MEMORANDUM OF ADVICE

Kingshill Development No 1 Pty Ltd & Kingshill Development No 2 Pty Ltd Development: 3221 Pacific Highway Kings Hill and 35 Six Mile Road Kings Hill

Impact of mitigation measures on criteria for assessment of significance of impact to threatened species, populations and communities

TO

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A. This advice

1. My instructing solicitors act for Kingshill Development No 1 Pty Ltd & Kingshill Development No 2 Pty Ltd, the nominated applicants for concept development application being DA16-2018-772-1 made to Port Stephens Council on 23 November 2018 concerning the site of a regionally significant future residential subdivision of land situated at 3221 Pacific Highway Kings Hill and 35 Six Mile Road Kings Hill (**Concept DA**).

2. I have been asked to advise as to the following question in relation to the assessment of the Concept DA:

> *"Can a consent authority take into account mitigation measures proposed as part of the DA for the purposes of determining whether or not the development as a whole is "likely to significantly impact threatened species, populations or communities…", particularly as relevant to the determination of whether the concurrence of the Department of Planning, Industry and Environment[1] is required to the granting of development consent?"*

3. In short, the answer in my opinion is "*Yes*". There is sound authority to the effect that 'ameliorative measures' that are included as part of a proposed development to limit and offset its negative effects on protected ecology (as opposed to measures required by condition) are properly to be considered when determining the extent of those effects.

4. In answering that question, I discuss the particular and distinct way in which the concurrence issue arises in relation to this DA under the applicable statutory scheme, because of the way complex savings provisions associated with the introduction of the *Biodiversity Conservation Act 2016* (***BC Act***) apply.

5. In order to explain the basis and consequences of my opinion, I first examine the parameters of the proposed "*concept*" for which concept development approval is sought which is directed essentially to separating ecologically important parts of the Site from areas proposed for residential development for conservation. That concept is discussed in the context of the application for a first stage of the works essentially directed to implementing that separation, and a voluntary planning agreement (**VPA**) approved by

[1] Which has subsumed the functions of the Office of Environment and Heritage.

Port Stephens Council which would bind the proponent to complete part of the ecological works and fund the Council to complete the remainder after the land identified as ecologically significant is dedicated to the Council.

6. Second, I survey the key conclusions of the assessment staff of Port Stephens Council (**Council**) about the significance of the effects of the proposed development on threatened species and communities. I consider whether those conclusions are relevant to the question established on the authorities as relevant to the 'concurrence question'.

7. After establishing the material facts of the Concept DA and its assessment to date for the purposes of answering the question identified above, I make observations about the complex statutory scheme that applies to this Concept DA including that:

    a) The Concept DA is largely directed to obtaining concept approval only, with the only works proposed being those directly associated with establishing the apportionment of the Site under that concept between the areas to be conserved and the areas to be developed, rather than any application for particular forms of urban development which are to be the subject of later DAs.

    b) Assessment of the Concept DA must navigate 'savings and transitional' provisions associated with the transition to the new statutory scheme for ecological assessment under the BC Act from the now repealed scheme applying under the *Threatened Species Conservation Act 1995* (***TSC Act***) (now repealed, but applying when the 'Chief Executive's Requirements' (***CERs***) were fixed for the preparation of the species impact statement (**SIS**) in this case). Those transitional provisions require an assessment of the Concept DA as an "*interim planning application*" made for land within "*an expired interim designated area*" (as defined by those transitional provisions).

    c) The ultimate effect of those Savings Provisions (as was considered in a comparable Land & Environment Court case[2]) is that neither the "biobanking" scheme that applied under the TSC Act, nor the "*biodiversity offset credit*" scheme under the BC Act, apply to assessment of the Concept DA, but the TSC Act applied when the CERs issued for preparation of the SIS.

    d) A merit assessment of biodiversity offsetting through the proposed mitigating measures is therefore necessary. In this case mitigating measures have been the subject of extensive negotiations associated with the resolution of a VPA between the owner of the Site and the Council focusing on ecological outcomes.

[2] *Statewide Planning Pty Ltd v Blacktown City Council* [2019] NSWLEC 1397.

e) Section 110 (2)(i) of the *TSC Act* (now repealed, but applying when the 'Chief Executive's Requirements' (***CERs***) were fixed for the preparation of the SIS in this case) made it mandatory for an SIS to include:

> *"(i) a full description and justification of* ***the measures proposed to mitigate any adverse effect of the action*** *on the species and populations, including a compilation (in a single section of the statement) of those measures,"* (emphasis added).

f) It was no doubt to meet that essential requirement, the particular CERs issued by the Chief Executive of OEH for the preparation of the SIS for the Concept DA in this case specifically required author of the SIS to consider "*ameliorative measures*" in order to conduct the assessment of whether the impact of the proposal on threatened species, populations or ecological communities or their habitats will be significant. The CERs included:

> *'Assessment of Significance' (s. 5A EP&A Act) is to be provided for each of the affected species identified in the SIS, incorporating relevant information from sections 5.1 to 7 of the SIS. On the basis of these assessments* ***a conclusion is to be provided concerning whether, based on*** *more detail assessment through the SIS process and consideration of alternatives and* ***ameliorative measures proposed in the SIS, the proposal is still considered likely to have a significant effect on threatened species, populations or ecological communities or their habitats****."* (Page 29 of Attachment A of the CERs – emphasis added).

8. It is against that wider relevant background that I lastly turn to answer the question that I am specifically briefed to consider, with reference to leading Court authorities which have considered the proper treatment of '*ameliorative measures*' in the assessment of whether DA works will significantly affect protected ecology.

9. In that task I have considered the extensive SIS prepared by Mark Aitkens of RPS Group dated 24 July 2020 (version 7) lodged with the Concept DA (***Aitkens SIS***), and have been assisted by a supplementary report prepared by Mr Aitkens dated 29 January 2021 which summarises the background to the methodology employed in the SIS, particularly its consideration of "complex mitigation, amelioration and compensatory measures", and the reasoning of the ultimate conclusion of the SIS.

B. The Concept DA and its Context

10. The real property description of the land the subject of the Concept DA is Lot 41 DP 1037411 & Lot 4821 DP 852073, being two adjacent but non-contiguous lots, with a combined area measuring 517.13ha (***Site***). Of that total area, about 205.8ha of the Site is

zoned E2 Environmental Conservation, with the remaining 311.4ha zoned for urban purposes.

11. The future residential development anticipated in the Concept DA will comprise a substantial portion of the Kings Hill Urban Release Area (***KHURA***) while at the same time proposing that a substantial portion of the site be reserved for conservation management. That apportionment has been guided by a SIS accompanying the Concept DA. KHURA is the largest and most significant urban release area for the Port Stephens Local Government Area, and forms an important part of the NSW Government's *Hunter Regional Plan 2036* and the *Greater Newcastle Metropolitan Plan 2036*.

12. The Statement of Environmental Effects (***SEE***) at clause 3.3.2 describes the proposed "*concept*". The concept has been clarified further by a "*Statement of Environmental Effects Addendum*" letter from the applicants' town planner JW Planning dated 24 September 2020 (***SEE Addendum***). In addition to seeking approval for the identified concept, specific Stage 1 works are proposed.

13. From an examination of the SEE and the SEE Addendum, it can be seen that while the Concept DA anticipates future subdivision to accommodate an estimated 1900 lots, a local centre, public parks and a school site, the application does ***not*** seek either development consent or concept approval for subdivision or associated civil infrastructure works.

14. Rather, the substance of the "*concept*" proposed is the separation of the conservation areas within the Site from the remainder of the land on which urban development of some kind might occur (termed the "proposed impact area" in the Concept DA documents). Residential development footprints within the proposed impact area upon which development is anticipated to occur are mapped in the Concept DA plans.

15. The Concept DA material sets out how the proposed concept and Stage 1 works have been developed according to the recommendations of the project ecologist, and specifically as guided by the Aitkens SIS. . Consideration of that SIS and the "*description and justification of the measures proposed to mitigate any adverse effect of the action on the species and populations*" it contains, is an essential consideration for the Regional Panel as consent authority in considering the Concept DA. (see discussion of the statutory scheme applying before the repeal of the TSC Act by Moore J in *Western Sydney Conservation Alliance v Penrith City Council [2011]*[3] and the consideration of the scheme of the Act

[3] [2011] *NSWLEC 244* at [89]

following the "overhaul" which introduced s.78A provided by the decision of Tobias JA in the Court of Appeal in *Cranky Rock Road Action Group Inc v Cowra Shire Council [2006]*[4])

16. The concurrence question arises for the concept and Stage 1 works proposed in this concept DA, not the contemplated future development. Following the Court of Appeal's decision in *Bay Simmer Investments Pty Ltd v State of NSW*,[5] section 83B(5) was added to the *Environmental Planning & Assessment Act 1979* (NSW) (**EP&A Act**), which as at as at 24 August 2017 stated:

> *"The consent authority, when considering under section 79C the likely impact of the development the subject of a concept development application, need only consider the likely impact of the concept proposals (and any first stage of development included in the application) and does not need to consider the likely impact of the carrying out of development that may be the subject of subsequent development applications."*

Assessment of the Concept DA must adhere to that direction

17. The proposed concept in substance is that:

(a) The boundaries between the conservation areas and the 'proposed impact area' are to be fixed and fenced as mapped in the Concept DA plans, with the conservation areas marked for dedication to the Council once they have first been substantially rehabilitated according to a vegetation management plan (***VMP***) and biodiversity management plan (***BMP***) submitted with the Concept DA. That ecological rehabilitation work is to be prioritised so as to be substantially advanced within 5 years. Long term ongoing management of the conservation area is then to be continued by Council, and with funding from the proponent in accordance with a voluntary planning agreement between the proponent and the Council.

(b) The 'proposed impact area' is to be allocated into precincts numbered 1-7 as depicted in the Concept DA plans. The clearing of the proposed impact area as necessary to facilitate urban use of the precincts is required to be staggered over a minimum 8-year period to mitigate the impact of the clearing work. However, I am instructed that clearing of the proposed impact area to facilitate urban use of the precincts has been proposed now so that it can be assessed together with the overall conservation strategy which includes the 8+ year staging of the clearing works. However, I also understand that the proposed clearing works for any precinct (although assessed and approved now under the concept DA) will be

[4] [2006] NSWCA 339, 150 LGERA 81, and see discussion of *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited* [2010]; *Friends of Tumblebee Incorporated v ATB Morton Pty Limited (No 2)* [2016] below

[5] [2017] NSWCA 135.

delayed until subdivision works for that precinct are approved through later stages of the DA process.

18. The Stage 1 works for which development consent is sought to be carried out forthwith upon the granting of consent are specified in the SEE Addendum. Specifically, they are:

a) Conservation works described in the VMP and BMP, being particularly:

i. the proposed fencing between the conservation, development precincts and neighbouring properties;

ii. proposed tracks and trails for fire protection, recreation and conservation management purposes; and

iii. proposed pre-development clearing to the mapped proposed development footprint within the proposed impact area.

b) Stage 1 initial site preparation works staggered over a minimum 8-year period so as to meet the recommendations of the Aitkens SIS, as well as the requirements of the VMP.

More specific details of the Stage 1 Works are provided in Section 3.2 of DA Report/Statement of Environmental Effects, and in the documents there cited – particularly the VMP and BMP.

19. The Stage 1 Works proposed in the Concept DA are critically linked to a VPA between the applicants and the Council approved by the Council on 8 December 2020. The VPA when entered into will oblige the proponent to complete nominated rehabilitation and enhancement works to the ecologically protected areas as described in the BMP within 5 years to a value of $3.5 million. Upon completion of those works the protected land is to be dedicated to Council together with a further cash payment of $3 million to fund ongoing ecological management, including weed and pest management, bushfire management, fencing and trail maintenance.

20. The development the subject of the Concept DA has been declared to be regionally significant development in accordance with Schedule 7, clause 3 and 5 of *State Environmental Planning Policy (State and Regional Development) 2011* on the basis that it comprises general development with a capital investment value exceeding $30 million. Under section 4.5 of the EP&A Act, the consent authority is the Hunter & Central Coast Regional Planning Panel.

21. An important part of the context of the Concept DA is that (as I understand matters) the environmental investigations and assessments which lead to the precise form of the Concept DA took place over a period of around 15 years, and included assessments undertaken for the rezoning of the land having regard to the statutory considerations

required by the repealed TSC Act. I would expect that the CERs issued by OEH were prepared taking that context into account. No doubt, part of the reason for the savings provisions in the BC Act which delay the application of Part 7 of that Act is directed to ensuring that the ecological assessment work done through that long process directed to resolving a considered, ecologically acceptable outcome is not lost and made redundant.

C. Transitional Arrangements for the Biodiversity Conservation Act 2016

22. The BC Act commenced on 25 August 2017, with transitional provisions under the *Biodiversity Conservation (Savings and Transitional) Regulation 2017* (NSW) (**Transitional Regulation**) forming part of the statutory scheme as discussed below. Parts 6 and 7 of the BC Act provide a regulatory framework for assessing and offsetting biodiversity impacts by reason of development in a Biodiversity Offset Scheme. The application of the operational provisions for the offset scheme found in Part 7 is limited for certain development proposals by the Transitional Regulation.

23. Clause 28(1) of the Transitional Regulation applies to this DA. It reads relevantly as follows:

> "*28 Former planning provisions continue to apply to pending or interim planning applications*
>
> *(1) The* ***former planning provisions*** *continue to apply (and Part 7 of the new Act does not apply) to the determination of a* ***pending or interim planning application****."* (emphasis added).

24. The subject DA is a "*pending or interim planning application*" because it meets the description of an application specified in paragraph (f1) of the definition of that expression in the Transitional Regulation, which states:

> *"(f1) in the case of development (except State significant development)* ***within an expired interim designated area*** *under subclause (3)—an* ***application for development consent*** *under Part 4 of the* Environmental Planning and Assessment Act 1979 *(or for the modification of such a development consent)* ***made on or before 24 November 2018*** *(but only if any* ***species impact statement*** *that is to be submitted in connection with the application is* ***submitted on or before 24 May 2019****),"* (emphasis added).

25. In that regard, Port Stephens local government area is an expired interim designated area within the meaning of paragraph (f1) of the definition of pending or interim planning application, and the Concept DA was made before 24 November 2018. An earlier version of the species impact statement for the Concept DA was submitted before 24 May 2019.

26. For the purposes of section 28, the "*former planning provisions*" which apply under the *Transitional Regulation* are defined to be provisions of the EP&A Act "*that would be in force if that Act had not been amended by the new Act*".[6] As noted above, the new BC Act which was assented to on 23 November 2016, commenced on 25 August 2017.

27. Accordingly, Part 7 of the "new Act" (i.e. the BC Act) does not apply in the consideration of this Concept DA. That Part covers:

- *Division 1 - Preliminary*
- *Division 2 - Biodiversity assessment requirements*
- *Division 3 - Consultation and concurrence*
- *Division 4 - Biodiversity assessment and offsets*
- *Division 5 - Preparation of species impact statements*

28. Before the new BC Act commenced, those matters were addressed in the TSC Act.[7]

29. However, the definitions in the Transitional Regulation expressly defines the "*former planning provisions*" still to be applied as being the provisions of the EP&A Act only and not the repealed TSC Act (discussed further below). The OEH has confirmed that is how it reads the legislation, as noted where that reading has been applied by the Land & Environment Court in *Statewide Planning Pty Ltd v Blacktown City Council*.[8]

30. The reason why the TSC Act cannot apply is because the Department of Planning, Industry and Environment (once operating as the OEH) no longer processes

[6] *Transitional Regulation*, clause 27(1). It is not entirely clear whether amendments to the EP&A Act since which were not made by the commencement of the BC Act should be given effect, but nothing seems to turn on that question. For the purposes of this advice I assume that the reference is to the EP&A Act as it was worded on 24 August 2017 (noting that is the approach taken by Adams AC in the Land & Environment Court case of *Statewide v Blacktown* discussed below).

[7] Under the former planning provisions, Part 7A of the TSC Act required the proponent of any applicable development to obtain a Biobanking Statement following an assessment of the development in accordance with the Biobanking Assessment Methodology carried out by the department. Part 6 of the BC Act provides for a 'Biodiversity Offsets Scheme' and Part 7 replaces the former BioBanking Assessment Methodology with a Biodiversity Assessment Method (BAM). The BAM determines the number and type of credits required for a particular development site, as well as the number and type of credits created at a Biodiversity Stewardship Site (ie. the offset site).

[8] [2019] NSWLEC 1397 at [52].

applications for "*Biobanking Agreements*" under the repealed TSC Act such that it can no longer be applied. [9]

31. Consequently, with Part 7 of the BC Act not applying to the Concept DA and the corresponding provisions of the TSC Act repealed, there are no relevant provisions which codify an offsetting scheme for this application.

32. Accordingly, there is no statutory basis for a consent authority to demand a cash offset for an environmental impact to be spent on other land, although that may be offered by the applicants (as is here the case to some extent in substance through the VPA). A consent authority's ability to impose conditions requiring the payment of monetary contributions are regulated by the development contribution provisions of what was Division 6 Part 4 of the EP&A Act.

33. Other important consequences of the Transitional Regulation relevant to the concurrence question are:

    (a) The requirement for OEH concurrence (i.e. of the "Environment Agency Head") under section 7.12 of the BC Act does not apply.

    (b) Section 7.16 of the BC Act which would otherwise require a DA to be refused *"if it is of the opinion that the proposed development is likely to have serious and irreversible impacts on biodiversity values"* does not apply either.

34. The provisions of the EP&A Act as it stood on 24 August 2017 (before the 2018 amendments which among other changes reorganised and renumbered the Act) of relevance to this Concept DA are sections 5A, 78A and 79C.

35. Section 78A(8) of the EP&A Act (as at 24 August 2017) relevantly provided:

> *"(8) A development application (other than an application in respect of State significant development) must be accompanied by:*
>
> *(a) …, or*
>
> *(b) if the application is in respect of development on land that … is likely to significantly affect threatened species, populations or ecological communities, or their habitats—a species impact statement prepared in accordance with Division 2 of Part 6 of the Threatened Species Conservation Act 1995."*

[9] That is consistent with clause 21 of the *Transitional Regulation* which only allows for the Environment Agency Head to issue further Biobanking Agreements where an application for the Statement was made for them before the new BC Act commenced which is not the case here.

36. Section 5A(1) of the EP&A Act read relevantly:

> ***"5A Significant effect on threatened species, populations or ecological communities, or their habitats***
>
> *(1) For the purposes of this Act and, in particular, in the administration of sections 78A, 79B, 79C, 111 and 112, the following must be taken into account in deciding whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats:*
>
> *(a) each of the factors listed in subsection (2),*
>
> *(b) any assessment guidelines."*

37. "*Assessment guidelines*" is defined at section 5A(3) to mean:

> *"Assessment guidelines issued and in force under section 94A of the* Threatened Species Conservation Act 1995 *or, subject to section 5C, section 220ZZA of the* Fisheries Management Act 1994*."*

38. There can be no assessment guidelines now in force under section 94A of the TSC Act, because that Act has been repealed.

39. While the *Threatened Species Assessment Guidelines February 2008* (**2008 Guidelines**) issued by the then NSW Department of Environment and Climate Change are not *"in force"*, they might still be considered to provide an indication of matters relevant to the assessment of the significance of likely impacts. That seems inevitable given that the CER's issued on the basis of those 2008 Guidelines applying. On page 12 the 2008 Guidelines suggest that "*[p]roposed measures that mitigate, improve or compensate for the action, development or activity should not be considered in determining the degree of the effect on threatened species, populations or ecological communities*…". However, that suggestion is qualified by the words that follow: "…*unless the measure has been used successfully for that species in a similar situation*".

40. Plainly therefore mitigation strategies have always been part of the ecological assessment scheme, albeit that it was to be considered cautiously under the 2008 Guidelines. To the extent that there is any conflict between the 2008 Guidelines and the case law on proper interpretation of the phrase "*likely to significantly affect*", given the 2008 Guidelines are no longer "in force", the case law needs to be followed.

41. The 2008 Guidelines also implicitly approve the consideration of mitigation measures by stating (also on page 12): "*[I]n many cases where complex mitigating, ameliorative or compensatory measures are required, such as translocation, bush restoration or purchase of land, further assessment through the species impact statement process is likely to be required*".

42. The Aitkens SIS[10] reports that KHD consulted with the OEH (as it then was) to understand the statutory approach required prior to lodgement of the Concept DA, with the aim of ensuring a compliant proposal to be prepared taking into consideration OEH comments and advice. In particular, KHD's notes record:

> ***"17 April 2018** – a consultation meeting was held with the Hunter Central Coast Branch attended by Steve Lewer & Steven Cox from OEH. "APP" and "JWP" are noted to have discussed process related to:*
>
> - *Treatment of DGRs (seek amendment to include Lot 4821)*
> - *Offsetting approach / SIS*
> - *Approach for all future DAs (include LEP changes & alignment with PSC KPoM)*
> - *Approach to Koala impact*
>
> ***2 August 2018** – Pre-SIS Consultation (Hunter Central Coast Branch attended by Steve Lewer & Steven Cox from OEH), APP, CE and JWP.*
>
> ***7 Feb 2019** – Pre-lodgement Consultation Meeting (Hunter Central Coast Branch attended by Steven Cox from OEH), Port Stephens Council (Ms Natalie Nowlan and Mr Duncan Jinks), OWAD, RPS, JWP and ANU representatives."*

43. If the proposal does not result in a "*significant effect on threatened species*", section 5A has no further relevance to this DA.

44. Even though not strictly required if Council's (and the Applicants') assessment is accepted, a SIS was nonetheless prepared and submitted to Council. The Aitkens SIS was prepared in accordance with the repealed provisions of the TSC Act and forms part of the Concept DA.

45. The remaining concurrence provision of relevance is section 79B(3) of the EP&A Act as it applied on the relevant date. It then read:

> *"79B Consultation and concurrence*
>
> *…(3) Consultation and concurrence—threatened species*
>
> *Development consent cannot be granted for:*
>
> *(a) development on land that is, or is a part of, critical habitat, or*
>
> *(b) development that is likely to significantly affect a threatened species, population, or ecological community, or its habitat,*

[10] Aitkens SIS at Part 1.3 (page 23).

without the concurrence *of the Chief Executive of the Office of Environment and Heritage or, if a Minister is the consent authority, unless the Minister has consulted with the Minister administering the Threatened Species Conservation Act 1995.*

… (11)However, if the specified person fails to inform the consent authority of the decision concerning concurrence within the time allowed for doing so, the consent authority may determine the development application without the concurrence of the specified person and a development consent so granted is not voidable on that ground." (emphasis added)

46. Notably, it is the task of the consent authority and not the applicant to refer a DA requiring concurrence to the relevant concurrence authority.[11]

47. The Council's Principal Development Planner, Ryan Falkenmire, in his report to the Regional Panel dated 14 December 2020 has recommended that consent be granted to the proposed concept development, including consent for the Stage 1 works. The recommended terms of the consent include extensive conditions of consent.

48. Relevantly, Mr Falkenmire's report includes the following assessment of the likelihood of the proposed development having a significant effect on a threatened or endangered species, population or community:

"At the request of Council, an independent ecological review of the assessment documentation informing this Development Application was undertaken. Based on this review, the SIS, field surveys, reporting of results and consideration of alternatives including avoidance ***and proposed mitigation measures*** *were supported. Information and assessment presented in the SIS report relating to impacts and assessment of significance was also supported. The detailed assessment and measures presented in the SIS and supporting VMP and BMP relating to the Koala was supported. Subject to the implementation of the VMP, BMP and adoption of a mechanism that achieves the fully funded management and preservation of the Conservation Area in perpetuity, the independent review concluded that the proposed Concept DA will not have a significant impact on threatened species, populations and ecological communities as assessed in the SIS such that a local extinction will occur."* (emphasis added).

49. If that conclusion by Council assessment staff that the development proposed in the Concept DA will ***not*** have a significant impact on any threatened species, populations and ecological communities is accepted, section 79B is not engaged. The concurrence from the Chief Executive of the OEH for the development would not then apply because the authors of the Assessment of Significance and the Aitkens SIS concluded

[11] EP&A Regulation cl.59(2): "*The development application must be forwarded to the relevant concurrence authority* ***within 14 days after the application is lodged****, except as otherwise provided by this clause.*" (emphasis added)

that the proposal is not likely to significantly affect a threatened species, population, or ecological community.

50. Notably, the Aitkens SIS considers the factors listed in the 7 Part test required by section 5A(2) of the EP&A Act as it was worded prior to the commencement of the BC Act, which lists seven "… *factors (that) must be taken into account in making a determination* …" as to the significance of the effect on an ecological species, population or ecological community under the section.

51. The review of the Aitkens SIS by "*Council's independent ecology consultant*" is referred to on page 58 of 95 of the Council planner's DA assessment report.

52. The Aitkens SIS undoubtedly supports the conclusion of the Council assessment staff that there will be no relevant significant effects on any protected ecological species, population or ecological community.

53. I observe that Mr Aitkens sets out in his January 2021 summary memo how the assessment of significance undertaken in order to determine whether an SIS was necessary (appropriately) did <u>not</u> take into account the mitigating effects of the proposal when determining whether or not an SIS was required. That is because it is an essential requirement of the SIS to consider what mitigating measures might ameliorate the adverse impacts of the proposal. Mr Aitkens states that the mitigating measures considered and relied upon in his final conclusions are "*Well known, widely used and effective.*"

54. Section 79C of the EP&A Act would still require the consent authority to take into consideration the effects of the proposal on the important ecology of the locality applying the general matters for consideration applying to all DA's. The section reads:

> *"(1)* ***Matters for consideration—general***
>
> *In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:*
>
> *(a) the provisions of:*
>
> *(i) any environmental planning instrument;*
>
> …
>
> *(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
>
> *(c) the suitability of the site for the development,*
>
> *(d) any submissions made in accordance with this Act or the regulations,*

(e) the public interest."

55. The Council staff's assessment of the proposal records satisfaction that those various matters in section 79C are duly addressed if the proposed conditions are adopted.

D. Can mitigating (ameliorative) measures be taken into account to determine whether concurrence is required?

56. I am instructed that an issue has arisen related to whether the Council assessment staff were correct to take into account "*proposed mitigation measures"* when considering the significance of the likely effects of the proposed development on any threatened or endangered ecological species, population or ecological community.

57. In *Timbarra Protection Coalition Inc v Ross Mining NL and Ors* [12], Spigelman CJ (with whom Mason P and Meagher JA agreed) held that where it is determinative of whether the consent authority has power to grant a development consent, the question of whether a development is "*likely to significantly affect threatened species"* if carried out involves a jurisdictional fact (see [28]–[42] and [94]). That is, it will be an essential requirement that must be considered and addressed in determining a development application: *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited*(***Newcastle and Hunter Valley Speleological Society***) [13]; *Friends of Tumblebee Incorporated v ATB Morton Pty Limited (No 2) (****Friends of Tumblebee Incorporated****).* [14]

58. The question of whether the effect on threatened species would be significant was held by Spigelman CJ (at [78]) to be one of "… *an objective fact, not as references to the respective opinions of the consent authority*".

59. In *Newcastle and Hunter Valley Speleological Society*, Preston CJ said the following about the issue at [82]–[86]:

> *[82] "A number of points may be made about this requirement. First, s 78A(8)(b)* ***focuses on the development proposed in the development application****; the inquiry is whether the "development" in respect of which application is made is likely to significantly affect threatened species, populations or ecological communities or their habitats. An application can, of course, be amended after it is initially lodged. The development proposed, therefore, may be amended. The relevant time for the inquiry is immediately prior to the determination of the application; it is the development as it then stands that is to be evaluated for its likely impact on*

[12] (1999) 46 NSWLR 55.

[13] [2010] NSWLEC 48, [81] (Preston CJ).

[14] [2016] NSWLEC 16, [75] (Pepper J).

threatened species, populations or ecological communities or their habitats: Corowa v Geographe Point Pty Ltd at [50], [51]." (emphasis added)

60. In this case, therefore, the inquiry must focus on the development as it stands as at the date of determination. Preston CJ continues:

> *"[83] Secondly, the description of the development the subject of the development application is not restricted to the nature, extent and other features of the development but* ***can also include ameliorative measures to prevent, mitigate, remedy or offset impacts of the development. However, in order to be able to be considered in answering the inquiry of likely impact, the ameliorative measures must be proposed as part of the development application. Ameliorative measures not proposed as part of the development application, but which are imposed afterwards, as conditions of consent or restrictions in construction certificates, are not able to be considered in answering the inquiry as to likely impact. This is because the inquiry required by s 78A(8)(b) focuses on the development and its likely impact before the determination of the application and not afterwards****: see Drummoyne Municipal Council v Maritime Services Board (1991) 72 LGRA 186 at 192; Smyth v Nambucca Shire Council [1999] NSWLEC 226; (1999) 105 LGERA 65 at [11]-[13]; Corowa v Geographe Point Pty Ltd at [57].*
>
> *[84] Thirdly, the word "likely" means "a real chance or possibility" and "significantly" means "important", "notable", "weighty" or "more than ordinary": Oshlack v Richmond River Shire Council (1993) 82 LGERA 222 at 233 and cases therein cited; Plumb v Penrith City Council [2002] NSWLEC 223 at [22(1)]; Corowa v Geographe Point Pty Ltd at [52]; Nambucca Valley Conservation Association v Nambucca Shire Council at [82].*
>
> *[85] Fourthly, in deciding whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats, the consent authority and the Court on appeal must take the factors in s 5A of the EPA Act into account and in particular the factors in the now seven part test in s 5A(2).* ***However, the consent authority is not limited to consideration of these factors; there may be facts and circumstances relevant to the inquiry which are not specifically contained in any of the factors in the seven part test****: Plumb v Penrith City Council at [37]; BT Goldsmith Planning Services Pty Ltd v Blacktown City Council [2005] NSWLEC 210 at [12]; and Corowa v Geographe Point Pty Ltd at [52].*
>
> *[86] Fifthly, a positive answer to any one or more of the seven factors does not mandate an affirmative answer to the question of whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats but equally does not preclude a negative answer to the question: Carstens v Pittwater Council [1999] NSWLEC 249; (1999) 111 LGERA 1 at [61]; Masterbuilt Pty Ltd v Hornsby Shire Council [2002] NSWLEC*

170 at [11]; Plumb v Penrith City Council at [36]; Nambucca Valley Conservation Association v Nambucca Shire Council at [83]."

(emphasis added)

61. In *Friends of Tumblebee Incorporated*[15] (at [75]–[83]), Pepper J adopted Preston CJ's formulation of the matters to be considered in *Newcastle and Hunter Valley Speleological Society*. Her Honour said at [78]:

> *"… the description of the development the subject of a development application is not restricted to the nature, extent and other features of the development,* ***but can also include measures that ameliorate or mitigate, prevent, remedy or offset the impacts of the development*** *(Newcastle & Hunter Valley Speleological Society at [82]). This means that ameliorative measures not proposed as part of the development, but that are imposed later as conditions to the consent, are not able to be considered because the statutory inquiry is directed to the likely impact of the proposed development prior to, and not after, the determination of the application (Newcastle & Hunter Valley Speleological Society at [83] and the cases cited thereat)." (emphasis added)*

Consideration of the Issue

62. The only potential requirement for concurrence arises from former section 79B of the EP&A Act. Case law has extensively interpreted what the phrase "*likely to significantly affect*" means.

63. In light of those authorities and the applicable legislation cited above, it is quite clear that mitigation measures proposed as part of the Development (which were required to be considered and evaluated as part of the SIS by the CERs and s.110 of the TSC Act which applied at the time) may be taken into consideration in determining if it is likely to significantly impact threatened species.

64. The Council assessment staff and the author of the Aitkens SIS were correct to do so.

65. It is not within the ambit of this advice to attempt to provide any assessment of whether as a matter of objective "*jurisdictional*" fact (in the sense referred to by Spigelman CJ in the *Timbarra Protection* case) the development identified in the Concept DA is likely to have a "significant effect" on threatened or endangered species, populations or communities.

66. That is the function of the SIS, to be ultimately considered by the Regional Panel as consent authority according to principle. I have not attempted any detailed analysis of the conclusions of that 1500 page document but note it is prepared by an appropriately

[15] Supra.

qualified and experienced senior ecologist, and Council's independent ecologist concurs with the view that the concept DA is not "*likely to significantly affect threatened species*…".

67. I observe that the SIS records in its description of the "Proposal" on page iv:

> *"The assessment provides for the consideration of local, long-term sustainable, biodiversity restoration and mitigation measures tailored to restore and improve the habitat of affected threatened species and ecological communities, managed and funded under an in-perpetuity agreement, in addition to species impact and habitat loss."*

68. As discussed above the authorities establish that although a consent authority must consider the seven factors mandated by section 5A of the relevant EP&A Act when considering whether the impact of a proposal on threatened and endangered ecology, other relevant facts and circumstances may also be accounted for, as the seven factors are not exhaustive: *Friends of Tumblebee Incorporated*[16]. Accordingly, for the reasons already advanced, in my view it is appropriate to consider those measures in the way Council assessment staff have done.

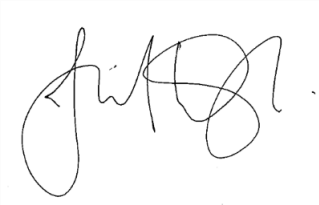
69. For ease of reference, the ultimate "*Assessment Conclusion*" of the Aitkens SIS reported at page vi is:

> *"The Proposals impact includes sequenced and managed habitat loss over an 8+ year timeframe coupled with the delivery of restoration, mitigation and conservation works designed to attain localised ecological benefit for affected threatened species and ecological communities within the adjacent Conservation Area. The Conservation Area is of sufficient size and character to retain local viable populations of affected threatened species and ecological communities, with in-perpetuity funding and management delivering certainty in the outcome.*
>
> *A nett gain in preferred Koala feed trees is expected through the revegetation of cleared lands and intraforest enrichment. Koala habitat protection measures such as fencing, road underpasses, grids and bridges are also proposed to prevent mortality. These measures, in addition to the managed protection of Koala habitat within the Conservation Area satisfy the requirements specified in the PSC Comprehensive Koala Plan of Management.*
>
> *On balance, it is concluded that the habitat loss and ecological benefit of the Proposal will deliver a local outcome for affected threatened species and ecological communities that is not likely to have a significant impact on these matters."*

70. In my view, having regard to the matters discussed, the reasoning cited as underlying those conclusions appear to be valid and may form the basis of a valid determination of

[16] At [82]–[83].

the Concept DA. If they are accepted by the Panel (as recommended by Council assessment staff) then the concurrence of the Department is not required.



Justin Doyle
Frederick Jordan Chambers
9 February 2021