

8 October 2020



Via Online Portal

Department of Planning, Industry and Environment,
Green and Resilient Places Division,
Locked Bag 5022, Parramatta NSW 2124

Dear Sir/Madam,

**Objection to Draft Cumberland Plain Conservation Plan
[REDACTED] Kemps Creek [REDACTED]**

We act on behalf of our clients, who own [REDACTED] Kemps Creek [REDACTED]

The following letter sets out our written objection to the draft Cumberland Plain Conservation Plan and proposed State Environmental Planning Policy (SEPP) which proposes to implement biodiversity conservation measures for Western Sydney.

Site features— [REDACTED] Kemps Creek

The site covers an area of approximately 29.58ha and is located on the western side of [REDACTED] with access provided by one of two driveways. The site is elongated extending toward the west with the western boundary proximate to the alignment of South Creek. Additional to South Creek, the site is traversed by Kemps Creek at a location approximately 265m east of South Creek. The property is occupied by a large dwelling house with a smaller caretaker's dwelling house located to the south of the main dwelling. Both dwellings occupy the same title.

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PLANNING

APPROVALS

DEVELOPMENT

The site slopes gently toward South Creek and contains little vegetation other than remnant bushland along the Kemps Creek banks which traverses the site from south to north. There is little vegetation within the riparian buffer of the South Creek banks.

A high voltage transmission line and associated easement bisects the site in a north-south direction.

The site, in the regional context is depicted in

Figure 1 with a site detailed aerial image depicted in [Figure 2](#) below.

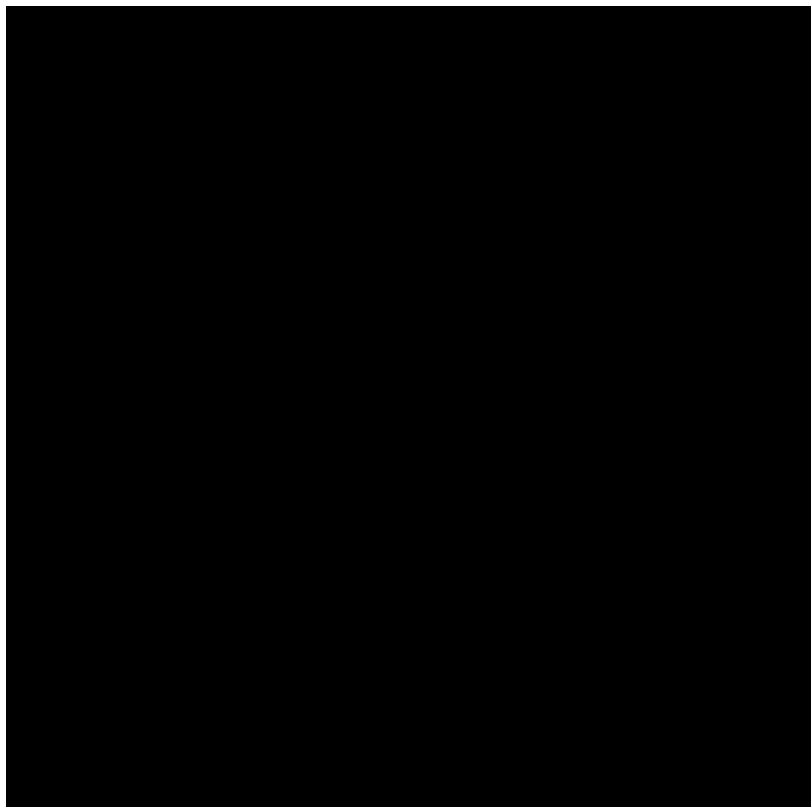


Figure 1 Regional context

Source: SixMaps

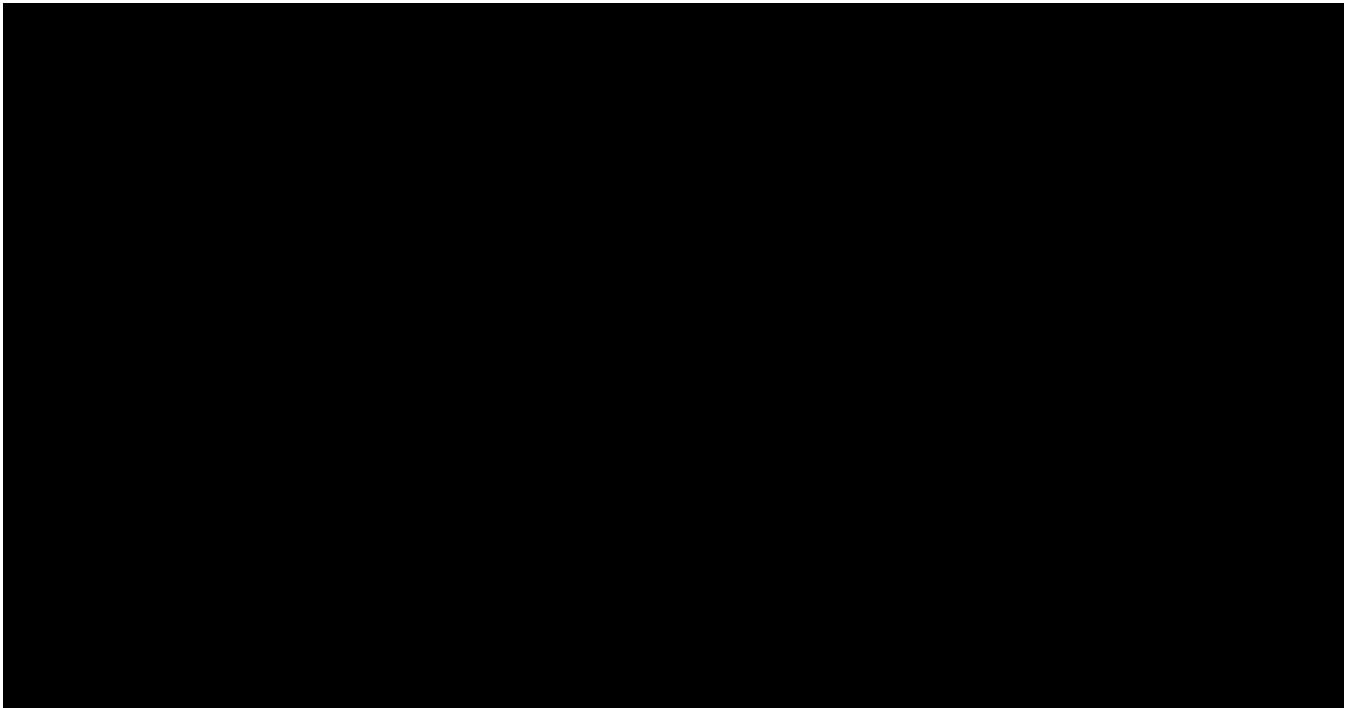


Figure 2 Local context

Source: - NearMap

Planning Framework

It is assumed that DPEI Officers are well aware of the legal and policy relationships between the Draft Cumberland Plain SEPP with existing and historical environmental planning instruments applying to the land.

A full description of the planning framework as well as a brief discussion of biodiversity issues is contained within Appendix 1 to this objection.

For the purposes of this objection, the following observations are relevant.

- Under Penrith LEP 2010 only South Creek, Kemps Creek and their associated riparian corridors were zoned E2.
- The Biodiversity Offset Scheme Entry Threshold Map permits biodiversity stewardship agreements only for the watercourses and riparian lands around both creeks.
- State Environmental Planning Policy (Western Sydney Aerotropolis) 2020 (WSA SEPP) identifies the land between the two creeks as additional “high biodiversity values” land. Compared with the former E2 zoning under PLEP 2010, the additional biodiversity values land is entirely devoid of vegetation save grass ground cover.
- WSA SEPP also maps the extent of flood liable land.

- Land to the east of the flood liable land is future industrial land under State Environmental Planning Policy (Western Sydney Employment Area (WSEA SEPP)). A relatively small part of the land west of Kemps Creek is zoned RE1 – Public Recreation under WSEA SEPP with Penrith Council identified as the acquiring authority.

Grounds for Objection

At its core, the draft Cumberland Plain Conservation Plan is an overlay mapping exercise which identifies what is purported to be non-urban capable land and it then proposes to apply an E2 – Environmental Conservation zone to all of that land.

The proposed E2 zone is indiscriminate about what is the reason for purported non-urban capability. In other words, it treats non-biodiversity flood liable land the same as existing core Cumberland Plain Woodland.

Taken at its kindest, this is a well-intentioned public purpose zoning which seeks to set aside land for Cumberland Plain recovery and over time, to bring that land into public ownership. We note here that there is neither timeframe nor funding method for the acquisition of the proposed E2 zoned land.

We assume that the rather more odorous operational effect of the proposed E2 zoning, being stealthy devaluation of Environmental and Recreation Zoned Land under WSA SEPP, is not intended by DPIE. Unintended as it may be, that is the clear, front and centre and immediate operational impact of the Cumberland Plain Conservation Plan.

The South Creek Precinct under WSA SEPP 2020 was intended to be the first of three precincts to be released for planning. The precinct is to be an open space and environmental conservation spine which will provide for recreation opportunities to support the Aerotropolis.

As gazetted, the WSA SEPP only presently identifies a small part of the South Creek Precinct as being subject to acquisition, that being land adjacent to and south east of the Aerotropolis Core. It is to be presumed that as other precincts are released, proximate and or adjacent areas of South Creek Precinct will also be identified for acquisition.

When such acquisition occurs, it will be done so either by agreement or in accordance with the Land Acquisition (Just Terms) Compensation Act 1991. Under either pathway, the compensation payable by DPIE to the disposed land owner will be based on “market value” as defined in accordance with Section 56 of that Act.

The typical methodology for determining “market value” is to identify the ‘underlying zoning’. That is, the zone that would have applied, but for the proposal to carry out the public purpose.

The Cumberland Plain Conservation Plan combined with WSA SEPP operates to double layer environmental conservation values to significant areas of land which but for the historic E2 zoning under PLEP 2010, in fact have no existing environmental conservation value.

The DPIE would be well aware that in accordance with Walker v Sydney Harbour Foreshore Authority, it is only the public purpose for which the land is to be acquired which can be disregarded, not all public purposes which might apply to the land.

The practical effect is that if acquired as "Environment and Recreation" under WSA SEPP, the underlying zoning will be E2 under Cumberland Plain SEPP. If acquired under Cumberland Plain SEPP, the underlying zoning will be Environment and Recreation under WSA.

We described this outcome as "more odorous" above, because but for the Cumberland Plain SEPP, the underlying zoning absent the Environment and Recreation zone would have been, in most cases, (depending on time frames) underlying RU2 under Penrith LEP with future industrial potential or underlying Industrial (flood liable) under the SEPP WSA.

The valuation difference between flood liable industrial and E2 Environmental Conservation is likely to be in the order of \$100/sqm or more. Multiplied by the area of land affected by the Cumberland Plain SEPP, **the acquisition cost savings to DPIE would be measured in the hundreds of millions if not billions of dollars.**

It is difficult to believe this to be an unintended consequence because of the fact that the E2 zone involves such obvious and palpable double layering of environmental conservation values to land which in fact has no present biodiversity value.

We look forward to the Department's considered review of our client's submission.

Please feel free to contact me on telephone number [REDACTED] or [REDACTED] should you wish to discuss further.

Yours sincerely

Haskew de Chalain

[REDACTED]

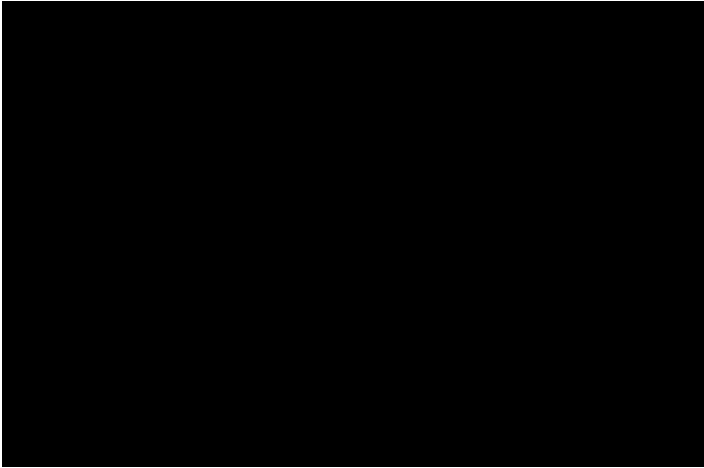
David Haskew

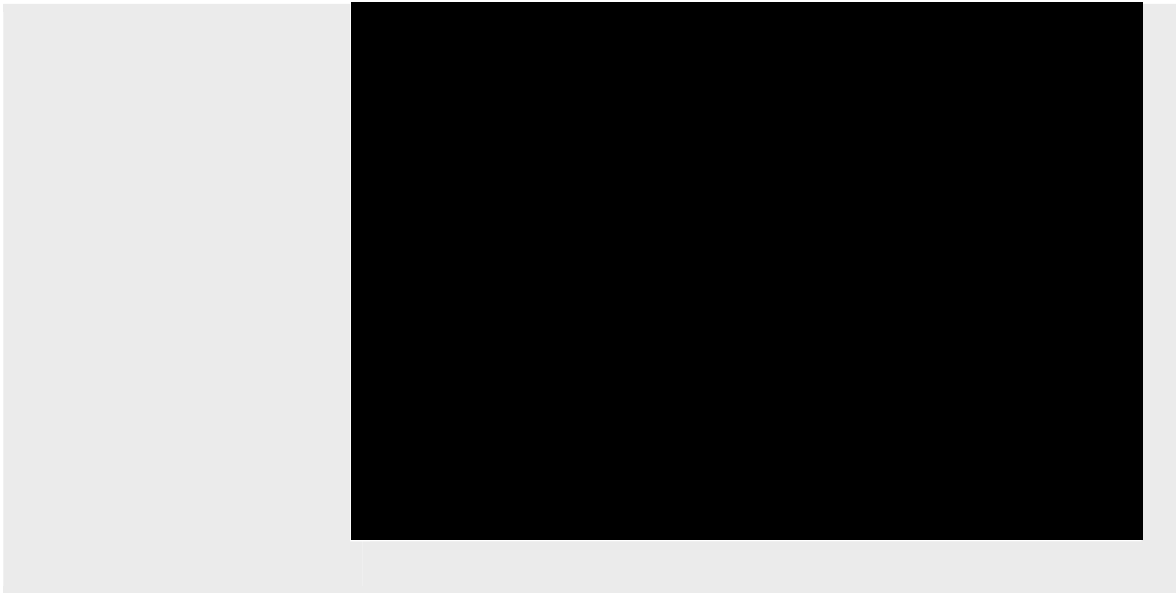
Senior Partner

Appendix 1 Relevant planning context and biodiversity matters

Current planning framework

The property falls under State Environmental Planning Policy (Western Sydney Employment Area (WSEA SEPP) and under State Environmental Planning Policy (Western Sydney Aerotropolis) 2020. Prior to incorporation into those SEPPs it was subject to the provisions of Penrith Local Environmental Plan 2010. The consideration of previous and current zoning and environmental protection overlays is relevant when considering the impact of the draft Cumberland Plain Conservation Plan and associated future SEPP on the property. The following table outlines the applicable zoning and environmental protection mapping currently applied to the site:

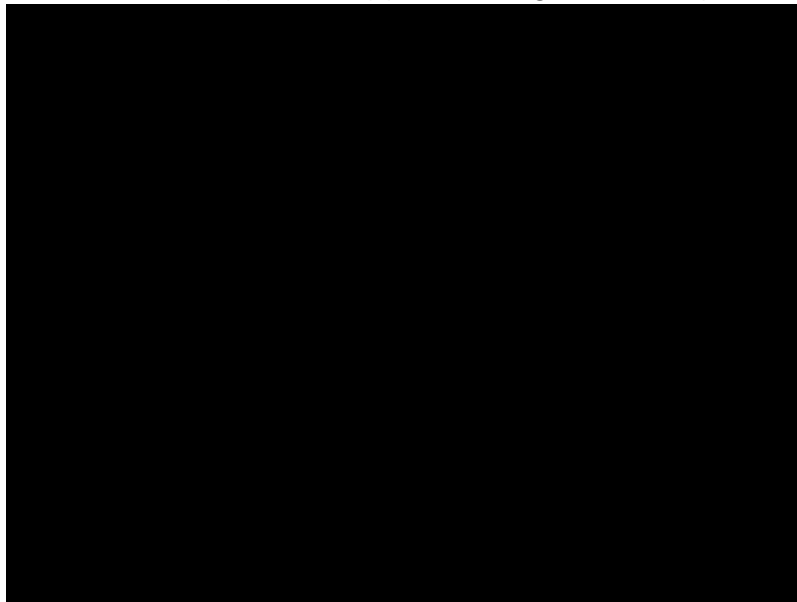
Planning Instrument	Provisions
SEPP (Western Sydney Employment Area) 2009	<ul style="list-style-type: none"> IN1 General Industrial RE1 Public Recreation
ZONING	
SEPP (Western Sydney Aerotropolis) 2020 (SEPP WSA)	<ul style="list-style-type: none"> Environment and Recreation Zone (ENZ)
ZONING	



**SEPP (Western Sydney
Aerotropolis) 2020 (SEPP
WSA)**

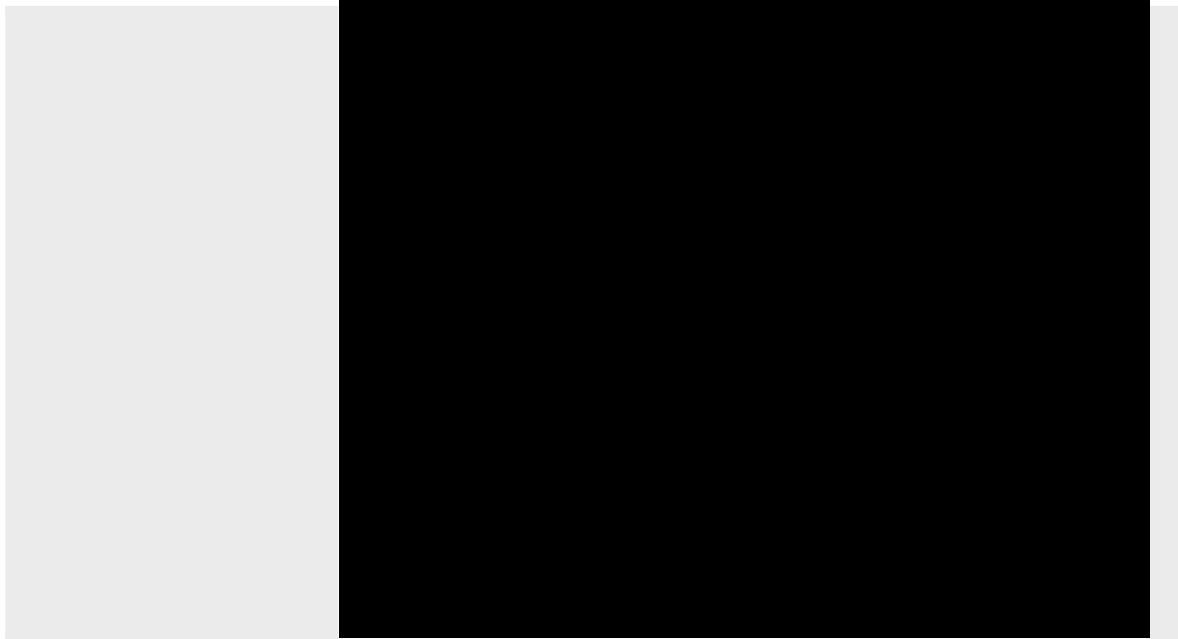
**High Biodiversity Value
Areas Map**

- Western portion mapped with High Biodiversity Values



FLOOD AFFECTATION

- Western half of site affected by 1 in 100 year flood extent



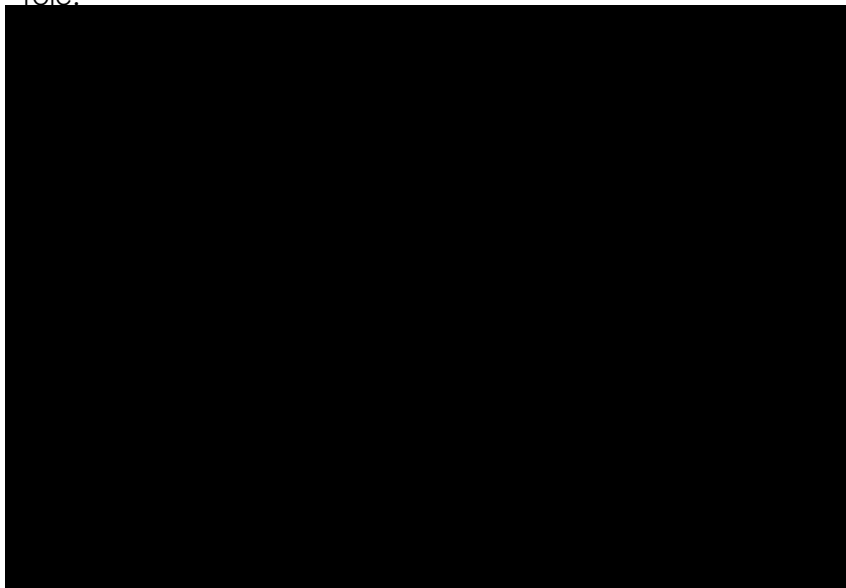
**SUPERSEDED – Penrith
Local Environmental Plan
2010**

The draft Cumberland Plain Conservation Land and proposed E2 zoning applies to the same land which was either or both “High Biodiversity Values” or “Flood Affected”.

Prior to the site’s incorporation into the SEPP WSEA and SEPP WSA the site was covered by the provisions of Penrith LEP and was zoned part:

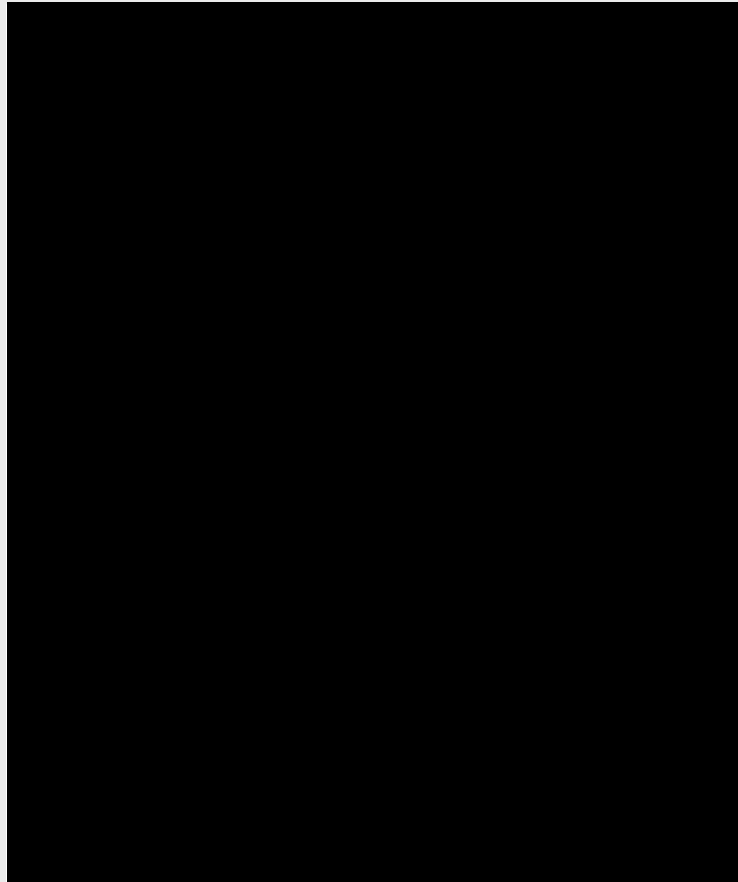
- RU2 – Rural Landscape; and part
- E2 – Environmental Conservation.

The E2 zone delineation closely reflects the location of Kemps Creek and South Creek and likely performed a riparian buffer role.



Biodiversity Conservation Act 2016

The riparian buffer portions of the site are identified on the 'Biodiversity Values' map under the Biodiversity Conservation Act 2016.



The effect of this regulatory legislation, as confirmed by the BOSET Report for the site, is that any proposed future land clearing in excess of 0.5ha would trigger a requirement for a Biodiversity Threshold Assessment undertaken by an accredited assessor.

It is noteworthy that very little of the proposed E2 zoned land under the Draft Cumberland Plain Conservation Plan is recognised as having conservation value under the BOS.

Proposed provisions under the Draft Cumberland Plain Conservation Strategy

The draft Conservation Plan has designated our client's property as partly;

- Certified – Urban Capable (SEPP WSEA IN1 – General Industrial zoned portion);
- Non-certified – avoided for biodiversity;
- Non-certified - Western Sydney Aerotropolis;
- Non-certified – avoided for other purposes; and
- South western third of the site is identified as 'proposed environmental conservation zoning' denoted by red diagonal hatching.

Figure 3 below reproduces the proposed land categories for the property:

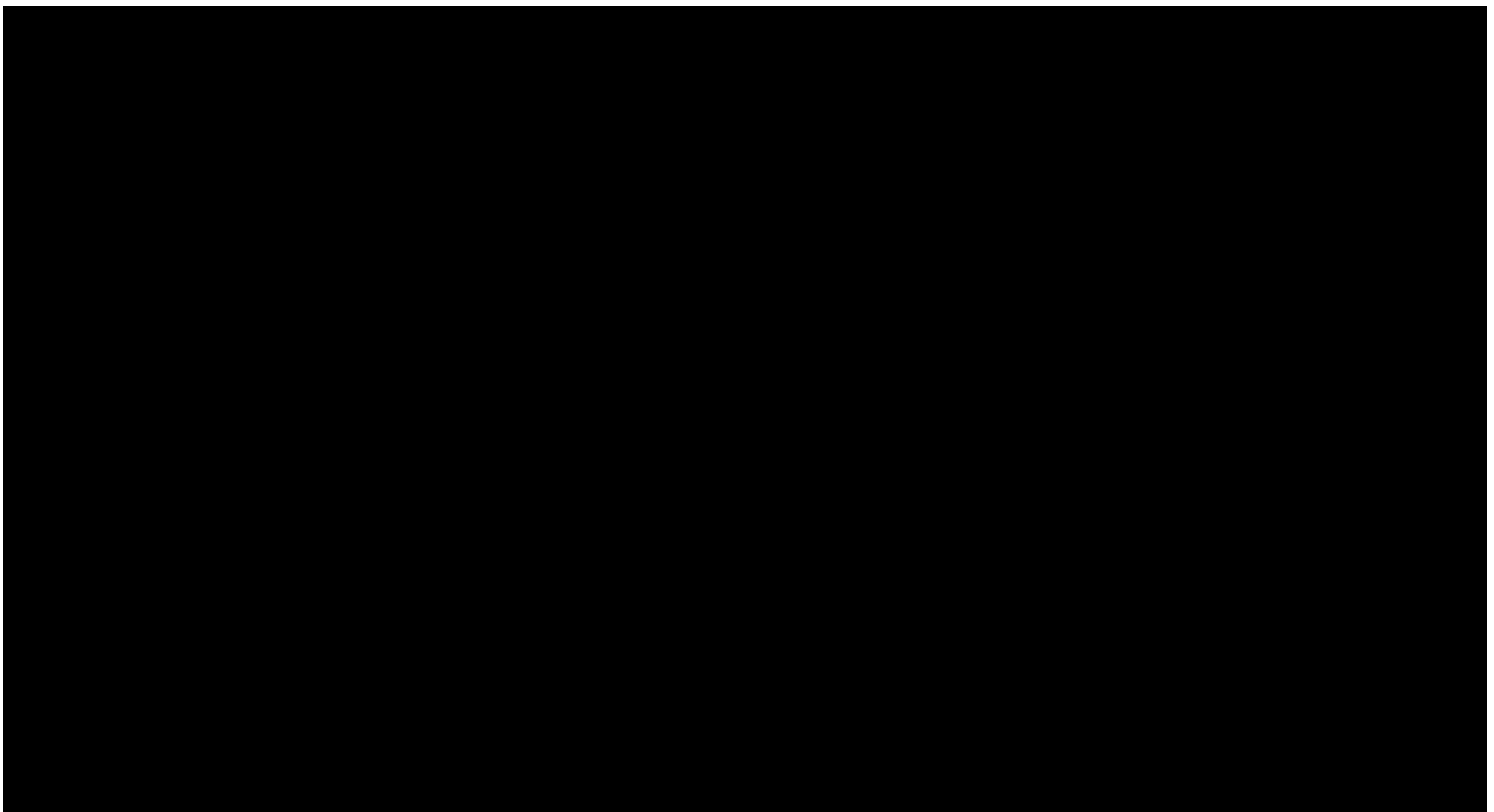


Figure 3 Proposed Environmental Conservation Zoning

Biodiversity applicability

The Cumberland Plain Conservation Plan combined with WSA SEPP operates to double layer environmental conservation values to significant areas of land which but for the historic E2 zoning under PLEP 2010, in fact have no existing environmental conservation value.

It is acknowledged that provisions exist for certain E2 – Environmental Conservation land to be suitable as biodiversity stewardship agreement sites between the Biodiversity Conservation Trust and a land holder. Such agreements permanently protect and manage an area of land to improve its biodiversity values. The eligibility for the scheme however,

relies on the presence of certain critically endangered and endangered ecological communities.

The ecological assessment that informed the structure plan for the [REDACTED] Precinct, prepared by Eco Logical (*Eco Logical Pty Ltd – Broader Western Sydney Employment Area – Biodiversity and Riparian Assessment, 19 June 2013*) identified remnant alluvial woodland, in poor condition, on the banks of Kemps Creek where it bisects the site. See **Error! Reference source not found.** below:

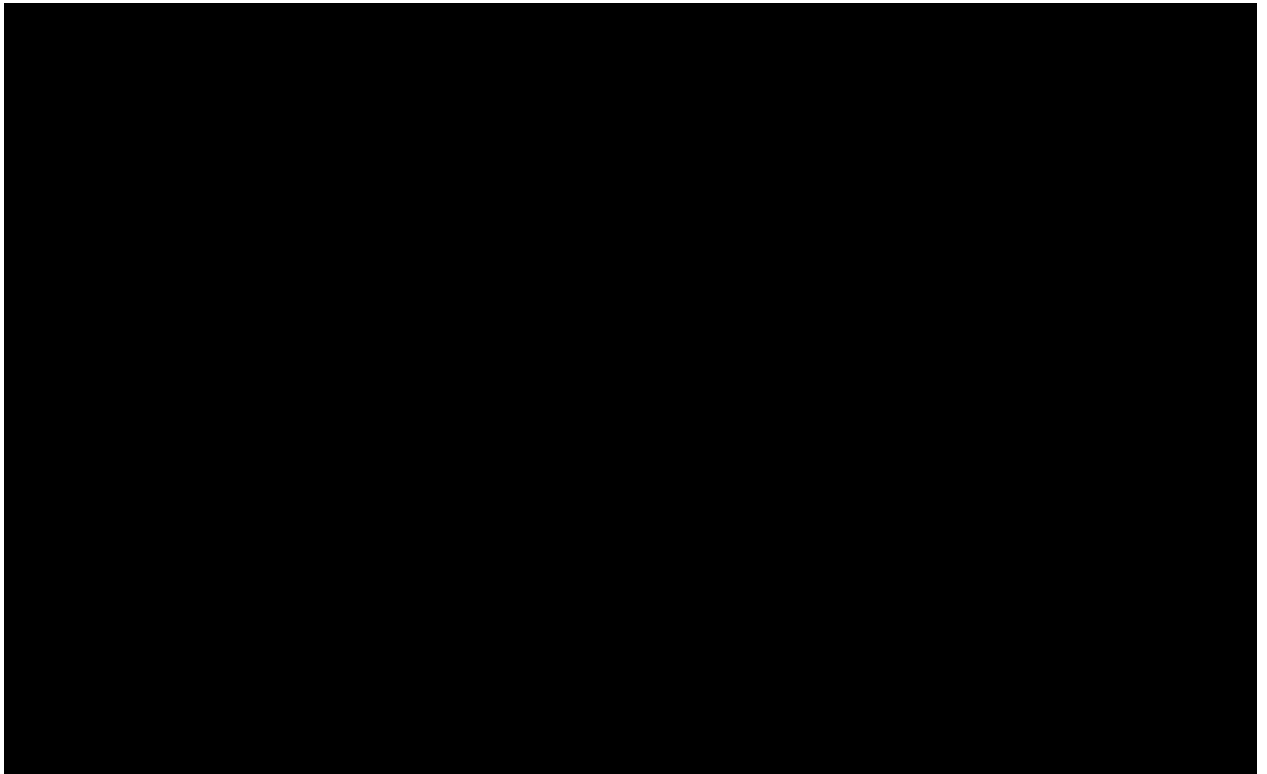


Figure 4 Eco Logical – Vegetation Communities (EEC and CEEC) and Threatened Species records

Source – Eco Logical Broader Western Sydney Employment Area – Biodiversity and Riparian Assessment, 19 June 2013, Figure 3, page20)

The Eco Logical report maps the condition of the remnant vegetation on the site as poor quality (TX). Given the small size of the remnant community and its poor quality, it is unlikely this site would qualify for the biodiversity stewardship scheme. If it did actually qualify, it would be limited to the remnant vegetation only, leaving the balance of the E2 zoned land.

The site is largely cleared. Given the small size of the Alluvial Woodland community, it is likely the proposed future E2 zoning has been applied due to flooding affection and riparian buffer requirements (see superseded Penrith LEP zoning over the site) rather than reflecting any additional threatened biodiversity communities.