

MODIFICATION OF CONSENT REPORT - DA021/18 (MOD039/19) PROPOSAL TO VARY CONSENT CONDITIONS REQUIRING CERTAIN SEWER AND CERTAIN ROAD PROVISION TO APPROVED 86 LOT SUBDIVISION AT 43 HILLCREST AVE BOWENFELS

1. PROPOSAL

Council is in receipt of a modification of development consent application from Mr James Flynn. The modification seeks to amend certain requirements of the conditional consent for an 86 lot residential subdivision by requesting the deletion of a southern link road and the provision of an interim sewage pumping station (this no longer forms part of the modification proposal). The detailed request is provided below. Please note that the Modification application is subject to a Class 1 Appeal to the Land and Environment Court and this application has been amended by the applicant several times over the course of the past 13 months. The modification request now mainly only applies to the provision of a link road and the applicant seeks to enter into a VPA in order to otherwise satisfy the consent conditions.

The original approval was determined by the Council. Min.18-279 - Ordinary Meeting of Council held on 29 October 2018.

The application will be assessed under Section 4.55 1(A) of the *Environmental Planning and Assessment Act 1979*.

2. SUMMARY

To assess and recommend determination of a Section 4.55 Modification of Consent MOD039/19 of DA021/18. The recommendation will be for approval (but only if subject to an additional VPA).

3. LOCATION OF THE PROPOSAL

Legal Description : Lot 1 DP 1230208, Lot 4 DP 1230208 and Lot 2 DP 1049398
Property Address : 43 Hillcrest Avenue, 13A Thornton Avenue and 994 Great Western Highway, Bowenfels

4. DETAILS OF CURRENT APPROVAL

DA021/18 was originally approved by the Council on 29 October 2018, for an 86 Lot Subdivision. Min.18-279

The approval requires the provision of a link road to Col Drewe Drive for Stage 2 and the connection to a new Council sewer pumping station also for stage 2.

5. PERMISSIBILITY: The development was originally permissible in the zone under Council's current LEP under which a subdivision is permissible in the zoning. This permissibility is not proposed to change as part of this modification. In fact, nothing changes by way of the proposed modification in relation to planning legislation (unless described below) as the proposed changes are essentially procedural or

operational in nature and therefore only brief comment is provided in relation to these matters below.

5.1 POLICY IMPLICATIONS (OTHER THAN DCP's)

Policy 7.7 Calling in of Development Applications by Councillors

This modification application is reported to Council as the original determination was by the Council.

5.2 FINANCIAL IMPLICATIONS

The application as originally submitted was to delete the requirements of infrastructure provision brought about by the 86 lot subdivision. It is considered that if approved, those costs would have become borne by the public purse (Council) instead. The latest VPA offer satisfactorily resolves this issue.

Planning Agreements

A planning agreement was made as part of the original application. It provides for community facilities and open space not provided for by the developer (see Condition No 9). The proposed modification will not impact upon the recuperation of finances from this agreement. The latest VPA offer for a link road is in **addition** to the original.

5.3 LEGAL IMPLICATIONS

5.3.1 Environmental Planning and Assessment Act 1979- Section 4.55 (1A)

(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 that requires the notification or advertising of applications for modification of a development consent, and**
- (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.

Comment:

It is determined that the Modification Application can be considered within this category of a minimal environmental impact. The subdivision is similar to that which was previously approved, the modification only relates to the mechanism in which access provision will be provided i.e. by way of a VPA as opposed to a consent condition, with the original lot layout completely unchanged.

The application has not been notified as it is considered minor in nature. Accordingly, no submissions have been sought or received in relation to the Modification Application. The VPA was notified for 28 days.

5.3.2 Environmental Planning and Assessment Act 1979- Section 4.55 (3)

- (3) *In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15 (1) as are of relevance to the development the subject of the application.*

Any Environmental Planning Instruments

Lithgow Local Environmental Plan 2014

The original application was assessed in accordance with the provisions of Lithgow's Local Environmental Plan 2014, and was found to be compliant. The modification does not require any further assessment under the LEP other than Clause 7.10 Essential services that relates to adequate disposal of sewage and suitable vehicular access.

State Environmental Planning Policies

The original application was assessed in accordance with the provisions of the relevant SEPP's, and was found to be compliant. The modification does not require any further assessment under any SEPP apart from the Infrastructure SEPP. It is within this SEPP that "***Traffic generating development to be referred to Roads and Maritime Services***" lists certain subdivisions. The applicant correctly points out that this application does not fall within that Schedule. One could argue that as the only way to exit the subdivision is via James O'Donnell Drive, traffic impacts upon a classified road being the Great Western Highway are precisely the same; however, the application was actually required to be referred to the RMS (now TfNSW) as works (being a left turn out only restriction) are proposed - requiring concurrence.

TfNSW has carefully considered the application and has essentially refused the request. In summary, they agree with the applicant's traffic consultant that the 'level of service' at the James O'Donnell Drive intersection with the Highway will remain at reasonably good levels i.e. queuing won't become a major problem, however they have deemed the intersection to be unsafe (due to the current road width and alignment). TfNSW has indicated that they will be responsible for the provision of traffic lights at Col Drewe Drive and therefore require the connection of this subdivision to those lights as a no-right-turn restriction is also required.

It is considered that this is a most reasonable requirement to be placed upon this development in lieu of the cost of a set of traffic lights by the developer. The cost of traffic lights is not insignificant and the cost to the developer to connect to them is not an unreasonable imposition in order to provide satisfactory access to 86 lots. TfNSW has suggested ways that the applicant may wish to consider cost sharing to the other developers involved in their respective subdivision approvals, be it a Voluntary planning Agreement (VPA), or similar mechanism.

The applicant was originally advised of this requirement in 2017 prior to lodgement of the development application.

Sewer Provision

The second component of the modification application was to amend a condition that relates to the provision of sewer. The applicant no longer wishes to change Condition 2 in this respect. Nonetheless, an insignificant amendment by staff is proposed simply to delete the reference to neighbouring Lot 4 DP 1230208 as that is now considered unnecessary and therefore superfluous.

The applicant has accepted that they should in the future submit a water and sewer design plan and obtain a Construction Certificate/Subdivision Works Certificate to service both Stages with gravity sewer as this will trigger the construction of the required Sewer Pump Station and associated trunk sewer mains that Council has committed to build downstream of the development.

Any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority

Nil.

Any Development Control Plan

Nil.

Any planning agreement that has been entered into under Section 7.4, or any draft planning agreement that a developer has offered to enter into under Section 7.4?

A current planning agreement is in place for the provision of open space and community facilities. The proposed modification seeks an additional (VPA) agreement.

The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality

Access:

The modification is principally about access arrangements. Staff are satisfied that this provision can be done via a VPA as opposed to consent conditions and the same outcome will result. Council will instead be responsible for the coordination and implementation of the link road works.

The Suitability of the site for the development

The original application was assessed in terms of site suitability and was found to be suitable. The modification does not require any further assessment of suitability.

Any submissions made in accordance with this Act or the Regulations

Given that the proposed amendment is considered to be minor it does not require re-notification. The proposal was referred to TfNSW as mentioned previously.

The public interest

The original application was assessed in terms of the public interest. The proposed modification, if approved, is considered to meet the public interest.

6. DISCUSSION AND CONCLUSIONS

The application has been thoroughly assessed under Section 4.55 1(A) of the *Environmental Planning and Assessment Act 1979* and is appropriate for a recommendation of approval subject to conditions.

7. ATTACHMENTS

Schedule A - Conditions of consent.

8. RECOMMENDATION

THAT the Section 4.55 Modification of Consent Application No.039/19 associated with DA No. 021/18 be approved subject to the following amended conditions as outlined in Schedule A:

Report prepared by: Paul Cashel

Schedule A

Conditions of Consent (Consent Authority) and General Terms of Approval (Integrated Approval Body)

Please Note: It should be understood that this consent in no way relieves the owner or applicant from any obligation under any covenant affecting the land.

ADMINISTRATIVE CONDITIONS

2. This development consent is for a **staged approval** being two stages in total. Stage 1 comprises 20 lots and one drainage reserve (Lots 1 to 10 & 50 to 59 & Pt Lot 87). Stage 2 comprises 66 lots and three drainage reserves (Lots 11 to 49 & 60 to 86 & remaining Part Lot 87). Construction of Stage 2 is not to commence until a sewer connection is made available on Lot 4 DP 1230208 and a road link between James O'Donnell Drive and Col Drewe Drive is constructed, dedicated as a public road and open to traffic.

Amended: 24 May 2021 (MOD039/19)

9. That the Voluntary Planning Agreements (VPAs) be endorsed by all parties as proposed by:
- a) Voerman & Ratsep Land Surveyors on 06/02/2018, and
 - b) **Noel Flynn on 25/02/21** prior to the Subdivision Certificate release of Stage 1. Additionally, the contribution agreed to within the VPA is to be paid at a rate of \$6200.00 per lot for community facilities (\$6000) and public open space (\$200) prior to the Subdivision Certificate release of Stages 1 & 2:
 - Stage 1= \$124,000 for 20 lots
 - Stage 2= \$409,200 for 66 lots

The contribution agreed to within the additional VPA (2021) for the provision of a link road is to be paid at a rate of:

- **pay an amount of \$275,200 being \$3,200 for each of the 86 residential lots created, to go towards Council's provision of a link road between James O'Donnell Drive and Col Drew Drive, Bowenfels; and**

- *Install a concrete island and “No Right Turn” signage on the James O’Donnell Drive approach to the Great Western Highway*
- *The payment is to be paid prior to the release of the Subdivision Certificate for the 21st lot to be created under DA021/18.*
- *The intersection works are to be completed prior to the release of the Subdivision Certificate for the 30th lot to be created under DA021/18.*

Amended: 24 May 2021 (MOD039/19)

42. ~~Prior to the release of the stage 2 sub-division certificate (prior to the release of the 21st allotment) a linkage road is to be constructed linking Col Drewe Drive to James O’Donnell Drive. The road is to be constructed to a collector road standard as defined in Council’s Guidelines for Civil Engineering Design and Construction for Development. Conditions 14—22, 24, 40 and 41 are to be met during the design and construction of the linkage road.~~
Deleted: 24 May 2021 (MOD039/19)

49. ~~Prior to the issuance of a subdivision certificate for/or including, the twentyfirst (21st) allotment, the following road works are to be completed:~~
- ~~○ A road link between the proposed subdivision and Col Drewe Drive is to be constructed, dedicated as a public road and open to traffic.~~
 - ~~○ Right turn and cross flow vehicular movements from Rabual Street and James O’Donnell Drive into and/or across the Great Western Highway are to be prevented by way of signage and concrete islands.~~
- Deleted: 24 May 2021 (MOD039/19)**

NB – all other conditions of consent remain.