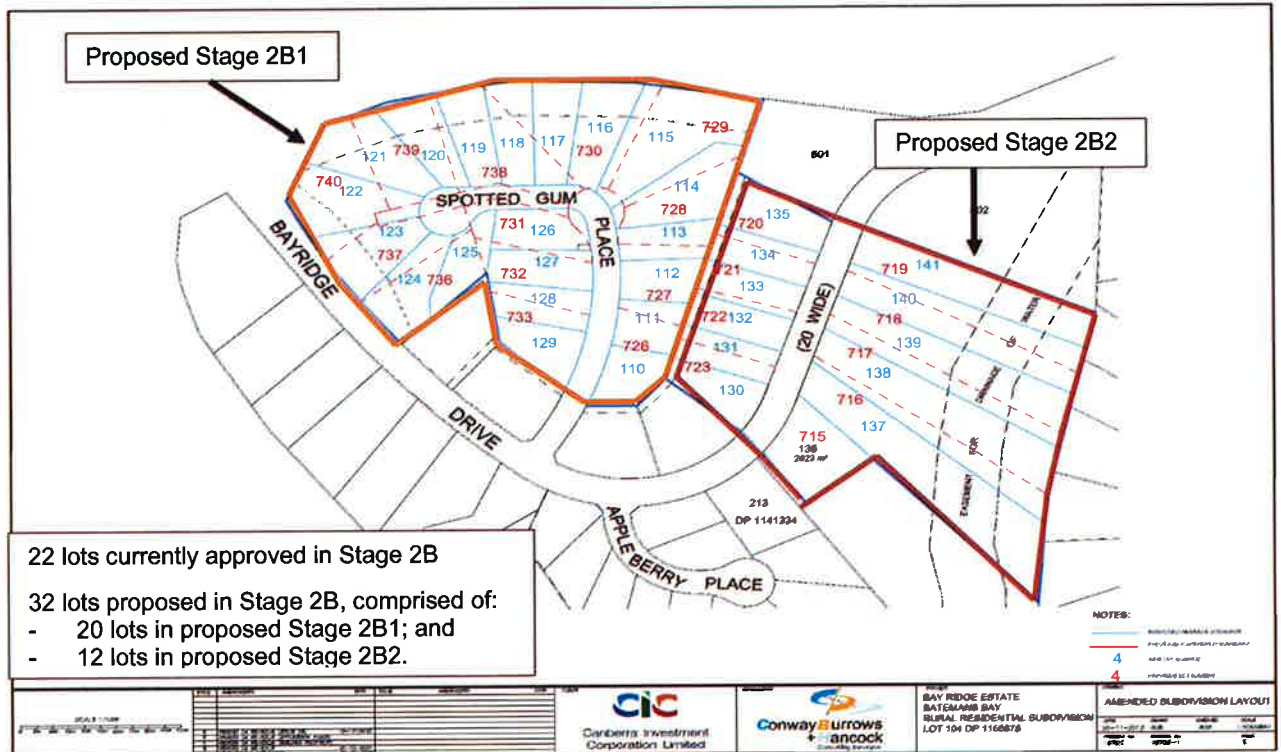


Figure 4: Proposed Revisions to the Layout of Stage 2B (approved lot layout in red, proposed lot layout in blue)

On 20 July 2012, the Eurobodalla LEP was gazetted and rezoned the site 'R5 - Large Lot Residential'. In this regard, the Lot Size Map referenced in clause 4.1 of the Eurobodalla LEP permits new lots within the Bay Ridge Estate to achieve a minimum lot size of 1,500 m².

In addition, on 28 November 2011, the *Eurobodalla Residential Zones Development Control Plan* (Eurobodalla DCP) commenced operation. The Eurobodalla DCP establishes setbacks for residential lots under 2,500 m² using performance based criteria. In this regard, in order to achieve compliance with the DCP a 1,500 m² lot would require a minimum building envelope of between 350 m² and 400 m².

The proposed lots in stages 2B1 and 2B2 range in size between 1,500 m² and 6,855 m² in area, and are therefore consistent with the minimum lot size requirements of the LEP. In addition, the application seeks to amend Condition 1.1B to enable the creation of building envelopes less than 400 m² in stages 2B1 and 2B2, provided that they meet the performance based requirements of the Eurobodalla DCP.

The Department has reviewed the proposed modifications to the subdivision layout and has concluded that the proposed modifications are acceptable for the following reasons:

- the proposed lots and building envelopes within Stage 2 are consistent with the Council's LEP and DCP requirements;
- the application would not result in any additional clearing beyond that approved under the original development application; and
- the proposed lots can be serviced in accordance with the servicing strategy approved under the original development consent.

6.2 Compliance with the North Batemans Bay Masterplan

The North Batemans Bay Masterplan, which was adopted under clause 18 of SEPP 71, permits the creation of lots ranging in size between 2,500 m² and 31,811 m². It should be

noted that this Masterplan is classified as a development control plan (DCP) under the provisions of clause 95 of Schedule 6 of the EP&A Act.

Clause 19 of SEPP 71 requires a consent authority to assess all applications against the provisions of an adopted Masterplan. In this regard, the North Batemans Bay Masterplan is currently inconsistent with the minimum lot size requirements of the Eurobodalla LEP and the minimum setback requirements for 1,500 m² lots as outlined in the Eurobodalla DCP.

The Department is supportive of the revised lot sizes and building envelopes as proposed under the modification application and has recommended a new condition requiring the Proponent to amend the requirements for development within Stage 2B to provide consistency with the Eurobodalla LEP and DCP prior to the issue of a Subdivision Certificate for lots within Stage 2B.

6.3 Bushfire Protection

Both the Council and the RFS advised that the proposed lots within stages 2B1 and 2B2 may increase the bushfire attack classification from BAL 29 to BAL FZ. In addition, the Council requested that the Department impose a condition requiring the development to achieve a BAL of 40 or lower.

As previously outlined, the Proponent provided supplementary bushfire advice to verify the bushfire attack classification for the proposed lots within Stage 2B. This advice concluded that:

- the bushfire attack classifications for the approved subdivision were calculated in accordance with the requirements of *Planning for Bushfire Protection 2001* (PBP 2001), which have been superseded by *Planning for Bushfire Protection 2006* (PBP 2006);
- when PBP 2006 is applied, it is evident that there would be 300 to 400 m² of space available within each lot to facilitate the establishment of APZs;
- APZs of 39 metres for lots 136-141 and 18 metres for lots 115-122 meet a BAL 29 classification under the Australian Standard, and this is a reduction from the previous assessment of a BAL 40 classification negating the need for additional clearing in Stage 2B;
- whilst the building envelopes for lots 115-122 and Lot 136 would technically extend into the BAL 40 limit, a 300 to 400 m² building could reasonably be sited within the building envelope, and setback to the extent required to achieve a BAL 29 classification (see **Figures 5 and 6**); and
- any requirement to increase the proposed APZs is over and above the requirements of the Australian Standard.

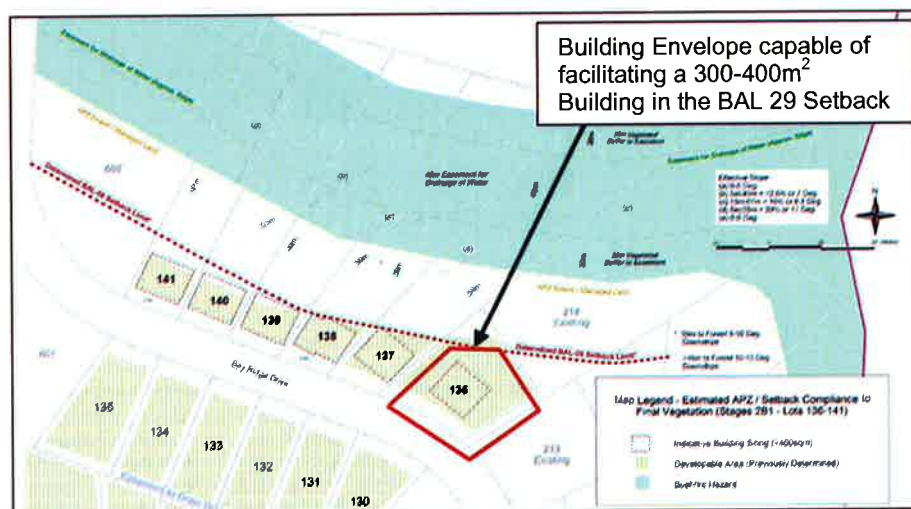


Figure 5: Building Envelope for Lot 136

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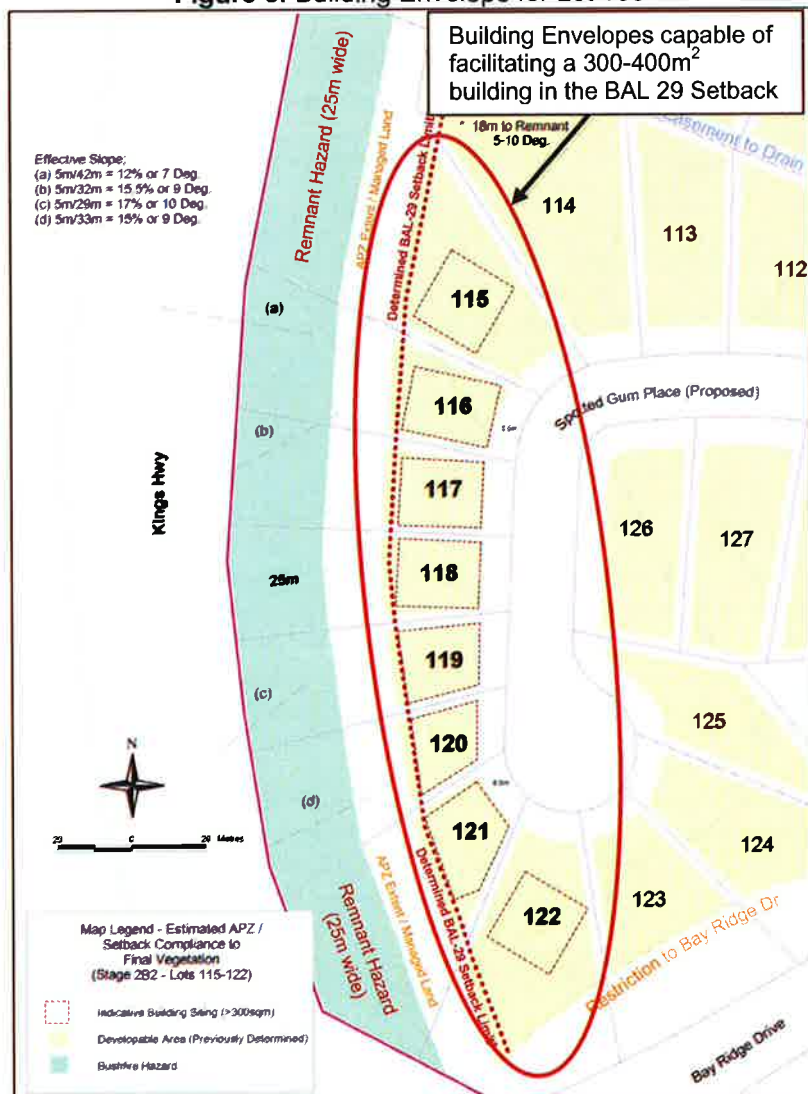


Figure 6: Building Envelopes for Lots 115-122

The Department has assessed the supplementary bushfire advice in conjunction with the RFS and has concluded that the proposed lots can achieve a BAL 29 classification without the need for additional clearing. The Department has recommended conditions of approval to ensure a BAL 29 classification is achieved.

6.4 Aboriginal Heritage

As previously outlined, portions of the site have been cleared to facilitate the construction of the approved road network, and the OEH sought clarification to determine whether these works were undertaken in accordance with Section 90 permit 2099.

The Proponent's RTS included an Archaeological Site Assessment to address the issues raised by the OEH. In this regard, the assessment concluded that the following relics have been destroyed or removed in accordance with Section 90 permit 2099:

- KPH 1 and PAD 2 have been destroyed; and
- PADs 1,3,4,5,6, and 7 have been partially destroyed.

Based on the above, it is clear that the proposed works in Stage 2B, including the extension to Spotted Gum Place, will take place on areas of KPH 1 and PAD 1 that have already been destroyed (see **Figures 7 and 8**). As such, the Department accepts that the proposed

extension of Spotted Gum Place will not result in the disturbance or removal of any intact relics or PADs.

Notwithstanding, the Department notes that as sites KPH 2 to 5 are intact, the OEH has requested that the Proponent obtain a new section 90 permit prior to undertaking any additional excavation works outside of Stage 2B. The Department has reviewed the OEH's advice and has concluded that section 75U(1)(d) of the EP&A Act specifies that excavation permits required under section 90 of the *National Parks and Wildlife Act 1974* do not apply to Part 3A projects.

As the proposed modification is a transitional Part 3A project, the Department cannot require the Proponent to obtain a new section 90 permit. However, the Department has recommended a new condition (Condition 1.13a) requiring the Proponent to prepare an Aboriginal Cultural Heritage Assessment outlining the impacts of the works on any relics or PADs, and identify appropriate conservation or mitigation measures to manage any impacts. This report must be prepared in consultation with the OEH, and approved by the Secretary prior to the Proponent undertaking any new excavation works outside of Stage 2B.

The Department is satisfied that subject to the imposition of the condition outlined above, the application would not result in any adverse archaeological impacts.

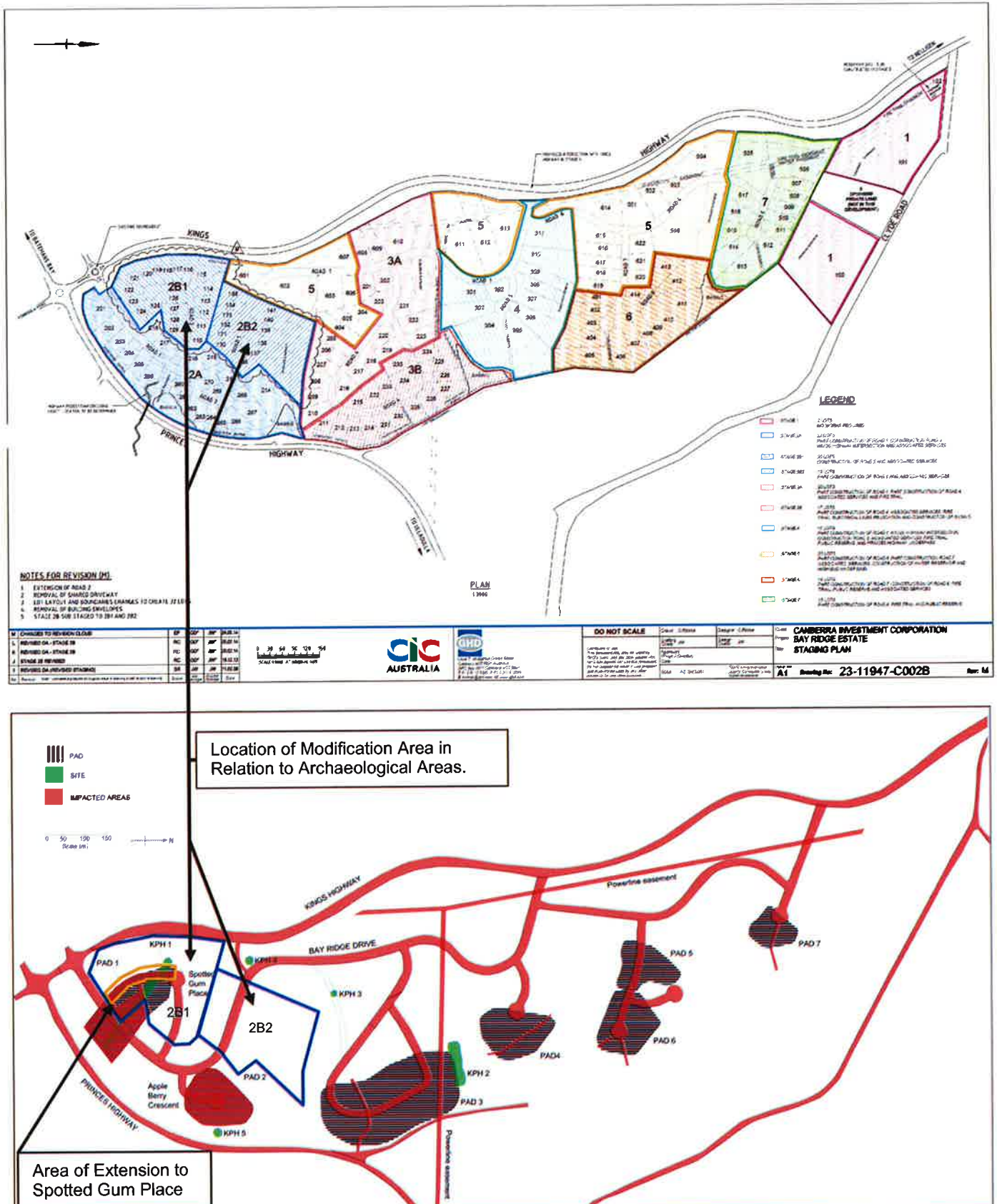


Figure 7 (top) Staging Plan and Figure 8 (bottom) Archaeological Sites Map Showing the Relationship between Archaeological Areas

7. CONCLUSION

The Department has assessed the proposed modification in accordance with the requirements of section 75W the EP&A Act and has concluded that the proposed modification will not result in any environmental impacts beyond those assessed under the original development consent.

In addition, the Department has concluded that the application fully complies with the requirements of the Council's LEP and DCP, and the requirements for PBP 2006. Furthermore, the Department has recommended conditions to ensure the excavation of any archaeological relics not removed under the Proponent's previous section 90 permit does not occur until it has provided a revised Archaeological Assessment to the satisfaction of the OEH and the Department. Accordingly, the Department supports the approval of the proposed modification application.

8. RECOMMENDATION

It is recommended that the Planning Assessment Commission:

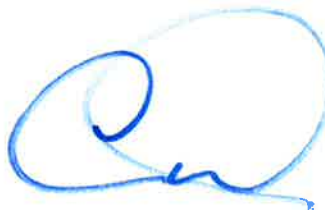
- a) **Consider** the findings and recommendations of this report:
- b) **Approve** DA 172-72-2005 MOD 3 under section 75W of the *Environmental Planning and Assessment Act 1979*; and
- c) **Sign** the attached Instrument of Modification (**Tag A**).

Endorsed by:



27.4.15

David Mooney
Acting Manager
Industry Assessments



27.4.15

Chris Wilson
Executive Director
Infrastructure and Industry Assessments

APPENDIX A – NOTICE OF MODIFICATION