

JOINT REGIONAL PLANNING PANEL

Hunter and Central Coast

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| JRPP No | 2011HCC009 |
| DA Number | DA/113/2011 |
| Local Government Area | Lake Macquarie City Council |
| Proposed Development | 4 into 404 Lot Residential Subdivision (Previously 4 into 375 lots) |
| Street Address | Lot 103 DP 1000408, 11 Robertson Street, West Wallsend Lot 105 DP 1000408, 103 Withers Street, West Wallsend Lot 15 DP 849003, 115 Withers Street, West Wallsend Lot E DP 938528, 17 Appletree Road, West Wallsend |
| Applicant/Owner | Hammersmith Management Pty Ltd |
| Number of Submissions in Re-exhibition | 300 total (237 of which were pro-formas) |
| Recommendation | Approval with Conditions - (Deferred Commencement) |
| Report by | Matt Brogan Senior Development Engineer Lake Macquarie City Council |

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1 PRÉCIS

At the Joint Regional Planning Panel Meeting held at Lake Macquarie City Council on 3 November 2011, the panel carried a motion to defer the determination of the application to allow additional information to be submitted by the applicant to address the issues raised. This Addendum Assessment Report is supplementary to council's original Planning Assessment Report. The Addendum Assessment Report provides an assessment of additional information provided by the applicant to address the issues raised by the panel, and gives consideration to public submissions received during the re-exhibition period.

The applicant submitted additional information on 22 December 2011 to address the issues raised by the panel. The additional information was referred to the relevant integrated and concurrence authorities on the 23 January 2012 for their approval or otherwise. Each authority has either re-granted concurrence/general terms of approval or confirmed that the original approvals remain current.

Council re-exhibited the application on 30 January 2012, until 5 March 2012. At the time of writing this report, a total of 300 public submissions of objection were received, of which 237 were pro forma based.

Lake Macquarie City Council Councillors engaged a Planning Consultant to prepare a submission of objection on their behalf. The submission was received on 21 May 2012. The applicant has prepared a comprehensive response to the issues raised within the Councillor submission.

2 PUBLIC SUBMISSIONS

Council re-exhibited the application from 30 January 2012, until 5 March 2012. At the time of writing this report, 300 public submissions of objection had been received. Of the 300 submissions received, 237 were standard pro forma style, with or without specific comment. The main points of objection remain fundamentally unchanged from the original exhibition period, and are as follows:

- Increased noise and traffic congestion resulting from increased traffic volumes produced from the development and increased exposure to George Booth Drive due to removal of bushland. Increased traffic volume on existing streets, which are narrow and in poor condition is also a concern.
- The removal of significant amounts of bushland is a concern on various grounds, including loss and displacement of native flora and fauna, increased noise, increased dust, visual impact and the destruction of the Ecological Endangered Community (Lower Hunter Spotted Gum & Iron Bark Forest).
- Increased instances of flooding due to development of the existing bushland on the subject site. The inability of detention basins to attenuate post development flows to predevelopment levels.
- The proposed development will detract from the strong heritage culture of the existing area. The building over the tramline remnants within the corridor, the lack of control or restriction over future dwelling designs and potential for damage to the “butterfly caves.”
- The overall density of the proposal is considered too high and the average lot sizes are considered too small in comparison to the existing lot sizes within the area.
- Existing services and facilities are unable to cater for the increased demand, which will result from the development.
- The potential for adverse social impacts on the existing community.

In addition to the main points of objection above, a small number of submissions have raised concern with the following:

- The Dam Safety Committee should be advised of the proposed detention basins within the development, to determine whether any basin or basins are required to be classified as prescribed dams.
- The exclusion of small lot housing from the development as required by LM LEP2004.

The issues raised have been adequately addressed in the documentation provided with the application and are discussed in detail throughout this report and the previous Planning Assessment Report.

2.1 LMCC Councillor Submission

Lake Macquarie City Council Councillors engaged a planning consultant to prepare a submission of objection on their behalf. A copy of the submission is contained within Appendix C of this report. The applicant prepared a response to the Councillor submission. A copy of the response is contained within Appendix E of this report.

The primary objections that were raised in the consultant's report are as follows:

- *Adverse Visual Impact and Inadequate Visual Assessment – primarily at the Withers Street and Carrington Street entrances to the township and the proposed lots on the higher eastern slopes.*
- *The lack of Building Envelopes.*
- *The lack of Small Lot Housing.*
- *A number of unresolved issues referred to in Section 6 of the submission.*

The applicant's response has addressed the primary objections listed above, and has identified that many of the points raised were previously addressed to the satisfaction of council officers and the JRPP, prior to the deferral of the application. The four primary objections are addressed as follows:

Visual Impact

The visual impact assessment is considered to be comprehensive and adequate for the purposes of this application. The assessment has found that the proposed development will have a low visual impact on the surrounds. From vantage points within the existing residential areas of West Wallsend, parts of the development will be visible, but screening is achieved by a combination of topography, existing vegetation and existing built form. The visual impact of

those areas of the development, that are visible, will be mitigated by the incorporation of controlled treatments in accordance with the proposed Heritage and Urban Design Guidelines.

The gateway entry to West Wallsend via Withers Street has been diminished by existing development to the east on Seaham Street, and in particular the gravel tracks and tree clearing that has occurred to achieve access to the rear of some properties. The incorporation of landscaping to the proposed detention basin to the south of Withers Street, and landscaping/street tree planting within the road reserve and in private properties will ameliorate the impact, and in some locations likely enhance it. On the northern side of Withers Street a 250m length will remain generally in its current state, with landscaping, building setbacks and building controls being placed on lots which front Withers Street. The visual impact to the gateway entry to West Wallsend from the development will be minimal and is considered appropriate.

The Carrington street entry will remain fundamentally in its current form, with a minor decrease in length. Landscape treatment and a building setback to Lot 822 will sufficiently mitigate any adverse visual impact from the gateway entry at Carrington Street. The gateway entry will not be significantly compromised by the proposed development.

Building Envelopes

The Councillor submission recommends that building envelopes be provided on certain “sensitive” lots. This recommendation for building envelopes is based on the consultant’s assessment that the site is a sensitive site.

Sensitive areas within the development site and areas of high visual value have been excluded from development and are contained within the areas retained for conservation. Approximately 45% of the site will not be developed and this area contains the areas of high ecological and visual value.

It is considered more appropriate to protect the high value environmental and visual areas in the conservation areas. The conditions of consent require that these areas will be managed in perpetuity to protect these values. It is better to include the sensitive areas of the site in the conservation areas, where they will be better managed, rather than including them on larger lots with building envelopes. Council’s experience is that it is very difficult to prevent land owners from causing impacts outside of a building envelope.

It should also be noted that the Heritage and Urban Design Guidelines, that will be linked to the title of each property, set allowable building envelopes on each lot.

Exclusion of Small Lot Housing

The exclusion of small lot housing has been addressed in Section 5.1 of this report.

Other Unresolved Issues

Many of the issues identified in Section 6 of the Councillor Submission have been previously addressed by the applicant and commented upon in council officers previous report to the panel. These issues were not identified by the JRPP as requiring further addressing. However, the applicant has adequately addressed the concerns raised in Section 6 in their comprehensive response to these matters. The response included additional assessment, reporting and comment from various experts in relation to matters including visual impact, threatened species, engineering, noise and planning. Two of these issues are addressed below.

Acoustic Assessment

The applicant has submitted an updated Acoustic Report, which updates the report to comply with the new NSW Roads Noise Policy 2011. The report has been reviewed by Council's Principal Environmental Officer and found to be satisfactory. A number of lots will require building construction controls to ensure that they meet the relevant noise standard. Conditions of consent have been included to cover this issue.

Sooty Owls

Council has recently engaged an expert on large forest owls to undertake a survey for owls in the north-western area of the City. As a part of this project, the expert has reviewed the SIS for this development. He has suggested, that based on the available survey data, that there is a potential for a Sooty Owl nest site to be located in the vicinity of this development.

Despite the fact that the Office of Environment and Heritage has already granted concurrence to the development, it was agreed that further detailed survey work should be undertaken to identify if a Sooty Owl nest site was present on the site. The applicant arranged for Niche Environment and Heritage to undertake a further survey of the site and adjoining lands to the north-east of George Booth Drive, on 1 June and 4 June 2012.

The survey did not locate any Sooty Owl nest on the development site, but did locate a possible Sooty Owl roost tree on land on the eastern side of George Booth Drive.

The conclusion of the additional survey report was that:

- The development site presents limited opportunities for nesting by Sooty Owls, Masked Owls or Powerful Owls.
- The latest survey concurs with the information provided in the SIS, that being, that the development site provides limited foraging and nesting habitat for the Sooty Owl and that the two known hollow-bearing trees, that could potentially be suitable for owl nests, are greater than 100 metres from the development area.
- The forest area on the eastern side of George Booth Drive provides much better habitat for owls and their prey.

Based on the SIS and this further survey work, it is considered that the development will not impact on any large forest owl nest sites.

3 INTEGRATED REFERRALS

The proposed development is defined as Integrated Development under Section 91 of the Environmental Planning and Assessment Act 1979. Notwithstanding, that General Terms of Approval had been previously granted by each integrated authority with the original application, the revised application was referred back to each integrated body to allow consideration of the changes. A copy of each approval is contained within Appendix B of this report. Details of each approval are given below:

3.1 Mine Subsidence Compensation Act 1961

The applicant has sought General Terms of Approval under Section 15 of the Mine Subsidence Act 1961. General Terms of Approval, subject to conditions were granted by the Mine Subsidence Board on 31 January 2012.

3.2 Rural Fires Act 1997

The applicant has sought General Terms of Approval for a Bushfire Safety Authority under Section 100B of the Rural Fires Act 1997. The NSW Rural Fire Service granted General Terms of Approval, subject to conditions on 28 February 2012.

3.3 National Parks & Wildlife Act 1974

The applicant has sought General Terms of Approval for consent under Section 90 of the National Parks and Wildlife Act 1974. General Terms of Approval, subject to conditions were granted by Department of Environment, Climate Change & Water on 30 March 2012.

3.4 Water Management Act 2000

The applicant has sought General Terms of Approval for an approval under Section 91 of the Water Management Act 2000. The NSW Office of Water correspondence dated 15 March 2012 advises that the previous approval, subject to conditions remains applicable.

4 CONCURRENCE REFERRALS

The proposed development requires the concurrence of the Office of Environment & Heritage and the Roads & Maritime Services. Notwithstanding that concurrence had been previously granted by each authority with the original application, the revised application was referred back to each body to allow consideration of the changes. A copy of each approval is contained within Appendix B of this report. Details of each approval are given below:

4.1 Office of Environment & Heritage

Council's Flora & Fauna Planner reviewed the SIS prepared by Niche 2011 and determined that the document met the Director Generals Requirements, and subsequently recommended that Council seek concurrence from the former DECCW (now the Office of Environment and Heritage). The Office of Environment and Heritage re-granted concurrence subject to conditions on 22 March 2012.

4.2 Roads and Traffic Authority

The proposal has been identified by the Applicant as traffic generating development under SEPP Infrastructure. The proposal has been referred to the RMS for concurrence under Clause 104 & Schedule 3 of SEPP Infrastructure. RMS correspondence dated 10 February 2012 advises that the previous approval, subject to conditions remains applicable.

5 JRPP ISSUES FOR DEFERRAL

At the Joint Regional Planning Panel Meeting held at Lake Macquarie City Council on 3 November 2011, the panel carried a motion to defer the determination of the application to allow additional information to be submitted by the applicant to address the issues raised. A copy of the minutes of the panel meeting of 3 November is contained within Appendix D. The matters identified by the panel are addressed below.

5.1 Small Lot Housing Requirements

The panel identified that the original development application failed to provide small lot housing as required by Lake Macquarie LEP 2004 under clause 24(2)(a) and Schedule 2. In the current application, the applicant has proposed to provide no small lot housing, but has proposed an alternative solution to satisfy the planning control. A SEPP1 Objection has been submitted to justify the exclusion of small lot housing from the application.

The SEPP 1 objection has been submitted in relation to Part 4, clause 8 of Schedule 2 of the Lake Macquarie City Council Local Environment Plan 2004, that requires “*At least 10%, but no more than 50%, of lots must be small lot housing lots.*” The applicant has proposed to create no small lot housing lots.

The aim of SEPP 1 is to provide flexibility in the application of planning controls in circumstances where strict compliance with those standards would be unreasonable or unnecessary, or hinder attainment of the objectives of the Act. The policy outlines that where except for a development standard, a development application could be made, an application can be submitted to Council so long as it is supported by a written objection stating that compliance with the development standard is unreasonable or unnecessary in the circumstances, and specifying the grounds of that objection. The applicant has submitted such an objection.

The SEPP 1 objection has been considered with reference to two judgments of the Land and Environment Court, that being *Winten Property Group Ltd v North Sydney Council* [2001] LGERA 79 and *Wehbe v Pittwater Council* [2007] NSW LEC 827.

The applicant has provided a legal opinion from a senior counsel on the SEPP 1, which contains the following statement at Clause 20:

“In my opinion, each of the elements identified in the two authorities set out above (*Winten Property Group Ltd v North Sydney Council* [2001] LGERA 79 and *Wehbe v Pittwater Council* [2007] NSW LEC 827) are sufficiently addressed for the purposes of enabling the consent authority to consider the objection pursuant to SEPP 1 on its merits”.

Under the case of *Winten Property Group Ltd*, five tests were identified to assess a SEPP 1 objection. These tests are considered below.

1. *Is the planning control in question a development standard?*

Clause 24(3) of the LEP indicates the provisions of Schedule 2 are development standards.

2. *What is the underlying object or purpose of the standard?*

The LEP does not state the purpose or objectives of the standard. The only guidance is provided in Clause 14(d) of the Lifestyle 2020 strategy, which states “*guide the development of urban communities that are compact, distinct and diverse and include a range of housing types and activities*”.

The SEPP 1 Objection has deduced that the purpose of the standard is to increase the range of available lot sizes and dwelling sizes, which in turn promotes accessibility to housing. Council officers agree with this identified purpose but also believe that the purpose should encompass the provision of “compact” communities.

The remaining tests of the *Winten* case (as follows) are considered in conjunction with the new tests by *Wehbe* and therefore are not addressed here.

3. *Is compliance with the development standard consistent with the aims of the policy and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act?*

4. (a) *Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?*

(b) *Is a development which complies with the development standard unreasonable or unnecessary?*

5. *Is the objection well founded?*

The Honourable B J Preston, Chief Judge of the Land and Environment Court, in *Wehbe v Pittwater Council* [2007] NSW LEC 827, revisited the *Winten* test and in his judgement set out 3 requirements, which should be satisfied in order for a consent authority to uphold a SEPP 1 objection. In addition, the Chief Judge listed 5 ways of establishing that compliance with a development standard is unreasonable or unnecessary. The three requirements to be satisfied are as follows:

1. *The applicant must satisfy the consent authority that the objection is well founded, the objection is to be in writing and must be an objection that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and it must specify the grounds of the objection.*

The SEPP 1 objection has been provided in writing, has specified the grounds of objection and has argued that it is well founded based on three of the points identified in *Wehbe*.

- *The objectives of the standard are achieved notwithstanding the non-compliance with the standard.*

It has been identified that the purpose of the control is to increase the range of available lot sizes, provide compact communities and promote accessibility to housing. The applicant has proposed an alternative solution to provide a range of lot sizes that it claims will achieve this objective. The application proposes to create 13% of all lots as smaller conventional lots. These lots will have an area of greater than 450 square metres and less than 550 square metres, making the lots slightly larger than small lot housing lots, which have an area of between 300 and 450 square metres. The lots generally have a frontage in the range of 14 to 16 metres. These lot sizes are significantly smaller than the typical lot size that currently exists in West Wallsend. The lots are also smaller than the typical lot size in the Northlakes Urban Release Area, which is located to the east of this site.

The proposed smaller lots will create a distinct variety in lot sizes within the development and locality and should assist in providing more variety in housing size and more affordable access to housing.

The density of development over the entire subdivision site is 5.7 lots per hectare. This low density is because approximately 45% of the site is being conserved for environmental and visual purposes. The lot density, over the area that is actually being developed, is approximately 12 lots per hectare. In the area that has been proposed for smaller lots, the density is 16.3 lots per hectare. Therefore, the proposed smaller lots are contributing to a more compact development.

In summary, it is considered that the objectives of the standard are achieved by the applicant's alternative proposal to provide 13% of all lots as smaller conventional lots.

- *The purpose of the standard would be thwarted if compliance was required.*

The SEPP 1 has argued that the purpose of the standard would not be achieved if small lot housing was provided in accordance with the LEP control. The basis of this argument is that small lot housing could not be provided in a cost competitive way. The applicant has provided a report from a local Real Estate Agent and an Economic Analysis of small lot housing in the locality to justify this argument.

The small lot housing control was included in Council's LEP in 2004. Since that time almost all large subdivisions have satisfied the control by creating large development lots that are set aside for future small lot housing (this approach was permissible under earlier versions of the LEP). To date, Council officers are not aware of any of these development sites, that are located within urban release areas, that have been developed. This suggests that there is either no demand for small lot housing in these areas or that the housing cannot be developed in an economic way.

This anecdotal evidence supports the applicant's claim that compliance with the standard may thwart the intention of the standard.

- *The standard has been abandoned via previous approvals.*

The SEPP 1 objection argues that by deferring small lot housing and allowing development lots to be created, the Council may have abandoned the standard. The SEPP 1 identifies that Council's draft LEP, (which has obtained a Section 65

Certificate and is expected to go on exhibition around September), no longer contains a control requiring small lot housing.

In summary, it is considered that based on a number of the tests identified in *Wehbe*, the SEPP 1 is well founded and has demonstrated that the standard is unnecessary and unreasonable in the circumstances.

2. *The consent authority must be of the opinion that granting consent to the development application would be consistent with the Policy's aims of providing flexibility in the application of planning controls operating by virtue of development standards where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in s5(a)(i) and (ii) of the Environmental Planning and Assessment Act 1979.*

It is considered that the proposal to provide smaller conventional lots in lieu of the small lot housing is a reasonable alternative that meets the objectives of the control and satisfies the principles of SEPP 1. The applicant has argued that the control is unnecessary as there is an alternative solution that meets the objective of the planning control and the control is unreasonable because small lot housing is not a desired product in this location and is uneconomic to produce in this location. This argument is supported. To require small lot housing to be provided when it is not economical to do so, would not be in accordance with the objectives specified in s5(a) (ii) of the EP&A Act.

3. *It is also important to consider:*

- 1) *Whether non-compliance with the development standards raises any matter of significance for State or regional planning; and*
- 2) *The public benefit of maintaining the planning controls adopted by the environmental planning instrument.*

Non-compliance with the development standard will not raise any significant issues for State or regional planning.

To date, the planning control has not in fact created any small lot housing in the Northlakes Urban Release Area and only very limited small lot housing in other release areas. This is because the developers have chosen to create development lots for future small lot

housing. Despite the availability of these lots, to date none in the Northlakes Urban Release Area have been further developed for small lot housing. This supports the applicant's analysis that suggests that this form of development will not contribute to more diverse and affordable housing in this area. The applicant argues that small lot housing is better located in an area that has high amenity. Council's draft LEP, which has a Section 65 Certificate, proposes to remove the small lot housing control. It is therefore considered, that in the circumstances of this application, there is no public benefit in maintaining the planning control.

In conclusion, it is considered that the SEPP 1 Objection is well founded and any requirement for strict compliance with the provisions of Part 4, clause 8 of Schedule 2 of LMCC LEP 2004, is considered to be unreasonable and unnecessary having regard to the specific circumstances.

5.2 Contamination

The panel identified that the Preliminary Contamination Assessment Report has only considered 3 of the 4 lots subject to the application.

Lot 15 DP 849003 was inadvertently omitted from the original report. The applicant has provided an additional contamination report applicable to Lot 15 DP 849003. The report was prepared by Douglas Partners, reference 39794.06 dated December 2012. The report concludes that the site has localised areas of contamination present, largely from illegal dumping. The contamination is capable of being remediated by offsite disposal to a licensed landfill after undertaking a waste classification. A Detailed Contamination Assessment & Remediation Action Plan will be required prior to construction.

Council is satisfied that the land can be made suitable for its intended use as residential land.

5.3 Aboriginal Heritage

The panel requested that council investigate issues including the suggested 100m minimum separation distance from the butterfly caves to the development footprint and concerns raised in a submission from the Awabakal Local Aboriginal Land Council dated 28 October 2011.

Table 2 Appendix 7 of Lake Macquarie Aboriginal Heritage Management Strategy states that any proposed development within 100m of an identified aboriginal object is unable to occur as Exempt Development. The policy does not identify an appropriate buffer distance from a development footprint to an aboriginal object. The Department of Environment Climate Change

& Water – National Parks and Wildlife have issued General Terms of Approval for the development based on a buffer distance of 20m, and previously it issued GTAs with an 8m buffer.

Correspondence dated 28 October 2011, from the Awabakal Local Aboriginal Land Council (LALC) was critical of the consultation process undertaken by council. The LALC claimed that council continues to allow the destruction of significant aboriginal sites in the interest of developers. Further, the LALC is concerned that the butterfly caves, aboriginal scar trees and natural corridors will not be adequately protected. The LALC recommends that Stage 8 (presumably Stage 9) be excluded from the development, and requests that Council and the developer undertake further consultation which is honest and genuine.

Subsequent to receiving this letter, Council Officers arranged a site meeting at the butterfly caves, which occurred on 6 December 2011. Representatives of the LALC, the applicant and council were in attendance. A council administration staff member minuted the main points of discussion. Draft minutes were distributed to each stakeholder to confirm the accuracy of the minutes. The applicant provided some minor revisions, which were incorporated. No comment was received from the LALC, so the minutes were finalised as advised. The outcomes of the meeting, as minuted, were as follows:

- Members of the Awabakal LALC agreed in principle that the recommendation made by Council to the JRPP (for the removal of 12 lots from Stage 7) are far more reasonable, and the LALC are supportive of the modification (provided that an Aboriginal Cultural Heritage Management Plan be developed) which includes removal of 12 lots (as per the recommended condition) and retaining wall, increasing the distance of the development from the butterfly caves.
- The above mentioned Aboriginal Cultural Heritage Management Plan is to be a collaborative work with the Awabakal LALC, and will include issues such as bush regeneration and grounds maintenance. Members of Awabakal LALC stated the Landcom Fletcher Plan of Management set a good precedent.
- Area fencing, signage, interpretation etc, are matters for Awabakal LALC to consider for inclusion in the Aboriginal Cultural Heritage Management Plan.
- Awabakal LALC will be informed when surveyor pegs are placed to identify the agreed layout, to show the removal of the 12 lots recommended by Council to the JRPP and therefore achieving the setback from the 'Butterfly Cave' of 20 metres and will require another site visit by the Awabakal LALC.

- Revised plans will be provided to Council, who will then forward a copy of the plans to Awabakal LALC, prior to Awabakal LALC replying with a Letter of Agreement.

As agreed at the site meeting of 6 December 2011, the applicant had the 20m buffer pegged. Council has made the following attempts to arrange a further site meeting to discuss the adequacy of the 20m offset from the butterfly caves:

- 27 February 2012 council email to LALC - requesting involvement of the LALC in a further site meeting
- 5 March 2012 LALC email to council – requesting a time to meet
- 14 March 2012 council email to LALC – nominating a time to meet (26 March 2012) and requesting confirmation of availability.
- 26 March 2012 council email to LALC – requesting that LALC nominate a time to meet
- 2 April 2012 council letter to LALC – requesting that LALC advise of their willingness to meet and to nominate a time to meet.
- 24 April 2012 council officers met with the former Acting CEO of the Awabakal Local Land Council and other members of the aboriginal community at Council's offices. Council officers advised the LALC that the Office of Environment & Heritage (OEH) had granted General Terms of Approval based on the current layout, which represents a 20m buffer from the caves to the extent of works. Council advised that OEH are the state department empowered to consider such matters, and have confirmed that they were aware that the caves had been nominated as an aboriginal place, prior to granting approval. Council advised that any further formal submissions received prior to the completion of the assessment, will be forwarded to the JRPP for their consideration. Council also extended a further invitation to meet on site with stakeholders to view the pegged extent of works.
- 18 May 2012 council officers provided the new CEO of the Awabakal Local Land Council with contact details for the assessing officer and invited the CEO to discuss the proposal.

No further attempt was made to contact the LALC, as it was considered that all reasonable means had been exhausted.

Council is in receipt of a submission from the LALC dated 17 February 2012. The letter disputes that the LALC agreed to a 20m buffer from the butterfly caves to the development footprint, at the site meeting of 6 December 2011. Further, the LALC stated that they are not happy with the development in any form and have requested that stages 7 and 9 be excluded from the development, to achieve an adequate buffer to the butterfly caves.

It appears that the LALC have re-considered their original position in relation to an appropriate buffer. None the less, an appropriate buffer is required to be determined, with consideration to the LALC request, DECCW General Terms of Approval, expectations of the community and their representatives, and the recommendations from various consultants.

From an engineering perspective, an 8m buffer is considered adequate to physically protect the cave. Previous General Terms of Approval from DECCW concur that 8m is adequate, with the current General Terms of Approval being based on 20m. The applicant's previous preference was an 8m buffer, but has since agreed that a 20m buffer on indigenous heritage grounds is appropriate. Without a scientific basis, a legislative requirement, or an understanding of the rationale to require a greater buffer, council is of the opinion that the General Terms of Approval, granted by DECCW, the state department empowered to consider matters of indigenous heritage governs. The current General Terms of Approval is based on a 20m buffer.

5.4 Heritage and Urban Design Guidelines

The panel advised that mitigation measures identified in the Visual Impact Assessment Report should be incorporated into the Heritage and Urban Design Guidelines. Further, the guidelines were required to be enhanced and modified to address the whole site and establish a desired future character for future housing on the site, within the landscape qualities of the site and surrounding area.

The current version of the Heritage and Urban Design Guidelines have been revised to address the whole site and enhanced to achieve the mitigation measures recommended in the Visual Impact Assessment Report. Council Officers are satisfied that measures detailed within the Heritage and Urban Design Guidelines will achieve appropriate development which is sensitive to the surrounds and which are practical in nature.

5.5 Climate Change

The panel requested that the applicant consider the effects of climate change in their assessment of stormwater and flood impacts.

Brown Consulting has undertaken additional modelling to determine the effects of climate change on flooding. Modelling scenarios included 10%, 20% & 30% increase in peak rainfall and storm volume in accordance with the recommendations of *Floodplain Risk Management Guideline – Practical Consideration of Climate Change (2007)*.

Modelling has shown that proposed stormwater detention basins are capable of attenuating post developed flows to predevelopment flows in the relevant climate change scenarios. Council is satisfied that the effects of climate change have been appropriately considered.

5.6 Visual Impact Assessment

The panel requested that the applicant update the Visual Impact Assessment to include the small lot housing component of the proposal.

Although small lot housing is no longer part of the proposal, the applicant has provided an updated Visual Impact Assessment to address the proposed future built form on the site, including the proposed smaller lots.

The visual impact is considered to be acceptable for the context and the underlying 2(1) zoning.

5.7 Section 88E Offset Security

The applicant has provided a letter from the mortgagor of the offset lands accepting the dedication of land for those purposes.

Council is satisfied with reasonable certainty, that conditions of concurrence from OEH will achieve the specified offset requirements as intended. In any event, if the applicant cannot satisfy the OEH requirements the conditions of consent will not be met and Council will not issue a Subdivision Certificate, which is required before any subdivision can be registered.

6 ADDITIONAL ISSUES

6.1 Filling on Proposed Lot 651 – 657

The applicant has requested that council and the JRPP reconsider conditioning the deletion of lots 651 – 657. Brown Consulting have prepared a memorandum dated 5 November 2011, to justify the extent of filling required to achieve the lots in question. In summary, Brown Consulting argue that the filling is not excessive given it is localised to a minor depression, it is not identified by the NSW Office of Water as being significant, 54% of the fill area is less than 1m in depth and 84% is less than 2m in depth.

Council has considered the facts provided by the applicant, however the original opinion on this matter remains unchanged. The proposed filling of the natural gully and ephemeral watercourse contravenes council's Protection of Watercourses and Drainage Channels Policy and is not supported. Council recommends that the original condition remain.

6.2 Additional Stormwater Modelling

Brown Consulting has undertaken additional modelling to determine additional detention volume required to attenuate post developed flows to pre developed flows for the 1 in 1yr ARI to 1 in 100yr ARI ranges.

Results show that for the 1 in 1yr ARI scenario, Basins 4 & 5 are required to be raised by 0.05m to gain the additional storage required to achieve strict compliance with the recommendations of Australian Rainfall & Runoff, which is the industry accepted standard in this case. Achieving attenuation for the 1 in 1yr ARI scenario is generally not critical as downstream infrastructure has the capacity to convey such flows. However, given that only a minor increase in basin volume is required to attenuate 1yr flows, council supports the increase in basin volume as suggested.

6.3 Dam Safety Committee

A small number of public submissions raised concerns in relation to whether the proposed detention basins should be prescribed dams under the NSW Dams Safety Act 1978. Typically, the Dam Safety Committee (DSC) do not classify detention basins, of the size and nature of

those proposed within the development, as prescribed dams. To date, only two public detention basins within the Lake Macquarie LGA have been prescribed by the DSC.

In response to the public submissions, Brown Consulting has undertaken an assessment of the consequence of dam failure in accordance with the requirements of the Dam Safety Committee (Table 2 of Consequence Categories for Dams DSC3A, 2011). The Consequence Category for all the detention basins was determined to be “very low”. Based on this preliminary assessment none of the basins meet the requirements to be a prescribed dam under the NSW Dams Safety Act 1978.

Brown Consulting referred its assessment to the DSC for comment. A reply from the DSC dated 4 June 2012, indicated that the DSC had no statutory functions in regards to any consent or approval roles for developments. The DSC also indicated that it is willing to comment on whether a detailed design or constructed dam accords with DSC safety requirements. However, such advice must not be construed or relied upon as anything more than a comment and it must not, for example, be construed as an approval that the dam or design for a dam is safe or effective.

Based on the Brown Consulting assessment the proposed detention basins have a “very low” Consequence Category and no approval is required from the DSC.

7 CONCLUSION & RECOMMENDATION

The assessment of this application has required consideration of many complex and competing issues. It is acknowledged that the subject site and surrounds contain areas of high ecological and cultural value, and that the proposal has attracted significant objection from many local residents and Lake Macquarie City Council Councillors.

Notwithstanding the above, the site is strategically located and appropriately zoned to support residential development. Council has previously sought the support of the Department of Planning and Infrastructure to back-zone the site to an environmental zoning. The Department of Planning & Infrastructure has determined that the zoning of the subject site is appropriate. The basis for the Department's determination is that the Lower Hunter Strategy identifies the site as an urban area and that the site is located adjacent to other lands identified as suitable for development similar to that proposed.

All the relevant State Government Departments have issued General Terms of Approval or concurrence for the proposed subdivision. The Department's have not raised any objections to the proposal.

Significant conservation and environmental measures will be achieved, with approximately 45% of the development site being retained for conservation. In addition, 34.5 hectares within the West Wallsend area and 178.1 hectares outside of the local government area, will be created as offset lands to be preserved for conservation purposes.

Lot sizes and dwelling yields have been carefully balanced, having regard to competing pressures and considerations. Members of the community have expressed concern that average lot sizes were too small resulting in excessive density, however on the other hand Lake Macquarie Local Environmental Plan seeks to achieve dwelling variety and efficient use of urban land. The current proposal represents a reasonably balanced outcome on a range of conflicting pressures.

The current application has adequately addressed outstanding issues raised by the panel, and a determination of the development application is warranted to provide certainty to the applicant and the local community, as well as making a contribution to housing supply in a key growth corridor of the city.

On balance, the proposed development is considered to be suitable for the locality, and in the public interest. It is therefore, recommended that the application be approved as a Deferred Commencement Consent, subject to the conditions contained in Appendix A of this report.

Matt Brogan
Senior Development Engineer
Lake Macquarie City Council

I have reviewed the above planning assessment report and concur with the recommendation.

Greg Field
Chief Subdivision Engineer
Lake Macquarie City Council