



Mills Oakley
ABN: 51 493 069 734

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Your ref:
Our ref: MDSS/KXMS/3473232

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Dear Scott

Advice re: Assessment of ecological offsets and measures proposed to minimise the impact on biodiversity values
Development Application DA/228/2020/JP
Property: 328-330 Annangrove Rd Rouse Hill

We refer to your request to provide legal advice in relation to the above development application and its assessment against the terms of the *Biodiversity Conservation Act 2016 (BC Act)* and *Biodiversity Conservation Regulation 2017 (BC Regulation)*. Specifically, you have asked us to advise on:

- a) Whether a consent authority can, or is required to, consider any offsets or measures proposed to minimise the impact on biodiversity values proposed by the development application and recommended by a BDAR assessment, when making a determination under s7.16(2) of the BC Act in respect of a “*serious and irreversible impact*”.
- b) Does the decision in *Denoci Pty Ltd v Liverpool Local Council* [2020] NSWLEC 102 preclude the Council (or any consent authority) from considering the offsets proposed by your development application?

Summary advice

In our view, based upon the background facts set out below, review of the applicable legislative provisions and consideration of the details of the proposed development, we advise as follows:

- The determination of *serious and irreversible impacts* on biodiversity values in s 6.5 of the BC Act is to be undertaken in accordance with the principles set out in cl 6.7 of the BC Regulation and Guideline titled “Guidance to assist a decision-maker to determine a serious and irreversible impact” (**the Guideline**).
- In determining whether a proposed development is likely to have serious and irreversible impacts on biodiversity values in s.7.16(2) of the BC Act, a consent authority is required to consider the “*measures proposed to be taken to avoid or minimise the impact on biodiversity values of the proposed development or activity*” (s.7.16(1)).
- The consideration of offsets and all measures proposed to minimise impact must be considered prior to a determination of a serious and irreversible impact for the purpose of s.7.16(2).

- A consent authority is required to take into consideration the “*the likely impact of the proposed development on biodiversity values as assessed in the*” BDAR.
- The Chief Judge’s decision in *Denoci Pty Ltd v Liverpool Local Council* [2020] NSWLEC 102 does not restrict the Council (or any consent authority) from considering the offsets and mitigation measures proposed by a development application.
- *Denoci* considered the previous legislative regime of the *Biodiversity Conservation Act 2016* and a Commissioner’s finding that he was not required to consider the offsets proposed because he had already found that the proposed development did not satisfy other development controls in the relevant LEP and DCP which mandated its refusal. For those reasons, the findings in *Denoci* do not apply to the situation presented by the proposed development and assessment required under the BC Act.

Background

We understand the following background details are relevant to our advice:

- Development Application DA/228/2020/JP has been lodged with the Hills Shire Council and seeks consent for the following development to be carried out at 328-330 Annangrove Rd Rouse Hill (**the Site**):
 - Demolition of existing dwellings and facilities on numbers 328 and 330 Annangrove Road;
 - Clearing of vegetation within the proposed building footprint;
 - Excavation for construction of the basement car parking and construction of new buildings with a total GFA of 10,020m²;
 - Construction of stormwater infrastructure;
 - Upgrades to the public roadway and construction of footpaths;
 - Landscape works in areas immediately surrounding the buildings; and
 - Implementation of conservation measures in the retained native vegetation in accordance with an approved Biodiversity Management Plan.
- The Site contains two Critically Endangered Ecological Communities - Cumberland Plain Woodland (**CPW**) and Shale Sandstone Transition Forest (**SSTF**).
- The total area of CPW on the development site is 0.37 hectares.
- The total area of SSTF on the development site is 1.45 hectares.
- The proposed development seeks consent to remove areas of both CPW and SSTF.
- A BDAR assessment has been prepared by Keystone Ecology which undertakes an assessment of the impacts on Biodiversity as a result of the proposed development
- The BDAR recommends, and the DA proposes, the following mitigation measures and offsets in response to the removal of portions of the EECs:
 - Ongoing management pursuant to a Biodiversity Management Plan;
 - Weed control and physical protection of EECs;
 - Planting, long term maintenance and regeneration;
 - Fauna habitat enrichment; and
 - Purchase of biodiversity credits.
- Council has raised a query in relation to the assessment of the proposed development and whether it generates a serious and irreversible impact for the purpose of s. 7.16(2) of the BC Act.
- The Council has also raised a query as to whether the mitigation measures and offsets proposed by the BDAR and development application can be, or are required to be, taken into account as part of its assessment of the proposed development and cited the case of *Denoci* to inform any advice.
- You have sought our (Mills Oakley) advice in relation to the assessment of the proposed development and specifically the ecological impacts.

Detailed Advice

1. The legislative framework

- 1.1 Part 6 of the BC Act establishes a regime for, amongst other things, the creation and trading of biodiversity credits and the assessment of impacts on biodiversity values by accredited persons which considers the offsetting of certain impacts that may arise as a result of proposed development or clearing.
- 1.2 Relevantly, Part 6 also makes provision for the assessment and determination of (through the BC Regulation and Guideline) a serious and irreversible impact.
- 1.3 Part 7 of the BC Act establishes the detailed assessment regime for proposed development and planning approvals sought under the *Environmental Planning and Assessment Act 1979*. It provides for processes in respect of the assessment mechanisms and reporting requirements for forms of development that have impacts on specified ecological communities.
- 1.4 Part 7 also provides for an express prohibition on the approval of development in circumstances where a serious and irreversible impact on biodiversity values exists even after any measures proposed to avoid or minimise the impact on biodiversity values of a proposed development are considered.
- 1.5 Section 6.5 of the BC Act provides:

6.5 Serious and irreversible impacts on biodiversity values

(1) The determination of serious and irreversible impacts on biodiversity values for the purposes of the biodiversity offsets scheme is to be made in accordance with principles prescribed by the regulations.

(2) The Environment Agency Head may provide guidance on the determination of any such serious and irreversible impacts, and for that purpose may publish, from time to time, criteria to assist in the application of those principles and lists of potential serious and irreversible impacts.

Note—

For proposed development—see section 7.16; for proposed clearing only—see section 60ZF of the [Local Land Services Act 2013](#); for proposed biodiversity certification—see section 8.8.

- 1.6 We have not extracted the terms of clause 6.7 of the BC Regulation or Guideline here as they are matters which inform the assessment of a SAI rather than the legal requirements considered by this advice.
- 1.7 Section 7.13(2) of the BC Act provides:

(2) The consent authority, when determining in accordance with the Environmental Planning and Assessment Act 1979 any such application, is to take into consideration under that Act the likely impact of the proposed development on biodiversity values as assessed in the biodiversity development assessment report that relates to the application. The consent authority may (but is not required to) further consider under that Act the likely impact of the proposed development on biodiversity values.
- 1.8 Importantly, this provision expressly requires the consideration of the impact of proposed development as assessed and expressed in the BDAR report – including the provision of any mitigation measures or offsets.
- 1.9 Section 7.16 of the BC Act provides:

7.16 Proposed development or activity that has serious and irreversible impacts on biodiversity values

(1) *In this section, serious and irreversible impacts on biodiversity values of proposed development or activity means serious and irreversible impacts on biodiversity values as determined under section 6.5 that would remain after the measures proposed to be taken to avoid or minimise the impact on biodiversity values of the proposed development or activity.*

(2) *The consent authority must refuse to grant consent under Part 4 of the [Environmental Planning and Assessment Act 1979](#), in the case of an application for development consent to which this Division applies (other than for State significant development), if it is of the opinion that the proposed development is likely to have serious and irreversible impacts on biodiversity values.*

- 1.10 Although subtle, there is a very important distinction between the finding of serious and irreversible impacts contemplated by s.6.5 and the way in which the same term is used in s. 7.16(2) – which is established by the provisions of s.7.16(1).
- 1.11 Importantly, for the purpose of considering whether consent may or may not be granted pursuant to the terms of s7.16(2) a consent authority is required to consider not only the assessment criteria set out in the BC Regulation and Guideline, but also whether such an impact would remain after “*the measures proposed to be taken to avoid or minimise the impact on biodiversity values of the proposed development or activity*”.
- 1.12 The additional requirement to consider the measures taken to avoid the potential impact is highly relevant to the assessment approach for the current Development Application and is considered further below.
2. **Is a consent authority required to consider offsets or measures proposed to be taken to avoid or minimise the impact on biodiversity values when making a determination under s.7.17(2) of the BC Act?**
 - 2.1 In short, yes.
 - 2.2 The Development Application is required to prepare a BDAR for the purpose of assessing the impact of the proposed development on biodiversity values.
 - 2.3 The BDAR undertakes its assessment of the proposed impact and has made recommendations for the purpose of avoiding, offsetting, and minimising the impact on biodiversity values of the proposed development. We understand that those offsets and measures set out in the BDAR are embraced by the applicant and proposed as part of the development application.
 - 2.4 S.7.13(2) expressly requires that a consent authority “*take into consideration under that Act the likely impact of the proposed development on biodiversity values as assessed in the biodiversity development assessment report that relates to the application*”. This requirement includes the offset provisions within the BDAR report provided in support of the application which directly impact the assessment of the likely impact.
 - 2.5 Importantly, to make a determination under s.7.16(2) of the of the BC Act, the consent authority must assess whether a *serious and irreversible impacts on biodiversity values* will result in accordance with the requirements of 7.16(1).
 - 2.6 Importantly, the determination of a *serious and irreversible impacts on biodiversity values* is different for the purpose of s.7.16 than that which is required by s.6.5. Although the same term, for the purpose of s.7.16 the assessment requires additional matters to be considered.
 - 2.7 For the purpose of that assessment, s7.16(1) requires the consent authority to undertake a two-step assessment process.

- 2.8 Firstly, a consent authority must consider whether the proposed development will generate serious and irreversible impacts on biodiversity values as that term is defined by s6.5 of the BC Act and in accordance with the principles in cl 6.7 of the BC Regulation and the guideline.
- 2.9 Secondly, a consent authority **must** consider *“the measures proposed to be taken to avoid or minimise the impact on biodiversity values of the proposed development or activity”* and then determine whether the *serious and irreversible impacts on biodiversity values* would remain even after those measures were undertaken.
- 2.10 For the purpose of determining whether a consent can be granted, the BC Act expressly requires a consent authority to consider the mitigation measures and offsets proposed by an application and set out in the BDAR.
- 2.11 The language in respect of mitigation measures to avoid or minimise impact contained within 7.16(1) reflect precisely the description provided earlier in Division 4 within s. 7.13(3) of the BC Act, which applies to the Development Application.
- 2.12 S. 7.13(3) provides:
- (3) If the consent authority decides to grant consent and the biodiversity offsets scheme applies to the proposed development, the conditions of the consent must require the applicant to retire biodiversity credits to offset the residual impact on biodiversity values of the number and class specified in the report (subject to subsection (4)). **The residual impact is the impact after the measures that are required to be carried out by the terms or conditions of the consent to avoid or minimise the impact on biodiversity values of the proposed development (being measures on which the report was based).***
- 2.13 The repetition of the wording within 7.16(1) aligns with its context within Part 7 and clearly seeks to adopt a meaning which directly relates to recommendations and offsets provided for within a BDAR, the report referred to in parenthesis.
- 2.14 In our view, the terms of s.7.16 are clear and unequivocal, and expressly require that a consent authority consider *“the measures proposed to be taken to avoid or minimise the impact on biodiversity values of the proposed development or activity”* as part of the assessment of serious and irreversible impact set out in s7.16(2).
- 2.15 If a consent authority failed to consider those measures it would not be capable of reaching a determination as required for the purpose of s.7.16(2) of the BC Act.
- 3. Does the decision *Denoci Pty Ltd v Liverpool Local Council* [2020] NSWLEC 102 preclude the Council (or any consent authority) from considering the offsets proposed by your development application?**
- 3.1 In short, no.
- 3.2 Firstly, the decision in *Denoci* considered a development application which was subject to the previous Biodiversity Conservation regime - before the enactment of the provisions in respect of serious and irreversible impact and specifically s7.16(2).
- 3.3 As outlined above, in our view the new provisions expressly require a consent authority to consider the offsets proposed and any mitigations measures for the purpose of a determination in s. 7.16(2) of the BC Act.
- 3.4 On that basis alone the decision in *Denoci* is distinguishable for the purpose of the current assessment under s.7.16(2) however, for completeness, we consider the findings more fully below.

- 3.5 The appeal sought to challenge the Commissioner's decision on a number of basis, which included that the Commissioner did not adequately consider the offsets proposed (by way of purchase of biodiversity credits from registered biobank sites).
- 3.6 The Chief Judge's findings on the issue of whether the offsets were required to be considered, did not turn on the terms or requirements contained within the BC Act but instead was concluded by the fact that the Commissioner had resolved to refuse the development application on the basis of findings in relation to the relevant LEP and DCP requirements. This meant that he did not need to consider the offsets proposed as part of an assessment under old BC Act which were not required to be considered by the relevant LEP and DCP provisions on which the commissioner relied.
- 3.7 This finding was summarised by his honour at [179] as follows:
- Even if Denoci's proposal to offset the impacts on biodiversity by purchasing biodiversity credits could be said to be a mandatory relevant consideration, **the obligation to consider the proposal to purchase biodiversity credits did not arise because of the way in which the Commissioner decided the appeal. As I have earlier explained, the Commissioner found that the proposed development should not be approved. The proposed development, by not sufficiently avoiding or mitigating the impacts on biodiversity on the subject land, would result in such significant residual impacts on biodiversity that consent should not be granted. In this event, the issue of offsetting the significant residual impacts did not arise. Hence, the Commissioner found "it is unnecessary for me to further consider whether the impacts on biodiversity of the Applicant's proposed development should be offset by the purchase of offsets from registered biobank sites" (at [140]). Having decided the appeal in this way, any obligation to consider the issue of whether the impacts on biodiversity should be offset by the purchase of biodiversity credits did not arise.***
- 3.8 The decision in *Denoci* dealt with the requirement to consider offsets proposed by a development application in a very different legislative context and also in a context where His Honour found the consideration of offsets was not required because the DA was to be refused for other reasons which meant that there was no practical necessity to consider any offsets as they would never be imposed in a consent.
- 3.9 We also just note that the article which was provided to us emphasised the distinction between the current and previous BC Act regime as a distinguishing factor and agreed that under the new BC Act a consent authority would need to consider the offset proposal set out in a BDAR.
- 3.10 In our view the terms of the BC Act which apply to the Development Application expressly require the consideration of the BDAR and offsets which it proposes.
- 3.11 The decision in *Denoci* considered a different assessment regime and addressed a distinct question about consideration in circumstances where the DA was to be refused on other grounds which did not require the consideration of offsets proposed.
- 3.12 Interestingly, the Commissioner's decision, which was reviewed by the Chief Judge, emphasised the importance of connectivity in assessing ecological impacts. The Commissioner's findings focused heavily on the retention of connectivity between EEC areas in preference to the retention of isolated patches of EEC.
- 3.13 Although ultimately a matter of merit, the approach adopted by the proposed development seeks to retain connectivity between EEC areas in preference to retention of isolated patches adjacent to the roadway.

Conclusion



In our view, it is clear that a consent authority is required to consider the offsets and measures proposed to avoid or mitigate impact contained within the BDAR assessment. This requirement is not addressed or changed by the decision in *Denoci* which considered a previous statutory scheme. The decision in *Denoci* dealt with a circumstance in which the development application was to be refused on other grounds and accordingly, did not require a consideration of the offsets proposed in a BDAR.

Please contact Matt Sonter on (02) 8035 7850 or Kate Marginson (02) 8035 7851 should you have any queries.

Kind regards

A handwritten signature in blue ink, appearing to be 'MS' with a flourish.

Matt Sonter
Partner