

10 February 2021

Leanne Harris
Senior Case Manager
Planning Panels Secretariat
320 Pitt Street Sydney NSW 2000

By email: Leanne.harris@dpie.nsw.gov.au

Dear Leanne,

Kings Hill concept development for residential subdivision | PPS-2018HCC047

1. We refer to the Record of Deferral dated 23 December 2020 in relation to the above development application, and confirm that we act for Kingshill No.1 Pty Ltd and Kingshill No.2 Pty Ltd, the applicant for the above regionally significant development application.
2. While it is a matter for the consent authority to determine whether a development requires concurrence (something ordinarily required to occur within 14 days of the application being lodged - see clause 59(2) of the EP&A Regulation), the reasons for deferral included that the Panel would be obtaining further independent advice on:
 - (a) the adequacy of the species impact statement (**SIS**) and whether the conclusion of 'no significant effect' is supported;
 - (b) the statutory or policy framework,along with seeking a briefing from the Biodiversity Conservation Division (**BCD**) relating to the question of whether concurrence is required.
3. To assist the Panel's briefing with BCD, we attach a copy of an advice which our client has obtained from counsel in relation to the statutory scheme. Notably, that advice addresses the following matters which we expect will assist the briefing process:
 - (a) the parameters of the proposed concept;
 - (b) the particular and distinct way in which the concurrence issue arises in relation to this DA under the applicable statutory scheme, because the environmental assessments were commenced, progressed, and finalised under the former *Threatened Species Conservation Act 1995* in accordance with the Chief Executive's Requirements, and the manner in which the complex savings provisions associated with the introduction of the *Biodiversity Conservation Act 2016* apply;

- (c) the key conclusions of assessment staff of Port Stephens Local Council regarding the significance of the impacts of the proposed development on threatened species and communities;
 - (d) the effect of the savings provisions;
 - (e) case law on whether mitigating (ameliorative) measures are to be taken into account in determining whether a development is *"likely to significantly affect threatened species, populations or ecological communities or their habitats"*; and
 - (f) the adequacy of the SIS in the statutory context.
4. In summary, that advice concludes that in light of Land and Environment Court cases explained in the advice, and the applicable legislation:

Mitigation Measures:

- (a) *"...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.*

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

Statutory and Policy Framework:

- (b) Due to the application of the *Biodiversity Conservation (Savings and Transitional) Regulation 2017* (NSW) to this Concept DA:
 - (i) Part 7 of the BC Act does not apply in assessing this Concept DA; and
 - (ii) the former provisions of the TSC Act also do not apply in assessing this Concept DA, as the *Transitional Regulation* defines *"former planning provisions"* still to be applied as being the provisions of the EP&A Act only and not the repealed TSC Act.
- (c) *"Consequently...there are no relevant provisions which codify an offsetting scheme for this application."*
- (d) With no statutory basis for a consent authority to require a monetary contribution as an offset for an environmental impact under either the BC Act or the TSC Act, impact mitigation arrangements can lawfully be offered by the applicant as proposed within the voluntary planning agreement between the applicant and Council.
- (e) The Council DA assessment report supports the SIS conclusions, the proposed mitigation measures, and the assessment of impact significance, subject to implementation of the SIS via the BMP and VMP, and the adoption of a mechanism that fully funds the management and preservation of the Conservation Area in perpetuity.

Adequacy of the SIS in the statutory context:

- (f) The advice concludes that *"...having regard to the matters discussed, the reasoning cited as underlying those conclusions [in the SIS] appear to be valid and may form the basis of a valid determination of the Concept DA."*
5. We also **attach** a memorandum prepared by Mark Aitkens, the author of the SIS submitted with this Concept DA, which summarises the key conclusions in the SIS, for ease of reference given that document is 1380 pages long.

6. We trust that this will assist in clarifying the application, the SIS, and the applicable statutory scheme relating to the question of likely significant effect.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Todd Neal', is positioned above the contact information for Todd Neal.

Todd Neal

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