

## RECORD OF DECISION

HUNTER & CENTRAL COAST REGIONAL PLANNING PANEL

<b>DATE OF DEFERRAL</b>	2 November 2021
<b>PANEL MEMBERS</b>	Alison McCabe (Chair), Clare Brown and Chris Wilson
<b>APOLOGIES</b>	None
<b>DECLARATIONS OF INTEREST</b>	<p>Juliet Grant declared a conflict of interest as her employer is currently engaged by an adjoining land-owner.</p> <p>Sandra Hutton did not have a significant conflict of interest prior to 6 October 2021. On 7 October 2021 Ms Hutton became aware through internal reporting that her employer, ADW Johnson, was about to enter into a contract regarding potential development on land directly adjoining the site, and immediately declared a conflict of interest to avoid a reasonably perceived conflict, and a potential actual conflict in the future. Ms Hutton had previously declared a non-significant, non-pecuniary interest as her employer has had limited historical involvement over seven years ago on an unrelated part of the URA.</p> <p>Cr Ryan Palmer declared a conflict of interest as he has advocated for this project in the past.</p> <p>Cr Paul LeMottee, Cr Giacomo Arnott and Cr Chris Doohan declared conflicts of interest as they have been briefed on the project as councilors.</p> <p>Steve Peart declared a conflict as he has been intimately involved with environmental assessments, negotiation of VPAs and general project assessment and feedback for this DA.</p> <p>John Maretich declared a conflict of interest as he has been involved in discussions with developers and their consultants, working through details on required and future works, engineering assessments and workshops with all of the developer's engineers, workshops with other government agencies (Planning, Hunter Water Corporation, the then RMS) and direct discussion with his staff who have also been involved the above.</p>

Public meeting held at by teleconference on 20 October 2021, opened at 4pm and closed at 6pm.

### MATTER DISCUSSED

PPS-2018HCC047 – Port Stephens Council – 16-2018-772-1 at 3221 Pacific Highway Kings Hill and 35 Six Mile Road Kings Hill – residential subdivision (as described in Schedule 1).

The Panel previously met on the 22<sup>nd</sup> December 2020 in relation to this development application. The Panel deferred determination of the DA to obtain independent advice and a peer review regarding:

- The adequacy of the species impact statement 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.

The purpose of this Panel meeting is related to an administrative matter regarding whether or not to refer the Development Application for the concurrence of the Chief Executive Officer of OEH (now Co-ordinator General, Environment, Energy and Science).

This is an application that was lodged prior to the commencement of the *Biodiversity Conservation Act 2016*.

The Biodiversity Conservation (Savings and Transitional) Regulation 2017 sets out the statutory framework for consideration of these applications. The former s79B of the *Environmental Planning and Assessment Act 1979* (EP&A Act 1979) is preserved by the Regulation.

The specific provision the Panel is addressing reads as follows:

*“(3) Consultation and concurrence – threatened species*

*Development Consent cannot be granted for:*

*...*

*(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 & Heritage. ...”*

The Panel is required to take into account the factors listed in the former s5A(2) of the EP&A Act 1979 in deciding whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats. The Panel understands that this involves a consideration of all of the matters proposed as part of the Development Application inclusive of mitigation measures.

The Panel has received independent advice on the adequacy or otherwise of the SIS supporting the Development Application from Umwelt Consultants – (Attachment 7 and 15 to the Report).

The Panel has had the benefit of comprehensive documentation and briefings from BCD, Independent Consultants, the applicant and their consultants and Council. The applicant has also provided the Panel with additional expert advice and peer reviews of particular aspects of the application. This has included detailed legal advice including legal advice on the Panel’s power under section 4.7(2)(c) of the EP&A Act 1979.

All of this advice has been reviewed by Umwelt.

In summary the application’s position is that the comprehensive suite of measures included in the Development Application would warrant a conclusion that the development – is not likely to significantly affect a threatened species, population, or ecological community or its habitat. Furthermore, the applicant’s legal advice concludes that the Panel has no power to refer the matter under s4.7(2) of the EP&A Act 1979 – that this is a Council responsibility and Council have made the decision not to refer.

The Panel’s independent advice from Umwelt concludes that there is likely to be a significant affect on a threatened species, population or ecological community or its habitat.

The Panel’s legal advisers disagree with the applicant’s position on s4.7(2) of the EP&A Act 1979.

The Panel has also reviewed a summary of the points of difference between the ecological experts – this is found in Attachment 13 to the published report. The Panel has from December 2020 a letter from the BCD raising issues with the SIS. This was reinforced at a briefing held on 22 March 2021.

The Panel had deferred this matter in December 2020 to seek independent advice. This decision arose from the detailed and complex approach to the consideration of the likely impacts on threatened species – but also a heightened concern regarding Koalas arising from Parliamentary enquiries, 2019/2020 bushfire and




potential impacts, that urban development has on Koalas, Koala habitats and more generally threatened species, population and ecological communities.

The Panel has considered the application as a whole and given weight to the independent advice contained in the Umwelt Report. For the reasons contained in the Umwelt Report the Panel therefore considers that the proposed development is likely to significantly affect threatened species, populations, or ecological community or its habitat and is therefore required to be referred to the Chief Executive Office of OEH (now co-ordinator General, Environment, Energy and Science) for concurrence.

#### **PANEL DECISION**

The Panel agreed that Development Application DA16-20J18-772-1 (PPS-2018HCC047) be referred to the Chief Executive Office of OEH (now co-ordinator General, Environment, Energy and Science) for concurrence.

The decision was unanimous. The Panel adjourned during the meeting to deliberate on the matter and formulate a resolution.

PANEL MEMBERS	
 Alison McCabe (Chair)	 Clare Brown
 Chris Wilson	

SCHEDULE 1		
1	PANEL REF – LGA – DA NO.	PPS-2018HCC047 – Port Stephens Council – 16-2018-772-1
2	PROPOSED DEVELOPMENT	Concept Proposal for Residential Subdivision and Stage 1 Works including Vegetation Clearing and Establishment of a Conservation Area
3	STREET ADDRESS	3221 Pacific Highway KINGS HILL & 35 Six Mile Road KINGS HILL (Lot 41 DP 1037411 & Lot 4821 DP 852073)
4	APPLICANT/OWNER	Kings Hill Developments PTY LTD
5	TYPE OF REGIONAL DEVELOPMENT	General development over \$30 million
6	RELEVANT MANDATORY CONSIDERATIONS	<ul style="list-style-type: none"> <li>• Environmental planning instruments: <ul style="list-style-type: none"> <li>○ State Environmental Planning Policy No.55 – Remediation of Land;</li> <li>○ State Environmental Planning Policy (State and Regional Development) 2011;</li> <li>○ State Environmental Planning Policy No 44—Koala Habitat Protection;</li> <li>○ State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017;</li> <li>○ State Environmental Planning Policy (Infrastructure) 2007;</li> <li>○ State Environmental Planning Policy (Coastal Management) 2018;</li> <li>○ Port Stephens Local Environmental Plan 2013.</li> </ul> </li> <li>• Draft environmental planning instruments: Nil</li> <li>• Development control plans: <ul style="list-style-type: none"> <li>○ Port Stephens Development Control Plan 2014</li> </ul> </li> <li>• Planning agreements: Nil</li> <li>• Provisions of the <i>Environmental Planning and Assessment Regulation 2000</i>: Nil</li> <li>• Coastal zone management plan: Nil</li> <li>• The likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality</li> <li>• The suitability of the site for the development</li> <li>• Any submissions made in accordance with the <i>Environmental Planning and Assessment Act 1979</i> or regulations</li> <li>• The public interest, including the principles of ecologically sustainable development</li> </ul>
7	MATERIAL CONSIDERED BY THE PANEL	<ul style="list-style-type: none"> <li>• Council assessment report: 14 December 2020</li> <li>• Port Stephens Council Memorandum: 16 December 2021</li> <li>• Written submissions during public exhibition: 21</li> <li>• Verbal submissions at the public meeting on 22 December 2020: <ul style="list-style-type: none"> <li>○ Ann Lindsey on behalf of Hunter Bird Observers Club Inc, Ben van der Wijngaart on behalf of Port Stephens Koalas, Nigel Waters on behalf of Port Stephens Greens, Anne-Marie Abell on behalf of Voice of Wallalong and Woodville and Surrounds (VOWW) and Kathy Brown on behalf of EcoNetwork Port Stephens</li> <li>○ On behalf of the applicant – Adam Smith, Mark Aikens, Jason Wasiak, Ben Clark and Todd Neal</li> </ul> </li> <li>• Peer review by Umwelt: 28 May 2021</li> <li>• Applicant response: 3 June 2021</li> <li>• Supplementary Panel Report: 5 October 2021</li> <li>• Verbal submissions at the public meeting on 20 October 2021: <ul style="list-style-type: none"> <li>○ Carmel Northwood on behalf of Koala Coalition EcoNetwork Port Stephens, Kathy Brown on behalf of Mambo-Wanda Wetland</li> </ul> </li> </ul>

		<p>Conservation Group and Nigel Waters on behalf Port Stephens Greens</p> <ul style="list-style-type: none"> <li>○ On behalf of the applicant – Adam Smith, Tim Robertson, Todd Neal, Olivia Woosnam, Mark Aitkens, Dr John Hunter</li> <li>● Total number of unique submissions received by way of objection: 17</li> </ul>
8	MEETINGS, BRIEFINGS AND SITE INSPECTIONS BY THE PANEL	<ul style="list-style-type: none"> <li>● Briefing: 3 June 2020 <ul style="list-style-type: none"> <li>○ <u>Panel members</u>: Alison McCabe (Chair) and Sandra Hutton</li> <li>○ <u>Council assessment staff</u>: Ryan Falkenmire and Rean Lourens</li> </ul> </li> <li>● Site inspection and applicant briefing: 12 August 2020 <ul style="list-style-type: none"> <li>○ <u>Panel members</u>: Alison McCabe (Chair) and Sandra Hutton</li> <li>○ <u>Council assessment staff</u>: Ryan Falkenmire and Rean Lourens</li> <li>○ <u>Applicant representatives</u>: Adam Smith, Mark Aitkens, Jason Wasiak and Wesley Chong</li> </ul> </li> <li>● Briefing to discuss Council's recommendation: 22 December 2020 <ul style="list-style-type: none"> <li>○ <u>Panel members</u>: Alison McCabe (Chair), Sandra Hutton and Clare Brown</li> <li>○ <u>Council assessment staff</u>: Ryan Falkenmire, Elizabeth Lamb, Kate Drinan and Matt Doherty</li> <li>○ <u>Department</u>: Jane Gibbs, Leanne Harris and Lisa Foley</li> </ul> </li> <li>● Briefing: 22 March 2021 <ul style="list-style-type: none"> <li>○ <u>Panel members</u>: Alison McCabe (Chair), Sandra Hutton and Clare Brown</li> <li>○ <u>Biodiversity and Conservation Division</u>: Steven Cox, Joe Thompson and Paul Hillier</li> <li>○ <u>Umwelt</u>: Travis Peake and Allison Riley</li> <li>○ <u>Department</u>: Jane Gibbs, Leanne Harris and Verity Rollason</li> <li>○ <u>Council</u>: Kate Drinan, Steven Peart and Rean Lourens</li> <li>○ <u>MJD Consulting</u>: Matt Doherty</li> </ul> </li> <li>● Briefing: 17 June 2021 <ul style="list-style-type: none"> <li>○ <u>Panel members</u>: Alison McCabe (Chair), Sandra Hutton and Clare Brown</li> <li>○ <u>Applicant</u>: Wesley Chong, Jason Wasiak, Mark Aitkens, Adam Smith, Tim Robertson SC and Dr David Dique</li> <li>○ <u>Umwelt</u>: Travis Peake and Allison Riley</li> <li>○ <u>Department</u>: Jane Gibbs, Leanne Harris and Verity Rollason</li> <li>○ <u>Council</u>: Kate Drinan, Rean Lourens and Ashley Bacales</li> <li>○ <u>MJD Consulting</u>: Matt Doherty</li> </ul> </li> </ul>
9	COUNCIL RECOMMENDATION	Approval
10	DRAFT CONDITIONS	Attached to the Council assessment report