

Ref: 16-19

**NSW P&E Ref: 8\_0167 Belle O'Connor St****08\_0167 MOD2, Modification to Residential Subdivision - 08\_0167 MOD 2**

26 May 2017

The Director General  
NSW Planning and Environment  
GPO Box 39  
SYDNEY NSW 2001

Attention: Jane Flanagan

Dear Jane

**RE: Section 75W Modification of Consent – Stage 10 and 11 of MP 08\_0167  
Lot 36 DP 1214499 Belle O'Connor Street, South West Rocks.**

Reference is made to the additional comments to the above application provided by Kempsey Shire Council on 11 May 2017.

The matters raised by Council are addressed as follows:

**Modification of Project Approval**

The subject Modification (08\_0167 MOD2) is not concerned with any subsequent modifications made by adjoining land owners.

As stated in the S75W Application submitted last October 2016, the subject Modification is concerned with Lot 36 DP 1214499 only. Lot 36 is now held in separate ownership to the remaining stages 1 to 9 of the Malbec land.

To confirm that the subject Modification can and should be determined by the Minister under Section 75W of the *Environmental Planning and Assessment Act* (EP&A Act) 1979, the following points are made:

1. Application No. 08\_0167 was approved by the Minister for Planning and Infrastructure on 2 June 2011. Part 3A of the EP&A Act was repealed on 1 October 2011, however, under the transitional provisions pursuant Schedule 6A of the EP&A Act the Project Approval can be modified.

2. Presently, NSW Planning and Environment (NSW P&E) continues to accept modifications to applications previously approved under Part 3A. Under Part 3A, the Minister has broad powers to modify Project Approvals, unlike the “substantially the same” test under Section 96 of the EP&A Act.
3. Correspondence between (NSW P&E) and Mr Geoff Smyth of Geoff Smyth & Associates, Town Planners in October 2015 (copies attached) on behalf of the proponent confirms that the subject request to modify the Project Approval should be made under Section 75W of the EP&A Act.
4. It is agreed that Council's local planning controls would apply to development ‘outside the realms of the repealed Part 3A’, however, MOD2 has been made under Part 75W and it is the responsibility of the Minister to assess and determine the application.

Council refers to Clause 6.3 of the Kempsey Local Environmental Plan (KLEP) 2013. Clause 6.3 provides that development consent must not be granted unless a development control plan addressing a range of environmental matters has been prepared for the land. Under Part 3A, development is assessed in accordance with the Director General's Environmental Assessment Requirements (DG's EARs). In this case, the DG's EARs were issued in 2008, prior to the gazettal of the LEP Amendment 55 on 14 August 2009, and prior to the gazettal of KLEP 2013.

Under Part 3A, there is no requirement for Modifications of consent to address subsequent environmental planning instruments and development controls.

It is further noted that Council provided a submission to MOD3 of the Project Approval. MOD3 involves amending Stages 3 to 8 of the Project Approval to enable a seniors living development. Council did not raise Clause 6.3 of the Kempsey LEP 2013 as a matter to be addressed by the proponent for MOD 3. This appears to be an inconsistent approach by Council to the various proponents of the Project Approval MP 08\_0167.

The environmental assessment of the proposal as originally lodged by Malbec and as modified (MOD 1 and MOD 2) has been adequately addressed and documented as required in the DG's EARs.

**Other Comments raised in Council's submission:**

**a) Copy of Construction Certificate for Stage 1A.**

Noted.

**b) Provision of Essential Services.**

All essential services will be provided to proposed Lots 1 to 43 as shown in the Engineering Issues report submitted on 2 March 2017.

**Access to each of the ‘developments’**

As shown in the Engineering drawings, public road access to proposed Lots 1 to 43 will be via a new public road connection off the Belle O'Connor Street / Burrawong Drive roundabout.

This new road connection intersects with Road 14. Road 14 serves the remaining stages of the Malbec development.

The proposed extension of Burrawong Drive will have no detrimental impact on the ability of the remaining stages of the Project Approval to proceed as approved and modified.

### **Adequacy and integration of the overall road network**

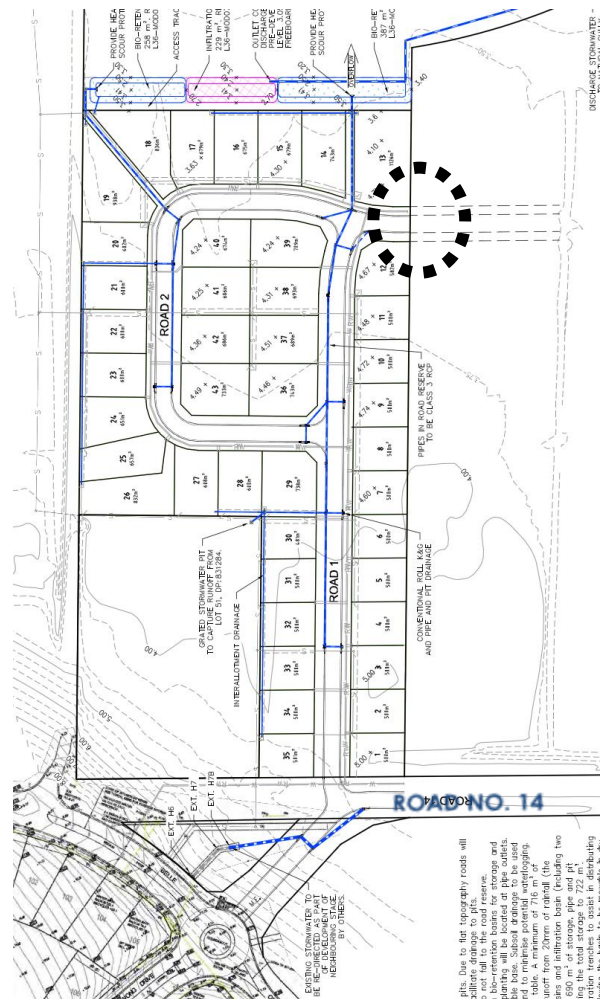
As stated above, Road 14 serves the remaining stages of the Malbec development. Proposed Road 14 is the main connection to Belle O'Connor Street. The proposed modification does not jeopardise the approved road layout in any way.

As shown in the images below, (dashed black circle), the proposed layout retains a local road connection from Lot 36 to Stage 9 of the approved development.

**APPROVED ROAD LAYOUT**



**PROPOSED ROAD LAYOUT**



**Lot 36 shown shaded red**

**Public Road connection from Lot 36 to Stage 9.**



***Appropriateness and integration of the different stormwater management systems proposed.***

The proposed stormwater drainage management system for Lot 36 will function independently of the system proposed for Stage 1 to 9 of the Project Approval. The main elements of the proposed system are:

- Water collected within the developed site is to be drained to bio-retention basins for treatment.
- The proposed bio-retention basins are to be lined with filter media and selected plantings.
- The bases of the basins are proposed to be impermeable and sub-soil drainage to be used to drain to the infiltration gallery to avoid waterlogging.
- The proposed infiltration gallery is to recharge the groundwater table.
- The bio-retention basins have been sized to suit the deemed to comply WSUD solutions.

As shown in the Engineering Issues Report and Drawings 13056-L36-MOD04-DA1 and Drawing 13056-L36-MOD07-DA, there is no requirement to integrate the two systems.

A bio retention basin will be located within the existing Easement to Drain Water 15 wide created by DP 1214499. This easement was created to benefit Lot 36.

***Interface between the various level of cut/fill involved in each of the 'developments':***

The difference in grade between Lot 36 and Lot 1 DP1220275 (Stage 9 of the Project Approval) is approximately 600 mm. The interface between the two lots (the shared north/south boundary) will either be gently battered or retained with a low wall. The details to be provided with the Construction Certificate documentation.

***c) Stormwater management infrastructure for Lot 36 is proposed on the adjoining and separate Lot 35. Whilst at present the two parcels are under the same ownership, how will this be addressed should this not be the case in the future?***

The stormwater infrastructure (pipe outlet and grassed swale) is wholly located within Lot 36 and the drainage easement over Lot 35.

Reference is made to the attached S88B Instrument for the Easement for drainage of water 15 wide and variable width. The drainage easement burdens Lot 35 and benefits Lot 36 DP 1214499 and Lot 1 DP 1128633. The easement runs with the land irrespective of ownership. Therefore, there will be no difference in the management of stormwater infrastructure if Lot 35 is held in separate ownership to Lot 36.

In any case, at the completion of the proposed subdivision of Lot 35, the E2 zoned land, in which the easement is located, will ultimately become a public reserve under the ownership and management of Council.

It is further noted that Kempsey Shire Council issued Subdivision Certificate 2641/16 on 11 March 2016 for DP 1214499, inclusive of the creation of the drainage easement over Lot 35.

***This land is zoned E2 Environmental Conservation under the KLEP 2013 and such development is not only inconsistent with the objectives of this zone, but it is also prohibited.***

The stormwater management infrastructure will be wholly located within the Easement to Drain Water 15 m wide created by DP 1214499. As stated above, Council issued a Subdivision Certificate for DP 1214499 inclusive of the creation of the drainage easement over Lot 35.

The stormwater infrastructure works will be located within an already cleared area at the boundary of Lot 35 and Lot 36 DP 1214499. The stormwater swale will be vegetated as shown in Drawing L36-MOD07 – refer extract below.

The Project Approval included a 20 m wide APZ straddling the boundary between Lot 35 and Lot 36 in the location of the drainage easement. As shown in the image below, a walking track and cycleway is also located within this area. The intention for this land was always for infrastructure associated with the subdivision.

Consistent with the Project Approval, this 15 m wide strip of land will be used for fire trail, cycleway, native grass planting and the stormwater swale.

In accordance with Schedule 8 of the *Conveyancing Act 1919*, the statutory terms relevant to the easement for drain water enable the dominant tenement (generally the land owner) the right of laying and maintenance of pipes and drainage of water (reproduced below).

### **Part 3 - Easement to drain water**

Full and free right for every person who is at any time entitled to an estate or interest in [possession](#) in the [land](#) herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, from time to time and at all times to drain water (whether rain, storm, spring, soakage, or seepage water) in any quantities across and through the [land](#) herein indicated as the servient tenement, together with the right to use, for the purposes of the easement, any line of pipes already laid within the servient tenement for the purpose of draining water or any pipe or pipes in replacement or in substitution therefor and where no such line of pipes exists, to lay, place and maintain a line of pipes of sufficient internal diameter beneath or upon the surface of the servient tenement, and together with the right for the grantee and every person authorised by the grantee, with any tools, implements, or machinery, necessary for the purpose, to enter upon the servient tenement and to remain there for any reasonable time for the purpose of laying, inspecting, cleansing, repairing, maintaining, or renewing such pipe line or any part thereof and for any of the aforesaid purposes to open the soil of the servient tenement to such extent as may be necessary provided that the grantee and the persons authorised by the grantee [will](#) take all reasonable precautions to ensure as little disturbance as possible to the surface of the servient tenement and [will](#) restore that surface as nearly as practicable to its original condition.

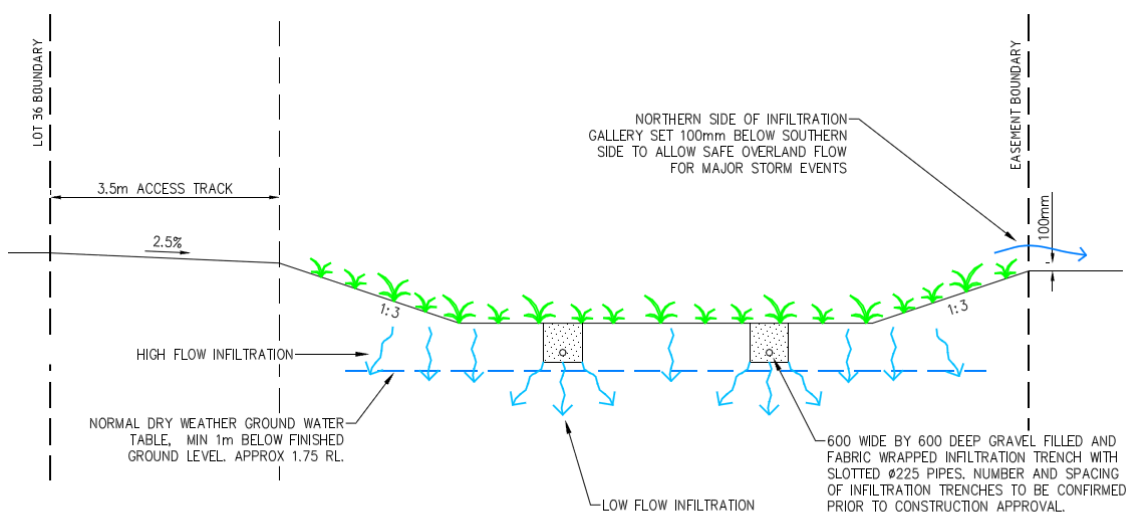
A copy of DP 1214499 and the relevant S.88 B instruments is attached.



**Extract Drawing L36-MOD07**



**Extract from MOD1 Plan 3 of 3 approved 6/8/13**



**INFILTRATION GALLERY DETAIL**

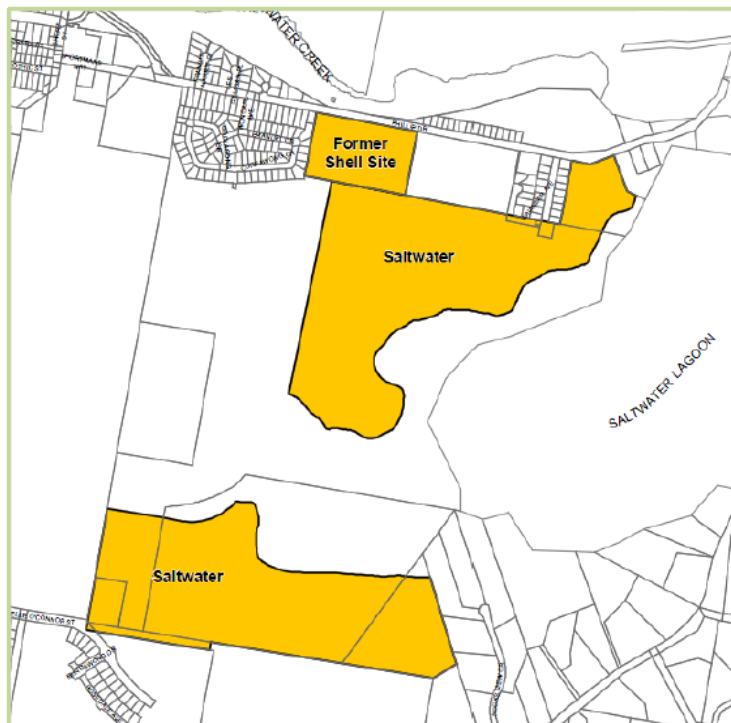
**deGroot and Benson, Drawing L36-MOD07**

- d) If Lot 36 is to be developed independently, with no control over how the remainder of the project develops, it should incorporate its own open space areas.**

Any future subdivision of Lot 35 will be assessed independently of the subject Project Approval Modification application.

In any case, the land is zoned E2 Environmental Protection which limits the range of land uses within that zone. The intention for the E2 zoned land within Lot 35 is for it to be conserved and maintained as open space until it is dedicated to Council as community land (public reserve).

There is 27.2 hectares of E2 zoned land within Lot 35. 27.2 hectares is sufficient open space to provide for the whole of the Saltwater precinct, regardless of the ownership of the overall development areas within the precinct. The Saltwater Precinct is shown shaded yellow below:



Source: NSW Legislation 2017

- e) these comments relate to consent conditions and rewording of the statement of commitments to reflect which proponent/landowner is responsible for what and when**

The S75W application and the further information submitted on 2 March 2017, makes it clear that Lot 36 is capable of development for low density residential purposes independently of the remaining stages of the Project Approval.

**f) Condition E10 relating to developer contributions would need to be updated.**

As stated in the S75W application, Condition E10 should be modified to reflect the increase in ETs from 273 to 288. The name of the Contribution Plan remains as approved on 3 June 2011.

If you have any queries or require any further information in relation to this application, please contact me on 0458 515963 or email [keiley@keileyhunter.com.au](mailto:keiley@keileyhunter.com.au).

Yours faithfully



Keiley Hunter  
Urban Planner

**Encl: Correspondence between Kempsey Shire Council, NSW Planning and Environment and Geoff Smyth & Associates.**

**88B Instrument**





ABN 25 125 245 361  
PO Box 1925, Coffs Harbour NSW 2450  
E-mail: geoff.smyth@bigpond.com  
Mobile: 0418 398 492

TOWN PLANNING & DEVELOPMENT ADVICE

26 October 2015  
Ref: GS1302.29

Director General  
Department of Planning and Environment  
GPO Box 39  
SYDNEY NSW 2001

Dear Sir

***MP 08-0167 Residential Subdivision  
Lot 36 DP 1167775  
Belle O'Connor Street, South West Rocks***

The residential subdivision of the above-mentioned property and including adjoining land to the east was approved by the Department of Planning and Environment. It is understood the approval was granted under Part 3A of the Environmental Planning and Assessment Act. The original approval was subsequently modified under Section 75W of the Act on 6 August 2013 and it is understood that the subdivision has commenced. A copy of the approved modification is attached.

Lot 36 DP 1167775 is a 7.372ha parcel of land that has a frontage to an unmade road reserve and a small frontage to Burrawong Drive that was approved to be the main access road from Belle O'Connor Street. The original subdivision including Lot 36 was proposed by Malbec Properties and Lot 36 comprised Stages 10 and 11 of the approved subdivision. Lot 36 has subsequently been sold and the new owners have requested advice on the procedure to develop this land independently from the other approved stages of subdivision.

To achieve the independent subdivision of this land it would be necessary to provide a new road access from Burrawong Drive and for some approved lots to be rearranged to recognise the new access road. In 2012 a concept for a modified subdivision was prepared by Planit Consulting that shows the extent of change that might be necessary for Lot 36 to be subdivided independently. A copy of the concept layout is enclosed so that the extent of modification might be appreciated.

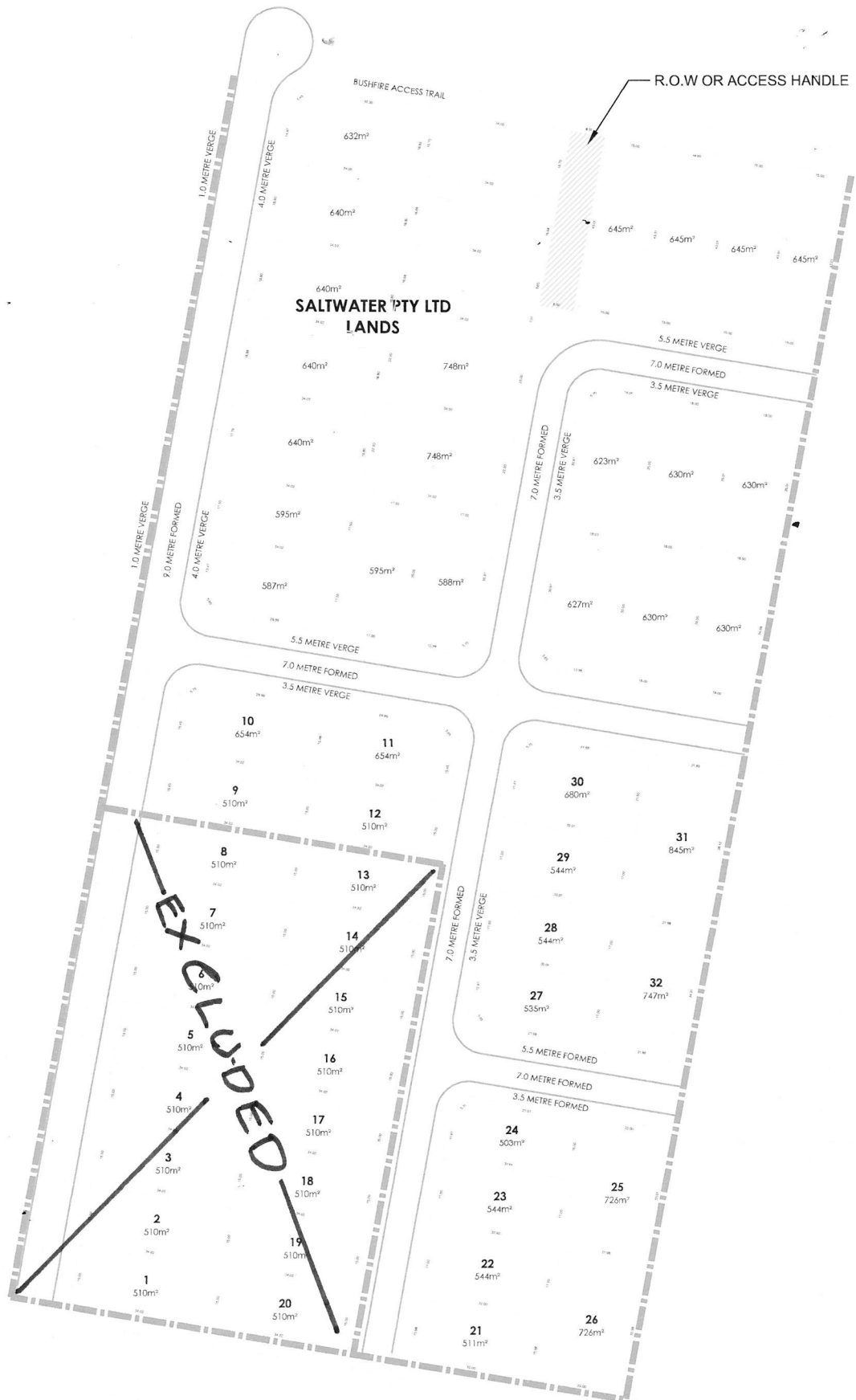
Advice has been sought from Kempsey Shire Council to ascertain whether a change in road access and the removal of reference to Stages 10 and 11 could be dealt with by way of a modification application in a subdivision layout similar to the concept plan prepared by Planit Consulting enclosed. Kempsey Shire Council advised that any modification application must be submitted to your Department pursuant to Section 75W and not the Council.

The purpose of this letter is to ascertain whether you consider that a change in road access and removal of the reference to Stages 10 and 11 can be dealt with by way of a modification application in a subdivision layout similar to the concept plan prepared by Planit Consulting and enclosed.

Yours faithfully  
**GEOFF SMYTH & ASSOCIATES**



**GEOFF SMYTH**  
gs.jm



# **SOUTH WEST ROCKS - OPTION 02** LOT 38 DEVELOPMENT OPTIONS

SCALE: 1:1000 @ A3  
DRAWN: [Signature]  
DATE: 14/10/10  
REV: 01

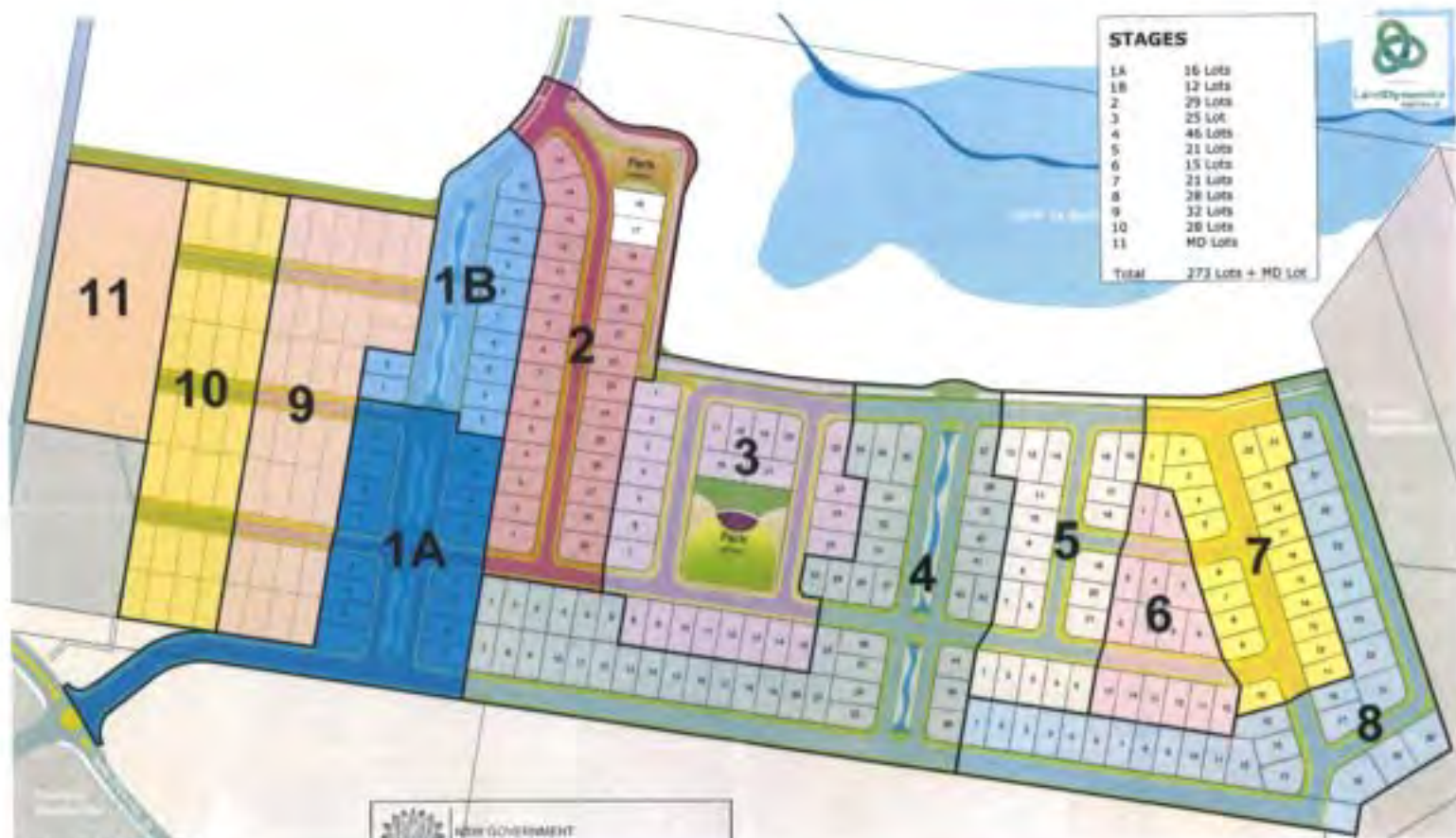
DRAW NO: SOUTH WEST ROCKS OPTION 02  
CHECKED: [Signature]



Level 1 2247 Gold Coast Hwy  
Nobby Beach  
PO Box 204 Nobby Beach QLD 4218

Telephone: 07 5526 1500  
Fax: 07 5526 1502  
admin@planitconsulting.com.au





STAGES	
1A	16 Lots
1B	12 Lots
2	29 Lots
3	25 Lots
4	46 Lots
5	21 Lots
6	15 Lots
7	21 Lots
8	28 Lots
9	32 Lots
10	28 Lots
11	MD Lots
Total	273 Lots + MD Lot



NEW SOUTH WALES  
GOVERNMENT  
Planning

Issued under the Environmental Planning and Assessment Act 1979

Approved Section 25W Modification Application

Shire of 1 granted on the 12 August 2011

In respect to Lot 25-0107

Signed

Shire No 2 of 3

**MALBEC**  
PROPERTIES

2011/01  
14479

# COAST STAGING PLAN



RE\_GS1302 Emails to Kate.txt

From: Geoff Smyth & Associates  
To: Katie.MacDonald@planning.nsw.gov.au  
Subject: RE: South West Rocks -Proposed Section 75W Modification  
Date: Wednesday, 25 November 2015 9:04:41 AM  
Attachments: Lot 36 current.pdf

(File Attachment comment)  
Lot 36 concept.pdf

(File Attachment comment)  
Hi Kate

I have passed on your advice regarding Section 75W to my client and he has requested I obtain some further clarification from you before we commence preparing an application. Section 75W seems to operate quite differently to Section 96.

Attached is the currently approved plan for the Lot 36 that my client now owns. The approval is for stages 10 and 11 with stage 11 being a medium density development lot. Also attached is a preliminary concept prepared by de Groot and Benson for a more practical layout for Lot 36 based on the land being in separate ownership and having regard to the zoning of the land.

My client has requested I obtain your advice as to whether this amended layout can be assessed as a Section 75W modification.

Regards  
Geoff Smyth  
GEOFF SMYTH & ASSOCIATES

TOWN PLANNING & DEVELOPMENT ADVICE  
ABN 25 125 245 361  
PO Box 1925, Coffs Harbour NSW 2450  
Mobile: 0418 398 492 Email: geoff.smyth@bigpond.com

PLEASE ENSURE AN ACKNOWLEDGEMENT OF RECEIPT IS FORWARDED UPON RECEIPT OF EMAIL. THIS WILL ASSURE US YOU ARE IN RECEIPT OF OUR EMAIL AND DELAYS IN OUR RESPONSES ARE AVOIDED. YOUR ASSISTANCE WITH THIS IS APPRECIATED.

RE\_GS1302 Emails to Kate.txt

From: Katie.MacDonald@planning.nsw.gov.au  
[mailto:Katie.MacDonald@planning.nsw.gov.au]  
Sent: Monday, November 9, 2015 4:50 PM  
To: geoff.smyth@bigpond.com.au  
Subject: South West Rocks - Proposed Section 75W Modification

Hi Geoff,

I refer to your correspondence to the Department dated 26 October 2015, seeking confirmation whether it is possible to lodge a section 75W modification to alter the access arrangements to stages 10 and 11 of MP 08\_0167.

As per our telephone conversation this afternoon, I can confirm that you can lodge a request to

↑

modify the project approval under section 75W of the EP&A Act. Any request would need to assess the impacts of altering the approved site access arrangements and whether any consequential changes are required to the current conditions of approval. assess the impacts of altering the approved site access arrangements and whether any consequential changes are required to the current conditions of approval.

Please feel free to give me a call on 9228 6435 once you have had a chance to review the existing approval and you understand the impacts of the proposed modification in more detail.

Kind regards,

Kate

↑



ePlan

**Instrument setting out terms of Easements or Profits à Prendre intended to be created or released and of Restrictions on the Use of Land or Positive Covenants intended to be created pursuant to Section 88B Conveyancing Act 1919<sup>1</sup>**

(Sheet 1 of 1 Sheets)

**Plan: DP1214499**

Plan of Subdivision of Lots 35 & 36 in Deposited  
Plan 1167775 covered by Subdivision Certificate  
No. 2641/16 Dated: 11 March 2016

**Full name and address  
of owner of the land:**

Teebee Holdings Pty Limited ABN 32 107 172 618  
6 Myola Road, Newport, NSW 2106

**PART 1 (Creation)**

Number of item shown in the intention panel on the plan	Identity of easement, profit à prendre, restriction or positive covenant to be created and referred to in the plan.	Burdened lot(s) or parcel(s):	Benefited lot(s), road(s), bodies or Prescribed Authorities:
1	Easement for drainage of water 15 wide and variable width	35	36 1/1128633

Executed for and on behalf of **Teebee Holdings Pty Limited ABN 32 107 172 618** in accordance with Section 127 of the Corporations Act 2001 by the Directors:

Signature of authorised person:

*Sandy Tall*

Name of authorised person: Sandra Joan Tall  
Office held: Director

Signature of authorised person:

*Alexander Tall*

Name of authorised person: Alexander  
Bradstock Tall  
Office held: Director/Secretary

REGISTERED



13.4.2016

**INSTRUMENT SETTING OUT TERMS OF EASEMENTS OR PROFITS À PRENDRE  
 INTENDED TO BE CREATED OR RELEASED AND OF RESTRICTIONS ON THE USE OF  
 LAND OR POSITIVE COVENANTS INTENDED TO BE CREATED PURSUANT TO  
 SECTION 88B OF THE CONVEYANCING ACT 1919**

(Sheet 1 of <sup>4</sup> sheets)

**Plan: DP1208962**

Of Easement to Drain Water 15 Wide  
 Affecting Lots 35 & 36 DP1167775 and  
 Lot 1 DP1128633 and Easement to Drain  
 Water 15 Wide & Variable affecting Lot 36  
 DP1167775

**Full Name and Address of the Registered  
 Proprietor of the Land:**

Malbec South West Rocks Pty Limited  
 ACN 106 698 428  
 of

and

Teebee Holdings Pty Ltd  
 ACN 107 172 618  
 of

**PART 1 (Creation)**

Number of item shown in the intention panel on the plan	Identity of easement, profit à prendre, restriction or positive covenant to be created and referred to in the plan	Burdened lot(s) or parcel(s):	Benefited lot(s), road(s), bodies or Prescribed Authorities
1.	Easement to drain water 15 wide	35/1167775  36/1167775  1/1128633	1/1128633 and 36/1167775  1/1128633  36/1167775
2.	Easement to drain water 15 wide & variable	36/1167775	1/1128633

**PART 2 (Terms)**

**1. Terms of Easement to Drain Water 15 Wide and Easement to Drain Water 15  
 Wide & Variable numbered 1. and 2. in the Plan**

- 1.1 An easement in the same terms as the easement to drain water set out in Part 3 of  
 Schedule 8 to the Conveyancing Act 1919.

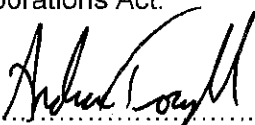
**INSTRUMENT SETTING OUT TERMS OF EASEMENTS INTENDED TO BE CREATED OR  
RELEASED AND OF RESTRICTIONS ON THE USE OF LAND OR POSITIVE  
COVENANTS INTENDED TO BE CREATED PURSUANT TO SECTION 88B OF THE  
CONVEYANCING ACT 1919**

(Sheet 2 of <sup>4</sup>8 sheets)

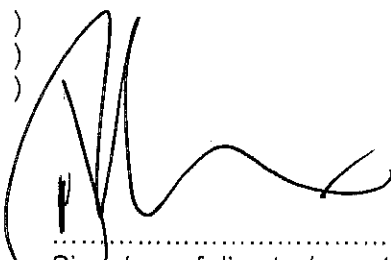
**Plan: DP1208962**

Of Easement to Drain Water 15 Wide  
Affecting Lots 35 & 36 DP1167775 and  
Lot 1 DP1128633 and Easement to Drain  
Water 15 Wide & Variable affecting Lot 36  
DP1167775

**EXECUTED by MALBEC SOUTH WEST  
ROCKS PTY LIMITED ACN 109 698 428**  
in accordance with section 127 of the  
Corporations Act:

  
.....  
Signature of director

**ANDREW TOWZELL**  
.....  
Name (please print)

  
.....  
Signature of director/secretary

**IAN CAMERON**  
.....  
Name (please print)

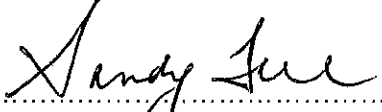
INSTRUMENT SETTING OUT TERMS OF EASEMENTS INTENDED TO BE CREATED OR  
RELEASED AND OF RESTRICTIONS ON THE USE OF LAND OR POSITIVE  
COVENANTS INTENDED TO BE CREATED PURSUANT TO SECTION 88B OF THE  
CONVEYANCING ACT 1919

(Sheet 3 of <sup>4</sup> sheets)

Plan: **DP1208962**

Of Easement to Drain Water 15 Wide  
Affecting Lots 35 & 36 DP1167775 and  
Lot 1 DP1128633 and Easement to Drain  
Water 15 Wide & Variable affecting Lot 36  
DP1167775

EXECUTED by TEEBEE HOLDINGS PTY )  
LTD ACN 107 172 618 in accordance with )  
section 127 of the Corporations Act: )

  
.....  
Signature of director

Sandra Joan Tall  
.....  
Name (please print)

  
.....  
Signature of director/secretary

Alexander Bradstock Tall  
.....  
Name (please print)

**INSTRUMENT SETTING OUT TERMS OF EASEMENTS OR PROFITS À PRENDRE  
INTENDED TO BE CREATED OR RELEASED AND OF RESTRICTIONS ON THE  
USE OF LAND OR POSITIVE COVENANTS INTENDED TO BE CREATED  
PURSUANT TO SECTION 88B OF THE CONVEYANCING ACT 1919**

(Sheet 4 of 4 sheets)

**Plan: DP1208962**

Of Easement to Drain Water 15 Wide  
Affecting Lots 35 & 36 DP 1167775 and Lot 1  
DP 1128633 and Easement to Drain Water  
15 Wide & Variable affecting Lot 36 DP  
1167775

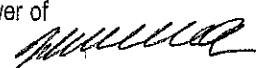
**Full Name and Address of the Registered  
Proprietor of the Land:**

Malbec South West Rocks Pty Limited  
ACN 106 698 428  
of  
and  
Teebee Holdings Pty Ltd  
ACN 107 172 618  
of Suite 4, 11 Waratah Street, Mona Vale  
NSW 2103

**EXECUTED** for and on behalf of  
**COMMONWEALTH BANK OF AUSTRALIA** by

its duly constituted Attorney pursuant to Power  
of Attorney registered Book  
No. in the presence of:

Signed at Sydney the 12th day of  
February 2015 For Commonwealth  
Bank Of Australia ABN 48 123 123 124 by its  
Duly appointed Attorney under Power of  
Attorney Book 4297 No 297

Witness  Jodie Franklyn-Smith

**Monika Eshou**

150 George Street Parramatta NSW

Signature of Witness

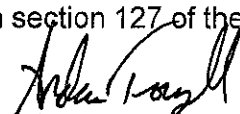
Signature of Attorney

Name of Witness (please print)

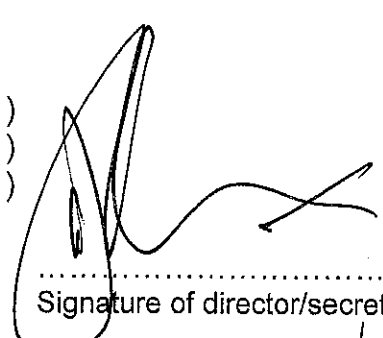
Name of Attorney in full (please print)

Address of Witness (please print)

**EXECUTED** by **MALBEC DEVELOPMENTS  
PTY LIMITED ACN 111 314 795** in accordance  
with section 127 of the Corporations Act:

  
Signature of director

**ANDREW TOWZELL**  
Name (please print)

  
Signature of director/secretary

**IAN COUSMAN**  
Name (please print)

REGISTERED



4.6.2015