

20 November 2014

## **NSW Planning Assessment Commission Determination Report**

### **KINGS FOREST ESTATE Concept Plan Modification (MP06\_0318 MOD 4) & Stage 1 Project Approval Modification (MP08\_0194 MOD 2)**

#### **1. INTRODUCTION**

The site of Kings Forest Estate covers around 880ha, approximately 15km south of Tweed Heads and close to the coastal suburbs of Bogangar, Cabarita Beach and Casuarina. The site is surrounded by agricultural lands to the north, west and southwest. Cudgen Lake and the wetland habitat surrounding the lake, borders the south-eastern boundary. The Cudgen Nature Reserve extends alongside the eastern site boundary.

#### **2. DEVELOPMENT BACKGROUND AND PREVIOUS APPROVALS**

In 2006, Project 28 Pty Ltd (the Proponent) submitted a concept plan for development of a residential community (including subdivision), educational facilities, town centre, service station, golf course and club house, neighbourhood centre and a regional community facility at the subject site.

##### 2.1 Concept Plan (MP06\_0318)

In 2010, the Planning Assessment Commission (PAC) provided the then Minister for Planning with a review of the Director-General's Environmental Assessment Report for the Concept Plan. The PAC review concluded that it was generally satisfied with the Department's assessment and recommendations.

On 19 Aug 2010 the then Minister for Planning approved a Concept Plan for the site for the following:

- Residential development for approximately 4500 dwellings;
- Town centre and neighbourhood centre for future retail and commercial uses;
- Community and education facilities;
- Employment land;
- A golf course;
- Open space;
- Wildlife corridors;
- Protection and rehabilitation of environmentally sensitive land;
- Utility services infrastructure;
- Water management areas and lake; and
- Roads, bicycle and pedestrian network.

Since approval, in 2010, The Concept plan has been modified on three occasions:

- 22 Dec 2010 (MOD 1): amendments to incorporate the Kings Forest Development Code into the approval, amendments to certain plans and clarification of other terms of approval.
- 11 Aug 2013 (MOD 2): reducing the number of precincts from 24 to 14; the requirement of a new east-west wildlife corridor; a new term of approval requiring the Proponent to

implement all management plans in perpetuity; a new future environmental assessment requirement that all future development applications for subdivision are to provide details of proposed land dedications to Tweed Shire council; and various other future environmental assessment requirements.

- 16 May 2014 (MOD 3); amendments and additional definitions, extension to the lapsing date of the approval and amended the terms relating to precinct specific management plans.

## 2.2 Project Approval - Stage 1 (MP08 0194)

On 11 Aug 2013, the PAC issued Project approval including bulk earthworks across the site; a plan for development and subdivision of Precinct 5 (376 lots); development of a rural supplies building and access arrangements (Precinct 1); subdivision and infrastructure works along Kings Forest Parkway and within precincts 1 and 5.

On 16 May 2014, concurrently with MOD 3 of the Concept Approval, the Project Approval was modified to allow: addition of allotments, definition changes, amendments to statutory requirements, changes to timeframes for various conditions, changes to Section 94 contributions, amendments to the weed management plan, water and sewer arrangements, geotechnical certification and registration of easements.

## **3. CURRENT APPLICATIONS**

The Proponent is seeking to make amendments to the following definitions and conditions of approval:

### Concept Plan (MP06 0318)

- Schedule 1: amendments to the following definitions:
  - *Land to be dedicated to Council in the Future;*
  - *Council Dedicated Land Plan;* and
  - *Offset Area.*
- Schedule 2:
  - Amendments to the approved Concept Plan drawings (term **A2**),
  - Amendments to the terms **B5, B7, C3, C29** to reflect amended definitions in Schedule 1;
  - Amendment to alter the trigger for the implementation of the Environment Management Plans and an additional note to define the commencement of the project (term **B7**)
  - Amendments to the resolution of disputes and the Secretary as moderator (term **B8**); and
  - Amendments to term **C30** relating to provision of affordable housing being subject to funding arrangements.

### Project Approval - Stage 1 (MP08 0194)

- Schedule 1: amendments to the following definitions:
  - *Land to be dedicated to Council in the Future;*
  - *Council Dedicated Land Plan;*
  - *Establishment Period*
  - *Maintenance Period* and
  - *Offset Area.*
- Schedule 2:
  - Amendments to the references to bulk earthworks requirements (condition **A1(2)**),
  - Amendments to the terms of commencement to management and maintenance of environmental lands (condition **A13**);



- Amendments to the resolution of disputes and the Secretary as moderator (conditions **A15**)
- Amendments to the timing of site subdivision (condition **1.1**),
- Amendments to the timing of survey plans and registration of a form of dealings to be registered on the title to the land dedicated to the public(condition **3**),
- Amendments to certification of compressible clay material in precincts 11,12 and 14 (condition **13.2**)
- Amendments to the timing of the baseline monitoring (condition **37**),
- Amendments to the timing of Koala food tree plantings (condition **45**),
- Amendments to the timing of environmental audits reports and the remedy for non-compliance (condition **49**),
- Deletion of the requirement for a bond for environmental restoration works (condition **50**),
- Amendments to the dust mitigation measures during construction (condition **82**),
- Amendments to the arrangements for the dedication of public open space (condition **148**)
- Amendments to the timing of the dedication of land to the OEH (condition **149**) and
- Amendments to the telephone and electrical services requirement (condition **156.2**)).

#### **4. DELEGATION TO THE COMMISSION**

In response to the public exhibition of the modification applications the Department of Planning & Environment (DP&E) received a total of 52 submissions; including five from public authorities. The applications have been referred to the PAC for determination as Council lodged a submission objecting to some aspects of the proposal and more than 25 public submissions objected to the proposal.

Ms Gabrielle Kibble AO, then Chair of the Planning Assessment Commission, nominated Mr Garry West (chair) and Ms Jan Murrell to constitute the Commission to determine the applications.

#### **5. SECRETARY'S ENVIRONMENTAL ASSESSMENT REPORT**

Following the public exhibition (12 Feb – 12 March 2014) the proponent revised its original modification request in April 2014. In addition, further discussion between the Department and the Proponent took place to clarify a number of issues which required further discussion.

The Secretary's Assessment Report provided an assessment of the final version of the revised original modification request. The Report considered that the key issues relate to the modification of the Project Approval, as they have the potential to affect the physical work. The modifications of the Concept Plan were considered generally minor and for administrative purposes.

DP&E recommended that some parts of proposed amendments should be approved. However, the Department did not support amendments to Condition 3 (Environmental Offset Areas) and Condition 50 (Bond for Environmental Restoration Works) of the Stage 1 Project Approval as '*it considers that the amendments to these conditions are either unnecessary or inconsistent with the intent and objectives of the existing approved conditions*'.

#### **6. Consultation and meetings**

##### **6.1. Tweed Shire Council**

During the public exhibition Tweed Shire Council submitted their comments, expressing support (or support with some changes) or not supporting proposed amendments. The council objected to proposed modification of the following conditions: 13 (Compressible Clay Material in Precincts 11,

12 to 14), 37 (Baseline monitoring), 45 (Koala Plan of Management), 50 (Bond for Environmental Restoration Works), 82 (Dust Mitigation) and 156 (Telephone and electricity services and Federal Government's National Broadband Network (NBN).

On 8 October 2014, the Commission met with representatives from Tweed Shire Council to discuss the Council's views on the Secretary's Environmental Assessment Report.

The Council objected to draft amendments to Conditions 13, 37, 45 and 82 due to the following reasons:

- Future allotment owners should not be required to use expensive footing/foundation construction techniques (Condition 13).
- The amendment seeks to further delay the commencement of baseline monitoring which is necessary to inform the revision of the EMPs. The works may not commence for many months or years after the Construction Certificate (CC) is issued. In these circumstances the value of the baseline monitoring is diminished (Condition 37).
- It is not acceptable to delay the tree planting offsets. The Project approval extends to bulk earthworks across the entire site, not just Precincts 1 and 5. Impact mitigation should also be considered across the entire site (Condition 45).
- Current condition details the responsibility of the contractor and developer which is essential on a site near the Tweed coast which is affected year round by strong winds. Dust nuisance has significantly affected the amenity and health of residents in the area (Condition 82).

The Council recommended further amendments to the definition of '*Council Dedicated Land Plan*', Conditions B5 and B7 in the Concept Plan; definition of '*Potential Council Land Plan*', Condition A13, 3, 49 and 50 of the Stage 1 Project Approval.

#### 6.2. The Proponent

The Commission also met with the proponent on 8 October 2014. The proponent and their representative elaborated further on the Department's draft amendments. In particular, the proponent questioned his obligation to comply with any conditions of consent, until the development is physically commenced on the land (Condition A13); the need for a legal instrument on the title to ensure that the environmental protection areas are protected in perpetuity (Condition 3); preparation of environmental audit reports every 2 years (Condition 49) and bond for environmental restoration and maintenance works (Condition 50).

Further correspondence from the Proponent was received on 11 November 2014 and the Commission met with the proponent on 18 November 2014 to further discuss additional DP&E and Tweed Council's comments.

#### 6.3. Public Meeting

On Wednesday 8 October 2014 the Commission held a public meeting to hear the community's views on the DP&E Environmental Assessment Report and recommended amendments to the terms and conditions of the Concept Plan and Stage 1 Project Approval at the South Tweed Sports club. The meeting was attended by more than 40 people and eight speakers registered to speak at the meeting (refer Appendix 1).

All speakers opposed all of the proposed modifications and their key issues were:



### General

- Proposed modification is a further watering down of already agreed and imposed environmental safeguards;
- Shrinking responsibility for mitigation works, or pushing the timing out for these to be done so that those works become uncertain;
- This has been an ill-conceived project from the start, with the focus on creating monetary wealth rather than considering the future well-being of the area and permanent jobs as opposed to fly in fly out non local tradesmen.
- At the last public hearing many important points were ignored.
- Council/OEH amendments to conditions **30, A13, 13.2)** and **82** are strongly supported.
- The development has the potential to cause significant harm or extinction of the Wallum Sedge Frog (WSF). Almost all frogs' habitat will become either cut or fill during bulk earthworks. Offset land will not work for WSF and its froglets. WSF and koala habitat are mutually exclusive. An Acid Frog Management Plan is needed.

### Definitions

- Rewording of definitions instils a level of uncertainty and ambiguity. The proponent's arguments to change definitions are unconvincing.
- Words '*dedicated*' and '*potential*' are contradicting. The OEH does not support the removal of the definition '*Offset areas*'.

### B7 Implementation of Environmental Management Plans

- There are many initial environmental management actions necessary to progress while waiting for the approval from the Commonwealth.

### C3 Dedication of Land to OEH

- Staged schedule for surveying boundaries of future Council and OEH land could lead to misunderstandings about boundary placing and the timing of land dedications.
- No earthworks or works with heavy machinery should travel from site to site.

### A13 Management and maintenance of environmental lands

- The trigger for the management and maintenance of environmental lands should be '*prior to the issue of a CC for bulk earthwork*' because '*commencement of bulk earthworks*' is difficult to define.

### 37 Baseline Monitoring

- No current modification to current baseline monitoring standards.
- A full year of baseline data is essential in order to capture the seasonal effects of phenomena.
- The timing of the earthworks is not crucial to the collection of the baseline data.

### 45 Koala Plan Management

- 18 koala food trees and 742 potential roost trees will be lost. All planned koala food trees must be planted and maintained without delay as these trees take many years to mature.
- Tree planting should commence within 1 month of the revised KPM approval.
- *The Tweed Coast Koala Habitat Study 2011* states that gaps between large habitat blocks must be revegetated. These compensatory trees should have been planted years ago.
- It is upsetting to see that Department approved staged planting.

### 49 Environmental Audit Reports

- The Condition **49.3)** must stand as it is the incentive to ensure compliance with management plans.

#### 50 Bond for environmental restoration and maintenance works

- The proponent must be made to adhere to the original Condition 50. It is critical that the bond is not returned until the land is transferred to public authority.

### **7. Commission's Consideration**

The Commission has considered the DP&E Assessment Report on proposed modifications; the Department's recommended conditions of modification and associated documents, including submissions from Tweed Shire Council, the public and the Proponent's response.

The primary concerns of the Commission related to:

- The proposed definition for '*commencement of the project*';
- Controls for areas of compressible clay material in Precincts 11, 12-14;
- Timing of baseline monitoring;
- Proposed amendments to the Koala Plan of Management (KPoM);
- Improved clarity of the cost of environmental maintenance works and the timing for the release of the bond; and
- Dust mitigation.

#### 7.1 Definition for '*commencement of the project*' (B7 of the Concept Plan and C3 of the Stage 1)

The Commission notes that the proponent seeks to alter the trigger for the implementation of the Environmental Management Plans from the date of the Stage 1 project approval to the physical commencement of the Project. The Department considered the proposed definition reasonable. The Commission agrees with the intention and has slightly amended the definition to exclude non-actual works such as drawing subdivision plans or surveying.

#### 7.2 Compressible Clay Material in Precincts 11, 12 to 14 (condition 13 of the Stage 1)

The Proponent contends that it is unreasonable to guarantee that no settlement will occur in the proposed areas and that there will be no need for special construction techniques. The Department considered the proponent's request reasonable, given the difficulty for any development to guarantee that earthworks would achieve '*no settlement occurring*'. Council indicated that they do not agree with this approach and objected to the reference to AS 3798-2007. The Commission agrees that the condition needs further clarification and adopted an approach that would retain the reference to the Australian Standard but also maintain the role for an appropriately qualified practising geotechnical engineer, approved by the Secretary.

#### 7.3 Baseline monitoring (condition 37 of the Stage 1)

The proponent seeks to alter the timing for the demonstration that baseline monitoring has commenced to '*three months prior to the commencement of bulk earthworks*' stating that it is unreasonable to require baseline monitoring prior to the issue of a Construction Certificate (CC) as works may not commence for many years after the construction certificate is issued. The Department has accepted the Proponent's modification. The Commission notes the community objection to the proposed amendments and has amended the condition to set the timing prior to the issue of the first CC and not the commencement of the project. The Commission believes that the Proponent is in a good position to estimate the time of obtaining the first CC.

#### 7.4 Koala Plan of Management (condition 45 of the Stage 1)

The Proponent seeks to change the timing of planting Koala food trees from one month of the revised KPoM being approved to the time of commencement of bulk earthworks in each relevant stage. Both Council and the community objected to the proposed modification. DP&E has recommended that the potential impacts to Koala habitat can be appropriately managed and



mitigated through the implementation of the recommended conditions, including the schedule of tree planting in the revised KPoM to be approved by the Secretary and in general accordance with the plan titled 'Proposed Koala Compensatory Habitat Area Staging Plan, condition 45, Figure 1, JWA Pty Ltd, 29 April 2014'.

The Commission notes that the plan was revised following the public exhibition in Feb/March 2014 and has incorporated issues raised by the community and other stakeholders. The Commission concurs with the Department. The Commission has also made an amendment that requires amended KPoM to have regard to any future determination of the NSW Scientific Committee. On 17 October 2014, The Committee made a Preliminary Determination to support a proposal to list a population of the Koala in Tweed LGA as endangered population in Part 2 of the *Threatened species Conservation Act 1995*.

#### 7.5 Bond for Environmental restoration and Maintenance Works (condition 50 of the Stage 1)

The Proponent has request that condition 50 be deleted as unreasonable, vague and unlawful. The Department noted the concerns raised by the Proponent and provided amended condition to stage the bond for the establishment period and maintenance period and link the payment of the bond to the release of the associated precinct to enable refund. In response to additional Proponent's and Council's submissions received during the PAC determination process, the Department reviewed the recommended modification and provided amended version. The Commission concurred with the Department.

#### 7.6 Dust Mitigation (condition 82 of the Stage 1)

The Proponent states that the condition is onerous and unreasonable and that the dust impact should be dealt with through performance based criteria rather than prescriptive measures. The Department agrees with this approach. The Commission agrees that the dust mitigation measures required to be implemented can be consolidated and rationalised. For this reason, the requirement contained in the condition 82 have been transferred and incorporated in condition 52 Construction Environmental Management Plan.

The Commission has carefully considered all other proposed modifications and either made minor amendments to them or concur with the Department.

### **8. Commission's Determination**

The Commission has determined the section 75W modification applications and the attached signed modification instruments MP06\_0318 and MP08\_0194 are consistent with this determination report.



**Garry West**  
Member of the Commission



**Jan Murrell**  
Member of the Commission

# Appendix 1

## List of Speakers

### PLANNING ASSESSMENT COMMISSION MEETING

**Date:** Wednesday, 8 October 2014, 2:00 pm

**Place:** South Tweed Sports, 4 Munjungbal Drive, Tweed Heads South

**Speakers:**

1. Caldera Environment Centre - Marion O'Riordan
2. Northern Rivers Guardians- David Norris
3. Tweed Team Koala- Jennifer Hayes, Tony Thompson & Jan Pilgram
4. Lindy Smith
5. Marie Jack
6. Tracey Dobson
7. Tweed Greens- Andrea Vickers
8. Katie Milne