

11 April 2018

Our Ref: DIC 15/71 Pt 2

Secretary
Department of Planning and Environment
GPO Box 39
Sydney NSW 2001

Dear Madam

Request Under Section 4.55(1A) of the Environmental Planning and Assessment Act (as Amended)
to Modify (MOD3) Condition A6 of Major Project Approval No. MP05-0198 (as Modified)
at Lot 1 DP 134787, Lot 1 DP 167380, Lot 2 DP 961928 & Lot 5 DP 1117326
Walmsleys Road & Stott Street, Bilambil Heights

1.0 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**. Modification No. 1 does not affect Condition A6.

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**.

Condition A6 of the Approval (as modified) is in the following terms:

"A6 Lapsing of Approval

This approval shall lapse on 2 August 2018, unless the works subject to this approval have been commenced before that time."

In accordance with Condition A6, the Approval will lapse on 2 August 2018, unless the condition is further extended or the work is commenced prior to that date.

2.0 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.

As a result of these complexities, it is highly unlikely that any Construction Certificate will be issued before 2 August 2018 to enable work to commence prior to that date, such that the project is commenced. Accordingly, the Department is requested to modify Condition A6 to extend the lapsing date to 2 August 2019.

3.0 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.

Clause 11A of Schedule 2 of the Regulation relates to modifications and is in the following terms:

“11A Requests to extend date that Part 3A approval lapses

- (1) This clause applies to an approval for carrying out, or an approval of a concept plan for, a transitional Part 3A project in respect of which a request has been duly made to the Minister to extend the date on which the approval would otherwise lapse (a relevant modification request). This clause extends to any such request that was duly made before the commencement of this clause.*

- (2) *If a relevant modification request is made before the date on which the approval would otherwise lapse and the request has not been determined before that date, the approval does not lapse on that date but continues in force until:*
 - (a) *the request is determined or withdrawn, or*
 - (b) *the date that is 12 months after the request was made, whichever first occurs.*
- (3) *If a relevant modification request is determined and the date on which the approval would otherwise lapse is extended, the approval continues in force in accordance with the determination despite subclause (2).*
- (4) *If a relevant modification request was made before the commencement of this clause and was not determined before the approval lapsed, the approval is revived for the purposes of the application of this clause and of any other request made before that commencement in relation to the approval. In that case, the period of 12 months referred to in subclause (2) (b) is taken to be the period of 12 months after the commencement of this clause."*

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 under section 72 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 an extension of the lapsing date for a further 12 months. No changes to the design of the project or conditions of approval (other than A6) are proposed.

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

"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 96.

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 Ilene Pty Ltd* (1984) 3 NSWLR 414 at 421)".*

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 83 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.
- 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).

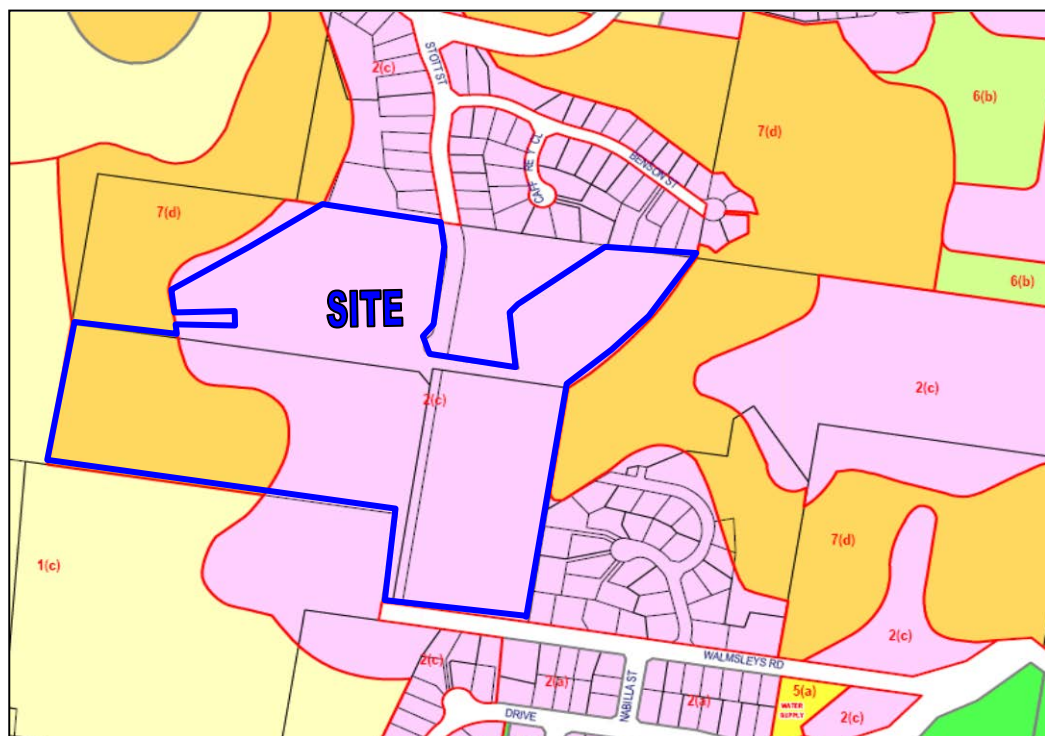


Figure 1 – Site Location and Zoning
Source: Figure 1 of Environmental Assessment, DAC, November 2006

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.

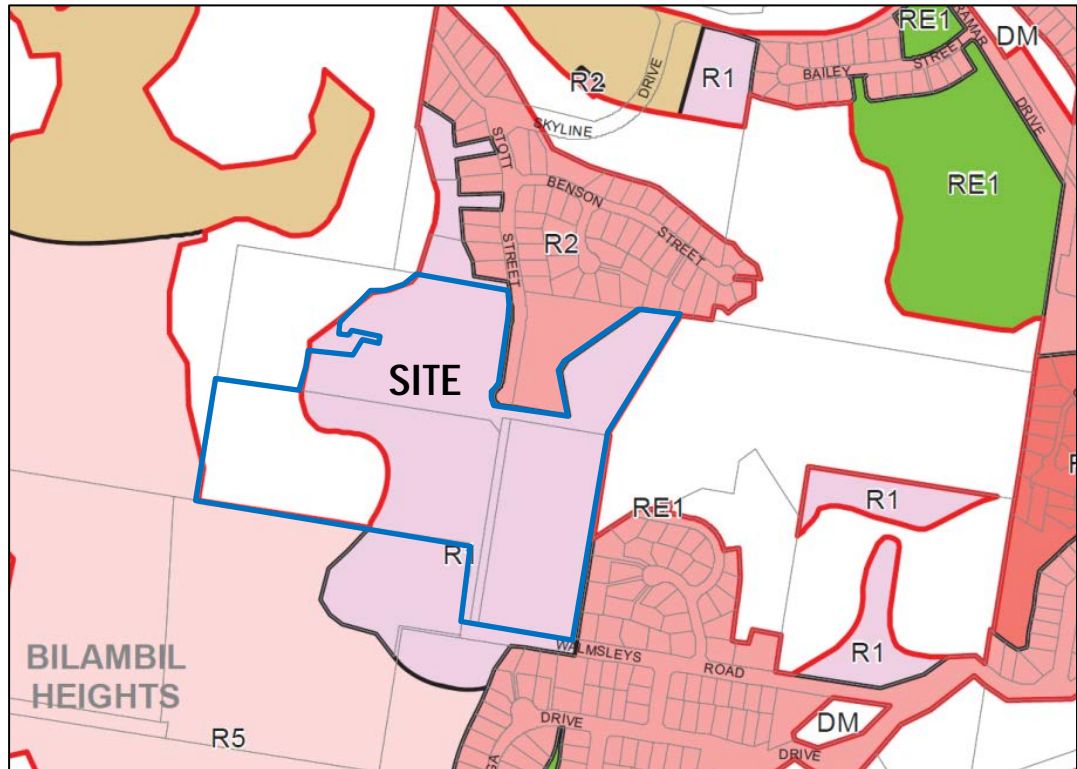


Figure 2 – Zoning Map
Source: Tweed Local Environmental Plan 2014

A minimum lot size of 450m² continues to apply to the R1 zoned land and the approved residential lots comply with this requirement (see **Annexure B**).

In summary, the Project Approval (as 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 nature of the proposed modification, only minimal 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.

As there has been no change in the statutory of 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 extension of the Project Approval for a further 12 months would not be inconsistent with the public interest and would not give rise to any significant adverse environmental impacts.

4.0 SUMMARY AND CONCLUSIONS

In support of this request for an extension of the period within which the work must be commenced, we **attach** the following:

- ♦ A completed Application to Modify Development Consent Form.
- ♦ Two (2) Owner's Consent Letters.

In summary, approval of the request will enable the project to proceed to the construction stage such that additional lots are provided to meet the continuing demand for housing in the northern sector of Tweed Shire.

Please do not hesitate to contact Darryl Anderson should you require any further information in relation to this matter.

Yours faithfully
DAC Planning Pty Ltd



Darryl Anderson
Director

Encl.