



The Bay Resort, Anna Bay

*State Significant
Development Assessment
(SSD 5916)*



February 2020

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Cover photo

Artist Impression of the amended development (Source cover RPS Group)]

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Glossary

Abbreviation	Definition
Applicant	Raphael Shin Enterprises Pty Ltd
Amended DA	The amended Development Application (SSD 5916) submitted by the Applicant in September 2019
Amended EIS	Amended Environmental Impact Statement titled ' <i>Anna Bay Resort – Amended Preliminary Environmental Impact Assessment</i> ' prepared by RPS dated September 2019
CIV	Capital Investment Value
Construction	The demolition of buildings or works, carrying out of works, including earthworks, erection of buildings and other infrastructure covered by this consent
Consent	Development Consent
Council	Port Stephens Council
DA	Development Application
Demolition	The removal of buildings, sheds and other structures on the site
Department	Department of Planning, Industry and Environment
Development	The development as described in the amended EIS for the construction and operation of a tourist resort
EPA	Environment Protection Authority
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i>
EP&A Regulation	Environmental Planning and Assessment Regulation 2000
EPBC Act	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
EPI	Environmental Planning Instrument
EPL	Environment Protection Licence
ESD	Ecologically Sustainable Development
LEP	Local Environmental Plan
Minister	Minister for Planning and Public Spaces (or delegate)
Original DA	The Development Application (SSD 5916) submitted by the Applicant in April 2015
Original EIS	Original Environmental Impact Statement titled ' <i>The Bay Resort Environmental Impact Statement (SSD 13_5916) Anna Bay, New South Wales</i> ' prepared by RPS dated April 2015
Planning Secretary	Planning Secretary of the Department of Planning, Industry and Environment
RMS	Roads and Maritime Services
RtS	Response to Submissions titled ' <i>The Bay Resort Response to EIS Submissions – SSD – 13_5916</i> ' prepared by RPS dated 26 April 2017
SEARs	Secretary's Environmental Assessment Requirements
SEPP	State Environmental Planning Policy
SRD SEPP	State Environmental Planning Policy (State and Regional Development) 2011
SSD	State Significant Development



Executive Summary

Introduction

This report details the Department of Planning, Industry and Environment's (the Department) assessment of an amended Development Application (DA) for State significant development (SSD 5916) for 'The Bay Resort' at 4177 Nelson Bay Road, Anna Bay. Raphael Shin Enterprises Pty Ltd (the Applicant) proposes to construct and operate a tourist resort, comprising 68 units, 51 villas and a multi-purpose amenity building containing a cafe, gym and administration building.

The site is located in the Lower Hunter region, within the Port Stephens local government area, approximately two kilometres (km) north-west of the town of Anna Bay and 51 km north-east of Newcastle.

Development Background

The site and surrounds are environmentally sensitive comprising endangered ecological communities (EEC) and wetlands protected under State Environmental Planning Policy No. 14 – Coastal Wetlands (SEPP 14). The site also borders conservation areas including the Tilligerry Nature Reserve and is regularly inundated by saltwater tides from Tilligerry Creek, which is located to the north.

Since 2005, there have been at least four development applications lodged by the Applicant (or on its behalf) that have sought to develop a tourist resort at the site in various forms. In August 2006, the then Minister for Planning refused a development application (DA164-7-2005) for a tourist resort primarily due to it being prohibited and for failing to adequately assess and mitigate biodiversity impacts, flood risk and bushfire hazards.

Project Description (Original Development Application)

The original DA proposed the construction of a 150-room hotel and 219 serviced apartments, including restaurants, cafes and retail, theatre, a business conference centre and parking. Landscaping and civil works were also proposed and a biodiversity offsets package, with part of the site to be maintained and converted to a formal biobanking site.

The application is SSD pursuant to section 4.36 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) as it would involve the construction of a tourist facility with a capital investment value (CIV) over \$10 million and is located in an environmentally sensitive area of State significance and a sensitive coastal location. This meets the criteria set out in clause 13(2)(b) of Schedule 1 of State Environmental Planning Policy (State and Regional Development) 2011 (SRD SEPP).

Engagement

The Department exhibited the original DA and accompanying Environmental Impact Statement (EIS) for the development between 9 June 2015 and 7 August 2015. A total of 14 submissions were received, including six from government authorities, two from special interest/community groups and six from the general public. There were seven objections to the development with the key issues raised relating to flooding, stormwater, biodiversity, disturbance of potential acid sulfate soils, visual amenity, traffic, access and permissibility.

In its review of the original DA, the Department also raised concerns about the suitability of the site due to its environmental sensitivity, in relation to flooding, biodiversity and disturbance of potential acid sulfate soils and the characterisation of the development as an 'eco-tourist facility' under the Port Stephens Local Environmental Plan

2013 (Port Stephens LEP). The Department advised that the proposal had not been sensitively designed and located to minimise bulk, scale and overall physical footprint and any ecological or visual impact as required by the definition of 'eco-tourist facility' in the Port Stephens LEP. The Department considered that the development was better characterised as a 'hotel or motel accommodation', 'serviced apartments' and 'entertainment facility', which are prohibited within the RU2 Zone and suggested the Applicant withdraw the DA.

Amendments to the Development Application

In November 2017, the Applicant lodged a Class 1 appeal to the NSW Land and Environment Court (LEC) on the basis of deemed refusal. To avoid a lengthy LEC proceeding, the Department and the Applicant worked in good faith and it was agreed the Applicant would reduce the scale of the development by way of an amended DA pursuant to clause 55 of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation). In doing so, the Applicant agreed to discontinue the proceedings in the LEC.

In September 2019, the Applicant amended the DA proposing a boardwalk and cabin-style development comprising around 119 cabin-style buildings, including 68 units and 51 villas, a cafe and gym, administration building and car park. The amended design was intended to reflect the requirements for an 'eco-tourist facility' under the Port Stephens LEP.

Assessment

The Applicant reduced the scale of the development as part of the amended DA, however no detailed architectural drawings or updated technical reports have been provided to adequately address the issues raised in the submissions. As such, the issues raised in submissions remain unresolved.

The Department has repeatedly requested the Applicant provide a detailed assessment of the potential impacts particularly in relation to biodiversity, flooding and stormwater to inform the final design of the development, however the Applicant has been unable to demonstrate this with scientific certainty. The Department considers the amended DA does not contain a full and robust assessment of environmental impacts, and does not adequately demonstrate the potential impacts of the development can be effectively mitigated.

The Department's assessment has also concluded that based on the information provided, the amended DA cannot be characterised as an eco-tourist facility for the reasons previously mentioned in relation to the original DA and on the basis that it is properly characterised as hotel or motel accommodation, it would be prohibited in an RU2 zone.

Summary

The Department remains dissatisfied with the Applicant's assessment of the environmental impacts of the amended DA and considers matters relating to flooding, stormwater, biodiversity, disturbance of potential acid sulfate soils, visual amenity, traffic and access to the development have not been satisfactorily addressed. Furthermore, the Department finds that when properly characterising the development as hotel or motel accommodation, it is prohibited on site.

On the basis of the above, the development is not in the public interest as the public benefit of the proposed development does not outweigh the potential unacceptable impacts the proposed development may have on the surrounding environment now and into the future.

It is considered that these concerns and impacts cannot be appropriately dealt with by conditions of consent. On balance, the Department concludes that the amended DA is not consistent with the objects of the EP&A Act, is prohibited and should be refused.



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1. Introduction

1.1 The Department's Assessment

This report details the Department of Planning, Industry and Environment's (the Department) assessment of an amended Development Application (DA) for State significant development (SSD 5916) for 'The Bay Resort' in Anna Bay. The proposed development as amended (the development) involves the construction and operation of a tourist resort known as 'The Bay Resort', comprising 68 units, 51 villas and a multi-purpose amenity building containing a cafe, gym and administration building.

The Department's assessment considers all documents submitted by Raphael Shin Enterprises Pty Ltd (the Applicant), including the Environmental Impact Statement (EIS), Response to Submissions (RTS), Amended EIS, and submissions received from government authorities, special interest groups and the public. The Department's assessment also considers the legislation and planning instruments relevant to the site and the development.

This report describes the development, surrounding environment, relevant strategic and statutory planning provisions and the issues raised in submissions. This report evaluates the key issues associated with the development and provides a recommendation for determining the application.

1.2 Background to the Development

The Applicant is seeking development consent to construct and operate a tourist resort known as 'The Bay Resort' at 4177 Nelson Bay Road, Anna Bay in the Port Stephens local government area (the site). The site is located in the Lower Hunter region, approximately two kilometres (km) north-west of the town of Anna Bay and 51 km north-east of Newcastle (see **Figure 1**).

The site and surrounds are environmentally sensitive comprising endangered ecological communities (EEC) and wetlands protected under State Environmental Planning Policy No. 14 – Coastal Wetlands (SEPP 14) (see **Figure 2** and **Section 1.6**). The site also borders conservation areas including the Tilligerry Nature Reserve and is regularly inundated by saltwater tides from Tilligerry Creek, which is located north of the site.

The development of the site for the purposes of a tourist resort has a long and contentious history. Since 2005, there have been at least four development applications lodged by the Applicant (or on its behalf) that have sought to develop a tourist resort at the site in various forms. In August 2006, the then Minister for Planning refused a development application (DA164-7-2005) comprising a 150-room hotel, 234 apartments, an artificial lagoon, fitness area and associated roads and parking. The proposal was refused for the following reasons:

- the proposal was prohibited and did not adequately assess and mitigate the biodiversity impacts, flood risk and bushfire hazards associated with the proposal
- the bulk and scale of the proposal was out of character with the surrounding area
- the proposal did not encourage a strategic approach to coastal management
- the proposal did not have adequate regard to the principles of ecologically sustainable development and was not in the public interest.

All other applications lodged before the current amended DA did not proceed due to insufficient information being provided by the Applicant, which is described further in **Table 1**.

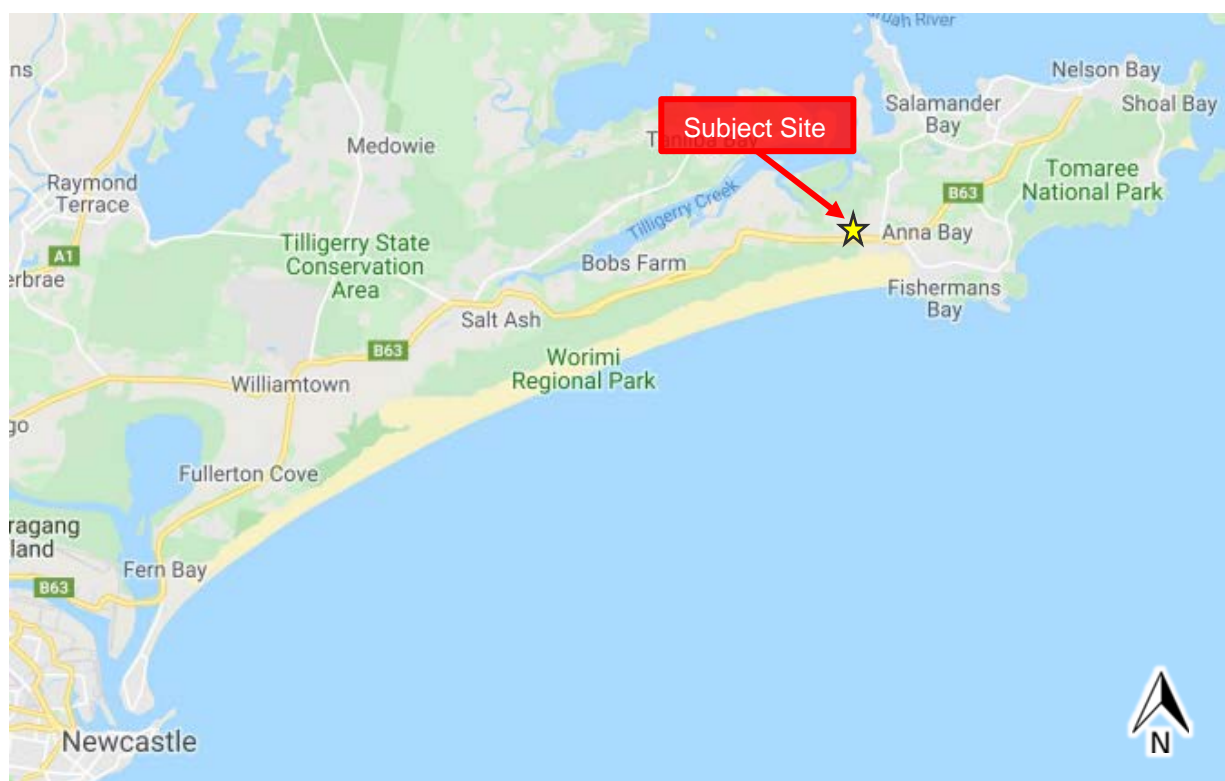


Figure 1 | Regional Context

Table 1 | Previous Development Applications lodged by the Applicant

Application	Description
DA-53-03-2005-i	<ul style="list-style-type: none"> Application lodged 14 March 2005 by Spacecon Pty Ltd (Spacecon) seeking consent for a nature resort, comprising 150 accommodation rooms, conference rooms, cafe/restaurants, garden villas, lagoons, fitness areas and nature trails. Paid lodgment fees but DA never proceeded.
DA 164-07-2005	<ul style="list-style-type: none"> Application lodged 7 July 2005 by Spacecon seeking consent for a nature resort comprising a 150-room tourist hotel, 234 tourist units, 4.5-hectare artificial lagoon, roads, and associated facilities. Application was refused on 8 August 2006.
09_0112	<ul style="list-style-type: none"> Application lodged 19 May 2009 by Spacecon seeking the opinion of the Minister under clause 6 of the now repealed State Environmental Planning Policy (Major Development) 2005, that a proposal for a nature resort comprising a 144-room tourist hotel, 71 tourist units, associated facilities and roads was a major project. The Department notified the Applicant in June 2009 that the proposal was contrary to the zone objectives and the clause 6 request would not progress.
SSD 5262	<ul style="list-style-type: none"> Application lodged 5 April 2012 by Spacecon seeking consent for a nature resort comprising of a tourist facility comprising of 384 rooms/suites, associated facilities and roads. Throughout 2012, there were numerous meetings between the Department and applicant to discuss aspects of the proposal and request additional information. In March 2013, the Department requested the Applicant provide another request for DGRs/SEARs as the proposal had changed considerably since the SEARs were issued and were no longer reflective of the proposed development. The Applicant did not do this and the application did not progress.

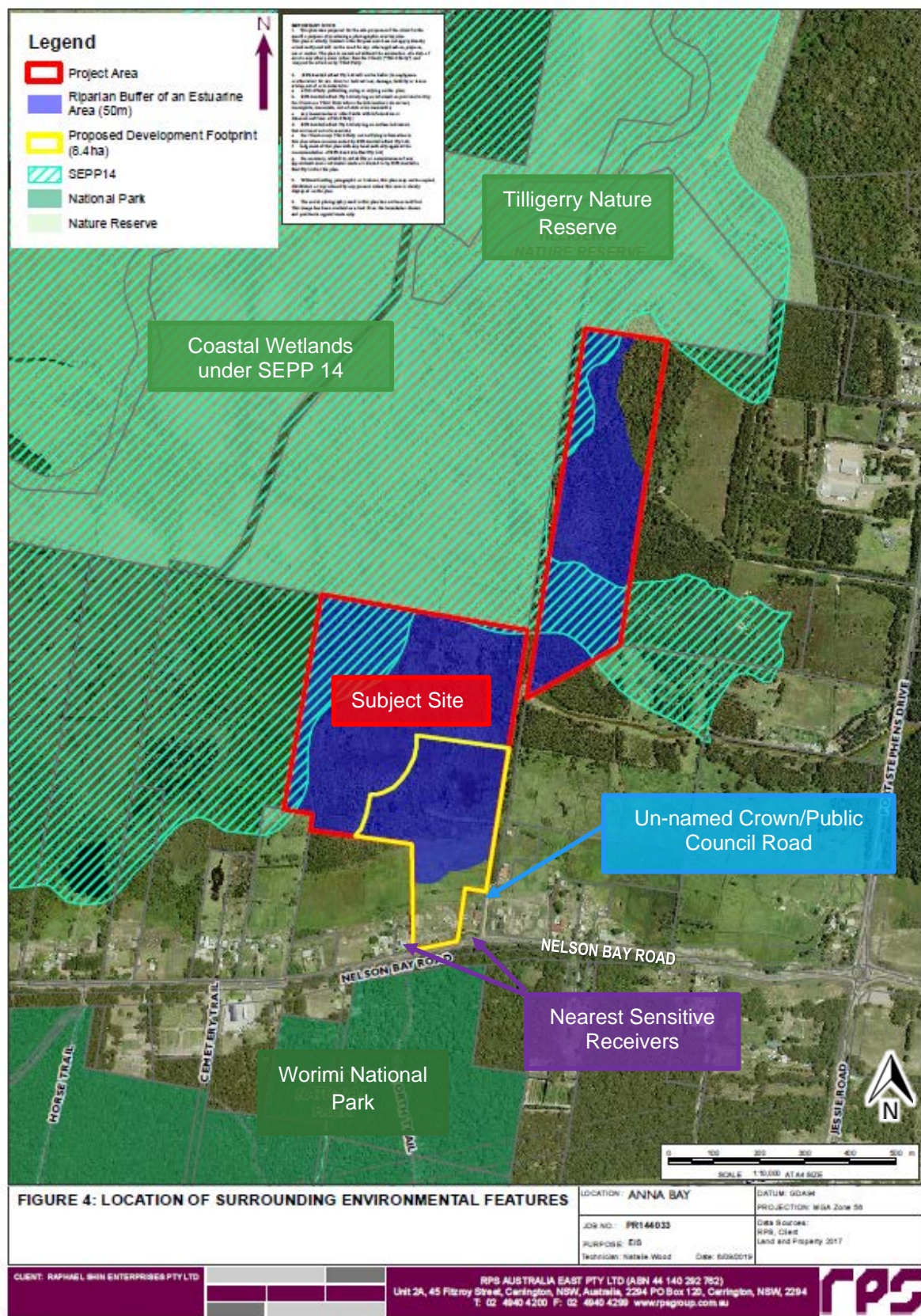


Figure 2 | Subject Site and Environmental Features of the Site and Surrounds

1.3 Original Development Application

In April 2015, the Applicant lodged a fifth development application (SSD 5916) to construct and operate a tourist resort over 8.4 hectares (ha) of the site (see **Figure 3**), comprising:

- a 150-room hotel including restaurants, cafes and retail facilities, multi-purpose theatre, business conference centre and parking
- a three storey tourist accommodation with 219 serviced apartments with associated car parking and common areas
- landscaping and civil works
- provision of a biodiversity offsets package, with part of the site to be maintained and converted to a formal biobanking site.

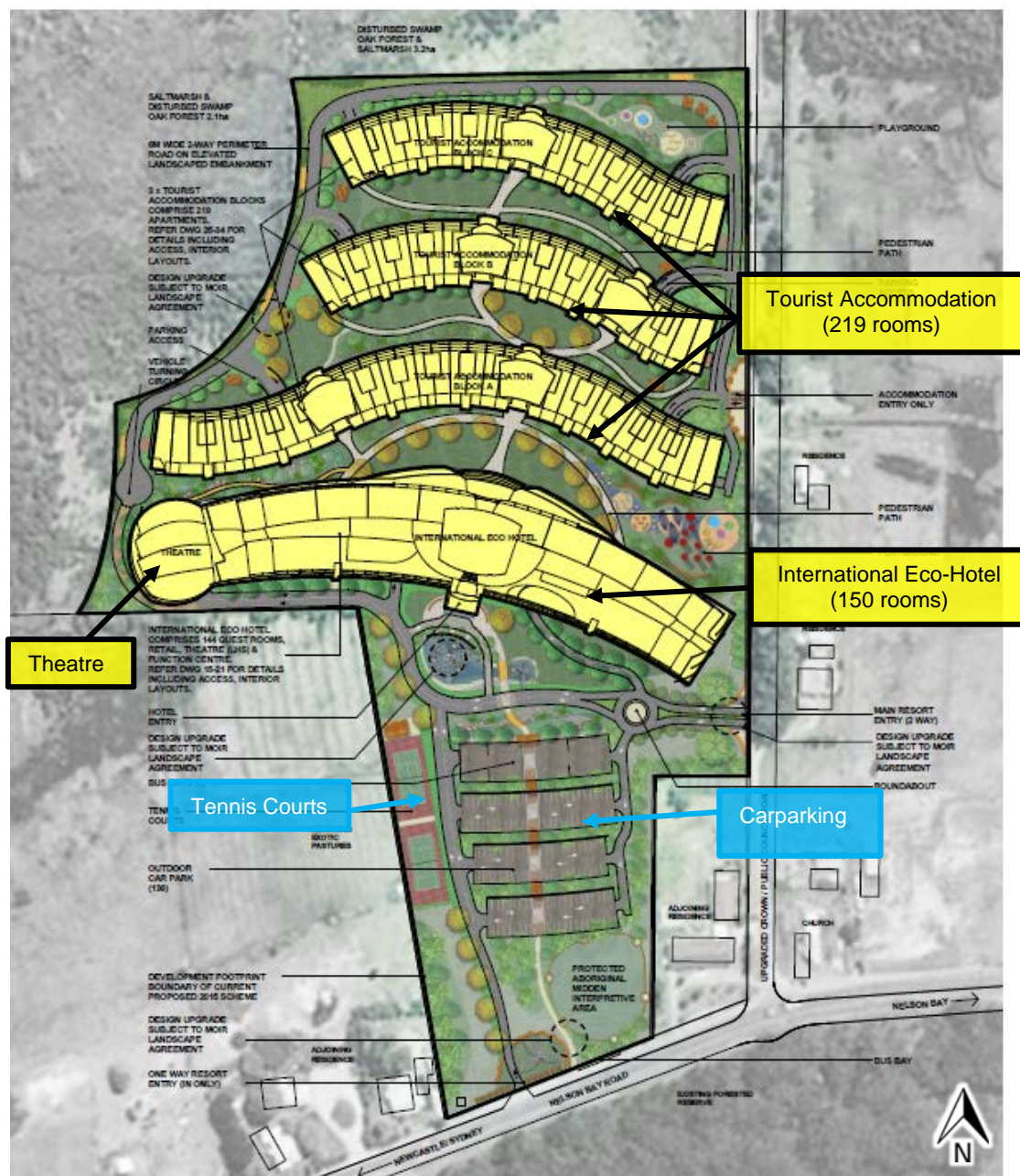


Figure 3 | Original Proposal for SSD 5916

The original DA was exhibited between 9 June 2015 and 7 August 2015 and received a total of 14 submissions, including six from government authorities, two from special interest/community groups and six from the general public. Of the 14 submissions received, seven objected to the development. Issues raised in submissions relate to:

- **hydrology (stormwater and flooding)** – submissions noted the increased flood risk and severity of flooding (velocity and levels) affecting adjoining properties as a result of the proposed filling of the site. The former Office of Environment and Heritage (now Environment, Energy and Science group (EES)) and the NSW Department of Primary Industries (DPI) raised significant concerns about the Applicant's flood modelling and proposed flood mitigation strategy to use fill to achieve the required floor levels. Submissions also noted the original DA did not provide a suitable assessment of potential dewatering impacts on groundwater dependent ecosystems and other groundwater users.
- **biodiversity** – submissions noted the potential impacts of the development to on-site and surrounding biodiversity and ecology, particularly the potential significant impacts to EECs and the adjoining Tilligerry Nature Reserve. EES raised significant concerns regarding the Applicant's proposed biodiversity offset strategy, threatened species surveys and plant community type descriptions.
- **traffic and access** – submissions noted the potential traffic impacts associated with the transport of around 90,000 m³ of fill to the site, and access issues to and from the site, which would require major upgrades to Nelson Bay Road and the un-named Council and crown roads. The former Roads and Maritime Services (now Transport for NSW (TfNSW)) and Port Stephens Council (Council) requested a revised traffic impact assessment that considers improvements to Nelson Bay Road and the un-named Crown and Council roads. Council also raised concerns about car parking provisions for the development.
- **acid sulfate soils (ASS)** – submissions from Council and DPI raised significant concerns about potential ASS and requested the Applicant prepare an ASS Management Plan and provide additional management and mitigation measures.
- **visual and landscape character** – submissions indicated the proposal is inconsistent and incompatible with the character of the surrounding landscape which could potentially result in adverse visual impacts. In particular, submissions from the public raised concerns about the bulk and scale of the development, which is incompatible with the rural character of the area.

In its review of the original DA, the Department also raised concerns about the suitability of the site and characterisation of the development as an 'eco-tourist facility' under the Port Stephens Local Environmental Plan 2013 (Port Stephens LEP).

The Applicant submitted a Response to Submissions (RTS) in April 2017 and supplemented this with legal advice regarding the permissibility of the development. The Department responded in August 2017 and advised the Applicant the development was wholly prohibited under the Port Stephens LEP as it considered the proposal had not been sensitively designed and located to minimise its bulk scale, physical footprint, visual dominance and ecological impact as required by the definition of the Port Stephens LEP. As such, the Department suggested the application be withdrawn.

1.3.1 Land and Environment Court Proceedings

In November 2017, the Applicant lodged a Class 1 appeal to the NSW Land and Environment Court (LEC) on the basis of deemed refusal. The Department in response raised a significant number of contentions on which the application must be refused, particularly on the grounds that the development is not permissible under the Port Stephens LEP and could result in unacceptable flooding and biodiversity impacts.

To avoid a lengthy LEC proceeding, the Department and the Applicant worked in good faith and it was agreed the Applicant would reduce the scale of the development by way of an amended DA pursuant to clause 55 of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation). In doing so, the Applicant agreed to discontinue the proceedings in the LEC.

In March 2019, the Applicant sought to amend the DA instead proposing a boardwalk and cabin-style development comprising around 119 cabin-style buildings, including 68 units and 51 villas, a cafe and gym, administration building and car park. The amended design was intended to reflect the requirements for an 'eco-tourist facility' under the Port Stephens LEP.

In agreeing to an amended DA, the Department required the Applicant provide detailed site plans and a revised assessment of the potential environmental impacts, addressing the Department's additional requirements relating to site layout, urban design, biodiversity and hydrology. The Department provided the Applicant with eight weeks (until 19 June 2019) to submit additional information in support of the amended DA. The Department then agreed to granting an extension of time until September 2019 to do so.

In September 2019, the Applicant submitted an amended EIS to support its amended DA, which is the subject of this assessment report.

1.4 Site Context

The subject site is 40 ha in area and is legally described as Lot 2, DP 747399, comprising two areas – a northern and southern area, separated by an unnamed road running north-south from Nelson Bay Road (see **Figure 2**).

The northern area of the site is approximately 14 ha and comprises mostly native vegetation on low-lying land, which is affected by tidal influence. Man-made drainage lines and unpaved tracks traverse parts of the site. Historically, the northern area would have formed part of the estuarine wetlands associated with Fenninghams Island Creek, Wallis Creek and Port Stephens. No development is proposed to occur in the northern area of the site.

The southern area of the site is approximately 26 ha and contains cleared grazing land previously used for dairy and cattle farming. The remainder of the southern area shows signs of disturbance due to the construction of levees and drainage channels which were used to minimise tidal influences and promote the growth of pasture grasses.

The site currently supports small scale rural uses such as cattle and horse grazing and existing structures at the site comprise rural outbuildings located near the Nelson Bay Road boundary.

1.5 Surrounding Land Uses and Regional Road Network

The site is situated in a rural-residential locality in the Port Stephens LGA. The site is surrounded by (see **Figure 2**):

- rural residential uses to the east and west of the site
- Tilligerry Nature Reserve, which adjoins the northern boundary of the site, and Tilligerry Creek further to the north
- Nelson Bay Road to the south, with Worimi National Park beyond this including the Stockton sand dunes formation.

The nearest residential receivers to the site are located approximated 15 m west and 23 m east of the site.

Access to and from the site is via Nelson Bay Road, which is a major road link between Newcastle and the M1/Pacific Highway to the west and the Nelson Bay Peninsula to the east. Nelson Bay Road is a classified (State) road and any works to this road requires TfNSW concurrence and Council approval under section 138 of the *Roads Act 1993*.

An un-named Council road and Crown Road run in a north-south direction perpendicular to Nelson Bay Road and provides access to three adjoining residences and a set of floodgates to the north.

1.6 Site Constraints

The site is constrained by several environmental and physical factors, which are outlined below.

1.6.1 Biodiversity

The site contains and is located close to highly sensitive environmental features including SEPP 14 wetlands, EECs and habitats for various threatened species. Within the site there are several threatened species including orchid species *Diuris praecox* and *Diuris arenaria*, and EECs including the Swamp Oak Floodplain Forest NSW North Coast, Sydney Basin and South East Corner Bioregions (Swamp Oak Floodplain Forest) and Coastal Saltmarsh in the NSW North Coast, Sydney Basin and South East Corner Bioregions (Coastal Saltmarsh). The site also contains potential habitat for threatened species including the Eastern Cave Bat, Greater Broad-nosed Bat and Wallum Froglet.

The EES did not support the original DA because:

- the Applicant's Biodiversity Assessment Report did not provide an adequate offsets package for the development nor did it describe the vegetation communities present, both floristically and structurally
- a number of threatened flora species were not adequately surveyed for, such as *Lindernia dslinoides* (Noah's False Chickweed), which require targeted surveys to be undertaken between November to February.

1.6.2 Flooding

The site is low-lying with existing levels of between 1.0 m Australian Height Datum (AHD) and 0.5 m AHD and is subject to a 1 in 100-year flood event. Based on the velocities and depths predicted in the flood study undertaken for the original DA, a large area of the site would be considered either high hazard floodway or high hazard flood storage.

In its submission, EES noted flooding in the area is very complex and during a flood event, the area may be hydrologically connected with the Hunter River and Fullerton Cove, in addition to the Port Stephens Estuary. The Department requested the Applicant assess the impact of flooding on the development for the full range of flood events up to the probable maximum flood (PMF) as well as the impact of the development on flood behaviour on adjacent, downstream and upstream areas.

1.6.3 Acid Sulfate Soils

The site has a high likelihood of ASS and potential ASS (PASS) due to the low-lying nature of the site and proximity to the wetlands. The original EIS found that PASS is present across the majority of the site, particularly north of the existing structures. During construction, the original proposal would have disturbed the existing soil profile, which would require extensive soil and water treatment.

Council and DPI requested further information on the volume of ASS that would likely be disturbed and management and mitigation measures proposed by the Applicant.

1.6.4 Bushfire

The site is located within a designated bush-fire prone area. Any development on-site would need to comply with the Rural Fire Service's (RFS) *Planning For Bushfire Protection 2006*. The site lies within a geographical area with a Fire Danger Index (FDI) rating of 100 and the typical climate in this area ranges from warm subtropical to warm temperate. The bushfire season typically runs from October to March.

RFS did not object to the proposal but provided general advice that it had not accepted the Applicant's vegetation assessment in the bushfire report to be saline wetlands rather than forested wetlands. RFS invited the Applicant to provide further evidence to support a different NSW RFS vegetation category.

1.6.5 Aboriginal Heritage

The site has one identified Aboriginal site registered on the Aboriginal Heritage Information Management System (AHIMS), which includes a shell midden and artefact scatter. The AHIMS site is classified as being of low scientific significance due to the cumulative levels of land disturbance on-site. As the Aboriginal site may be within the potential disturbance footprint, EES advised it may be subject to salvage under a Cultural Heritage Management Plan.

1.6.6 Mosquitos (health issue)

The site is located within the Port Stephens estuary, which contains the largest area of mangrove forest and saltmarsh in NSW. These habitats are known breeding grounds for various mosquito species.

The Port Stephens region contains over 47 mosquito species, of which five species may be present at the site, including *Ochlerotatus vigilax* (The Saltmarsh Mosquito), *Ochlerotatus multiplex*, *Coquillettidia linedis* (The Reed Mosquito), *Ochlerotatus notoscriptus* (the Domestic Mosquito) and *Culex quinquefasciatus* (The Common Mosquito). Mosquitos on site may impact the amenity enjoyed by potential visitors to the development and could have health implications for these visitors due to the potential for spread of disease.



2. Project Description

2.1 Amended Development Application

The original DA sought development consent to construct and operate a tourist resort comprising a 150-room hotel including restaurants, cafes and retail facilities, multi-purpose theatre and a business conference centre and a three-storey tourist accommodation with 219 serviced apartments.

In April 2019, the Director Industry Assessments, as delegate of the Minister for Planning and Public Spaces agreed to the submission of an amended DA under clause 55 of the EP&A Regulation following the discontinuance of legal proceedings in the LEC. The Applicant was also requested to provide detailed site plans and an amended EIS to indicate the nature of the changed development.

The Applicant lodged an amended DA, including an amended EIS for consideration in September 2019. The amended EIS included an amended design consisting of a boardwalk and cabin style development on the southern portion of the site only. This proposal is described below and forms the basis for the assessment in this report.

2.2 Amended Development Description

The Applicant proposes to construct and operate a tourist resort at 4177 Nelson Bay Road, Anna Bay. The major components of the development are summarised in **Table 2**, shown in **Figure 4** and described in full in the amended EIS, included in **Appendix B**.

Table 2 | Main Development Components

Aspect	Description
Development Summary	Construction and operation of a tourist resort comprising 119 cabin-style buildings variously positioned along several boardwalks, cafe/gym, administration building and car park.
Accommodation and multi-purpose amenity building	<p>The accommodation would consist of:</p> <ul style="list-style-type: none">• 68 one and two bedroom units• 51 three-bedroom villas, including 10 accessible units. <p>The multi-purpose amenity building would include a cafe, gym and administration building.</p>
Car parking	<ul style="list-style-type: none">• Construction of a car park with 112 car spaces.
Demolition	<ul style="list-style-type: none">• Demolition of existing structures, including two brick dwellings and associated outbuildings.
Site Preparation Works	<ul style="list-style-type: none">• Upgrade the existing un-named Council road.• Fill and level the site using clean imported sand.
Infrastructure and services	<ul style="list-style-type: none">• The development would be serviced by reticulated water, sewer, electricity and communications.• Each cabin would have rainwater collection and solar power.

Aspect	Description
Ecologically Sustainable Initiatives	<p>The development would incorporate ecologically sustainable initiatives including, but not limited to:</p> <ul style="list-style-type: none"> • building designs based on passive solar design principles • buildings to have natural lighting and ventilation • use of natural colours for main external walls and roofs • provision of solar panels on the roof of buildings.
Employment	<ul style="list-style-type: none"> • 191 jobs during construction • 91 jobs during operation
Hours of Operation	<ul style="list-style-type: none"> • Construction hours: Monday to Friday 7 am to 6 pm, Saturday 8 am to 1 pm, no work on Sundays. • Operational hours: 24 hours a day, 7 days a week.

2.3 Applicant's Need and Justification for the Development

The Applicant considers the development has potential to attract new visitors to the Lower Hunter Region and enhance regional tourist and economic activity in the region. The development is also estimated to create direct and indirect economic benefits for the Lower Hunter regional economy during construction and operation of the development. The Applicant considers the development helps to address the rising levels of unemployment in the Lower Hunter Region through the provision of construction and operational jobs.

In terms of the environmental design, the Applicant considers the revised development design would have a light environmental footprint, which would achieve a connection with the local environment, while also incorporating a number of ecologically sustainable design initiatives to achieve environmental and sustainability outcomes.

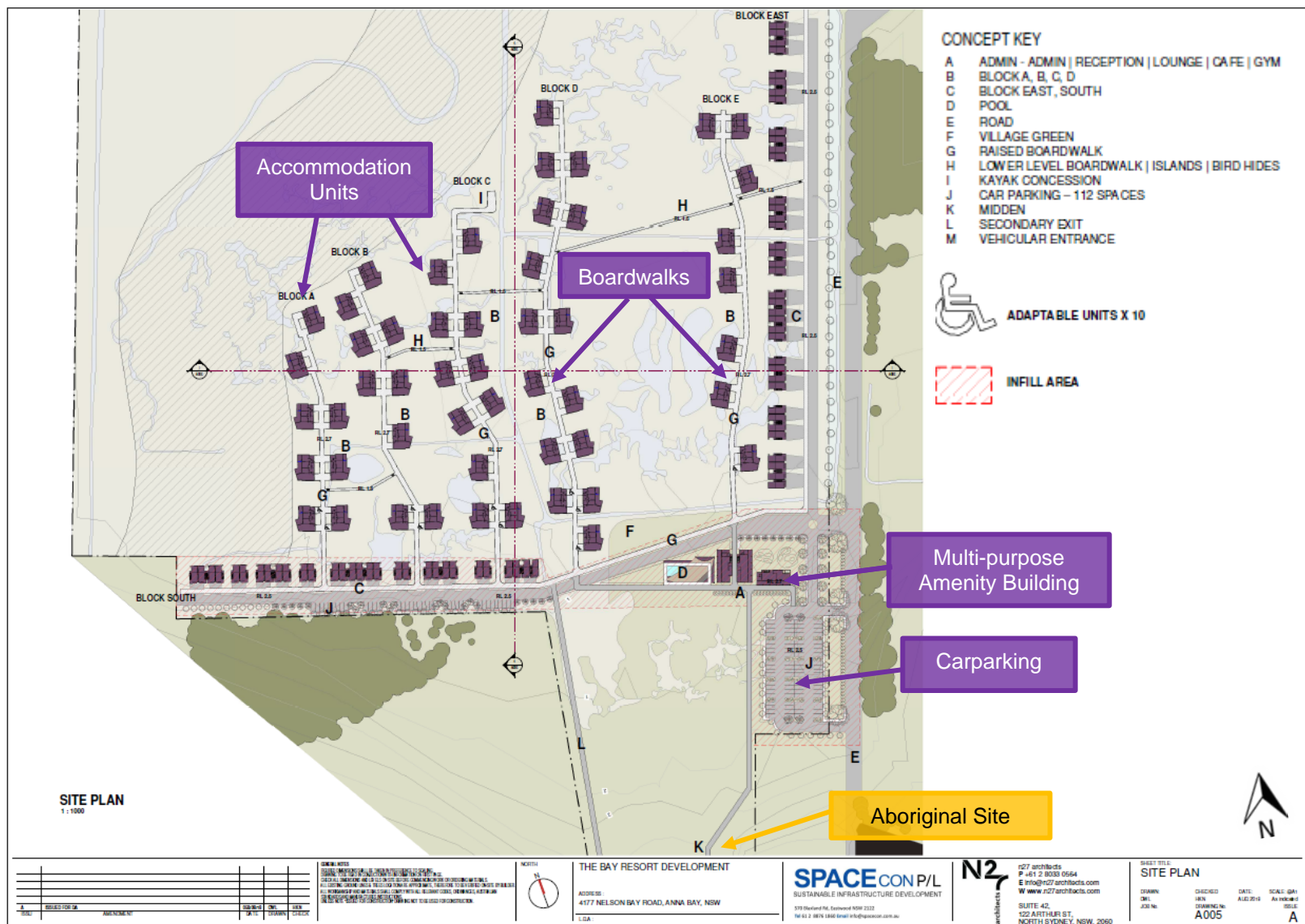


Figure 4 | Proposed Amended Development Layout



3. Strategic Context

3.1 Hunter Regional Plan 2036

The Hunter Regional Plan (the Plan) sets out the NSW Government's vision for the Hunter Region until 2036. The Plan anticipates the projected population along corridor is estimated to be around 1.1 million by 2036, resulting in an increased demand for jobs, housing and infrastructure investment. The Plan also identifies the potential to increase tourism in the Hunter Region, noting the coastal areas are some of the most visited and scenic parts of the region, which also requires ongoing protection and conservation to keep it attractive to visitors.

The key priorities of the Plan are to strengthen the region's economy, manage and protect the region's biodiversity rich natural environment, enhance the region's thriving communities and provide greater housing choice and jobs. Key directions of the Plan are to encourage tourism development in natural areas that support conservation outcomes, protect natural areas, to sustain water quality and increase resilience to hazards such as flooding, erosion and bushfires (Directions 6, 14-16).

The water catchments in the Hunter Region encompass important coastal lakes and lagoons, coastal wetlands, sensitive estuaries and the protected water of Port Stephens and the Great Lakes. The site is located within a highly sensitive environmental area containing EECs and protected SEPP 14 wetlands. While the development may contribute to the growth of tourism within the region, the Department considers that insufficient information has been provided for an assessment to be undertaken of the full extent of potential impacts on the surrounding highly sensitive environmental area. On that basis, the Department is not able to determine the development is consistent with the Plan.

3.2 Lower Hunter Regional Conservation Plan

The Lower Hunter Regional Conservation Plan (the LHRCP) sets out the NSW Government's framework to guide conservation efforts in the Lower Hunter. It identifies the Lower Hunter Region as a diverse area that contains a range of biodiversity values including wetlands and is home to a number of threatened species. The LHRCP highlights the importance offsetting the biodiversity impacts of development through mechanisms such as biodiversity banking and biodiversity offset schemes.

LHRCP identifies a 'green corridor' extending east of the Pacific Highway from the Watagan Ranges to the Hexham Wetlands and Port Stephens. The amended EIS suggests the northern part of the site could be transferred into public ownership and be absorbed into Tilligerry Nature reserve to form part of the 'green corridor', noting this would be subject to 'appropriate negotiations with the relevant authorities'. No further details are provided in this regard.

The former Office of Environment and Heritage (now Environment, Energy and Science group (EES)) noted in their submission the Biodiversity Assessment Report (BAR) for the original DA does not provide a Biodiversity Offset Strategy commensurate with the impact of the development. The BAR offers a 'land based' biodiversity offset site to be conserved under a BioBanking Agreement which results in a shortfall in ecosystem credits. No other supplementary measures such as the generation of credits through rehabilitation were proposed with the amended DA.

The amended DA does not include updated BAR and provides insufficient information regarding the biodiversity impacts of the development. The Department considers that the Applicant has therefore not demonstrated that the development is consistent with the LHRCP.

3.3 NSW Coastal Policy 1997

The NSW Coastal Policy 1997 guides the management and planning of land within the coastal zone. The Coastal Policy adopts nine goals to achieve ecological sustainability for the coastal zone. These include protecting, rehabilitating and improving the natural environment, recognising and accommodating the natural processes of the coastal zone and providing for ecologically sustainable development and settlement. These are underpinned by objectives and strategic actions including the full protection of SEPP 14 coastal wetlands from inappropriate development, biodiversity conservation, management of the environment to protect the public interest, the maintenance and improvement of water quality within coastal waters, estuaries and rivers, avoiding disturbance of potential acid sulfate soils and ensuring development complements the surrounding environment.

The original EIS states in relation to the Coastal Policy that the development will achieve a balance between the unique environmental characteristics of the site and the design of built form, with environmental impacts mitigated. The Department considers that insufficient information has been provided for an assessment to be undertaken of the full extent of potential impacts on the surrounding highly sensitive environmental area. On that basis, the Department is not able to determine whether the development is consistent with the Coastal Policy.

3.4 Coastal Design Guidelines of NSW 2003

The Coastal Design Guidelines of NSW 2003 (the Guidelines) support a place based planning approach and show how best practice urban design allows development to respond to local conditions and community expectations. Anna Bay is likely to be classified as a coastal town under the Guidelines, having a population of 3,000 to 20,000 people with visual connections to the landscape and the coast.

Part 2 of the Guidelines provides design principles for coastal settlements. The principles encourage a defined footprint and boundary, connected open spaces, the protection of natural edges and appropriate building design for the coastal context. The amended EIS states the development has a lighter environmental footprint and achieves a connection with the natural environment, thereby applying the principles set out in the Guidelines. However, the amended DA does not include detailed architectural drawings or updated technical reports and therefore the Department considers that the Applicant has not demonstrated the development is consistent with the Guidelines.



4. Statutory Context

4.1 State Significant Development

The development is SSD pursuant to section 4.36 (development declared SSD) of the EP&A Act as it would involve the construction of a tourist facility with a capital investment value (CIV) over \$10 million and is located in an environmentally sensitive area of State significance and a sensitive coastal location. This meets the criteria set out in clause 13(2)(b) of Schedule 1 of State Environmental Planning Policy (State and Regional Development) 2011 (SRD SEPP).

4.2 Permissibility

The site is zoned RU2 – Rural Landscape under the Port Stephens LEP. Within the RU2 zone, land uses permitted with consent include ‘eco-tourist facilities’ and ‘tourist and visitor accommodation’. Tourist and visitor accommodation is a broader category of land uses, which encompasses: backpackers’ accommodation, bed and breakfast accommodation, farm stay accommodation, hotel or motel accommodation, and serviced apartments (but does not include eco-tourist facilities). However, prohibited land uses include ‘backpackers’ accommodation’, ‘hotel or motel accommodation’, ‘serviced apartments’, and any development not specified in the ‘permitted without consent’ or ‘permitted with consent’ categories.

Given the prohibited land uses, the only tourist and visitor accommodation permissible with consent in RU2 zoned land is bed and breakfast accommodation, and farm stay accommodation. The proposal does not constitute either of these uses.

Under the Port Stephens LEP, an eco-tourist facility means a building or place that:

- (a) provides temporary or short-term accommodation to visitors on a commercial basis
- (b) is located in or adjacent to an area with special ecological or cultural features
- (c) is sensitively designed and located so as to minimise bulk, scale and overall physical footprint and any ecological or visual impact.

If the development cannot be characterised as an eco-tourist facility which is permissible with consent in RU2 zoned land, then the development is characterised as hotel or motel accommodation which is prohibited in RU2 zoned land.

In its review of the original EIS, the Department formed the view that the original proposal (comprising hotel accommodation, conference and theatre) was wholly prohibited under the Port Stephens LEP, as it considered the proposal had not been sensitively designed and located so as to minimise its bulk scale, physical footprint, visual dominance and ecological impact as required by the definition of the Port Stephens LEP.

During the course of the LEC proceedings, a preliminary judgment (*Raphael Shin Enterprises Pty Ltd v Minister for Planning* [2018] NSWLEC 42) held that the definition of eco-tourist facility is inextricably linked to the considerations in clause 5.13(3) of the Port Stephens LEP, which includes requirements that the consent authority must consider when granting consent for eco-tourist facilities.

The amended EIS describes the development as an eco-tourist facility comprising cabin-style accommodation on stilts, which would be accessed by elevated boardwalks above natural salt marsh. A large portion of the vegetation on-site would be retained and rehabilitated to maintain the rural landscape character of the land.

The Department considers the development would not be characterised as an eco-tourist facility for the reasons set out in Table 3 below, because it fails to satisfy sub-clause (c) of the definition of eco-tourist facility. On the basis that development, properly characterised, comprises the land use of hotel or motel accommodation, it is wholly prohibited on RU2 zoned land. In accordance with s 4.38(2) of the EP&A Act, which states that development consent may not be granted if the development is wholly prohibited by an environmental planning instrument, the proposed use is prohibited and the application should be refused.

Notwithstanding the above, if the Department considered the development was characterised as an eco-tourist facility, the requirements of Clause 5.13(3) of the Port Stephens LEP would still need to be satisfied. The Department considers that insufficient information has been provided to demonstrate the development is sensitively designed and located to minimise bulk, scale, overall physical footprint, ecological or visual impacts. On that basis, the Department considers the requirements of Clause 5.13(3) have not been satisfied.

The Department's review of the development against the considerations outlined in clause 5.13(3) are outlined in **Table 3**.

Table 3 | Consideration under clause 5.13(3)

Clause 5.13(3)	Consideration
a) there is a demonstrated connection between the development and the ecological, environmental and cultural values of the site or area, and	The amended EIS states that cabin-style accommodation would be provided on stilts above natural saltmarsh and would be designed to have a lighter environmental footprint. To connect the development with the environmental and cultural values of the site, the Applicant is proposing to provide interactive displays and educational activities to highlight the regional and ecological setting. The Department considers that it may be possible these components could connect the development with the environmental and cultural values of the site, however, the Applicant has not provided sufficient information including detailed site plans, operational details and technical studies to confirm the suitability of the site and scale of the development. On this basis, the Department considers that clause 5.13(1)(a) has not been satisfied.
b) the development will be located, constructed, managed and maintained so as to minimise any impact on, and to conserve, the natural environment, and	The amended EIS states all intensively serviced functions would be concentrated towards the roadside. Accommodation would be provided as cabins on stilts with access via elevated boardwalks to minimise impact on the natural environment. A large portion of the vegetation on-site is proposed to be retained and rehabilitated to maintain the rural landscape character of the land. However, the amended EIS is not supported by technical studies such as a Biodiversity Assessment Report (BAR), updated Biodiversity Offsets Strategy or flood study to demonstrate impacts associated with the development would be effectively managed. On this basis, the Department considers that clause 5.13(1)(b) has not been satisfied.
c) the development will enhance an appreciation of the environmental and cultural values of the site or area, and	The amended EIS states the development would use interpretive information and display methods to educate visitors on conservation issues, which would assist in enhancing the environmental and cultural values of the site. However, the Applicant has not provided a revised Biodiversity Assessment Report and Aboriginal and Cultural Heritage Assessment to accurately map the existing environmental and cultural values of the site, which makes it unclear how this enhancement would

	take form nor have further operational details been provided. On this basis, the Department considers that clause 5.13(1)(c) has not been satisfied.
d) the development will promote positive environmental outcomes and any impact on watercourses, soil quality, heritage and native flora and fauna will be minimal, and	The amended EIS includes a general statement that the development would not re-establish an existing tidal gate on-site and a large proportion of the site would become an offset site, however there is no technical evidence to support this statement including a BAR, flood study and ASSMP to confirm the development would not impact on watercourses, soil quality, heritage and native flora and fauna. On this basis, the Department considers that clause 5.13(1)(d) has not been satisfied.
e) the site will be maintained (or regenerated where necessary) to ensure the continued protection of natural resources and enhancement of the natural environment, and	The amended EIS states the majority of the site would become an offset site which would continue to be maintained and rehabilitated by the Applicant, however the amended EIS was not supported by an updated BAR or Biodiversity Offset Strategy. On this basis, the Department considers that clause 5.13(1)(e) has not been satisfied.
f) waste generation during construction and operation will be avoided and that any waste will be appropriately removed, and	The amended EIS provides a general statement that any waste generated during construction would be managed in accordance with a Waste Management Plan or recycled where possible. The Department considers the amended EIS does not provide a detailed assessment of waste impacts including an assessment of waste quantities and types that would be generated by the development. On this basis, the Department considers that clause 5.13(1)(f) has not been satisfied.
g) the development will be located to avoid visibility above ridgelines and against escarpments and from watercourses and that any visual intrusion will be minimised through the choice of design, colours, materials and landscaping with local native flora, and	The amended EIS provides a general statement that the proposal would integrate visually with the surrounding landscape setting. The amended EIS is not supported by a revised Visual Impact Statement providing perspectives of the development from key vantage points. On this basis, the Department considers that clause 5.13(1)(g) has not been satisfied.
h) any infrastructure services to the site will be provided without significant modification to the environment, and	The amended EIS states infrastructure services would be provided on the underside of the elevated boardwalks without significant modifications to the environment. However, the Department has not received detailed engineering plans or an infrastructure report to support the statement. On this basis, the Department considers that clause 5.13(1)(h) has not been satisfied.
i) any power and water to the site will, where possible, be provided through the use of passive heating and cooling, renewable energy sources and water efficient design, and	The amended EIS provides a general statement that cabins will have good ventilation, rain water collection and solar power, but does not include technical information to support this statement. On this basis, the Department considers that clause 5.13(1)(i) has not been satisfied.
j) the development will not adversely affect the agricultural productivity of adjoining land, and	The amended EIS does not consider whether the development would impact on the agricultural productivity of adjoining land. Rather, the amended EIS provides a general statement that the site is not considered to be prime agricultural land because it contains soils with severe limitations. This statement is not supported by technical studies. On this

	basis, the Department considers that clause 5.13(1)(j) has not been satisfied.
<p>k) the following matters are addressed or provided for in a management strategy for minimising any impact on the natural environment—</p> <ul style="list-style-type: none"> (i) measures to remove any threat of serious or irreversible environmental damage, (ii) the maintenance (or regeneration where necessary) of habitats, (iii) efficient and minimal energy and water use and waste output, (iv) mechanisms for monitoring and reviewing the effect of the development on the natural environment, (v) maintaining improvements on an on-going basis in accordance with relevant ISO 14000 standards relating to management and quality control. 	The amended EIS states the collective measures required to mitigate the impacts associated with the development are detailed in a separate chapter, which is derived from the recommendations detailed in the technical studies. The Department has not received the technical reports and is unable to determine whether the mitigation measures provided in the amended EIS are reasonable and appropriate. On this basis, the Department considers that clause 5.13(1)(k) has not been satisfied.

4.3 Consent Authority

The Minister for Planning and Public Spaces is the consent authority for the development under section 4.5 of the EP&A Act. On 11 October 2017, the Minister delegated the functions to determine SSD applications to the Executive Director, Regions, Industry and Key Sites, where:

- the relevant local council has not made an objection
- there are less than 25 public submissions in the nature of objections
- a political disclosure statement has not been made.

Of the 14 submissions received, seven objected to the initial development application. Council did not object to the development. No reportable political donations were made by the Applicant in the last two years and no reportable political donations were made by any persons who lodged a submission.

As discussed in **Section 4.7** of this report, the amended DA was not exhibited, and no further submissions were received. Accordingly, the application can be determined by the Executive Director, Regions, Industry and Key Sites under delegation.

4.4 Other Approvals

Under section 4.42 of the EP&A Act, other approvals may be required and must be approved in a matter that is consistent with any Part 4 consent for SSD under the EP&A Act.

The works may require an approval under section 138 of the *Roads Act 1993*. RMS stated in its submission insufficient information was provided in relation to access to the site which would be via a Council road that connects directly onto Nelson Bay Road. However, RMS noted Council is the relevant authority for the proposed works.

4.5 Considerations under Section 4.15 of the EP&A Act

Section 4.15 of the EP&A Act sets out matters to be considered by a consent authority when determining a development application. The Department's consideration of these matters is set out in **Section 6** and **Appendix C**.

4.6 Environmental Planning Instruments

Under section 4.15 of the EP&A Act, the consent authority, when determining a development application, must take into consideration the provisions of any environmental planning instrument (EPI) and draft EPI (that has been subject to public consultation and notified under the EP&A Act) that apply to the proposed development.

The Department has considered the development against the relevant provisions of several key EPIs including:

- State Environmental Planning Policy (State and Regional Development) 2011 (SRD SEPP)
- State Environmental Planning Policy (Infrastructure) 2007 (ISEPP)
- State Environmental Planning Policy No. 44 – Koala Habitat Protection (SEPP 44)
- State Environmental Planning Policy No. 55 – Remediation of Land (SEPP 55)
- Port Stephens Local Environmental Plan 2013 (Port Stephens LEP).

The following EPIs were repealed when the State Environmental Planning Policy (Coastal Management) 2018 (Coastal Management SEPP) commenced in April 2018:

- State Environmental Planning Policy No. 14 – Coastal Wetlands (SEPP 14)
- State Environmental Planning Policy No. 71 – Coastal Protection (SEPP 71)

The application was lodged (but not finally determined) before the commencement of the Coastal Management SEPP. In accordance with Clause 21 of the Coastal Management SEPP, it does not apply to this DA and the former planning provisions under SEPP 14 and SEPP 71 continue to apply.

Detailed consideration of the provisions of all EPIs that apply to the development is provided in **Appendix D**. It is noted that Development Control Plans (DCPs) do not apply to SSD under clause 11 of the SRD SEPP.

4.7 Public Exhibition and Notification

In accordance with section 2.22 and Schedule 1 to the EP&A Act, the development application and any accompanying information of an SSD application are required to be made publicly exhibited for at least 28 days. The application was on public exhibition from 9 June 2015 until 7 August 2015.

4.8 Objects of the EP&A Act

In determining the application, the consent authority must consider whether the development is consistent with the relevant objects of the EP&A Act. These objects are detailed in section 1.3 of the EP&A Act. The objects of relevance to the merit assessment of this application include:

- to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- to promote the orderly and economic use and development of land,*
- to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- to promote good design and amenity of the built environment,*

- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,
- (j) to provide increased opportunity for community participation in environmental planning and assessment.

The Department has fully considered the objects of the EP&A Act, including the encouragement of Ecologically Sustainable Development (ESD). The Department's assessment concludes the amended DA is not consistent with the objects of the EP&A Act (See **Table 4**).

Table 4 | Considerations Against the EP&A Act

Object	Consideration
1.3 (a)	The Department has not received the relevant updated technical studies (such as a BAR or flood study) that would have informed the amended design. Although the proposal indicates the amended design would have a lighter environmental footprint than the original proposal and has the potential for positive social and economic impacts, the Department considers the Applicant has not adequately demonstrated the amended design would not impact on the SEPP 14 wetlands and adjoining Tilligerry Nature Reserve and would promote a better environment.
1.3 (b)	While the development has the potential for positive economic and social impacts, the Department considers the Applicant has not adequately demonstrated the development is consistent with the principles of ESD, in particular, the conservation of biodiversity and ecological integrity. Further discussion is provided in Section 4.9.
1.3 (c)	The Department considers the Applicant has not provided sufficient information to demonstrate that the development would promote the orderly and economic use and development of land.
1.3 (e)	The Department considers the Applicant has not provided sufficient information, including a BAR or Flooding Study, to demonstrate the environment is protected, including the conservation of threatened species and other species of native animals and plants, ecological communities and their habitats.
1.3 (f)	The site contains a known Aboriginal site registered on the AHIMS. The amended EIS notes the Aboriginal site is not within the development footprint but is at potential risk from disturbances during construction and therefore recommends a Cultural Heritage Management Plan be prepared prior to any works commencing.
1.3 (g)	The proposal indicates the amended design would have a lighter environmental footprint than the original proposal. However, the previous and significantly different development is not an appropriate basis for comparison and the amended design has not been supported by detailed architectural drawings or technical studies to demonstrate that the development promotes good design and amenity of the building environment.
1.3 (h)	The amended DA includes built structures, however no detailed architectural drawings were submitted as part of the amended DA to demonstrate the development will be properly constructed and maintained.
1.3 (i)	The Department's assessment has been informed by submissions from both local and State Government.
1.3 (j)	The Department publicly exhibited the original DA in 2015 and has considered submissions from the public and special interest groups during its assessment of the application. The Department consulted with Government authorities, receiving submissions on the original EIS.

4.9 Ecologically Sustainable Development

The EP&A Act adopts the definition of ESD found in the *Protection of the Environment Administration Act 1991*. Section 6(2) of that Act states that ESD requires the effective integration of economic and environmental considerations in decision-making processes and that ESD can be achieved through the implementation of:

- (a) *the precautionary principle*
- (b) *inter-generational equity*
- (c) *conservation of biological diversity and ecological integrity*
- (d) *improved valuation, pricing and incentive mechanisms.*

The Department has considered the principles of ESD throughout its assessment of the amended DA. The aspects most relevant to the development are the precautionary principle and the conservation of biological diversity and ecological integrity. The site and surrounds are environmentally sensitive comprising EEC and wetlands protected under SEPP 14 and their conservation is a fundamental consideration in the assessment of the development. As discussed in the Department's Assessment in **Section 6**, insufficient information has been provided to undertake a full and proper assessment to determine the extent of impacts of the development. For this reason, it has not been demonstrated that the development is consistent with the objectives of the EP&A Act and the principles of ESD.

4.10 Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)

Under the EPBC Act, assessment and approval is required from the Commonwealth Government if a development is likely to impact on a matter of national environmental significance (MNES), as it would therefore be considered to be a 'controlled action'.

The original EIS recommended a referral be made by the Applicant under the EPBC Act as the development may reduce the extent of 'Subtropical and Temperate Coastal Saltmarsh', which is listed as Vulnerable under the EPBC Act. The Department is not aware if a referral was made to the Department of Environment and Energy. The amended EIS does not include a revised preliminary assessment of the MNES in relation to the development.



5. Engagement

5.1 Consultation

The Applicant, as required by the Director General's Environmental Assessment Requirements (DGRs), undertook consultation with relevant local and State authorities. The Department undertook further consultation with these stakeholders during the exhibition of the original EIS and throughout the assessment of the application. These consultation activities are described in detail in the following sections.

5.1.1 Consultation by the Applicant

The Applicant undertook a range of consultation activities throughout the preparation of the original EIS including meeting with local and State authorities and local Aboriginal groups. The original EIS did not provide any evidence of consultation with the community and affected landowners and this was raised in the objections received from special interest groups and the public.

5.1.2 Consultation by the Department

The Department consulted with relevant public authorities during preparation of the DGRs.

After accepting the DA and original EIS for the application, the Department:

- made it publicly available from **9 June 2015** until **7 August 2015**
 - on the Department's website
 - at the Department's Sydney and Newcastle offices
 - at Port Stephens Council
- notified landowners in the vicinity of the site about the exhibition period by letter
- notified and invited comment from relevant State government authorities and Port Stephens Council by letter
- advertised the exhibition in the Newcastle Herald and the Port Stephens Examiner.

As discussed in **Section 2.1**, the Department agreed to accept an amended DA in April 2019 and an amended EIS was submitted in September 2019. The amended DA was made available on the Department's website. The amended DA was not publicly exhibited. While the submissions discussed in **Section 5.2** relate to the original DA, it is considered that the matters raised remain relevant to the amended DA and remain outstanding.

5.2 Submissions

A total of 14 submissions were received on the proposed development during the exhibition period, including six from public authorities and eight from special interest groups and the public. Of the 14 submissions received, seven objected to the development. A summary of the issues raised in submissions is provided below, and included in **Appendix A** and **C**.

5.2.1 Public Authorities

Port Stephens Council (Council) did not object to the proposal but raised a number of matters to be resolved prior to determination of the application. These include the deficiencies with the flooding assessment, stormwater, biodiversity impacts and offsets, traffic, access and parking, including access for fire vehicles, disturbance and management of acid sulfate soils, provision of sewer services, accessibility and the extent of filling proposed.

Roads and Maritime Services (RMS) did not object to the proposal but raised a number of matters to be addressed within an updated traffic impact assessment prior to determination of the application. These included

a requirement for a deceleration lane on Nelson Bay Road, potential upgrades to the existing right turn bay and potential relocation of the existing u-turn bay. RMS also noted that Nelson Bay Road is a state classified road and advised their concurrence is required for works within the roadway under Section 138 of the *Roads Act 1993* and the consent of the Council.

Office of Environment and Heritage (OEH) raised concerns regarding the Applicant's proposed biodiversity offset strategy, threatened species surveys and plant community type descriptions within the Biodiversity Assessment Report. Concerns were also raised with the Applicant's flood modelling and proposed flood mitigation strategy to use fill to achieve the required floor levels.

Department of Primary Industries (DPI) raised concerns about the proposed development due to its location in and adjacent to wetlands directly connected to a sanctuary zone in the Marine Park. DPI also raised concern with the Applicant's flood modelling, increased runoff impacts on saltmarsh areas, disturbance and management of acid sulfate soils, ground heave and the insufficient assessment of the drawdown impacts on groundwater dependent ecosystems.

Department of Industry – Resources and Energy (Dol) noted that the subject site overlies Quaternary coastal sand dunes and is covered by a petroleum exploration licence. Dol suggested that consultation should occur with the licence holder.

NSW Rural Fire Service (NSW RFS) did not object to the proposal but provided general advice that it had not accepted the Applicant's vegetation assessment in the bushfire report that the vegetation was saline wetlands rather than forested wetlands. RFS invited the Applicant to provide further evidence to support a different NSW RFS vegetation category.

5.2.2 Special Interest Groups and Public Submissions

EcoNetwork – Port Stephens Inc did not object to the development but requested more information regarding the proposed ecologically sustainable development practices, operational noise and visual impact buffers, traffic and access impacts, solar access and ventilation to neighbouring properties, earthworks, biodiversity offsets and carbon reductions. Additionally, the submission sought clarification on the process for remedial work should construction commence on site but not be completed and on the role of the Department in supervising construction work to ensure compliance with any conditions of consent.

Tomaree Ratepayers & Residents Association Inc objected to the development noting it as being of an unacceptable scale and out of character with the area leading to adverse visual impacts. The submission raised concerns with the economic justification for the development, noting its location as relatively isolated, and the potential for construction work to commence on site but not be completed, referring to a separate tourist facility within Port Stephens where this occurred. The submission also questioned whether the development satisfied the definition of an eco tourist facility and expressed concern with the extent of earthworks and disturbance to acid sulfate soils, stormwater impacts and traffic, access and parking.

Six objections were received from members of the public raising concern with classifying the development as an eco tourist facility and highlighting a lack of consultation between the Applicant and the community. Environmental concerns were also raised that were consistent with the matters raised by agencies. These included flooding, stormwater, traffic and access, disturbance of acid sulfate soils and groundwater, biodiversity, visual impacts, ecologically sustainable development practises, noise, air quality, mosquito impacts and land heave.



6. Assessment

The Department's assessment of the development has been undertaken in accordance with the EP&A Act. The relevant matters for consideration in determining the amended DA are:

- the provisions of relevant EPIs that apply to the land to which the amended DA relates
- 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 suitability of the site for the development
- submissions made in accordance with the EP&A Act or the EP&A Regulation
- whether the development is in the public interest.

In preparing the assessment, the Department has considered the Applicant's amended DA and submissions made during the exhibition of the original EIS. The Department repeatedly requested additional assessment information from the Applicant throughout the assessment period, to fully address the key issues. Despite revisions to the original DA and subsequent amendment to the DA, the Department considers the Applicant has provided insufficient information to demonstrate the potential impacts of the development could be effectively mitigated. The Department has undertaken an assessment against the relevant matters for consideration under section 4.15 of the EP&A Act. These issues are discussed throughout **Section 6** of this report.

As required by s 4.12(8) of the EP&A Act, the applicant needs to prepare (or have prepared on their behalf), an environmental impact statement in support of a SSD application in the form prescribed by the EP&A Regulation. The environmental impact statement needs to meet the standards set out in Schedule 2 of the EP&A Regulation. This includes a full description of the development and assessments of the environmental impact of the development.

6.1 Consistency with relevant EPIs

Under section 4.15(1)(a) of the EP&A Act, the Minister or his delegate as the consent authority, is required to consider the relevant provisions of any EPIs that apply to the land to which the amended DA relates. Several EPIs apply to the land to which the amended DA relates, including but not limited to the following (see **Section 4.6** and **Appendix D**):

- SEPP 14 (coastal wetlands)
- SEPP 71 (coastal protection)
- Port Stephens LEP.

EPIs have several purposes including regulating development and protecting the environment. For example, SEPP 14 aims to ensure coastal wetlands are preserved and protected in the economic interests of the State, while SEPP 71 aims to protect and manage the NSW coast through improving public access, protecting Aboriginal cultural heritage and protecting visual amenity and coastal habitats.

SEPP 14 – Clause 7 Matters

The Minister must consider the matters for consideration under clause 7 of SEPP 14. The matters for consideration include, but are not limited to:

- whether the coastal wetlands are preserved and protected by the development
- the environmental effects of the development on native plant and wildlife communities, habitats and surface and groundwater
- whether adequate safeguards and rehabilitation measures will be made to protect the environment
- feasible alternatives to the development

The Department considers the amended DA is incomplete and does not sufficiently describe the development or assess the impacts of the development, particularly on protected SEPP 14 wetlands within and close to the site or demonstrate how they would be effectively managed or mitigated. For example, the amended DA is not supported by a revised biodiversity assessment report, revised flood study, architectural drawings and a design statement to fully demonstrate the development would have minimal impacts on the surrounding environment. In addition, the amended DA does not provide information on adequate safeguards and rehabilitation measures to protect the sensitive environmental attributes of the site and surrounds. Therefore, the Department considers the amended DA does not adequately satisfy the matters for consideration under clause 7 of SEPP 14.

SEPP 71 – Clause 8 Matters

The Minister must also consider the matters for consideration under clause 8 of SEPP 71. The matters for consideration include, but are not limited to:

- suitability of the development, given its type, location and design and its relationship with the surrounding area
- any detrimental impact that development may have on the amenity of the coastal foreshore
- measures to conserve threatened animal and plant species and their habitats
- likely impacts of the development on coastal processes and coastal hazards.

The Department acknowledges the Applicant's attempt to revise the design and reduce the environmental footprint of the development to achieve consistency with SEPP 71. However, the Department considers the amended DA is incomplete and does not sufficiently demonstrate the suitability of the development for its context or provide adequate mitigation measures and safeguards in relation to significant natural assets including EECs such as the Swamp Oak Floodplain Forest and Coastal Saltmarsh and wetlands protected under SEPP 14. Therefore, the Department considers the DA application does not adequately satisfy the matters for consideration under clause 8 of SEPP 71.

Clause 5.13(3) of the Port Stephens LEP

As described in **Section 4.2**, the Minister must not grant consent for eco-tourist facilities unless the development meets the requirements of clause 5.13(3) of the Port Stephens LEP. The Department's consideration of the amended DA against the requirements of clause 5.13(3) of the Port Stephens LEP is provided in **Table 3**. The Department considers the amended DA in its current form has not adequately demonstrated consistency with clause 5.13(3) of the Ports Stephens LEP.

Conclusion

The Department's assessment has determined the Applicant has not demonstrated the amended DA would be consistent with the aims, objectives and matters of consideration of the EPIs that apply to the site, particularly SEPP 14, SEPP 71 and the Port Stephens LEP. While the Applicant has attempted to reduce the scale and footprint of the development, the Department considers the Applicant has not provided sufficient information to demonstrate that the potential impacts of the development could be managed to an acceptable level. The Department concludes the application has not satisfied the requirements of section 4.15(1)(a) of the EP&A Act.

6.2 Assessment of the likely impacts of the development

Section 4.15(1)(b) of the EP&A Act requires the Minister to consider the likely impacts of the development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.

As discussed in **Section 1.6**, the site is environmentally sensitive and is constrained by the following environmental and physical elements:

- biodiversity – the site contains and is surrounded by significant natural assets including EECs such as the Swamp Oak Floodplain Forest and Coastal Saltmarsh, habitat for various threatened species, wetlands protected under SEPP 14 and the adjoining Tilligerry Nature Reserve located north of the site
- flooding – the site is regularly inundated by saltwater tides from Tilligerry Creek to the north, and is subject to a 1 in 100-year flood event
- Aboriginal heritage – the site contains a known Aboriginal site registered on the AHIMS.

During exhibition of the original DA, submissions received from Council, EES, DPI and members of the public raised significant concerns regarding the potential ecological, flooding, traffic, soil and visual impacts of the development (see **Section 1.3**). While the Applicant has reduced the scale of the development, the amended DA contains no detailed architectural drawings or technical information to adequately address the issues raised in the submissions. As such, the issues raised in submissions remain unresolved.

Throughout the assessment process, the Department has repeatedly requested the Applicant provide a detailed assessment of the potential impacts particularly in relation to biodiversity, flooding and stormwater to inform the final design of the development, however the Applicant has been unable to demonstrate this with scientific certainty.

The Department considers the amended DA does not contain a full and robust assessment of environmental impacts, and does not adequately demonstrate the potential impacts of the development can be effectively mitigated. With regard to economic impacts, the Department acknowledges the development has the potential to generate economic benefits during construction and operation, such as increasing tourism in the area and creating additional local jobs. However, the amended DA does not contain a detailed assessment of the potential social impacts of the proposal particularly on neighbouring properties, which are predominantly rural-residential land uses.

The Department's assessment has determined the Applicant has not undertaken an adequate assessment of the likely environmental, social and economic impacts in the locality and concludes the application has not satisfied the requirements of section 4.15(1)(b) of the EP&A Act.

6.3 Suitability of the site

Section 4.15(1)(c) of the EP&A Act requires the Minister to consider the suitability of the site for development. In assessing whether the development is suitably located, the Department has primarily considered the environmental attributes of the site and its immediate surrounds.

The Department requires a full and robust level of assessment of the key environmental impacts of the development be undertaken by the Applicant to determine whether the development is suitably located. As discussed in Section 6.2, the site contains and is surrounded by significant natural assets including EECs such as Coastal Saltmarsh, SEPP 14 wetlands and habitat for threatened species. The site also contains an Aboriginal site (shell midden and artefact scatter) that is registered on the AHIMS. The site is subject to regular tidal inundation from the Tilligerry Creek and during a flood event, the area may be hydrologically connected with the Hunter River and Fullerton Cove, in addition to the Port Stephens Estuary.

The Department notes the amendments made to the proposal as described in the amended DA reflects a smaller development footprint compared with the original proposal. However, the amended DA does not provide sufficient evidence, including a full and robust environmental assessment, to demonstrate the suitability of the site and compatibility of the development with its immediate environmentally sensitive surrounds. The Department's assessment has determined the Applicant has not adequately demonstrated the suitability of the site or demonstrated that any potential impacts can be mitigated and concludes the application has not satisfied the requirements of section 4.15(1)(c) of the EP&A Act.

6.4 Submissions made in accordance with the EP&A Act or the EP&A Regulation

Section 4.15(1)(d) of the EP&A Act requires the Minister to consider any submissions made in accordance with the EP&A Act and the EP&A Regulations. A total of 14 submissions were received on the original DA during the exhibition period, including six from agencies and eight from the public and special interest groups (see **Section 5.2**). Of the 14 submissions received, seven objected to the development.

As discussed in **Section 2.1**, the Department accepted an amended DA in April 2019 and an amended EIS was submitted in September 2019. The amended DA was made available on the Department's website but not publicly exhibited due to the insufficient information provided. While the submissions discussed in **Section 5.2** relate to the original DA, it is considered that the matters raised remain applicable to the amended DA.

The submissions received from agencies primarily raised concerns with the deficiencies in the flooding assessment, stormwater, biodiversity impacts, offsets and the sites environmentally sensitive surroundings, traffic, access and parking, including access for fire vehicles and disturbance and management of acid sulfate soils.

The submissions received from special interest groups and the public reiterated the concerns of agencies and questioned the permissibility of the development. Submissions also noted the development to be of an unacceptable scale that will result in visual impacts and expressed concern regarding the extent of earthworks proposed, operational noise and the economic justification for the development.

The Department considered the submissions received during the exhibition period and notes that insufficient information has been provided with the amended DA in response to the concerns raised. It is the Department's position that the concerns remain outstanding.

6.5 Public Interest

The Department has considered the issue of public interest in relation to the proposal. The amended DA states the proposal represents a positive development outcome for the site and surrounding area and is an appropriate and suitable land use because, the development:

- has been designed to have a lighter environmental footprint compared to the original DA
- has the potential to generate almost \$84 million in direct and indirect gross value added and up to 191 construction jobs and 91 operational jobs, particularly within an 'eco-tourism' market not otherwise readily catered for by existing tourism establishments in the Lower Hunter region
- has the potential to significantly contribute to regional economic activity, particularly in construction, accommodation, events and food and retail trade.

The Department acknowledges the development has the potential to provide a number of public benefits to the broader community as described by the Applicant. The Department agrees it is in the broader public interest to enhance regional tourism in the Lower Hunter Region. The Department also notes the social benefits of the development for the broader community.

However, the Applicant has been unable to provide sufficient evidence to demonstrate the development would not result in serious or irreversible environmental impacts, or that such impacts could be effectively avoided or mitigated. As discussed previously, the amended DA does not contain a full and robust assessment of environmental impacts to adequately demonstrate the potential impacts of the development can be effectively mitigated.

The Department has considered the issue of the public interest very closely. The Department does not consider the public benefit of a tourist resort would sufficiently outweigh the potentially serious environmental impacts the development could have on the significant natural assets of the site and surrounds in the short, medium and long-term. Consequently, the Department does not consider the proposed development is in the public interest.



7. Evaluation

The Department's assessment of the application has fully considered all relevant matters under section 4.15 of the EP&A Act, the objects of the EP&A Act and the principles of ecologically sustainable development. The Department has considered the application on its merits, taking into consideration the strategic plans that guide development in the Anna Bay area and the environmental planning instruments that apply specifically to the development.

The Department's assessment has involved considerable consultation with the Applicant and the government agencies that raised significant concerns about the proposal, including evaluation of both the original DA and amended DA. The Department has reviewed and evaluated the amended DA and, since 2015, has worked in good faith with the Applicant to identify concerns with the proposal's environmental impacts and provide it with the opportunity to amend the DA. However, despite the amendments to the application, the Department remains dissatisfied with the Applicant's assessment of the environmental impacts of the proposal.

The site contains and is located close to highly sensitive environmental features including SEPP 14 wetlands, EECs and habitats for various threatened species. The site also borders conservation areas including the Tilligerry Nature Reserve and is regularly inundated by saltwater tides from Tilligerry Creek, which is located north of the site.

The site is also subject to a 1 in 100-year flood event and velocities and depths predicted in the flood study undertaken for the original DA, show a large area of the site would be considered either high hazard floodway or high hazard flood storage. Additionally, the site has a high likelihood of ASS and potential ASS (PASS) due to the low-lying nature of the site and proximity to the wetlands.

The Department's assessment has concluded:

- the proposal cannot be characterised as an eco-tourist facility and on the basis that the development is properly characterised as hotel or motel accommodation, it would be prohibited in an RU2 zone
- notwithstanding the above, were the development considered an eco tourist facility the matters raised in clause 5.13(3) of the Port Stephens LEP have not been satisfied
- the Applicant has not demonstrated the potential environmental impacts of the development would be acceptable and adequately mitigated
- there remain unresolved issues relating to flooding, stormwater, biodiversity, disturbance of potential acid sulfate soils, visual amenity, traffic and access to the development that the Applicant has been unable to satisfactorily address
- the potential water quality impacts on SEPP 14 wetlands present an unacceptable risk
- given the outstanding issues above, the location of the proposal within an environmentally sensitive area is not considered suitable
- the development is not in the public interest as the public benefit of the proposed development does not outweigh the potential unacceptable impacts the proposed development may have on the surrounding environment now and into the future.

It is considered that these concerns and impacts cannot be appropriately dealt with by conditions of consent. On balance, the Department concludes that the amended DA is not consistent with the objects of the EP&A Act and is not in the public interest and should be refused.



8. Recommendation

For the purpose of section 4.38 of the *Environmental Planning and Assessment Act 1979*, it is recommended that the Executive Director, Regions, Industry and Key Sites, as delegate of the Minister for Planning and Public Spaces:

- **considers** the findings and recommendations of this report
- **accepts and adopts** all of the findings and recommendations in this report as the reasons for making the decision to refuse consent to the application
- **agrees** with the key reasons for refusal listed in the notice of decision
- **refuses consent** for the application in respect of SSD 5916; and
- **signs** the attached instrument of refusal (see **Appendix H**).

Prepared by:
Pamela Morales and William Hodgkinson
Acting Principal Planners
Industry Assessments

Recommended by:

Joanna Bakopanos
Team Leader
Industry Assessments

Recommended by:

Chris Ritchie
Director
Industry Assessments



9. *Determination*

The recommendation is **adopted by:**

Sargeant

Anthea Sargeant

Executive Director

Regions, Industry and Key Sites



Appendices

Appendix A – List of Documents

Appendix B – Considerations under Section 4.15

Appendix C – Consideration of Environmental Planning Instruments

Appendix D – Instrument of Refusal

Appendix A List of Documents

The Department has relied upon the following key documents during its assessment of the SSD application:

Amended Environmental Impact Statement

- Amended Preliminary Environmental Impact Assessment (SSD 13_5916), prepared by RPS dated September 2019 (see <https://www.planningportal.nsw.gov.au/major-projects/project/12256>)

Submissions

- see <https://www.planningportal.nsw.gov.au/major-projects/project/12256>)

Environmental Impact Statement

- The Bay Resort Environmental Impact Statement (SSD 13_5916) Anna Bay, New South Wales see <https://www.planningportal.nsw.gov.au/major-projects/project/12256>)

Appendix B Considerations under Section 4.15

Section 4.15 of the EP&A Act requires that the consent authority, when determining a development application, must take into consideration the matters contained in **Table 5**.

Table 5 | Matters for consideration under section 4.15

Matter	Consideration
a) the provisions of: <ul style="list-style-type: none"> i) any environmental planning instrument, and ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and iii) any development control plan, and (iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), that apply to the land to which the development application relates,	<ul style="list-style-type: none"> • A detailed consideration of the provisions of all environmental planning instruments is provided in Section 4 and 6 of this report. • The Applicant has not entered into any planning agreement under section 7.4 of the EP&A Act. • The Department has undertaken its assessment of the amended DA in accordance with all relevant matters as prescribed by the EP&A Regulation, the findings of which are contained within this report.
b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,	<ul style="list-style-type: none"> • The Department has considered the likely impacts of the amended DA in detail in Section 6 of this report.
c) the suitability of the site for the development,	<ul style="list-style-type: none"> • The Department has considered the suitability of the site for the development in detail in Section 6 of this report.
d) any submissions made in accordance with this Act or the regulations,	<ul style="list-style-type: none"> • All matters raised in submissions have been summarised in Section 5 of the report and given due consideration as part of the assessment of the amended DA in Section 6 of this report.
e) the public interest.	<ul style="list-style-type: none"> • The Department has considered the public interest in detail in Section 6 of this report.

Appendix C Consideration of Environmental Planning Instruments

State Environmental Planning Policy (State and Regional Development) 2011

The SRD SEPP identifies certain classes of development as SSD. In particular, the construction and operation of a tourist facility with a capital investment value over \$10 million located in an environmentally sensitive area of State significance and within a sensitive coastal location, meets the criteria of clause 13(2)(b) of Schedule 1 of the SRD SEPP. Consequently, the development is classified as State significant development.

State Environmental Planning Policy (Infrastructure) 2007 (ISEPP)

The ISEPP aims to facilitate the effective delivery of infrastructure across the State and lists the types of development defined as traffic generating development.

The development constitutes traffic generating development in accordance with the ISEPP as it would generate more than 50 motor vehicle movements per hour as per Schedule 3 of the ISEPP. Consequently, the development was referred to the former Roads and Maritime Services (now Transport for NSW (TfNSW)) for comment and consideration of accessibility and traffic impacts.

TfNSW raised a number of matters to be addressed within an updated traffic impact assessment prior to determination of the application. These included a requirement for a deceleration lane on Nelson Bay Road, potential upgrades to the existing right turn bay and potential relocation of the existing u-turn bay. These matters are unresolved and therefore the Applicant has not satisfied the requirements of the ISEPP.

State Environmental Planning Policy No. 14 – Coastal Wetlands (SEPP 14)

SEPP 14 aims to ensure that the coastal wetlands are preserved and protected in the environmental and economic interests of the State. The Minister must consider the matters for consideration under clause 7 of SEPP 14 during assessment of a development. The matters for consideration are addressed in **Table 6** below.

Table 6 | Matters for consideration under clause 7 of SEPP 14

Matter	Consideration
<p>a) the environmental effects of the proposed development, including the effect of the proposed development on,</p> <p>i) the growth of native plant communities,</p> <p>ii) the survival of native wildlife populations,</p> <p>iii) the provision and quality of habitats for both indigenous and migratory species,</p> <p>iv) the surface and groundwater characteristics of the site on which the development is proposed to be carried out and of the surrounding area, including salinity and water quality,</p>	<ul style="list-style-type: none">The amended EIS is not supported by a revised biodiversity assessment report (BAR), revised flood study or architectural drawings demonstrating the effect of the development on native plant communities, native wildlife populations, the provision and quality of habitats or water quality. On this basis, the Department considers the amended DA has not satisfied the requirements of Clause 7(a).

b) whether adequate safeguards and rehabilitation measures have been, or will be, made to protect the environment,	<ul style="list-style-type: none"> The amended EIS is not supported technical studies demonstrating whether adequate safeguards and rehabilitation measures have been or will be made to protect the environment. On this basis, the Department considers the amended DA has not satisfied the requirements of Clause 7(b).
c) whether carrying out the development would be consistent with the aim of this policy,	<ul style="list-style-type: none"> The aim of SEPP 14 is to ensure that coastal wetlands are preserved and protected in the environmental and economic interests of the state. The amended EIS is not supported by technical studies demonstrating the development would protect coastal wetlands. On this basis, the Department considers the amended DA has not satisfied the requirements of Clause 7(c).
d) the objectives and major goals of the "National Conservation Strategy for Australia" (as set forth in the second edition of a paper prepared by the Commonwealth Department of Home Affairs and Environment for comment at the National Conference on Conservation held in June, 1983, and published in 1984 by the Australian Government Publishing Service) in so far as they relate to wetlands and the conservation of "living resources" generally, copies of which are deposited in the office of the Department,	<ul style="list-style-type: none"> The amended EIS is not supported by technical studies demonstrating the development would conserve coastal wetlands and living resources. On this basis, the Department considers the amended DA has not satisfied the requirements of Clause 7(d).
e) whether consideration has been given to establish whether any feasible alternatives exist to the carrying out of the proposed development (either on other land or by other methods) and if so, the reasons given for choosing the proposed development,	<ul style="list-style-type: none"> The amended EIS notes that the amended layout has a lesser footprint which will reduce the overall potential environmental impacts. The Department acknowledges that this may be the case, however as the amended EIS has not been supported by technical studies, the Department considers the amended DA has not satisfied the requirements of Clause 7(e).
f) any wetlands surrounding the land to which the development application relates and appropriateness of imposing conditions requiring the carrying out of works to preserve or enhance the value of those surrounding wetlands.	<ul style="list-style-type: none"> The Department recommends that the amended DA be refused and therefore no conditions of consent are to be imposed.

State Environmental Planning Policy No. 44 – Koala Habitat Protection (SEPP 44)

SEPP 44 aims to encourage the proper conservation and management of areas of natural vegetation that provide habitat for koalas, to ensure a permanent free-living population over their present range and reverse the current trend of koala population decline. The Applicant's amended EIS notes that no preferred koala feed trees occur within the proposed development footprint but do occur approximately 500m north, with four koala scats recorded during surveys undertaken in preparation of the original EIS. The amended EIS concluded that the identified habitat will be retained and the amended DA will not affect the life cycle of the koala.

While the proposed buffer between the development footprint and the closest koala feed trees may be sufficient to protect the local koala population, the amended EIS was not supported by an updated biodiversity assessment report. The Department therefore considers that insufficient information has been provided to demonstrate that the amended DA satisfies the requirements of SEPP 44.

State Environmental Planning Policy No. 71 – Coastal Protection (SEPP 71)

SEPP 71 aims to protect and manage the NSW coast through improving public access, protecting Aboriginal cultural heritage and protecting visual amenity and coastal habitats. The Minister must consider the matters for consideration under clause 8 of SEPP 71. The matters for consideration are addressed in **Table 7** below.

Table 7 | Matters for consideration under clause 8 of SEPP 71

Matter	Consideration
a) the aims of this Policy set out in clause 2,	<ul style="list-style-type: none">• The amended EIS states that accommodation would be provided as cabins on stilts with access via elevated boardwalks to minimise impact on the natural environment with a large portion of the vegetation on-site to be retained and rehabilitated to maintain the rural landscape character of the land.• However, the amended EIS is not supported by technical studies or detailed architectural drawings to demonstrate impacts associated with the development would be effectively managed. On this basis, the Department considers that the Applicant has not demonstrated a consistency with the aims of SEPP 71 and there has not satisfied the requirement of Clause 8(a).
b) existing public access to and along the coastal foreshore for pedestrians or persons with a disability should be retained and, where possible, public access to and along the coastal foreshore for pedestrians or persons with a disability should be improved,	<ul style="list-style-type: none">• The amended DA would not impact public access along the coastal foreshore.

c) opportunities to provide new public access to and along the coastal foreshore for pedestrians or persons with a disability,	<ul style="list-style-type: none"> The location of the site does not provide opportunities for new public access to or along the coastal foreshore.
d) the suitability of development given its type, location and design and its relationship with the surrounding area,	<ul style="list-style-type: none"> The Department acknowledges that an eco-tourist facility may be appropriate for the site and that the Applicant has attempted to revise the design to reduce the environmental impacts of the development. However, the amended EIS is not supported by technical studies demonstrating the suitability of the site for the development. On this basis, the Department considers the amended DA has not satisfied the requirements of Clause 8(d).
e) any detrimental impact that development may have on the amenity of the coastal foreshore, including any significant overshadowing of the coastal foreshore and any significant loss of views from a public place to the coastal foreshore,	<ul style="list-style-type: none"> The amended EIS is not supported by technical studies demonstrating the impacts of the development on the amenity of the coastal foreshore. On this basis, the Department considers the amended DA has not satisfied the requirements of Clause 7(e).
f) the scenic qualities of the New South Wales coast, and means to protect and improve these qualities,	<ul style="list-style-type: none"> The amended EIS is not supported by technical studies or detailed architectural plans demonstrating the development will not have a detrimental impact on the scenic qualities of the coastal foreshore. On this basis, the Department considers the amended DA has not satisfied the requirements of Clause 7(f).
g) measures to conserve animals (within the meaning of the <i>Threatened Species Conservation Act 1995</i>) and plants (within the meaning of that Act), and their habitats,	<ul style="list-style-type: none"> The amended EIS is not supported by technical studies demonstrating that suitable measures will be undertaken to conserve plants, animals and their habitats. On this basis, the Department considers the amended DA has not satisfied the requirements of Clause 7(g).
h) measures to conserve fish (within the meaning of Part 7A of the <i>Fisheries Management Act 1994</i>) and marine vegetation (within the meaning of that Part), and their habitats	<ul style="list-style-type: none"> The amended EIS is not supported by technical studies demonstrating that suitable measures will be undertaken to conserve fish, marine vegetation and their habitats. On this basis, the Department considers the amended DA has not satisfied the requirements of Clause 7(g).

i) existing wildlife corridors and the impact of development on these corridors,	<ul style="list-style-type: none"> The amended EIS is not supported by technical studies demonstrating the impacts of the development on existing wildlife corridors. On this basis, the Department considers the amended DA has not satisfied the requirements of Clause 7(i).
j) the likely impact of coastal processes and coastal hazards on development and any likely impacts of development on coastal processes and coastal hazards,	<ul style="list-style-type: none"> The amended EIS is not supported by technical studies demonstrating the impacts of coastal hazards on the development and any likely impacts of the development on coastal processes and coastal hazards. On this basis, the Department considers the amended DA has not satisfied the requirements of Clause 7(j).
k) measures to reduce the potential for conflict between land-based and water-based coastal activities,	<ul style="list-style-type: none"> The Department considers that due to the location of the site, approximately 1.8 kilometres from the coastal foreshore, the development is unlikely to result in conflicts with water based coastal activities.
l) measures to protect the cultural places, values, customs, beliefs and traditional knowledge of Aboriginals,	<ul style="list-style-type: none"> The amended EIS is not supported by technical studies demonstrating the measures to protect the cultural places, values, customs, beliefs and traditional knowledge of aboriginals. On this basis, the Department considers the amended DA has not satisfied the requirements of Clause 7(l).
m) likely impacts of development on the water quality of coastal waterbodies,	<ul style="list-style-type: none"> The amended EIS is not supported by technical studies demonstrating the impacts of the development on the water quality of coastal waterbodies. On this basis, the Department considers the amended DA has not satisfied the requirements of Clause 7(m).
n) the conservation and preservation of items of heritage, archaeological or historic significance,	<ul style="list-style-type: none"> The amended EIS is not supported by technical studies demonstrating measures to conserve and preserve items of heritage, archaeological or historic significance. On this basis, the Department considers the amended DA has not satisfied the requirements of Clause 7(n).

<p>o) only in cases in which a council prepares a draft local environmental plan that applies to land to which this Policy applies, the means to encourage compact towns and cities,</p>	<ul style="list-style-type: none"> • Not applicable.
<p>p) only in cases in which a development application in relation to proposed development is determined:</p> <p>(i) the cumulative impacts of the proposed development on the environment, and</p> <p>(ii) measures to ensure that water and energy usage by the proposed development is efficient.</p>	<ul style="list-style-type: none"> • The amended EIS is not supported by technical studies demonstrating the cumulative impacts of the development on the environment while limited information is provided regarding the measures to ensure that water and energy usage is efficient. On this basis, the Department considers the amended DA has not satisfied the requirements of Clause 7(p).

Port Stephens Local Environmental Plan 2013 (Port Stephens LEP)

The Port Stephens LEP aims to provide for a diverse and compatible mix of land uses to deliver high quality development and urban design outcomes. The Port Stephens LEP also aims to achieve intergenerational equity by managing environmental, social and economic goals in a sustainable and accountable manner and to protect and enhance the natural environmental assets of Port Stephens.

The development is located within the RU2 – Rural Landscape zone where ‘eco-tourist facilities’ are permitted with consent. The objectives of the RU2 zone include encouraging sustainable primary industry production, maintaining the rural landscape character of the land and providing for a range of compatible land uses. The Department acknowledges that the development may be able to maintain a rural landscape character and be a compatible land use, however insufficient information has been provided to demonstrate this.

The Department has consulted with Port Stephens Council on the original EIS and has considered all relevant provisions of the Port Stephens LEP and those matters raised by Council in its assessment of the development (see **Section 6** of this report). The Department concludes that the Applicant has not demonstrated that the proposed development is consistent with the Port Stephens LEP, specifically the Applicant has not demonstrated that the development is characterised as an eco-tourist facility or satisfied the matters under Clause 5.13 – eco tourist facilities.

Appendix D Instrument of Refusal

The recommended conditions of consent for SSD 5916 can be found on the Department's website at:

<https://www.planningportal.nsw.gov.au/major-projects/project/12256>)