

MEMORANDUM

TO: Hunter and Central Coast Regional Planning Panel (HCCRPP)
FROM: Port Stephens Council (PSC) / MJD Environmental
DATE: 10 June 2021
FILE NO: 16-2018-772-1
PROPERTY: LOT: 41 DP: 1037411, LOT: 4821 DP: 852073
3221 Pacific Highway KINGS HILL, 35 Six Mile Road KINGS HILL
PROPOSAL: Concept Development Proposal for Residential Subdivision and Stage 1
Works including Vegetation Clearing and Establishment of a
Conservation Area
SUBJECT: PSC Response to Umwelt Peer Review Report

1. SIS Adequacy Assessment

PSC Response: Refer to attached MJD Memo.

2. Adequacy of SIS Advertisement and Exhibition

PSC Response: The Umwelt Review acknowledged the Species Impact Statement (SIS) was notified/advertised for the correct time period of 28 days in accordance with the *EP&A Regulations 2000 (EP&A Regs)*, noting the SIS V4 (dated 22 May 2019) was first notified and advertised from 6 June 2019 to 4 July 2019 (29 days).

Umwelt highlight the written and published notice must contain '*a statement that the development is threatened species development*' in accordance with Clause 89(2)(b), which has since been repealed. This does not appear to have been included on the written notice or notification letters distributed by Council. Notwithstanding, Clause 89(2)(b) (as written in the version of the *EP&A Regs* applicable at the time of notification) refers to threatened species development as being the following:

threatened species development means development to which section 7.7 (2) of the *Biodiversity Conservation Act 2016* or section 221ZW of the *Fisheries Management Act 1994* applies.

Section 7.7 (2) of the *Biodiversity Conservation Act 2016* is not applicable to the application. Section 221ZW of the *Fisheries Management Act 1994* refers to proposed development '*that is likely to significantly affect threatened species, populations or ecological communities*' is required to be supported by a Species Impact Statement.

The SIS that was originally lodged and notified (V4 dated 22 May 2019) concluded there was 'no significant impact' on threatened species associated with the development. Accordingly, the inclusion of the statement required under 89(2)(b) of the *EP&A Regs* could be considered as not being strictly required, as there was no significant impact concluded in the SIS. In either case, the inclusion of the threatened species development statement on the written notice did not materially compromise the exhibition process as all information was available on Council's DA tracker for 28 days and the public have been provided ample opportunity to provide comment on the application.

Additionally, the timeline in the Umwelt advice is not correct. The SIS V6 (dated 13 March 2020) was re-notified for a period of 22 days, from 19 March 2020 until 10 April 2020. The re-notification period was intended to be from 19 March 2020 to 2 April 2020 (14 days); however, at the request of a local community group, the notification period was extended until 10 April 2020. The extension applied to all members of the public and the documents remained available for view on Council's website.

The reasoning for not undertaking a full 28 day re-notification/re-advertising of the application was based on Clause 23(2) of Schedule 1 (Community Participation Requirements) in the *EP&A Act*, which stipulates re-exhibition is not required if the environmental impact of the development has been reduced or not increased. Council determined the environmental impact of the development had been reduced under the revised application given the development footprint was reduced by approximately 40ha and the environmental conservation area increased.

Further, Clause 90(1) of the *EP&A Regs* allows notice requirements to be dispensed with if the revised application differs only in minor respects from the original application and the notification requirements for the original application were complied with. The variations between Version 6 of the SIS (dated 13 March 2020) and Version 7 (dated 24 July 2020) were minor and at the request of Council's independent ecologist. The requested amendments were related to providing additional detail on koala fencing, ensuring maintenance tracks were included in the assessment, including a table detailing survey effort against the methodologies/guidelines and rectification to typos. These changes were considered minor and did not materially change the SIS assessment or conclusions. On that basis, no additional notification was considered necessary pursuant to Clause 90(1) of the *EP&A Regs*.

It should be highlighted Clause 90(1) of the *EP&A Regs* is an important legal mechanism that provides Council and consent authorities the discretion to dispense with re-notification for minor changes to plans or reports. Continual re-notification and advertisement of an application for minor changes to a report is burdensome and results in lengthy delays in the assessment process.

Notwithstanding the above, if the Panel is minded to do so, the SIS could be re-notified and advertised to include a written notice that contains '*a statement that the development is threatened species development*'.

The above does not constitute a legal opinion, however in light of the above, Council is of the opinion the advertisement and notification of the SIS was adequate.

3. Need for Project Referral

PSC Response: Refer to attached MJD Memo.

4. Consideration of the Voluntary Planning Agreement

PSC Response:

- The Kings Hill VPA does not propose or is necessary to offset the likely impacts of the development.
- The Kings Hill VPA is only proposed as a means of securing the land to be dedicated to Council for conservation purposes. The VPA is not necessary to offset the impacts the development or necessary to support the assessment and determination of the DA. If there is no VPA, KHD could still manage and rehabilitate the proposed conservation land to offset the impacts of the proposal.
- The calculation of the costs and requirements under the VPA have been independently reviewed by Council's consultant ecologist and are considered to be in accordance with a Biodiversity Conservation Management Plan prepared by the proponent (separate from any documents prepared to support the DA). The OEH Total Fund Deposit calculator was applied to this site (predominantly used for biodiversity stewardship sites).
- The VPA itself includes requirements for reporting etc. If KHD agree, Council can share the draft of the VPA, which is commercial in confidence, with the Panel.

Council acknowledges the VPA needs to be exhibited; however, there is no requirement to do so prior to determination of the application. Council have previously provided advice on the VPA matter at previous Panel briefings. It was agreed Councillor endorsement of the VPA terms was sufficient to progress the application. Endorsement of the VPA draft offer by Councillors occurred at an Ordinary Meeting in December 2020. This approach is not uncommon practice.

VPA matters therefore appear to be outside of the expertise or remit of the Umwelt Peer Review.

5. Approval Pathway

PSC Response: Apart from Umwelt's view that the SIS should be referred to DPIE (EES) for concurrence; all other aspects of the approval pathway appear to be correct in terms of the statutory planning framework and process in relation to the application.



Umwelt's opinion of referral to DPIE (EES) for concurrence being necessary is divergent from the ecology and legal opinion provided by the applicant; and the opinion of Council's independent ecologist.