

**HUNTER AND CENTRAL COAST  
REGIONAL PLANNING PANEL**

**SUPPLEMENTARY INFORMATION REPORT**

<b>HCCRPP No</b>	2018HCC047
<b>DA Number</b>	16-2018-772-1
<b>Local Government Area</b>	Port Stephens
<b>Proposed Development</b>	Concept Proposal for Residential Subdivision and Stage 1 Works including Vegetation Clearing and Establishment of a Conservation Area
<b>Street Address</b>	3221 Pacific Highway KINGS HILL & 35 Six Mile Road KINGS HILL (Lot 41 DP 1037411 & Lot 4821 DP 852073)
<b>Applicant/Owner</b>	<b>Owner</b> - Kings Hill Developments PTY LTD <b>Applicant</b> - Kings Hill Developments PTY LTD
<b>Regional Development Criteria (Schedule 4A of the Act)</b>	The development is declared as regionally significant development in accordance with schedule 7 clause 2 of <i>State Environmental Planning Policy (State and Regional Development) 2011</i> ('SEPP State and Regional Development'), being general development over \$30 million.
<b>List all documents submitted with this report for the panel's consideration</b>	Attachment 1 – Concurrence referral from NSW Environment, Energy and Science (EES) Attachment 2 – Correction letter from NSW Environment, Energy and Science (EES)
<b>Report by</b>	Ryan Falkenmire (Development Planning Coordinator)
<b>Report date</b>	25 January 2022
<b>Scheduled Meeting Date</b>	2 February 2022

## 1.0 EXECUTIVE SUMMARY

This Development Application (DA) seeks Approval for a Concept Proposal for Residential Subdivision and Stage 1 Works including the clearing of land within the urban development footprint, establishment of environmental protection measures and vegetation enhancement works within the Environmental Conservation Areas. The Concept Proposal seeks approval for the integrated bushfire and stormwater management strategies. All other subdivision components, such as roads, servicing, recreational areas, landscaping and lot layout are subject to future detailed applications.

On 20 October 2021, the Hunter and Central Coast Planning Panel (the Panel) held a public meeting to determine if the DA would be referred to the Chief Executive of OEH (now Secretary of Environment, Energy and Science (EES) within the Department of Planning, Industry and Environment) for concurrence under the former *Threatened*

*Species Conservation Act 1995* and the former planning provisions in section 5A of the *Environmental Planning and Assessment Act 1979*.

On 2 November 2021, the Panel issued a record of decision resolving to refer the DA to the Secretary of Environment, Energy and Science (EES) for concurrence. On 10 November 2021, Council referred the application to EES at the direction of the Panel for concurrence under former section 79B of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

A response to the concurrence request from a Secretary delegate of EES was issued to Council on 8 December 2021. The Secretary delegate determined to refuse to grant concurrence to the DA. This decision was made on the basis that the development is likely to have an unacceptable and significant effect on biodiversity matters and because the DA and SIS do not satisfactorily demonstrate how the biodiversity impacts of the proposed development have been adequately assessed or avoided, mitigated or offset. The specific reasons for the decision to refuse to grant the concurrence are outlined in the EES letter, contained at **Attachment 1** of this report.

## 2.0 INTRODUCTION

The purpose of this supplementary report is to present to the Panel the concurrence decision from EES following the Panel direction to refer the application. As mentioned in the executive summary, the Secretary delegate determined to refuse to grant concurrence to the DA for the reasons discussed in this report and the letter contained at **Attachment 1** of this report. This report will support the Panel determination meeting scheduled for 2 February 2022.

A further supplementary report was prepared by the Planning Panels Secretariat, dated 5 October 2021, to present additional information received to the Panel at the 20 October 2021 public meeting. The report prepared by the Planning Panels Secretariat presented the additional supporting material, including the independent peer review report, supplementary memos and technical information from the applicant, legal advice from their Senior Counsel Mr Tim Robertson, a joint report from the ecologists and a final addendum to the Umwelt Peer Review.

## 3.0 STATUTORY CONTEXT

### 3.1 Threatened Species Conservation Act 1995 (TSC Act)

The Application was lodged on 23 November 2018 and at the time of lodgement Port Stephens was identified as an interim designated area for the purposes of the transitional arrangements of the *Biodiversity Conservation Act 2016*. The DA is therefore assessed under the former *Threatened Species Conservation Act 1995* (TSC Act 1995) and the former planning provisions in section 5A of the *Environmental Planning and Assessment Act 1979* (EP&A Act 1979). The DA was accompanied by a Species Impact Statement (SIS).

The TSC Act 1995 provides for the conservation of threatened species, populations and ecological communities of animals and plants. The TSC Act 1995 sets out a number of specific objects relating to the conservation of biological diversity and the promotion of ecologically sustainable development.

Section 5A(2) of the TSC Act 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 as stipulated below.

*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 longterm 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.*

Former section 79B(3) of the EP&A Act 1979 provides that the consent authority cannot grant development consent for development that is likely to significantly affect a threatened species, population, or ecological community or its habitat (biodiversity matters), without the concurrence of the Chief Executive of Office of Environment and Heritage (OEH) (now Secretary of Environment, Energy and Science (EES) within the Department of Planning, Industry and Environment) (the Secretary).

#### *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.*

On 2 November 2021, the Panel issued a record of decision resolving to refer the DA to the Secretary of Environment, Energy and Science (EES) for concurrence. The Panel considered the application on its merits and gave weight to the independent report prepared by Umwelt. For the reasons contained in the Umwelt report, the Panel considered the proposed development is likely to significantly impact on threatened species, populations or ecological communities. Accordingly, the Panel instructed Council to refer the application to EES for concurrence.

#### Concurrence Decision

As contained in the concurrence response letter dated 8 December 2021 (contained at **Attachment 1**), the Secretary delegate determined to refuse to grant concurrence to the DA. This decision was made on the basis that the development is likely to have an unacceptable and significant effect on biodiversity matters and because the DA and SIS do not satisfactorily demonstrate how the biodiversity impacts of the proposed development have been adequately assessed or avoided, mitigated or offset.

The specific reasons for the decision to refuse to grant the concurrence are summarised as follows:

1. Inadequate assessment of impacts to the Koala;
2. Assessment of significance of likely effects on threatened species, populations and endangered communities is not supported;

3. Proposed conservation and mitigation measures are not supported;
4. In-perpetuity security of the conservation area and remaining habitat areas is unclear and inadequate;
5. Inadequate assessment of impacts to threatened species;
6. Cumulative impacts associated with the KHURA and associated infrastructure are unclear;
7. Potential social and economic impacts not properly assessed.

A detailed explanation of the above reasons for the decision to refuse to grant concurrence is outlined in the EES letter, contained at **Attachment 1** of this report.

A further correction letter was issued to Council on 20 December 2021, seeking to address incorrect information contained in Reason 4 of the concurrence response letter dated 8 December 2021 (contained at **Attachment 2**). Specifically, Reason 4 states that:

*“the draft VPA provided with the DA **does not** [emphasis added] specify that the agreed monetary contribution from the proponent is to fund ‘in-perpetuity maintenance of the Conservation Area’ ”.*

In the correction letter, EES acknowledged the draft VPA does specify this. Notwithstanding the correction, EES remained concerned about the likely effectiveness of the VPA in providing appropriate in-perpetuity conservation outcomes.

### **3.2 Draft planning agreement under Section 7.4 of the EP&A Act**

Kingshill Development No 1 Pty Ltd and Kingshill Development No 2 Pty Ltd (together the Developer), made an offer to Port Stephens Council to enter into a Voluntary Planning Agreement (VPA), in connection with the subject application.

In summary, the VPA required the provision of conservation works (estimated at \$3,500,000), embellishment and public dedication of a Conservation Area, a Monetary Contribution of \$3,000,000 for ongoing management of the Conservation Area and a \$250,000 Monetary Contribution towards administrative costs of Council in administering the Planning Agreement and the Conservation Area. A detailed summary of the VPA offer and developer requirements was included in the Council Planners Assessment submitted to the Panel in support of the 20 December 2020 public determination meeting.

At Councils 12 October 2021 Ordinary Meeting, the elected Councillors resolved to authorise the execution of the Kings Hill VPA. However, following the decision by the Panel on 2 November 2021 to refer the application to the Secretary of Environment, Energy and Science (EES) for concurrence, Council deferred execution of the VPA until a concurrence decision was received. Given the EES decision to refuse concurrence, Council have not executed the VPA.

## **4.0 CONCLUSION**

This supplementary report has been prepared to present to the Panel the EES concurrence decision for DA16-2018-772-1 (2018HCC047), being a Concept Proposal for Residential Subdivision and Stage 1 Works including Vegetation Clearing and Establishment of a Conservation Area at Lot 41 DP 1037411 and Lot 4821 DP 852073, 3221 Pacific Highway, KINGS HILL.

The Secretary of Environment, Energy and Science (EES) delegate determined to refuse to grant concurrence to the DA for the reasons discussed in this report and the letter contained at **Attachment 1**. Given the EES decision to refuse to grant concurrence to the DA, Council assumes the Panel will likely resolve to determine DA16-2018-772-1 (2018HCC047) by way of refusal.

**Signed (Assessing Officer)**



**Date: 25/01/2022**

**Ryan Falkenmire  
Development Planning Coordinator**

**Authorised for submission to HCCRPP**



**Date: 17/01/2022**

**Kate Drinan  
Manager Development & Compliance**