



DATE OF DETERMINATION	4 February 2022
DATE OF PANEL DECISION	4 February 2022
DATE OF PANEL MEETING	2 February 2022
PANEL MEMBERS	Alison McCabe (Chair), Clare Brown and Chris Wilson
APOLOGIES	None
DECLARATIONS OF INTEREST	<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 councillors.</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 by teleconference on 2 February 2022, opened at 4.00pm and closed at 5:00pm.

MATTER DETERMINED

PPS-2018HCC047 – Port Stephens Council – 16-2018-772-1 - 3221 Pacific Highway Kings Hill and 35 Six Mile Road Kings Hill - Concept proposal for residential subdivision and stage 1 Works including vegetation clearing and establishment of a conservation area (as described in Schedule 1).

PANEL CONSIDERATION AND DECISION

The Panel considered: the matters listed at item 6, the material listed at item 7 and the material presented at meetings and briefings and the matters observed at site inspections listed at item 8 in Schedule 1.

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 and reads in part 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 previously met on 20 December 2020 in relation to this development application. The Panel deferred determination of the DA to obtain independent legal advice and a peer review regarding:

- The adequacy of the species impact statement and whether the conclusions are supported or otherwise; and
- 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 Panel met again on 20 October 2021 and agreed to refer the development application for concurrence of the Chief Executive Officer of OEH (Now Coordinator General Environment, Energy and Science).

Since the deferral of the DA in December 2020, the Panel has had the benefit of numerous briefings and provision of technical assessment material for this application as outlined in the attached schedule.

Port Stephens Council provided a supplementary report in January 2022 indicating that the Secretary delegate of Environment, Energy and Science had refused to grant concurrence to the DA.

As outlined above, Development Consent cannot be granted without the concurrence. The Panel in its deliberation in addition to the concurrence issue has considered the matters required to be considered in the determination of the development application under section 4.15 of the *Environmental Planning and Assessment Act 1979*.

Development application

The Panel determined to refuse the development application pursuant to section 4.16 of the *Environmental Planning and Assessment Act 1979*.

The decision was unanimous.

REASONS FOR THE DECISION

The Panel determined to refuse the application for the following reasons:

1. The concurrence of the Secretary of Environment Energy and Science (EES) as required by the former s79B of the *Environmental Planning and Assessment Act 1979* has not been granted.
2. The proposed development is likely to significantly affect threatened species population or ecological communities or their habitats and the application has not demonstrated adequate mitigation measures.

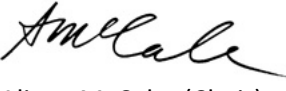


3. The concept plan application does not provide sufficient detail to provide an adequate planning framework for the consideration of future development applications for subdivision for urban development.
4. The development application does not provide sufficient detail to undertake an assessment of the potential impact of the works required to deliver the infrastructure external to the site that is fundamental and integral to the use of land for urban purposes.
5. The site is not suitable for the intensity of urban development proposed given the environmental impacts and the proximity of proposed urban land use to existing waste facilities.
6. The proposed development results in the loss and sterilisation of planned B4 Mixed Use zone – limiting future employment options for the release area.
7. The provisions of clause 6.1(2) of the Port Stephens LEP 2013 have not been satisfied.
8. The provision of clause 6.2 Public Utility Infrastructure of the Port Stephens LEP 2013 have not been satisfied.
9. The proposed development has failed to satisfy the provisions of clause 6.6 of the Port Stephens LEP 2013.
10. There is insufficient information to properly consider the provisions of clause 7.2 Earthworks.
11. There is insufficient information to demonstrate that the requirements of clause 7.8 Drinking Water Catchment of the Port Stephens LEP 2013 have been satisfied.
12. The provisions of clauses 10 and 11 of the Coastal Management SEPP and clause 7.9 of the Port Stephens LEP 2013 have not been satisfied.
13. The proposed development has not been appropriately designed or sited to avoid/minimise adverse odour, noise and visual impacts arising from the adjoining waste resource facility.
14. The proposed development has failed to satisfy clause 7 of SEPP 55 Remediation of Contaminated Land.
15. The proposed acoustic mitigation measures are not compatible with the landscape character and environmentally sensitive context of the interface with the Pacific Highway.
16. The extent of clearing proposed to accommodate future urban development would result in unreasonable environmental impacts on both the natural and future built environment within the site.
17. The proposed urban footprint has not been designed to reflect the physical and ecological limitations of the site.

CONSIDERATION OF COMMUNITY VIEWS

In coming to its decision, the Panel considered written submissions made during public exhibition/s and heard from all those wishing to address the Panel at each of the Public meetings. The Panel notes that issues of concern included:

- Removal of vegetation and impacts on flora and fauna including koala and bird habitat
- Impacts on local waterways and wetlands including fish habitat
- Traffic impacts including congestion, road safety
- Land use conflicts with adjoining resource recovery facility and landfill (noise, odour and gas)

The Panel considers that concerns raised by the community have been adequately identified in the assessment report and that no new issues requiring assessment were raised during the public meetings.

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 and 35 Six Mile Road Kings Hill
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"> • Environmental planning instruments: <ul style="list-style-type: none"> ○ State Environmental Planning Policy No.55 – Remediation of Land; ○ State Environmental Planning Policy (State and Regional Development) 2011; ○ State Environmental Planning Policy No 44—Koala Habitat Protection; ○ State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017; ○ State Environmental Planning Policy (Infrastructure) 2007; ○ State Environmental Planning Policy (Coastal Management) 2018; ○ Port Stephens Local Environmental Plan 2013. • Draft environmental planning instruments: Nil • Development control plans: <ul style="list-style-type: none"> ○ Port Stephens Development Control Plan 2014 • Planning agreements: Draft VPA Port Stephens Council and Kingshill Development No.1 Pty Ltd and Kingshill Development No. 2 Pty Ltd • Provisions of the <i>Environmental Planning and Assessment Regulation 2000</i>: Nil • Coastal zone management plan: Nil • The likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality • The suitability of the site for the development • Any submissions made in accordance with the <i>Environmental Planning and Assessment Act 1979</i> or regulations • The public interest, including the principles of ecologically sustainable development
7	MATERIAL CONSIDERED BY THE PANEL	<ul style="list-style-type: none"> • Council assessment report: 14 December 2020 • Port Stephens Council Memorandum: 16 December 2021 • Written submissions during public exhibition: 21 • Verbal submissions at the public meeting on 22 December 2020: <ul style="list-style-type: none"> ○ 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 ○ On behalf of the applicant – Adam Smith, Mark Aikens, Jason Wasiak, Ben Clark and Todd Neal • Peer review by Umwelt: 28 May 2021 • Applicant response: 3 June 2021 • Supplementary Panel Report: 5 October 2021

		<ul style="list-style-type: none"> • Verbal submissions at the public meeting on 20 October 2021: <ul style="list-style-type: none"> ○ Carmel Northwood on behalf of Koala Koalition EcoNetwork Port Stephens, Kathy Brown on behalf of Mambo-Wanda Wetland Conservation Group and Nigel Waters on behalf Port Stephens Greens ○ On behalf of the applicant – Adam Smith, Tim Robertson, Todd Neal, Olivia Woosnam, Mark Aitkens, Dr John Hunter • Council supplementary report received: 24 January 2022 • Verbal submissions at the public meeting on 2 February 2022: <ul style="list-style-type: none"> ○ Carmel Northwood on behalf of Koala Koalition EcoNetwork and Nigel Waters on behalf of Port Stephens Greens ○ On behalf of the applicant – Tim Robertson SC • Total number of unique submissions received by way of objection: 17
8	MEETINGS, BRIEFINGS AND SITE INSPECTIONS BY THE PANEL	<ul style="list-style-type: none"> • Briefing: 3 June 2020 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Alison McCabe (Chair) and Sandra Hutton ○ <u>Council assessment staff</u>: Ryan Falkenmire and Rean Lourens • Site inspection and applicant briefing: 12 August 2020 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Alison McCabe (Chair) and Sandra Hutton ○ <u>Council assessment staff</u>: Ryan Falkenmire and Rean Lourens ○ <u>Applicant representatives</u>: Adam Smith, Mark Aitkens, Jason Wasiak and Wesley Chong • Briefing to discuss Council’s recommendation: 22 December 2020 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Alison McCabe (Chair), Sandra Hutton and Clare Brown ○ <u>Council assessment staff</u>: Ryan Falkenmire, Elizabeth Lamb, Kate Drinan and Matt Doherty ○ <u>Department</u>: Jane Gibbs, Leanne Harris and Lisa Foley • Briefing: 22 March 2021 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Alison McCabe (Chair), Sandra Hutton and Clare Brown ○ <u>Biodiversity and Conservation Division</u>: Steven Cox, Joe Thompson and Paul Hillier ○ <u>Umwelt</u>: Travis Peake and Allison Riley ○ <u>Department</u>: Jane Gibbs, Leanne Harris and Verity Rollason ○ <u>Council</u>: Kate Drinan, Steven Peart and Rean Lourens ○ <u>MJD Consulting</u>: Matt Doherty • Briefing: 17 June 2021 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Alison McCabe (Chair), Sandra Hutton and Clare Brown ○ <u>Applicant</u>: Wesley Chong, Jason Wasiak, Mark Aitkens, Adam Smith, Tim Robertson SC and Dr David Dique ○ <u>Umwelt</u>: Travis Peake and Allison Riley ○ <u>Department</u>: Jane Gibbs, Leanne Harris and Verity Rollason ○ <u>Council</u>: Kate Drinan, Rean Lourens and Ashley Bacales ○ <u>MJD Consulting</u>: Matt Doherty • Briefing: 20 October 2021 <ul style="list-style-type: none"> ○ <u>Panel members</u>: Alison McCabe (Chair), Clare Brown and Chris Wilson ○ <u>Umwelt</u>: Travis Peake and Allison Riley

		<ul style="list-style-type: none"> ○ <u>Department:</u> Jane Gibbs and Leanne Harris ○ <u>Council:</u> Kate Drinan and Ryan Falkenmire ○ <u>MJD Consulting:</u> Matt Doherty <ul style="list-style-type: none"> ● Final briefing to discuss Council’s recommendation: 2 February 2022 <ul style="list-style-type: none"> ○ <u>Panel members:</u> Alison McCabe (Chair), Clare Brown, Chris Wilson ○ <u>Council assessment staff:</u> Ryan Falkenmire and Kate Drinan ○ <u>Department staff:</u> Jane Gibbs, Leanne Harris and Lisa Foley
9	COUNCIL RECOMMENDATION	Approval (Initial assessment report December 2020)
10	DRAFT CONDITIONS	Attached to the Council assessment report dated 14 December 2020