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Dear Geoff,

### **Protection of Cumberland Plain Woodland and other high conservation land in Western Sydney**

We refer to your request for advice on how to best protect the remaining Cumberland Plain Woodland and other high conservation land in Western Sydney. This advice sets out broadly some legislation that may be of assistance in protecting these areas. We are happy to provide you with further advice on any specific issues in due course.

#### **Critical habitat**

The *Threatened Species Conservation Act 1995* ("TSC Act") contains provisions for declaring critical habitat. It allows any land comprising the habitat of an endangered ecological community or ecological community that is critical to the survival of the ecological community to be declared under this Part to be the critical habitat of the ecological community.<sup>1</sup> The Director-General of Department of Environment, Climate Change and Water (DECCW) is responsible for the identification of critical habitat.<sup>2</sup> She is to consult with the Scientific Committee and obtain advice from them in order to prepare a recommendation of critical habitat.<sup>3</sup> She must also consider the social and economic consequences of any declaration. Once the recommendation is prepared it must be advertised and notice provided to those who are affected landholders, public authorities or others with interests in the land.<sup>4</sup> The Director-General must then summarise the Scientific Committee's advice, submissions about the recommendations and any response to the Minister to consider.<sup>5</sup> The Minister in making a declaration about critical habitat must consider the social and economic consequences of the declaration, the likely impact on landowners, advice of the Scientific Committee and the submissions before making a decision to declare critical habitat.<sup>6</sup>

One way to deal with the former ADI site would be to make any key parts for Cumberland Plains Woodland critical habitat zones. The Minister could ask the Director-General to undertake the process above for Cumberland Plains Woodland. There are only two critical habitat areas that are protected currently (little penguin habitat and Wollemi pine critical habitat). Those areas have

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<sup>1</sup> Section 37

<sup>2</sup> Section 38

<sup>3</sup> Section 39

<sup>4</sup> Section 40 and section 41.

<sup>5</sup> Section 43

<sup>6</sup> Section 44 and 47



clauses in the *Threatened Species Conservation Regulations* ("Regulations") that protect clearing or disturbing of those critical habitats.

In order to adequately protect the critical habitat you would need similar provisions inserted in the Regulations for Cumberland Plains Woodland, as is provided for in section 51 of the TSC Act.

There are no provisions for compensation to be paid in relation to declarations of critical habitat. Obviously landowners views are to be considered as well as economic impacts before making a declaration.

### **E2 Zoning:**

Recent amendments to the *Environmental Planning and Assessment Act 1979* (EP & A Act) provide the Minister for Planning with broad powers to amend a Local Environment Plan. The Minister can therefore make and initiate an LEP and direct Council to do various things during that process.<sup>7</sup>

E2 zoning is suitable for areas with high ecological, scientific, cultural or aesthetic values outside the reserve system. It allows for uses compatible with its ecological values. At present, residential flat buildings and multi house developments are prohibited by the Standard Instrument –Local Environmental Plan ("Standard LEP"), although the Department of Planning circulars note that some additional uses can be permitted with consent in the E2 zoning such as bed and breakfast accommodation, farm stay accommodation, eco-tourism and information and education facility.

The issue becomes whether zoning as E2 would trigger compensation provisions in s.26 of the EP & A Act. Section 26(1)(c) enables an Environmental Planning Instrument to do the following:

"(c) reserving land for use for the purposes of open space, a public place or public reserve within the meaning of the *Local Government Act 1993*, a national park or other land reserved or dedicated under the *National Parks and Wildlife Act 1974*, a public cemetery, a public hospital, a public railway, a public school or any other purpose that is prescribed as a public purpose for the purposes of this section".

Section 27 of the EP & A Act states:

"An environmental planning instrument that reserves land for use exclusively for a purpose referred to in section 26 (1) (c) must specify an authority of the State that will be the relevant authority to acquire the land if the land is required to be acquired under Division 3 of Part 2 of the *Land Acquisition (Just Terms Compensation) Act 1991*."

(2) Section 21 of the *Land Acquisition (Just Terms Compensation) Act 1991* applies for the purposes of determining whether an environmental planning instrument reserves land for use exclusively for a purpose referred to in section 26 (1) (c)."

The Department of Planning has indicated too restrictive prohibitions on E2 zoning could in certain circumstances invoke the *Land Acquisition (Just Terms Compensation) Act 1991*, and mean the Minister will need to designate a relevant acquiring authority. However the right to compensation will only arise in such a circumstance. If the E2 zoning is drafted in such a way that development can still proceed albeit in a restricted way then it may be possible for no compensation to be payable.

There is also the ability to ensure LEPs contain overlay zones where development may be easier to restrict. The Department of Planning has indicated that overlays may be prepared where a local

<sup>7</sup> Section 53 and 59



provision is appropriate.<sup>8</sup> It notes overlays could apply to a water supply area such as a water supply catchment that have additional considerations the Council must consider before consent is granted to development in those areas. Similar provisions could be used in relation to conservation areas.

### **Sydney Regional Environment Plan**

The area is to some extent regulated by the *Sydney Regional Environmental Plan no.30- St Marys* (SREP) may be able to be amended to provide some greater protections to the area. In particular, the SREP is now a State Environmental Planning Policy that would govern development in the area. It sets out areas for a Regional Park Zone and it would be possible to expand those areas. However it is clear from the SREP that it is contemplated that those areas will be dedicated under the *National Parks and Wildlife Act 1974* and would therefore have to be acquired and compensation issues would arise. The only other protections are in relation to areas around the Regional Park Zone and adjoining it where NPWS must comment on any development proposals. However this will not necessarily provide adequate protection for areas of Cumberland Plain Woodland.

Section 37 of the EP & A Act enables the Governor to make a SEPP about any matter that is in the opinion of the Minister for Planning of state or regional significance. This has been interpreted by the Courts as an extremely broad power to make SEPPs and it would of course be possible to create other SEPPs to protect the area.<sup>9</sup>

If you have any further queries please do not hesitate to contact me on 9262 6989.

Yours sincerely

**Environmental Defender's Office (NSW) Ltd**

  
**Kirsty Ruddock**  
Principal Solicitor

<sup>8</sup> Department of Planning, LEP Practice Note, Standard Instruments for LEPs- frequently asked questions.

<sup>9</sup> *Save the Showground for Sydney Inc v Minister for Urban Affairs & Planning* (1996) 92 LGERA, *Dubler Group Pty Ltd v Ku-ring-gai Municipal Council & Anor* [2004] NSWLEC 305.



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