



Our Ref: DOC19/729322

Casey Joshua  
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Planning and Assessments Department of Planning, Industry and Environment  
320 Pitt Street SYDNEY NSW 2001

Dear Casey

**RE: NPWS submission in relation to Winten (No.21 Pty Ltd) request to modify Concept Approval for Minmi/Link Road subdivision (MP 10\_0090 MOD 4)**

I refer to your letter dated 15 August advising the National Parks and Wildlife Service (**NPWS**) of the request by Winten (No 21) Pty Ltd (proponent) to modify the Concept Approval (MP 10\_0090) for the Minmi/Link Road subdivision and seeking comment.

NPWS **objects** to the request to amend Concept Approval **Condition 1.16** that relates to the provision of recreation facilities to meet demand for the development area. The applicant has requested the condition apply only to land located in the Newcastle local government area, specifically stages 3,4 and 5. The reasons for objection are set out in this submission.

**Legal context - Power to modify a concept approval**

The concept plan for the project was approved under the former Part 3A of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*. Part 3A has now been repealed, and the savings and transitional provisions which apply to Part 3A projects are contained in the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 (Transitional Regulations)*.

Clause 3C(1) in Schedule 2 of the Transitional Regulations provides:

*(1) Section 75W continues to apply (subject to clause 3BA) for the purpose of the modification of a concept plan approved before or after the repeal of Part 3A, whether or not the project or any stage of the project is or was a transitional Part 3A project.*

And relevantly, clause 3BA(5) in Schedule 2 of the Transitional Regulations provides:

*(5) **A concept plan may continue to be modified under section 75W** pursuant to a request lodged on or after the cut-off date (whether or not the project is or has ceased to be a transitional Part 3A project), but **only if the Minister is satisfied that:***

- (a) the proposed modification is to correct a minor error, misdescription or miscalculation, or*
- (b) the proposed modification is of minimal environmental impact, or*
- (c) the project to which the concept plan as modified relates is substantially the same as the project to which the concept plan currently relates (including any modifications previously made under section 75W). (Emphasis added).*

Accordingly, Winten needs to establish its modification satisfies one of the three matters identified in clause 3BA(5). In relation to clause 3BA(5)(c), it adopts the language of section 4.55(2)(a) of the EP&A Act (“substantially the same development”), noting however that for a Part 3A project a consent authority would be comparing the proposed modification against the concept plan as modified by any subsequent approved modification application. Accordingly, the present modification application needs to be assessed against the Concept Approval as modified by MOD 1.

In *Trinivass Pty Ltd V The Council of the City of Sydney* [2018] NSWLEC 77 at [22]-[27], Moore J set out the principles guiding how a consent authority would assess whether the development modification is substantially the same development. Relevantly, his Honour continued to apply the principles established in *Moto Projects No 2 Pty Limited v North Sydney Council* [1999] 106 LGERA 298, where Bignold J explained at [55]-[56]:

*55 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...*

*56 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).*

For the reasons which follow, NPWS submits that the modification to condition 1.16:

1. does not correct a minor error, misdescription or miscalculation;
2. is not of minimal environmental impact; and
3. will not result in a project which is “substantially the same” as the current concept plan as modified by MOD 1.

### **Condition 1.16 of the Concept Approval should not be modified**

NPWS maintains strong interest and concerns regarding the proposed development which adjoins land acquired and reserved under the *National Parks and Wildlife Act 1974*. There is a clear nexus between the recreation and open space demands of the proposed development and the adjoining Blue Gum Hills Regional Park (**BGHRP**). BGHRP is the largest, most significant parcel of open space land adjoining the proposed development, with many walkway/cycleway links to the Park identified in the development proposal.

Condition 1.16 currently requires “Prior to the determination of the development application for the subdivision of Stage 3, 4 and 5 ... the arrangement for provision of recreation facilities to meet demand for development within all stages including the skate park are to be identified”.

The following sentence in condition 1.16 qualifies the requirement, providing: “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).”

Winten is proposing to modify Condition 1.16 so that it needs only provide “recreation facilities ... [for] stages 3, 4, and 5 that are located within the Newcastle Local Government Area.” The justification put forward by Winten for the proposed amendment is that it is premised on a potential, future local government area boundary change which is yet to take place.

The problem with this approach, which is averted to by Winten in its modification application on page 1, is that currently the “DA/2087/2018 lodged with Lake Macquarie City Council [is] for 1,063 lot residential subdivision, comprising most of stage 5, and a very small portion of stages 3 and 4”. That is, over 52% of the 2,025 currently proposed subdivisions (lots) are within the Lake Macquarie Local Government Area (**LGA**).

By way of reference, Figure 2 in the Department's Assessment report of MOD 1 (which originally amended condition 1.16), clearly set out the size and configuration of the 5 stages proposed by the Concept Approval:



Figure 2: Indicative Staging Plan (source: PPR to original application)

Winten's proposed modification to remove the current obligation to provide "recreation facilities to meet demand for development within all stages", will exclude 52% of the proposed subdivisions from having recreational facilities within the development area or within their proximity. This modification:

- does not correct a minor error, misdescription or miscalculation;
- will have a significant environmental impact; and
- will result in a project which is not substantially the same as the current concept plan as modified by MOD 1.

By requiring Winten to identify land "within the development area", or to identify "alternative arrangements" through negotiations with "the relevant Council(s)" (and note the intentional use of the plural), prior to the determination of the development application for stages 3, 4 and 5, it is NPWS' position that Condition 1.16 currently ensures a holistic regional approach to recreational planning. This in turn will deliver improved recreation outcomes for all future residents (not just those within the Newcastle LGA), and will reduce impacts on the adjoining BGHRP.

The proposed modification would remove the need for recreation infrastructure for the entire development area to be considered by both Councils. If approved, this would facilitate fractured planning outcomes that would result in development of facilities in impractical locations that are unreasonable travel distances from residents within the development. This represents a substantial change to the concept approval that could not reasonably be considered minor as it will result in social impacts for residents as well as increased recreation pressures, and subsequent environmental impacts, on the adjoining BGHRP.

Further, Winten's assertion that "The modifications sought do not alter the approved development in any way" (page 1 of the MOD 4 application) is not supported by any expert assessment demonstrating there will be no environmental impacts. BGHRP is a sensitive receiver. This was recognised in condition 1.20(c) which requires Winten to manage the interface "between the development site and the conservation lands, Blue Gum Hills Regional Park ... to minimise any potential impacts". NPWS submits that, due a lack of any supporting assessment, there is no evidential basis for the DoP to be satisfied that the MOD 4 application will have "minimal environmental impact" (clause 3BA(5)(b) of the Transitional Regulations) or would result in "substantially the same development" (clause 3BA(5)(b) of the Transitional Regulations).

NPWS recommend DoP refuse the modification request and require Councils and the proponent to participate in coordinated regional planning for recreation facilities that meet the needs of residents within the entire development area, as the current condition 1.16 requires.

As a significant adjoining land owner of what will be a rapidly growing community, NPWS seeks DoP support in facilitating involvement and consultation in planning of parkland and recreation facilities for the development. This could include exploring the feasibility of potential partnerships with Councils and consideration of the potential benefits of locating recreation and sporting facilities within BGHRP. Further information on the potential use of BGHRP to satisfy the recreation needs of the development area is included in Attachment 1.

If you would like to discuss any aspects of the submission please contact Mitch Carter, Acting Area Manager, Lower Hunter Area on 4946 4102 or at [mitchell.carter@environment.nsw.gov.au](mailto:mitchell.carter@environment.nsw.gov.au).

Yours sincerely



**KYLIE YEEND**  
**Director, Hunter Central Coast Branch**  
**NSW National Parks and Wildlife Service**

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## Attachment 1 -

### Establishment and intent of Blue Gum Hills Regional Park

Blue Gum Hills Regional Park (BGHRP) was gazetted in 2007 as part of the NSW Government's Lower Hunter Regional Strategy and Lower Hunter Regional Conservation Plan. The purpose and intent for the establishment of Regional Parks by the NSW Government was to protect urban bushland and create regional open space, to provide quality parks for the purpose of public recreation and enjoyment in metropolitan areas subject to urban growth. BGHRP is also recognised in *Newcastle Council's Parkland and Recreation Strategy 2014* as providing key recreation opportunities for current and future residents of the area.

Contributions at the time of gazettal of BGHRP funded capital improvements within the park. However, this investment and the park's infrastructure will not meet the projected demand for public and recreational facilities arising from the current proposed development applications within Newcastle City Council (NCC) - DA2018/01351 and Lake Macquarie City Council (LMCC) - DA2087/2018 local government areas.

### NPWS Development Application submissions and willingness to explore feasibility of locating required recreation facilities within Blue Gum Hills Regional Park

NPWS has provided submissions and participated in without prejudice discussions with both Newcastle and Lake Macquarie as part of both development applications. During these discussions NPWS has expressed a willingness to explore the feasibility and potential community benefits of locating recreation and sporting facilities, required as part of the concept approval condition 1.16, within BGHRP. This would include consideration of adequate contributions and potential partnership arrangements between Council/s and NPWS for BGHRP to meet the increased infrastructure and maintenance demands of the development. NPWS has confirmed with both Councils that this approach would be consistent with *National Parks and Wildlife Act* and original intent for BGHRP.

LMCC, in an 9<sup>th</sup> April 2019 submission to Department of Planning (DoP), indicated willingness for consideration of upgrading existing facilities within BGHRP as a potential alternate solution to satisfy Condition 1.16. In its submission LMCC indicated –

- *The Blue Gum Hills Regional Park was created to provide the recreation and open space needs for this development corridor, part of which comprises this development area*
- *The existing playground in the BGHR Park is located just 1.5km to 2.5km from the furthest lots within LRN Precinct*
- *The replacement of the existing (NP) playground asset, expansion of the playground to a higher level, provision of outdoor exercise equipment, and provision of shared pathways and/or recreational trails (providing direct access to the playground in BGHR Park) may be funded from:*
  - a) **The \$8M allocation** – a portion of the allocation could be “reallocated” however, it requires agreement between both council and the Department of Planning. and/or
  - b) **Developer Contributions** - however, it would need a satisfactory mechanism (i.e. a long-term lease/licence, other legal agreement) to enable the expenditure of development contributions funds. Alternatively, the management responsibilities of the BGHR Park could be transferred to a Council, if outcomes were acceptable.
- *The Minmi Link Road Development Recreation Facilities prepared by ADW Johnson for the applicant, identifies three possible locations for sporting facilities for the development area...All three locations identified are not considered fit for purpose or not suitable for the construction of the sporting facilities.*

- *In relation to the sporting facilities, another site which may be considered, is a large degraded area that was an old mine site within the BGHR Park. If Location 2 and Location 3 are not suitable, then it is recommended that a feasibility assessment be undertaken by the proponent to determine if this site is suitable for the construction of sporting fields. The Blue Gum Hills Regional Park Plan of Management (2007) (PoM) identifies as a funding opportunity to 'seek funding support from Local Government and cooperatively identify projects and initiatives of shared public interest that can be jointly implemented*

NPWS, through submissions and correspondence (DOC19/306184), expressed its support for LMCC's DoP submission and indicated a willingness to further explore recreation and partnership opportunities in more detail with both councils. Requests for these discussions and further consultation with NPWS when identifying preferred locations for recreation facilities as part of the development have not been pursued by Councils or the proponent.