

ASSESSMENT REPORT

Section 75W Modification

Fern Bay Seaside Village, Fern Bay, Port Stephens Local Government Area MP 06_0250 MOD 6

1. BACKGROUND

This report is an assessment of a request to modify the Project Approval for the community title residential subdivision at Fern Bay (MP 06_0250) in the Port Stephens local government area. The request has been lodged by Fern Bay No. 1 Pty Ltd pursuant to section 75W of the *Environmental Planning and Assessment Act 1979* (EP&A Act). It seeks to modify conditions B4 and B13 to reduce the extent of the footpath/cycleway along Nelson Bay Road and remove the requirement for a Dune Restoration/Stabilisation Management Plan.

2. SUBJECT SITE

The subject site is located approximately 18 kilometres (km) north of Newcastle and 6 km north of Stockton (see **Figure 1**). The site is located between two key coastal features, being the Hunter River to the west and the Stockton Bight to the east.

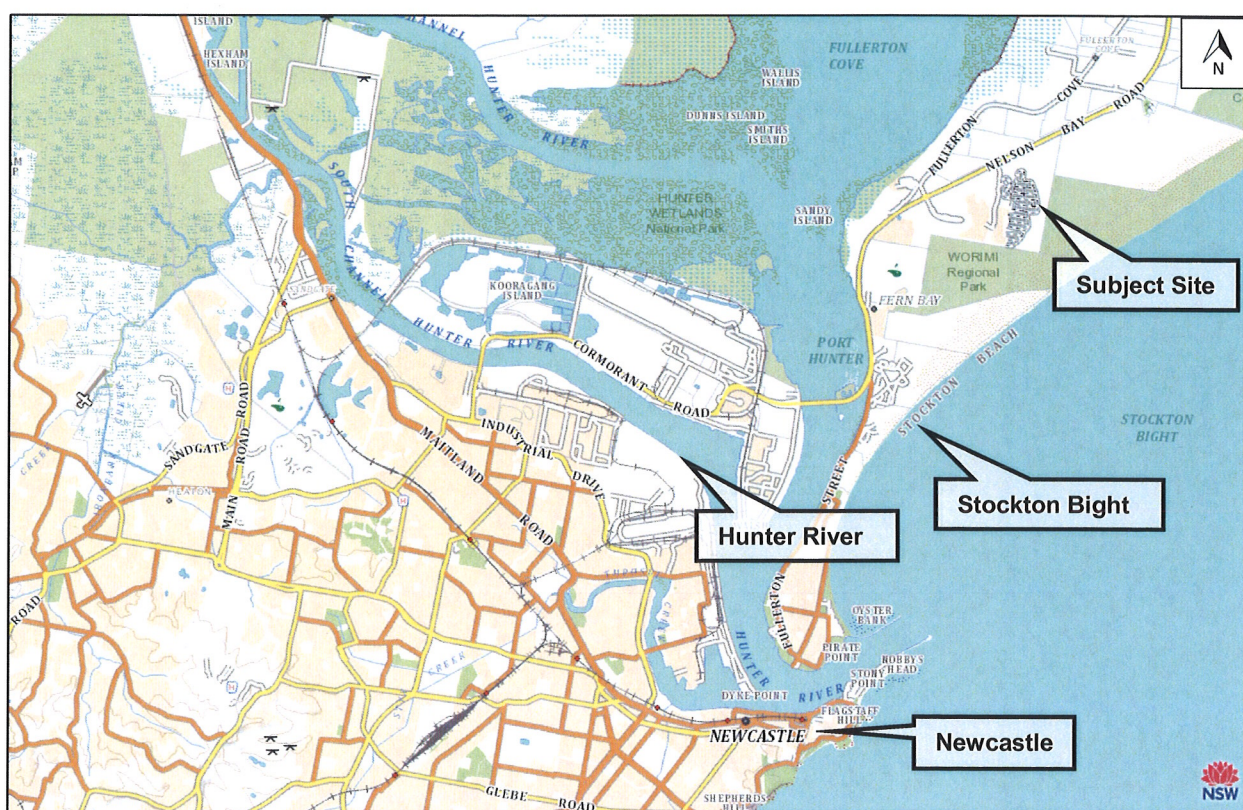


Figure 1: Site Location

The subject site is 205 hectares (ha) and is largely vegetated, and contains part of the Newcastle Bight dune barrier system (see **Figure 2**). It is legally described as Lot 46 in Deposited Plan 28008 and lots 1, 4 and 7 in Deposited Plan 270466 and is located off Nelson Bay Road in Fern Bay.

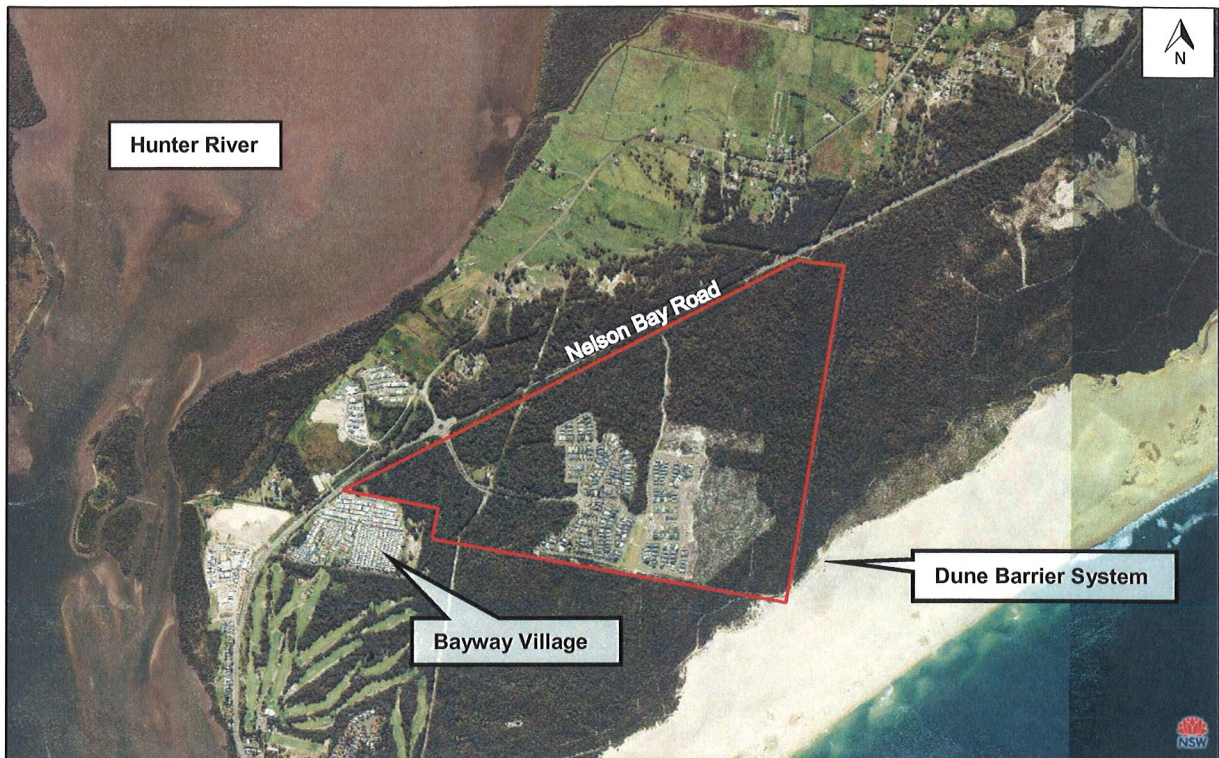


Figure 2: Subject Site

3. SITE HISTORY

On 29 September 1997, the Land and Environment Court granted approval to a 208 lot residential subdivision. This consent has been modified on five occasions with the most significant modification being the relocation of 33 lots from the area adjacent to Nelson Bay Road to create a vegetated buffer.

SEPP 71 Master Plan

On 8 August 2006, the then Minister for Planning adopted a Master Plan (20-4-2005) prepared in accordance with clause 18 of *State Environmental Planning Policy No. 71 – Coastal Protection* (SEPP 71) over the site. The Master Plan was for a subdivision consisting of 947 residential lots, open space lots, a community nursery, conservation areas, recreational and commercial facilities, new public roads, fire trails, pedestrian trails and asset protection zones.

Major Project Approval

On 28 June 2010, the then Deputy Director-General, Development Assessments and Systems Performance approved MP 06_0250 for a 411 lot residential subdivision to be constructed across 20 stages.

The project approval has been modified on four occasions to:

- amend the timing for the construction of the cycleway/footpaths, the provision of the plan detailing the location of detention basin 6, and the provision of the landscaping and revegetation plans for individual stages;
- amend the subdivision layout to incorporate stormwater detention basin 6 within the development footprint;
- undertake the Stage 8 subdivision works in two stages,

- amend the provision of infrastructure and services; and
- amend the subdivision and road network layout.

The development, as modified, currently comprises 370 residential lots, 38 super lots, two commercial lots, one community lot, conservation areas, and an open space and road network. To date, stages 4, 11 and 12 have been completed. Stages 5 to 7 and Stage 8A are currently under construction.

4. PROPOSED MODIFICATION

On 10 November 2014, the Proponent lodged a section 75W modification request (MP 06_0250 MOD 6) seeking approval to delete conditions B4 (Construction of Shared Footpath/Cycleway along Nelson Bay Road) and B13 (Dune Restoration/Stabilisation Management Plan).

The Proponent has advised that the modifications are required on the basis that:

- the Proponent does not own lots 1 and 2 in DP 881206, which are required to enable the construction of the footpath/cycleway between the intersection of Nelson Bay Road and the bus stop at Bayway Village;
- the rate of dune transgression is less than that predicted in the Environmental Assessment prepared to support the Project Application; and
- dune restoration works are unlikely to achieve stabilisation of the dune system.

5. STATUTORY CONSIDERATION

5.1 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 to the EP&A Act, continues to apply to section 75W modification applications to Part 3A projects.

The modification request has been lodged with the Secretary pursuant to section 75W of the EP&A Act. The Minister's approval is not required if the project, as modified, remains consistent with the original approval. As the modification request seeks to delete conditions B4 and B13 of the Project Approval, the Minister's approval is required.

The proposed changes constitute a modification, are within the scope of section 75W of the EP&A Act, and do not constitute a new application. Therefore, the Minister (or his delegate) has the ability to determine the modification application.

Consequently, this report has been prepared in accordance with the requirements of Part 3A of the EP&A Act and the Environmental Planning and Assessment Regulation 2000 (EP&A Reg). The Minister (or his delegate) may approve or disapprove of the modification of the project under section 75W of the EP&A Act.

5.2 Approval Authority

The Minister for Planning delegated responsibility for the determination of section 75W modification requests to the managers and directors who report to the Executive Director, Infrastructure and Industry Assessments where:

- the relevant local council has not made an objection; and
- a political disclosure statement has not been made; and
- there are no public submissions in the nature of objections.

The proposal complies with the terms of the delegation as Council did not object to the proposal, a political disclosure statement has not been made in relation to the application, and no public submissions were received in the nature of objections. Accordingly, the

Manager, Industry Assessments may determine the application in accordance with the Minister's delegation.

6. CONSULTATION

6.1 Notification and Submissions

The modification request was made publicly available on the Department's website on 17 November 2014. The Department also referred the application to Port Stephens Council, Newcastle City Council, the Office of Environment and Heritage (OEH), Roads and Maritime Services (RMS) and the Department of Primary Industries (DPI) for comment. Given the minor nature of the modification request, it was not publicly exhibited.

The Department received submissions from Port Stephens Council, Newcastle City Council the OEH, the RMS and DPI. It should be noted that no public submissions have been received.

A summary of the comments provided by Port Stephens and Newcastle councils, the OEH, RMS and DPI is provided below.

Port Stephens Council raised concerns with the removal of Condition B4 on the basis that it would reduce pedestrian and cyclist safety and connectivity within the locality. The Council requested the provision of an alternate treatment to address this issue.

The Department reviewed the Council's comments and requested that the Proponent clarify whether it is possible to provide an alternate pedestrian and cycle connection along Nelson Bay Road.

Newcastle City Council raised no objection to the application and advised that it would not be providing any comments.

The **OEH** raised no objection to the modification request however it raised concern with the removal of Condition B13 on the basis that the current rate of dune transgression may not be sustained into the future. To avoid impacts associated with potential changes in the rate of dune transgression, the OEH recommended that the Proponent provide adaptive management measures to monitor the transgression rates, and establish trigger levels for the implementation of management actions.

The Department reviewed the OEH's comments and requested that the Proponent outline appropriate management measures in the event that dune transgression accelerates beyond the levels predicted in the Proponent's original Environmental Assessment.

The **RMS** objected to the modification and requested that Condition B4 be amended to:

- allow for construction of the majority the shared footpath/cycleway along the Nelson Bay Road frontage of the site; and
- ensure the footpath/cycleway is designed to tie into the existing shoulder of Nelson Bay Road at the point where the path ends.

As previously outlined, the Department requested the Proponent to clarify whether it is possible to provide an alternate pedestrian and cycle connection along Nelson Bay Road as part of its Response to Submissions (RTS).

The **DPI** raised no objection to the modification request, however it sought clarification that no waste water would be injected into the dune system adjoining the site.

The Proponent has confirmed that no waste water will be discharged into the adjoining dune system.

6.2 Response to Submissions

The Proponent provided a Response to Submissions (RTS) on 4 March 2015. The RTS seeks to revise the scope of the modification to address the issues raised in the agency submissions. The proposed changes to the modification request are summarised below:

- the modification request seeks to construct the portion of the footpath/cycleway along Nelson Bay Road within the boundaries of the project area. However, to enable additional consultation with Port Stephens Council and the RMS prior to the final design of the footpath, the Proponent is seeking to defer its construction until prior to the creation of the 380th lot; and
- the modification seeks to amend Condition B13 to require the monitoring of dune transgression by the Proponent until the project is complete. At the end of this period, the Proponent will report on the results of the monitoring and provide recommendations for on-going monitoring and management of the dune system. The Proponent will implement any management measures that require immediate implementation, as identified in the report. However, any management measures requiring implementation following the completion of the subdivision works will be undertaken by the future Community Association.

The RTS was placed on the Department's website on 5 March 2015, and was referred to Port Stephens Council, the OEH and the RMS for comment. A summary of each agencies' comments is provided below.

Port Stephens Council supports the proposed modifications to conditions B4 and B13 subject to the Proponent providing a road shoulder treatment for cyclists between the end of the pathway and the bus shelter adjacent to the entrance of the Bayway Village.

The Department has reviewed the Council's comments and agrees that it would be appropriate to require the Proponent construct a road shoulder treatment to ensure the shared pathway ties in with the adjoining pedestrian/road network. This issue is discussed in greater detail in **Section 7.1** of this report. The Department has recommended revisions to conditions B4 to address this issue.

The **OEH** raised no objection to the revised wording of Condition B13, however it confirmed that an adaptive management approach is required to manage dune transgression, and that this approach should include on-going contingency measures and triggers for its implementation.

As outlined above, the Department agrees that the Proponent should prepare an appropriate management plan to ensure dune transgression is managed over the life of the development.

The **RMS** supported the proposed modification of Condition B4 and recommended minor revisions to clarify the extent of the footpath/cycleway that the Proponent is required to construct as well as the timing for its construction.

7. ASSESSMENT

In its assessment of the modification application, the Department has considered the following:

- the EA provided to support the proposed modification (see **Appendix A**);
- all submissions received by the Department (see **Appendix B**); and
- the Director-General's/Secretary's assessment reports for the original Project Application and the subsequent modification requests.

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

- modifications to the design of the shared footpath/cycleway on Nelson Bay Road; and

- dune management.

These issues are discussed in detail in **Sections 7.1** and **7.2** of this report.

7.1 Modifications to the Design of the Shared Footpath/Cycleway on Nelson Bay Road

The modification seeks approval to amend Condition B4 of the Project Approval to:

- reduce the extent of the footpath/cycleway required to be constructed along Nelson Bay Road; and
- defer the timing for the construction of the footpath/cycleway from prior to the issue of a Construction Certificate for the 250th lot, to prior to the issue of a Construction Certificate for the 380th lot.

The Proponent has advised that the modification of Condition B4 is required on the basis that the Proponent does not own the necessary land to ensure the provision of the pathway between the southern boundary of the site and the Bayway Village bus stop. In addition, the Proponent is seeking to defer the completion of the pathway to enable sufficient time to respond to the design issues raised by the Council and the RMS. The current and proposed wording of Condition B4 is provided in full below.

Current wording:

“B4 Construction of a Shared Footpath/Cycleway along Nelson Bay Road

The shared footpath/cycleway along Nelson Bay Road must be constructed prior to the issue of any subdivision certificate that creates the two hundred and fiftieth of the development. It shall be designed and constructed at the cost of the Proponent, in accordance with the requirements of Council. The Roads and Traffic Authority must be consulted where there is a potential interface between the road pavement and the shared footpath/cycleway.

Detailed plans for the footway/cycleway (extending from the existing roundabout at the intersection of Nelson Bay Road and Fullerton Cove Road to the bus shelter at Bayway Village to the south) shall be approved by Council, prior to the issue of the Construction Certificate for the civil works that create the two hundred and fiftieth residential lot of the development (clearing and/or Bulk Earthworks Construction Certificates may be issued prior to the approval of a Construction Certificate for the civil works)”.

Proposed wording:

“B4 Construction of a Shared Footpath/Cycleway along Nelson Bay Road

*The shared footpath/cycleway along Nelson Bay Road must be constructed prior to the issue of any subdivision certificate that creates the ~~two hundred and fiftieth~~ **three hundred and eightieth residential lot** of the development. It shall be designed and constructed at the cost of the Proponent, in accordance with the requirements of Council. The Roads and Traffic Authority must be consulted where there is a potential interface between the road pavement and the shared footpath/cycleway.*

*Detailed plans for the footway/cycleway (extending from the existing roundabout at the intersection of Nelson Bay Road and Fullerton Cove Road to the bus shelter at Bayway Village to the south) shall be approved by Council, prior to the issue of the Construction Certificate for the civil works that create the ~~two hundred and fiftieth~~ **three hundred and eightieth** residential lot of the development (clearing and/or Bulk Earthworks Construction Certificates may be issued prior to the approval of a Construction Certificate for the civil works)”.*

The Department notes that both the Council and the RMS support the revised wording of Condition B4, subject to the Proponent providing a road shoulder treatment for cyclists in the area between the end of the pathway and the bus shelter adjacent to the entrance of the

Bayway Village.

The Department has reviewed the Proponents justification and the comments provided by the Council and the RMS and agrees that it is not be possible for the Proponent to construct the section of the footpath/cycleway between Lot 1 in DP 881206 and the bus shelter at the entrance of the Bayway Village on the basis that the Proponent does not own this land (see **Figure 3**). In addition, the Department notes that to date neither the Council or the Proponent have been unable to acquire sufficient land to enable the construction of the portion of the footpath/cycleway south-east of Lot 1 in DP 881206.

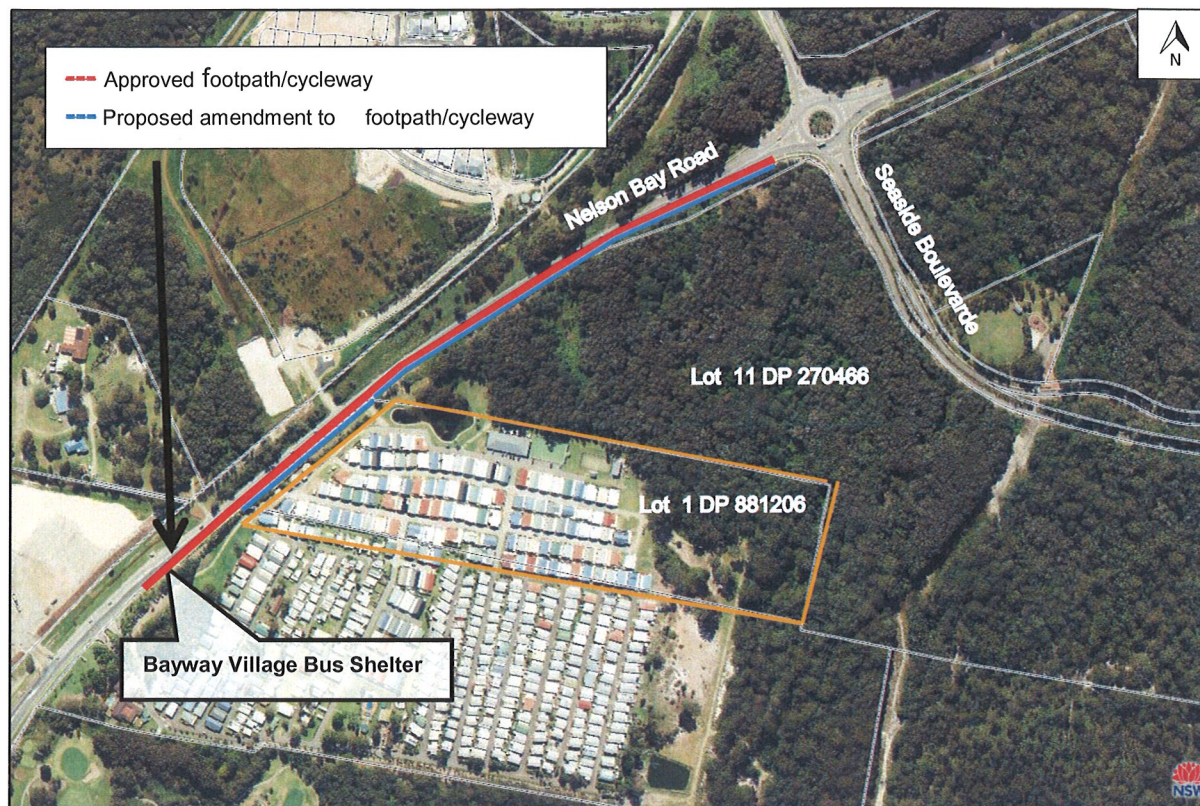


Figure 3: Comparison of Approved and Proposed Footpath/Cycleway

Given the above, the Department considers that the proposed modifications to Condition B4 will ensure that the footpath/cycleway is constructed to the maximum possible extent within the project area. In addition, the Department supports deferring the timing for the construction of the footpath/cycleway to ensure that the Proponent has sufficient time to consult with the Council and the RMS on the final design of the path.

Furthermore, the Department has concluded that in order to ensure cyclists can access the bus shelter at the Bayway Village the Proponent will need to construct a road shoulder treatment in the area between the end of the pathway and the bus shelter adjacent to the entrance of the Bayway Village.

The Department has recommended modifications to Condition B4 to reflect the above.

7.2 Dune Management

The modification request seeks approval to re-word Condition B13 to:

- require the monitoring of dune transgression by the Proponent until the project is complete; and
- require the preparation of a report on the results of monitoring prior to the issue of the final Subdivision Certificate, which identifies on-going management measures in the event that dune transgression rates accelerate beyond those predicted in the original EA.

The Proponent has advised that the modification of Condition B13 is required on the basis that:

- a recent review of the historical behaviour of the dune system (prepared by Umwelt) has revealed that the dune transgression rates are significantly lower than those predicted in the original Environmental Assessment, and
- Umwelt's revised predictions for dune transgression demonstrate that dune stabilisation is not required to prevent dune transgression into the project area.

The current and proposed wording of Condition B13 is provided in full below.

Current wording:

"B13 Dune Restoration/Stabilisation Management Plan

A Dune Restoration/Stabilisation Plan is to be prepared prior to the issue of the Construction Certificate for Stage 6. The plan is to include dune restoration/stabilisation measures to limit the expected transgressive dune movement, being an update of those proposed in the Fern Bay Dune Stabilisation Position Paper (prepared by Australian Water and Coastal Studies Pty Ltd, dated 1993, provided in Annex K of the EA).

The Dune Restoration/Stabilisation works can be programmed in such a way that stabilisation is achieved progressively to match the progression of the development. All restoration works shall be conducted prior to the issue of the Subdivision Certificate for Stage 20 (the final stage of development)".

Proposed wording:

B13 Dune Restoration/Stabilisation Management Plan

A report is to be prepared by December 2017 addressing any requirement for Dune Restoration/Stabilisation works based on likely dune encroachment in the 100 year planning horizon of the consent. The plan is to include dune restoration/stabilisation measures that may be required to limit any expected transgressive dune movement within the planning horizon (i.e. by 2095) based on the most likely scenario based on monitoring to December 2017. All restoration works or any alternative mitigation methods proposed on the report in response to likely encroachment by the year 2095 shall be undertaken and or/documented prior to the issue of the Subdivision Certificate for Stage 20 (the final stage of the development). If the monitoring report demonstrates no encroachment is predicated by 2095, the report shall still canvas options for addressing the issue that the Management body of the estate could consider should encroachment rates accelerate but acknowledging that methods of protection available over the next 50 + years could vary substantially from those that exist at the time this consent is granted".

The Department notes that the OEH did not object to the proposed modifications to Condition B13, however it advised that the Proponent should be required to prepare a document outlining adaptive management actions in the event that dune transgression rates increase beyond those predicted in the Umwelt report. In this regard, the OEH recommend that the document include:

- details of on-going monitoring of transgression rates to ensure they remain within the thresholds of the Umwelt report;
- details of the trigger levels for the implementation of management actions; and
- details of management actions that will be implemented to reduce adverse impacts to the Fern Bay Seaside development should the transgressive dunes encroach on the development.

In response to the OEH's comments the Proponent has agreed to undertake further monitoring up until the issue of the final Subdivision Certificate, and to develop an adaptive management plan in accordance with the recommendations of the OEH. However, the Proponent requested that the Plan nominate the future body corporate as the management body following the completion of the subdivision works.

The Department has reviewed the Proponent's justification and the comments provided by the OEH and has concluded that the proposed modifications to Condition B13 are appropriate subject to the Proponent:

- monitoring the dune transgression rates until the completion of the project (up until the issue of the final Subdivision Certificate); and
- preparing a management plan which identifies potential management actions in the event that dune transgression increases beyond the rates identified in the Umwelt report.

In addition, the Department recommends additional modifications to Condition B13 to identify that the future Community Association will be responsible for dune management upon transfer of the Community Conservation Lands to the Community Association. These modifications have been included in the recommended Instrument of Modification.

7.3 Consequential Administrative Changes

Condition A2 of the Project Approval details the staging of the project and includes a reference to the footway/cycleway extending to the bus shelter at the Bayway Village. This condition is required to be updated to reflect the changes recommended to Condition B4.

Condition A4 of the Project Approval includes a schedule of approved documents that the final development must comply with. This schedule is required to be updated to reference the Environmental Assessment and RTS provided to support MOD 6.

Condition E4 of the Project Approval refers to the dune restoration/stabilisation works required by Condition B13. This condition requires modifications to provide consistency with the recommended modifications to Condition B13.

Condition E17 describes the timing associated with the Council inspection of the footpath/cycleway required under Condition B4. This is required to be updated to reflect the recommended timing for completion of the footpath/cycleway (prior to the issue of the Subdivision Certificate for the 380th lot).

The Department has recommended changes to the definitions contained in Schedule 3 of the Project Approval to reflect contemporary departmental names and the like.

These changes have been included in the Instrument of Modification provided at **Appendix C**.

8. CONCLUSION

The Department considers the proposed modification is appropriate on the basis that:

- the development will remain consistent with the intent of the original Project Approval;
- it will ensure the footpath/cycleway will be constructed to the maximum extent possible within the Project Area; and
- the management actions for dune stabilisation will be developed and responsibility for their implementation will be clearly identified.

Consequently, the Department has concluded that the modification request should be approved subject to the conditions recommended in the Instrument of Modification at **Appendix C**.

9. RECOMMENDATION

It is recommended that the Manager, Industry Assessments, as the delegate of the Minister for Planning, approve MP 06_0250 MOD 6, subject to the conditions recommended in the Instrument of Modification at **Appendix C**.



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2/6/15



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APPENDIX A: MODIFICATION REQUEST MP 06_0250 MOD 6

Refer to http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=6798

APPENDIX B: SUBMISSIONS RECEIVED

Refer to http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=6798

APPENDIX C: MODIFICATION INSTRUMENT MP 06_0250 MOD 6
