
+ SECTION 4.15(1A) MODIFICATION OF CONCEPT PLAN APPROVAL NO. 06_0316 (MOD 11)

COBAKI ESTATE CONCEPT PLAN – PROPOSED RESIDENTIAL SUBDIVISION

At Sandy Lane, Cobaki Lakes

• Prepared For: **Leda Manorstead Pty Ltd** | • Prepared by: **DAC Planning Pty Ltd** | • May 2018 |



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MODIFICATION OF CONCEPT PLAN APPROVAL NO. 06_0316 (MOD 11)

PROPOSED COBAKI ESTATE RESIDENTIAL DEVELOPMENT AT SANDY LANE, COBAKI LAKES

1.0 INTRODUCTION

Leda Manorstead Pty Ltd has commissioned DAC Planning Pty Ltd to prepare an application for modification (MOD 11) of Concept Plan Approval No. 06_0316, which relates to a residential subdivision at Cobaki Estate. It includes approximately 5,500 dwellings, a town centre and neighbourhood centres; community facilities and school sites; open space; wildlife corridors; protection and rehabilitation of environmentally sensitive land; road corridors and utility services infrastructure; water management areas; and roads and a pedestrian and bicycle network.

Condition C1 of the Concept Plan Approval requires the submission of a Plan of Development (POD) for each future application for subdivision on the Cobaki Estate site. This application (MOD 11) proposes that this condition be modified to allow the detail to be included in the POD to be expanded during the various application stages, from Development Application (DA) stage through to the Construction Certificate (CC) and Subdivision Certificate (SC) stages. This will enable more detailed and accurate information to be provided at the required stages and reduce potential amendments. It does not alter the detail to be provided for the ultimate development and the change is largely administrative to reduce potential amendments as detailed design evolves.

Tweed Shire Council has been consulted in relation to the proposed modification and the proposed amended Condition C1 is consistent with Council's comments dated 17 April 2018.

2.0 SITE DESCRIPTION

Cobaki Estate is located adjacent to the New South Wales/Queensland border and has a total area of approximately 600 hectares. The legal description of the Cobaki Estate is Lot 1 in DP 570076; Lot 2 in DP 566529; Lot 1 in DP 562222; Lot 1 in DP 570077; Lot 1 in DP 823679; and Lots 46, 54, 55, 199, 200, 201, 202, 205, 206, 209, 228 and 305 in DP 755740.

Land surrounding the Cobaki Estate includes the State Border Reserve to the north and west, environmental land and the Cobaki Broadwater to the east and Cobaki Creek and Rural Residential and grazing land to the south and southwest.

3.0 CONDITION C1

Condition C1 requires:

"C1 Plan of Development"

A Plan of Development must be submitted with each future application for subdivision on the Cobaki Estate site. The Plan of development must, at a minimum, include the following information:

- (1) Location and width of Asset Protection Zones.*
- (2) A notation on the fire affected lots that development is subject to the requirements of 'Planning for Bushfire Protection 2006' and AS 3959-2009 – Construction of Building in Bushfire Prone Areas.*

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- (3) Type of development permissible on each lot. eg: zero lot housing, plex housing, etc.
 - (4) Finished floor levels requirements on flood prone lots in accordance with the requirements of Tweed Shire Council's Development Control Plan – Section A3 – Flood Liable Land (or any replacement document).
 - (5) All other matters specified for Subdivision in the Cobaki Development Code."

The Plan of Development requirements are set out in Section 5.6 of the Cobaki Development Code. This Section provides that:

"5.6 Plan of Development Requirements

Objectives

- (1) To identify the position of Nominated Lots within a subdivision.
- (2) To provide the key controls which are necessary to achieve the effective master planning of the nominated lots.
- (3) To identify vehicular access location for each lot.
- (4) To provide the landscape and fencing intent for key locations of the subdivision.

Controls

- (1) A Plan of Development must be submitted with all future development applications for subdivision on the site and include the following information where applicable.
 - (a) location and width of Asset Protection Zones; and
 - (b) Level of construction required for dwellings/buildings adjacent to Asset Protection Zones in accordance with Planning for Bushfire Protection 2006 and Australian Standard 3959 – 1999 – Construction of Building in Bushfire Prone Areas; and
 - (c) type of development permissible or intended for each lot, for example, dwelling house, seniors housing, attached dwelling; and
 - (d) finished floor levels requirements on flood prone lots in accordance with the requirements of Tweed Shire Council's Development Control Plan – Section A3 – Flood Liable Land (or any replacement document); and
 - (e) the type of development nominated on each lot which may be undertaken as Complying development; and
 - (f) the location of development lots and the maximum number of dwellings and bedrooms intended in the future development of the development lot; and
 - (g) setbacks for all buildings and structures, including garages; and
 - (h) zero lot line locations if relevant; and
 - (i) the location of preferred vehicular street access and driveway locations for all dwellings; and
 - (j) the location of private open space for each lot; and
 - (k) the type of fencing to be provided to roads and other public land frontages; and
 - (l) the lots on which 3 or >3 storey building height is permissible other than those which may be determined on merit by DRP; and
 - (m) The location of public open space; and
 - (n) The location of specific landscaping to meet the design guidelines for each precinct; and
 - (o) Gateways or entry statements; and
 - (p) A reference to the Design Guidelines which apply to the precinct.
- Note: Any lot except for a development lot, or lot within the town centre, may be development for a dwelling house, despite being nominated on the POD for another residential type."

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Minor changes to such matters as subdivision layout, levels, road design, servicing arrangements, desired housing types etc. may occur between DA stage, CC stage and SC stage once detailed design has been undertaken. These changes may only be very minor but may alter the detail shown on the POD. Therefore, in order to ensure that the detail on the POD is appropriate for each stage of design, and to minimise ongoing POD changes as the design process unfolds, it is proposed to modify Condition C1 to enable the level of detail to be expanded upon through the development process from DA to Subdivision Certificate stage so that all control provisions of Section 5.6 of the Cobaki Development Code are addressed/notated by the Subdivision Certificate stage.

4.0 PROPOSED MODIFICATIONS

4.1 Condition C1 – Plan of Development

It is proposed to modify Condition C1 to read:

C1 Plan of Development

A Plan of Development must be submitted with each future application for subdivision on the Cobaki Estate site. The level of detailed information illustrated in the Plan of Development is expanded upon through the development process from Development Application to the Subdivision Certificate such that, all controls provisions of the Cobaki Development Code Section 5.6 are addressed / notated by the Subdivision Certificate stage.

1. *The Plan of Development associated with a **Development Application** must, at a minimum, include the following information:*
 - a. *A notation on fire affected lots that development is subject to the requirements of 'Planning for Bushfire Protection 2006' and AS3959-2009 Construction of Buildings in Bushfire Prone Areas, including the location and width of Asset Protection Zones.*
 - b. *Proposed development on each lot, specifically;*
 - i. *For areas nominated residential on the approved Concept Plan, the type of residential accommodation and the number of dwellings and bedrooms associated with each; or*
 - ii. *Other permissible use; and*
 - iii. *For areas nominated Town Centre/ Neighbourhood Centre on the approved Concept Plan the;*
 1. *type of residential accommodation and the number of dwellings and bedrooms associated with each; and/or*
 2. *type of tourist and visitor accommodation and the number of dwellings and bedrooms associated with each; and /or*
 3. *business premises; and/or*
 4. *commercial premises; and/or*
 5. *health services facility; and/or*
 6. *community facility; and/or*
 7. *a mixed use building.*

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- c. *Finished Floor Level requirements on flood prone lots in accordance with the requirements of Tweed Shire Council's Development Control Plan – Section A3 – Flood Liable Land (or any replacement document).*
 - d. *Acoustic fencing location and specification (if applicable)*
 - e. *Setback controls (tabular format)*
 - f. *Driveway location*
 - g. *Private Open Space location; and*
 - h. *Maximum building height.*
2. *The Plan of Development to be submitted with each **Subdivision Certificate application** must, at a minimum, include the following information:*
- a. *Location and width of Asset Protection Zones; and*
 - b. *Level of construction required for dwellings/buildings adjacent to Asset Protection Zones in accordance with Planning for Bushfire Protection 2006 and Australian Standard 3959 – 1999 – Construction of Building in Bushfire Prone Areas; and*
 - c. *Type of development permissible or intended for each lot, for example, dwelling house seniors housing attached dwelling; and*
 - d. *Finished Floor Levels requirements on flood prone lots in accordance with the requirements of Tweed Shire Council's Development Control Plan – Section A3 – Flood Liable Land (or any replacement document); and*
 - e. *The type of development nominated on each lot which may be undertaken as Complying development; and*
 - f. *The location of development lots and the maximum number of dwellings and bedrooms intended in the future development of the development lot; and*
 - g. *Setbacks for all buildings and structures, including garages; and*
 - h. *Zero lot line locations if relevant; and*
 - i. *The location of nominated vehicular street access and driveway locations for all dwellings; and*
 - j. *The location of private open space for each lot; and*
 - k. *The type of fencing to be provided to roads and other public land frontages; and*
 - l. *The lots on which 3 or >3 storey building height is permissible and*
 - m. *The location of public open space; and*
 - n. *The location of specific landscaping to meet the design guidelines for each precinct; and*
 - o. *Gateways or entry statements; and*
 - p. *A reference to the Design Guidelines which apply to the precinct; and*
 - q. *All necessary easements.*

The proposed re-wording of Condition C1 has been undertaken in consultation with Tweed Shire Council.

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4.2 Amended Cobaki Estate Development Code

The original Cobaki Estate Development Code (CEDC) was approved by the Director General of the (then) Department of Planning and Infrastructure on 15 November 2010 as a component of the Concept Plan.

The Code has been revised on a number of occasions and the current version is August 2017 (Revision 3).

The request to modify Condition C1 will result in the need to make consequential changes to the Controls in Section 5.6 of the Code.

The Department is requested to approve the amended CEDC in conjunction with modification of the Concept Plan Approval.

A copy of the amended CEDC is contained at **Annexure A**. the requested change is to insert the same wording as proposed modified Condition C1 into the "Controls" contained in Section 5.6 of the Code.

This will ensure consistency between the Concept Plan Approval and the CEDC.

5.0 ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (AS AMENDED) & ENVIRONMENTAL PLANNING AND ASSESSMENT (SAVINGS, TRANSITIONAL AND OTHER PROVISIONS) REGULATION, 2017

Clause 3BA of Schedule 2 of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation, 2017 (the Regulation) provides that a Concept Plan Approval cannot be modified under Section 75W of Part 3A (as saved for transitional projects) after 1 March 2018. Therefore, this Modification Application is lodged under Section 4.55(1A) of the Environmental Planning and Assessment Act (EPAA), on the basis that it will involve minimal environmental impact.

Section 4.55(1A) of the Act relates to modifications involving minimal environmental impact and is in the following terms:

"(1A) Modifications involving minimal environmental impact

A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

- a) it is satisfied that the proposed modification is of minimal environmental impact, and*
- b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and*
- c) it has notified the application in accordance with:*
 - i) the regulations, if the regulations so require, or*
 - ii) a development control plan, if the consent authority is a council that has made a development control plan under section 72 that requires the notification or advertising of applications for modification of a development consent, and*

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- d) *it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.*

Subsections (1), (2) and (5) do not apply to such a modification."

With regard to Section 4.55(1A)(a), the proposed modification to the Concept Plan Approval is unlikely to create any additional environmental impact given that it only involves an administrative change as to when POD information is provided, which will be commensurate with the stage in the design process that the subdivision is at. There will be no change to the information that needs to be supplied, only the stage in the process that it is provided. No changes to the design of the project or conditions of approval (other than C1) are proposed.

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

The Land and Environment Court has made a number of decisions in relation to this threshold question, as discussed in the following sections.

In *Moto Projects (No. 2) Pty Ltd v North Sydney Council* (1999) Bignold J described the following test in determining the threshold question:

"The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified. The result of the comparison must be a finding that the modified development is "essentially or materially" the same as the (currently) approved development.

The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified where that comparative exercise is undertaken in some type of sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development consent was granted)."

Further, in *Wolgan Action Group Incorporated v Lithgow City Council* (2001) Talbot J addressed the question of "substantially the same development" in the context of Section 96.

In forming his view, Talbot refers to case law as follows (note relevant definitions underlined):

"In Vacik Pty Limited v Penrith City Council (Stein J, NSWLEC, 18 February 1992, unreported), Stein J adopted a meaning for "substantially" where used in the earlier s 102(1)(a) of the EP&A Act as "essentially or materially or having the same essence". In North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 97 LGERA 433 at 440, Mason P expressly agreed with the view taken by Stein JA. Mason P also said, at p 439, that in the context of s 102 the verb modify meant "to alter without radical transformation" (see Sydney City Council v Ilenace Pty Ltd (1984) 3 NSWLR 414 at 421)".

In Standley Stein JA also reiterated the view he expressed in Vacik.

Following on from the tests established in these cases and based on numerous Land and Environment Court decisions, it is apparent that the following key principles apply:

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- The comparison is undertaken at a general level rather than between detail;
 - The question is whether the development as a whole is essentially or materially similar to the originally approved development;
 - If the impacts of the modifications are minor, the modified development is more likely to be essentially or materially the same development;
 - It is relevant to consider the magnitude of any physical changes to the development and any changes to the use of the land.

Having regard to the fact that the development concept will not change, the information to be lodged with the POD will also not change, and considering the key principles discussed above, it is submitted that the threshold question is satisfied on the basis that:

- The development as a whole, being for a residential subdivision including approximately 5,500 dwellings, a town centre and neighbourhood centres; community facilities and school sites; open space; wildlife corridors; protection and rehabilitation of environmentally sensitive land; road corridors and utility services infrastructure; water management areas; and roads and a pedestrian and bicycle network, will remain unchanged.
- The proposed modification will not alter the statutory or policy compliance of the proposal, create any other material difference and does not give rise to any significant environmental impacts.
- The likely impact of the modification is minor.
- No changes to the nature, scale, intensity and layout of the development will occur.

Accordingly it is submitted that the proposed modification will not represent a substantial change to the originally approved development and that the proposed modification to the Approval will represent substantially the same development as the development for which the Approval was originally granted.

Pursuant to Section 4.55(1A)(c), public notification of the proposed modification to the Approval is to be in accordance with the Regulation. Clause 117(2) of the Regulation states that the notification of Section 4.55(1A) Applications are to be in accordance with a Development Control Plan.

Clause 4.0 of the relevant Tweed Development Control Plan 2008, Section A11 – Public Notification Policy, states that the Plan only applies to modifications of Approvals under Section 4.55(2) of the EP&A Act 1979. Accordingly there is no requirement to advertise the subject application.

In considering an application to modify an Approval under Section 4.55(1A) of the Act, Section 4.55(3) requires the consent authority to take into account relevant Section 4.15(1) matters.

Relevant Section 4.15(1) matters are addressed as follows:

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a) the provisions of:

i) Any Environmental Planning Instrument

Concept Plan Approval No. 06_0316 was approved based on the planning controls contained in Tweed Local Environmental Plan 2000 (TLEP2000). This included a mix of zones comprising land zoned:

2(c) Urban Expansion;
2(e) Residential Tourist;
6(b) Recreation;
7(d) Environmental Protection (Scenic/ Escarpment); and
7(l) Environmental Protection (Habitat).

On 4 April 2014, TLEP2000 was replaced by Tweed Local Environmental Plan 2014 (TLEP2014). Under the provisions of TLEP2014, the land is now zoned:

- R1 General Residential
- B2 Local Centre, and
- RE2 Private Recreation

The land contained in the Environmental Protection Zones in TLEP2000 is a Deferred Matter and therefore retains the 7(d) and 7(l) zonings under TLEP2000.

There are no additional assessment or compliance matters arising under TLEP2000 and TLEP2014 as a result of the proposed modification to Condition C1.

ii) Any Exhibited Draft Planning Instrument

Not applicable.

iii) Development Control Plans

Tweed Development Control Plan 2008 contains various controls. Given that there will be no change to the layout, environmental management measures and information requirements that are required to be submitted, it is considered that modification of the Approval, as proposed, will not be inconsistent with any relevant provisions of Tweed Development Control Plan 2008.

iiia) Planning Agreements

Not applicable.

iv) Provisions of the Regulations.

Not applicable.

v) Any coastal zone management plan.

Not applicable.

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b) Likely Impacts of the Development

Given the nature of the proposed modification and the fact that all required details will be supplied for the ultimate development at various stages, only minimal impacts are likely to occur.

c) The Suitability of the Site for the Development

As acknowledged when the project was originally approved, the site was and remains, suitable for the proposed development.

d) Any Submissions Made In Accordance With the Act or Regulations

It is a matter for the Department to consider any submissions made in respect of the Modification Application.

e) The Public Interest

As there are no physical changes to the scale, layout or intensity of the development, it is submitted that the proposed modification would not be inconsistent with the public interest.

6.0 SUMMARY AND CONCLUSION

The Cobaki Estate comprises a major Urban Release Area which will ultimately deliver up to 5500 dwellings and a range of associated commercial services and facilities. The Cobaki Estate Concept Plan will facilitate development of the site in an orderly, co-ordinated and economic manner.

The proposed amendment of Condition C1 and the Cobaki Estate Development Code is essentially an administrative matter to enable the logical progression of the submission of Plan of Development information commensurate with the level of investigation and design that occurs throughout the subdivision process. There will be no change to the ultimate development and level of assessment that will occur throughout the process.

The proposed modification to Condition C1 of the Concept Plan has been prepared to give effect to MOD11.

It is therefore concluded, having regard to the foregoing information, that the project is generally consistent with relevant statutory planning controls and compliant with Cobaki Development Code requirements for the ultimate development of the Estate. Approval of MOD11 would therefore be sustainable and in the public interest.

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