

ASSESSMENT REPORT

KINGS FOREST CONCEPT PLAN AND STAGE 1 PROJECT APPROVAL MP06_0318 MOD 8 MP 08_0194 MOD 7

1. INTRODUCTION

This report is an assessment of a request to modify the Concept Plan (MP06_0318) and the Stage 1 Project Approval (MP08_0194) for the Kings Forest subdivision in the Tweed local government area (LGA). The request has been lodged by Project 28 Pty Ltd (the Proponent) pursuant to section 75W of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

It seeks to amend the lapse date of the Concept Plan and Project Approval to 31 December 2019. The proposal also seeks to insert a new condition into the Project Approval to clarify that a construction certificate may be issued for preliminary investigative and monitoring work, without meeting other pre-conditions of approval.

2. SUBJECT SITE

The Kings Forest site is approximately 880 hectares in area and comprises 19 parcels of land. It is located approximately 15 kilometres (km) south of Tweed Heads, close to the townships of Bogangar, Cabarita Beach and Casuarina.

The site is surrounded by agricultural and pastoral lands to the north, south and west. Cudgen Lake, wetlands and the Cudgen Nature Reserve border the southern and eastern site boundaries. Further to the east, on the opposite side of Cudgen Nature Reserve, is the coastal suburb of Casuarina. (Figure 1).

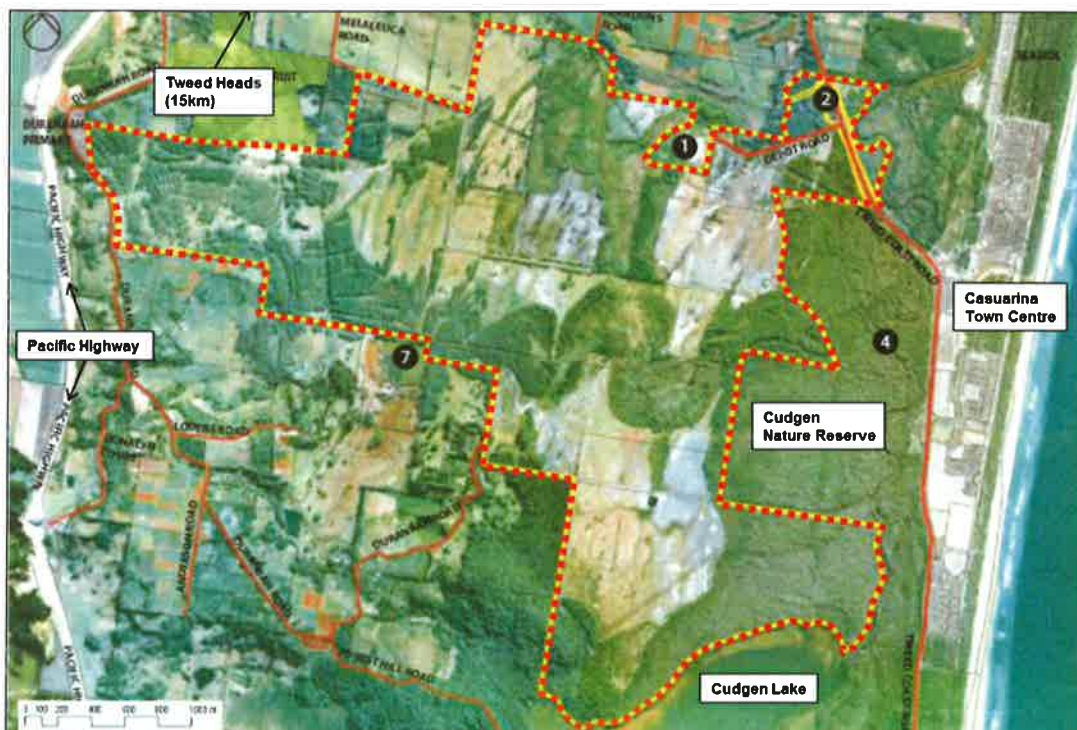


Figure 1: The site (dashed outlined) and its surroundings

3. APPROVAL HISTORY

3.1 Concept Approval (MP 06_0318)

On 19 August 2010, the Concept Plan (MP 06_0318) was approved by the then Minister for Planning. The Concept Approval allows for:

- residential development for approximately 4500 dwellings;
- town centre and neighbourhood centre for future retail and commercial uses;
- employment land and community and education facilities;
- a golf course, open space, wildlife corridors, protection and rehabilitation of environmentally sensitive land;
- water management areas and lake; and
- roads, bicycle and pedestrian network and utility services infrastructure.

The Concept Approval has been modified on five occasions, as summarised in **Table 1** below.

Table 1: Approved Modifications to Concept Plan MP 06_0318

Mod No.	Description of Modification	Approved
MOD 1	Incorporation of the Kings Forest Development Code into the Concept Approval, amendments to the schedule of approved plans, and administrative changes to the terms of approval.	22/12/2010
MOD 2	Amendments to the Concept Plan drawings, reduction in the number of precincts from 24 to 14, provision of an east-west wildlife corridor, and modifications to the terms of approval to require the implementation of management plans in perpetuity, and clarify the plans that need to be prepared prior to the dedication of land to Tweed Shire Council.	11/08/2010
MOD 3	Amendments to the conditions of approval and definitions table, extension of the approval lapse date (from 19 August 2015 to 31 December 2016), and amendments to the precinct specific management plans.	16/05/2014
MOD 4	Amendments to the schedule of definitions and terms B5, B7, C3, C29 (to reflect the amended definitions) and C30 (relating to provision of affordable housing) and insertion of the Department's standard dispute resolution clause.	20/11/2014
MOD 5	Amendments to the Kings Forest Development Code to include food and drink premises as permissible uses on employment lands.	10/11/2015

Term of Approval A5 of the Concept Approval provides that:

In order that the approval remains relevant to the planning intent for the area, the approval shall lapse on 31 December 2016 unless works the subject of any related application are physically commenced, on or before that lapse date. The Secretary may extend this lapse date if the proponent demonstrates to the satisfaction of the Secretary that the project remains current, appropriate and reflective of the best use of the site at the date the approval would otherwise lapse.

On 24 June 2015, the Secretary's delegate extended the lapse date to 11 August 2018 as permitted by the Term of Approval.

3.2 Project Approval (MP 08_0194 Stage 1)

On 11 August 2013, the Planning Assessment Commission (the Commission) approved MP 08_0194 for:

- the staged creation of 10 development lots
- bulk earthworks across the site
- subdivision of Precinct 5 into 376 residential lots
- infrastructure and roadworks works along the Kings Forest Parkway and within Precincts 1 and 5

- construction of 2,036 m² of floor space within Precinct 1 for future use as a rural supplies building with associated car parking and landscaping.

The Project Approval has been modified on four occasions, as summarised in **Table 2** below.

Table 2: Approved Modifications to Project Approval MP 08_0194 Stage 1

Mod No.	Description of Modification	Approved
MOD 1	Amendments to the weed management plan, changes to the staging plans for works adjacent to the environmental protection zones, inclusion of the former Crown reserves into the project area description, and amendments to the conditions of approval to extend the timeframes for submitting the environmental management plans.	11/08/2013
MOD 2	Amendments to the list of definitions in Schedule 1, introduction of a modified process for bond payments, changes to dust mitigation measures, inclusion of a new dispute resolution condition, and amendments to the timing of the: <ul style="list-style-type: none"> • planting of Koala food trees • management of the 'Potential Council Land' and 'Future Office of Environment and Heritage (OEH) Land' • commencement of baseline environmental monitoring • surveying and delineation of the environmental offset areas, the boundaries of the Cudgen Nature Reserve and the SEPP 14 wetlands • the submission of audit reports. 	20/11/2014
MOD 3	Amendments to replace the previously approved rural supplies building in Precinct 1 with a service station/food and drink premises, including six food tenancies, an outdoor dining area, eight car bowsters, car and dog wash, and two pylon signs of between 7.5-9.5 metres high.	20/02/2017
MOD 6	Amendments to conditions to defer the timing for the construction of the roundabout, correct an error in the description of the inner protection area (IPA) for bushfire management at the service station site, and apply a discount to road infrastructure contributions applicable to development within Precinct 1.	21/12/2017

A further modification application, MOD 4, is currently under consideration by the Department. It seeks approval to implement a new Koala Plan of Management and undertake related changes to the conditions of approval. An application to modify water servicing arrangements (MOD 5) was withdrawn and not pursued.

Condition A17 of the Project Approval provides that:

In order that the approval remains relevant to the planning intent for the area, the approval shall lapse 5 years after the determination date of this approval unless building, engineering or construction work relating to the works authorised by this approval is physically commenced on the land to which this approval applies before this date.

The lapse date of the approval (5 years after determination) is 11 August 2018.

4. PROPOSED MODIFICATION

On 21 February 2018, the Proponent lodged two section 75W modification requests (MP MP06_0318 MOD 8 and MP08_0194 MOD 7) seeking approval to:

- amend Term of Approval A5 of the Concept Plan Approval to extend lapse date to 31 December 2019 and to vary the description of the required physical works to align with the Project Approval and the lapsing provisions in section 4.53(4) of the EP&A Act
- amend Condition A17 of the Project Approval to extend the lapse date to 31 December 2019

- insert an additional condition in the Project Approval to enable a construction certificate to be issued for the carrying out of preliminary investigative and monitoring work on the land, without complying with the existing body of 'before construction certificate' conditions.

The Proponent advises the modifications are requested to:

- allow sufficient time to commence physical works on the site following resolution of a current modification request under assessment (MOD 4 to the Project Approval)
- ensure there is no confusion in the type of works that must be carried out to prevent lapsing of each approval
- remove any doubt that some preliminary works can be carried out on the site without satisfying the wide range of measures currently required to be satisfied before the issue of a construction certificate.

5. STATUTORY CONSIDERATION

5.1 Section 75W

The Concept Plan and Project Approval were originally approved under Part 3A of the EP&A Act. The projects are transitional Part 3A projects under Schedule 2 to the EP&A (Savings, Transitional and Other Provisions) Regulation 2017. The power to modify transitional Part 3A projects under section 75W of the Act as in force immediately before its repeal on 1 October 2011 is being wound up – but as the requests for these modifications were made before the 'cut-off date' of 1 March 2018, the provisions of Schedule 2 (clause 3) continue to apply. Consequently, this report has been prepared in accordance with the requirements of Part 3A and associated regulations, and the Minister (or his delegate) may approve (with or without conditions), or disapprove the modifications under section 75W of the EP&A Act.

5.2 Section 75Y

Former section 75Y of the EP&A Act Provides that a condition specifying a lapsing dated on an approval may be modified to extend the lapsing period and the Minister is to review the approval before extending the lapsing period. The Department has therefore reviewed the original approvals, as discussed in **Section 7** of this report.

5.3 Approval Authority

The Minister for Planning is the approval authority for the requests. However, the Executive Director Key Sites and Industry Assessments may determine the modification requests under delegation as:

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

6. CONSULTATION

The Department made the modification request publicly available on its website, consulted with Tweed Shire Council (Council), the Office of Environment and Heritage (OEH) and wrote to surrounding landowners about the proposed modification.

Council does not object to the proposed extension to the lapse dates, however Council questioned the legal basis for the proposed new condition to enable investigative and monitoring work, in particular:

- whether a construction certificate is necessary for preliminary and investigative monitoring work
- whether investigative and monitoring works constitute lawful physical commencement prior to the finalisation of required management plans, noting Council considers environmental management plans need to be approved prior to commencement.

Council advises that if more time is needed to satisfy the environment management plan requirements prior to commencing works on the site, the lapse date of the approvals should

be amended accordingly.

OEH advises it does not raise any issue with the proposed extension of the lapse dates but has concerns with the proposed new condition to enable investigative and monitoring work. In particular OEH considers the proposed condition is unnecessary as monitoring and surveying works can be undertaken without the need for a modification and the condition may have the effect of authorising works that could impact on environmental values.

There were no **public** submissions received on the proposal.

7. ASSESSMENT

7.1 Change to Lapse Date Conditions

The requests seek to extend the lapse date of both approvals by 16.5 months from 11 August 2018 to 31 December 2019. The modification to the Concept Plan approval also seeks to clarify that physical commencement relates to building, engineering or construction work carried out under a related Project Approval or Development Application on the site.

The proposed change to the Concept Plan Term of Approval is as follows:

*In order that the approval remains relevant to the planning intent for the area, the approval shall lapse on 31 December 2016 **2019** unless building, engineering or construction work relating to the works authorised by ~~works the subject of any related project approval or development consent is~~ application are physically commenced on the land, on or before that lapse date. The Secretary may extend this lapse date if the proponent demonstrates to the satisfaction of the Secretary that the project remains current, appropriate and reflective of the best use of the site at the date the approval would otherwise lapse.*

The proposed change to the Project Approval condition is as follows:

*In order that the approval remains relevant to the planning intent for the area, the approval shall lapse ~~5 years after the determination date of this approval~~ on **31 December 2019** unless building, engineering or construction work relating to the works authorised by this approval is physically commenced on the land to which this approval applies before this date.*

Former section 75Y of the EP&A Act provides that the Minister may modify the lapsing period of an approval granted under Part 3A of the EP&A Act, subject to a review of the approval before extending the lapsing period. The Department notes the conditions were imposed in order to ensure the approvals remain relevant to the planning intent for the area, and in the case of the Concept Approval, the condition allows for an extension where it is demonstrated the project remains current, appropriate, and reflective of the best use of the site.

The Department has reviewed the original approvals and is satisfied there are no circumstances which have materially changed since the original approvals that would result in a different determination of the applications today.

In particular, the Department notes the development of the site remains consistent with the strategic planning intent for the area. A key direction of the North Coast Regional Plan 2036 (Plan) is to deliver greater housing supply to the region and the Plan recognises the importance of the Kings Forest site in the delivery of housing under this direction. The site is zoned urban expansion and environmental protection under the State Environmental Planning Policy (State Significant Precincts) 2005 (SSP SEPP). The planning controls for the site have not changed and the approved development remains consistent with the SSP SEPP. The Department is therefore satisfied the approvals would remain consistent with the strategic planning framework established for the site.

The Department also notes the physical context of the site has not materially changed, and no physical changes are proposed which would change the environmental impacts of the development beyond those already assessed and approved.

On this basis, the Department is satisfied the approved development remains current, appropriate and reflective of the best use of the site. The Department's assessment therefore concludes an extension to the lapse dates by 16.5 months to 31 December 2019 is acceptable.

The proposed changes to the wording of Term of Approval A5 clarifying the nature of the work required for physical commencement are also considered acceptable as:

- it would bring the Concept Approval into line with the same provision in the Project Approval, ensuring that if the Project Approval is physically commenced, and that approval preserved, there is no doubt that the Concept Approval is also preserved. This was always the intention of the condition
- the proposed wording closely mirrors the provisions of section 4.53 of the EP&A Act relating to lapsing of Part 4 development consents, and therefore is consistent with current legislation and policy relating to lapsing of approvals.

7.2 Construction Certificate Requirements for Investigative and Monitoring work

The Proponent seeks to include a new condition in the Project Approval specifying that a construction certificate may be issued for any investigatory or monitoring work relating to the works authorised by the approval. The proposed condition reads as follows:

Despite any other condition of the project approval, a construction certificate may be issued under a project approval for any investigatory or monitoring work relating to the works authorised by this approval, such as geotechnical work (including the drilling of bore holes), surveying activities (including the pegging out of land), monitoring environmental conditions, the taking of samples and the measurement of physical features. For avoidance of doubt, any other conditions precedent imposed by this project approval for the issue of a construction certificate do not apply to a construction certificate issued for investigatory or monitoring work under this condition.

The Proponent argues that a construction certificate is required to authorise investigative and monitoring works (such as survey pegging, soil testing and baseline environmental monitoring) so it can meet other pre-conditions of the approval. The Proponent has suggested that the legal position in relation to issuing a construction certificate for these works is unclear. Therefore, to remove any doubt, the Proponent seeks to insert the above condition into the Project Approval to provide that a construction certificate may be issued for these works.

Council and OEH raised concern about the proposed condition as they consider that a construction certificate is not necessary for such minor activities. Council and OEH also raised concerns about the condition as the existing Project Approval includes a range of measures to protect the environmental values of the site which must be met before any construction certificate can be issued. The proposed modification would allow a construction certificate to be issued for some activities without these environmental safeguards being in place.

The Department has considered the proposed condition as well as the issues raised by Council and OEH. The Department considers the proposed condition is unnecessary as the minor investigatory and monitoring work referred to in the condition is not work (constituting subdivision work) for which a construction certificate must be issued.

The Department also notes that a construction certificate is defined to be a certificate to the effect that work completed in accordance with specified plans and specifications, will comply with the requirements of the regulations. However, in this case, the Department considers the minor investigatory and monitoring work outlined in the proposed condition are not matters which require plans or specifications, so are not matters that a construction certificate could

be issued for.

Further, to the extent a Construction Certificate is required for works on the site, the Department maintains the view that the relevant preconditions set out in the approval must be met prior to the issue of any construction certificate, particularly given the sensitive environmental nature of parts of the site.

The Department's assessment therefore concludes the proposed condition is unnecessary as minor investigatory and monitoring works can be carried out without a Construction Certificate.

8. CONCLUSION

The Department has assessed the modification requests and supporting information in accordance with the relevant requirements of the EP&A Act. The Department's assessment concludes the proposed modifications to the lapsing dates are appropriate on the basis that:

- the proposals remain consistent with the current strategic planning framework for the site and would play an important role in meeting the housing supply needs of the North Coast
- the modifications would bring the lapsing provisions of the Concept Approval into line with the Project Approval.

However, the Department does not support including a condition to permit the issue of a construction certificate for preliminary investigatory and monitoring works, as these minor works can be carried out without a construction certificate.

Consequently, it is recommended that the modifications to the lapsing date be approved but the additional proposed condition not be included in the Project Approval.

9. RECOMMENDATION

It is recommended that the Executive Director, Key Sites and Industry Assessments, as delegate for the Minister for Planning:

- consider the findings and recommendations of this report
- determine that MP MP06_0318 MOD 8 and MP08_0194 MOD 7 are within the scope of section 75W of the EP&A Act
- modify the Concept Plan for MP 06_0318 and Project Approval for MP 08_0194
- sign the attached notices of modification (see **Attachment A**).

Recommended by:



Anthony Witherdin
Director
Regional Assessments

Approved by:



Anthea Sargeant 24/5/18
Executive Director
Key Sites and Industry Assessments
as delegate of the Minister for Planning.

APPENDIX A: NOTICE OF MODIFICATION

A copy of the notices of modification can be found on the Department's website at:

http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=9118

and

http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=9119

APPENDIX B: SUPPORTING INFORMATION

The following supporting documents and supporting information to this assessment report can be found on the Department of Planning and Environment's website as follows:

1. Modification request

http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=9118

and

http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=9119

2. Submissions

http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=9118

and

http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=9119