

## **JOINT REGIONAL PLANNING PANEL (Hunter & Central Coast)**

<b>JRPP No</b>	2012HCC014
<b>DA Number</b>	40918/2011
<b>Local Government Area</b>	Gosford City Council
<b>Proposed Development</b>	Resource Recovery Facility
<b>Street Address</b>	168 Somersby Falls Road SOMERSBY
<b>Applicant/Owner</b>	R J Davis & S M Davis
<b>Number of Submissions</b>	18
<b>Recommendation</b>	Refusal
<b>Report by</b>	Gosford City Council Staff

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*The following item is defined as a planning matter pursuant to the Local Government Act, 1993 & Environmental Planning & Assessment Act, 1979.*

### **EXECUTIVE SUMMARY**

#### **Reason for Referral to Joint Regional Planning Panel (JRPP)**

Designated and Integrated Development with EPA

#### **Assessing Officer**

R A Eyre

#### **Reviewing By**

Independent Development & Environment Panel (IDEP)  
Director Environment and Planning  
General Manager

#### **Date Application Received**

26/07/2011

#### **Proposal**

Resource Recovery Facility (JRPP)

#### **Zone**

4(a1) Industrial (General)-LEP22

#### **Area**

11.097ha

### **Permissible Development**

Development permissible on the land zoned 4(a1) Industrial (General)-LEP22

### **Section 94 Contributions**

The land zoned 4(a1) Industrial (General)-LEP22 is subject to legal agreement on payment of Contribution.

### **Gosford 2025 – Community Strategic Plan**

Although not a statutory Plan, the proposal is consistent with the City Vision.

### **Public Submissions**

Eighteen (18)

### **Pre-DA Meeting**

Not Held

### **Political Donations**

None declared.

### **Relevant Statutory Provisions**

- 1 Environmental Planning & Assessment Act, 1979 – Section 79C and EPA Regulations (Schedule 3)
- 2 Local Government Act 1993 – Section 89
- 3 LEP 22 (as amended by LEP 457)
- 4 Draft Gosford LEP 2009
- 5 Threatened Species Conservation Act 1995
- 6 SEPP 55 – Remediation of Land
- 7 SEPP (Infrastructure) 2007
- 8 SEPP 33 Hazardous and Offences Industry
- 9 Sydney REP 20 Hawkesbury/Nepean River
- 10 Rural Fires Act 1997
- 11 DCP 89 – Scenic Quality
- 12 DCP 128 – Public Notification of Development Applications
- 13 DCP 106 – Controls for Site Waste Management
- 14 DCP 111 – Car Parking
- 15 DCP 159 – Character
- 16 DCP 165 – Water Cycle Management
- 17 Somersby Plan of Management
- 18 Protection of Environment Operations Act 1997
- 19 Land and Environment Court Act 1979

### **Key Issues**

- 1 Background
- 2 The Site
- 3 The Locality
- 4 Zoning
- 5 Gosford LEP 22
- 6 Draft Gosford LEP 2009
- 7 Climate change and Sea Level Rise
- 8 S94 Contributions
- 9 Abuse of Process
- 10 Aboriginal Heritage
- 11 Environment Protection Authority
- 12 Office of Environment and Heritage

- 13 Environmental Assessment
- 14 Engineering Assessment
- 15 Roads and Maritime services
- 16 Public Submissions

### **Recommendation**

Refusal

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## REPORT

### Background

A development application for a building recycling facility was originally lodged on the **30 June 2005** (DA 28023/2005). The application was **withdrawn** due to insufficient information being lodged with the development application, including a Species Impact Statement (SIS). A second application was lodged on the **13 September 2005** for a waste recycling processing plant which was also **withdrawn** for reasons unknown (DA28579/2005).

A third development application was lodged on the **2 December 2005** for a waste recycling facility (DA29246/2005). A Section 5A assessment was undertaken and concluded that there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats. As such a SIS was prepared in accordance with Section 111 of the *Threatened Species Conservation Act 1995*. The Director General **refused to** issue concurrence and Council refused the application on 24 July 2006 for the following reasons:

- 1 *The Environmental Impact Statement and Species Impact Statement are not in accordance with the Director General's requirements, particularly with regard to Flora and Fauna Assessment.*
- 2 *The proposal is prohibited under the draft LEP for Somersby and does not comply with the Somersby Plan of Management.*
- 3 *The proposal is contrary to the objectives for the existing and proposed industrial zone and will detract from the character of the area due to visual impact, dust and noise generation.*
- 4 *The proposal may impact existing and future industrial development and result in the loss of employment and have an economic impact on the Somersby Industrial Estate.*
- 5 *The application does not provide adequate engineering and traffic information, including;*
  - a *The survey has not located the road reserve boundaries, edges of bitumen, table drains, utilities/services, trees, bend in the road, sight obstructions, etc.*
  - b *The Traffic Report has not included details on the sight distance at the proposed access to the development.*
  - c *Driveway longitudinal section has not been extended to the centreline of Somersby Falls Road.*
  - d *The application has not addressed compliance with AS2890.1:2004 and 2890.2-2002.*
- 6 *The public objections to the proposal and likely impact on adjoining properties due to increased traffic, dust and noise.*

An appeal was lodged with the Land and Environment Court. The appeal was dismissed by the Land and Environment Court on **4 December 2007**, in essence, on the basis of:

- *The lack of adequate ecological evidence on the impact of the proposal on two threatened flora and fauna species, namely the *Hibbertia procumbens* and the Eastern Pygmy Possum; and*

- The impact of intrusion by the proposed facility into the management zones that were identified in the Plan of Management for Somersby Industrial Park.

A letter from Council **dated 17 September 2010** advised the applicant that a SIS will need to accompany a future development application if any proposal intrudes into the management zones delineated within the Somersby Industrial Park Plan of Management (Figure One).

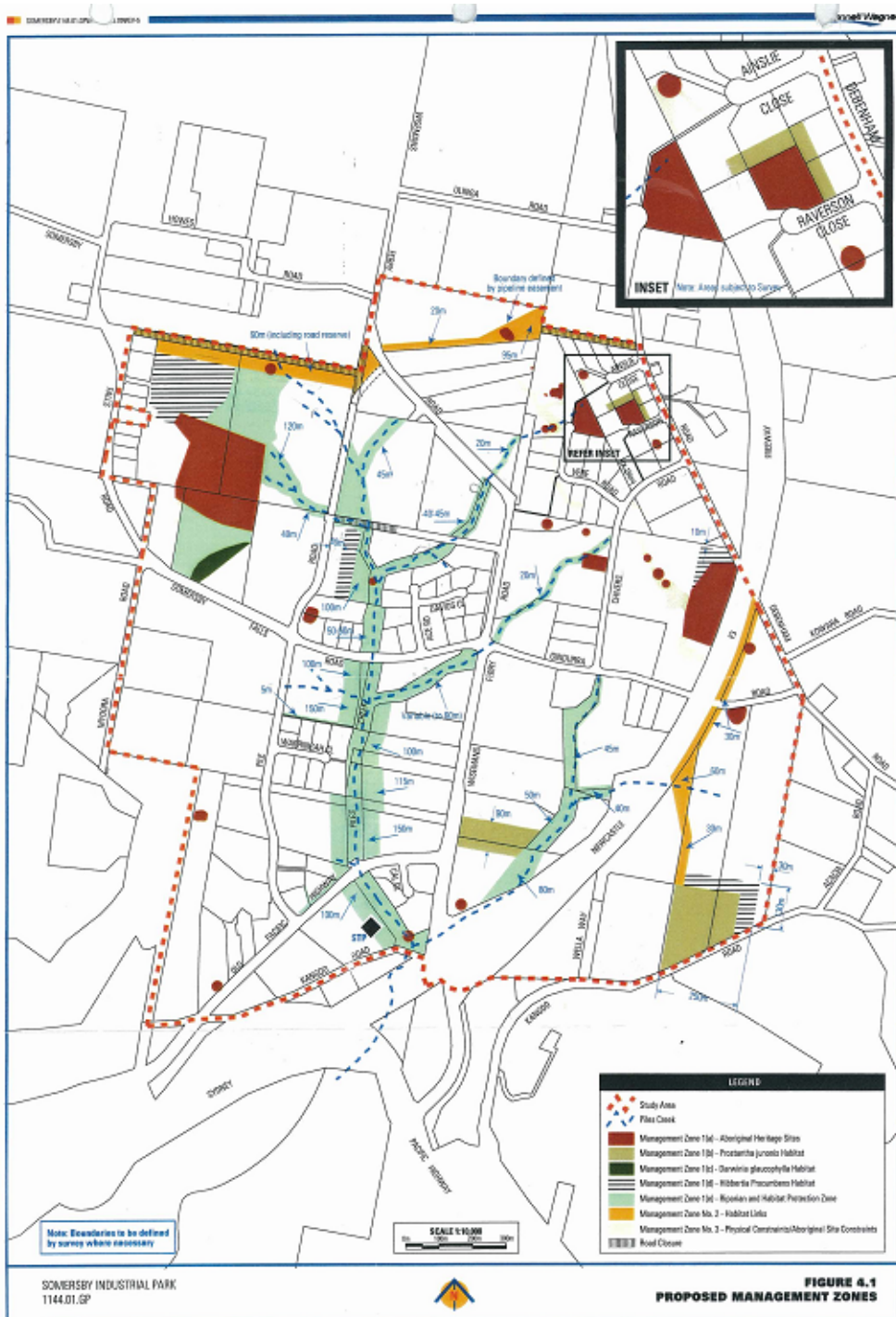


Figure One – Somersby Industrial Park Management Zones (Source: Draft management plan (Version 5, June 2005))

The current (fourth) application was lodged on the **26 July 2011** for a resource recovery facility (DA40918/2011). The development constitutes Designated/Integrated Development under the *Environmental Planning and Assessment Regulation 2000*. The application was deemed invalid by Council on the grounds that a SIS was not submitted with the application. On the **22 August 2011**, the applicant then lodged a Section 82B Review to the invalid application.

On **31 August 2011** - the Section 82B Review was considered by Council's Independent Development and Environment Panel (IDEP). IDEP determined the DA invalid due to no SIS. In summary this was based upon the fact that under Clause 64 of the *Environmental Planning and Assessment Regulation 2000* the Director General of Department of Environment and Conservation (Now known as the NSW Office of Environment and Heritage) has the power to issue an assumed concurrence to Council for development within the Somersby Industrial Park (SIP).

A letter from the department dated 11 November 2005 permits Council to assume concurrence for permissible development on lands outside the management zones identified in Figure 4.1 of the draft management plan (Version 5, June 2005). This eliminates the need for the seven part test under Section 5A of the *Environmental Planning and assessment Act, 1979* of these lands. However, the Department has advised that any development proposal within these management areas is likely to result in a significant impact and therefore **requires the preparation of a SIS** and the concurrence of the Director General prior to any consent issued by Council.

The Department's letter conveying the assumed concurrence contains the following warning:

***It is highly unlikely that concurrence would be granted (to development within the management zones) given that the draft management plan has identified the minimum areas necessary to maintain viable populations of threatened species at the Somersby Industrial Park.***

Council's Environmental Assessment officer noted within the 2008 flora and fauna assessment that accompanied the Development Application that the development will **require the removal of the best quality habitat on the site**. While amelioration measures are recommended to compensate for the loss of habitat, **no positive offsets are proposed**. The development proposes works that will intrude into the Management Zone 1(d) *Hibbertia Procumbens* Habitat (Figure Two). The proposal is inconsistent with the conditions specified in the assumed concurrence. The proposed development in the view of Council's Environmental Officer is likely to have a significant impact upon threatened species therefore requiring the preparation of an SIS.

Prior to the report being presented to IDEP, Council's Manager of Development undertook a comprehensive peer review of the report and agreed that a SIS was required.





Figure Two– Subject Site: yellow dotted line delineates the development area and the grey hatching delineates the *Hibbertia Procumbens* Habitat Management Zone (Source: Whelan Insites (June 20011) Flora and Fauna Assessment Report)

On the **27 March 2012** through the Class 4 Appeal in the Land and Environment Court, the Court determined that an SIS was not required and directed the consent authority to consider the Development application as being lodged on **26 July 2011**.

In brief the Court ruled that all the supporting documentation associated with the Plan of Management as summarised above was inadmissible in the Class 4 proceedings. However, the Court acknowledged that in any future Class 1 proceedings the Plan of Management would be admissible and a factor that must be taken into consideration.

On **12 April 2012** the Development Application along with the accompanying EIS was returned to Council for assessment. As the development application is classified as designated development the application was placed on public exhibition from **25 April 2012** to **25 May 2012**. The application is also Integrated Development as a license from the Environment Protection Authority (EPA) is required. The following Government Departments/Organizations have been consulted:

- Office of Environment and Heritage (OEH)
- Department of Planning and Infrastructure (DOPI)
- Roads and Maritime services (RMS)
- Environment Protection Authority (EPA)
- Aboriginal Land Councils

### The site

The site is located in the north-western part of the Somersby Industrial Estate. The street address is 168 Somersby Falls Road Somersby. The site has an area of 11.097 hectares and is described as Lot 9 DP787857. The site is vacant and contains native vegetation. The eastern boundary is 417.4m. The southern boundary adjoining an unformed section of Somersby Falls Road and has a length of 251.3m. The western boundary adjoins the rear of

Lots 1-8 DP787857 and has a frontage of 30 metres to Somersby Falls Road between Lots 6 and 7 DP787857. Between these two properties is the proposed access which avoids the construction of the unformed road to the south of the land.

Under the Somersby Industrial Park Plan of Management the site has been identified as containing

- Management Zone 1(a) Aboriginal Heritage Sites
- Management Zone 1(d) *Hibbertia procumbens* habitat
- Management Zone 1(e) Riparian and Habitat Protection Zone
- Management Zone 2 Habitat Links

The reason for the number of management zones on the subject property is because under the Plan of Management it has been identified as containing significant habitat for *Hibbertia procumbens*, Heath Monitor, Speckled Warbler and the Brown tree creeper. In addition to the site being significant habitat for these four (4) threatened species it is also prime habitat for the Eastern Pygmy Possum, Eastern False Pipistrelle, East Coast Freetail bat, and Southern Myotis.

Through LEP No 457 all the habitat areas have been identified as 'ecologically significant and Aboriginal Lands'.

The site is classified as "Bush Fire Prone" land. The site varies in elevation generally from about RL220m AHD in the south-eastern corner to about RL240m AHD on the northern side.

### **The locality**

To the north, the land is zoned 1(a) Rural (Agriculture) under IDO No 122 - Gosford and generally contains dwelling-houses and rural activities such as agriculture and chicken sheds. To the east, the land is zoned 4(a1) General Industrial. On this adjacent parcel Council approved the Central Coast recycling facility within an enclosed building and the balance of the 'ecologically significant and Aboriginal land' has been donated at no cost to the Gosford Environment Protection Trust.

To the south and south-east, the land is partly zoned 1(a) Rural (Agriculture) and partly zoned 4(a1) General Industrial. The land varies from containing dwelling-houses to vacant land and industrial buildings.

On the western boundary, the site adjoins the rear of a number of small industrial zoned lots which contain a variety of industrial uses. This includes warehousing, manufacturing, assembly and a manager's residence. Further to the west, on the other side of Somersby Falls Road, the land is zoned 1(a) Rural (Agriculture) and contains dwelling-houses and rural activities such as agriculture.

Somersby Falls Road on the western side is a bitumen-sealed road. The nearest dwelling-houses to the proposal are about 40 metres to the south, about 120 metres from the northern boundary and about 125 metres to the west. About 1km to the south of the site is the Australian Reptile Park. Adjoining the Reptile Park is the former "Old Sydney Town".

### **Zoning**

The site is zoned 4(a1) Industrial (General) – LEP 22, as amended by Gosford LEP 457. Industry is a use permissible with consent.

### **The Proposal**

The proposal is the establishment of a Resource (Waste) Recovery Facility generally located in the south-western part of the site. The Facility is proposed to recycle construction and demolition waste for use in the construction and building industry. The development covers an area of 4.05ha.



Access to the proposal will be from Somersby Falls Road between Lots 6 and 7 DP 787857. The proposed development includes a facility to recover and process brick, concrete, sandstone, soil, sand, asphalt, timber and other building waste material (including metal) for re-use in the building and construction industry. Access to the site from Somersby Falls Road will be via a bitumen sealed driveway.

The development involves the construction of:

- a weighbridge to control access and materials to be received at the facility;
- a bitumen sealed truck parking and manoeuvring area;
- a bitumen sealed staff car parking area accommodating eight (8) cars;
- a raised bitumen sealed perimeter road around the facility works area;
- a 6m high pre-cast concrete acoustic wall around the facility works area, which is to incorporate a 4m wide dust roof and sprinkler dust suppression system; and
- a storm water drainage system that includes first flush/sediment basins, detention/infiltration basins and a rainwater tank;
- the placement of three (3) single storey Colorbond transportable buildings adjacent to the weighbridge to provide an office, a shed to be used to provide staff amenities and a toilet/shower facility;
- the installation of:
  - a crusher and screen; and
  - grates, sumps and a shaker rack to capture dirt and soil from the tyres of vehicles entering and leaving the site;
- the establishment of a facility works area for the processing of construction and demolition waste material, including an area accommodating the crushing and screening equipment and holding areas for received waste material, rejected waste material and processed material for re-use;
- on-site refuelling operations using a mobile tanker; and
- the landscaping around the perimeter of the facility.

The quantities of materials to be processed are to be:

<b>Materials</b>	<b>Process</b>	<b>Maximum Quantity</b>
Bricks and concrete	Crushing and screening	1,000 tonnes/day 50,000 tonnes/annum
Sandstone	Crushing and screening	3,000 tonnes/annum
Soils	Screening	5,000 tonnes/annum
Sand	Screening	5,000 tonnes/annum
Asphalt	Crushing and screening	6,000 tonnes/annum
Building Waste (including timber)	Crushing	5,000 tonnes/annum
Metals	Crushing	1,000 tonnes/annum

The quantity of materials to be processed will increase from between 10-15,000 tonnes/annum during the first year of operation to 75,000 tonnes/annum over a ten (10) year period.

Six (6) permanent staff are to be employed. Staff are to be employed as weighbridge operators, plant and equipment operators and office and administration staff. Staff may increase to 15 people when the facility is operating at maximum capacity.

Hours of operation are 7:00am to 6:00pm Mondays to Fridays and 8:00am to 4:00pm on Saturdays.

The proposal is to be developed in 2 Stages, with:

**Stage 1:**

- site establishment and cleaning of accessible areas;
- trimming and grading of the land to be used and the construction of the stormwater management system;
- construction of internal driveways and parking areas;
- connection and installation of water, sewerage and electricity services;
- construction of the weighbridge;
- establishment of the facility works area for processing equipment, including the crusher and screen and the holding areas; and
- commissioning of all plant and equipment.

**Stage 2:**

- the transportable buildings providing the management and staff facilities are to be replaced with a permanent building located adjacent to the western boundary of the site; and
- an on-site fuel storage facility is to be established.

The applicant advises that a separate application is to be submitted and approved prior to the establishment of these facilities in Stage 2. That is, this application is for Stage 1 only.

**Assessment**

This application has been assessed using the heads of consideration specified under Section 79C of the Environmental Planning & Assessment Act 1979, Council policies and adopted Management Plans. The assessment supports refusal of the application and has identified the following key issues which are elaborated upon for Council's information.

**Gosford LEP 22**

**a Objectives Of Zone**

There are no stated objectives for the 4(a1) zone.

It is considered that the proposal is inconsistent with the principles of Ecologically Sustainable Development, as specified within the Local Government Act 1993, due to the potential impacts on flora and fauna and incompatibility with adjoining and surrounding development.

**b Character**

There are no character statements for this locality.

However, existing industrial development is essentially manufacturing, assembly and warehousing in buildings.

Due to the exposed operations and potential noise and dust emissions, in this instance, the proposal does detract from the character of the immediate locality.

**(c) Clause 24(b) of Gosford LEP 22 states that the aim of this Clause is:**

"to protect ecologically significant land and land with Aboriginal heritage characteristics within the Industrial Park (as identified as Management Zones 1 and 2 in *Plan of Management Somersby Industrial Park (2005)*, as prepared for the Council),"

The current proposal will involve the removal of native vegetation from an area of 4.05 hectares, or 36.5% of the site. Plus it will result in the removal of approximately 1.4 hectares of land identified in Management Zone 1(d) *Hibbertia procumbens* habitat. The EIS justifies this intrusion on nine points ranging from; an opinion that parts of the site have been highly modified and degraded or modified by the 2005 bushfire, which appears to have caused significant environmental damage to the northern and eastern parts of the proposed development site; to an array of environmental management and impact amelioration measures to be undertaken to compensate for the loss of vegetation proposed.

A detailed examination of the environmental study submitted with the application has resulted in a series of questions. These questions extend from the fact that the Flora and Fauna study included within the EIS was undertaken in 2008 and there is no scientific explanation on the continued degradation of the site when adjacent areas which were affected by the same 2005 bushfire are undergoing extensive regeneration and are not showing signs of being highly modified.

(d) Clause 25 of Gosford LEP 22 states:

*"In determining a development application relating to land to which this Division applies, the consent authority must have regard to:*

- (a) Plan of Management Somersby Industrial Park (2005), as prepared for the Council,*
- and*
- (b) The aims of this Division (as referred to in clause 24)."*

(e) Clause 26 of Gosford LEP states:

*"In this clause, **hatched area** means any area shown hatched on the map marked "Gosford Local Environmental Plan No 457" deposited in the office of the Council, being an area identified on that map as being ecologically significant and Aboriginal heritage lands)."*

The proposal intrudes about 1.4 hectares into the Ecologically Significant and Aboriginal Heritage Lands identified hatched area on the map marked Gosford Local Environmental Plan No 457, being Management Zone 1(d) – *Hibbertia Procumbens* Habitat identified in the Plan of Management for Somersby Industrial Park. Concurrence is required from the Director General of the Office of Environment and Heritage (previously DECC) to intrude into the Management Zones. No concurrence has been given. The EIS prepared by Ludvik and Associates Pty Ltd (page 6) states that: *"The concurrence of the Department of Environment, Climate change and Water (DECC) is required for any intrusion of development into the Management Zones established under the PoM."*

### **Abuse of Process**

The current application is almost identical to DA29246/2005, Case No 10121 of 2007 which was dismissed by the Land and Environment Court on 4 December 2007. The only difference is the shape of the amenity building and the intrusion further into the Management Zone 1(d) identified in the Somersby PoM. As the current application is materially the same as the previous application determined by the Land and Environment Court it falls within the principal established in the Court of Appeal decision of *Russo v Kogarah Municipal Council (1999) NSW CA 303*.

In this case the Justice Stein found:

*"The current application, being more or less precisely the same application as the first and the second, both of which were appealed and dismissed by the court, is an abuse of process of the Land and Environment Court, and ought not be permitted to proceed."*

*... appeal be dismissed as an abuse of process of the Land and Environment Court"*

The findings of Justice Stein, supported by Justice Davis in the judgement states:

*"... it is an abuse of process for an applicant to bring repeated applications to a court, such as the Land and Environment Court, seeking to re-agitate issues which are as a matter of substance already been determined in prior decisions.*

*The application of this principle is not precluded by the making of some minor changes to a town planning application or by reliance upon an argument or arguments which could have been put, were not previously put. If there has been no significant change in circumstances, the new application ought not to be brought. Otherwise, the application will appear to be a collateral attack upon the prior decision or decisions of the Court".*

The third Judge in this matter Justice Meagher agreed within his fellow judges Stein and Davis.

When the applicant contacted Council on what should be addressed in the preparation of the current Development Application they were advised by Council in a letter dated **17 September 2010** that they needed to address the principal established in *Russo v Kogarah Municipal Council (1999) NSW CA 303*.

Reflecting upon this decision this means with the current application the consent authority has to determine whether or not there has been a **significant change in the circumstances**. One of the issues that has changed is the fact that the Land and Environment Court has determined that a SIS is not required. As no SIS is required to be submitted with the application this may be regarded as a change in circumstances. The previous class 1 appeal decided on the **4 December 2007**, for essentially the same application the court ruled in Council's favour based on two principles being:

- The lack of adequate ecological evidence on the impact of the proposal on two threatened flora and fauna species, namely the *Hibbertia procumbens* and the Eastern Pygmy Possum; and
- The impact of intrusion by the proposed facility into the management zones that were identified in the Somersby Industrial Park Plan of Management.

Considering the previous decision although it has been determined that no SIS is required the recent Class 4 appeal did not consider the impact of the intrusion into the management zones that were identified in the Somersby Industrial Park Plan of Management and the judge ruled the consideration of Somersby Industrial Park Plan of Management as inadmissible. However, he went on to state that the Somersby Industrial Park Plan of Management would be admissible in a Class 1 Appeal and must be taken into consideration at that point in time.

The following table illustrates the comparison of the previous DA refused by the Land and Environment Court and the current application.

Item	L&EC 10127 of 2007	DA40918/2011
Maximum quantity of materials to be processed	75,000 tonnes	75,000 tonnes
Hours of Operation	7:00am to 6:00pm Monday to Friday 8:00am to 4:00pm Saturdays	7:00am to 6:00pm Monday to Friday 8:00am to 4:00pm Saturdays
Average vehicle trips per day	130	130
Intrusion into Somersby Management Zones	1ha	1.4ha
Flora & Fauna Assessment	SIS	7 part Test

Site Plan	See Attachment 1	See Attachment 2
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In addition to the above, the EIS includes:

(a) Traffic Impact

The EIS includes the previous Traffic Assessment Reports dated November 2004 and July 2007 for the Land and Environment Court Proceedings 10121 of 2007.

A statement has been included from the Traffic Engineer that this application has minimal change to:

- the previous submitted layout;
- the potential traffic generations

(b) Air Quality

The EIS includes and relies on the previous Air Quality Assessment dated 28 April 2005 and Joint Expert Evidence submitted for the Land and Environment Court case which was dismissed.

The EIS includes a statement by the applicant's Air Quality expert that:

*"there would not be expected to have any significant change in impact from this change in boundary noting the sensitive receivers to potential dust impacts eg Dimension-Polyant Membranes are located adjacent to the western boundary of the Cescastle site. This assumes the site operations and location of plant and equipment within the site remain essentially the same as that in the original assessment."*

(c) Noise Impact

The Noise Impact Assessment is based on background noise levels taken in September 2004 and the joint report by Noise experts for the Land and Environment Court Case 10121 of 2007.

The joint report to the Court dated 15 November 2007 concluded that subject to conditions, including extension of the proposed acoustic wall, and removal of the secondary crusher, the proposal would comply with the NSW Industrial Noise Policy (INP). Also the traffic modelling would comply with the Environmental Criteria for Road Traffic Noise (ECRTN).

(d) Visual Impact

The stockpile storage area, and waste receival area will have 6m high pre-cast concrete wall erected around the southern, western, and northern sides with an outer perimeter road.

The erection of such a wall is not of a high quality visual appearance even though it would not be highly visual from a public road. This is what was proposed for the previous application.

(e) Surface and Groundwater Impacts

The applicant has submitted a Stormwater Management Plan for sediment control storage basin and stormwater re-use.

The previous joint experts report in Land and Environment Proceedings 10121 of 2007 agreed that stormwater controls were adequate.

Council's Development Engineer considers the proposed on-site stormwater detention and settling areas minimise the environmental impact of the proposed development to pre-development discharge.

**It is therefore concluded that:**

This application does not differ in any material respect from the application previously refused by the Land and Environment Court (10127 of 2007). (*Turier v Nipote Pty Ltd and Gosford City Council* (LGRA 48, 20)).

Therefore the current application is essentially and materially the same development, on the same site, using the same information previously used in Land and Environment Court Case No 10127 of 2007.

Therefore the current application is an abuse of the previous decision of the Land and Environment Court.

**Draft Gosford Local Environmental Plan 2009**

The application has been assessed under the provisions of Draft Gosford Local Environmental Plan 2009 in respect to zoning, development standards and special provisions. The assessment concluded the proposal is inconsistent with the Draft Plan.

The DLEP 2009 was exhibited between 10 February 2010 and 5 May 2010. Council adopted the DLEP 2009, as amended, at its meeting on 31 May 2011 and forwarded the DLEP 2009 to the Minister to make the Plan in September 2011.

The site is proposed to be zoned IN1 General Industrial under the DLEP 2009. The proposal is a “waste or resource management facility” as defined in DLEP 2009.

A waste or resource management facility means any of the following:

- (a) a resource recovery facility
- (b) a waste disposal facility
- (c) a waste or resource recovery facility
- (d) a building or place that is a combination of any of the things referred to in paragraphs (a)-(c)

A waste or resource management facility is a prohibited use under DLEP 2009 in the IN1 General Industrial zone.

The objectives of the IN1 General Industrial zone are:

- to provide a wide range of industrial and warehouse land uses;
- to encourage employment opportunities;
- to minimise any adverse effect of industry on other land uses;
- to support and protect industrial land for industrial purposes;
- to promote ecologically, socially and economically sustainable development;
- to ensure retail, commercial or service land uses on industrial zoned sites are of an ancillary nature and Council feels the land use is appropriate only in the industrial zone or the land use primarily serves the needs of persons employed in the industrial zone; and
- to ensure development is compatible with the desired future character of the areas covered in this zone.

Clause 7.13 of the amended GLEP 2009 states:

*“7.13 Development in the Somersby Industrial Park (local)*

*(1) The objectives of this clause are:*

- (a) to maximise the opportunity for industrial development in the Somersby Industrial Park so as to provide employment opportunities in the Gosford Local government Area, and*
- (b) to protect ecologically significant land and land with aboriginal heritage characteristics within the Industrial Park (as identified as Management Zones 1 and 2 in Plan of Management Somersby Industrial Park (2005), as prepared for the Council), and*



- (c) to ensure that the function and appearance of future subdivision or other development of the Industrial Park protects ecologically significant land and land with Aboriginal heritage characteristics within the Industrial Park, and*
- (d) to provide that subdivision of land occurs in a flexible manner to take account of ecologically significant land and land with Aboriginal heritage characteristics within the Industrial Park.*

*(2) In determining a development application relating to land to which this clause applies, the consent authority must have regard to:*

- (a) plan of Management Somersby Industrial Park (2005), as prepared for the Council, and*
- (b) the objectives of this clause referred to in subclause 1.*

Clause 1.8A of the draft GLEP 2009 includes a savings provision to the effect that if a development application has been made before the commencement of the plan and the application has not been finally determined before the commencement of the plan, the application must be determined as if the plan has been exhibited but had not commenced.

It is agreed that consent could be granted to the current application, even if the draft LEP 2009 was made, due to the Savings Clause. However, taking into consideration the impact of the proposal upon flora and fauna, the proposal should not be approved.

### **Climate change and sea level rise**

Climate change and sea level rise have been considered in the assessment of this application.

Climate change and sea level rise will be felt through:

- increases in intensity and frequency of storms, storm surges and coastal flooding;
- increased salinity of rivers, bays and coastal aquifers resulting from saline intrusion;
- increased coastal erosion;
- inundation of low-lying coastal communities and critical infrastructure;
- loss of important mangroves and other wetlands (the exact response will depend on the balance between sedimentation and sea level change); and
- impacts on marine ecosystems.

Internationally there is a lack of knowledge on the specifics of climate change and the likely impact it will have on the subject development. Government action may mitigate the impact of climate change and the question of sea-level rise may be able to be addressed through the construction of containment works or through Council's policies that may be developed over time.

In the absence of any detailed information at the present however, refusal of this application is not warranted.

### **Section 94 Contributions**

The land zoned 4(a1) Industrial (General)-LEP22 is not subject to contribution plan but is subject to a legal agreement on the payment of contributions for the upgrading of infrastructure.

### **Aboriginal Heritage**

The application was referred to Darkinjung Local Aboriginal Land Council (DLALC) and the following advice was received:

*"Darkinjung Local Aboriginal Lands Council has now read and reviews all the development application and supporting documents.*

*We note that the broader site contains sites of cultural significance. We also note that the area of proposed development is located outside Management Zone 1(a) – aboriginal*

*Heritage sites, as identified under the Plan of Management for the Somersby industrial Park.*

*As such, an individual Aboriginal Heritage Impact Statement or Archaeological Investigations is not required for lodgement of the development Application.*

*However, given the nature and proximity of the proposed works to the Management Zone 1(a) area, Council, in its assessment of the application, must be satisfied that the proponent has adequately addressed at least the following:*

- *Division 4 of LEP No 22; and*
- *Section 4.7.1 – Sub Zone 1(a) Aboriginal Heritage Sites of the Somersby Industrial Park Plan of Management.*

*The Darkinjung LAC would appreciate being kept informed on the progress of this application as it is assessed by Council.*

*Darkinjung LALC formally objects to the abovementioned development application as the proposed development is in close proximity to numerous Aboriginal sites. This development would also impact on surrounding cultural significant sites.”*

### **Environment Protection Authority**

The EPA advises:

*“Should the Proposal be approved, the Proponent will need to apply for an environment protection licence pursuant to Schedule 1 of the Protection of the Environment Operations Act 1997 (“POEO Act”). In relation to this Proposal, the Applicant may need to consider the scheduled activities of “Resource Recovery”, “Waste Processing - non-thermal treatment” and/or “Waste Storage”. The Proponent must apply for and receive an environment protection licence from the EPA prior to commencing any significant activity associated with the Proposal. Waste must not be received at the Site until the EPA has provided the Proponent with an environment protection licence which approves those activities.*

*The EPA also advises that should consent be granted, consistent with provisions under Part 9.4 of the POEO Act, any environment protection licence issued by EPA in relation to a waste facility will require the provision of a financial assurance, in the form of a bank guarantee, before a licence will be issued. The amount and form of the assurance would be determined by the EPA.*

*The EPA is aware the location of the Site is within encroachment management zones and may not be suitable due to direct and indirect impacts on threatened species and aboriginal cultural heritage. The EPA understands the Office of Environment and Heritage are reviewing the Proposal and the Site location in respect of these impacts. Please note the EPA has not included these impacts in its review.*

*EPA has reviewed the Proposal based on the information set out in the EIS, the EPA provides Conditions of Approval for Council's consideration (**Attachment A**) and a copy of general conditions for an Environment Protection Licence for resource recovery facilities (**Attachment B**).*

***The EPA has determined that all required information was not submitted as part of the EIS. The EPA requires the latest air quality assessment to be provided in order for the EPA to undertake a full assessment of the proposal.”***

### **Office of Environment and Heritage (OEH)**

The OEH advises:

*"OEH has reviewed the application and assessed that OEH is not an approval body for integrated development in this instance, as the proposal does not trigger any of the aforementioned 'integrated development' scenarios under the relevant sections of the NP&W Act. Given that the proposal is not 'integrated development' as defined under the EP&A Act for Aboriginal cultural heritage issues then OEH is not required to provide general terms of approval for the application and generally does not become involved with such applications. However, in this case there are a few issues that the proponent does not appear to have addressed in their DA, such as evidence of recent consultation with local Aboriginal communities in relation to this DA. Therefore, OEH provides some recommended conditions of approval for Aboriginal cultural heritage values with this letter for inclusion in any approval conditions for the development proposal. These are explained in more detail below.*

*OEH understands from Council that this is a Part 4 application pursuant to the EP&A Act which will be determined by the Hunter & Central Coast Joint Regional Planning Panel. OEH only has a statutory role in assessing a DA for threatened species issues if the consent authority determines that the development is likely to significantly affect a threatened species, population, or ecological community, or its habitat. The Hunter & Central Coast Joint Regional Planning panel in this instance is the consent authority, however, they will be relying on the assessment of this development by Gosford City Council. If Council determines a significant impact is likely, then pursuant to Section 79B of the EP&A Act, Council must seek the concurrence of the Minister administering the Threatened Species Conservation Act 1995. Under this scenario OEH will have a concurrence role, which will include the likely provision of Director General's Requirements (DGRs) for a Species Impact Statement (SIS) and assessment of the completed SIS. In the event that the proposed development is considered likely to have a significant impact on threatened species then a new set of DGRs would need to be issued given that the last DGRs were issued on 29 March 2004.*

*Given the above, could Council please advise if OEH's concurrence is required for this development? Furthermore, if OEH is required to provide concurrence (including the review of the SIS), Council will need to ensure the following:*

- the \$320 administration fee due under clause 252A of the Environmental Planning and Assessment Regulation 2000 is forwarded and made payable to OEH*
- copies of the SIS, DA and any supporting information is to be provided in **both** printed (hardcopy) and digital format*
- all public submissions received by Council are forwarded to OEH for their consideration (as per 79B(5) of the EP&A Act) in the assessment of SIS and to enable completion of the concurrence determination.*

*OEH notes that the proposed development footprint covers about 1.39 hectares of 'Management Zone 1(d) - Hibbertia procumbens' of the Somersby Industrial Park (SIP) Plan of Management (POM). The PoM was a requirement of the assumed concurrence for the SIP issued by OEH on 11 November 2005 and covers all of Lot 9 DP 787857. The development footprint contains about 88 Hibbertia procumbens plants (out of about 591 on Lot 9) and also includes vegetation in the south western corner of Lot 9 where the Eastern Pygmy possum was recorded. OEH's correspondence to Council of 20 November 2007 (copy attached) stated that "... if sound and compelling reasons are put forward to allow development within a management zone the proposal must be supported by appropriate mitigation and offset measures to compensate the loss / impact on threatened species management zones..".*

*OEH further notes that the ruling of 27 March 2012 in the NSW Land & Environment Court about this proposed development [Davis v Gosford City Council [2012] NSWLEC 62] determined that the proposed development was unlikely to have a significant impact on local populations of Hibbertia procumbens and the Eastern Pygmy Possum. This may be*

why the impact amelioration and environmental management measures' outlined in section 10 of Appendix 3 of the DA (Flora & Fauna Assessment Report (Whelans InSites Pty Ltd, June 2011)) do not include any biodiversity offsets for proposed clearing of the management zone for this proposal. If Council determines that the proposed development is likely to have a significant impact on threatened biodiversity, particularly in light of new information on *Hibbertia procumbens* or the Eastern Pygmy Possum, or in the consideration of other threatened entities and thus seeks concurrence from the Minister administering the TSC Act, then OEH would likely require a biodiversity offset for the proposed development. OEH would gauge the suitability of any biodiversity offset offered for this proposal against the 'Principles for the use of biodiversity offsets in NSW' [www.environment.nsw.gov.au/biocertification/offsets.htm](http://www.environment.nsw.gov.au/biocertification/offsets.htm).

If consent is granted to the proposed development without an appropriate biodiversity offset then OEH would consider that outcome to be contrary to the aims and objectives of the assumed concurrence issued for the Somersby Industrial Park in 2005. Whilst the implementation of the SIP PoM is a matter for Council, the encroachment of development onto a management zone in the SIP could lead to OEH revoking the assumed concurrence, using clause 64 of the Environmental Planning and Assessment Regulation 2000. In that case all subsequent development proposals within the SIP would need to be assessed on a case-by-case basis. Due to the wealth and importance of Aboriginal cultural sites and diversity and abundance of threatened species in this area it appears likely that OEH would have a larger regulatory role, including concurrence, for the majority of new developments on the site.

#### **Aboriginal Cultural Heritage Assessment**

The importance of protecting Aboriginal cultural heritage is reflected in the provisions of the National Parks and Wildlife Act 1974 (NPW Act). This Act clearly establishes that Aboriginal objects and places are protected and may not be harmed, disturbed or desecrated without appropriate authorisation. Importantly, approvals under Part 4 of the EP&A Act do not absolve the applicant of their obligations under the NPW Act.

#### **Somersby Industrial Park (SIP)**

OEH notes that the SIP contains significant biodiversity and Aboriginal cultural heritage values which need to be carefully managed. OEH was also a member of a NSW Premiers Department Taskforce, which was established in 1999 to resolve uncertainty around the development potential of the SIP. The Taskforce commissioned an Aboriginal cultural heritage assessment and a report entitled 'Somersby Industrial Park - Aboriginal Heritage Study for Plan of Management - Report to Gosford City Council and Somersby Industrial Taskforce in three volumes', dated February 2002, by Australian Museum Business Services (AMBS). The recommendations of the study were then reflected in the PoM.

OEH understands that the intent of incorporating the Aboriginal cultural heritage assessment into the PoM and subsequent LEP processes was to clearly identify the development and conservation outcomes for the SIP. In effect the PoM delivered protection for Aboriginal cultural heritage of greatest significance to the local Aboriginal community, which reflected the significance of landscape features as well as physical sites.

#### **Plan of Management (POM)**

OEH notes that a PoM was adopted by Council and the Premiers Taskforce in 2005. The PoM created Management Zones (MZs) in the SIP, including Zone No. 1, Sub-zone 1(a) Aboriginal heritage (MZ 1(a)), which identified specific development restrictions and constraints for areas of ecological or cultural significance. The mapping also included buffers necessary to protect those values. The protection areas and buffers incorporated in the PoM map boundaries are equal to or below the minimum recommended in the original studies, reflecting the outcome of negotiations by the Premiers' Taskforce. As

*these lots are relatively small in size, there is no opportunity to develop these sites without substantially impacting the Aboriginal cultural heritage values.*

*OEH notes that the proposed development footprint borders an area of MZ 1(a), as identified in the PoM on Lot (refer to Figure 4 in the Environmental Impact Statement, July 2011). OEH understands that the level of development constraint associated with the MZ 1(a) zoning restricts development to ensure preservation and permanent protection of the associated Aboriginal cultural heritage values contained within the MZ 1(a) lands. OEH continues to support this previously agreed position.*

### **Aboriginal Cultural Heritage Values**

*OEH acknowledges the significance of the local environment to the local Aboriginal community. OEH also notes the existence of numerous registered significant Aboriginal sites in the immediate locality. These sites include Aboriginal ceremonial and dreaming sites, resource gathering sites, grinding grooves, rock engraving sites, shelter with art sites, artefact scatters, culturally modified trees and potential artefact deposits. It is also acknowledged that the project area contains landforms which have yielded a significant volume of evidence of Aboriginal occupation.*

*It is noted that three Aboriginal sites are located within Lot 9 DP 787857. These sites include SIE 1', SIE 2', and 'SIE 4' and are all identified as rock engraving Aboriginal sites. These sites are recognised as having significant cultural value in the PoM and accordingly have associated Level 1 constraints, whereby development should not be permitted through planning processes to ensure complete and permanent protection of the sites within the SIP. The PoM has mapped these sites within a MZ 1(a) zoning area to ensure an adequate buffer is placed around the perimeter of the sites.*

### **Management of Aboriginal Cultural Heritage Values**

*OEH acknowledges that there are additional threats on the MZ 1(a) zoned land of the project area from the development proposal. These threats include changes to drainage regimes, airborne pollution, unrestrained access, exposure and weathering. The AMBS report highlighted recommended management actions for these sites. These included sites to be protected within appropriate management zones, monitoring of sediment and vegetation accumulation at site SIE 1' and general management recommendations for site SIE 2' which could not be relocated during the AMBS assessment.*

*OEH acknowledges that the applicant has considered these recommendations and has proposed to manage the MZ 1(a) zone in accordance with the AMBS recommendations and the PoM. In particular, the applicant has proposed to:*

- fence the boundary of the MZ 1(a) zone with a two meter chain wire fence with associated conservation signage to be erected*
- develop and implement a six monthly monitoring program of the AZ 1(a) area for a period of two years from the commencement of construction activities to assess the potential impact on the Aboriginal sites from air borne particulate matter*
- operations of the project site shall be undertaken in accordance with the PoM*
- create a public positive covenant pursuant to Section 88E (3) of the Conveyancing Act 1919 to allow local Aboriginal community access to the sites along a 1.5 meter wide 'right of footway' along the southern boundary of the project area to the start of the MZ 1(a).*

*OEH supports these proposed management strategies.*

*However, OEH also acknowledges that the control of soil and water movement was identified in the PoM as a major issue, particularly during periods of construction, land clearing and landscaping where changed patterns of water flow and soil movement have the potential to adversely impact Aboriginal sites. Accordingly, OEH strongly recommends*

*that the proposed monitoring program also encompasses an assessment of the potential impact on the sites from water flow and soil movement, primarily to assess whether there has been any alterations to drainage patterns associated with the sites from the project.*

*OEH also recommends that an Aboriginal Cultural Heritage Education Program is developed and implemented by the applicant for all contractors and personnel associated with construction activities of the development proposal. This program should also be developed in consultation with representatives of the local Aboriginal community and should focus personnel on their statutory responsibilities with the premise to avoid or impact areas of known Aboriginal cultural heritage values. OEH has included below in **Appendix A**, a recommended condition of consent to target this matter*

*Further, it is also strongly recommended that, in order to achieve the necessary management outcomes, to manage the timing of these recommendations and to demonstrate compliance with the PoM. The applicant should develop an Aboriginal Cultural Heritage Management Plan (ACHMP) for the project. The ACHMP must be developed in consultation with the local Aboriginal community and OEH following any determination of the consent. OEH has included below in Appendix A, a recommended condition of consent to target this matter.*

### **Local Aboriginal Community Consultation**

*Effective Aboriginal cultural heritage management requires knowledge of values or cultural significance. It requires an understanding of the factors that make a place culturally significant, and why, and enables appropriate decisions to be made about the management of that place. OEH recognises and acknowledges that Aboriginal people are the primary source of information about the value of their heritage and how this is best protected and conserved and must have an active role in any Aboriginal cultural heritage planning process.*

*However, OEH notes that the applicant has not provided any additional evidence of the recent consultation process undertaken with local Aboriginal communities in relation to this DA. Aboriginal people who hold knowledge about the area, objects and places that may be directly or indirectly affected by the proposed activity must be given the opportunity to be consulted. Without evidence of consultation the Aboriginal cultural heritage assessment is considered incomplete.*

*In order to progress this matter and to help inform any decision making, OEH strongly recommends that the applicant revisit the current development process, to undertake an appropriate level of consultation with the local Aboriginal community.*

*It will not be necessary to initiate a new consultation process with Aboriginal people if the applicant can demonstrate that: it is clear that the consultation process was initiated for the entire investigation and assessment process for this particular development application; and there has been a continuous consultation process with Aboriginal people from the investigation stage through to the submission of the development application. As a general rule, gaps in the consultation process of six months or more will not constitute a continuous consultation process. Where an applicant envisages a gap of more than six months it is recommended that Aboriginal parties are regularly informed of progress.*

*Evidence of consultation may take the form of records consultation/conversation logs/registrations of interest, copies of all correspondence sent/received for the project, records of personal communications, documented phone calls, copies of agendas, copies of newspapers advertisements, and minutes to any Aboriginal community meetings. Evidence of consultation should be collated and provided to the consent authority in support of the development application.*



OEH has developed the 'Aboriginal cultural heritage consultation requirements for proponents 2010' ([www.environment.nsw.gov.au/licences/consultation.htm](http://www.environment.nsw.gov.au/licences/consultation.htm)) to assist applicants with consultation with the Aboriginal community. While these guidelines are aimed at proponents seeking an Aboriginal Heritage Impact Permit under the NPW Act, the guidelines do provide a useful reference to guide broader community consultation during the development of DAs.

### **Legislative Requirements**

OEH reminds the applicant that the importance of protecting Aboriginal cultural heritage is reflected in the provisions of the NPW Act. The NPW Act has been amended recently and the proponent is also reminded to ensure they are familiar with the new requirements as they relate to the development and any subsequent assessment processes. Further advice regarding Aboriginal cultural heritage can be found on OEH's web-site at: [www.environment.nsw.gov.au/cultureandheritage.htm](http://www.environment.nsw.gov.au/cultureandheritage.htm)

### **Conclusions**

Providing the matters raised above are addressed by the applicant, OEH has no further concerns regarding the Aboriginal cultural heritage assessment for the DA. It is further recommended that the recommended conditions of approval for Aboriginal cultural heritage values contained in Appendix A are incorporated into any approval conditions for the development proposal.

*If the assumed concurrence for the SIP were to be revoked, OEH would continue to have a regulatory role in any further development of the site due to the wealth and importance of Aboriginal cultural sites and diversity and abundance of threatened species in this area."*

### **Environmental Assessment**

The NSW Land & Environment Court determined on the 27 March 2012 that the proposed development was unlikely to have a significant impact on local populations of *Hibbertia procumbens* and the Eastern Pygmy Possum. As a result of this decision Council commissioned 'Keystone Ecological' to:

- Test the hypothesis that the Somersby Industrial Park Plan of Management delivers an acceptable conservation outcome;
- A consideration of reducing the 1.4 hectares of *Hibbertia procumbens* using the bio-certification tool;
- Undertake site survey to quantify the potential impacts of the proposed development;
- Determine the extent, damage and possible origin of the understorey vegetation loss.

The additional ecological study was commissioned by Council to consider the proposed developments impacts (if any) upon the strategic implications of the Somersby Industrial Park Plan of Management. Various flora and fauna studies were reviewed and relied upon when drawing conclusions in the recent ecological study.

To place the studies undertaken by Council's consultant in context, the following review presents a summary of the Somersby Industrial Plan of Management:

#### **(a) Ecology studies associated with the Somersby Industrial Park Plan of Management**

*The Flora and Fauna Study prepared by Connell Wagner, 2003) and the Supplement Report (2005) defined areas within the Somersby Industrial Park as being of significance for threatened Flora and Fauna (Figures 2.5 & 8.2e). The combined habitat of all threatened species is extensive and there is an overlap between the habitat requirements of some species (Figure 2.6). As a consequence, application of the principles defined in Table 2.2 of the Somersby Industrial Park Plan of the Management was used to defined area as "significant habitat" in the Park that:*

- Generally display a low edge to area ratio thus minimising edge effects;
- Contain a diversity of native species and structure;
- Have an ability to be viably linked to other habitats;
- Provide an opportunity to conserve a representative range of the habitats of threatened species;
- Have a greater potential to withstand major threatening processes.

*The areas of significant habitat identified within the Plan of Management and Supplementary Report are considered to be the minimum areas required to allow the species to remain viable in the Park.*

*As a result of defining significant habitat areas the Plan of Management states that no development will be permitted within Sub-Zone 1(d) Hibbertia procumbens Habitat except where development directly associated with the protection and management of any population of Hibbertia procumbens, for bushfire management, essential emergency works or the maintenance of an already approved work. Any such work shall be in accordance with a management plan that has been approved by the Council and / or the NSW Office of Environment and Heritage.*

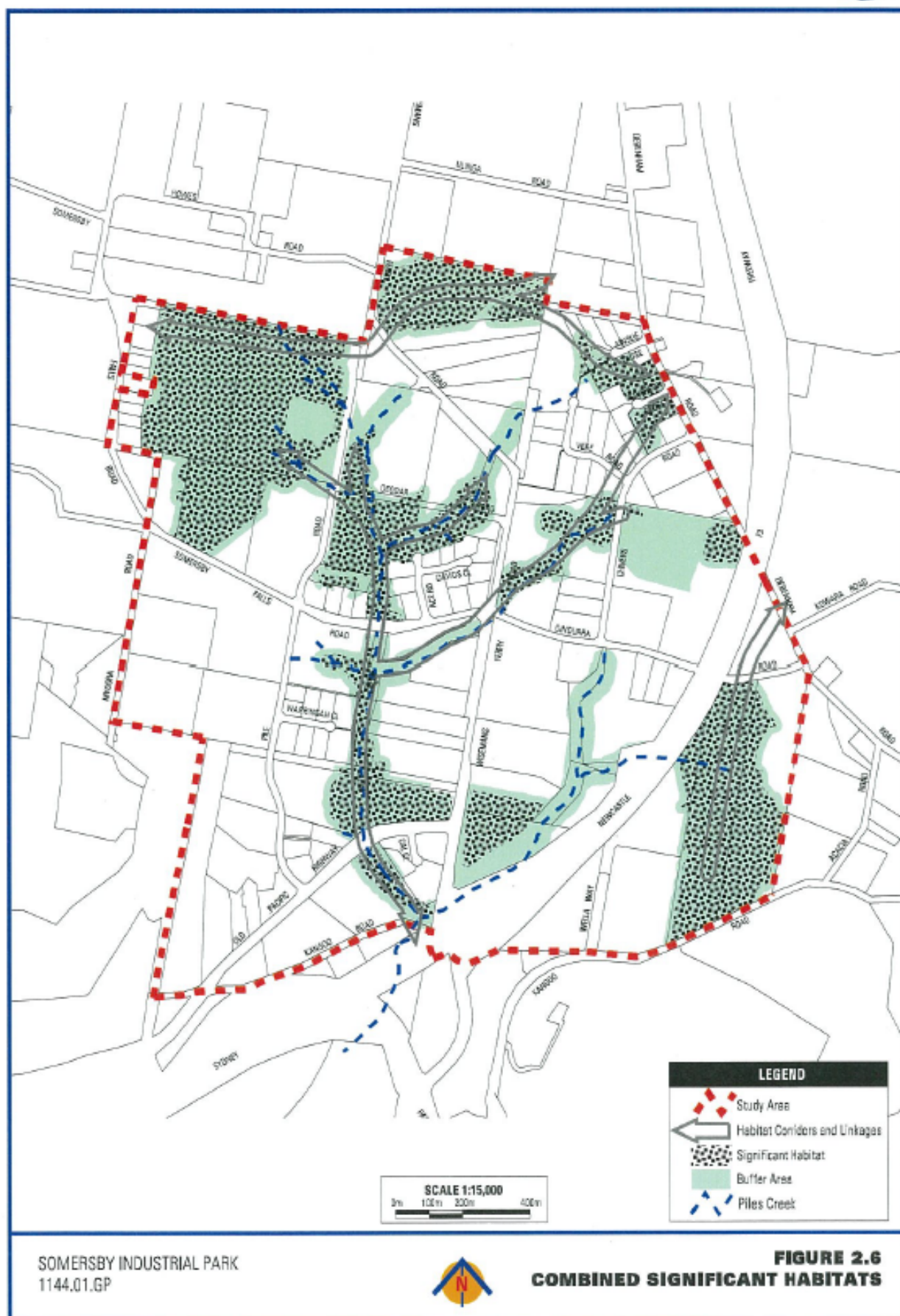
*The development proposes works within the Management Zone 1(d) Hibbertia Procumbens Habitat. A flora and fauna assessment report has been prepared by Whelan Insites Pty Ltd and submitted with the latest development application. The Report admits that the development will require the removal of the best quality habitat currently present on the site for Eastern Pygmy Possum and other potential habitat on the site and encroaches upon the management zones. While amelioration measures are recommended to compensate for the loss of habitat, no positive offsets are proposed nor are there sufficient provisions for the justification of altering the management zones. The report was prepared on the basis that much of the development footprint is located within areas which was adversely affected to a substantial and significant extent by the December 2005 bushfire and has regenerated only to a limited extent.*

*The Somersby Industrial Park Plan of Management achieves a balance between cultural, environmental and economic factors. To achieve this balance the minimum areas of biodiversity were identified and delineated within defined management zones. Development assessment within the Park has strictly adhered to the undevelopable nature of the management zones where no positive offsets are proposed.*









*In reviewing the EIS submitted with the application it was observed that the Flora and Fauna Study included with the EIS is based upon data collected in 2005 and 2008. However, Council is aware from site inspection conducted in October 2011 that the existing vegetation is declining in health. To examine the declining health and the potential impacts on the delineated management zones as defined in The Somersby Industrial Park Plan of Management Council engaged a Consultant to examine the ecological consequences on the site from the proposed development and report on their scientific findings. The following advice has been provided:*

#### *Eastern Pygmy Possum*

*The density of traps was the same for the development area as it was for the retained habitat in the Management Zones, so the disproportionately high numbers in the development area reflect a deliberate choice for the development area by the animals rather than sampling bias.*

*At the time of setting the traps, the habitat in the development area was judged to be of high quality due to the presence of dense and mature *Banksia ericifolia*. This provides good winter forage as well as shelter. The dense thickets allow these small animals to move through their habitat without coming to the ground, where they are very vulnerable to predators.*

*While the rest of the area identified by others as Pygmy Possum habitat supports what appears to be an appropriate and dense mix of forage species, this area was burnt in the fire of December 2005. Therefore it is at a different seral stage, being only 7 years old and so produces fewer flowers, much less nectar and is lower to the ground. Note however that some mature *Banksia ericifolia* individuals were scattered around the edges of the burnt part, one of which was near trap 54, thus helping to explain the presence of the group of 3 Pygmy Possums outside of the best habitat.*

*The density of animals within the high quality habitat on the subject site is approximately 6.8 per hectare. One of the main reasons for the listing of this species as Vulnerable in NSW is the lack of recent records from the dry woodland habitats dominated by *Banksia* species (S. J. Ward and V. Turner in *The Mammals of Australia* ed by S. Van Dyck and R. Strahan 2008). So while the density of this population is less than the high levels measured elsewhere (e.g. 14-20 per hectare in optimal habitat in Victoria), it is certainly greater than that recorded in nearby populations.*

*The presence of 12 individuals indicates to me that this is a significant population: I know of no other population of similar size being found on the Central Coast. There are only two locations in the Somersby Industrial Park where this species has been recorded. Three individuals were trapped on the subject site during previous work in 2005 by Andrews Neil and one individual was trapped at 218 Wisemans Ferry Road in September 2011. This latter site has since been cleared and developed.*

*Council's vegetation mapping (Bell 2009) shows that the Pygmy Possum records largely coincide with vegetation type E29 Hawkesbury *Banksia* Scrub – Woodland, which is dominated by *Banksia ericifolia*. This vegetation type is rare within the SIP and other large patches that might support Pygmy Possums are isolated from the subject population. Large patches of E29 in National Park to the west are separated by farmland with scattered woodland eucalypts. Patches to the south east are isolated by the F3 Freeway. Records to the south in Brisbane Water National Park are also functionally isolated for this species from the Somersby area by the F3 freeway.*

*At the time of preparation of the Plan of Management for the SIP, the patch of *Banksia* Scrub – Woodland on the subject site was not recognised as being particularly important habitat for the Pygmy Possum and it was traded off as part of the compromise solution to achieve the "triple bottom line" of benefits.*



However, given these latest trapping results, I recommend that Council reconsiders its importance in the allocation of retained habitat in the SIP for the Pygmy Possum. It is my opinion that the mature *Banksia* thickets in the southern part of the proposed development area provide a critical refuge and food source for this population - especially in the winter when nectar is scarce.

Although a male Pygmy Possum has been recorded as moving up to 450 metres in a night, they generally move shorter distances e.g. 120 metres) and occupy small home ranges (typically 0.75 hectares) (Ward and Turner 2008). Given their movements the extent and configuration of suitable habitat and the significant barriers within and without the SIP, this population is isolated and endangered by the existing zoning of the land and the intended land use.

I believe that a case may even be made for listing this as an Endangered Population.

#### *Hibbertia procumbens*

Whelans Insites reported 398 individuals of *Hibbertia procumbens* across the subject site, with 88 occurring within the proposed development area. Only 28 plants were located in the development area during this study.

The group of plants detected along the western boundary to the north of the development area were commensurate in distribution and abundance to those reported by Whelans Insites in 2008 in that part of the site.

Even allowing for the smaller survey area in this study and discounting the plants at the south eastern part of the development area which were not re-located in this study, the numbers recorded by Whelans Insites in spring 2008 (particularly in the proposed development area) are higher than those observed in winter 2012.

Fewer plants being recorded in this survey may be due to a general decline in the population, an artefact of the season of survey or a combination of both.

Although this species is most easily detected when in flower, it still can be seen in its vegetative state, particularly in the open areas. The understorey vegetation is very sparse in the proposed development area and so it is likely that detectability does not adequately account for the discrepancy, at least in that part of the site.

Therefore the observation of fewer plants is likely to be a manifestation of a smaller population in the development area than that observed in 2008.

Some plant species are fire sensitive and one of the known disturbances experienced by this site is fire. The fire response of *Hibbertia procumbens* is unknown but this is unlikely to explain the uneven decrease in numbers as the condition and vigour of the plants are different for this species inside the development area compared with outside of the development area. Both of these areas were burnt in the bushfire of December 2005.

Environmental conditions are unlikely to explain a difference over such a small distance. Temperature and rainfall for example are identical inside and outside of the proposed development area. The abiotic conditions are also identical – the soils are similar with the area to the north being a continuation of the lateritic ridge.

The most parsimonious explanation for the different response in the vegetation between these areas is the action of an added factor experienced only by the proposed development area, such as poison or pathogen.

This is further discussed in a later section of this report.

*However, despite the misfortunes suffered by this population, it remains extant with new plants and new shoots in evidence, indicating that the underground portion of the population (seed bank, rootstock) is also intact. This resilience of the population leads to the conclusion that, in the absence of further negative influences, the above ground population should return to its previous high numbers.*

*Thus, the development proposal is still likely to remove a sizeable proportion of the population in the subject site.*

*If this analysis is incorrect and the population is in fact in serious and sharp decline generally across the site, then it is a cause for alarm and further losses should not be countenanced. This Endangered species is only known from a relatively small area from Mogo Creek in the west to Wondabyne in the south east and the Somersby populations are large and significant in that context.*

*The Management Zone within the subject site is the largest patch in the SIP and is part of a large contiguous area of suitable habitat, the scale of which does not occur elsewhere in the SIP.*

*It is unlikely that a declining population of an Endangered species can continue to sustain further losses such as those proposed for the subject site, without serious consequences to its conservation status. It is notable that the Biobanking methodology defines a “negligible loss” for this species as being 1 to 3 individuals. A proposed loss of 28 or 88 individuals of *Hibbertia procumbens* would not be allowed under the Biobanking methodology even if sufficient species credits were available to offset the losses.*

#### *Degradation by fire*

*The understorey vegetation within the proposed development area is in poorer condition than that within the rest of the subject site. Prior to the fire, it was observed to be in excellent condition across most of the site with only a small area of weeds associated with the access handle and at the rear of the factories (Abel Ecology 2005).*

*It is unlikely that the single summer fire on the subject site would create the pattern in the vegetation seen today. It is ecological nonsense that fire degrades the vegetation – in this case the vegetation type is reliant on fire to maintain its species composition.*

*There is an abundance of literature investigating the fire response of the sandstone vegetation around Sydney. An inappropriate fire regime (e.g. too hot or too cool, too often or not often enough) will result in the loss of some species and a shift in the vegetation type over a long period of time.*

*A single fire will not degrade the vegetation to the point of worthlessness. A very hot fire will kill above ground plants and may also cook some of the soil-stored seed bank but in this case there is a resilience being expressed now with the resprouting and germination of many species in the development area.*

*The regrowth in the development area is not of the scale as that outside of the proposed development area, where the recent rains have resulted in a complex and dense understorey. However, given time and lack of further perturbation, the bushland should recover in the development area as well.*

*Fire is a necessary agent of change for sclerophyllous vegetation. Such vegetation is degraded by nutrients, pollution, weeds, excavation, compaction and built form, not by natural events to which the species are well adapted.*

*The past misinterpretation of fire in the natural environment has led to such “degradation” being explicitly excluded from being used as an excuse in the BioBanking and*

*Biocertification process to justify the loss of habitat. Recently burnt areas are expressly prohibited from being classified as in “low condition”, because they are not – they are simply in a different state.*

*The known impact of fire and the likely presence of a third malevolent influence are illustrated by *Hakea teretifolia*.*

*As an obligate seeder, the adults are killed by fire. The majority of seeds are held on the adult plant within the closed woody capsules. These are opened by fire and the seeds released. These subsequently germinate in the ash beds.*

*This life cycle produces a particular pattern of plants across its habitat: a cluster of juveniles beneath an adult plant. Eventually the dead adults fall and decay and then one sees a dense thicket of *Hakea*. This typical pattern was observed in the burnt areas to the north of the proposed additional development area - a dead adult with a group of juvenile plants beneath.*

*However, this pattern was not observed in the proposed additional development area. Instead, dead adults were observed without juveniles beneath them and, where juveniles were in evidence, instead of a cluster, they were scattered. This indicates that some additional impact has removed the juveniles from the proposed additional development area.*

*The pattern of death of understorey species across the development area (dead grass clump next to live clump) and lack of understorey vegetation in general is consistent with poison being applied from a back pack spray unit.*

*However, the likelihood of a pathogen must be explored. Known pathogens currently impacting on native vegetation in eastern Australia are *Phytophthora* (root rot) and *Myrtle Rust*.*

***Phytophthora** is a soil-borne fungus that occupies wet soil and is moved around naturally by water. People and their vehicles / machinery are also important vectors. However, it needs moisture to survive and the stony ridgetop habitat is entirely unsuitable for this pathogen. Also, the trees remain unaffected and this is not the pattern observed in *Phytophthora* infested / affected vegetation. *Phytophthora* is an unlikely cause of the patterns observed.*

***Myrtle Rust** is a fungus that occurs on the leaves of *Myrtaceae*. No *Myrtaceae* were observed to be affected. In fact, it is the rest of the flora that have been mysteriously lost – the grasses, graminoids, peas and proteaceous shrubs, groups of plants that do not support *Myrtle Rust*, but that are easily poisoned by a back pack spray. *Myrtle Rust* is an unlikely cause of the patterns observed.*

*The distribution and numbers of plants across the development area indicates that there is an additional impact in the proposed additional development area other than fire. These patterns are consistent with poison being applied.*

#### *Biobanking Certification*

*Preliminary results indicate that the Somersby Industrial Park (SIP) Plan of Management (PoM) is inadequate in terms of the Biodiversity Certification process and that extra credits need to be retired in order to achieve an “improve or maintain” outcome.*

*Moreover, the recent listing of Upland Swamp (equivalent to Map Unit E54 Hanging Swamps sensu Bell 2009) as an endangered ecological community further degrades the efficacy of the SIP PoM to deliver a conservation outcome.*

*Therefore it follows that any incursion into the Management Zones would further endanger the delivery of a conservation outcome for the subject species and compromise the ability of the PoM to achieve its intended end.*

*Note that the Management Zone for Hibbertia procumbens on the subject site is the biggest of the 4 areas in the SIP identified to be set aside for this species and is more than the other three locations added together (3.78 hectares compared with 0.32, 0.82, 1.73 hectares). It is also part of the biggest conservation area in general across the SIP, being 23.12 hectares of contiguous Management Zones 1(a), 1(c), 1(d), 1(e) and 2.*

*The value of this large area of habitat lies in its size, shape and diversity. The development of the additional incursion into the Hibbertia procumbens Management Zone 1(d) will compromise its shape and diversity and will therefore alter the efficacy of this part of the SIP to deliver the intended conservation outcome for that species and others that it may support*

### Conclusion

*The principal of Keystone Ecological concludes:*

*It is disingenuous to apply the 7 part test to a subset of the SIP to support the proposed imposition into a management zone. The management zones and the areas mooted for development have been developed as a result of consideration of the SIP in its entirety.*

*Pulling apart the management plan and tweaking the boundaries to suit a particular development proposal will endanger the implementation of the plan as a whole (and ultimately allow for a string of similar proposals where the management zones are deemed by a proponent to be “inconvenient”).*

*While a narrowly applied 7 part test can be cleverly written or interpreted in such a way as to arrive at a non-significant conclusion and support a particular development proposal, this represents a classic example of “death by a thousand cuts” – loss of species in a local area as a result of the accumulation of a series of small losses that are of themselves not significant.*

*This is a major criticism of the current impact assessment process, as each proposal is considered in isolation of other contemporary or likely future proposals in the local area. It is also one of the catalysts for the recent development of the Biodiversity Certification process: a quantitative and transparent methodology that applies conservation planning at a broader landscape scale, beyond the boundaries of a single lot or development site in both time and space.*

*The PoM was developed and implemented by Gosford Council prior to the development of Biodiversity Certification by the NSW Government. However, it applies much of the logic that underlies the Biodiversity Certification process: a large but discrete area is identified for attention, the most important areas for conservation are identified, the competing development interests are overlain, and plan that delivers both conservation and development is developed across the subject area **as a whole**.*

*The PoM is not modular – the pieces cannot be removed and replaced at will without requiring an entire reassessment of the remaining pieces. The PoM has been put together to prioritise the most important areas for the conservation of species and Aboriginal heritage while still delivering a workable industrial footprint.*

*Piecemeal application of over-sized development footprints in isolation of the conservation context of the SIP as enunciated by the PoM will threaten the long term conservation of the subject species because it will irrevocably compromise the PoM's integrity. The PoM relies on its constituent parts being implemented in its entirety without significant amendment.*

*The declaration by DEC that incursion into the management zones are likely to result in a significant impact is supported in this report by two prongs of investigation:*

- 1. The exploration of the distribution and abundance of *Hibbertia procumbens*, *Cercartetus nanus* Eastern Pygmy Possum and their habitats across the subject site and the likely impact of the losses produced by the proposed development; and*
- 2. The application of the Biodiversity Certification methodology to the SIP.*

*Overall,*

- 1. The distribution and numbers of plants across the development area indicate that there is an additional impact in the proposed additional development area other than fire. These patterns are consistent with poison being applied to the proposed additional development area or an unknown pathogen in the proposed additional development area.*
- 2. Notwithstanding this likely impact, the resilience exhibited by the vegetation indicates that it is capable of natural regeneration. Some assisted management may be required (e.g. control of Whisky Grass).*
- 3. The type of habitats to be conserved, the configuration of habitats and the size of the remnant in the NW corner of the SIP are very important in delivering the conservation objectives of the PoM. Any incursions into this will alter its efficacy to return the intended conservation outcome.*
- 4. The Biocertification calculations indicate that the threatened species within the Somersby Industrial Park cannot sustain any further losses to the management zones.*
- 5. The large Pygmy Possum population is of great significance and the rezoning of the important refuge habitat in the southern part of the development area should be seriously considered by Council. Otherwise, this population will become extinct as the adjacent habitat is not at the right seral stage to sustain this species, particularly in the winter bottleneck.*

#### **(b) Ecological Sustainable Development**

*The Plan of Management addressed issues relating to the principles of ecological sustainable development (ESD). In respect to the Park the investigations identified economic, ecological / environmental and aboriginal heritage values and the key threats to these values. The key tenets of ESD were considered and the Plan of Management achieves the principles of ESD, namely:*

- It provides certainty with respect to key values and there will be no postponements of measures to minimise degradation.*
- It will permit future generations to understand and protect the values of the areas.*
- It recognised biological diversity and ecological integrity.*
- It includes environmental values in the overall assessment of economic values of the Somersby Industrial Park.,*
- It recognises that economic development can take place in an environmentally responsible manner in accordance with ESD principles.*

*Compromising the management zones with the encroachment of development will erode the ESD principles that the management plan was founded upon.*

**(c) Conclusion**

*The objectives of the relevant policies, zoning objectives and potential environmental impacts associated with the proposal have been considered. Council's Environmental Assessment Officer raises objection to the proposal on a number of grounds:*

- The proposal is inconsistent with the objectives and management controls of the Somersby Plan of Management. It intrudes into Management zone 1(d) Hibbertia procumbens by about 1.4ha.*
- The proposal is not ecologically sustainable and contrary to the precautionary principle as it has a direct and unknown impact upon the habitat areas of both Hibbertia procumbens and the Eastern Pygmy Possum*
- The proposal is inconsistent with the objectives of the Threatened Species Conservation Act, 1995.*
- Approval of the proposed development would have an irreversible impact and endanger the local population of the Eastern Pygmy Possum.*
- Approval of the proposed development would have an irreversible impact of the largest area in the Somersby Industrial Park Plan of Management set aside for Hibbertia procumbens.*
- The development of the additional incursion into the Hibbertia procumbens Management Zone 1(d) will compromise its shape and diversity and will therefore alter the efficacy of this part of the Somersby Industrial Park to deliver the intended conservation outcome for that species and others that it may support.*
- The proposal does not deliver an "improve or maintain" outcome for the Somersby Industrial Park. The Biocertification calculations indicate that the threatened species within the Somersby Industrial Park cannot sustain any further losses to the management zones.*
- The proposal has not been supported by appropriate mitigation and offset measures to compensate the loss / impact on threatened species management zones and habitat. A Biobanking Certificate has not been submitted with the development application.*
- Piecemeal applications of over-sized development footprints in isolation of the conservation context of the SIP as enunciated by the PoM will threaten the long term conservation of the subject species because it will irrevocably compromise the PoM's integrity.*
- Compromising the management zones with the encroachment of development will erode the Ecologically Sustainable Development principles that the Somersby Industrial Park Plan of Management was founded upon.*

**Engineering Assessment**

Council's Development Engineer advises:

**"(a) Flooding & Drainage**



*The site is not subject to flooding. The applicant has proposed to implement on-site stormwater detention and settling areas in order to minimise the environmental impact of the proposed development as well as limit stormwater from the site to pre-development discharge.*

**(b) Traffic, Road Works & Access**

*The RMS has provided the following advice:*

*RMS has no proposal that requires any part of the property.*

*RMS has reviewed the information provided and has no objections to the proposed development, provided the following matters are addressed and included in Council's conditions of development consent:*

- The access onto Somersby Falls Road should be designed in accordance with AS 2890.2 Part 2: "Off-Street commercial vehicle facilities. The proponent should provide as a minimum a Basic Right Turn Treatment (BAR) in Somersby Falls Road at this access point location. The "BAR" right turn treatment should be provided in accordance with Austroads Guide to Road Design Pt.4*
- The proponent should provide a sealed approach to Somersby Falls Road site access together with on-site cleaning measures to minimise transportation of loose material onto Somersby Falls Road.*
- On site vehicular turning facilities are to be provided to enable all vehicles to exit the site in a forward direction.*
- Internal accesses and all parking facilities on site are to be designed and constructed in accordance with Gosford City Council's DCP No. 111: Carparking and AS/NZS 2890.1:2004 Part 1: "Off-Street Car Parking". "Off-street car parking" AS 2890.2 Part 2: "Off-street commercial vehicle facilities"*
- A Construction Traffic Management Plan (CTMP) shall be prepared and include a Vehicle Movement Plan and Traffic Control Plan. It shall be prepared with the intention of causing minimal impact to the operation of the road network during construction. The CTMP shall be submitted to Council for review and approval prior to any construction activities occurring onsite.*
- The works referred to above shall be undertaken at full cost to the developer and to the satisfaction of RMS."*

Austroads "Guide To Road Design – Part 4A: Unsignalised and Signalised Intersections" 2009 contains a Warrant for the type of intersection to be used. Based on the information from the applicant's traffic engineer, the number of traffic movements on Somersby Falls Rd will not exceed 150 vehicles per hour. This clearly places the type of intersection to be used in the BAR category.

**Roads and Maritime Services (RMS)**

The RMS advises that they have no objections to the proposal subject to conditions provided being included in the conditions of consent.

**Public Submissions**

A number of public submissions were received in relation to the application. Those issues associated with the key issues have been addressed in the above report. The remaining issues pertaining to various concerns were addressed in the assessment of the application pursuant to the heads of consideration contained within Section 79C of the Environmental Planning and Assessment Act 1979.

A summary of the submission is detailed hereunder.

**1 The Council and the Land and Environment Court refused a similar application in 2007.**

Comment

The proposal is essentially the same development refused by the Land and Environment Court, albeit it extends 0.4ha into the management zone identified in the Somersby Plan of Management.

**2 The proposal is located near rural residents and will affect property values in the area due to the contaminants and impacts on roads, groundwater and air quality.**

Comment

If the proposal generates noise, dust and odour beyond the boundaries of the site, it will impact rural amenity and employment on adjoining industrial sites.

**3 The proposal will affect the local community by:**

- **Increased heavy traffic on Somersby Falls Road;**
- **Noise. The acoustic wall may not reduce noise and traffic noise will still be generated;**
- **Dust. Crushing cement and other products will create health hazards and such dust is carcinogenic and a cause of silicosis;**
- **Odour. Mulched timber and chicken manure create odours;**
- **Rubbish. There will be problems with dumped rubbish along roads to the site as well as controls on excess or non-recyclable materials.**

Comment

The application is accompanied by Traffic, Noise and Air Quality Reports which identify that the proposal can meet relevant standards subject to conditions. These Reports are essentially those relied upon in the previous Land and Environment Court Case 10121 of 2007.

**4 The draft LEP 2009 will prohibit the proposal.**

Comment

This is correct. The proposal is defined as a “waste or resource recovery facility” which is prohibited under the proposed IN1 Industrial zone. The draft LEP has been referred to the Minister to make the Plan. Although the draft LEP includes a savings provision, the proposal should not be approved if it is to be a future prohibited use.

The draft LEP must be taken into consideration in assessment and determination of this application.

**5 The land to the north and west is rural land comprising of agricultural enterprises which need clean air and water and a peaceful environment. The site lies within 250m-300m of the Brisbane Water National Park.**

Comment

The site is located on the edge of the Somersby Industrial Estate. Any development on the site should be required to contain impacts to within the site.

- 6 The land slopes towards adjoining rural land with dams for water supply. The risks of surface and groundwater pollution are high and will impact adjoining agricultural and domestic uses as well s further downstream in the National Park.**

Comment

The EIS has included a Water Cycle Management Plan and relies on previous agreement by experts in Land and Environment Court Case 10121 of 2007.

- 7 The land is bushfire prone and the use of a fuel tanker and on-site fuel storage are unreasonable.**

Comment

The presence of fuel storage does not increase bushfire risk if appropriate safety measures (including OH&S) are implemented.

- 8 An adequate buffer has not been provided between the development and the National Park as required under DCP 89 Scenic Quality.**

Comment

There is no requirement for a buffer. In any case, the land is zoned General Industrial although not complying with the Somersby Plan of Management.

- 9 The significant increase in heavy transport traffic, particularly over the next 10 years.**

Comment

Somersby Falls Road can cater with the additional traffic although upgrading works will be required.

- 10 The activity will generate noise, air quality and odour problems, particularly against a rural background.**

Comment

The site is located on the edge of the industrial area and any noise odour impacts must be either contained within the site or comply with relevant air and noise standards.

- 11 The proposal intrudes into the management zones under the Somersby Plan of Management and insufficient protection has been given to Aboriginal Heritage.**

Comment

The proposal intrudes into the 1(d) Management zone identified in the Somersby Plan of Management. The Darkinjung LALC has also objected to the proposal. The OEH is not satisfied that the EIS has included adequate consultation.

- 12 The proposal is not ecologically sustainable development. The transport of such materials over long distance is not sustainable. Such recycling should be carried out at the source.**

Comment

The EIS identifies that some sorting will be carried out at the source. However, if the cost of transport increases, and the value of materials decreases, the viability of the proposal may change. This is for the proponent to consider.

- 13 The proposal will have the potential to impact the Australian Reptile Park due to the increase in large heavy traffic, and dust impact on the Park's rainwater tank. Noise and odour impacts may affect animals at the Park.**

Comment

The Reptile Park is located about 900m to the South of the site. The Noise and Air Quality Reports submitted with the EIS indicate the Reptile Park will not be affected.

- 14 The proposal is incompatible with existing adjoining businesses and the local community due to the impact of noise, smell and dust.**

Comment

The proposal will generate noise, dust and odour which if not contained within the site or within acceptable standards will impact adjoining properties, amenity and employment.

- 15 How will noise, dust and odours be monitored to ensure controls contain the levels to what is expected? Who and how will compliance be monitored?**

Comment

The EIS includes an Environmental Management and Monitoring Plan. Conditions of consent could also be imposed to address monitoring and reporting.

- 16 The Flora and Fauna Report confirms that there will be an impact on plants and animals.**

Comment

The proposal adversely impacts upon the habitat area of *Hibbertia procumbens* and the population of the Eastern Pygmy Possum and its habitat.

- 17 The impact is much wider and significant than that advertised by council. The impact is underestimated.**

Comment

Council notified the proposal in accordance with DCP 128 – Public Notification of Development Applications and the EPA Act and Regulations.

- 18 The Traffic Report is flawed and outdated. Somersby Falls Road already suffers from potholes and parking problems.**

Comment

The Traffic Report was prepared in 2004 and 2007 and is at least 5 years out of date.

- 19 The EIS confirms that groundwater will be contaminated unless street containment increases are complied with.**

Comment

Stormwater controls are proposed which were previously agreed to by experts on both sides in Land and Environment Court proceedings 10121 of 2007 which was dismissed. The Environmental Protection Authority requires additional information on water management.

- 20 Kele Property Group Qld Pty Ltd/Bidvest is in the process of establishing a warehouse for the storage and distribution of food and associated products on a site 600-800m away. This development is a \$5.5 million building and will provide employment to more than 30 persons.**

**The emission of dust, airborne pathogens (including listeria bacteria) and odours will impact employees and their health.**

Comment

If dust, odour and air quality controls do not protect such developments, it will impact development and employment potential on other industrial sites.

- 21 The proposal will be a harbouring and breeding ground for rats and other pests and could present a public health threat to Bidvests premises.**

Comment

If only building recyclable waste is processed (no domestic waste) with strict controls to prevent off-site impacts, the proposal should not be a breeding ground. The Environmental Protection Authority has provided conditions if approved for such controls.

- 22 The proponent has a similar operation in Terry Hills which is objected to by local residents.**

Comment

This is not a relevant matter in consideration of this application.

## **Conclusion**

The proposal is permissible with consent as an industrial use.

The proposal is defined as a “waste resource management facility” under the draft Gosford LEP 2009. The site is proposed to be zoned IN1 General Industrial under the draft LEP and a waste resource management facility is a prohibited use.

The draft LEP is a matter for consideration as the draft LEP has been exhibited and referred to the Minister to make the plan. Although the draft LEP contains a savings provision, approval of the proposal would conflict with existing and potential future industrial development.

The proposal is essentially and materially the same as that refused by Council under DA29246/2005 and dismissed by the Land and Environment Court on 4 December 2007. Therefore this application is essentially an appeal to the Court's previous dismissal and an abuse of process. This is supported by the EIS which essentially has relied on the previous air quality, traffic and noise impacts assessment.

The proposal intrudes into the Management Zone 1(d) *Hibbertia procumbens* habitat and therefore is contrary to and inconsistent with the objectives of Clauses 24-26 of Gosford LEP 22 and the Somersby Plan of Management. The OEH has indicated that if this application is approved, their concurrence may be withdrawn for the Somersby Industrial Park.

The proposal is objected to by the Darkinjung Local Aboriginal Land Council and 18 residents. The objections to the proposal are mainly due to the impacts of:

- heavy traffic;
- dust and air pollution;
- noise;
- groundwater and surface water quality.

Whilst the EPA has provided general terms of approval under Integrated Development, the EPA advises that “...all required information has not submitted as part of the EIS. The EPA requires the latest air quality assessment to be provided in order for the EPA to undertake a full assessment of the proposal.” The EPA has also identified that additional information is required on water management and waste handling.

The proposed development is located on and impacts threatened or endangered species being the *Hibbertia procumbens* and Eastern Pygmy Possum. Therefore the proposal is against the principles and aims of ecologically sustainable development and the Threatened Species Conservation Act.

The application should be refused.

**Attachments:** Previous and current Site Plans  
Draft Conditions of Consent.

**Tabled Items:** Nil

## **RECOMMENDATION**

A The Joint Regional Planning Panel as consent authority refuse Development Application No 40918/2011 for the proposed Resource Recovery Facility in 2 Stages on Lot: 9 DP: 787857 No 168 Somersby Falls Road Somersby, for the following reasons:

- 1 The proposal is essentially and materially the same as that dismissed by the Land and Environment Court on 4 December 2007 under Case No 10121 of 2007. Therefore this application is an abuse of process as identified in *Russo v Kogarah Municipal Council* (1999) NSW CA 303.
- 2 The proposal is inconsistent with the aim and objectives of Clauses 24-26 of Gosford Local Environmental Plan 22.
- 3 The proposal (a waste or resource management facility) is a prohibited use under the draft Gosford LEP 2009.
- 4 The proposal is inconsistent with the objectives and management controls of the Somersby Plan of Management. It intrudes into Management zone 1(d) *Hibbertia procumbens* by about 1.4ha.
- 5 The proposal is not ecologically sustainable and contrary to the precautionary principle as it has a direct and unknown impact upon the habitat areas of both *Hibbertia procumbens* and the Eastern Pygmy Possum
- 6 The proposal is inconsistent with the objectives of the *Threatened Species Conservation Act, 1995*.

- 7 Approval of the proposed development would have an irreversible impact and endanger the local population of the Eastern Pygmy Possum.
- 8 Approval of the proposed development would have an irreversible impact of the largest area in the Somersby Industrial Park Plan of Management set aside for *Hibbertia procumbens*.
- 9 The development of the additional incursion into the *Hibbertia procumbens* Management Zone 1(d) will compromise its shape and diversity and will therefore alter the efficacy of this part of the Somersby Industrial Park to deliver the intended conservation outcome for that species and others that it may support.
- 10 The proposal does not deliver an “improve or maintain” outcome for the Somersby Industrial Park. The Biocertification calculations indicate that the threatened species within the Somersby Industrial Park cannot sustain any further losses to the management zones
- 11 The proposal has not been supported by appropriate mitigation and offset measures to compensate the loss / impact on threatened species management zones and habitat. A Biobanking Certificate has not been submitted with the development application.
- 12 Piecemeal applications of over-sized development footprints in isolation of the conservation context of the SIP as enunciated by the PoM will threaten the long term conservation of the subject species because it will irrevocably compromise the PoM’s integrity.
- 13 Compromising the management zones with the encroachment of development will erode the Ecologically Sustainable Development principles that the Somersby Industrial Park Plan of Management was founded upon.
- 14 There has been no evidence submitted of recent consultation with local Aboriginal communities in relation to the application as outlined in the letter from the NSW Office of Environment and Heritage dated 16 May 2012.

The Darkinjung Local Aboriginal Land Council has objected to the proposal due to the close proximity to numerous Aboriginal sites and the impact on surrounding culturally significant sites.

- 15 The Environmental Protection Authority has determined that all required information was not submitted as part of the EIS. The EPA requires the latest air quality assessment to be provided in order to the EPA to undertake a full assessment of the proposal, as well as additional information on water management and waste handling all required information was not submitted as part of the current EIS application.
- B The applicant is advised of JRPP’s decision and of their right to appeal to the Land and Environment Court within 12 months after the date of determination.
- C The objectors are notified of Council’s decision.
- D The External Authorities be notified of the Joint Regional Planning Panel decision.

<<Insert Attachment Link/s Here >>