



Office of Sustainable Development Assessment and Approvals, Urban Assessments

## Planning Assessment Report

### Application to Modify Development Consent

#### MOD 115-7-2005 modifying DA 187-8-2004

#### LOT 224 Dianella Drive, Casuarina Beach

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## 1 SUMMARY

This report is an assessment of the proposed development the subject of Development Application Modification number MOD 115-7-2005 modifying DA 187-8-2004 pursuant to Section 96(1)(A) of the Environmental Planning and Assessment Act, 1979 (the Act).

This application for modification was lodged by Mr John Lea of Pacific Projects Group Pty Ltd on 8 July 2005. The application seeks to modify Development Application DA 187-8-2004 approved by the Minister on 28 April 2005.

The site is located at Lot 224 in DP 1048494, Dianella Drive, Casuarina Beach and is more commonly known as the 'Santai Development'.

The Minister for Planning is the consent authority for modifications to consents the Minister has granted. However the Minister on 12 September 2005 initiated new delegations in respect of certain development. This application fits within the delegations and therefore is able to be determined by the Director General of the Department and the Deputy Director General, Office of Sustainable Development Assessments and Approvals.

It is recommended that the modification application be **refused** for the reasons listed at **Tag A**.

### 1.1 Background

Development Application (DA) 187-8-2004 proposing tourist accommodation for 114 units with lobby/reception area, guest dining area, guest lounge, central recreation courtyard with pools and restaurant and conference room was approved by the Minister on 28 April 2005 subject to conditions of development consent (refer **Tag B**).

In addition to the above, the applicant has also lodged another S96(1A) application (Mod 114-7-2005) for the modification of a number of conditions, however, no objection is raised to these modifications. This application is yet to be determined.

## 2 THE PROPOSED MODIFICATIONS

The applicant is seeking to modify the approved development as follows:

- Modification of Condition G12 relating to occupation period (42 consecutive days or 150 days in calendar year) in the following manner (deleted words in strikethrough and new in bold and underlined):

'The **tourist facility approved by this consent is approved exclusively as a tourist accommodation as defined and allowed under Tweed LEP 2000** tourist facility approved by this consent will not be occupied by any proprietor or occupier of the unit for longer than forty two (42) consecutive days or an aggregate one hundred and fifty (150) days in any twelve (12) month period. Such periods are to be calculated from the date of the first occupation of the tourist facility.'

- Deletion of Condition G13 relating to occupancy register as follows:

~~'A register will be kept by the owner or proprietors to record the occupancies and will be available at any time for inspection by an authorised officer of Council.'~~

- Modifications of Condition G14 relating to occupancy restrictions (deleted words in strikethrough and new in bold and underlined) in the following manner:

~~'The occupancy restrictions will be incorporated into the by-laws of the tourist facility and a copy of the by-laws will be provided to Council prior to occupancy a Management Agreement for the Tourist Facility. A copy of the Management Agreement will be provided to Council prior to the occupancy of the development'~~

In support of the application, the applicant has submitted legal advice from Noel Hemmings QC which contains interpretation of the definition of tourist facility and precedent cases in the NSW Land and Environment Court (refer **Tag C**).

### 3 STATUTORY FRAMEWORK

#### 3.1 Statement of permissibility

The site is zoned 2(e) Residential Tourist pursuant to the provisions of Tweed Local Environmental Plan 2000 (LEP 2000). Pursuant to Clause 11 of LEP 2000, development for tourist accommodation is a permissible use within the zone.

Tourist accommodation is defined in LEP 2000 as 'a building principally used for the accommodation of tourists but does not include a building elsewhere defined in this Schedule'.

The original application and subsequent approved development was for tourist accommodation only. Notwithstanding that multi dwelling residential housing is permissible on the site/zone and is separately defined, the originally approved application did not comprise any permanent residential accommodation. With the proposed amendments to the conditions, permanent residential accommodation is a distinct possibility.

Therefore it is considered in this instance the phrase 'principally used for' in the definition of tourist accommodation is immaterial as the proposed to be modified development has the potential to introduce a lack of certainty as to the future use. It also has the potential to quantitatively change the essential character of the tourist facility, the originally approved development and on these grounds the proposed modified development is not supported.

#### 3.2 Instrument of consent

The site is defined as a 'Tourist Facility' pursuant to the provisions of State Environmental Planning Policy No. 71 – Coastal Protection (SEPP 71) and was therefore State Significant Development at the time of lodgement of the original DA.

The Minister is the consent authority pursuant to Clause 10(1) of SEPP 71 and also for state significant development.

##### 3.2.1 Relevant planning instruments/guidelines/policies

The environmental planning instruments, development control plans and policies applicable to the land to which this application for modification relates are as follows:

- SEPP 71;
- North Coast Regional Environmental Plan 1988 (REP 1988);
- LEP 2000;
- Tweed Development Control Plan No. 2 – Site Access and Car Parking (DCP 2);
- Tweed Development Control Plan No. 45 – Socio and Economic Impacts (DCP 45); and

- Tweed Development Control Plan No. 48 – Tweed Coast Building Heights (DCP 48).

#### **4 CONSULTATION / PUBLIC EXHIBITION**

Public consultation of the proposal was not considered necessary given the minor nature of the modifications. However, each of the previous objectors (2 in total) to the originally approved DA were notified of the application for modification on 20 October 2005 and had 14 days to provide a response.

No submissions were received during the period of exhibition.

##### **4.1 Council**

The application was referred to the Tweed Shire Council on 20 October 2005. Council responded on 23 November 2005 (refer **Tag D**). Council raised a number of issues in their correspondence and essentially did not support the proposed modifications (the applicant has failed to demonstrate the necessity for altering the approved conditions).

#### **5 CONSIDERATION**

##### **5.1 Section 96**

The application is not considered to comply with the prerequisites of Section 96(1A) of the Act in that the proposed modifications will introduce the potential to result in a development which is not substantially the same as to that which development consent was originally granted (S96(1A)(b) and furthermore the proposed modifications is considered not to be in the public interest and refusal of the modification is therefore recommended.

##### **5.2 Section 79C**

The application and the likely impacts of the proposed development have been considered in accordance with Section 79C of the Act and it is considered that the approved development is proposed to be qualitatively changed. Consideration is also given to relevant provisions of the planning instruments/guidelines/policies described at Section 3.2.1 of this report. It is considered the proposed modifications do potentially alter the approved development's compliance/consistency with those planning instruments/guidelines/policies listed at Section 3.2.1 for the following reasons:

- The original application was made for a tourist facility based on typical short term holiday lettings not for permanent or long stay residential accommodation and which enhanced the variety of available tourist accommodation in the area;
- The original application (DA 187-8-2004) remained silent on any proposed long stay or residential use of the site. The proposed modified development qualitatively (and has the potential to quantitatively) changes the essential character of the approved development as a tourist facility;
- With any relaxation of the restrictions of use (Conditions G12, G13 and G14), doubt arises as to the principal use of the site being a tourist facility (as approved under DA 187-8-2004), whether or not in the short or long term;
- The design of the tourist facility was not assessed against more stringent residential flat building provisions/guidelines/policies (SEPP 65, Residential Flat Design Code etc), which would apply if a residential use was sought;
- If the conditions of development consent in question (G12, 13 and 14) were deleted, the qualitative and quantitative aspects of the approved development would be compromised/altered (i.e. enforcing the use of the site as a tourist facility becomes increasingly difficult when restrictions for its approved use are not in place);

- The proposed modified development is considered to be inconsistent with the objectives (those relevant to the application) of the originally approved development which were to:
  - meet the demands and expectations of the growing tourist numbers on the Tweed coast;
  - provide additional choice in tourist accommodation on the Tweed Coast;
  - raise the image of the Tweed Coast as a quality domestic and international tourist destination;
  - create high quality tourist accommodation; and
  - provide a range of commercial facilities and services that cater to the needs of guests.
- Permanent multi dwelling housing is a competing product on the site. Through the introduction of employment generating land uses such as the tourist facility, the sustainability of the area is increased as opposed to the opposite effect in relation to permanent residential accommodation;
- Should the modifications be approved, the potential for the predominant use of the units to be for long stay accommodation (i.e. residential) for the owners/occupiers of the units increases;
- Tourist facilities are to complement infrastructure, service and amenities in association with separate residential development; and
- The proposal is not in the public interest.

The original application and subsequent approved development was for tourist accommodation only. Notwithstanding that multi dwelling residential housing is permissible on the site/zone and is separately defined, the originally approved application did not comprise any permanent or long stay residential accommodation. Should the proposed modifications be approved, the use of the site for permanent residential or long stay accommodation is a distinct possibility.

Furthermore, it has long been the Department's internal policy to condition proposals such as that approved under DA 187-8-2004 to ensure the use for which consent has been granted (in this case) is enforced. Conditions G12, 13 and 14 preserve the integrity of the originally approved development as a tourist facility and therefore should remain.

## **6 CONCLUSION**

The Minister for Planning is consent authority for modifications to consents he has granted.

The proposed development as modified is considered not to be substantially the same development as originally approved as if approved it would provide opportunity for ambiguity of land use. The conditions as currently drafted restrict/maintain the facility to be for tourist purposes only, the use for which development consent was applied for and ultimately granted.

The application has been considered with regard to the matters raised in section 79C of the Act. Due to the minor nature of the application for modification, the only people notified were the objectors (2) to the original development proposal and Council. Council essentially does not support the proposed modifications for the abovementioned reasons. No other submissions were received.

On balance, it is considered that the proposed development as modified is unacceptable and should be refused.

## **7 CONSULTATION WITH APPLICANT – DRAFT CONDITIONS**

As refusal is recommended, no consultation with the applicant was/is required.

## **8 DELEGATION**

Under the instrument of delegation dated 12 September 2005, the Minister has delegated to Director General of the Department of Planning and the Deputy Director General, Office of Sustainable Development Assessments and Approvals, Department of Planning his functions under Section 96(1A) of the Act relating to modifying development consents.

## **9 RECOMMENDATION**

It is recommended that the Deputy Director General, Office of Sustainable Development Assessments and Approvals as delegate for the Minister for Planning as described in the instrument of delegation dated 12 September 2005, pursuant to Sections 81 and 96(1A) of the *Environmental Planning and Assessment Act, 1979* and clause 122(2) of the *Environmental Planning and Assessment Regulations, 2000*:

- (A) **refuse** the application subject to the reasons for refusal shown at Tag **A**, and
- (B) authorise the Department to carry out notification of determination of the application to modify the consent.

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