



22 May 2019

**Determination of Modification Application
Island Point Road Residential Subdivision (DA 277-11-2004 MOD 3)**

1. INTRODUCTION

1. On 2 April 2019, the NSW Independent Planning Commission (**Commission**) received from the NSW Department of Planning and Environment (**Department**) a modification application from Allen Price & Scarratts Pty Ltd (**Proponent**) to modify an approved residential subdivision (the **modification application**) at 74 and 92 Island Point Road, St Georges Basin, in the Shoalhaven local government area (the **site**).
2. The modification application relates to a project approved under Division 4 of Part 5 of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) before its repeal in 2005.
3. In accordance with clause 88(3) of Schedule 1 to the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (**Transitional Regulation**), the approval is taken to be an approval under Part 3A of the EP&A Act.
4. The power to modify transitional Part 3A projects under section 75W of the EP&A Act in force immediately before its repeal on 1 October 2011 is being wound up – but as the request for this modification was made before 1 March 2018, the provisions of Schedule 2 (clause 3) of the Transitional Regulation continue to apply.
5. As the project is a transitional Part 3A project under clause 2 of Schedule 2 of the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (**Transitional Regulation**), and the Commission is the consent authority in respect of such transitional Part 3A projects under the Minister for Planning's delegation of that function to the former Planning Assessment Commission by instrument of delegation dated 14 September 2011, given that the Commission is to be taken to be the same legal entity as the Planning Assessment Commission, pursuant to clause 7 of the Transitional Regulation. The Commission may determine the Application under delegation as the Proponent has made a reportable political donation.
6. Professor Mary O'Kane AC, Chair of the Commission, nominated Alan Coutts (Chair) and Adrian Pilton to constitute the Commission determining the modification application.

1.1 Site and locality

7. The site is located west of Jervis Bay, on the NSW south coast, and is approximately 4.4 hectares (ha) in area. According to the Department's assessment report dated March 2019 (**Department's assessment report**), two dwellings are located on the site, and the majority of vegetation has been cleared. To the north is a relocatable home park; to the south is a residential aged care facility; and to the east and west are low density dwellings.

1.2 Modification Application

Background

8. **Table 1** outlines the Approval history for the site:

Table 1	
6 November 2006	<ul style="list-style-type: none">• Deferred commencement consent granted for:<ul style="list-style-type: none">- the subdivision of the site into 47 residential lots;- construction of a new loop access road;- creation of wildlife corridors; and- creation of an Asset Protection Zone (APZ).• The deferred commencement condition stated that the consent could not operate until an easement with a restriction as to the user was placed on the adjoining allotment to the south to provide an asset protection zone for the proposed subdivision.
19 January 2009	Modification 1 approved for: <ul style="list-style-type: none">• the deletion of the deferred commencement condition;• a reduction in the number of lots from 47 to 44;• amendment of the plans to reflect number of lots;• the introduction of staging (2 stage development); and• a modification to the on-site storm water detention requirements.
29 November 2012	Modification 2 approved to: <ul style="list-style-type: none">• allow for Stage 1 to be implemented;• preserve the existing vegetation on Stage 2 until satisfactory drainage infrastructure is in place;• delete reference to the Rural Fire Service (RFS) from the approved APZs;• rename lot numbers to facilitate staging; and• modify the approved vegetation preservation corridors.

Summary of the Modification Application

9. On 24 June 2015, the Proponent lodged a section 75W modification application (DA 277-11-2004 MOD 3) seeking approval to:
- increase the number of residential allotments created from 44 to 62;
 - modify the subdivision layout, including the relocation of the southern road;
 - increase the number of lots released in the first stage, from 24 to 49, with the remaining 13 lots in Stage 2 (otherwise being the asset protection zone for Stage 1);
 - alter the road layout from a loop road to two cul-de-sacs with access from Island Point Road;
 - demolish the dwelling house currently located upon Lot 15 DP 25550 (No 92) Island Point Road, previously approved Lot 115;
 - modify the topography of the proposed roads to improve site drainage and allow drainage to be directed to infrastructure within Island Point Road;
 - alter the drainage easement parallel to the eastern site boundary - this is an easement only over Lots 23 and 62 and is otherwise within the road reserve; and
 - provide a retaining wall on the road reserve for the retention of the re-contoured site.
10. On 21 August 2017, the Proponent provided a Response to Submissions (RtS) amending the modification application to address concerns raised in agency submissions. Additional

information and changes were also submitted to the Department from the Proponent on 31 October 2017.

11. The modification application seeks approval for:
 - an increase of residential lots from 44 to 63;
 - an increase of lots in Stage 1 from 24 to 49 with the remaining 14 lots in Stage 2;
 - no existing dwellings to be retained;
 - part road carriageway reduction from 8 metres (m) to 7m;
 - removal of APZ requirements;
 - removal of the threatened species corridor;
 - removal of the tree retention/planting easement; and
 - modification of the subdivision topography to improve site drainage.
12. The Commission is satisfied that the proposed changes are within the scope of section 75W of the EP&A Act as the increase in residential lots will not increase the project area and there will be no change in environmental impacts, and the proposal does not constitute a new application.

Stated need for modification

13. According to the Department's assessment report, the modification was requested on the basis that clearing of the site has significantly reduced the bushfire hazard and removed the need for a protection measure, and the clearing of the subject site and surrounding sites has degraded the environmental value of the site and removed connectivity, therefore a threatened species corridor at this location would have little purpose.
14. The modification to the drainage design is requested on the basis that an easement over the adjoining southern property was obtained.

2. THE DEPARTMENT'S CONSIDERATION OF THE MODIFICATION APPLICATION

2.1 Key steps in Department's consideration of the Modification Application

15. The Department made the modification application and the Proponent's RtS publicly available on its website, between 18 June 2015 to 2 July 2015 and 31 August 2017 to 15 September 2017 respectively, and consulted with Shoalhaven Council (Council), the Office of Environment and Heritage (OEH) and Rural Fire Service (RFS) about the modification application.
16. No public submissions were received by the Department. A summary of the submissions from Council, OEH and RFS are outlined in Table 1 of the Department's assessment report. No objections were received from these government agencies.
17. The Department notes in its assessment report that the Proponent responded to Council's concerns with the RtS in relation to lot layout and drainage and updated the plans to increase the frontage of Lots 2 and 3, show a building envelope on Lot 63 despite easements, and correct errors within the engineering plans.
18. The Department also states that the remaining issues have been assessed by the Department, and conditions recommended to address Council's concerns where required.

2.2 The Department's assessment report

19. The Department's assessment report identified subdivision layout, amenity impacts –

eastern boundary, stormwater management, biodiversity, road widths, access, cut and fill, staging, APZs, stormwater easements, water infrastructure and developer contributions as the key impacts associated with this modification application. The Department has also recommended updated conditions, which are outlined in its proposed modification instrument.

20. The Department concluded that the modification application is appropriate on the basis that:
 - *“the revised subdivision layout is acceptable as it provides a logical subdivision pattern and most of the lots comply with the requirements of Council’s DCP;*
 - *the proposal would result in greater amenity for adjoining properties as it would reduce the length of road directly adjoining the southern boundary of the site;*
 - *the amenity for adjoining properties to the east would be maintained through the provision of a landscaped strip along the eastern boundary of the site;*
 - *the clearing of surrounding sites has removed the bushfire threat and the need for bushfire protection;*
 - *the drainage strategy would remove the requirement for an OSD basin and utilise the existing infrastructure;*
 - *the threatened species corridor has been compromised due to the clearing and redevelopment of adjoining sites and as such is no longer required; and*
 - *the access arrangements are acceptable, given the minor increase in the number of lots.”*
21. The Department stated that it is *“satisfied the proposal would not result in any significant impacts beyond those already assessed and approved”*.
22. The Department considers the modification application is approvable subject to the conditions of approval outlined within this report.

3. THE COMMISSION’S MEETINGS AND SITE INSPECTION

23. As part of its determination of the modification application, the Commission met with the Department on 2 May 2019 to discuss the modification application. A transcript of the meeting was uploaded to the Commission’s website on 7 May 2019.
24. On 17 April 2019, the Commission sent Council an email asking whether it intended providing comment on the Department’s assessment report and modification instrument. Council responded via email on 7 May 2019 and stated that:

“Both the assessment report, modification instrument and previous emails to the Department have been reviewed.

The assessment report and modification instrument do satisfactorily address the issues Council has raised in the past”.
25. Both emails were uploaded to the Commission’s website on 14 May 2019.
26. As per the Commission’s *Site Inspection and Locality Tour Guidelines*, there is no statutory requirement for the Commission to conduct a site inspection or locality tour when determining an application or carrying out any other of its functions. In deciding whether to undertake a site inspection or locality tour for this modification application, the Commission has taken the following matters into account:
 - the physical attributes of the site and whether they can be adequately assessed by other means;
 - the physical size of the proposed development;

- whether the project application involves only administrative changes to a consent;
 - the nature of the likely impacts of the project (such as visual impacts or other proximity impacts); and
 - the accessibility of the project site and safety considerations.
27. As discussed in paragraph 16, none of the government agencies objected to the modification application and no public submissions were received during the Department's exhibition period. The Commission did not consider it necessary to meet with the Proponent or undertake a site inspection for this determination due to the likely impacts of the modification application.

4. ADDITIONAL INFORMATION

28. Following the Commission's meeting with the Department on 2 May 2019, the Commission requested clarification of Condition C2 (Drainage) in the Department's modification instrument.
29. The Commission noted that wording in Condition C2 stated that the development of the eastern catchment (Stage 2) must not be implemented until an easement over adjacent land has been attained. However, the Commission also noted that the Department's assessment report states that the Proponent was able to secure the easement on the adjoining land to accommodate drainage to the east of the site.
30. The Commission received clarification from the Department on 14 May 2019 through the amended wording to Condition C2 as follows:

*The western catchment (Stage 1) must drain naturally to Island Point Road. The ~~development of the eastern catchment (Stage 2) must not be implemented until an~~ **drain to the easement over adjacent land to the south-east.** ~~has been attained in accordance with Condition C3.~~*

5. THE COMMISSION'S CONSIDERATION

5.1 Material considered by the Commission

31. In this determination, the Commission has carefully considered the following material (**material**):
- the original Development Approval and subsequent modifications;
 - the Proponent's modification application, covering letter and its accompanying appendices dated 24 June 2015;
 - all government agencies' and Council's submissions made to the Department;
 - the Proponent's Final Updated Subdivision Layout dated 24 July 2017;
 - the Proponent's Response to Submissions dated 1 August 2017 and 24 October 2017 and its accompanying appendices;
 - the Department's Assessment Report and proposed Modification Instrument, dated March 2019;
 - information provided to the Commission at its meeting with the Department on 2 May 2019;
 - additional information provided by Council in its email of 7 May 2019; and
 - additional information provided by the Department, outlined in section 4 above.

5.2 Mandatory considerations

32. In light of the above, the Commission has taken into consideration the following relevant considerations:
- the provisions of all:
 - relevant development control plans;that apply to the land to which the modification application relates;
 - the likely impacts of the development, including environmental impacts on both the natural and built environments,
 - submissions made in accordance with the EP&A Act and Regulations; and
 - the public interest, including ESD.

5.3 Relevant Development Control Plans

33. The Commission identifies the *Shoalhaven Development Control Plan 2014 (DCP)* as relevant to the modification application.
34. The Department states in its assessment report that the subdivision layout and road widths are consistent with Council's DCP and that the Proponent's stormwater management strategy is acceptable, subject to updated conditions requiring compliance with the DCP. The Department concludes that the modification application is appropriate on the basis that most of the lots comply with the requirements of Council's DCP.
35. The Commission accepts the Department's findings in paragraph 34 and finds that the modification application is generally consistent with Council's DCP because it complies with provisions or has conditions that require compliance with the provisions of this DCP.

5.4 Likely impacts of the development on the natural and built environments

36. The Commission considers subdivision layout, amenity impacts on the eastern boundary, stormwater management, biodiversity, road widths, access, APZs, objects of the EP&A Act and the public interest to be the key issues relevant to the assessment and determination of the modification application.

5.4.1 Subdivision Layout

Council and Proponent Consideration

37. In its response to the Proponent's RtS, the Commission notes that Council stated:
"The proposed access to lots 2 and 3 severely limits the remaining frontage available to the lots. Lot 3 has no direct street frontage. Bin placement may be outside another property."
38. The Department's assessment report states that the Proponent updated the subdivision layout to increase the frontages of lots 2 and 3 by 1.8m and 3.3m respectively in response to Council's concerns.

Department's Consideration

39. The Department notes in its assessment report that:
"Council's DCP requires a minimum lot width of 16 m and depth of 30 m for rectangular lots and a mean width of 18 m for irregular shaped lots. The majority of lots meet the requirement, with some minor variations, which would not affect the amenity of future dwellings on the lots."
40. The Department concludes that:
"the proposed subdivision layout, is acceptable, as it forms a logical subdivision pattern

providing high levels of residential amenity, reduces the length of road facing the adjoining boundary of the site and it complies with the majority of Council's subdivision controls".

Commission's Consideration

41. The Commission acknowledges the Proponent's update to the subdivision layout to respond to Council's concerns over lot access outlined in paragraph 38.
42. The Commission acknowledges from paragraphs 39 and 40 that lots 2 and 3 do not comply with the minimum lot width requirement under Council's DCP. However, the Commission accepts the Department's findings in paragraphs 39 and 40 that the majority of lots proposed by the modification application would comply with Council's DCP and also notes that Council states in paragraph 24 that the Department's assessment report satisfactorily addresses the issues Council has raised in the past.
43. Based on the material, the Commission finds that the subdivision layout is acceptable as it would not adversely impact on the amenity of future dwellings on lots.

5.4.2 Amenity impacts – eastern boundary

Council's Comments

44. The Commission notes that Council raised concern in its second submission to the Proponent's RtS, dated 4 December 2017 about potential amenity impacts of the proposed road along the eastern boundary on five adjoining lots, and subsequently recommended that an easement for a strip of land directly adjacent to the boundary be provided as either a road reserve or a public reserve (under the care of Council). This would minimise amenity impacts and prevent unauthorised access to existing properties via the rear boundary.

Department's Consideration

45. The Department states in its assessment report that it *"agrees with Council that this would result in a better amenity outcome for these properties, and recommends a new condition requiring the strip of land along the eastern boundary of the site to be created as a landscaped easement"*.

Commission's Consideration

46. The Commission accepts the Department's statement in paragraph 45, and the inclusion of the new condition C18 satisfactorily addresses the issues Council has raised in the past as stated in paragraph 24.
47. Based on the material, the Commission finds that the imposition of a new condition (C18) requiring a landscaped easement along the eastern boundary of the site is acceptable as it would result in a better amenity outcome for properties on this boundary.

5.4.3 Stormwater Management

Council and Proponent Consideration

48. Council initially raised concern in its response to the modification application, dated 2 July 2015, about the proposed on-site detention (OSD) basin having unacceptable visual impacts.
49. In its RtS the Proponent modified the modification application by altering the proposed earthworks, to match the existing site topography and reduce the reshaping of the land. The

OSD basin was also proposed to be removed.

50. The Proponent was able to secure the easement on the adjoining land to the south (62 Island Point Road) to accommodate drainage to the east of the site and proposed a revised drainage strategy.
51. Council advised in its second submission to the Proponent's RtS, dated 4 December 2017, that the drainage strategy was sufficient, and any further issues could be resolved at the construction certificate stage.

Department's Consideration

52. The Department states in its assessment report that it considers the proposed drainage strategy would appropriately service the site, and the removal of the OSD basin would result in an improved amenity outcome and that subject to the updated conditions requiring compliance with Council's DCP, the Department considers the proposed stormwater management strategy is acceptable.

Commission's Consideration

53. As outlined in paragraphs 28 and 29, the Commission requested clarification of wording in Condition C2 as it noted that the Proponent was able to secure an easement to the adjoining land to the south to accommodate drainage to the east of the site.
54. The Commission notes that Council states in paragraph 24 that the Department's modification instrument, which includes amending Condition C2 and providing new conditions C2A and C12D, satisfactorily addresses the issues raised by Council.
55. Based on the material, the Commission finds that the Proponent's drainage strategy is acceptable as it would appropriately service the site. The Commission accepts the Department's suggested wording for Condition C2 outlined in paragraph 30.

5.4.4 Biodiversity

Office of Environment and Heritage (OEH) Comments

56. OEH reviewed the modification application and advised in their submission to the Department that the retention of the threatened species corridor, originally proposed under this modification application, would not enhance threatened species movement due to extensive clearing that had already occurred on site and from approved developments constructed to the north and south.

Department's Consideration

57. The Department states in its assessment report that it *"considers the removal of the threatened species corridor is acceptable in this instance, given the adjoining sites have been cleared and redeveloped for urban purposes. The site has now become isolated from adjoining bushland and a threatened species corridor at this location would have little purpose"*.

Commission's Consideration

58. Based on the material, the Commission accepts OEH's and the Department's statements in paragraphs 56 and 57 and finds that the removal of the threatened species corridor is acceptable as there has been extensive clearing on site and surrounding sites, isolating the site from bushland.

5.4.5 Road Widths

Council and Proponent Consideration

59. In its RtS, the Proponent sought to reduce the vehicle carriageway width from 8m to 7m and provide a 0.5m rollover curve on each road edge to facilitate a possible carriageway width of 8m wide. Council initially raised concern to the Proponent's RtS that the proposed reduction in width would potentially result in medium rigid vehicles crossing the centreline of the road and damage from trucks using the roll kerb.
60. Council further recommended in its submission to the Department, dated 20 March 2019, that a 7m wide carriageway with a 15m wide road reserve for the entrance to the site, and a 16m wide road reserve for the loop road should be provided. The Proponent provided an updated plan which adjusted the lot boundaries to accommodate the required road reserve width while maintaining a minimum lot size of 500 square metres (m²).

Department's Consideration

61. The Department considers in their assessment report that the 7m carriageway is acceptable given the proposed road is an access street, which requires a minimum carriageway width of 6m in accordance with Council's DCP.
62. The Department notes that the modification application also seeks to modify Condition C16 of the modification instrument to clarify that a footpath is not required along the full length of the loop road. The Department notes Council's recommendation in its submission to the Department, dated 20 March 2019, of a condition requiring a 2m wide footpath to be provided from Island Point Road, along the northern side of the entrance road, to the first intersection with the loop road. The Department has subsequently updated Condition C16 to require a footpath to be provided in accordance with Council's recommendation.
63. The Department states in its assessment report that it considers the road reserve width and provision of a footpath is consistent with Council's DCP and is sufficient for the proposed subdivision given the loop road is an access road only.

Commission's Consideration

64. The Commission notes that Council states in paragraph 24 that the Department's modification instrument, which includes updating Conditions C9 and C16, satisfactorily addresses the issues Council has raised in the past.
65. The Commission accepts the Department's findings in paragraph 62 and its recommendation to update Condition C16 in line with Council's requirement for footpath width. Based on the material, the Commission finds that the road and footpath widths are acceptable as they are consistent with Council's DCP.

5.4.6 Access

Council's Comments

66. In its response to the Proponent's RtS, Council stated that:
"The number of lots proposed is 63 which is excessive for a cul-de-sac arrangement (regardless of the internal loop road) and could severely limit access by residents during an emergency. Two entry/exit points would be preferable to provide a more suitable amenity."

Roads and Maritime Services' (RMS) Comments

67. In its response to the modification application, dated 2 July 2015, RMS stated that:
"The proposed subdivision will access a local road and is not considered to impact on the safety and efficiency of the classified road network" and
"The proposed additional allotments are likely to have a minor traffic impact on the proposed intersection with the local road".

Department's Consideration

68. The Department states in its assessment report that it *"considers the existing access arrangement is acceptable as it is consistent with the current approval and the increase in the number of lots is minor (19)"*.
69. The Department also notes that Council raised no concern with the proposed single access arrangement as part of the original assessment, and the development directly to the north of the site contains 56 relocatable dwellings and has a similar single access arrangement.
70. The Department concluded that the retention of the single access arrangement is acceptable and would not result in amenity impacts.

Commission's Consideration

71. The Commission acknowledges previous Council's concerns regarding the modification application's single access arrangement but notes that Council did not raise any concerns in its submission to the Department, dated 20 March 2019, or its correspondence to the Commission, outlined in paragraph 24.
72. Based on the material, the Commission accepts the Department's and RMS' statements in paragraphs 67-70 and finds that the single access arrangement is acceptable as it would not result in any amenity impacts.

5.4.7 Asset Protection Zones (APZs)

Rural Fire Service's (RFS) Comments

73. The Commission notes that the RFS reviewed the modification application and advised in their submission to the Department, dated 5 December 2017, that *"In recognition that the site...has recently been subject to significant vegetation removal...the NSW RFS does not object to the removal of conditions relating to bushfire protection"*.

Department's Consideration

74. The Department states in its assessment report that it *"considers the removal of these conditions is appropriate, given the extent of clearing on the site and surrounding sites has reduced the threat of bushfire"*.

Commission's Consideration

75. Based on the material, the Commission accepts RFS's and the Department's statements in paragraphs 73 and 74 and finds that the removal of conditions to bushfire requirements is acceptable as there has been extensive clearing on site and surrounding sites which has reduced the threat of bushfire.

5.4.8 Objects of the EP&A Act and the public interest

76. In determining the public interest merits of the modification application, the Commission has had regard to the objects of the EP&A Act. The Commission notes that the Proponent and the Department are silent as to how the modification application is consistent with the objects of the EP&A Act and public interest.
77. A key relevant object of the EP&A Act to the modification application is the facilitation of Ecologically Sustainable Development (**ESD**). The Commission notes that section 6(2) of the *Protection of the Environment Administration Act 1991* states that ESD requires the effective integration of social, economic and environmental considerations in its decision-making.
78. The Commission considers that the benefits of the modification application include better street frontages for lots 2 and 3, a better amenity outcome for properties on the eastern boundary of the site, and no adverse impacts on amenity from the single access arrangement.
79. The Commission considers that the retention of an APZ and threatened species corridor is unnecessary as it notes the significant vegetation removal that has occurred on the site and surrounding area, which has been acknowledged by the Department, RFS and OEHL.
80. The Commission has considered how the modification application relates to the objects of the EP&A Act and finds that the modification application is consistent with ESD principles, the objects of the EP&A Act and is in the public interest, because the proposed modification will not result in adverse amenity impacts and will improve the amenity of the existing lots, as outlined in paragraph 78.

5.5 Other matters considered by the Commission

81. The Commission is satisfied that the matters relating to cut and fill, staging, stormwater easement and water infrastructure have been satisfactorily considered and addressed in the Department's assessment report and, where relevant, its modification instrument.
82. The Commission notes that Council did not raise any concerns with the Department's assessment report and modification instrument in respect of these matters in their correspondence to the Commission, outlined in paragraph 24.

6. CONCLUSION: THE COMMISSION'S FINDINGS AND DETERMINATION

83. The Commission has carefully considered the Material before it.
84. The Commission finds that the modification application:
 - would have an acceptable subdivision layout;
 - would have an acceptable easement along the eastern boundary of the site;
 - would have an acceptable drainage strategy;
 - would have acceptable road and footpath widths;
 - would have an acceptable single access arrangement; and
 - is in the public interest.
85. The Commission also finds it acceptable to remove the threatened species corridor and APZ due to the already extensive clearing of the site and surrounding sites.
86. For the reasons outlined in paragraphs 84 and 85, the Commission determines to approve

the modification application, subject to conditions. These conditions are designed to:

- prevent, minimise and/or offset adverse environmental impacts;
- set standards and performance measures for acceptable environmental performance
- require regular monitoring and reporting; and
- provide for the on-going environmental management of the development.

87. The reasons for the Decision are given in this Statement of Reasons for Decision dated 22 May 2019.



Alan Coutts (Chair)
Member of the Commission



Adrian Pilton
Member of the Commission