

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

9 October 2020

Dear Sir/ Madam

**Re: [REDACTED] Kemps Creek [REDACTED]
Impact due to Draft Cumberland Plain Conservation Plan ('draft plan')**

We act for the property owners of No. [REDACTED] Kemps Creek ('property'). Our client resides in a dwelling house on the property. The property is used for extensive agriculture. The site area of the property is about 11ha.

There are only scattered trees within the front setback of the existing dwelling, with a thinned cluster of trees proximate to its western boundary extending to the rear boundary. The central area of the parent parcel is not occupied by vegetation, but appears to be used for extensive agriculture purposes, with livestock occupying that area (at the time of our site visit) (*Image 1*).

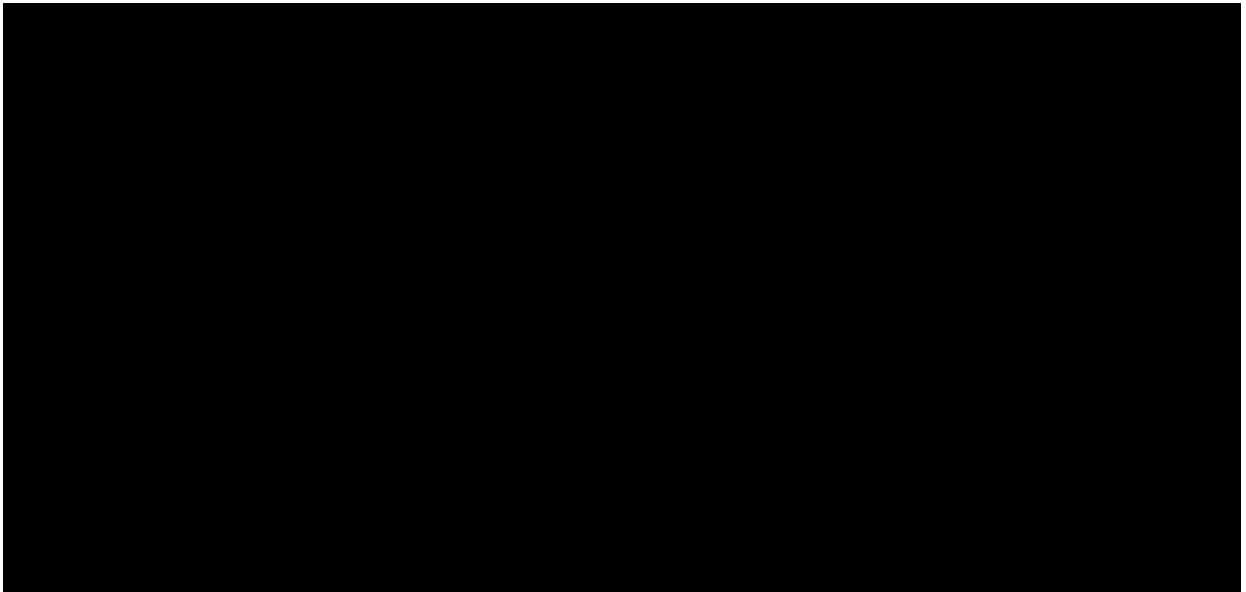
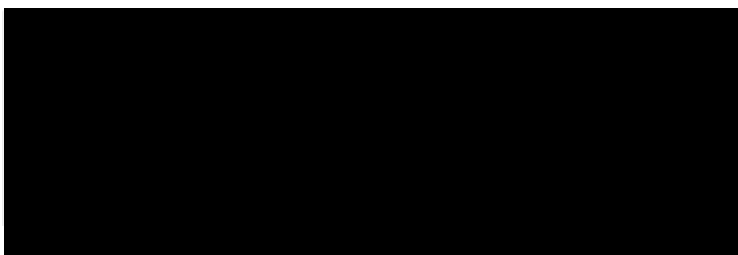


Image 1: Facing north to the rear boundary on the property



By comparison to the view in Image 1, the mapped footprint of existing vegetation prepared as part of the exhibited Draft Cumberland Plain Conservation Plan ('draft plan') is excessive. The mapping relied upon is to be updated.

The front portion of the property is identified for future acquisition for the widening of Elizabeth Drive. It is understood also that there is to a road intersection that will involve partial acquisition of the western side of the property. As a consequence, existing trees in the front setback, and along that boundary will be required to be removed (*Image 2*).

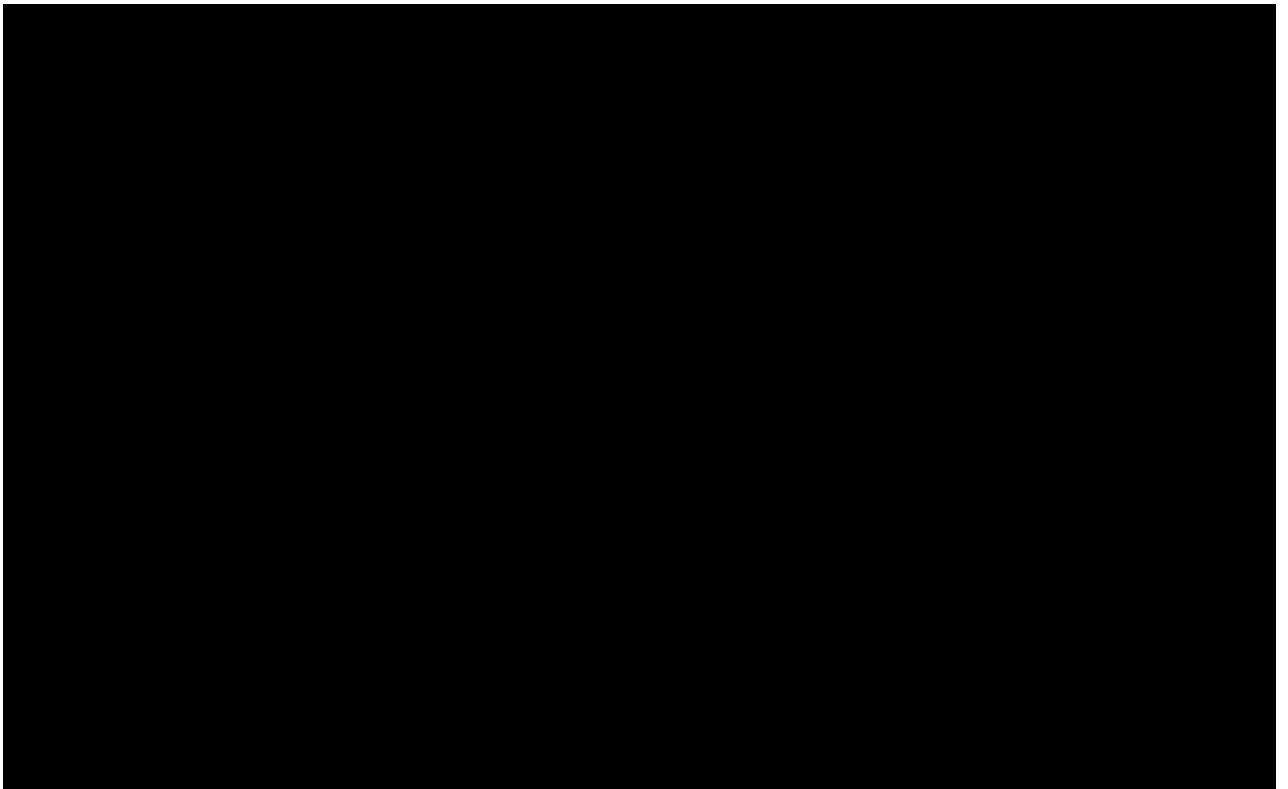


Image 2: Extract from road widening plan for Elizabeth Drive depicting land to be acquired, with trees to be removed in the front setback and along the western side of the property.

Our client's property is currently a potential development site. It has the potential for:

- the extraction of regionally significant clay/shale resources under deemed SEPP instrument, State Regional Environmental Plan No.9 – Extractive Industry ('SREP9');
- rural residential subdivision for 5 lots under the Penrith LEP 2010 ('LEP'); and,

- would have been identified under the SEPP (Aerotropolis) 2020 ('SEPP 2020'), as future Flexible Employment land but for the mapping within the draft plan which caused it to be amended for future zoning for a public purpose, as public open space.

Current planning provisions

A. State Regional Environmental Plan No.9 – Extractive Industry No.2 – 1995 ('SREP9')

Our client's property is currently identified on Schedule 1 of SREP9 as a *clay/shale extraction area of regional significance*. SREP9 is a deemed SEPP under the Environmental Planning and Assessment Act 1979. The clay/shale resources under the property are regionally significant.

The neighbouring quarry land immediately east of the property is also identified in Schedule 1 of SREP9 in a similar manner.

B. Growth Centres SEPP

Neighbouring land (south of the property) on the opposite side of Elizabeth Drive, is mapped under the Growth Centres SEPP as *Public Recreation – Regional*. It is densely vegetated with woodland identified as being similar to that suggested for the property under the draft plan. The subject property is not mapped in that manner.

The proposed future widening of Elizabeth Drive will result in there being greater separation of the subject property from the neighbouring land.

C. Penrith LEP 2010 ('LEP')

The property is currently zoned RU4 Primary Production Small Lots under the LEP. The LEP minimum lot provision for subdivision applicable to the property is 2ha. That provision enables subdivision of the property into 5 rural-residential lots.

The property is not included in Council mapping for biodiversity purposes under the LEP. Unlike neighbouring densely vegetated land north of the property, it is not mapped under the Council LEP as *natural resources sensitive land* to which clause 7.3 of the LEP applies (**Image 3**). Clause 7.3 incorporates measures to protect biodiversity corridors and remnant indigenous vegetation.



Image 3: Extract from the natural resources sensitive land mapping of the LEP pertinent to land north of Elizabeth Drive.

D. Western City District Plan

The property is identified on the structure plan of the Western City District Plan ('District Plan'), which is subject to Ministerial Direction, in the Land Release Area. The District Plan is to be relied upon for future strategic plan-making for the area, and thus is a consideration in the consideration of the draft Plan.

E. Western Sydney Aerotropolis Growth Area ('WSAGA')

Since August 2018, the property has been identified in the Land Use and Infrastructure Implementation Plan ("LUIIP") for the WSAGA. It is identified in the Kemps Creek Precinct for future zoning as Flexible Employment (**Image 4**).

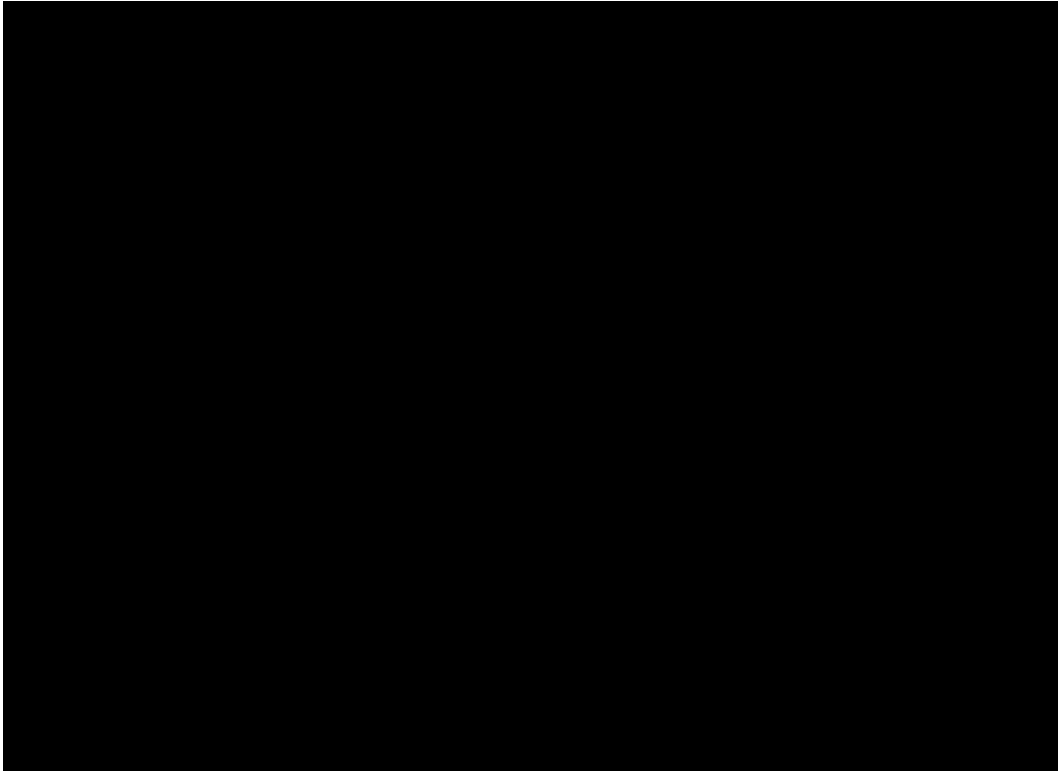


Image 4: Extract from the LUIIP, with the property identified in the Flexible Employment Zone.

When the LUIIP was issued the property was identified in Precinct 11, *Broader Western Sydney Employment Area*, under SEPP (Western Sydney Employment Area) 2009 ('WSEA SEPP'). The precinct comprised land that was ear-marked for future employment purposes. The property has been identified in Precinct 11 since 2015, for some 5 years (**Image 5**).

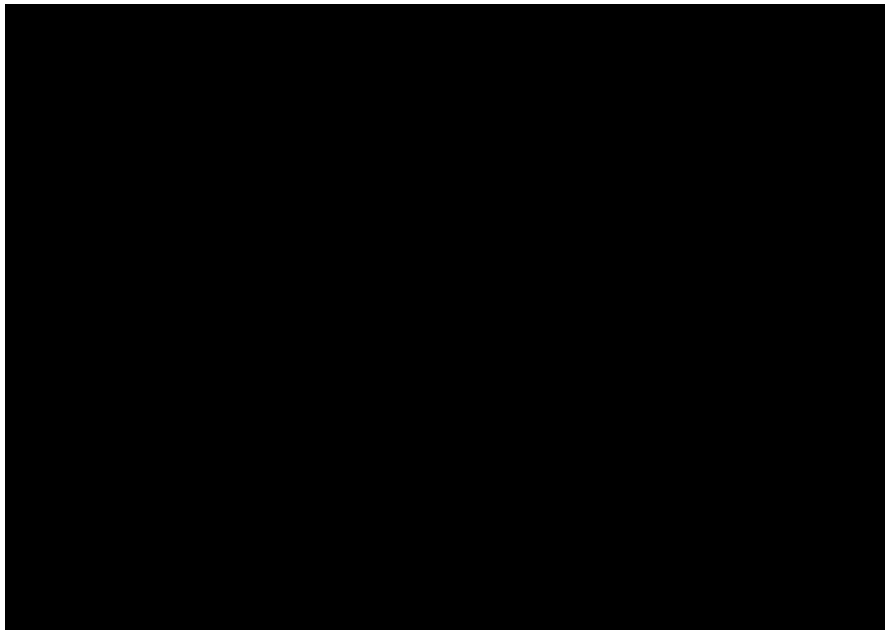


Image 5: Extract from the SEPP WSEA mapping, with property shown in the area of Precinct 11.

In December 2019, the exhibited Draft Western Sydney Aerotropolis Plan ('Draft WSAP') includes a further structure plan (evolving that within the LUIIP). Unlike the LUIIP structure plan mapping for the Kemps Creek Precinct, the property was only shown on the Draft WSAP mapping to be partially zoned Flexible Employment (along its frontage to Elizabeth Drive and the area around the existing dwelling). The remaining area was shown to be future Environment and Recreation ('Recreation Zone) on the structure plan.

The objectives, and permitted uses, in the Recreation Zone of SEPP 2020 are particular to the identification of public open space, and its use for outdoor recreation purposes. In essence, it is the equivalent of a land acquisition zone.

In the making of the final WSAP structure plan, the front portion of the site is identified for future road widening of Elizabeth Drive (**Image 6**). The footprint area of the future Recreation Zone on the structure plan on the property is the same footprint area as the proposed strategic conservation area identified for the property under the draft plan (**Images 6 and 7**).



Image 6: Extract from the final structure plan for the WSAGA

The Draft Plan

The draft plan advises, for the plan area:

- some 5,475ha of land is required to be secured to meet biodiversity requirements under the Commonwealth's strategic assessment of the area; and to achieve NSW Government strategic biodiversity certification; and
- of this, 2300ha is to be located in proposed strategic conservation areas.

The above biodiversity land targets of the Department are based on achieving a particular strategic planning nature to offset development within the WSAGA. They are created to offset biodiversity impacts caused by development envisaged for the plan area.

The draft plan identifies the property as:

- a future strategic conservation area (**Image 7**). It includes areas of the property shown on its own mapping as not being occupied by native vegetation;
- 'non-certified – avoided for biodiversity purposes';
- partially occupied by native vegetation; and
- to be primarily re-zoned E2 Environmental Conservation under a future SEPP.

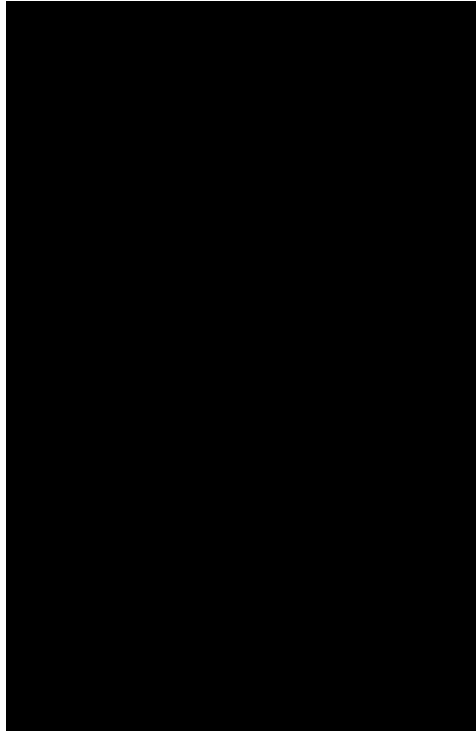


Image 7: Footprint area of the proposed strategic conservation area on the property.

Inappropriateness of the proposed E2-zoning and Non-Certified land designation

Application of the E2 zone to the property, and its identification as Non Certified Land, is unreasonable and inappropriate in this instance.

Our client's property is currently a potential development site. It has the potential for:

- the extraction of regionally significant clay/shale resources;
- rural residential subdivision for 5 lots; and,
- would have been identified as future Flexible Employment land but for its identified future zoning for a public purpose, for recreation/ public open space.

The proposed E2 zoning will impact upon the ability for the property to achieve the above development potential.

The mapped footprint (in the email of 22 September 2020 from the Department), scope and nature of native vegetation said to be located on the property that informs both the suggested footprint of the E2 zone and Non Certified land is inaccurate and/ or incorrect.

The proposed E2 zoning of the property, and neighbouring land, also represents a planning back-flip on the WSAP commitment upon which the recently made SEPP 2020 is based. The WSAP reads (pg.15¹):

‘The relevant LEP Zone applies until a precinct plan for Kemps Creek is developed’.

The proposed E2 zoning of land in the Kemps Creek Precinct, including the property, is contrary to commitment given by the Department to the community in its Western Sydney Aerotropolis Plan (‘WSAP’), i.e. to retain the existing land use zoning of the Kemps Creek Precinct. In providing that commitment, the WSAP effectively confirmed that the RU4 zoning under the LEP would remain until future precinct planning would occur.

The Department’s advice, dated 22 September 2020 (**Annexure A**) provides the following reason for the proposed rezoning of the property under the draft plan. It reads:

- *‘A large portion of your clients’ lot was identified as “Non-certified – avoided for biodiversity purposes” and has proposed environmental zoning due to the presence of Western Sydney Dry Rainforest, an endangered ecological community.’*

That advice from the Department, justifying the proposed E2-zoning and Non-Certified land designation of the property, is based on incorrect assumptions, and therefore is inappropriate for the following reasons:

- the advice of the Department about the *Western Sydney Dry Rainforest* on the land is inaccurate. The attached advice of our client’s ecological consultant, Umwelt) (‘ecological consultant’) confirms there is NO Western Sydney Dry Rainforest on the property (**Annexure B**);
- the native vegetation map provided depicting native vegetation on the property is also inaccurate (it being based solely on desktop analysis). To date there has been no on-site investigation of the property to inform the illustrated mapping provided by the Department on 22 September 2020. The ecology consultant advises that:

The extent of the native vegetation on site is less than that depicted in the draft plan, with the difference being significant.

¹ *Western Sydney Aerotropolis, Summary of Key Planning Documents, December 2019*

- the ecology consultant advises that none of the biodiversity species (considered in the supporting reports to the Biodiversity Study with low potential to be on the land) were identified on the property. It advises:

*Various species-specific reports are appendicised to the Draft Cumberland Plain Assessment Report (Biosis and Open Lines 2020). These include reports addressing the threatened plants *Hibbertia puberula*, *Hibbertia fumana*, *Acacia bynoeana*, *Acacia pubescens* and *Dillwynia tenuifolia*. I did not see any of these species whilst on the site.*

There is no justifiable basis expressed in the draft plan that distinguishes the subject property (proposed as Non Certified Land) from other land in the plan area occupied by similar stands of native vegetation but which are identified as Certified Land. The broad-based application of the E2 zone to the property is unreasonable given:

- a. in our experience, the E2 zone is not typically applied to land not occupied by existing native vegetation, or on which native vegetation can co-exist with other land uses. Such application has the potential to overly sterilise land from development. It also typically not applied to land that has the potential to support development that can co-exist with existing native vegetation;
- b. there are large areas of Certified Land in the South West Growth Centre ('Growth Area') south of Elizabeth Drive (which forms part of the plan area) currently occupied by native vegetation that is not identified as Non Certified Land under the draft plan. As such, that native vegetation will be permitted to be removed to facilitate redevelopment to meet urban targets.
- c. Under existing biodiversity certification, biodiversity offsets are required to be provided for any removal of native vegetation. Typical such land is situated below the 1 in 100 flood extent, being land considered generally unsuitable for development.

- d. By comparison the subject land is not flood-affected. It is best suited for redevelopment, as Certified Land. The subject land has been in the plan-making for the area identified, and is more suitable, for redevelopment. For instance:
- i. the subject land could retain its RU4 zoning (as was committed to under the WSAP), and be subdivided into 5 lots without the need to remove any existing native vegetation in the short to medium term pending future precinct planning. There is adequate cleared area on the property along the eastern boundary for an access driveway, and for 5 dwellings; and,
 - ii. the existing extractive resource could be removed, either solely from the cleared area; or involve rehabilitation with native vegetation where existing vegetation is required to be removed as part of that extraction, and thereafter restored as part of future precinct planning. The proposed E2 rezoning (under the proposed SEPP) will sterilise this resource due to clause 4(1) of SREP9 that would result in the proposed E2 zoning removing its potential for extractive industry purposes; and
 - iii. future Flexible Employment uses are suitable for the property (as reflected by the identification of the front portion of the land in that manner, and as was formerly identified for the whole of the land), with biodiversity offsets payable for any removal of existing vegetation, and that vegetation provided in flood-affected areas.
- e. The existing LEP has provisions, in the form of clause 7.3, that allow for the development of land identified as warranting biodiversity protection whilst not hindering development potential. For instance, the land north of the property is also zoned RU4, whilst also having an overlay to which clause 7.3 applies. Thus, for instance, that land would still be able to be subdivided for rural residential purposes, but only after consideration of any biodiversity impacts. The E2 zone is not used in the same broad-brush manner as is being proposed by the draft LEP. The current RU4 zoning also enables land occupied by native vegetation to be included in the area required for the determination of minimum lot size in a subdivision.
- f. Under the LEP, the E2 zone is used in a more practical manner, relating to the protection of watercourses and the like

Unreasonable identification of the property as strategic conservation area

The identification of the property as a proposed strategic conservation area extends over a large area of the property that not occupied by any mature native vegetation and is being used for extensive agricultural purposes.

Most of the land is clear of trees.

The identified tree species identified by the Department that is said exist on the land has been confirmed not to exist.

The footprint of the proposed strategic conservation area comprises the same footprint as that identified under SEPP 2020 that is identified for future recreation (a zone for future public open space and recreation) (**Images 6 & 7**). The purpose of the Environment and Recreation Zone is identified (pg.12²) '*for recreation and relaxation*', being '*vital to the Western Parkland City's liveability*'.

The draft plan also does not propose to include provision for the acquisition of land to achieve its proposed strategic conservation area, identified to facilitate the Department's requirement to provide sufficient land to meet its biodiversity targets for the plan area.

This potential will be compromised by the proposed widening of Elizabeth Drive, which will result in the further separation of the property from that area; as well as significant removal of large trees in the existing road reserve, and on the western side of the property. Thus the current connectivity of the two areas presumably assumed by the identification of the strategic conservation area will be diminished.

The purpose of proposed strategic conservation area is identified in the draft plan to facilitate the creation of a biodiversity corridor between the Regional Open Space south of Elizabeth Drive and the dense stand of native vegetation on neighbouring land north of the property. Its primary purpose is to assist the Department in achieving its identified biodiversity targets for the plan area.

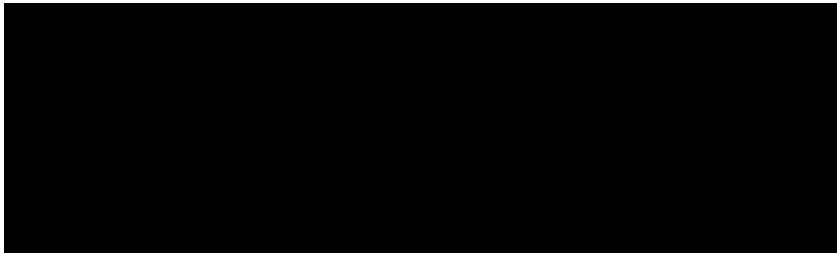
If the Department wishes to identify the property as a strategic conservation area, the property should also be identified within an acquisition zone, and not zoned E2, under the draft plan. Deferral of its likely acquisition to serve that purpose is unreasonable.

Application of an E2 zoning over the property is likely to result in a very costly and complicated appeal to Land and Environment Court under the terms of the *Land Acquisition (Just Terms Compensation) Act 1993*, given it's application effectively removes the development potential of the land, sterilising its use for the extraction of regionally significant clay/shale resources; for rural residential subdivision; or for future employment purposes.

² *Western Sydney Aerotropolis, Summary of Key Planning Documents*, December 2019

It is recommended that the E2 zoning of the property, and its treatment as Non-Certified Land be re-considered, to retain its current RU4 zoning for the whole of its area (as committed to by the Department in the making of the WSAP); and for the property to be identified for future employment purposes in the making of the future precinct plan for the Kemps Creek Precinct, with the relevant amendment made to the WSAP Structure Plan.

Otherwise the property should be identified for compulsory acquisition under the SEPP to facilitate implementation of the public purpose of a strategic conservation area corridor identified in the draft plan.



Anthony Rowan
Director

Annexure A

Email advice from the Department
22 September 2020

From: DPE PS Biodiversity Mailbox <biodiversity@planning.nsw.gov.au>
Subject: RE: Draft Cumberland Plain Conservation Plan - [REDACTED]
Date: 22 September 2020 at 11:57:50 am AEST
[REDACTED]

Dear Mr Anthony Rowan,

Thank you for your interest in the draft Cumberland Plain Conservation Plan(the Plan)
A letter notifying the landholder of public exhibition of the Plan was mailed to your clients on the 27 of August 2020, to their registered postal address. Please see here responses to your queries:

(a) a 3 week extension to make a submission

We are pleased to notify you that exhibition of the Plan has been extended for two weeks, now closing on Friday 9 October 2020.

(b) a copy of the documentation that has been sent to neighbouring landowners

A letter was sent to all landholders within the Plan area with proposed environmental conservation zoning on their land. We cannot provide the letters for neighbouring landowners due to confidentiality reasons however have attached the standard template on which most of the letters were based.

(c) a copy of the data that has informed the draft plan

A large portion of your clients' lot was identified as "Non-certified – avoided for biodiversity purposes" and has proposed environmental zoning due to the presence of Western Sydney Dry Rainforest, an endangered ecological community.



Mapping of the vegetation was undertaken by departmental consultants in 2019 in accordance with legislative requirements of the Biodiversity Conservation Act 2016 and the Environment Protection and Biodiversity Conservation Act 1999. The mapping was a mix of onsite and desktop analysis and completed by accredited assessors. Where the assessors were not able to visit land, aerial photo interpretation contributed to confirmation of locations of high biodiversity value.

For further information about environmental zoning under the Plan, you can refer this [FAQ about Land categories and conservation zoning](#).

We encourage your clients to make a [submission](#) by the 9 October 2020. All submissions will be considered in finalising the Plan.

Green & Resilient Places Division | Department of Planning, Industry and Environment

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Planning,
Industry &
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The Department of Planning, Industry and Environment acknowledges that it stands on Aboriginal land. We acknowledge the traditional custodians of the land and we show our respect for elders past, present and emerging through thoughtful and collaborative approaches to our work, seeking to demonstrate our ongoing commitment to providing places in which Aboriginal people are included socially, culturally and economically.

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on the Cumberland Plain Conservation Plan.
Submissions close 9 October.

Annexure B

Umwelt Ecological Advice
relating to the subject property

8 October 2020

Our Ref: 21022/R01/TP/08102020

8 October 2020

Anthony Rowan
Director
ARPL
PO Box 2163
ROSE BAY NORTH NSW 2030

Dear Anthony

Re: [REDACTED] Kemps Creek – Ecological advice based on site visit

I understand that the subject land, [REDACTED] Kemps Creek, is affected by the Draft Cumberland Plain Conservation Plan, and that comments on the exhibited draft plan are due by 9 October 2020. I undertook a site visit on Wednesday 23 September 2020 to assess the accuracy and suitability of the mapping presented in the draft plan, including the spatial viewer available at

https://webmap.environment.nsw.gov.au/Html5Viewer291/index.html?viewer=CPCP_Exhibition_Viewer

The following points summarise my findings:

1. The vegetation on the site is most likely predominantly composed of PCT 725 Castlereagh Ironbark Forest, as mapped in the Cumberland Plains Vegetation Map (OEH 2013). This occurs on the subject land as an open forest or woodland in a 'thinned' condition state, whereby past management (presumably over a long period) has led to the absence of some structural elements of the vegetation type. In some areas the vegetation is more dense, while in others it is more sparse and lacking an understorey. On the whole, however, the allocation of a 'thinned' condition state is appropriate.
2. It is likely that none of the native vegetation present on site now is 'old growth' and that all has regrown since previous clearing.
3. The extent of the native vegetation on site is less than that depicted in the draft plan, with the difference being significant.
4. I can confirm that the site does not support Western Sydney Dry Rainforest as indicated in the email to you from DPE dated 22 September 2020.
5. The vegetation corridor (running north-south) that is currently on the site is mostly restricted to the western side of the property, and is in parts quite narrow.
6. Various species-specific reports are appendicised to the Draft Cumberland Plain Assessment Report (Biosis and Open Lines 2020). These include reports addressing the threatened plants *Hibbertia puberula*, *Hibbertia fumana*, *Acacia bynoeana*, *Acacia pubescens* and *Dillwynia tenuifolia*. I did not see any of these species whilst on the site.



Please don't hesitate to contact me to discuss any further matters.

We trust this information meets with your current requirements. Please do not hesitate to contact the undersigned on [REDACTED] should you require clarification or further information.

Yours sincerely



Travis Peake
National Ecology Leader