



DIRECTOR SUSTAINABLE DEVELOPMENT SERVICES REPORT

13 October 2009

DSDS5	PART 3A APPLICATION – SALTWATER DEVELOPMENT, SOUTH WEST ROCKS
File: T5-55	RBP {Folio No. *}

SUMMARY:

Reporting that the Department of Planning (DoP) has advised that it intends to consider an application under Part 3A of the Environmental Planning and Assessment Act for part of the site known as the "Saltwater Development" without a development control plan being in place.

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BACKGROUND

At its meeting of 10 March 2009, council resolved: -

- A. *That Council adopt Draft LEP Amendment 55 except for the area of land that is shown on the attached Map as the "Deferred Area" pursuant to s68 of the EP&A Act, and forward it to the Department of Planning for Gazettal.***
- B. *That the Department of Planning be advised that Council's endorsement of the draft LEP is contingent upon the requirement to prepare a DCP prior to any development consent being issued being retained in the approved LEP.***
- C. *That all agencies and persons who made submissions be advised of Council's decision.***

Despite previously committing to the process of preparing a DCP, Malbec Properties have requested the department to press on with their Part 3A application for the southern section of the land and have not made any contact with Council in respect to the preparation of a DCP. However, an approach in respect to a possible Voluntary Planning Agreement (VPA) has been made.

NOTE: Saltwater Developments made a separate Part 3A application for the northern section of the site and are in the process of preparing a draft DCP for council's consideration in negotiation with council staff. [\(Appendix C – Page SDS-21\)](#)

Section 75M of the EP&A Act provides: -

(4) *If an environmental planning instrument requires the preparation of a development control plan before any particular or kind of development is carried out on any land, the obligation may be satisfied for a project by an application for approval and approval of a concept plan in respect of the land concerned (but only if the Minister authorises or requires an application for approval of the concept plan).*

In response to an invitation to comment on preliminary assessments and Director-Generals Environmental Assessment Requirements (DGEARS) related to separate Part 3A applications for the northern and southern sections, by letters of 16 September 2008, 28 April 2009 and 24 June 2009, Council advised the department of the status of the (then) draft LEP and requesting that the concept design be deferred pending completion of the DCP as required by the draft LEP. [\(Appendix D – Page SDS-22\)](#)

By emails of 22 and 25 September 2009, the department has advised that arrangements have been made to exhibit the Part 3A application for the southern section of the land from 30 September to 2 November 2009.

Having regard to council's meeting schedule, it will not be possible to assess and report the application to council within the allowed timeframe.

Section 69 Report

Council was provided with a copy of the internal departmental report to the Minister recommending that the minister proceed to make the plan. [\(Appendix E – Page SDS-29\)](#)

In recommending the plan be made, departmental officers advised the minister of the following in respect to the requirement to prepare a DCP:-

5. *"...A provision has been added to require that a Development Control Plan (DCP) must consider the Management Strategies provided in the Saltwater Creek and Lagoon, South West Rocks, Estuary Management Study and Plan prepared by WBM Oceanics, June 2006, have consideration to mosquito control, and must provide measures to identify and protect any significant Aboriginal cultural heritage items, relics or places that are present within the site."*

7(b). *"...Local drainage issues and the need to conserve small areas of habitat of the wallum froglet within the residential zone are among the matters that need to be considered in the preparation of the DCP, at development application stage, and through Director Generals Environmental Assessment Requirements (DGEAR) as part of Part 3A Project Application which applies to part of the land."*

13. *"...The draft LEP amendment and the ensuing DCP require a contamination assessment be prepared as part of the Hazard Management Plan."*

14. *"...Up to 35ha of vegetation will be included in the Environmental Protection zones, reference was made to the recommendations from the Saltwater Creek & Lagoon Estuary Management Plan, and the draft LEP and the ensuing DCP require an Urban Development Plan to be prepared."*

Although now repealed, as advised in the section 69 report, section 70 prescribes the matters the minister was required to consider in making the plan.

(1) After considering the Director-General's report made under section 69, the Minister may:

(a) make a local environmental plan

*(4) Where the Minister decides to make a plan in accordance with subsection (1), the Minister may exclude certain provisions of the draft plan or exclude part of the land from the draft plan, or both (in this section referred to as **the deferred matter**) which, in his or her opinion, require or requires further consideration but which should not prejudice the making of the local environmental plan.*

(8) Notwithstanding anything in this section and without affecting the power to make alterations pursuant to subsection (1), the Minister may make a local environmental plan with such alterations as the Minister thinks fit, being alterations that do not affect the substance of the provisions of the plan as submitted by the council or as altered pursuant to subsection (1).

Council staff were in constant contact with officers from the northern regional office who were supportive of the need for a DCP, which is reflected in the departmental officer's report to the minister.

The matter was also raised in a meeting in Sydney between the minister and the Mayor and Director Sustainable Development Services on 19 June 2009.

The Section 69 report was explicit in respect to the required DCP and the minister agreed to make the plan, which included retention of the requirement for a DCP, in the knowledge that a Part 3A application had been lodged. On this basis, it is reasonable to assume that the minister's intention was that a DCP would be required prior to consent being granted and that the concept approval would not be used to satisfy this obligation.

Need for a DCP

Clauses 66 of Kempsey Local Environmental Plan 1987 provides:-

(2) The objectives of this clause are to ensure that:

(e) development occurs in accordance with a development control plan that has been prepared for the land.

(3) Development consent must not be granted for development on land to which this clause applies unless a development control plan that provides for the matters specified in subclause (4) has been prepared for the land.

(4) A development control plan must provide for all of the following:

(a) a staging plan for the timely and efficient release of urban land making provision for necessary infrastructure and sequencing,

(b) *an overall transport movement hierarchy showing the major circulation routes and connections to achieve a simple and safe movement system for private vehicles, public transport, pedestrians and cyclists,*

(c) *an overall landscaping strategy for the protection and enhancement of riparian areas and remnant vegetation and Saltwater Creek and Lagoon,*

(d) *stormwater and water quality management controls,*

(e) *amelioration of natural, environmental and industrial hazards, including bush fire, acid sulfate soils, shallow groundwater table, mosquito breeding, noise and site contamination,*

(f) *detailed urban design controls showing the general subdivision pattern, residential densities and built form to achieve well designed urban development, including a range of site sensitive lot sizes,*

(g) *the identification and protection of any Aboriginal heritage relics on the land.*

(5) *Development consent must not be granted for development on land to which this clause applies unless the Council is satisfied that arrangements have been made for the ongoing management of the land within Zone No 7 (b).*

It is considered that a DCP is the best means of achieving the objectives of the LEP having regard to the following: -

- Several issues associated with the ongoing ownership and management of land for drainage and conservation purposes need to be negotiated between the parties and may be the subject of a VPA, which cannot be separated from the overall design of the subdivision. It is understood that any VPA would be an agreement between the developers and Kempsey Shire Council and that the department would not be a party to the agreement.
- A DCP provides greater opportunity for public participation in order to provide greater confidence to the community that their various concerns raised in submissions to the draft LEP will be addressed in the most transparent manner available under current legislation.
- The site is currently held under the ownership of five parties and the DCP, which includes the ex Shell site, will provide a mechanism to engage adjoining land holders to ensure the layout complies with clause 66(4).

Actions Taken

Having regard to council's resolution of 10 March 2009, the Mayor has requested urgent discussions with the minister to draw her attention to the matters referred to in the above report and requesting that consideration of the Part 3A application be deferred pending preparation of the required DCP.

RECOMMENDATION IMPLICATIONS:

- *Environmental*

Nil

- *Social*

Nil

- *Economic (Financial)*

Nil

RECOMMENDATION:

That the actions be noted.

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R B Pitt

DIRECTOR SUSTAINABLE DEVELOPMENT SERVICES