

24 July 2019

Jim Betts  
Secretary  
Department of Planning, Industry and Environment

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Attention Anthony Witherdin, Director Modification Assessments

Our ref: C Renner/39001117  
Your ref: MP 10\_0090

Dear Secretary

#### **MP 10\_0090 Section 75W application (MOD4)**

We make this modification request on behalf of our client, Winten (No. 21) Pty Ltd (**Winten**).

The proposed modifications relate to some minor adjustments and clarifications to certain Further Environmental Assessment Requirements (**FEARs**).

In the course of the assessment of two development applications that have been lodged for stages 3, 4 and 5, of the approved Concept Plan development it has become apparent that the FEARs in question potentially pose an obstacle to the approval of those development applications.

Due to the location of the site on the boundary of two Local Government Areas (**LGAs**), two development applications have been lodged, as follows:

1. DA/2097/2018 lodged with Lake Macquarie City Council for a 1,063 lot residential subdivision, comprising most of stage 5, and a very small portion of stages 3 and 4 of the Concept Plan, which is now the subject of a Land and Environment Court appeal (case number 2019/19121) and is listed for hearing on 16 and 17 September 2019 (**the Lake Macquarie DA**); and
2. DA 2018/01351 lodged with the City of Newcastle for a 962 lot residential subdivision, comprising most of stages 3 and 3, and a small portion of stage 5 of the Concept Plan, which is now the subject of a Land and Environment Court appeal (case number 2019/19165) and is listed for hearing on 30 September and 1-2 October 2019 (**the Newcastle DA**).

The modifications sought do not alter the approved development in any way and the resulting development would be the same as the development approved by the Concept Plan as it stands

today. We merely seek to change the wording of some of the FEARs to overcome technical difficulties that have arisen in the assessment of the two development applications, which are currently before the Land and Environment Court for determination.

The proponent has only very recently received feedback from the Department of Planning, Industry and Environment (**the Department**), the Rural Fire Service (**RFS**), Roads and Maritime Services (**RMS**), and the relevant Councils, that has lead it the view that modification of these FEARs is necessary.

In summary, the issues we seek to resolve by this modification application are:

1. To rectify the reference in condition 1.16 to “stage 3, 4, and 5” when the condition was only intended to apply to development applications lodged with the City of Newcastle. At the time that this condition was imposed, a change in LGA boundary was considered certain and imminent and it was expected that stages 3, 4, and 5 would all be located within the City of Newcastle by the time the relevant development application was lodged. However, this change of LGA boundary has not yet occurred.
2. The requirement, in condition 1.31, to resolve upgrades to the State road network prior to the determination of a development application. RMS has previously agreed, in relation to earlier stages, that the resolution of State road works can be deferred to a later time, but is now concerned that it technically does not have the authority to override condition 1.31 of the Concept Plan.
3. The fact that the City of Newcastle interprets the term “garbage removal vehicle” in condition 1.34, to mean “B-Double vehicle”.
4. The requirement, in condition 1.45, for “satisfaction of the RFS” in circumstances where it should be possible to objectively determine compliance with the requirements of the condition and RFS has now taken 184 days in the case of one development application, and 151 days in the case of another, and is yet to confirm its satisfaction.

A detailed explanation for each modification sought to the relevant FEARs is provided below.

#### Condition 1.16

Condition 1.16 was modified as part of MOD1. The modified condition as it currently stands is as follows:

- 1.16 Prior to the ~~determination lodgement~~ of the development application for the subdivision of Stage 3, 4 and 5 (whichever occurs first) as defined by the Indicative Staging Plan contained in the Minmi/Link Road Appendix A, Concept Plan Design Guidelines (May 2014), following Stage 4 the arrangement for provision of recreation facilities to meet demand for development within all stages including the skate park are to be identified. Suitable land for these facilities is to be identified within the development area, unless alternative arrangements can be made to accommodate these facilities within general proximity to the development site through negotiations with the relevant council(s). The location of the recreation facilities or alternative arrangements are to be submitted to the Director-General for approval ~~within 2 years of concept plan the approval or before the lodgement of the second stage – development application whichever occurs first prior to determination.~~

We have reviewed the application and determination materials for both the original application, and MOD1, which modified condition 1.16. It is clear from this review that the active recreation needs generated by stages 1 and 2 could be accommodated through existing and proposed facilities. The Department was only ever concerned about meeting the recreational needs generated by stages 3, 4, and 5.

In considering MOD1 the Department expressed the view that it would be inappropriate for recreational facilities to service the needs of stages 3 -5 to be located in stage 2, as this land was in a different LGA. However, a large proportion of stage 5 is in fact located within the same LGA as stage 2. It seems that this comment was based on the proposed boundary adjustment between the LGAs, which would have seen stage 5 (and, in fact, all stages other than stage 2) located wholly within the Newcastle LGA. The intention of the modified condition, therefore, appears to have been to require

resolution of the location of recreational facilities before the next development application for a stage within the Newcastle LGA was determined.

It is clear that the Department did not consider it appropriate for recreational facilities servicing that part of the development within one LGA to be located within the neighbouring LGA. Rather, each new lot created within an LGA would need to contribute toward recreational facilities within the LGA in which it was located.

In seeking modifications to condition 1.16, the Response to Submissions noted:

The provision and location of the required recreation facilities within Lake Macquarie LGA have been accounted for and determined through the current Section 94 plan, being *Lake Macquarie City Council Development Contributions Plan, Glendale Contributions Catchment – 2015*. This plan was adopted in May 2016 and took into account the development within the Lake Macquarie LGA. It is noted that Stage 5 (Link Road North) is currently the subject of a Local Government Boundary adjustment, where the intention is that Stage 5 will fall under the Newcastle LGA in the future. Based on the S94 Plan, supporting background documents and Council's submission to the Concept Plan, it is understood that LMCC intend to upgrade existing sporting fields (rather than provide new facilities) or have sites already earmarked within the catchment for other recreational facilities, to which the development will contribute to under Section 94. Based on prior discussions with LMCC S94 Coordinator, it is understood that any application lodged for Stage 5 prior to the LGA boundary adjustment would be subject to the current LMCC Section 94 Plan rate, hence contributions for recreational facilities would still be collected to upgrade the existing facilities.

There was an acknowledgement that Lake Macquarie City Council had a Contributions Plan that adequately took into account the proposed development, meaning that the recreational needs of the development within the Lake Macquarie LGA could be accommodated by development contributions paid in accordance with the Contributions Plan. This was so even in relation to that part of stage 5 that was within the Lake Macquarie LGA.

The City of Newcastle also had a Contributions Plan that took into account the proposed development and set out the type of recreational facilities that would be required to service the development. However, the location of some of those facilities was not resolved by the Plan.

The purpose of condition 1.16 is to require resolution of the location of the recreational facilities required to service the demand generated by the development within the Newcastle LGA.

The proposed adjustment of LGA boundaries has not occurred, as previously expected. Most of stage 5 therefore remains within the Lake Macquarie LGA, along with a very small sliver of stages 3 and 4.

Having regard to background of the modified condition, it is clear that the intention of the condition is directed toward the resolution of the recreational needs generated by development within the Newcastle LGA, and similar to what occurred with stage 2, there is no need to resolve the location of recreational facilities within the Newcastle LGA before development within the Lake Macquarie LGA can be approved (particularly noting that the recreational demand created by this development within the Lake Macquarie LGA will be addressed by the payment of monetary contributions to Lake Macquarie Council).

It is unfortunate that the condition currently refers to stages 3, 4, and 5, instead of simply "development within the Newcastle LGA", which was the original intention. However, it is clear that it was never proposed that the resolution of recreational facilities within one LGA would be a prerequisite to approval of development in the neighbouring LGA. The Department had always intended that each new lot created within an LGA would need to contribute toward recreational facilities within the LGA in which it was located.

We seek to modify the wording of this condition to reflect the fact that the adjustment of LGA boundaries has not occurred, and stages 3, 4, and 5, are therefore not wholly contained within the Newcastle LGA, as was anticipated at the time that the current version of the condition was approved as part of MOD1.

It is proposed to modify the wording of this condition as follows:

Prior to the determination of the **first** development application for the subdivision of **any part of** Stage 3, 4 ~~and or 5~~ **located within the Newcastle Local Government Area** (~~whichever occurs first~~) as defined by the Indicative Staging Plan contained in the Minmi/Link Road Appendix A, Concept Plan Design Guidelines (May 2014), the arrangement for provision of recreation facilities to meet demand for development within ~~all~~ stages **3, 4, and 5 that are located within the Newcastle Local Government Area** including the skate park are to be identified. Suitable land for these facilities is to be identified within the development area, unless alternative arrangements can be made to accommodate these facilities within general proximity to the development site through negotiations with the relevant council(s). The location of the recreation facilities or alternative arrangements are to be submitted to the ~~Director-General~~ **Secretary** for approval prior to determination.

### Condition 1.31

Winten acknowledges that some upgrades to the State road network will be required before any significant additional population can be supported in the Minmi area. The key items of regional road infrastructure that will be required are the upgrade of the Newcastle Link Road and Minmi Road intersection, as well as the Newcastle Link Road/Woodford Street/Cameron Park Road intersection.

These intersection works are beyond the capacity of any one developer to deliver, and they are included in the draft SIC which, despite being draft, has formed the basis of numerous planning agreements, meaning that the State government has already started collecting funds for these works.

Winten agreed to undertake micro-simulation modelling in November 2018 and has been working with RMS to complete the scoping brief and to establish the base model. Due to the complexity of the modelling and the significant time it takes, including necessary inputs from RMS, it is not possible to complete within a feasible timeframe with regards to determining the current development applications.

We therefore propose to amend the wording of condition 1.31 to allow regional road issues to be dealt with separately and prior to the commencement of subdivision construction. This is on the basis that the State road network is subject to a broader range of external influences, such as funding arrangements and regional traffic impacts, which are outside of Winten's control.

We propose that the condition be amended as follows:

*The first development application for subdivision within each stage of the proposed development is to include a revised traffic and transport impact assessment prepared in consultation with Transport for NSW and the relevant Council(s). Each traffic assessment must include:*

- *Details of traffic generation and distribution from all land uses proposed within that stage including retail, sporting facilities and education facilities.*
- *Intersection ~~and micro-simulation~~ modelling to determine the impact of the proposal on the existing regional and local road network.*
- *Proposed timing for upgrades of key **local** intersections, ~~in particular Newcastle Link Road/Woodford Street/Cameron Park Road and Newcastle Link Road/Minmi Road in accordance with RMS requirements.~~*
- *Details of any proposed upgrades to the **local** road network, including timing and funding arrangements, to accommodate the proposed development. ~~This is to include identification of suitable pedestrian and cycle links across Minmi Road and Newcastle Link Road.~~*

### **Each development consent for stages 3, 4, and 5 must contain the following condition:**

1. **Prior to the issue of any subdivision certificate, or such later date as may be agreed in writing by Roads and Maritime Services (RMS), the Newcastle Link Road and Minmi Road intersection and the Newcastle Link Road and Cameron Park Drive intersection must be upgraded to the satisfaction of RMS. The timing for each upgrade is to be negotiated with RMS and will be the subject of a WAD with RMS.**

**Note: These works will require RMS approval under the Roads Act and the above condition does not guarantee final RMS approval of the specific road work, traffic control facilities and other structures or works, for which it is responsible, on the road network. RMS must provide a final**

**consent for each specific change to the classified (State) road network prior to the commencement of any work.**

2. **Prior to the issue of any Construction Certificate for the proposed subdivision (excluding bulk earthworks), the applicant must provide microsimulation modelling of the Newcastle Link Road and Minmi Road intersection and the Newcastle Link Road and Cameron Park Drive intersection to RMS. The modelling must address:**
  - a. **The remaining life of the intersections.**
  - b. **The impact of the release of any lots on the intersections.**
  - c. **The proposed upgrade of each intersection and the impact of this upgrade on the Newcastle Link Road, and**
  - d. **The proposed upgrade operating at LOS D or better for a period of 10 years following the projected completion of the five stage Major Project MP10\_0090, using agreed background growth rates.**
3. **For works on or physically impacting any Classified Road, the applicant must obtain RMS approval for all engineering plans and specifications relating to those works, prior to the issue of a Construction Certificate for those works.**

#### **Condition 1.34**

We seek to modify condition 1.34 to clarify its intent. While we are of the view that the intent of the condition is clear on its face, we note that the City of Newcastle interprets this condition as requiring the proponent to provide access for B-Doubles to the waste management centre either through its residential subdivision, or on land outside of the proponent's ownership and control.

The condition currently provides:

*Each development application for subdivision for the Link Road North precinct is to demonstrate that key roads linking Minmi Boulevard and the waste management centre have been designed to accommodate waste removal vehicles in accordance with any requirements of the relevant council, unless otherwise agreed to by that council.*

The City of Newcastle has provided a submission to Lake Macquarie City Council, in relation to the Lake Macquarie DA, asserting that "waste removal vehicles" includes B-Doubles.

We understand that the City of Newcastle is desirous of safeguarding a potential B-Double route from Minmi Boulevard to the waste management centre in the hope of utilising this route in the future, if it decides to seek approval to expand the operations of the waste management centre to include the regional mass transfer of waste from other parts of NSW. We note that this is not currently an approved use of the waste management centre and we expect that such a proposal would be designated development, requiring a rigorous environmental assessment before it can be approved.

In support of the argument that condition 1.34 requires the proponent to provide B-Double access, the City of Newcastle relies on the submissions it made in relation to the original Concept Plan application.

Section 4.6 of the City of Newcastle's submission on the Concept Plan application (dated 8 April 2011) outlined the following:

- 'Council has previously noted the existence of a potential Link Road access road route along the existing road reserve... However, Council is not dogmatic in insisting on that particular route, but would be willing to work cooperatively with the developer to identify a route that could manage potential future conflicts between heavy waste vehicles and light traffic or residents'; and
- 'Council considers that any development of the land immediately south of the Summerhill Waste Management Centre (SWMC) and Blue Gum Hills Regional Park (BGHRP) that would

*preclude the provision of an alternative access road into the SWMC would not be consistent with these objects (of the EP&A Act) and opposes any such development.'*

There was no mention of B-Double access being required in this submission.

In response to the City of Newcastle's submission, the original proponent provided the following (correspondence dated 6 June 2011):

- Significant consultation with the City of Newcastle and Lake Macquarie City Council was undertaken through their respective representatives on the proposed Hunter Integrated Resources waste facility, however it was noted that the proposal had been abandoned;
- City of Newcastle needed to open its own discussion with the RTA (now RMS) on access issues to the Newcastle Link Road to and from the SWMC;
- At the time of writing, it was noted that City of Newcastle was seeking approval to an extension to the operation of SWMC and that the application did not contain any reference to a proposed access from Newcastle Link Road.

The matter of a southern access to SWMC was discussed specifically in the Director General's Environmental Assessment Report (dated April 2013). At section 5.6.5 of the report, the Director General recommended that the Concept Plan approval require the proponent to identify that a road has been provided within the Link Road North Precinct linking Minmi Boulevard and the waste management centre. Further, the road is to be designed to accommodate *waste removal vehicles*, in accordance with any requirements of the relevant council.

The intention of Condition 1.34 is to allow the City of Newcastle an alternative access to the waste management centre for *waste removal vehicles*.

It is our view that a waste removal vehicle is a vehicle purpose built or adapted for waste removal – that is, kerbside collection. A B-Double is not built or adapted for this purpose and, in fact, given the restricted access provisions that prevent B-Doubles from using the general road network, a B-Double would clearly be inappropriate as a waste removal vehicle.

If the intent was to accommodate much larger vehicle access through the Link Road North Precinct, such as B-Doubles, we would have expected the Department to have undertaken, or at least required, a far more rigorous assessment of the matter as part of the Concept Plan. It is relevant to note that B-Doubles are heavily restricted in terms of access routes and they are only permitted to drive on RMS approved routes. It is inappropriate, and unsafe, for a B-Double access route to traverse residential streets.

Condition 1.34 does not in any way require Winten to provide access to SWMC through its residential subdivision for B-Doubles. It also does not require Winten to identify, design, or obtain any RMS approval, for a B-Double access road to SWMC through other land outside of its residential subdivision. Indeed, condition 1.34 says nothing at all about B-Double access to SWMC for regional mass-waste transfer operations; it simply requires access for waste removal vehicles.

In order to clarify the intention of this condition we seek to modify the wording of the condition as follows:

*Each development application for subdivision for the Link Road North precinct is to demonstrate that key roads linking Minmi Boulevard and the waste management centre have been designed to accommodate waste removal vehicles **(being heavy rigid vehicles purpose built or adapted for kerbside collection)** in accordance with any requirements of the relevant **consent authority** ~~council~~, unless otherwise agreed to by that **consent authority** ~~council~~.*

#### **Condition 1.45**

This condition requires certain bushfire planning measures to be incorporated into development applications under the Concept Plan. Winten has complied with this condition in relation to the

development applications for stages 3, 4, and 5 currently before the Land and Environment Court. However, RFS has not yet confirmed its satisfaction, which is required by the condition.

RFS was provided with the relevant information on 3 December 2018 for the Newcastle DA and 5 December 2018 for the Lake Macquarie DA. Numerous requests for information over and above the requirements of Condition 1.45 have been required by RFS since this time. In every instance, these have been responded to in a timely manner in an attempt to secure RFS satisfaction. The following tables provides a summary of the RFS assessment to date:

	<b>Lake Macquarie DA</b>
Pre DA Meeting with RFS	24 Oct 2018
DA lodged with Council inc. Bushfire Management Plan	22 Nov 2018
DA referred to RFS	5 Dec 2018
RFS Integrated fee request	11 Dec 2018
On-Site Inspection with RMS	7 February 2019
1 <sup>st</sup> Request for Information	28 March 2019 (111 days with RFS)
Applicant Response sent to RFS	5 April 2019 (8 days with Applicant)
2 <sup>nd</sup> Request for Information	29 May 2019 (54 days with RFS)
Applicant Response sent to RFS	13 June 2019 (15 days with Applicant)
3 <sup>rd</sup> Request for Information	19 June 2019 (6 days with RFS)
Applicant Response sent to RFS	10 July 2019 (21 days with Applicant)
<b>Total Assessment days with RFS</b>	<b>184 days to date</b>

	<b>Newcastle DA</b>
Pre DA Meeting with RFS	24 Oct 2018
DA lodged with Council inc. Bushfire Management Plan	3 Dec 2018
DA referred to RFS	14 Jan 2019
On-Site Inspection with RMS	7 Feb 2019
Gully crossing details sent to RMS	19 Feb 2019
RFS Email re Stage 38 10m S88B Requirement	28 Feb 2019
Applicant Response to Email	28 Feb 2019
RFS Email re: Fire trail and proposed revegetation in gully	28 Feb 2019
Applicant Response to Email	28 Feb 2019
1 <sup>st</sup> Request for Information	18 March 2019 (63 days with RFS)
Applicant Response sent to RFS	8 April 2019 (submitted to Council on 1 April 2019) (14 days with Applicant)
CN email to RFS prefer fire trail and E2 land to be revegetated	18 April 2019
2 <sup>nd</sup> Request for Information	6 May 2019 (received by Applicant 24 May 2019) (28 days with RFS)
Applicant Response sent to RFS	24 May 2019 (1 day with Applicant)
<b>Total Assessment days with RFS</b>	<b>151 days to date</b>

The condition creates a de-facto concurrence role for RFS, but this is not a formal role that can be assumed by the Land and Environment Court on appeal. We therefore seek to modify this condition to remove the requirement for RFS satisfaction, to ensure that the Land and Environment Court is empowered to determine the appeals despite the lack of a timely response from RFS.

We propose that the condition be amended as follows:

*Each development application for subdivision must be accompanied by a Bushfire Management Plan that demonstrates that the development complies with the **current** Planning for Bushfire Protection 2006 and to the satisfaction of the RFS, and provides detailed arrangements for:*

- a) A road network and lot layout appropriate to evacuation purposes;

- b) Property access roads which allow for the safe access, egress and defensible space for emergency services;*
- c) The location and composition of all APZs, including the inner and outer protection zones, including in relation to proposed building footprints.*
- d) Ongoing maintenance for APZs, fire trails and access tracks to ensure compliance with the required standards (for APZs outside individual lots this must be negotiated with the RFS and relevant council).*
- e) A staged approach to management of bushfire hazard and APZs during the development process.*

Given the pending hearing dates for both the Lake Macquarie DA and the Newcastle DA, we would appreciate if the Department could attend to this modification request as a matter of urgency.

Please note that, due to the transition from the old major projects website to the new one, we have been unable to lodge this modification request online. We confirm that Winten has not made any reportable political donations in the past 2 years.

Please let us know as soon as a fee for the application has been determined, so that we can arrange for this to be paid.

Yours sincerely



Christina Renner  
**Partner**  
Accredited Specialist Planning and Environment