

Our Ref: 20-0162

9 October 2020

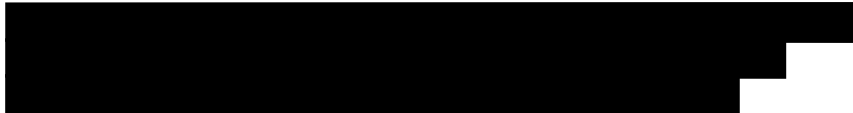
Manager
Department of Planning, Industry and Environment
Green and Resilient Places Division
Locked Bag 5022
Parramatta NSW 2124

By email: biodiversity@planning.nsw.gov.au

Dear Sir or Madam ,

Draft Cumberland Plain Conservation Plan 2020 (on Exhibition) Re Submissions

We represent the interests of the registered proprietors of the following properties in relation to the Draft Cumberland Plain Conservation Plan (**Draft Plan**):



We have been asked to make the following submissions on behalf of our clients in connection with the Draft Plan.

Information Available on the Plan Viewer

We refer to the Draft Cumberland Plain Conservation Plan Viewer (**Plan Viewer**), which sets out the numerous mapping layers that pertain to the area covered by the Draft Plan, from which we can assess the precise impacts of the Draft Plan on our clients' properties:

Regarding Lot 14:

- Approximately 15% of the land is classified as Non-Certified – Avoided for Biodiversity.
- Approximately 10% of the land is classified as Non-Certified – Avoided for Other (riparian corridors).
- Approximately 25% of the land is identified as Proposed Environmental Conservation Zoning.

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Regarding Lot 18:

- Approximately 80% of the land is classified as Non-Certified – Avoided for Biodiversity.
- Approximately 5% of the land is classified as Non-Certified – Avoided for Other (riparian corridors).
- Approximately 85% of the land is identified as Strategic Conservation Area.
- Approximately 85% of the land is identified as Proposed Environmental Conservation Zoning.

Regarding Lot 19:

- Approximately 90% of the land is classified as Non-Certified – Avoided for Biodiversity.
- Approximately 10% of the land is classified as Non-Certified – Avoided for Other (riparian corridors).
- 100% of the land is identified as Strategic Conservation Area.
- 100% of the land is identified as Proposed Environmental Conservation Zoning.

Observations

Having reviewed the details available on the Plan Viewer in relation to each of our clients' properties, we make the following observations.

Firstly, it is patently clear from the mapping available via the Plan Viewer that, as it pertains to [REDACTED] – as would be the case with numerous other properties within the precinct – the mapping represents broad and imprecise brush strokes over the landscape, presumably taken from satellite imagery and desktop analysis of “existing databases” (p.40 Draft Plan), often bearing little reality to the extent and quality of vegetation on the specific properties.

Regarding [REDACTED] the suggestion that approximately 15% of the land, in the south-west corner of the property, should be classified as Non-Certified – Avoided for Biodiversity based on its biodiversity qualities is not supportable. The vegetation at this location is sparse and degraded.

Regarding [REDACTED], similarly, the suggestion that approximately 80-90% of these landholdings should be classified as Non-Certified – Avoided for Biodiversity based on biodiversity qualities is not supportable. Again, the vegetation patches across these two properties is sparse and degraded, with expansive areas of open space.

A cursory inspection of these properties would support that observation.

The answer, we suspect, lies in the approach adopted by the Draft Plan in relation to the classification of land identified as Strategic Conservation Area, which Lots [REDACTED] are classified as. Relevantly, the Draft Plan provides (p.37 Draft Plan):

*The strategic conservation area represents areas of important biodiversity value to the Cumberland subregion. These areas include large remnants of native vegetation, areas with important **connectivity across the landscape**, and some areas with **ecological restoration potential**. The strategic conservation area has been identified as the area of greatest strategic value to deliver long-term conservation outcomes in the Cumberland subregion and which can offset for biodiversity impacts.*

[emphasis added]

This definition effectively includes large areas of land that has no extant vegetation but that otherwise may have clusters of potentially relevant vegetation within the property or in close

proximity to the property. The extensive areas of land without extant vegetation, which is the case with Lots [REDACTED], must therefore be required for “connectivity” purposes, or otherwise require for so-called “restoration” potential, albeit the cleared areas of land have been cleared for decades.

This expansive interpretation of land classified as Strategic Conservation Area seems to be at odds with the general premise, set out elsewhere in the Draft Plan, that land should only be avoided from the “certification process” where it is of “high biodiversity value” (p.47 Draft Plan). Such are the vagaries and imprecision of the Draft Plan.

Secondly, leaving aside the merits or otherwise of the classifications imposed by the Draft Plan (regarding the biodiversity credentials of the properties), of primary concern to our clients is the “Proposed Environmental Conservation Zone” to be applied to Lots [REDACTED]. The reference here to Proposed Environmental Conservation Zone in the Draft Plan is a clear reference to E2 Environmental Conservation (p.47 Draft Plan).

To support the protection of these areas, the department is proposing to apply environmental conservation zoning (E2) except for land owned by LALCs or under claim by LALCs.

While the precise scope of land uses available under the proposed E2 Environmental Conservation zone to apply in this precinct is yet identified, we can safely assume they will follow the land use restrictions adopted in other environmental planning instruments. For example, clause 11 of State Environmental Planning Policy (Western Sydney Employment Area) 2009 (**WSEA SEPP**) sets out the permissible land uses available under the E2 Environmental Conservation zone, relevant to that SEPP, comprising:

Artificial waterbodies; Environmental facilities; Environmental protection works; Flood mitigation works; Roads.

All other uses are prohibited under the WSEA SEPP.

On any view, these same restrictions will apply to land zoned E2 Environmental Conservation under the Draft Plan. Those restrictions effectively limit development to public purpose type uses, having no utility for non-government authorities or the non-government market. This highly restrictive land use zone will render a significant part of our clients’ land relatively worthless to the development market in the months and years ahead.

The future application of the E2 Environmental Conservation zone over our clients’ land will also properly be characterised as a de facto acquisition of land for a public purpose, albeit retained in private ownership, without any prospect of compensation.

The NSW Department of Planning, Industry and the Environment has previously cautioned government authorities and other decision makers (including itself) about highly restrictive uses associated with the application of the E2 Environmental Conservation zone. Relevantly (p.6 NSW Department of Planning LEP Practice Note PN 09-002, dated 30 April 2009):

Councils should be aware that uses [under the E2 Environmental Conservation zone] should not be drawn too restrictively as they may, depending on circumstances, invoke the Land Acquisition (Just Terms Compensation) Act 1991 and the need for the Minister to designate a relevant acquiring authority.

In our view, the proposed application of the E2 Environmental Conservation zone to the bulk of our clients' land meets the precise circumstances cautioned against by the Department.

Thirdly, the properties are currently zoned Environment and Recreation under State Environmental Planning Policy (Western Sydney Aerotropolis) 2020 (**Aerotropolis SEPP**). We acknowledge that the Environment and Recreation zone places restrictions on the use of the land. However, importantly, it is a zone of considerably greater flexibility than the E2 Environmental Conservation zone contemplated by the Draft Plan. Further, relevantly, the Aerotropolis SEPP makes express provision for development in the Environment and Recreation zone, including the removal of vegetation for the purposes of development, where certain conditions are met, pursuant to clause 27(4) of the Aerotropolis SEPP. That important merit-based provision available under the Aerotropolis SEPP, permitting development in certain circumstances, is not available under the E2 Environmental Conservation zone.

Fourthly, and arguably one of the more misleading representations in the information package provided with the Draft Plan, whether guided by ecological ultraism or ignorance, is the assertion that landholders with high biodiversity value will profit from their land. The representation is presented in several guises. For example (p.5 FAQ):

*Private landholders that have high biodiversity values present on their land **may** enter into a biodiversity stewardship agreement to realise the economic value of these biodiversity attributes and **potentially** generate monetary income to protect and manage the environment on their land.*

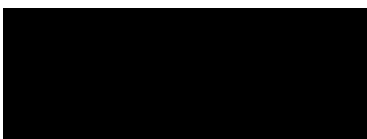
[emphasis added]

That assertion is made without any foundation in fact or experience. The reality is that landowners subjected to an E2 Environmental Conservation zone under the Draft Plan will be left with land incapable of further development and incapable of generating income associated with its purported biodiversity values.

Leaving aside the criticisms that could be fairly levelled at the Draft Plan regarding its complexity, voluminous size and dizzying array of land categorisations, the point remains that the Draft Plan rides roughshod over individual property rights in so far as it contemplates imposing an E2 Environmental Conservation zone over substantial parts of our clients' landholdings (and, in the case of Lot 19, over the whole property) for what could only be characterised as a public purpose zoning, without any recourse to compensation.

In short, having regard to the forgoing comments, the submission we present on behalf of our clients is a succinct one – the Draft Plan must be amended to exclude any power to impose an E2 Environmental Conservation zone (or similarly restrictive zone) over land within the precinct, including our clients' properties.

Yours faithfully,



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