



Council Works Depot at 208 Lundberg Drive South Murwillumbah (Tweed Shire Council)

Independent Peer Review of Council's Assessment Report

For the Northern Regional Planning Panel

PPSNHTH – 190 (DA 22/0793)

15 September 2023



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Commissioned by the Department of Planning and Environment

EXECUTIVE SUMMARY

This report comprises an independent review of the Council's Revised Assessment Report dated 13 September 2023 for the proposed development. This Review has been commissioned by the Department of Planning and Environment for the Northern Regional Planning Panel, as the site is owned by Tweed Shire Council and proposes a Council facility.

The proposal involves the construction of a Council works depot (including depot fuel station), a Public Administration Building for Depot office staff, two (2) large general industrial buildings, external hardstand storage areas and ancillary development including parking, landscaping, and signage at No 208 Lundberg Drive South Murwillumbah.

A preliminary review of the Council's original Assessment Report dated 22 August 2023 was undertaken with a number of matters being raised which required further consideration by Council. These matters were largely addressed by Council in their revised Assessment Report dated 13 September 2023, which is the subject of this Review Report.

A site inspection was undertaken with the Panel and Council staff on 12 September 2023 and the relevant application material has also been reviewed.

The main sections of Council's Assessment Report have been considered in this Review Report and found to be generally satisfactory. The recommendation for approval and recommended conditions are supported subject to some suggested changes to the recommended conditions as outlined in this Review Report.

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1. INTRODUCTION

Development Application No DA 22/0793 proposes the construction of a new Council works depot for Tweed Shire Council (**'the proposal'**) at 208 Lundberg Drive South Murwillumbah (**'the site'**). The proposal seeks to relocate an existing Council works Depot, which is currently located on land affected by flooding in close proximity to the site.

The consent authority for the development application is the Northern Regional Planning Panel (**'the Panel'**) pursuant to Section 4.5(b) of the *Environmental Planning and Assessment Act 1979* (**'the EP&A Act'**) and Section 2.19 of *State Environmental Planning Policy (Planning Systems) 2021*. Clause 3 of Schedule 6 of the Planning Systems SEPP provides that Council related development, in this case where Council is the owner of the land, with a capital investment value of more than \$5 million is regionally significant development. The *Tweed Local Environmental Plan 2014* (**'TLEP 2014'**) is the principal environmental planning instrument applying to the proposal.

Tweed Shire Council (**'the Council'**) has prepared an Assessment Report for the application, recommending approval dated 13 September 2023 (**'Council's Assessment Report'**).

1.1 Reason for the Report and Structure of the Review

This report comprises an independent peer review (**'the Review Report'**) of the Council's Assessment Report for the proposed development and has been commissioned by the Planning Panels Secretariat of the Department of Planning and Environment for the Panel. The Panel requested this independent peer review as the Council is the landowner and the proposal is for a Council facility (works depot).

This Review provides the following sections:

- Section 2 – The Site
- Section 3 – The Proposal (including a chronology)
- Section 4 – Review of the Council Assessment Report
- Section 5 – Key issues
- Section 6 – Conclusion
- Section 7 – Recommendation

1.2 Background to the Development Application

The site is located within the Industry Central master planned Industrial Estate, which was created under DA02/1685 for a 56 Lot Torrens Title Subdivision and bulk earthworks over eight (8) stages. Part of Lot 519 DP 1132400 which was created under this original consent, was further subdivided to create Lots 601, 602, 603 and 604, with Council purchasing Lot 604 in August 2018. This is the current legal property description of the site at this time.

In April 2021, DA02/1685 was modified to create 11 industrial lots from Lot 604 owned by Council (DA02/1685.27). This later subdivision is part of the *Tweed Industry Central Land Swap Project*, which is a strategic solution to assist selected landowners and businesses located within a high-risk flood zone in the existing South Murwillumbah industrial precinct to relocate to flood free land at Lundberg Drive (Industry Central) via a conditional land swap.

The proposal is to be located on approved Lots 703 and 711 (**Figure 1**), which have not been registered at this stage as subdivision civil works are still to be completed. A Subdivision Construction Certificate for the works has been issued by Council and these works are underway on the site. These two (2) separate allotments are separated by an extension to Thornbill Drive which will also become a ring road providing access from the site to Lundberg Drive. An application chronology is in **Table 1**.

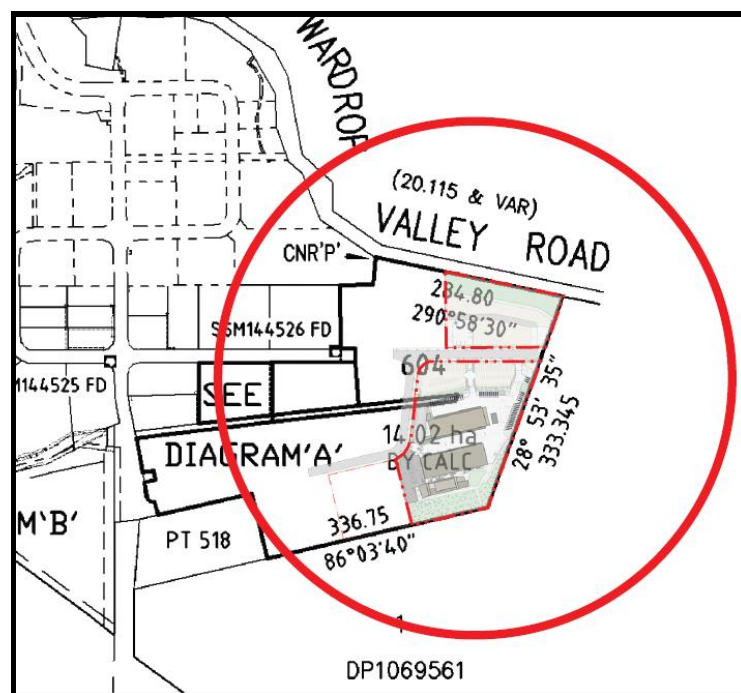


Figure 1: Approved subdivision with existing subdivision overlay (Source: Zone Planning)

Table 1: Chronology of the DA

Date	Event	Comments
2022		
5 December	DA lodged	DA (DA 22/0793) lodged with Council
16 December	Agency referral	The DA was referred to Water NSW, RFS and DPE (Water)
2023		
18 January – 15 February	Public exhibition	1 submission received raising concerns with flooding for adjoining property.
21 February	RFS Response	Advice pursuant to Section 4.14 of the EP&A Act with recommended conditions
10 March	Council briefing report to Panel	Recommended to send a request for information to the applicant in relation to a site plan, waste management plan, noise report and other issues raised by outstanding referrals.
15 March	Panel briefing	Discussed several key issues and requested a peer review of Council's assessment to be undertaken.
17 March	RFI from Council	Requesting the following: <ol style="list-style-type: none"> Existing Lot layout to be reflected on Architectural Plans Internal Noise/Amenity (potential impacts within the site) Waste Management Electricity infrastructure – unclear if pad mount has been approved by subdivision Fencing and landscaping at the street interface – whether fencing is proposed and its design Submissions – objection raises concerns NRPP comments and queries – raised by the panel to be addressed Outstanding referrals – NRAR and internal traffic comments outstanding.
21 April	Response to RFI from applicant	Provision of amended plans/additional information including: <ul style="list-style-type: none"> Revised site plan overlay with approved subdivision and a request to issue consent with a condition which defers works until the lots have been created; Windows to both side of the office building haven been provided for cross ventilation and outlook Electrical plan provided (to be considered in conditions) Fencing details provided – 1.8m high setback 3m Submission for Council to consider Considered Panel comments
5 May	RFI – DPE (Water)	Request for info from DPE (Water) for GTAs including site plans indicating waterfront land and calculations to demonstrate offsets have been determined in accordance with the guideline.
31 May	DPE (Water)	Proposal is exempt from controlled activity approval as works to be undertaken by a public authority.

2. THE SITE AND LOCALITY

2.1 The Site

The site is legally described as Lot 604 in DP1244954 and is known as No 208 Lundberg Drive South Murwillumbah. As outlined above, the site has a further subdivision approval as Lots 703 & 711 under DA02/1685, however, this approved subdivision has not been completed or registered at this stage.

The site is currently vacant land with minimal vegetation with the exception of a 25 metre wide landscape batter along the northern boundary of the site, adjacent to Wardrop Valley Road. Subdivision works are currently being undertaken on the site. The larger site (existing Lot 604) comprises a total land area of 14.02 hectares with primary frontage to Lundberg Drive. The approved Lot 703 comprises an area of 1.559 hectares and Lot 711 comprises 3.536 hectares. Unsealed access to the site is also available via Thornbill Drive.

The site is relatively flat as a result of previous filling of the land to achieve RL 6.7m AHD and does not contain any significant trees or other natural site features.

The site is zoned E4 General Industrial under the *Tweed Local Environmental Plan 2014* ('**TLEP 2014**') and is located adjacent to recently constructed industrial developments along Thornbill Drive. The site (Lots 703 and 711) have a total area of approximately 5.095 hectares.

The surrounding land use is primarily vacant rural land with some nearby industrial uses.

3. THE PROPOSAL

The proposal is for the establishment of a new works Depot for the Council comprising industrial uses for the storage, repair and maintenance of Council's vehicles and other industrial uses. The proposal will be located across the two (2) future lots known as Lots 703 and 711.

The proposal involves the following components:

- Construction of three (3) buildings on Lot 711 comprising:
 - Building 1 - Workshop building for small plant, fabrication and mechanical workshop;
 - Building 2 - Stores and Workshop building separated into appropriate divisions of Council including water and wastewater, roads and stormwater, and parks and recreation; and
 - Building 3 - Office building (Public Administration Building) in the southern portion of the site;
- Use of the site for a Council works depot including:
 - Industrial activities such as mechanical repair work, manufacturing, production, assembling, altering and finishing etc;
 - Staff - approximately 29 General Industries staff, 44 Public Administration Building and 103 Depot staff;
 - Hours of operation - Mon-Fri 6.00am – 5.00pm and Workshop servicing of trucks two times mid-week 4.00pm – 7.00pm. use of the site during natural disasters and other emergency events (such as servicing critical Council infrastructure) is also proposed;
- A hardstand area on Lot 711 for the storage of fleet vehicles, plant and other Council machinery;
- Installation of a petroleum storage system comprising two (2) x diesel pumps (58,000L

tanks) and two (2) x petrol pumps (34,000L tanks) adjoining the proposed workshop building (Building 1) with an awning over. This area is to be used for the Council fleet vehicles only and not offered for third party distribution/ sale;

- Installation of two (2) building identification signs, one on the corner of Thornbill Drive and Lundberg Drive and one on the western façade of the Stores and Workshop Building (Building 2) adjacent to the entrance of the facility; and
- Installation of an emulsion storage tank (45,000 litres) in the northwest portion of Lot 703 comprising a 15,000 litres (5.3 tonnes) bunded holding tank (not plant) for usage up to 45,000 litres annual (15.89 tonnes).

4. REVIEW OF THE COUNCIL ASSESSMENT REPORT

A thorough review of the Council's Assessment Report has been undertaken, including a preliminary review of the original Assessment Report dated 22 August 2023 which resulted in the revised Assessment report dated 13 September 2023.

The following aspects of the Council's assessment have been considered:

- Preliminary review of the Council's original Assessment Report dated 22 August 2023
- Section 4.15(1) Assessment
- Site constraints
- Building height and the Clause 4.6 Request
- Key Issues
- Recommendation
- Recommended Conditions

4.1 Preliminary review of the Council's original Assessment Report

A preliminary review of the Council's original Assessment Report dated 22 August 2023 was undertaken for this Review Report at which time a number of concerns were identified. This preliminary review was provided to Council to provide an opportunity to resolve the issues prior to the Panel meeting scheduled for 26 September 2023.

These concerns comprised jurisdictional issues, assessment issues and concerns with the recommended conditions. In some instances, the issues arose from a lack of information or assessment on issues which may have been considered at the subdivision stage for the site and the current servicing status of the land. However, this background information needs to be provided and considered as part of this assessment to ensure the application satisfies the required preconditions to the grant of consent. These initial concerns are outlined in **Table 2** and have now been satisfactorily addressed by Council.

Table 2: Matters raised in Preliminary Review

MATTER	COMMENT	REVISED REPORT	RESOLVED
Jurisdictional Issues			
Flooding and proposed deferred commencement condition	<p>Council initially recommended a deferred commencement condition to require the applicant to demonstrate to Council's satisfaction, that the proposed development will have no adverse impact on flooding in the downstream receiving environment for all events up to and including 1 % AEP storm event.</p> <p>The imposition of the proposed deferred commencement condition was not supported as this matter requires assessment and resolution prior to the grant of consent in accordance with Clause 5.21(2) of the TLEP 2014.</p>	<p>The applicant provided a revised stormwater plan which the Council has considered and found to be satisfactory. Consequently, the deferred commencement condition is no longer proposed in the recommended conditions.</p> <p>This issue is considered further in Section 5 of this report.</p>	Yes
Contamination	There was limited discussion in Council's Assessment Report and supporting information provided from the applicant on potential land contamination given Section 4.6(1) of the Resilience & Hazards SEPP is a jurisdictional precondition to the grant of consent.	Additional assessment has been provided in the Council's revised report, which satisfies the precondition to the grant of consent pursuant to Section 4.6 of the Resilience & Hazards SEPP.	Yes
Site services	<p>The subdivision works required to be undertaken on the site under DA02/1685.27 were referred to in the Council's initial Assessment Report and in the recommended conditions (Condition 33), but not detailed. This is required for the consent authority to have the requisite level of satisfaction as to whether <i>adequate arrangements</i> have been made in relation to essential services pursuant to Clause 7.10 of the TLEP 2014, which is a precondition to the grant of consent.</p> <p>The 'public infrastructure' required to be completed prior to the commencement of any works on the site in recommended condition No 33 (now Condition 34) is required to be outlined.</p>	The Council's revised report outlines the services which are required by DA02/1685.27 and provides a more detailed condition on the services to be provided prior to works commencing on the site (now proposed Condition 34).	Yes
Acid sulphate soils	There has been limited assessment in Council's Assessment Report and	The Council's revised report outlines that the proposed	Yes

	<p>supporting information provided from the applicant on acid sulphate soils ('ASS'), despite the site being mapped on the Acid Sulphate Soils map as Class 3 and 5.</p> <p>The <i>Preliminary Acid Sulfate Soils Investigation</i> Ref: 2020.187 prepared by HMC Pty Ltd referred to in Council's assessment had not been provided on the portal and Council's Assessment Report had not provided any information on the conclusions of that report (with the exception of the depth of the non-ASS layer of 10 metres). Furthermore, the <i>Minor Works ASS Management plan</i> is a blank template from Council's website and is unsatisfactory.</p> <p>Clause 7.1(3) of the TLEP 2014 is a precondition to the grant of consent and requires that an Acid Sulfate Soils Management Plan is prepared for certain works.</p>	<p>works will not extend beyond the filling level (undertaken for the subdivision of 10m) and therefore will not intercept the original ground/land and as a result does not require an Acid Sulfate Soil Management Plan.</p> <p>Council's Environmental Health Officer has assessed the proposal to be satisfactory.</p> <p>The Preliminary Acid Sulphate Soils Investigation prepared by HMC dated August 2020 has also now been provided on the Portal.</p> <p>As such the proposal is considered to satisfy Clause 7.1.</p>	
Report Recommendation	<p>The recommendation:</p> <p>(i) referred to incorrect section for determination of a deferred commencement (4.16(3) of the EP&A Act); and</p> <p>(ii) should specifically refer to the Clause 4.6 request as to whether the matters have been satisfied pursuant to Clause 4.6(4).</p>	<p>The Council's revised report has provided a revised recommendation consistent with these matters with a minor error in the section reference for a conditional approval to be corrected in the final determination of the Panel (if the report is supported).</p>	Yes
Assessment Issues			
Essential energy referral	<p>There was no referral sent to Essential Energy.</p>	<p>This was not addressed in the revised report. Condition 32 requires that the supply of electricity is provided to the site. The assessment should have referred the application to Essential Energy for abundant caution. This is not a jurisdictional requirement.</p>	Yes
Bushfire	<p>The applicant concluded that the fire trial required on the site under DA02/1685.27 is no longer required and accordingly, this development application also seeks to amend DA02/1685.27 by deleting Condition 11C to remove the need for a fire trail.</p>	<p>This issue has now been addressed in the revised recommended conditions and is considered further in Section 5 of this Review report.</p>	Yes (recommended change to condition)

Minor errors	The following requires amendment: - Section 1.3 (Public interest) where a school is mentioned. - section numbering from page 52 is incorrect. - zoning is now E4 (not IN1).	These errors have been corrected.	Yes
Recommended Conditions			
Plans and Documents (Condition 1)	Floor and elevation plans for office building appear to be Version 0 (not Version 2)	This has been corrected (office elevations are Version 2 with window detail).	Yes
Liquid trade waste (Condition 5 & 21) -	These are the same conditions.	This has been corrected (now Condition 22).	Yes
Public Infrastructure (Condition 33)	The statement " <i>all public infrastructure as shown on the approved subdivision works certificate</i> " requires more definition (as discussed above). It is further considered that this condition may require amendment to state " <i>....are completed to Council's satisfaction</i> ".	This condition (now Condition 34) has been updated to state <i>to Council's satisfaction</i> as well as additional details on the services to be provided.	Yes
Flooding	There are no recommended conditions addressing minimum floor levels or other flood related requirements, despite the Assessment Report referring to flooding conditions in Table 4 in relation to CI 5.21 of the TLEP 2014.	The minimum habitable floor level of the site is RL 6m AHD with the proposed buildings having a floor level of 9.8m (office) to 9.9 (workshop and stores). Condition 45 has been included regarding floor levels.	Yes
Fire trail	Conditions relating to the requirement for a fire trail require further consideration.	The revised recommended conditions address the fire trail issue (subject to a change to the wording and timing of condition.	Yes (recommended change to condition)
Contamination	The recommended conditions did not include a condition which would require action if contamination was discovered on the site during works.	Condition 38 has been added which requires action if contamination is discovered during construction.	Yes

4.2 Section 4.15(1) Assessment

Section 3 of the Council's Assessment Report provides an assessment of the matters for consideration pursuant to Section 4.15(1) of the EP&A Act. This section correctly identifies the relevant environmental planning instruments for the proposal as including:

- *State Environmental Planning Policy (Planning Systems) 2021*
- *State Environmental Planning Policy (Biodiversity & Conservation) 2021 (Chapter 2)*
- *State Environmental Planning Policy (Resilience and Hazards) 2021 (Chapter 3 & 4)*
- *State Environmental Planning Policy (Transport and Infrastructure) 2021 (Chapter 2)*
- *State Environmental Planning Policy (Industry and Employment) 2021 (Chapter 3)*
- *Tweed Local Environmental Plan 2014 ('TLEP 2014')*
- *Tweed Development Control Plan 2008*

The assessment of the proposal pursuant to the provisions of the relevant planning controls is satisfactory.

Council's assessment correctly identifies that the development application is not designated development, as the proposed development does not meet the requirements under Clause 8 (Bitumen pre-mix and hot-mix facilities) of Schedule 3 of the *Environmental Planning and Assessment Regulation, 2021* ('2021 Regulation'). While the proposal involves a 15,000 Litre (5.3 tonnes) bunded Emulsion holding tank for use up to 45,000 Litres annually (15.89 tonnes), this is below the thresholds in Clause 8(1) of the 2021 Regulation and there is no 'production' of the material on site, only storage.

The Emulsion Tank/ Petroleum Storage also does not trigger the requirement for an Environmental Protection Licence and therefore is not integrated development due to:

- The tank/use does not seek the blending or mixing of petroleum products and not exceeding 100 tonnes of produce;
- The tank/use does not seek to produce, blend or recover more than 1,000 tonnes of dangerous good per year; and
- The tank/use does not seek more than 2,000 tonnes of petroleum product storage (includes bitumen) at the site.

The site is within 40 metres of a classified watercourse to the south of the site within Lot 1 DP1069561, however, the water courses previously located on the site have been removed due to filling of the site via DA02/1685. Pursuant to Clause 41 of the *Water Management Act (General) Regulation* 2018, works undertaken by public authorities are exempt from the requirement for controlled activity approval on waterfront land and therefore the proposal does not require an approval under the *Water Management Act 2000*. The application also does not require a bushfire safety authority under the *Rural Fires Act 1997*. Therefore the proposal

is not integrated development.

The characterisation of the proposal as being for *depot, General Industry, Public Administration Building and Signage* is also supported and are permissible in the zone with consent.

Council's assessment in relation to the likely impacts of the development, the suitability of the site for the development, the submissions lodged in response to the notification of the proposal and the public interest have also been satisfactorily considered.

Council's Assessment Report satisfactorily considers the matters for consideration pursuant to Section 4.15(1) of the EP&A Act.

4.3 Site constraints

The site is mapped with the following site constraints:

- Regionally Significant Farmland
- Bushfire prone land
- Predictive for Aboriginal Cultural Heritage
- Class 3 and Class 5 Acid Sulfate Soils
- Probable Maximum Flood (PMF) of RL 10.9m AHD and a small portion of the land along the southern boundary affected by 'low flow' 1% AEP flood. The remainder of the site is above the 1% AEP of RL 5.5m AHD. The minimum habitable floor level of the site is RL 6m AHD.

The site constraints relating to regionally significant farmland, Aboriginal cultural heritage and acid sulfate soils have been adequately considered in Council's Assessment Report. There were initially concerns in relation to flooding and bushfire, however, these issues have now been adequately resolved by Council (subject to a change to the fire trail condition), which are further considered in Section 5 of this Review Report.

4.4 Building height and the Clause 4.6 Request

The proposal involves the workshop building exceeding the maximum building height development standard of 10 metres pursuant to Clause 4.3(1) of the TLEP 2014 by 0.505

metres for a portion of the roof, representing a 5.05% variation. The remaining buildings proposed on the site comply with the maximum building height development standard.

A Clause 4.6 request has been provided from the applicant which addresses the matters required by Clause 4.6(3) and (4) of the TLEP 2014. The building height variation arises from the provision of a gantry crane within the proposed workshop building to undertake the industrial activities within the proposed building as well as provide visual interest/appearance and energy efficiency of the building. The proposed roof line encourages passive design, enabling greater access to natural ventilation and light through the proposed louver windows in the roofline above the height limit.

The Council's Assessment Report considered the Clause 4.6 request for the proposed height exceedance for the workshop building by addressing the required preconditions to the grant of consent. This assessment is supported.

The concurrence of the Secretary can be assumed as the variation is less than 10% and the Panel is the consent authority given the proposal is for regionally significant development. The Clause 4.6 is supported in this instance.

4.5 Key Issues

The Council's Assessment Report identified the following key issues in Section 5 of the Report:

- Stormwater and flooding (late submission)
- Height exceedance
- Land use conflict
- Noise impact
- Waste management

The assessment of the issues outlined in this section are generally considered to be satisfactory, with the recommended conditions adequate to ensure mitigation and management measures are sufficient. However, the stormwater and flooding matters require further consideration as outlined in Section 5 of this Review. These matters have now been satisfactorily addressed in the Council's Assessment Report and revised recommended consent conditions.

4.6 Recommendation

The Council's recommendation for approval is supported given the assessment is satisfactory and the application is generally consistent with the matters for consideration pursuant to Section 4.15(1) of the EP&A Act.

There is a minor error in the recommendation in that it contains an incorrect reference in relation to Section 4.16 (determination) of the EP&A Act. The correct reference for a conditional approval is Section 4.16(1)(a) of the EP&A Act. This minor error in the section reference for a conditional approval is to be corrected in the final determination of the Panel (if the report is supported).

4.7 Recommended Conditions

Council's recommended conditions are provided at Attachment A and address the relevant requirements for the development. In particular, the following conditions have been recommended based on the matters raised in the Council's Assessment Report:

- Noise (including internal noise) – Conditions 25, 40, 62, 71, 72, 73 and 74
- Waste – Conditions 53 and 77
- Accessibility – Conditions 12, 49 and 50
- Building maintenance - Condition 78
- Contributions – Condition 13
- Building compliance – Conditions 2 and 41
- Traffic, access and car parking – Conditions 12, 16 and 34
- Utilities - Conditions 4, 5, 26, 34, 51 and 61
- Natural hazards – Conditions 84 to 87 from the RFS
- Flooding and drainage – Conditions 14, 18, 19, 20, 22, 33, 34, 57, 58, 65, and 67
- Aboriginal cultural heritage – Condition 37
- Lighting – Conditions 11 and 76
- Underground petroleum storage systems – Conditions 9, 10, 23, 24, 68, 69 and 83.

Importantly, the following conditions have been included:

- Condition 3 – requiring the modification of DA02/1685.27 in relation to the fire trail;

- Condition 20 – which limits post development peak stormwater discharge to pre-development flow to ensure flooding impacts in the area are not exacerbated by the proposed development;
- Condition 34 – stating no works shall commence until all public infrastructure required by the approved subdivision Works are completed to Council's satisfaction;
- Condition 45 – provides for minimum floor levels in relation to flooding;
- Condition 70 – requiring proposed Lots 703 and 711 to be created and registered with NSW Land Registry Services, prior to issue of any subsequent Final Occupation Certificate; and
- Condition 75 – providing operating hours which include provision for the use of the site during emergency works required to be undertaken by Council including during times of natural disasters, support for emergency services and for critical service breaks which may arise in Council's infrastructure.

However, the following concerns with the recommended conditions are noted:

- Condition 3 – This condition requires the modification of DA02/1685.27 in relation to the fire trail, however, requires revision to be more instructive. This matter is further considered in Section 5 of this Review Report;
- Condition 18(d) – This condition requires permanent stormwater quality treatment in accordance with a number of plans and policies. Subsections (iv), (v) and (vi) appear to be repeated from (i), (ii) and (iii) and are not necessary;
- Condition 82 – This condition is provided in the "Use" section of the conditions, however, it is unclear as to the purpose of this condition as it appears to refer to a number of different matters. This should be further reviewed by the Council and the Panel at the determination meeting.

The recommended conditions are otherwise satisfactory and are supported.

Council's Assessment and recommended conditions are supported.

5. ISSUES FOR REVIEW

Following review of the proposal, the Council's Assessment Report and a site inspection, the issues of flooding and bushfire are considered to be the most fundamental to this Review Report and are considered in more detail below.

5.1 Flooding

The site is affected by the 1% AEP flood event and is therefore considered to be within the *flood planning area* pursuant to Clause 5.21(5) of the *Tweed Local Environmental Plan 2014* ('TLEP 2014') (and the Floodplain Development Manual). Council's Assessment Report and the Statement of Environmental Effects ('SEE') also acknowledge this site constraint and that Clause 5.21 Flood Planning of TLEP 20124 applies to the proposal. It is also noted that Clause 5.21(2) of the TLEP 2014 contains a jurisdictional precondition to the grant of consent.

The issue of flooding is also an important one as it was raised in a submission from a nearby landowner.

Council's original Assessment Report proposed a deferred commencement condition which required the applicant to demonstrate to Council's satisfaction, with a Stormwater Management Plan, that the proposed development:

.....will have no adverse impact on flooding in the downstream receiving environment for all events up to and including 1 % AEP storm event.

The preliminary review report considered this to be a matter which requires satisfaction prior to the grant of consent as required by Clause 5.21(2)(b) which states (emphasis added):

*Development **consent must not be granted** to development on land the consent authority considers to be within the flood planning area **unless the consent authority is satisfied the development—***

....will not adversely affect flood behaviour in a way that results in detrimental increases in the potential flood affectation of other development or properties, and

This level of satisfaction was considered in *Michael Brown Planning Strategies Pty Ltd v Wingecarribee Shire Council* [2020] NSWCA 137, which stated

The correct question was whether the development satisfied the precondition at the time of granting consent – and it did not. A deferred commencement condition could not be used to satisfy clause 7.9(3)(a) because the relevant state of satisfaction was required in respect of the development proposed prior to the grant of consent.

Accordingly, the imposition of the proposed deferred commencement condition was not supported as this matter requires assessment and resolution prior to the grant of consent in accordance with Clause 5.21(2) of the TLEP 2014.

Therefore, the Council considered this matter further with the applicant, and a revised Stormwater Plan and Report was provided by the applicant and lodged on the Portal on 11 September 2023 ('Revised Stormwater Plan'). This Revised Stormwater Plan, prepared by ADG dated 8 September 2023, stated that when comparing the site's three (3) drainage catchments from pre-development to post-development, there would be an increase in peak discharge from the pre to post development flows under the proposal.

To mitigate this increase in peak discharge, the applicant demonstrated that on-site detention ('OSD') could be provided which was shown to mitigate peak discharge to below pre-development levels. The revised design included 518m³ of OSD for Catchment C1, 79m³ of OSD for Catchment C2 and 1,412m³ of OSD for Catchment C3. It was noted by Council that OSD was not required in the original subdivision approval. Council considered that the potential for downstream impacts from flooding would be addressed if the peak discharge from the site for the post development flows matched the pre-development flows. Such an outcome would also address Clause 5.21 of the TLEP 2014 and the concerns raised in the public submission.

Following the lodgement of the Revised Stormwater Plan and discussions with the applicant, the Council's Assessment Report and recommended conditions were amended to remove the deferred commencement condition as the applicant had sufficiently demonstrated that there were ways to ensure the peak discharge from the site post-development could be limited to pre-development flows. While initially the revised condition specifically referred to OSD being required the applicant informed Council that there were potentially other ways to ascertain the matching of pre and post flows from the site.

The Revised Stormwater Plan stated in the recommendation:

An alternative strategy for the site could be investigated by utilising Council's flood model and assessing the impact of the development on downstream flooding conditions without mitigation measures. If the alternative strategy indicates there is negligible downstream impacts from allowing the post-development peak flows discharging unmitigated from the areas of works, the detention measures provided in this advice may be omitted.

The Council and the applicant have discussed the wording of a condition relating to post-development flows from the site and it was agreed that the condition should not specifically require OSD, but rather should require that the post-development flows should be limited to the pre-development flows up to the 1% AEP design storm. This will allow the applicant to consider further options that will comply with the requirement for the post-development flows to be limited to the pre-development flows from the site.

Arising from these discussions and the recommendation of the Revised Stormwater Plan, the Council has provided the following revised recommended condition (Condition 20):

Peak stormwater discharge (post-development) shall be limited to the pre-development flow rates. The peak stormwater flow rate that may be discharged from the site to the public realm, in events of intensity up to the 1% AEP design storm shall be limited to the pre-development flow rates. Details are to be submitted with the S68 stormwater application to the satisfaction of Council's General Manager or his delegate.

This recommended condition is supported as it will ensure that the peak stormwater discharge shall be limited to the pre-development flows, which will ensure flooding in the area is not exacerbated by the proposal.

Accordingly, it is considered that the Council's Assessment Report has satisfactorily considered Clause 5.21 of the TLEP 2014 in relation to flooding for the application.

5.2 Bushfire

The site is bushfire prone land pursuant to the mapping and a *Bushfire Threat Assessment report* prepared by Bushfire Certifiers dated 12 November 2022 (**'Bushfire Report'**) has been provided. The Bushfire Report was referred to the NSW Rural Fire Service (**'RFS'**) pursuant to Section 4.14 of the EP&A Act, with no objections being raised by the RFS subject to recommended conditions.

Subsequent to the lodgement of the application, the bushfire mapping was updated which now indicates that the site is within Vegetation Category 3 (grassland). Correspondence from the Bushfire consultant dated 23 August 2023 addressed the updated mapping and concluded that the revised mapping did not change the outcomes with respect to the previous bushfire hazard assessment and that the Bushfire Report does not require amendment. The RFS also considered this updated mapping and concurred with the assessment, with the original recommended conditions satisfactory. The RFS were also not concerned with cane fires which are periodically undertaken in the area given such fires are managed. These matters have been satisfactorily addressed.

A further issue in relation to bushfire for the site is Condition 11C of DA02/1685.27, which requires a fire trail on the site. This condition of the subdivision approval states:

BUSHFIRE PROTECTION

11C. Access to the rear of all lots shall be provided for fire fighting purposes and a perimeter fire trail or access road complying with the publication Planning for Bushfire Protection Section 4.2.2 shall be provided on the bushland side of any significant structures located on Lots 5, 32, 33 and 45. An 88B Restriction is to be placed on the relevant titles to give effect to this condition and is to include provisions for a 20 metre wide asset protection zone where relevant. The draft 88B Instrument is to be submitted to Council for approval prior to release of the subdivision certificate.

This condition requires a 4 metre wide fire trail along the eastern boundary of the site which is to be registered on the title (**Figure 2**). It would appear that the subject site for the current application comprises Lots 32, 33 and 45 as illustrated in Figure 2.

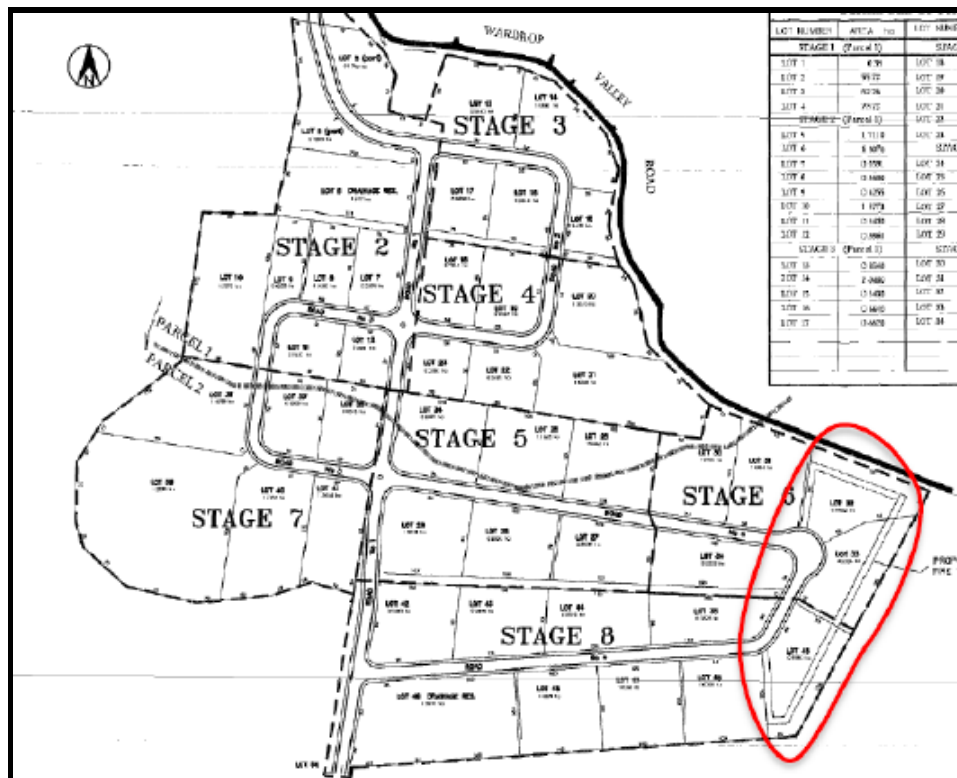


Figure 2: Fire trail required by DA condition 11C of DA02/1685.27 (Source: SEE p22)

The Bushfire Report concluded that the proposed access for firefighting is considered sufficient for firefighting intervention without the need for a designated fire trail and therefore condition 11C of DA02/1685.27 is no longer required.

The SEE states on page 22:

The Bushfire threat report has concluded that the proposed access for firefighting as identified in Attachment 1- Architectural Plans are considered sufficient for firefighting intervention without the need for a designated fire trail and therefore condition 11C of DA02/1685.27. In particular, it is referenced that Lot 711 has been designed with fire hydrants located within the site, providing coverage of the proposed buildings and providing the hazard interface protection if required. The access within the site will also be certified by the Accredited Practitioner (Fire Safety) for compliance with AS 2419.1, noting a booster is proposed at the entrance. It is also noted that Lot 703 to the north provides for a driveway access that exceeds the width required for a fire trail and allows for a medium ridged vehicle to traverse the site in a forward direction. Together with the it and proposed buildings have a low bushfire risk a fire tail as proposed will service no purpose.

As a result of the aforementioned, this development application seeks to amend Condition 11C of DA02/1685.27 removing the need for a fire trail over the subject site. It is noted the consent authority has the discretion to modify a consent by way of development conditions consistent with Clause 4.17 of the EP&A Act. We request this mechanism be perused as part of this application.

The applicant stated that since their assessment concluded that the fire trail is no longer required, that this development application also seeks to amend DA02/1685.27 by deleting Condition 11C to remove the need for a fire trail over the subject site. The applicant considers this can be achieved through Section 4.17 of the EP&A Act, which is requested to be imposed as part of this application.

Council's Assessment Report has now considered this matter in the executive summary (page 6-7), which states (emphasis added):

*... the modified subdivision development consent (DA02/1685.27) requires (Condition No. 11C) a four (4) metre wide fire trail to be provided along the eastern boundary of the site and for it to be registered on the title as an 88B restriction. The Bush Fire Assessment Report submitted with the current application notes that "the proposed use and layout will be sufficient for bushfire fighting intervention without the need for a designated fire trail within Lots 703 and 711", subject to the recommendations. In this regard, the proposal was referred to NSW Rural Fire Service (RFS) pursuant to Section 4.14 of the EP&A Act. The Bush Fire Assessment Report has been assessed to be satisfactory by the NSW RFS subject to the recommendations. These recommendations provided by the NSW RFS form part of the conditions, as contained at **Attachment 1** of this report.*

*The Statement of Environmental Effects (SEE) notes that the subject application seeks to amend Condition No. 11C of DA 02/1685.27, removing the need for a fire trail over the subject site. In this regard, as demonstrated by the Bush Fire Assessment Report and as accepted by NSW RFS, the Proposed Lots 703 and 711 do not require a fire trail. **Notwithstanding this, Condition No. 11C cannot be amended for the parent lot (Lot 604 Deposited Plan 1244954) as the Bush Fire Assessment Report does not relate to the entire site. It is considered that prior to the release of the Subdivision Certificate for the parent subdivision (DA 02/1685.27), the proponent would require to satisfy Condition No. 11C by virtue of a modification application or a revised Bush Fire Assessment Report. Notwithstanding this, an advisory***

condition is recommended that DA 02/1685.27 is amended to ensure the subject development and the subdivision consent are not inconsistent.

Council's Assessment Report considers that the fire trail is no longer needed and provides the following recommended condition to address this issue:

3. The parent subdivision approval (DA02/1685.27) shall be amended by virtue of a modification application with respect to Condition Number 11C. This is to ensure that the subject approval and the subdivision consent are not inconsistent in respect to the requirement of a fire trail over the development site.

Following review of this recommended condition, it is considered that the condition is required to be more instructive in that it should state that the fire trail is no longer needed and that is the required change to the condition. The instruction that the modification/change is to ensure that the approvals are “*not inconsistent*” is insufficient. It is also unclear from this recommended condition when this modification application should be required to be lodged.

The following condition is recommended to be imposed:

MODIFICATION OF DA 22/1685.27

Prior to the issue of a Construction Certificate and pursuant to Section 4.17(1)(b) of the *Environmental Planning and Assessment Act 1979*, the applicant is to modify development consent DA 22/1685.27 in Notice of Determination dated 7 April 2021 as prescribed by Clause 67 of the *Environmental Planning and Assessment Regulation 2021* in the following manner:

(a) Condition 11C – update as follows:

*11C. Access to the rear of all lots shall be provided for fire fighting purposes and a perimeter fire trail or access road complying with the publication *Planning for Bushfire Protection* Section 4.2.2 shall be provided on the bushland side of any significant structures located on Lots 5, ~~32, 33 and 45~~. An 88B Restriction is to be placed on the relevant titles to give effect to this condition and is to include provisions for a 20 metre wide asset protection zone where relevant. The draft 88B Instrument is to be submitted to Council for approval prior to release of the subdivision certificate.*

If this condition is not amended, the fire trail is required to be provided. Therefore the modification application is required to be lodged prior to the issue of the Construction Certificate for this approval.

This revised condition is recommended to the Panel to be included in the 'Prior to Issue of Construction Certificate' section of the recommended conditions and for the currently proposed Condition 3 to be deleted.

Subject to this change to the fire trail condition, matters relating to bushfire for the site have been satisfactorily addressed in the Council's Assessment Report and recommended conditions.

6. CONCLUSION

This Peer Review has considered the Council's Assessment Report and the recommended conditions in Attachment A prepared for the proposal. Following a thorough review of Council's Assessment Report and conditions and a site inspection, it is considered that the proposal has been adequately assessed by the Council.

The key conclusions arising from this review of Council's Assessment Report which have assisted in reaching this conclusion include:

- The concerns raised in the preliminary peer review of the Council's original Assessment Report dated 22 August 2023 have been adequately addressed in the Council's Assessment Report;
- The Council's assessment pursuant to Section 4.15(1) of the EP&A Act is satisfactory;
- The site is suitable for the development with the site constraints adequately considered in the Council's Assessment Report and recommended conditions;
- The exceedance of the maximum building height for the proposed workshop building and the Clause 4.6 Request is considered to be satisfactory and should be supported;
- The key issues have been adequately addressed and any impacts have been adequately mitigated in the recommended conditions;
- The recommendation for approval is supported; and
- Subject to the changes suggested in this Review Report, the recommended conditions in Attachment A are supported.

Accordingly, it is concluded that the Council's Assessment Report is supported subject to the recommended changes to some of the conditions and a correction to the recommendation to refer to the correct section for a conditional approval.

7. RECOMMENDATION

This Review report considers that the Council's Assessment Report is satisfactory and concurs with the recommendation for approval subject to the recommended consent conditions.

Accordingly, the following recommendations are made to the Panel:

- (a) The Council's Assessment Report in relation to the proposed development is satisfactory and is considered to accurately address the requirements for the assessment of development applications under the EP&A Act;
- (b) If the Panel were to approve the development application, it is noted that the final recommendation should refer to Section 4.16(1)(a) of the *Environmental Planning and Assessment Act 1979* for a conditional approval.
- (c) The Council's recommended draft conditions are satisfactory subject to the following changes:
 - Delete Condition 3;
 - Insert new condition in the "Prior to the issue of a Construction Certificate" section:

MODIFICATION OF DA 22/1685.27

Prior to the issue of a Construction Certificate and pursuant to Section 4.17(1)(b) of the *Environmental Planning and Assessment Act 1979*, the applicant is to modify development consent DA 22/1685.27 in Notice of Determination dated 7 April 2021 as prescribed by Clause 67 of the *Environmental Planning and Assessment Regulation 2021* in the following manner:

- (a) Condition 11C – update as follows:

11C. Access to the rear of all lots shall be provided for fire fighting purposes and a perimeter fire trail or access road complying with the publication Planning for Bushfire Protection Section 4.2.2 shall be provided on the bushland side of any significant structures located on Lots 5, ~~32, 33 and 45~~. An 88B Restriction is to be placed on the relevant titles to give effect to this condition and is to include provisions for a 20 metre wide asset protection zone where relevant. The draft 88B Instrument is to be submitted to Council for approval prior to release of the subdivision certificate.

- Condition 18(d) – Remove subsections (iv), (v) and (vi) which appear to be repeated from (i), (ii) and (iii) and are not necessary;
 - Condition 82 – clarify with Council the purpose of this condition and potentially amend to make clearer or remove. This should be further considered by the Panel.
- (d) The Council's Assessment Report and recommended draft conditions (subject to the recommended changes above) are satisfactory and should be adopted by the Panel.