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**Future Biodiversity Assessment Requirements for the Orchard Hills Development**

Dear Paul,

The purpose of this letter is to respond to the Penrith City Council's request for a biodiversity assessment in accordance with the Biodiversity Assessment Method (BAM) for the Orchard Hills rezoning proposal. In 2018, Cumberland Ecology prepared a Flora and Fauna Assessment (FFA) (17224 – RP1) in support of the planning proposal relating to the rezoning of 146 hectares of semi-rural land. The FFA is considered to be an adequate assessment of the indicative ecological impacts for a rezoning proposal. The preparation of an assessment in accordance with the BAM is not required until the development application (DA) phase. Assessments in accordance with the BAM will need to be prepared in the future for all DAs for the project that trigger entry into the Biodiversity Offsets Scheme. Further discussion relating to the future assessment requirements in accordance with the Biodiversity Conservation Act 2016 is provided in **Appendix A**.

Yours sincerely



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# APPENDIX A :

## Ecological Assessment Requirements

## A.1. Introduction

Legacy Property is undertaking the rezoning of 146 hectares of semi-rural land at Orchard Hills. In 2018, Cumberland Ecology prepared a Flora and Fauna Assessment (FFA) in support of the planning proposal. The planning proposal was subsequently endorsed by Penrith City Council in June 2018. This letter intends to address future Biodiversity Assessment requirements following the introduction of the NSW *Biodiversity Conservation Act 2016* (BC Act) and to respond to the Penrith City Council's request for a biodiversity assessment in accordance with the Biodiversity Assessment Method (BAM) during the rezoning phase of the project.

## A.2. Planning Proposal Ecological Assessment Requirements

In accordance with Clause 6.12 of the BC Act, a BDAR is required in relation to proposed development that would be authorised by a planning approval. Clause 6.1 defines a planning approval as:

- a. A development consent under Part 4 of the Environmental Planning and Assessment Act 1979 (other than a complying development certificate); or
- b. A State significant infrastructure approval under Part 5.1 of that Act; or
- c. A decision of a determining authority to carry out an activity, or approve the carrying out of an activity, under Part 5 of that Act if the proponent of the activity elects to obtain a biodiversity development assessment report in connection with environmental impact assessment under that Part.

As the project comprises a rezoning proposal, it is not defined as a planning approval. Furthermore, Clauses 7.7, 7.8 and 7.9 outline the biodiversity assessment requirements for projects assessed under the EP&A Act, and rezoning projects do not fall within these categories. Subsequently, an assessment in accordance with the Biodiversity Assessment Methodology (BAM) is not a formal requirement of the BC Act at the rezoning stage of a planning proposal.

Furthermore, the NSW Department of Planning and Environment (DPIE) guide to preparing planning proposals states that planning proposals submitted for Gateway determinations are only required to identify if the land subject to the proposal has the potential to contain critical habitat, threatened species, populations, ecological communities or their habitats (DPIE 2018). If it is likely that the land contains any of these entities, the proposal should identify what studies are necessary to confirm the presence of these species and habitats or their significance (DPIE 2018). A rigorous assessment of the significance of any identified ecological entity is typically not required until after gateway approval (DPIE 2018). In this instance, the previously prepared FFA has met and exceeded these guidelines as an indicative impact assessment has been already been prepared for the ecological entities identified within the rezoning area prior to Gateway Approval.

The FFA prepared in support of the planning proposal is considered to be an adequate assessment of the proposed ecological impacts for this stage of the rezoning project. Cumberland Ecology has prepared ecological assessments for a number of planning proposals since the commencement of the BC Act. Our experience with similar projects has shown precedence for the deferment of detailed ecological impact

assessment utilising the BAM until the development application (DA) stage. This is due to the fact that impacts to biodiversity are likely to change between the rezoning stage and the DA stage.

Cumberland Ecology proposes to prepare impact assessments under the BAM for each DA stage that triggers entry into the Biodiversity Offsets Scheme (BOS) with the preparation of Biodiversity Development Assessment Reports (BDAR). Additional flora and fauna surveys will be performed in accordance with the BAM as required. For DAs that do not trigger entry into the BOS, FFAs are proposed to be prepared. A discussion of the potential for DAs to trigger entry into the BOS is provided below.

### A.3. BC Act Assessment Requirements

#### A.3.1. Assessment Requirements

The ecological impacts of future DAs within the rezoning area will need to be assessed in accordance with the requirements of the BC Act at the DA stage. Under the BC Act local development assessed under Part 4 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) that triggers threshold levels (see below) are required to be assessed under the BOS. This will be assessed on a case by case basis for each DA.

For a DA to trigger the BOS, it would need to meet the following criteria:

- It is likely to significantly affect threatened species or ecological communities, or their habitats, according to the Test of Significance in Section 7.3 of the BC Act; or
- If the vegetation being cleared exceeds a threshold area; or
- It is carried out in an area mapped on the Biodiversity Values Map; or
- It is carried out in a declared Area of Outstanding Biodiversity Value (AOBV).

If any of these criteria are met, this triggers entry into the BOS. Assessment under the BOS requires an assessment following the BAM by an accredited assessor and the preparation of a BDAR. The BAM requires detailed field surveys to be undertaken, which may involve further plot/transect based flora surveys, and targeted threatened species surveys. The project would also need to demonstrate the implementation of avoidance and mitigation measures. According to the BOS, the requirement for offsets is determined using the BAM and associated BAM calculator. Under the BOS, any one or a combination of the following options outlined within the *Biodiversity Conservation Regulation 2017* can be used to meet the offset obligations:

- The retirement of the required number and class of like-for-like biodiversity credits;
- The retirement of the required biodiversity credits in accordance with the variation rules;
- The funding of a biodiversity conservation action that would benefit the relevant threatened species or ecological community and that is equivalent to the cost of acquiring the required like-for-like biodiversity credits as determined by the offsets payment calculator; and
- The payment of an amount into the Biodiversity Conservation Fund determined in accordance with the offsets payment calculator to satisfy the requirement to retire biodiversity credits.

### A.3.2. Assessment of Entry into the Biodiversity Offsets Scheme

This section provides a brief assessment of whether future development of the rezoning area would be required to enter the BOS.

#### A.3.2.1. Test of Significance

Tests of Significance in accordance with Section 7.3 of the BC Act have been prepared for all threatened communities or species known, or considered likely, to be impacted by future development. Tests of significance provide a potential avenue for entry into the BOS. Tests of significance performed to date by Cumberland Ecology have not returned a positive result. Subsequently, entry into the BOS is not triggered by this mechanism at this stage. Once the impacts of future DAs have been refined, tests of significance will be updated accordingly.

#### A.3.2.2. Biodiversity Offsets Scheme Threshold

A development can exceed the BOS threshold if it is or involves:

- The clearing of native vegetation, or other prescribed action, on land included on the Biodiversity Values Map;
- The clearing of native vegetation of an area above a prescribed threshold based on the minimum lot size; or
- Impacts to declared areas of outstanding biodiversity value.

An assessment of these three components is provided below.

##### a. Biodiversity Values Map

Any vegetation impacts associated with a development being assessed under Part 4 (Local Development) of the EP&A Act that occurs within areas mapped on the Biodiversity Values Map would automatically enter the BOS. The majority of the vegetation flagged for removal within the rezoning area is contained within areas mapped on the Biodiversity Values map as shown in **Figure 1**. Entry into the BOS will therefore be triggered for development applications occurring within these areas.

##### b. Area of Clearing Threshold

Any development being assessed under Part 4 (Local Development) of the EP&A Act that clears native vegetation above a threshold specified based on minimum lot size would automatically enter the BOS. The threshold levels of clearing for each minimum lot size are defined by the *Biodiversity Conservation Regulation 2017* and are reproduced in **Table 1**.

The rezoning area contains areas of two different minimum lot sizes under the *Penrith Council Local Environmental Plan 2010*. The majority of the rezoning area has a minimum lot size of 2 ha, with some select areas having a minimum lot size of 1000 ha. This allows native vegetation clearance of less than 0.5 ha and less than 2 ha, respectively, without triggering the BOS (see **Table 1**). The total area of native vegetation to be impacted within the rezoning area is 1.77 ha, however the majority of this vegetation is mapped on the Biodiversity Values Map and would automatically trigger entry into the BOS (see **Section A.3.2.2 a**). The area

threshold applies to all proposed native vegetation clearing associated with a development application, regardless of whether this clearing is across multiple lots. In the case of a subdivision, the proposed clearing must include all future clearing likely to be required for the intended use of the land after it is subdivided.

**Table 1 BOS vegetation clearing thresholds**

Minimum Lot Size	Area of Clearing (Native Vegetation)
Less than 1 hectare	0.25 hectares or more
<b>Less than 40 hectares but not less than 1 hectare</b>	<b>0.5 hectares or more</b>
Less than 1,000 hectares but not less than 40 hectares	1 hectare or more
<b>1,000 hectares or more</b>	<b>2 hectares or more</b>

#### **A.3.2.3. Declared Areas of Outstanding Biodiversity Value**

The BC Act currently lists the following AOBVs:

- Gould's Petrel habitat;
- Little Penguin population in Sydney's North Harbour habitat;
- Mitchell's Rainforest Snail in Stotts Island Nature Reserve; and
- Wollemi Pine habitat.

The rezoning area is not located within any of the currently identified AOBVs.

## **A.4. Conclusion**

Penrith City Council has requested the preparation of an additional biodiversity assessment in accordance with the BAM. Cumberland Ecology considers this level of assessment unnecessary for a rezoning proposal. Such assessments would likely be required at the DA stage if the BOS was triggered. Assessment at the DA stage will allow for accurate assessment following the refinement of impact areas.

## **A.5. References**

DPIE. 2018. A guide to preparing planning proposals.

# FIGURES

**Figure 1**