

ADDENDUM TO COUNCIL ASSESSMENT REPORT OF 4 NOVEMBER 2024
HUNTER AND CENTRAL COAST REGIONAL PLANNING PANEL

PANEL REFERENCE & DA NUMBER	PPSHCC-261 – 16-2023-685-1
PROPOSAL	Construction of a Shop (supermarket), 5 x Commercial Premises, a Medical Centre, Signage, Sewer Extension and Demolition of existing dwelling
ADDRESS	Lot 14 DP 258848 42 Fullerton Cove Road, Fullerton Cove
APPLICANT	CANAAN PD 2 PTYL LTD
OWNER	CANAAN PD 2 PTYL LTD
DA LODGEMENT DATE	04/12/2023
APPLICATION TYPE	Nominated Integrated
REGIONALLY SIGNIFICANT CRITERIA	Section 2.19(1) and Clause 2 of Schedule 6 of <i>State Environmental Planning Policy (Planning Systems) 2021</i> declares the proposal regionally significant development as the development has a capital investment value of more than \$30 million.
CIV	\$ 34,181,686.00 (excluding GST)
CLAUSE 4.6 REQUESTS	Yes – Clause 4.3 Height of Buildings and Clause 7.24 Maximum gross floor area for commercial premises and neighbourhood supermarkets at Fullerton Cove
KEY SEPP/LEP	<ul style="list-style-type: none"> • State Environmental Planning Policy (Biodiversity and Conservation) 2021 • State Environmental Planning Policy (Industry and Employment) 2021 • State Environmental Planning Policy (Planning Systems) 2021 • State Environmental Planning Policy (Resilience and Hazards) 2021 • State Environmental Planning Policy (Transport and Infrastructure) 2021 • State Environmental Planning Policy (Sustainable Buildings) 2022 • Port Stephens Local Environmental Plan 2013
TOTAL & UNIQUE SUBMISSIONS KEY ISSUES IN SUBMISSIONS	5
ORIGINAL DOCUMENTS SUBMITTED FOR CONSIDERATION	Attachment A: Draft Conditions of consent Attachment B: Clause 4.6 Request Attachment C: Architectural Plans

	<p>Attachment D: Civil Engineering Report and Plans</p> <p>Attachment E: Landscape Plans</p> <p>Attachment F: Traffic Impact Assessment</p> <p>Attachment G: Noise Impact Assessment</p> <p>Attachment H: Contamination</p> <p>Attachment I: Biodiversity Development Assessment Report and associated RFI responses</p> <p>Attachment J: Crime Prevent through Environmental Design Report</p> <p>Attachment K: Sewer Connection Plans</p> <p>Attachment L: Addendum to Aboriginal Cultural Heritage Assessment Report</p> <p>Attachment M: Aboriginal Due Diligence Assessment – Sewer Connection</p> <p>Attachment N: Statement of Environmental Effects</p> <p>Attachment O: Bushfire Report</p> <p>Attachment P: Applicant 4.6 Variation Request</p> <p>Attachment Q: Acid Sulfate Soils Management Plan</p> <p>Attachment R: Arborist Report</p> <p>Attachment S: Sewer Alignment Ecology Response</p>
ADDENDUM DOCUMENTS SUBMITTED FOR CONSIDERATION	<p>Amended Attachment A – Recommended Conditions of Consent</p> <p>Amended Attachment C – Updated Architectural Plans</p> <p>Amended Attachment E – Updated Landscape Plan</p> <p>Amended Attachment D – Updated Civil Engineering Plans and Reports</p> <p>Attachment T – Contamination Letter</p> <p>Attachment U – Flood Emergency Response Plan</p> <p>Attachment V – Applicant Clause 4.6 Variation Request – FSR</p> <p>Attachment W – Ecology Response Letter</p> <p>Attachment X – Applicant Written Response to HCCRPP Deferral</p> <p>Attachment Y – Clause 4.6 Variation Request</p>
SPECIAL INFRASTRUCTURE CONTRIBUTIONS (S7.24)	N/A
RECOMMENDATION	Approval
DRAFT CONDITIONS TO APPLICANT	Yes
SCHEDULED MEETING DATE	14 January 2025
PLAN VERSION	Revision E
PREPARED BY	Courtney Sargent – Senior Development Planner

DATE OF ORIGINAL REPORT	4 November 2024
DATE OF ADDENDUM REPORT	20 December 2024

EXECUTIVE SUMMARY

This addendum assessment report modifies and supplements the Council Assessment Report dated 4 November 2024, submitted to the Hunter and Central Coast Regional Planning Panel (HCCRPP) for determination of Development Application (DA) 16-2023-685-1 for Construction of a Shop (supermarket), 5 x Commercial Premises, a Medical Centre, Signage, Sewer Extension and Demolition of the existing dwelling at 42 Fullerton Cove Road, Fullerton Cove.

The purpose of this addendum is to address the additional information requested by the HCCRPP following the deferral of DA 16-2023-685-1 - PPSHCC-261 on 18 November 2024. The reason for deferral was to request further information from the applicant regarding the following:

- The calculated Gross Floor Area of the proposal in relation to Clause 7.24 of the PSLEP;
- Additional detail relating to nature of contamination on the site;
- Flood Emergency Response Strategy to address Clause 5.21 of the PSLEP 2013;
- Further consideration of avoidance with the E1 zoned portion of the site;
- Demonstrate that engineering, landscape and ecological outcomes are integrated and consistent.

Amended plans and additional information have been submitted by the applicant to address the matters raised by the HCCRPP in the Record of Deferral.

The recommended conditions of consent have been updated to reflect the amendments made to plans.

The additional information has been assessed, with regard to the matters raised by the HCCRPP in the record of deferral and under Section 4.15 of the EP&A Act and is considered satisfactory. Accordingly, it is recommended that the application be approved subject to the amended conditions of consent.

RECOMMENDATION

That Development Application [DA No 16-2023-685-1] for the Construction of a Shop (supermarket), 5 x Commercial Premises, a Medical Centre, Signage, Sewer Extension and Demolition of existing dwelling at 42 Fullerton Cove Road, Fullerton Cove be APPROVED pursuant to Section 4.16(1)(a) of the *Environmental Planning and Assessment Act 1979* subject to the amended draft conditions of consent attached to this report at **Amended Attachment A**.

INTRODUCTION

This addendum report provides a detailed overview of the amended plans and additional information submitted by the applicant to address the HCCRPP deferral dated 18 November 2024.

DETAIL OF ADDITIONAL INFORMATION PROVIDED

Amended plans and additional information have been submitted in response to the matters raised by the HCCRPP. The amended plans and additional information provided include:

- Updated Architectural Plans (Amended Attachment C);
- Contamination Letter (Attachment T);
- Updated Landscape Plan (Amended Attachment E);
- Updated Civil Engineering Plans (Amended Attachment D);
- Updated Flood and Stormwater Management Plan (Amended Attachment D);
- Flood Emergency Response Plan (Attachment U);
- Clause 4.6 Variation Request – FSR (Attachment V);
- Ecology Response Letter (Attachment W); and
- Written Response to HCCRPP Deferral (Attachment X).

Further details of the additional information provided are discussed below.

Ground Floor Area

The HCCRPP refuted how the Gross Floor Area (GFA) has been calculated for the purposes of addressing Clause 7.24 of the PSLEP. The applicant has provided amended Architectural Plans which include circulation and access areas, refer to **Figure 1**. The reconsideration of the GFA calculation has resulted in a total GFA of 5,939m² which is non-complaint with the restriction under Clause 7.24 of the Port Stephens Local Environmental Plan (PSLEP) 2013 which seeks to restrict the floor area of commercial premises to 5,500m². As such, the applicant has lodged a Clause 4.6 variation request which is discussed further below.

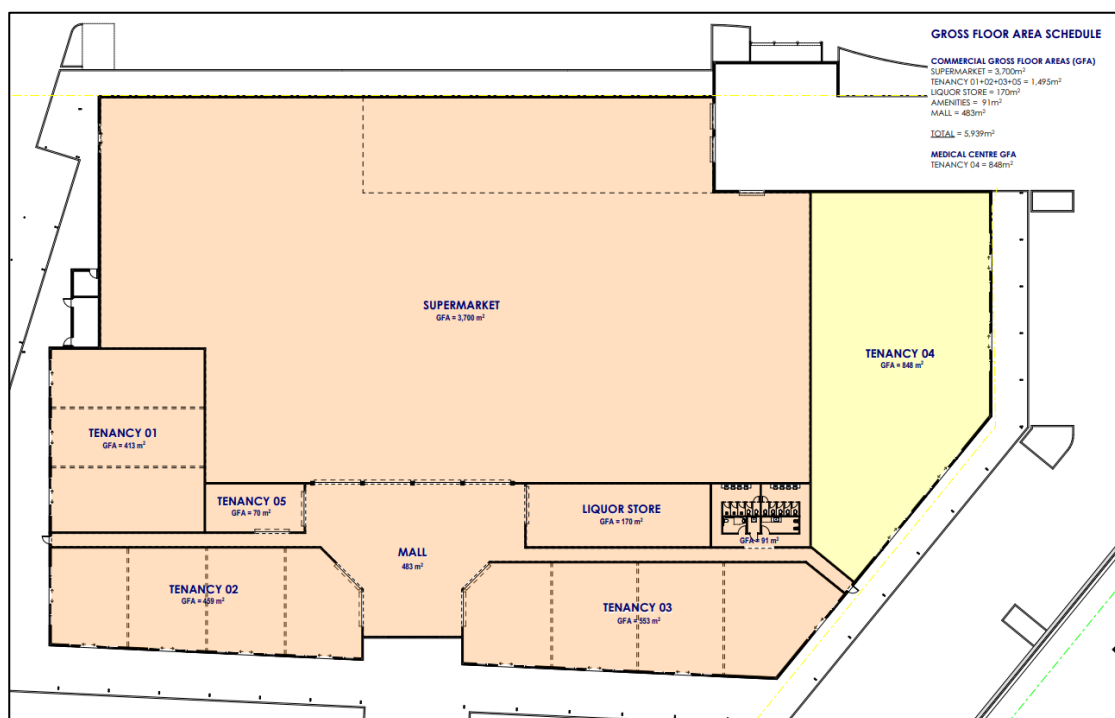


Figure 1. Amended GFA calculations

Flood Emergency Response

To satisfy clauses 5.21(2)(c) and 5.21(3)(c) of the PSLEP 2013, the HCCRPP requested that a Flood Emergency Response Strategy be provided that clearly identifies warning timeframes and likely evacuation or shelter-in-place requirements as a minimum.

A Flood Emergency Response Plan (FERP) has been prepared for the proposal by Northrop Consulting Engineers dated 9 December 2024. This is discussed further below against s5.21 of the PSLEP.

Contamination

To address contamination, the HCCRPP requested:

- Additional detail in terms of the nature of contamination;
- The anticipated remediation strategy; and
- A statement that the site can be remediated and made suitable for the use.

In response, a letter has been prepared by Qualtest Laboratory (NSW) Pty Ltd (Qualtest) dated 5 December 2024. This is discussed further below against s4.6 of the Resilience and Hazards SEPP 2021.

Ecology

The HCCRPP requested that further analysis of the vegetation and ecology, specific to the E1 Local Centre zoned land and the avoidance and minimisation be undertaken. A letter in response to this item was prepared by Anderson Environmental and Planning (AEP) dated 6 December 2024. This is discussed further below against Section 1.7 of the EP&A Act.

Plan consistency

Updated landscape plans, civil plans and architectural plans have been provided to ensure consistency with each other. The updates to the plans are largely administrative with some wording amended within the landscape plan to ensure consistency with ecology advice and the civil engineering plans. The overall design remains unchanged from what was assessed previously. The recommended conditions have been amended to reference the most recent set of plans provided.

PLANNING ASSESSMENT

This revised assessment considers only those matters relevant to the amended development. The remaining assessment remains unchanged from the original Council Assessment Report of 4 November 2023.

Environmental Planning and Assessment Act 1979 (EP&A Act)

Section 1.7 Application of Part 7 of Biodiversity Conservation Act 2016 and Part 7A of Fisheries Management Act 1994

Section 6.12 of the BC Act requires a Biodiversity Development Assessment Report (BDAR) to be prepared in accordance with the Biodiversity Assessment Method (BAM). The proposal seeks consent for the removal of native vegetation that exceeds the Biodiversity Offset Scheme (BOS) clearing threshold. As such, a BDAR was prepared for the proposal in accordance with the BAM by Anderson Environment & Planning. In the deferral, the HCCRPP requested that further analysis of the vegetation and ecology, specific to the E1 Local Centre zoned land and the avoidance and minimisation be undertaken. A letter in response to this item was prepared by Anderson Environmental and Planning (AEP) dated 6 December 2024.

Figure 1 of the AEP letter is a map detailing the ground surveyed existing vegetation located within the E1 zoned portion of the site including the Plant Community Type (PCT) and the condition of these PCTs which range from moderate to severely degraded.

Figure 2 of the AEP letter identifies vegetation that is proposed to be avoided within the E1 zoned portion of the site and identifies the retained native vegetation within this area which includes a Eucalyptus Robusta (preferred Koala feed tree). An excerpt of this figure is shown below in **Figure 2** below.

The letter details how impacts to biodiversity have been avoided and minimised to meet the requirements of Biodiversity Conservation Act 2016. Avoidance measures include retaining vegetation along the northern boundary of the site creating a buffer to the nearby wetland. As per the AEP letter, this area of avoidance will ensure water quality is improved for the wetland that flows into the Hunter Estuary Wetlands and also results in the protection of a listed threatened species *Syzygium paniculatum* (Magenta Lily Pilly). Further avoidance is located within the eastern portion of the site where vegetation will be retained providing a further buffer between the E1 zoned land and the C2 zoned land. This retained vegetation contains native species such as *Melaleuca quinquenervia* and *Eucalyptus robusta*, being a preferred koala feed tree.

To minimise impacts of the proposed development, the BMP is intended to be applied to the areas being retained in the north and east of the site which will include the planting of native species associated with endemic PCTS to provide habitat for flora and fauna. The BMP condition has been amended to be clear that these areas of avoidance must be included in the BMP that is to be submitted to and approved by Council. In addition, the landscape plan has been designed to incorporate terrestrial and aquatic native endemic species to increase native seed banks in the local area reducing the weed loads that dominant such system.

The development has demonstrated that the key principles of avoiding and minimising the direct and indirect impacts on biodiversity values have been incorporated in to the final design as required by the BC Act. Notwithstanding, biodiversity offsets are still triggered for the residual direct impacts on biodiversity values. The ecosystem credits required include:

- 1 x PCT 1646 (moderate);
- 2 x PCT 1717 (poor/managed);
- 10 x PCT 1717 (poor);
- 1 X PCT 1728 (moderate); and
- 8 x PCT 1737 (moderate).

The following species credit are required:

- 24 x Southern Myotis (*Myotis macropus*); and
- 18 x Common Planigale (*Planigale maculata*).

A condition requiring the applicant to retire the required credits prior to the issue of a construction certificate on site in order to offset the residual impact on biodiversity values remains in the recommended conditions.

Importantly, the Planners Assessment Report of 4 November 2023 comprehensively outlined the framework for avoidance and minimisation principles. A key objective of the Biodiversity Conservation Act 2016 (BC Act) is to establish a framework to avoid, minimise and offset the impacts of development on biodiversity. (See section 1.3(k). The BAM requires applicants to demonstrate how impacts on biodiversity have been avoided and minimised in designing for the development. Impacts must be avoided and minimised before offsets are proposed to compensate for any residual impacts. The BAM clearly notes each application must be considered on its individual merits.

Section 7 of the BAM sets out the considerations for avoidance when preparing a BDAR. Demonstrable exploration of reasonable avoid and minimise measures is necessary to meet the avoid and minimise provisions of the BAM and BC Act. Reasonable measures will vary with the circumstances of each development proposal and may be subjective depending on the site.

As outlined in the AEP letter, the proposed design avoids high value habitat and corridors for threatened species within the E1 zoned portion of the site. Interface and edge impacts have been addressed in the design, along with the measures required in the BMP. On a proportional site and impact basis, the development and associated ecological measures undertaken satisfies the BC Act avoidance requirements and mitigation hierarchy.



Figure 2. Areas of avoidance and minimisation (avoided areas in green)

Section 4.15 Evaluation

Section 4.15(1)(a)(i) provisions of any environmental planning instrument

The additional information is considered to be consistent with the provision of the Port Stephens Local Environmental Plan 2013 (PSLEP) and all relevant SEPPs applicable to the proposal as identified in Council's original assessment report and detailed below.

State Environmental Planning Policy (Resilience and Hazards) 2021

Chapter 4: Remediation of Land

The provisions of Chapter 4 of *State Environmental Planning Policy (Resilience and Hazards) 2021* ('the Resilience and Hazards SEPP') have been considered in the assessment of the development application. Section 4.6 of Resilience and Hazards SEPP requires consent authorities to consider whether the land is contaminated, and if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out.

As a part of the rezoning of the site, a Preliminary Contamination Assessment was prepared by Qualtest dated 16 November 2020. The report recommended that additional assessment, comprising soil sampling in the areas of environmental concern identified, be carried out after removal of buildings and stored equipment and materials. An Addendum Letter dated 4 June 2024 was prepared by Qualtest and provided to Council. The letter concluded that the site can be made suitable for the proposed development subject to a number of recommendations being met prior the issue of a Construction Certificate including:

- Preparation of a Detailed Site Investigation (DSI);
- Preparation of a Remediation Action Plan (RAP) (if required); and
- Preparation of a Validation Report should remediation be required which clearly stated that the site is suitable for the proposed development.

Council supported this conclusion and recommended conditions accordingly. Notwithstanding, the HCCRPP have requested further information to address contamination being:

- Additional detail in terms of the nature of contamination;
- The anticipated remediation strategy; and
- A statement that the site can be remediated and made suitable for the use.

In response, a supplementary letter has been prepared by Qualtest Laboratory (NSW) Pty Ltd (Qualtest) dated 5 December 2024. The letter outlines the likely contamination in each area of environmental concern, and how that contamination (if present) would be remediated. Much of the contamination expected relates to the building materials of those building to be demolished such as asbestos as well as potential presence for heavy metals and or hydrocarbons in surface soils. It is expected that if required, remediation would occur using conventional remediation measures.

The letter prepared by Qualtest confirms that the site can be made suitable for the proposed use satisfying the provisions of Chapter 4 of State Environmental Planning Policy (Resilience and Hazards) 2021.

Port Stephens Local Environmental Plan (PSLEP) 2013

Further assessment of the additional information has been undertaken against the relevant clauses of the PSLEP 2013 in **Table 1** below. The assessment for the remaining clauses in the Planner Assessment Report dated 4 November 2024, remains unchanged as a result of the additional information provided.

Table 1: Consideration of the LEP Controls

Control	Requirement	Proposal	Comply
---------	-------------	----------	--------

<p>Exception to development standards (CI 4.6)</p>	<p>Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.</p>	<p>The proposal does not comply with the height of buildings development standard in Clause 4.3 of the PSLEP and the maximum Gross Floor Area stipulated in Clause 7.24 of the PSLEP. A Clause 4.6 request was provided with the application for the exceedance of the maximum building height. The Clause 4.6 assessment for this variation was provided at Attachment B of the original assessment report. This assessment remains unchanged.</p> <p>A Clause 4.6 request has since been provided for the variation to the GFA control under Clause 7.24. The assessment is provided at Attachment Y of this addendum report.</p>	<p>Yes</p>
--	--	---	------------

<p>Flooding Planning (Cl 5.21)</p>	<p>Development consent must not be granted to development on land the consent authority considers to be within the flood planning area unless the consent authority is satisfied the development complies with the following matters identified in 5.21(2): (a) is compatible with the flood function and behaviour on the land, and (b) will not adversely affect flood behaviour in a way that results in detrimental increases in the potential flood affectation of other development or properties, and (c) will not adversely affect the safe occupation and efficient evacuation of people or exceed the capacity of existing evacuation routes for the surrounding area in the event of a flood, and (d) incorporates appropriate measures to manage risk to life in the event of a flood, and (e) will not adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or</p>	<p>As requested in the HCCRPP deferral, a Flood Emergency Response Plan (FERP) has been prepared for the proposal by Northrop Consulting Engineers dated 9 December 2024.</p> <p>The FERP identifies the flood behavior of the land including flood warning times and flood duration, noting that the site is impacted by both catchment flooding and flooding from the Hunter River. As per the FERP, the flood behaviour from the local catchment is likely to rise within three hours of rainfall commencing, and the warning for this mechanism is likely to come from Bureau of Meteorology forecasts the day before. Flooding from this event is likely to drain within a day and not cause significant disruption to the regional road network over a sustained period of time.</p> <p>In regard to flooding from the Hunter River, the FERP identifies that a warning time greater than 12 hours is expected. As per the FERP, the duration of flooding from the Hunter River is expected to be between three to seven days and therefore evacuation is required prior to the event occurring.</p> <p>The FERP identifies flood emergency response personnel, an emergency assembly point and evacuation routes. Chapter 9 lists flood response actions for different weather events including when to close and evacuate the premises.</p> <p>It is considered that the FERP appropriately addresses the requirements of clauses 5.21(2)(c) and 5.21(3)(c).</p> <p>The FERP has been included as a stamped document and referenced in an ongoing use condition in the amended recommended condition at Amended Attachment A.</p>	<p>Yes</p>
--	--	--	------------

	<p>watercourses Section 5.21(3) requires that the consent authority must consider the following matters— (a) the impact of the development on projected changes to flood behaviour as a result of climate change, (b) the intended design and scale of buildings resulting from the development, (c) whether the development incorporates measures to minimise the risk to life and ensure the safe evacuation of people in the event of a flood, (d) the potential to modify, relocate or remove buildings resulting from development if the surrounding area is impacted by flooding or coastal erosion</p>		
--	---	--	--

<p>Maximum gross floor area for commercial premises and neighbourhood supermarkets at Fullerton Cove (CI 7.24)</p>	<p>Development consent must not be granted for development for the purposes of commercial premises or neighbourhood supermarkets on land to which this clause applies unless the consent authority is satisfied the combined gross floor area of all commercial premises and neighbourhood supermarkets on the land will not exceed 5,500m².</p>	<p>The HCCRPP refuted the approach to Gross Floor Area (GFA) calculation for the purposes of addressing this clause. The applicant has provided amended Architectural Plans which include circulation and access areas. The reconsideration of the GFA calculation has resulted in a total GFA of 5,939m² which is non-complaint with the GFA restriction under this clause which seeks to restrict the floor area of commercial premises to 5,500m². As such, the applicant has lodged a Clause 4.6 variation request which is at Attachment Y.</p>	<p>Yes</p>
--	---	---	------------

Clause 4.6 Request

Height of Buildings

The maximum height of buildings pertaining to the site is 9m. The proposal has a maximum height of 9.75m which represent an 8.33% variation to the development standard. A Clause 4.6 request was provided with the application for the exceedance of the maximum building height. The Clause 4.6 assessment for this variation was provided at **Attachment B** of the original assessment report. This assessment remains unchanged.

Gross Floor Area

The maximum gross floor area (GFA) for commercial premises and neighbourhood supermarkets are restricted to 5,500m² on the subject site as per Clause 7.24. The proposal has a GFA of 5,939m² which represents a 7.98% variation to the standard.

Preconditions to be satisfied

Clause 4.6(3) of the LEP establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard. Clause 4.6(2) provides this permissive power to grant development consent for a development that contravenes the development standard is subject to conditions.

It is noted that in September 2023, the NSW Government published amendments to Clause 4.6 of the Standard Instrument which changes the operation of the clause across all LEP's. The amendment included savings provisions that allow for DA's made on or before 1 November 2023 to be determined as if the changes had not commenced. The DA was lodged after 1 November 2023 (being 4/12/2023) and therefore has been assessed against the amended Clause 4.6 provisions.

The preconditions are:

1. Tests to be satisfied pursuant to CI 4.6(3)(a) – this includes matters under CI 4.6(3)(a) and (b) in relation to whether the proposal is unreasonable and unnecessary in the circumstances of the case and whether there are sufficient environmental planning grounds to justify contravening the development standard.

These matters are considered in **Attachment Y** for the proposed GFA variation having regard to the applicant's Clause 4.6 request.

Overall, the proposed GFA variation is considered to be consistent with the objectives of Clause 4.6 given it will achieve a better outcome in these particular circumstances as the objectives of the standard are achieved notwithstanding non-compliance.

Section 4.15(1)(a)(ii) any draft environmental planning instrument that is or has been placed on public exhibition

There are no draft instruments relevant to the amended proposal.

Section 4.15(1)(a)(ii) any development control plan (and section 7.11 plan)

Port Stephens Development Control Plan 2014

The amended proposal is consistent with the provisions of the Port Stephens Development Control Plan 2014 (DCP).

The following sections of the DCP are relevant to the amended proposal:

B2 – Flora and Fauna

The amended documentation does not seek to remove any additional vegetation previously assessed in the Planners Assessment Report dated 4 November 2024, rather additional information has been provided to provide further clarification with regard to how biodiversity impacts have been avoided and minimised. This was discussed in detail under s1.7 of the EP&A Act in a preceding section of this report. Noting this, no further assessment under this section of the DCP is considered necessary.

1.1.1 Section 4.15(1)(a)(ia) Planning agreements

There are no planning agreements that are relevant to the proposed development.

1.1.2 Section 4.15(1)(a)(iv) the regulations (and other plans and policies)

There are no matters within the regulations that are relevant to the determination of the application.

Section 4.15(1)(b) the likely impacts of the development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality

The likely environmental impacts of the development relating to the natural and built environments, and social and economic impacts remain generally unchanged from that identified in the original Council Assessment Report of 4 November 2024.

Section 4.15(1)(c) the suitability of the site for the development

The site is suitable for the development for the reasons identified within the original Council Assessment Report of 4 November 2024.

Section 4.15(1)(d) any submissions made in accordance with this act or the regulations

The amended proposal does not involve any substantial change to environmental impacts or material changes from those plans originally notified. Accordingly, no further re-notification or advertising is required.

Section 4.15 (1)(e) the public interest

The amended proposal is considered to be in the public interest for the reasons identified within the Council Assessment Report of 4 November 2024.