



KINGS HILL CONCEPT SUBDIVISION
SUPPLEMENTARY INFORMATION
HUNTER AND CENTRAL COAST PLANNING PANEL

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| PANEL REFERENCE & DA NUMBER | PPS-2018HCC047 DA 16-2018-772-1 |
| PROPOSAL | Concept Proposal for Residential Subdivision and Stage 1 Works |
| ADDRESS | 3221 Pacific Highway Kings Hill and 35 Six Mile Road Kings Hill (Lot 41 DP 1037411 and Lot 4821 DP 852073) |
| APPLICANT | Kings Hill Developments Pty Ltd |
| REGIONALLY SIGNIFICANT CRITERIA | Clause 2 Schedule 7 of the State and Regional Development SEPP (General Development over \$30 million) |
| CIV | \$133,264,874 (excluding GST) |
| DATE OF REPORT | 5 October 2021 |
| SCHEDULED MEETING DATE | 20 October 2021 |

EXECUTIVE SUMMARY

On 23 December 2020 the Hunter and Central Coast Panel (the Panel) deferred determination of PP2-2018HCC047 to allow:

1. *The Panel obtain separate independent advice from an appropriately qualified person to peer review the application and submissions received, and provide recommendations to the Panel regarding:*
 - *The adequacy of the SIS and whether the conclusions are supported or otherwise.*
 - *The statutory and policy framework that is required to be addressed for the Panel to determine the matter and whether it has been satisfied.*
2. *The Panel seek a briefing from the Biodiversity Conservation Division.*
3. *A further supplementary report addressing the recommendations and matters arising from the independent report be prepared by the Council.*

Umwelt (Australia) Pty Limited were engaged by the Department of Planning, Infrastructure and Environment (DPIE) to undertake the independent peer review as required by point 1.

The Panel were briefed by the Biodiversity Conservation Division on 22 March 2021 as required by point 2.

In addition to the Species Impact Statement, council assessment report and its attachments and public submissions the Panel has now been provided with additional supporting information. This includes the independent peer review report, supplementary memos and technical information from the applicant, a briefing from the applicant including legal advice from their Senior Counsel Mr Tim Robertson and a joint meeting, a joint report from the ecologists and a final addendum to the Umwelt Peer Review. All supplementary material submitted to the Panel in response to the deferral is attached to this report.

The purpose of this supplementary report and Panel meeting is a procedural matter for the Panel to consider whether the proposed Kings Hill development is likely to significantly effect a threatened species, population or ecological community or its habitat, and hence whether concurrence is required from the Chief Executive of OEH (now Coordinator General, Environment, Energy and Science).

In light of all the factual information currently before it the Panel may wish to:

1. Refer the DA for concurrence, if the Panel considers that the requirement to obtain concurrence has been triggered; or
2. Take the matters raised before it into account as part of a general merit assessment of the DA without referring it for formal concurrence.

INTRODUCTION AND STATUTORY FRAMEWORK

The purpose of this report and Panel meeting is to deal with supplementary information that has been provided to the Panel since the deferral of the determination of the Kings Hill Concept DA in December 2020. As a precondition to the determination of the DA an assessment as to the significance of the impact on threatened species, populations or ecological communities needs to be made.

The DA was lodged prior to the commencement of the Biodiversity Conservation Act 2016 in the Port Stephens local government area which at the time was an interim designated area. The DA is therefore being assessed under the former *Threatened Species Conservation Act 1995* and the former planning provisions in section 5A of the *Environmental Planning and Assessment Act 1979*. The DA is accompanied by a Species Impact Statement (SIS).

Section 5A(2) lists the factors that must be taken into consideration in determining whether there is likely to be a significant impact on threatened species, populations or ecological communities:

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.

(2) The following factors must be taken into account in making a determination under this section:

(a) in the case of a threatened species, whether the action proposed is likely to have an adverse effect on the life cycle of the species such that a viable local population of the species is likely to be placed at risk of extinction,

(b) in the case of an endangered population, whether the action proposed is likely to have an adverse effect on the life cycle of the species that constitutes the endangered population such that a viable local population of the species is likely to be placed at risk of extinction,

(c) in the case of an endangered ecological community or critically endangered ecological community, whether the action proposed:

(i) is likely to have an adverse effect on the extent of the ecological community such that its local occurrence is likely to be placed at risk of extinction, or

(ii) is likely to substantially and adversely modify the composition of the ecological community such that its local occurrence is likely to be placed at risk of extinction,

(d) in relation to the habitat of a threatened species, population or ecological community:

(i) the extent to which habitat is likely to be removed or modified as a result of the action proposed, and

(ii) whether an area of habitat is likely to become fragmented or isolated from other areas of habitat as a result of the proposed action, and

(iii) the importance of the habitat to be removed, modified, fragmented or isolated to the long-term survival of the species, population or ecological community in the locality,

(e) whether the action proposed is likely to have an adverse effect on critical habitat (either directly or indirectly),

(f) whether the action proposed is consistent with the objectives or actions of a recovery plan or threat abatement plan,

(g) whether the action proposed constitutes or is part of a key threatening process or is likely to result in the operation of, or increase the impact of, a key threatening process.

(3) In this section:

assessment guidelines means 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. key threatening process has the same meaning as in the Threatened Species Conservation

If a decision is made that impacts are likely to be significant the administrative functions of the former section 79B and 79C of the EP&A Act requiring concurrence from the Chief Executive of OEH (now Coordinator General, Environment, Energy and Science) apply and this then becomes a threshold question for the DA:

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,

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.

Note—

The development is taken not to significantly affect threatened species, populations or ecological communities, or their habitats if:

(a) the development is to be carried out on biodiversity certified land (within the meaning of Part 7AA of the Threatened Species Conservation Act 1995), or

(b) a biobanking statement has been issued in respect of the development under Part 7A of the Threatened Species Conservation Act 1995.

The applicant has provided a legal opinion which suggests the Panel does not have the power to seek concurrence.

In considering the DA at a public meeting on the 22nd December 2020 the Panel had before it the assessment report prepared by Port Stephens Council including all of its attachments and public submissions made in response to the DA. At that time the council had agreed in principle to the preparation of a draft Voluntary Planning Agreement for the purposes of managing biodiversity impacts related to the development. The council proceeded to exhibit the draft VPA in July 2021.

The council and the applicant concluded that there would be no significant impact on threatened species, population or ecological communities and the council recommended approval of the DA.

In finalising their assessment, the council had the SIS reviewed by an independent ecologist (MJD Environmental) who concluded that with conservation outcomes in place there will be no significant impacts on threatened species.

Following the meeting on the 22nd December 2021 the Panel agreed to defer determination of the DA. The record of deferral states:

“Given the complexity of this matter and very nuanced and detailed approach to the mitigation of impact and conservation measures proposed, and the recognised importance of the area as part of the Port Stephens Koala Hub, the Panel is of the opinion that independent expert advice should be obtained to assist in informing the Panel in its determination.”

The Panel’s reasons for deferral were for the following:

1. *The Panel obtain separate independent advice from an appropriately qualified person to peer review the application and submissions received, and provide recommendations to the Panel regarding:*
 - *The adequacy of the SIS and whether the conclusions are supported or otherwise.*
 - *The statutory and policy framework that is required to be addressed for the Panel to determine the matter and whether it has been satisfied.*
2. *The Panel seek a briefing from the Biodiversity Conservation Division.*
3. *A further supplementary report addressing the recommendations and matters arising from the independent report be prepared by the Council.*

Umwelt (Australia) Pty Limited were engaged by the Department of Planning, Infrastructure and Environment (DPIE) to undertake the independent peer review as required by point 1.

The Panel were briefed by the Biodiversity Conservation Division on 22 March 2021 as required by point 2.

Since the deferral of the DA the Panel has been provided with additional supporting information. This has included the independent peer review report, supplementary memos and technical information from the applicant, a briefing from the applicant including legal advice from their Senior Counsel Mr Tim Robertson, a joint meeting and report from the ecologists and a final addendum to the Umwelt Peer Review. All supplementary material submitted to the Panel in response to the deferral is attached to this report.

In light of the factual information currently before it the Panel may wish to:

1. Refer the DA for concurrence, if the Panel considers that the requirement to obtain concurrence has been triggered; or
2. Take the matters raised before it into account as part of a general merit assessment of the DA without referring it for formal concurrence.

The following chronology sets out the events and documentation now before the panel in response to the above deferral and provides information related to the current status of the DA.

CHRONOLOGY

| Date | Details | Document |
|--------------------|--|----------------------------------|
| 23/12/2021 | Record of Deferral (as published on NSW Planning Portal) | Attachment 1 |
| January / Feb 2021 | Package of documents received from the applicant: a) Letter from Collins Biggers and Paisley, 10 February 2021 b) Counsel Advice, Justin Doyle 9 February 2021 c) RPS Memo on supporting conclusion of no significant impact, 29 January 2021 | Attachments 2A, 2B and 2C |
| 21/02/2021 | Public submission regarding WWF Report 2020 <i>Port Stephens Koala Population Study</i> (published 18/01/2021) | Attachment 3 |
| 22/03/2021 | Panel briefing from Biodiversity Conservation Division (as published on NSW Planning Portal) | Attachment 4 |
| 18/03/2021 | Applicant Peer Review (ERM- Dr David Dique) | Attachment 5 |
| 17/04/2021 | RPS memo in response to WWF report | Attachment 6 |
| 28/05/2021 | <i>Kings Hill Concept Subdivision DA Peer Review</i> (Umwelt (Australia) Pty Limited) May 2021 | Attachment 7 |
| May 2021 | Minor amendments made to DA under Clause 55 | Attachment 8 |
| 3/06/2021 | Memo from the Applicant / RPS responding to the Umwelt report | Attachment 9 |
| 10/06/2021 | Memo from Port Stephens Council responding to the Umwelt report | Attachment 10 |
| 10/06/2021 | Memo from MJD Environmental (Council Ecologist) independently reviewing assessment documentation | Attachment 11 |
| 17/6/2021 | Applicant Panel briefing | Attachment 12 |
| 6/07/2021 | Record of Joint Meeting of Ecologists | Attachment 13 |
| 28/7/2021 | Council advises of endorsement and exhibition of draft Voluntary Planning Agreement | N/A – advice only |
| 29/07/2021 | Applicant's final position and advice (Tim Robertson and RPS memo) | Attachment 14 |
| 1/10/2021 | Umwelt DA Peer Review Addendum, October 2021 | Attachment 15 |

SUPPLEMENTARY INFORMATION TO ASSIST THE PANEL

As provided for in the chronology, the Panel is in receipt of further information to assist it in its consideration and determination of the DA. Each document is published in full and a brief overview is provided below.

Attachment 1 – Record of Deferral.

Following a public determination meeting on the 22nd December 2020, the Panel deferred determination of the Kings Hill Concept Residential Subdivision (Council Reference DA 16-2018-772-1) to seek independent expert advice in determining whether to refer the DA to the Biodiversity Conservation Division to seek concurrence in relation to impacts on threatened species, populations or ecological communities.

In response to the Panel's Record of Deferral DPIE engaged Umwelt (Australia) Pty Limited to undertake the required peer review of the DA and SIS. The results of the independent peer review are discussed further under Attachment 7.

Attachment 2a, 2b and 2c – Package of Applicant Documents

In response to the Panel's deferral, the applicant submitted further documents to assist the Panel in determining whether concurrence from BCD is required. This includes counsel advice (Attachment 2b) which deals with the statutory assessment scheme for the DA, the ability of mitigation measures to be taken into consideration in determining whether a development is likely to significantly impact threatened species and the validity of the SIS and statutory and policy framework..

In light of Land and Environment Court cases the counsel advice concludes that the mitigation measures proposed may be taken into consideration and the council and the applicant's consultant were correct to do so.

The applicant's ecologist and author of the SIS, Mr Mark Aitkens (RPS) has also prepared a memorandum which summarised the key findings of the SIS (Attachment 2c). The memo sets out the basis for the findings of the no significant impact conclusions and compliance with the Chief Executive Requirements (CERs), particularly in relation to the evaluation of the development against the proposed ameliorative and compensatory measures. The memo indicates that the SIS conclusion of no significant impact was informed by the following key factors:

- 1 *Locally, the Proposal will 'conserve biological diversity and promote ecologically sustainable development' by:*
 - a. *Making provision for an adequately sized and in-perpetuity managed Conservation Area comprising 'like for like' biodiversity values for the benefit of local biodiversity including affected species (see Section 2.2.1.2 and Section 7.1 of the SIS and Biodiversity Management Plan – Appendix C of the SIS).*
 - b. *Promoting ecologically sustainable development outcomes by dispensing with the need for compensatory measures for residual significant effects (e.g. offsets) as the Proposal demonstrates:*

- i. The avoidance of high biodiversity values from development, with these areas to be incorporated in the in-perpetuity Conservation Area (see Section 2.2.1.1 of the Species Impact Statement)*
 - ii. The minimisation of impacts through a careful vegetation clearing sequence and procedure (see Sections 2.2.1.3 and 2.2.1.5 and Vegetation Management Plan – Appendix D of the Species Impact Statement)*
 - iii. The mitigation of impacts through establishment works within the Conservation Area (see Section 2.2.1.2 and Biodiversity Management Plan – Appendix C of the Species Impact Statement)*
- 2. *The local provisioning of a managed in-perpetuity Conservation Area substantially contributes to the prevention of local extinction and supports the recovery of affected species. The Conservation Area is of adequate size and biodiversity value (i.e. type and condition) to support/ substantially contribute to the ongoing sustained presence of affected species in the local area (see Section 8 of the Species Impact Statement – assessments for affected threatened species and ecological communities).*
- 3. *Protecting and conserving critical habitat of threatened species and ecological communities that are endangered by establishing a clear managed boundary between the urban lands and those designated for in-perpetuity biodiversity conservation (i.e. Conservation Area). Consequently, there is to be no overlap or conflict between future land uses to an extent that would otherwise compromise the protection of this habitat for affected species.*
- 4. *The Proposal provides a fully funded in-perpetuity management regime for the elimination/ management of certain processes that threaten the survival or evolutionary development of threatened species, populations and ecological communities (see Sections 2.2.1.1 and 2.2.1.2 and Biodiversity Management Plan – Appendix C of the SIS).*
- 5. *The Proposal encourages the conservation of threatened species, populations and ecological communities by the adoption of measures involving co-operative management by making recommendation to consolidate local landholdings into a single conservation area to promote in common management objectives and actions (see Section 7.1.2.1.3 of the Species Impact Statement).*

Attachment 3 – WWF Koala Population Study

This report was received via a public submission and presents the results of a Koala genetics study using scat detection field dogs across Port Stephens. The study found that historically Koalas in the region were genetically connected but now appear disconnected. The study identifies that the removal of key Koala habitat is resulting in genetic differentiation. The study concludes future management of Koalas should consider reserving and managing koala habitat and ensuring continued genetic diversity by habitat connectivity.

Attachment 4 – Biodiversity Conservation Briefing

As part of the deferral the Panel sought a briefing from the Biodiversity Conservation Division (BCD). This took place on 22 March 2021 and a record of the discussion was published.

Noting that BCD have only undertaken a very high level and preliminary review of the SIS, seven key areas of concern were raised and discussed with the Panel:

- 1. Compliance with the SEARs*
- 2. The impacts on local abundance of threatened species*
- 3. Cumulative impacts*
- 4. Use of offsets being used to determine impacts on significance*
- 5. Concerns with the proposed koala fence*
- 6. Methodology used to determine impacts on koalas*
- 7. Some species may not have been adequately surveyed*

Attachment 5 – Applicant Peer Review

The applicant engaged Dr David Dique of Environmental Resources Management Australia Pty Ltd (ERM) to peer review the SIS.

This peer review considered the adequacy of the SIS and conclusions in relation to the assessments of significance. The review also considered the information available in the 2020 Port Stephens Koala Population Study (WWF – provided as Attachment 3).

The SIS and specifically the seven-part tests of significance were reviewed for the species known and highly likely to occur. For those species categorised as known and likely to occur within the subject site a review of the disturbance and displacement of each species has been undertaken. The approach taken included an assessment against the original concept (ie not inclusive of the key avoidance and mitigation measures proposed under the DA), the potential impact of the proposal with the proposed avoidance and mitigation measures, the importance of the conservation area for each of the subject species and the potential impacts presented in the SIS. The findings and conclusions considers species specific habitat requirements, potential species specific impacts and the adequacy of the assessments of significance.

The peer review agrees with the SIS conclusions for each of the known and highly likely to occur species (24 species in total) and states:

It is important to note, that for some of these species, without mitigation, the extent of quantified habitat removal of up to 212.4 ha would ordinarily lead to a conclusion of a significant impact. However, I have considered the avoidance and mitigation measures that are integral to the Concept Proposal as part of my review and the positive impacts that may result. Indeed, where possible, I have used the information contained within the SIS and additional studies undertaken by specialists to support quantification of the positive impacts, as part of determining the overall level of significance of impact for each subject species.

Attachment 6 – Applicant Response to WWF Koala Report

The applicant's Ecologist, Mr Mark Aitkens (RPS) has provided the Panel with a memo in response to the WWF Report on the basis that this is an updated version of the same study commissioned by Kingshill Developments (KHD) as published in Appendix H of the SIS in July 2020. The Kingshill Developments commissioned study was used to inform the preparation of the SIS. The memo notes that Mr Aitkens is acknowledged in the WWF report for *'reasons relating to his role in initiating, defining the scope / purpose and project managing the production / publication of the genetic studies performed by OWAD Environmental for the SIS'*.

The memo closes by stating:

The WWF report is the third and most recent publication on Koala genetics in the Port Stephens LGA. It proceeds two earlier genetic studies commissioned by KHD for the Kings Hill project. All studies are consistent with each other and present a progressive knowledge build on Koala genetics in the Port Stephens LGA. Little difference exists between the genetic study published in the Kings Hill SIS and that presented in the WWF report. Both reports indicate the importance of building safe wildlife connectivity paths for the Koala in the local and regional context.

KHD has integrated this knowledge into the SIS by expanding and improving connectivity through its part of the urban release area. Further, KHD has recognised the importance of improving cross Pacific Highway connectivity noting the degradation of Koala genetics east of this existing transport corridor. Finally, KHD is of the understanding that the 'high' genetic diversity present on the Kings Hill site is an expected outcome and is a function of healthy genetic exchange with other Koalas that form part of the much large 'inland Koala' population (e.g. Wang Wauk State Forest ARKS). The inland Koalas population is genetically separated from the Tilligerry – Tomaree population (peninsular population), which is characterised by relatively low genetic diversity. It is the latter finding that is of major conservation significance and should be addressed by all levels of government to remedy the problem.

Attachment 7 – Independent Peer Review

Following the Panel's deferral of the DA Umwelt (Australia) Pty Ltd were engaged by the Department of Planning Industry and Environment to undertake the independent peer review of the SIS and DA. Their May 2021 report (version 3) provides the Panel with the findings of their review.

The Umwelt report *'reviewed the SIS, and relevant supporting documentation, primarily through the lens of whether the information presented, and conclusions drawn are appropriate upon which to determine that concurrence is not required'*.

Umwelt were asked to provide independent advice to the Panel in relation to the adequacy of the SIS and whether the conclusions drawn were supported or otherwise and to comment on the statutory and policy framework including whether the advertising and exhibition requirements of the SIS had been met. Umwelt were also asked to consider the draft VPA and a project referral to the Australian Government for consideration under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act).

The Umwelt review included consideration of the applicant peer review (Attachment 5) and the Counsel advice (Attachment 2b) as well as the suite of documents that accompanied the DA.

The review specifically examined the impacts on:

- Koala
- Brush-tailed Phascogale
- Lower Hunter Spotted Gum-Ironbark Forest EEC
- Pterostylis chaetophora
- Corybas dowlingii

The report concludes that the Panel, as the consent authority, should seek concurrence from the former Chief Executive of OEH, now the Coordinator-General, EES due to the probability of a significant impact on the above species.

The report finds:

This review has found that the SIS does not adequately address the assessment of impacts on:

- *Koala – the proposed offset and mitigation strategy are not considered sufficient to ensure that the development will not significantly impact the koala, and therefore the proposed measures are considered inadequate to mitigation risks to the local population.*
- *Lower Hunter Spotted Gum – Ironbark Forest EEC – incorrect comparison of the vegetation in PCT 1590 against the Final Determination and significant underestimation of the area of the EEC to be impacted.*
- *Pterostylis chaetophora – likely inappropriate survey effort and under-representation of impacts.*
- *Corybas dowlingii – likely inappropriate and poorly timed survey effort and under-representation of impacts.*

The following recommendations are made in response to the findings of the review:

Recommendation 1: *The SIS should be referred to the EES (former OEH) for assessment and concurrence. The EES review should consider the range of technical matters identified in this peer review, including the overall adequacy of the mitigation measures and offsets. It is recommended that the SIS be referred to EES in its current form to expedite the assessment process with EES to identify any further assessment requirements as part of its review, including consideration of the matters raised in this review.*

Recommendation 2: *The SIS exhibition process should be subject to further review and should it be confirmed that the exhibition process for the SIS was inadequate, this should be addressed prior to determination of the DA.*

Recommendation 3: *The project should be referred to the Commonwealth for its consideration of whether or not it constitutes a Controlled Action.*

Recommendation 4: *The Panel should ensure that the VPA is exhibited in accordance with statutory process once finalised and give consideration to the adequacy of funding to ensure that the conservation obligations of the SIS are met by PSC in-perpetuity. The Panel should also ensure that the VPA contains provisions*

that govern spending of money allocated for management of the conservation area to ensure it is spent for that purpose.

Attachment 8 - clause 55 amendments to DA and SIS

In May 2021 the applicant lodged a package of minor amendments to the SIS and Vegetation Management Plan (VMP) that accompanies the concept DA.

The applicant has provided a covering letter to the Council which summarises and explains the proposed amendments as follows:

The minor amendments proposed involve the SIS and VMP, and include:

- clarification as to the vegetation clearing procedure under Stage 1 of the Concept DA; and*
- to account for clearing works required to establish the koala fence at the edge of the proposed Conservation Area within Lot 4821 DP 852073, the area of clearing in each Phase needs to be adjusted. The proposed amendment only involves a reapportionment of the area to be cleared within each phase, so the total area of clearing remains unchanged.*

The amendments do not impact the conclusions or recommendations of the SIS and do not otherwise alter the proposed Stage 1 of the Concept DA.

The VMP is proposed to be amended to align with the requested amendments in the SIS, but a provision is also included to enable a 'performance target' reporting process. In short, the evaluation of performance targets is separate to the annual monitoring process, where the works performed for any given development stage relative to performance targets is to be provided for Council's review and satisfaction prior to progression onto subsequent development stages.

Attachment 9 – Applicant Response to Umwelt Review (RPS Memo) - dated 3 June 2021

The applicant submitted an initial response to the Umwelt report with a memo from their Ecologist dated 3 June 2021. This responded to 11 key matters that had been raised in the Umwelt report summarised as follows:

1. Umwelt refer to information being 'hidden' and the document structuring being 'somewhat challenging', however the SIS is presented in a way to comply with the Chief Executive Requirements (CERs) and is therefore not meant to hide or mislead the reader.
2. Umwelt refer to a 'Biodiversity Offsets Package' or 'Offsets'. The SIS makes mention of Compensatory Measures (i.e. Section 7.1.3 of the CERs) but does not infer the use of offsets as indicated by Umwelt. It appears that Umwelt do not hold a proper understanding of the Concept Development Application (Concept DA) or approach outlined in the SIS hence misunderstands the basis for the assessment conclusions.
3. Umwelt provide advice on the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The assessment of these matters relates to a 'proposed action' under the EPBC Act. This is separate and outside the jurisdiction of the NSW Planning framework and is not a matter for the Regional Planning Panel (RPP) or Council to consider.
4. In reviewing impacts on the Koala, Umwelt have provided an incomplete assessment of the information contained in the SIS.
5. Umwelt state that the nutrient enrichment mitigation is heavily relied on in the koala assessment and also take out of context the nutrient enrichment approach stating it is 'novel'. This is not the case. The SIS properly weights the inclusion of measures relating to the nutrient enrichment program.
6. Extensive genetic studies performed by OWAD Environmental for the koala show there is not considerable uncertainty about the connection between the koalas in the Kings Hill hub and other areas on the lower north coast.
7. Umwelt critique the Vegetation Mapping and Floristic Survey provided in the SIS. This critique is not correct.
8. Umwelt critique the classification of Lower Hunter Spotted Gum Ironbark Forest EEC. This critique is not correct.
9. Umwelt critique the survey timing and effort for *Pterostylis chaetophora* and *Corybas dowlingii*, the reliability of the results and, as a consequence, the seven part test conclusions. This critique is not correct.
10. Umwelt critique the SIS by stating it has not defined the locality and identified the extent of the local population for many affected species (e.g. brush-tailed phascogale) and, as a consequence, incorrectly state that the seven part test for these species has not been properly performed and the conclusions are therefore not supported. This critique is not correct.
11. Umwelt critique the assessment prepared for the Brush-tailed Phascogale on the basis of habitat classification and assessment of importance of habitat. This critique is not correct.

The memo then provides a more detailed discussion in relation to each of the above points.

Attachment 10 – Memo from Port Stephens Council dated 10 June 2021

Port Stephens Council provided a memo to the Panel supported with an additional memo from MJD Environmental (see attachment 11).

This memo clarifies the Council position in relation to the advertising and notification processes and which concludes that the Council consider that the advertisement and notification of the DA and SIS were adequate. Notwithstanding the Council acknowledges that the DA and SIS can be re-notified if the Panel is minded to do so.

The memo also provides further comment in relation to the draft Voluntary Planning Agreement and approval pathway for the DA.

Attachment 11 – Memo from MJD Environmental (Council Ecologist) dated June 10 2021

The Council requested MJD Environmental undertake a further review of the ecological assessment documentation and the Umwelt report. The memo raises a number of brief observations and makes comments in response to several of the Umwelt findings and conclusions noting that a technical response would be addressed by the applicant's ecologist (refer to Attachment 9).

Attachment 12 – Applicant Panel briefing

A further briefing of the Panel took place on 17 June 2021, attended by the applicant, Umwelt and the Port Stephens Council. The Panel were specifically briefed by Mr Tim Robertson SC on behalf of the applicant in relation to the applicant's position on the legal framework applying to the development application. The Panel also heard from the applicant's ecologist and Umwelt in relation to their differing opinions in respect of the ecological impacts of the proposed development.

Attachment 13 – Record of Joint Ecologists meeting

At the request of the applicant the Panel supported a joint expert meeting between the ecologists to discuss the matters raised in the RPS memo of June 3, 2021 (see Attachment 9). The final agreed record of the meeting is dated 6 July 2021. This summarises the areas of agreement and the remaining points of difference as well as proposed future actions.

Points of difference remain in relation to the term 'offset' and 'compensatory measure', impacts on koala, EEC and an orchid species. One future action was proposed in relation to further analysis of the EEC.

Attachment 14 – Applicant's final position and advice (Tim Robertson SC and RPS memo)

On the 29th July the applicant provided the Panel with further information in the form of a memo from RPS regarding the EEC classification and legal advice from Senior Counsel Tim Robertson.

In relation to the further analysis of the EEC matter, the applicant's covering letter states:

In response, RPS carried out further collection of reference data over 12 and 13 July 2021 to compare against the data presented in the SIS and compliment the RPS classification of vegetation as type PCT 1590. RPS concludes in the (**attached**) Memo dated 27 July 2021:

"The comparative analysis of plot data obtained from the subject site (Cumberland Ecology and RPS plots) and reference plot data obtained from known mapped patches of LHSGIF EEC in/adjacent to Werakata National Park and Columbey National Park has clearly demonstrated that the vegetation mapped as PCT 1590 within the subject site is not the same as vegetation described as LHSGIF EEC in the final determination."

The advice from Tim Robertson SC is as stated in the applicant's letter:

That advice is attached dated 28 July 2021. Key guidance is summarised below:

- a. The Panel has no power to decide whether concurrence is required: that is a function given exclusively to Council;
- b. Even if Council decided that concurrence was required, the concurrence authority has no power to refuse concurrence because the DA did not propose offsetting any residual impacts on biodiversity, or to impose a condition on its concurrence to require offsetting for that purpose;
- c. Neither the Threatened Species Guidelines nor the seven-part test is a focal point for consideration of biodiversity issues, where ever arising in the determination of the application;
- d. Neither is exhaustive of the matters to be considered in determining those issues;
- e. In deciding if the DA involves likely significant impacts on threatened species or their habitats, or in deciding to grant or refuse consent, the decision-maker must consider the mitigation measures including the proposal to enhance the carrying capacity of the conservation reserve for koala, phascogale and other species;
- f. Offsets compensate for residual impacts of the project on biodiversity, mitigation measures reduce the likely impacts of the proposal: reserving part of the existing habitat and enhancing it's carrying capacity by ecological restoration is not an offset, in the context of this DA;
- g. The threatened species guidelines cannot require decision-makers to ignore mitigation measures, if they have been incorporated in the DA. It is obligatory to consider the development proposal as a whole, including its proposals for ecological restoration and adaptive management;
- h. Restoration of koala habitats by tree species selection is a critical path of the Government's Koala Strategy (2018), is recommended by DPIE's *Koala Habitat Revegetation Guidelines (2020)*, and is supported by over 40 years scientific research into koala habitat preferences: to describe the SIS prescriptions as novel is to disregard evidence even if that is the correct question to ask, which it is not;
- i. Umwelt has adopted a legally flawed approach to the threshold question of significant impact, and it has disregarded evidence that the threshold of significance has not been exceeded;
- j. The SIS correctly determined and additional research has confirmed that the area to be cleared does not largely comprise an EEC.

Attachment 15 – Umwelt DA Peer Review Addendum, October 2021

Umwelt have provided their final comments in relation to the additional material supplied by the applicant in Attachment 14 in the form of an addendum to their Peer Review (see Attachment 7).

The Addendum responds to the 10 summary points (a. to j. above) from the applicant's letter of 29 July and provides the Panel with a response to the remaining points of contention in relation to impacts on Koala and analysis of the EEC. The Addendum concludes that the findings of the Umwelt May 2021 report stand, specifically in relation to the recommendation that the SIS should be referred to EES for assessment and concurrence.