



New South Wales Government
Independent Planning Commission

Mundamia Residential Subdivision Modification 1 SSD 7169 MOD 1

Statement of Reasons for Decision

Chris Wilson (Chair)

28 September 2021

Mundamia Residential Subdivision Modification 1 Final Report ©
State of New South Wales through the Independent Planning Commission 2021

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1 INTRODUCTION

1. On 16 September 2021, the NSW Department of Planning, Industry and Environment (**Department**) referred a State significant development modification application (SSD 7169 MOD 1) (**Application**) from Allen Price and Scarratts Pty Ltd (**Applicant**) to the NSW Independent Planning Commission (**Commission**) for determination. The Application seeks to modify the approval (**Existing Approval**) for the Mundamia Residential Subdivision (SSD 7169) (**the Project**) located in the City of Shoalhaven Local Government Area (**LGA**) pursuant to section 4.55(1) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**).
2. The Commission is the consent authority in respect of the Application under section 4.5(a) of the EP&A Act and clause 8A of the *State Environmental Planning Policy (State and Regional Development) 2011* (**SEPP SRD**) because the Applicant disclosed a reportable political donation
3. Mary O’Kane AC, Chair of the Commission, nominated Chris Wilson (Chair), to constitute the Commission determining the Application.

2 THE SITE

4. The Department’s Assessment Report (**Department’s AR**), dated September 2021, describes the Site in Section 1.2:

The Mundamia Residential Subdivision is located approximately 2.5 kilometres (km) west of the Nowra town centre, 1.5 km west of the suburb of West Nowra and 300m south of the Shoalhaven River. The site comprises approximately 41.3 ha of residential and environmental conservation zoned land.

The site forms part of the Mundamia Urban Release Area (URA). The Mundamia URA comprises approximately 53 ha of land and is intended to provide up to 720 new homes for approximately 1,800 residents within the Nowra-Bomaderry region. The Mundamia Residential Subdivision will create the first residential lots within the URA.

5. The ‘Site’ for the purposes of this Statement of Reasons is defined as the Mundamia Residential Subdivision site, as illustrated in Figure 1 below.

Figure 1: Site Location and Layout (source: Department's AR)



3 BACKGROUND

6. On 6 July 2021, the Commission received a request from the Department in relation to the deferred commencement conditions A1(4), A1(5), A1(6), A1(8) and A1(9) for the Existing Approval, which was determined by the Commission on 23 December 2019.
7. The Commission undertook a review of the material provided by the Department including the Department's compliance table and independent expert bushfire reports commissioned by the Department, and made the following conclusions:

The review concludes that the Applicant has:

- *demonstrated compliance with conditions A1(4), A1(5), A1(6)(i) and (ii), A1(8) and A1(9); and*
 - *not demonstrated compliance with Condition A1(6)(iii). Condition A1(6)(iii) requires Council to take responsibility for the implementation of several bushfire management plans and protocols including the Bushfire Emergency/Evacuation Management Plan (BEM&EP) and the Bushfire Traffic Management Plan (BTMP).*
8. The reason for the Commission's position was that Council had previously advised that it could not take responsibility for either the Bushfire Emergency/Evacuation Management Plan (**BEM&EP**) nor the Bushfire Traffic Management Plan (**BTMP**) and would only take responsibility for the Bushfire Fuel Management Plan and the Vegetation Management Plan insofar as they were applicable to land under Council's control.

4 THE MODIFICATION

9. The Application seeks to amend Condition A1(6)iii of the Existing Approval to remove the requirement for Shoalhaven City Council (**Council**) to have responsibility for the implementation, ongoing review, and update of the BTMP and the BEM&EP.
10. Section 1.4 of the Department's AR, describes the Modification as follows:

The request seeks to modify Deferred Commencement Condition A1(6)(iii) to remove the requirement for Council to have responsibility for the implementation, ongoing review and update of the Bushfire Traffic Management Plan (BTMP) and the Bushfire Emergency/Evacuation Management Plan (BEM&EP), as these were included in error.

11. Condition A1(6) of the Existing Approval is copied below:

(6) The Applicant must submit written confirmation from Council stating that Council will accept and be responsible for:

(i) the ownership and ongoing management of the APZs in parks, open space, road reserves and residual lands;

(ii) the ownership and ongoing maintenance, management and operation of the NSP;

(iii) the implementation, ongoing review and update of all bushfire management plans/protocols required by this consent, including but not limited to: the Bushfire Fuel Management Plan; the Emergency/Evacuation Management Plan; Bushfire Traffic Management Plan; and the Vegetation Management Plan.

The Applicant must demonstrate that it has entered into a suitable agreement/mechanism with Council for the ownership, maintenance and funding of the above items.

12. The Application seeks to modify the wording of Condition A1(6)(iii) of the Existing Approval to the following:

(iii) the implementation, ongoing review and update of the Bushfire Fuel Management Plan and the Vegetation Management Plan.

5 THE DEPARTMENT'S RECOMMENDATION

13. The Department did not undertake public engagement as consultation is not a statutory requirement for modification applications pursuant to section 4.55(1) of the EP&A Act.
14. The Department consulted with Council which did not object to the Application. Council's response is summarised in Section 4.2 of the Department's AR and considered further in Section 5 of the Department's AR.
15. The Department's recommendation in Section 7 of the Department's AR states:

It is recommended that the Independent Planning Commission:

- *considers the findings and recommendations of this report*
- *determines that the application SSD 7169 MOD 1 falls within the scope of section 4.55(1) of the EP&A Act*
- *accepts and adopts all of the findings and recommendations in this report as the reasons for making the decision to approve the modification*
- *modifies the approval SSD 7169*
- *signs the attached Modification of Project Approval (Appendix B).*

6 MATERIAL CONSIDERED BY THE COMMISSION

16. In this determination, the Commission has carefully considered the following material (**Material**):
 - the Existing Approval for the Mundamia Residential Subdivision (SSD 7169);
 - the Commission's letter to the Department in relation to the discharge of deferred commencement conditions of the Existing Approval, dated 30 July 2021;
 - the Applicant's Modification Report, dated 13 August 2021;
 - the Applicant's Political Donation Disclosure, dated 16 August 2021;
 - the Department's letter of referral, dated 15 September 2021;
 - the Department's AR, dated September 2021;
 - the Department's draft Instrument of Modification, dated 2021; and
 - the Department's email to the Commission, dated 24 September 2021.

7 STATUTORY CONTEXT

17. The Project was declared to be State significant development in 2015. Section 3.4 of the Department's AR states:

The original approval was previously a Transitional Part 3A project under Schedule 6A of the EP&A Act, as it satisfied the requirements of clause 1 (1)(j)(i), Schedule 2 of the then State Environmental Planning Policy (Major Projects) 2005, being the subdivision of land that is not in the metropolitan coastal zone, into more than 25 residential lots. As the project was not determined prior to Part 3A being wound up, it was declared a State significant development and transitioned into the Government's new State significant development assessment framework on 12 January 2015.

18. The Application was submitted pursuant to Section 4.55(1) of the EP&A Act, as set out below:

(1) Modifications involving minor error, misdescription or miscalculation 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 a development consent granted by it to correct a minor error, misdescription or miscalculation. Subsections (1A), (2), (3), (5) and (6) and Part 8 do not apply to such a modification.

8 ASSESSMENT

19. Section 3.1 of the Department's AR finds that the Modification falls within the scope of 4.55(1) of the EP&A Act as it:

- *corrects an error in the wording of a deferred commencement condition and reflects the standard practice for implementation, review, and update of bushfire management plans; and*
- *is substantially the same development as originally approved. Therefore, the Department is satisfied the proposed modification is within the scope of section 4.55(1) of the EP&A Act as it seeks to correct a minor error or misdescription in the consent and does not constitute a new development application. Accordingly, the Department considers that the application should be assessed and determined under section 4.55(1) of the EP&A Act.*

20. The Commission notes that an independent bushfire expert was engaged by the Department in relation to a number of the development's bushfire-related matters, including the discharge of the deferred conditions of consent in the Existing Approval. Section 5.2 of the Department's AR states:

The consultant advised that although there is some inevitable residual bushfire risk associated with there being no ongoing requirement to review and update the bushfire management plans/protocols that "it is standard practice that conditions of development consent in relation to bushfire for subdivisions do not generally require the ongoing review and update of these plans, except where there is a clear responsibility for them, as Council has clear responsibility for plans which relate to land under their control in this case".

21. Section 5.2 of the Department's AR finds that the Modification would correct a minor error being the inclusion of the BTMP and BEM&EP, stating:

The Department is satisfied that the amended wording would ensure the management of bushfire protection measures within land under the care and control of Council, and that the actions outlined in the BTMP and BEM&EP will be the responsibility of the State government agencies responsible for emergency procedures during a bushfire event. Subject to the amended condition, the Department is satisfied that the proposal reflects the standard practice for implementation, review, and update of bushfire management plans and corrects the erroneous inclusion of the BTMP and BEM&EP within Condition A1(6)(iii).

22. The Commission wrote to the Department on 24 September 2021 to seek clarification of the assessment provided in the Department's AR, particularly the Department's comment outlined in paragraph 21 above which states that the actions outlined in the BTMP, and BEM&EP will be the responsibility of the State government agencies responsible for emergency procedures during a bushfire event. The Department's response, received on the same day, confirmed that:

The purpose of the Bushfire Traffic Management Plan and the Bushfire Emergency/Evacuation Management Plan is to inform an appropriate fire and emergency response at the Mundamia Residential Subdivision site for both residents and emergency services. However, the implementation, ongoing review and update of these plans is not the responsibility of the Rural Fire Service or other relevant emergency services; and

Consequently, under these circumstances it is inappropriate to assign responsibility for the implementation, ongoing review and update of these plans via a Condition of consent or otherwise.

23. Noting the above clarification from the Department, the Commission agrees with the Department's finding that the Application should be approved as it would correct a minor error in a deferred commencement condition and that the development would remain substantially the same as originally approved.
24. The Commission is satisfied that the BTMP and BEM&EP are neither the responsibility of Council, Rural Fire Service, or any other emergency response organisation. It is clear the BTMP and BEM&EP were prepared in consultation with these same authorities and organisations to inform an appropriate emergency response in the case of a bushfire event. Whilst not to undermine the importance of these documents, the inclusion of the BTMP and BEM&EP in Condition A1(6) was clearly an error, and a minor error that can be rectified in accordance with Section 4.55 (1) of the EPA Act.
25. The Commission does not agree that a departure from "standard practice" in the imposition of conditions in and of itself constitutes an error. The Commission finds that the imposition of the original condition involved minor error insofar as it relied on the Department's recommendation of assigning responsibility to Council for functions that were properly the responsibility of State government agencies. Otherwise, the Commission defers to the Department's characterisation of the Application as one capable of determination under section 4.55(1) of the EP&A Act.
26. Noting that Council has advised that it would only be responsible for the VMP and BFMP as it relates to land under its management, the Commission has included the following wording in bold and underlined below to the instrument of modification to clarify Council's position in this respect:

*(iii) the implementation, ongoing review and update of ~~all bushfire management plans/protocols required by this consent, including but not limited to: the Bushfire Fuel Management Plan; the Emergency/Evacuation Management Plan; Bushfire Traffic Management Plan; and the Vegetation Management Plan~~ **required by this consent to the extent that those plans apply to land that will be under the care and control of Shoalhaven City Council.***

9 THE COMMISSION'S FINDINGS AND DETERMINATION

27. The Commission has carefully considered the Material before it as set out in section 5 of this report.
28. Based on its consideration of the Material, the Commission finds that the Application should be approved and Condition A1(6)(iii) of the Existing Approval should be amended as set out in Section 3 of this Statement of Reasons for Decision, including the additional wording discussed at paragraph 26, as:
 - the proposed modification falls within the scope of section 4.55(1) of the EP&A Act;
 - the Application would correct a minor error in a deferred commencement condition; and
 - the development would remain substantially the same as originally approved.



Chris Wilson (Chair)
Member of the Commission