



New South Wales Government  
Independent Planning Commission

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# Gateway determination review – Terrestrial Biodiversity update (Hornsby LEP 2013)

## GR-2022-26

### Advice Report

Terry Bailey (Chair)

21 December 2022

# 1. Introduction

1. On 18 November 2022, the NSW Independent Planning Commission (**Commission**) received a referral from the NSW Department of Planning and Environment (**Department**) requesting advice, pursuant to section 2.9(1)(c) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*, in relation to a planning proposal and gateway determination to update and extend the Terrestrial Biodiversity Map and update the terminology in the corresponding clause (6.4 Terrestrial Biodiversity) under the Hornsby Local Environmental Plan 2013 (**HLEP**).
2. Professor Mary O’Kane AC, Chair of the Commission, determined that Terry Bailey would constitute the Commission for the purpose of exercising its functions with respect to this request.
3. The Commission was requested by the Department to review the planning proposal and prepare advice concerning the merits of the Gateway Determination Review (**GR-2022-26**) request. The advice was requested to include a clear and concise recommendation to the Minister’s delegate confirming whether, in the Commission’s opinion, the Gateway determination should be altered.

## 2. Background

### 2.1 Council’s Planning Proposal

4. On 28 October 2020, Hornsby Shire Council wrote to the then Department of Planning, Industry and Environment (now the Department of Planning and Environment) (**Department**), requesting a Gateway Determination be made on a Planning Proposal to “*update and extend the Terrestrial Biodiversity Map and update the terminology in the corresponding Clause (6.4 Terrestrial Biodiversity) within the Hornsby Local Environmental Plan 2013 to protect land of biodiversity value*” (**PP-2020-3920**).

### 2.2 The Department’s Gateway Determination

5. On 30 August 2022, the Department, under delegation from the Minister for Planning, determined that PP-2020-3920 should not proceed.

### 2.3 Council’s Gateway Review Request

6. On 10 October 2022, Hornsby Shire Council submitted an application to the Department, requesting that the Department’s Gateway Determination for PP-2020-3920 be reviewed. This application was accompanied by a justification report responding to each of the reasons given by the Department.

## 3. The Commission's Review

### 3.1 Material considered by the Commission

7. The Commission has considered the following material (**Material**) as part of its review:

#### *Department's Referral to the Commission*

- The Department's [cover letter requesting the Commission's review of the Department's Gateway determination](#) (dated 18 November 2022)
- The Department's [Gateway Review Justification Assessment](#) (undated) (**Referral**)

#### *Council's Gateway Determination Review Request*

- Council's [Gateway Determination Review Application](#) (dated 10 October 2022)
- Council's [Gateway Determination Review – Justification Report](#) (dated October 2022)

#### *Department's Gateway Review*

- Department's [Gateway Determination](#) (dated 30 August 2022)
- Department's [Gateway Determination Report](#) (dated August 2022)

#### *Council's Planning Proposal*

- Council's [letter to the Department requesting Gateway Determination](#) (dated 28 October 2020)
- Council's [Planning Proposal](#) (dated September 2020) (**PP-2020-3920**)
- PP-2020-3920 Appendix A – [Hornsby Vegetation Map Update 2017 Report](#) prepared by Ecological Australia (dated May 2017)

#### *Other supporting documentation*

- Referral Attachment A – Council's Director's Report No. PC21/20 entitled [Planning Proposal – Vegetation Mapping Update](#) (dated 14 October 2020)
- Referral Attachment B – Council's [Minutes of General Meeting](#) (dated 14 October 2020)
- Referral Attachment C – Council's [Minutes of Local Planning Panel Briefing](#) (dated 30 September 2020)
- Referral Attachment D – [Mayoral Minute MM13/19](#) (dated 11 December 2019)
- Referral Attachment E – [Mayoral Minutes MM13/22 & MM12/22](#) (dated 14 September 2022)
- Referral Attachment F – Department's [Key Issues - Policy response](#) (dated 25 April 2021)
- Referral Attachment G – Department's [letter to Council requesting withdrawal of the Planning Proposal](#) (dated 2 March 2022)
- Referral Attachment H – [Mayor Ruddock's letter to Minister for Planning](#) (dated 4 April 2022)
- Referral Attachment I – Council's Director's Report No. PL5/20 entitled [Vegetation Mapping Options](#) (dated 12 August 2020)
- The Department's [Local Environmental Plan Making Guideline](#) (dated September 2022)
- [Council's response to request for information from the Commission](#) (dated 13 December 2022)
- [Department's response to request for information from the Commission](#) (undated - received by the Commission on 20 December 2022)

- comments and presentation material at meetings with the Department and Hornsby Shire Council, as referenced in Table 1 below.

## 3.2 The Commission's meetings

8. As part of its advice, the Commission met with the persons as set out in Table 1. A site inspection was not conducted as the planning proposal has applicability across the whole of the Local Government Area (LGA). All transcripts and associated presentations were made available on the Commission's website.

Table 1 – Commission's Meetings

Meeting	Date	Published on the Commission's website
Department	5 December 2022	9 December 2022
Council	5 December 2022	9 December 2022

## 3.3 Public submissions

9. Public submissions were sought by the Commission from 18 November 2022 to 12 December 2022. No submissions were received.

## 3.4 Council's objectives for PP-2020-3920

10. Council's Planning Proposal states that:

*This planning proposal is a result of the updated vegetation mapping provided in the Hornsby Vegetation Mapping Report 2017 prepared by Eco Logical Australia (ELA Report 2017). Due to changes in vegetation patterns and updates to State and Federal legislation and community classifications since the Smith and Smith 2008 mapping, the HLEP 2013 Terrestrial Biodiversity Map requires updating in accordance with the ELA Vegetation Report 2017. Remnants of Cumberland Plain Woodland vegetation community have been identified which is a CEEC and Angophora Woodlands has been upgraded from local to regionally significant. The ELA 2017 mapping also applies a broader vegetation definition and has consequently captured more vegetation, as it accounts for remnant vegetation without a native understorey, particularly in the urban and rural residential boundaries with bushland (known as relictual occurrences).*

*Further, Council has resolved that the updated mapping include the identification of all vegetation communities (adding 9 local or common communities) plus a 10m buffer.*

*Council's draft Biodiversity Conservation Strategy 2020 is currently on exhibition which will guide both Council and the community to conserve and manage Hornsby LGA's biodiversity. The strategy offers a range of recommended actions that sit alongside several other key strategies prepared in support of the Hornsby Local Strategic Planning Statement. This planning proposal is consistent with the draft Strategy to give effect to Action 1.1.2 Implement the revised HLEP 2013 Terrestrial Biodiversity Map.*

*Clause 6.4 of the HLEP 2013 details matters for consideration that must be addressed when assessing a development application on land within the area mapped on the Terrestrial Biodiversity Map. The terminology of both Clause 6.4 and the HLEP Map refers to “terrestrial biodiversity” in accordance with model provisions and drafting advice from the Department of Planning at the time the HLEP 2013 was being prepared.*

*It is proposed that the terminology be replaced with “environmentally sensitive land” to avoid any uncertainty concerning the application of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP). The Codes SEPP identifies specific land-based exclusions under ‘Clause 1.19 – Land on which complying development may not be carried out’, which restrict complying development from being carried out on that land. One such exclusion is being identified by an environmental planning instrument as being environmentally sensitive land.*

*The Codes SEPP does not define environmentally sensitive land. However, an environmentally sensitive area is defined in the Codes SEPP (in part) as land identified within an environmental planning instrument as being of high biodiversity significance. To provide consistency with the terminology in the SEPP, the planning proposal seeks to amend the map title to “Environmentally Sensitive Land”, change all references to “Biodiversity” on each map to “Environmentally Sensitive Land” and replace all references to “Terrestrial Biodiversity” in Clause 6.4 and the Dictionary with “Environmentally Sensitive Land”.*

11. Further to this, in Council’s meeting with the Commission, Mayor Ruddock stated: “... one of the formal submissions I did want to make on behalf of Council was to note that we’d recently adopted an urban forest strategy to provide guidance for future care and development of our forests and it was estimated when that strategy was put together that we were losing something in the order of 12 to 15,000 trees every year and if this trajectory were to continue it would not be possible in 40 years time to understand the character of the bushland shire, the bushland shire that we’ve known and understood, it would be lost”.
12. Later in that same meeting, James Farrington (Council’s Director Planning & Compliance) stated that the LGA’s tree losses were in the order of 2-3% annually and primarily resulted from the following causes:
  - 10/50 Vegetation Clearing Scheme
  - “tree applications”
  - development and unauthorised tree removal
13. Mr Farrington went on to state that the inclusion of the mapping in the HLEP was intended to: “...assist landowners that when they purchase or look at developing proposals for their site, that they’re clearly aware of where Council believes there are trees worthy of retention on their property that they can take into consideration in preparing any planning applications” and that this would help in improving both planning and compliance.



## 3.5 Consideration of Department's reasons that PP-2020-3920 should not proceed

### 3.5.1 Inclusion of locally significant and common vegetation communities

#### *Department's Gateway Determination*

14. In making its Gateway Determination, the Department stated: *"The Department does not support the broad inclusion of locally significant and common vegetation communities in the context of Clause 6.4 Terrestrial biodiversity LEP map. The Department does not support the grouping of such communities with other communities containing more significant conservation value; unless demonstrably linking and enhancing areas of Commonwealth, State or Regionally significant tracts of vegetation"*.

#### *Council's response*

15. In its Gateway Review Justification Report, Council stated:
- The inclusion of locally significant and common vegetation under the classification of 'Terrestrial Biodiversity' is justified as it is the position of Council that all vegetation is of high biodiversity significance. Inclusion of these vegetation communities within the definition and associated mapping would enhance the protection and management of bushland by ensuring the appropriate level of consideration and assessment is undertaken.*
- Further, there is no consistent approach to mapping terrestrial biodiversity within the LEPs of Greater Sydney Councils. This is reflected in the Gateway Determination report, which states that local and common vegetation communities are not typically mapped in Standard Instrument LEPs. The inclusion of the word 'typically' reveals that there are circumstances where there is strategic justification to map them. Further, there is no clarity surrounding the application of complying development within areas mapped as terrestrial biodiversity, environmentally sensitive land etc.*
- Council has previously sought clarity on the types of vegetation that could be mapped and their classification within a LEP, as there is no consistent approach and was advised that clarity would only be provided on this matter once a planning proposal was lodged for Gateway Review. The purpose of the mapping is to ensure additional protection for all types of vegetation communities.*

#### *Department's Gateway Review Justification Assessment*

16. In its Gateway Review Justification Assessment, the Department stated:
- *Council has stated that mapping local and common vegetation communities as "Terrestrial Biodiversity" and renaming these "Environmentally Sensitive Land" would enhance their protection. The Department has indicated that protection of existing vegetation, specifically local and common communities, is more appropriate through inclusion in Council's DCP.*
  - *The Department has formed the position that despite Council's intention to enhance tree protection, terrestrial biodiversity mapping within a standard instrument has never been a mechanism where all vegetation is mapped, and that the listing of local and common communities in the way proposed by Council does not align with the intention of terrestrial biodiversity mapping.*
  - *The Department has consistently applied vegetation mapping in recent times and offered alternative solutions to mapping such as mapping buffer areas.*

- *The proposal also does not establish a sound argument to support the broadscale inclusion of local and common communities in a clause that is primarily used to identify more ecologically significant vegetation.*

### *Commission's findings*

17. The Commission agrees with the Department's position as stated in the Gateway Determination.

## **3.5.2 Economic analysis**

### *Department's Gateway Determination*

18. In making its Gateway Determination, the Department stated: "*The Planning Proposal is not supported by a suitable economic analysis to allow Council and the public to fully understand the impacts on homeowners and local businesses. It is noted that the expansion of vegetation communities proposed to be mapped will affect over 12,000 properties*".

### *Council's response*

19. In its Gateway Determination Review Justification Report, Council stated:
- Council acknowledges the request for further economic analysis of the implications of the proposal to expand Terrestrial Biodiversity mapping. Council disagrees that the Department's concerns are a reason for refusing the Planning Proposal. Instead, economic analysis and reporting could be undertaken during the post-Gateway Determination process and implemented as a requirement by the Department as a Gateway condition prior to finalisation.*
- Further, Council has provided initial analysis regarding the magnitude of potential economic impacts. The Planning Proposal documentation identifies that the number of properties affected by the updated vegetation mapping will increase, precluding complying development, and this may result in additional costs for the lodgement of a development application.*
- The Gateway Determination Report agrees with Council's view that the Planning Proposal would not prohibit residential development, only restrict the potential for complying development on certain lands. As such, the changes to mapping would not preclude development but rather enhance the protection and management of bushland by ensuring the appropriate level of consideration and assessment is undertaken for all vegetation.*
- As noted above, the potential impacts of this could be addressed more fully via a Gateway Determination condition.*

### *Department's Gateway Review Justification Assessment*

20. In its Gateway Review Justification Assessment, the Department stated:
- *Council has stated that further economic analysis could be undertaken if a Gateway determination was issued to proceed. This underestimates the likely economic impact these changes will have to Hornsby residents and businesses.*
  - *It is anticipated that the consequences of this proposal could potentially have significant and widespread impacts, and even if this were the only issue with the proposal, it would be inappropriate to allow the proposal to proceed to Gateway before an economic analysis has been completed.*

### *Commission's findings*

21. The Commission agrees with the Department's position as stated in the Gateway Determination.

### **3.5.3 Effect on the application of the Codes SEPP**

#### *Department's Gateway Determination*

22. In making its Gateway Determination, the Department stated: *"The Planning Proposal will have a significant effect on the application of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008, as well as complying development pathways within State Environmental Planning Policy (Housing) 2021. The weakening of this development pathway is not fully justified in light of the vegetation communities to be mapped"*.

#### *Council's response*

23. In its Gateway Determination Review Justification Report, Council stated:  
*The intent of this planning proposal is to map vegetation of high biodiversity significance and prevent complying development from being undertaken within that mapped land.*
- Council acknowledges and notes the concern with setting a precedence for 'switching off' complying development pathways. The Planning Proposal seeks to enhance the protection and management of bushland by ensuring the appropriate level of consideration and assessment is undertaken for all vegetation which is a key priority for Hornsby Council and its community.*
- The impact of the Planning Proposal on a specific planning pathway within the Codes SEPP should be balanced against the strategic intent of the Regional and District Plan's emphasis on protecting the natural environment, regardless of State or Commonwealth identification. This can be achieved through the development application process.*

#### *Department's Gateway Review Justification Assessment*

24. In its Gateway Review Justification Assessment, the Department stated:
- *Council's request states that this proposal will ensure protection from development and also argues that the impact on complying development should not prevent Council from implementing its strategic intent to protect vegetation.*
  - *The Department is supportive of an update to Council's terrestrial biodiversity mapping, and acknowledges the intent to protect vegetation. However, the inclusion local and common vegetation communities, coupled with Council's intention to amend standard definitions and remove the application of complying development is not supported.*
  - *Council was presented with options prior to the preparation of this planning proposal, one of which involved local and common communities being mapped but not having complying development pathways removed (Attachment I).*
  - *This would ensure that trees are protected for vegetation communities with higher significance, but also allows for an added layer of consideration for local and common vegetation communities without the removal of a critical, cost-effective and diverse state development pathway that aids in the delivery of housing.*



### *Commission's findings*

25. The Commission agrees with the Department's position as stated in the Gateway Determination.

### **3.5.4 Replacement of definition of Terrestrial Biodiversity**

#### *Department's Gateway Determination*

26. In making its Gateway Determination, the Department stated: "*The Department does not support the replacement of the definition of 'Terrestrial biodiversity', being a standard definition under the Standard Instrument – Principal Local Environmental Plan*".

#### *Council's response*

27. In its Gateway Determination Review Justification Report, Council stated:
- Council currently interprets that complying development is not permitted on land mapped as 'Biodiversity' on the Terrestrial Biodiversity Map within the HLEP 2013, as do many other Councils within the Greater Sydney Region within their 10.7 Certificates. This is based on our interpretation of the definitions under the Codes SEPP as follows: Under Clause 1.19(1)(e)(iv) of the Codes SEPP, complying development may not be carried out on land identified by an environmental planning instrument as being environmentally sensitive land. Council considers this as a subset of the definition of Environmental Sensitive Area.*
- Under Clause 1.5 Interpretation – general of the Codes SEPP, 'environmental sensitive area' means any of the following -*
- (a) the coastal waters of the State,*
  - (b) a coastal lake identified in Schedule 1 to State Environmental Planning Policy (Coastal Management) 2018,*
  - (c) land identified as "coastal wetlands" or "littoral rainforest" on the Coastal Wetlands and Littoral Rainforests Area Map (within the meaning of State Environmental Planning Policy (Coastal Management) 2018),*
  - (d) land reserved as an aquatic reserve under the Fisheries Management Act 1994 or as a marine park under the Marine Parks Act 1997,*
  - (e) land within a wetland of international significance declared under the Ramsar Convention on Wetlands or within a World heritage area declared under the World Heritage Convention,*
  - (f) land within 100m of land to which paragraph (c), (d) or (e) applies,*
  - (g) land identified in this or any other environmental planning instrument as being of high Aboriginal cultural significance or high biodiversity significance,*
  - (h) land reserved under the National Parks and Wildlife Act 1974 or land to which Part 11 of that Act applies,*
  - (i) land reserved or dedicated under the Crown Lands Act 1989 for the preservation of flora, fauna, geological formations or for other environmental protection purposes,*
  - (j) land identified as being critical habitat under the Threatened Species Conservation Act 1995 or Part 7A of the Fisheries Management Act 1994.*

As a result, Clause 3.3 of the HLEP 2013 excludes complying development from being carried out on any environmentally sensitive area, where environmentally sensitive area is defined as including:

- (g) land identified in this or any other environmental planning instrument as being of high Aboriginal cultural significance or high biodiversity significance.

Vegetation mapped as Biodiversity within the HLEP 2013 has only been mapped due to its high biodiversity significance and therefore meets this definition.

The intent of the amendments to mapping provided in the planning proposal would be consistent with our current interpretation of Terrestrial Biodiversity Mapping under the Codes SEPP and continue to not allow complying development within land mapped as Biodiversity on the HLEP Terrestrial Biodiversity Map. This would include all mapped vegetation communities (Federal, State, Regional, locally significant and common species), which Council considers to be classified as high biodiversity significance.

It is noted that a survey of all Councils within the Greater Sydney Region shows there is no consistent approach to mapping terrestrial biodiversity within the LEPs of Greater Sydney Councils or whether complying development is or isn't permitted within areas mapped as terrestrial biodiversity, environmentally sensitive land etc. This has resulted in an unclear regulatory environment where areas of Terrestrial Biodiversity may or may not be afforded the rigour of a development application process. Given publicised abuses of the complying development pathway and Council's limited ability under current regulations to proactively protect biodiversity where complying development has been approved, Council believes that the clarity offered by this Planning Proposal is justified.

#### *Department's Gateway Review Justification Assessment*

28. In its Gateway Review Justification Assessment, the Department stated:
- Council has interpreted that complying development is currently not permitted on land mapped within its 'Terrestrial Biodiversity' map under HLEP 2013, and that the removal of complying development would limit the misuse of that development pathway.
  - The Department is not supportive of the replacement of standard definitions and model clauses. These clauses provide certainty to landowners and developers across the state.
  - The Department has offered to work with Council on the possibility of an additional map that includes local and common vegetation communities, and go through what terms and types of land that could be captured in that map, however Council has not accepted this offer.

#### *Commission's findings*

29. The Commission agrees with the Department's position as stated in the Gateway Determination.

### **3.5.5 Tree protection through other methods**

#### *Department's Gateway Determination*

30. In making its Gateway Determination, the Department stated: "Council's intention to enhance tree protection throughout its Local Government Area should be sought through other methods without expanding vegetation communities typically mapped under Clause 6.4 – Terrestrial biodiversity of HLEP 2013. This could be through an

expansion of Council's existing Tree Preservation Order within Council's Development Control Plan".

#### *Council's response*

31. In its Gateway Determination Review Justification Report, Council stated:
- Council notes the use of other policies and strategies, such as the Hornsby DCP and 'Greening Our Shire' initiative, as alternative methods for enhancing tree protection for Hornsby Shire. However, the proposed amendments to Council's key environmental planning instrument (HLEP 2013) would ensure that appropriate legislative weight would be given to consideration of existing vegetation on property when assessing development resulting in the ability for Council to plan locally with better outcomes for biodiversity within Hornsby Shire and protection of our tree canopy.*

#### *Department's Gateway Review Justification Assessment*

32. In its Gateway Review Justification Assessment, the Department stated:
- *Council considers the Hornsby LEP as being the key instrument to ensure an appropriate amount of legislative weight is given during development assessment.*
  - *The Department notes that Council has other methods to protect trees from development, including Council's Tree and Vegetation Preservation sections within Hornsby Development Control Plan, and the possibility of a separate map to identify local and common species in Hornsby LEP.*
  - *Notwithstanding that Council could also update the Commonwealth, State and Regionally significant vegetation communities mapping for the LGA.*

#### *Commission's findings*

33. The Commission agrees with the Department's position as stated in the Gateway Determination, however it notes that Council considers that none of the alternative approaches presented by the Department to date are likely to achieve Council's intended outcomes and meaningfully address the rate of tree loss in the Hornsby LGA.

### **3.5.6 Proposal does not give effect to the North District Plan**

#### *Department's Gateway Determination*

34. In making its Gateway Determination, the Department stated: "*Considering the unsupported mapping criteria explained above, and the lack of sound justification, the Planning Proposal does not give effect to the North District Plan in accordance with Section 3.8 of the Environmental Planning and Assessment Act 1979*".

#### *Council's response*

35. In its Gateway Determination Review Justification Report, Council stated:
- Section 3.8 of the EP&A Act requires that the relevant strategic planning authority give effect to the district and regional plans that the Hornsby LGA relates to. The Department has not provided an assessment of the Planning Proposal against the priorities and actions of the North District Plan, but rather has referenced a current policy position to identify Commonwealth, State and Regional significant vegetation in relevant mapping. The Gateway Determination does not identify any North District Plan priority or action that conflicts with the Planning Proposal.*
- Council, in the preparation of the Planning Proposal, has identified a number of priorities and actions of the Regional and North District Plan which it would give effect to, as extracted below:*
- Greater Sydney Regional Plan*

*Objective 27: Biodiversity is protected, urban bushland and remnant vegetation is enhanced.*

*Strategy 27.1: Protects and enhance biodiversity by:*

- *Supporting landscape-scale biodiversity conservation and the restoration of bushland corridors.*
- *Managing urban bushland and remnant vegetation as green infrastructure.*
- *Managing urban development and urban bushland to reduce edge-effect impacts.*

*North District Plan*

*Planning Priority N16 – Protecting and enhancing bushland and biodiversity*

*Planning Priority N17 – Protecting and enhancing scenic and cultural landscapes*

*Planning Priority N19 – Increasing urban tree canopy cover and delivering Green Grid connections*

*Action 66. Protect and enhance bushland and biodiversity by:*

- *Support landscape-scale biodiversity conservation and the restoration of bushland corridors*
  - *Managing urban bushland and remnant vegetation as green infrastructure*
  - *Managing urban development and urban bushland to reduce edge-effect impacts*
- Action 67. Identify and protect scenic and cultural landscapes*

*Action 71. Expand urban tree canopy in the public realm*

*Council maintains that these priorities and actions provide a robust strategic justification for advancing the Planning Proposal.*

### *Department's Gateway Review Justification Assessment*

36. In its Gateway Review Justification Assessment, the Department stated:

- *The Department acknowledges that the intention of the proposal is to enhance the protection of vegetation throughout the LGA, and can be consistent with numerous objectives and priorities of the North District Plan.*
- *However, consistency with the North District Plan is reliant on accurate and appropriate information, including striking a balance between local values and state-led policies.*
- *Specifically, the Department has formed the view that the grouping of local and common communities with more significant vegetation is not appropriate for inclusion in the terrestrial biodiversity map, nor is it appropriate to remove the application of complying development for local and common communities.*
- *As stated previously in this report, it has never been the intent to incorporate these communities within a terrestrial biodiversity map in a standard LEP.*
- *The proposal may set a precedent for mapping of local and common communities to preclude complying development. A precedent would have significant impacts across the State, delaying the assessment of low-impact development proposals. This would undermine the intention of the Exempt and Complying Development Codes SEPP.*
- *If the proposal were to proceed, it would set a policy position within the Department whereby multiple Council's may seek to take the same approach. This could remove complying development for tens of thousands of property owners across the State.*

### *Commission's findings*

37. The Commission agrees with Council in that the "Gateway Determination does not identify any North District Plan priority or action that conflicts with the Planning Proposal". Accordingly, the Gateway Determination should be altered to either:
- remove this as a reason for not proceeding with PP-2020-3920; or
  - identify specific priorities or actions that PP-2020-3920 is inconsistent with.

### **3.5.7 Department's commentary on policy impacts of the planning proposal**

38. Attachment F to the Department's Gateway Determination included policy commentary on the following matters:

***What is DPIE's policy position and rationale on the inclusion of 'locally significant' and 'common' tree species in LEP mapping and specifically land mapped as 'Environmentally Sensitive Land' or alternatively as land mapped as 'Terrestrial Biodiversity'?***

#### Policy comments

- *Whilst there may not be a formal written policy on this, environmentally sensitive land has really only included significant species that require additional assessment before developments are approved, not all vegetation. It has never been the Department's policy intent to use identification of all vegetation as a means to prevent complying development.*
- *Locally significant trees can already be captured in the council's significant tree register.*
- *A Planning Circular/Practice Note could be developed by the Regional Team to clearly establish the Department's position on how these maps can be used by councils in future.*
- *Policy would not support locally significant and common tree species being grouped with other elements that would have a higher conservation value i.e. terrestrial biodiversity.*

***What is DPIE's policy position and rationale on amending clause 6.4 as proposed and changing the title of the mapping to Environmentally Sensitive Land', particularly given this will set a precedent unless there are already other examples of this approach in other LEPs.***

#### Policy Comment

- *Rather than replacing a commonly used term, the LEP could specify that, for the purposes of that instrument, a particular mapped area is considered ESL (see cl7.5 of the Port Macquarie-Hastings LEP, which does this for Koala Habitat and environmentally sensitive area).*
- *Sutherland and Canada Bay councils have mapped ESL in separate maps and clauses, rather than replacing the model Biodiversity clause.*
- *Understanding the component of the current definition of ESL that Hornsby plans to use in this classification would be important – there are specific terms and types of land that can be captured under this definition. Hornsby can not add an ESL term to the SI Dictionary.*
- *NB The Department is currently reviewing Schedule 1 of the Seniors SEPP, which contains the definition of environmentally sensitive land. Any future changes to this may affect the way ESL can be captured.*



**We propose that an analysis of the planning and economic implications should be outlined by Council in the proposal, particularly given the amount of additional vegetation proposed to be mapped.**

Policy Comments

- In the 2018-19 financial year, 466 CDCs were issued for the Hornsby Council area.
- CDCs were issued for residential, commercial and subdivision developments (and “other” which could be industrial, education or infrastructure projects). A change in where complying development is used could affect all of these streams of development.
- There could be a considerable financial impost on a large number of homeowners and businesses if they are unable to access the complying development approval pathway for any future works, due to increases in approval time, uncertain or additional design or development requirements, and the increased design time required for a construction certificate to be granted, among other things.
- There would also be a significant increase in the number of applications needing to be assessed by council, which would impact time and human resources, and may require additional staff.
- Both these impacts should be considered as part of the financial analysis.

**What is or should be DPIE’s policy position or standard for validation.**

Contemporary best practice for validation outcomes is:

- Binary mapping (native/non-native vegetation) 95%+
- Fine scale mapping 80%+
- Regional scale mapping 70%+
- Vegetation models 60%-65%+

If 21% of the mapping has been validated and the validation methods and results reflect best- practice as outlined above then the effort would be sufficient. If **significantly** deficient in any or all of the above a further assessment of the effort to date would be necessary to identify the most cost effective means to address that and invest in further validation effort.

39. In its Gateway Review Justification Assessment, the Department stated:

- The Gateway determination assessment involved obtaining comments from various policy sections of the Department, with the response at Attachment F. The Metro North team reached out to the Housing Policy and Codes teams to confirm that previous comments remained relevant.
- Housing Policy and the Codes team have confirmed previous comments from 25 May 2021 still stand, with Housing Policy adding the following comments:
  - The Gateway Determination Review Report prepared by Hornsby Council does not address the relationship between the proposed policy and the Housing SEPP.
  - Section 80 of the Housing SEPP specifies that the seniors housing provisions of the Housing SEPP do not apply on land described in Schedule 3 Environmentally sensitive land.
  - It is noted that Schedule 3 does not include land identified as ‘terrestrial biodiversity’ as environmentally sensitive land for the purposes of the Housing SEPP. However, changing the title of clause 6.4 of the Hornsby LEP 2013 to ‘environmentally sensitive land’ may create confusion regarding the application of the seniors housing provisions under the Housing SEPP, and is not supported.
  - The planning proposal seeks to group locally significant and common tree species with recognised commonwealth, state and regionally significant

*vegetation, by including all categories as 'terrestrial biodiversity' under clause 6.4 of the Hornsby LEP 2013. This will result in the exclusion of land containing locally significant or common trees from accessing the complying development pathway.*

- *This is not supported, as it may unnecessarily impact on the ability to undertake certain diverse and affordable housing types as complying development under the Housing SEPP. The Housing SEPP allows certain development to be undertaken as complying development. This is an important pathway as it facilitates the timely and cost-efficient delivery of housing.*

### **Commission's findings**

40. The Commission recommends that the Department:
- develop a Planning Circular/Practice Note to clearly set out the Department's position on how Terrestrial Biodiversity/Environmentally Sensitive Land maps should be used by councils.
  - work with Hornsby Shire Council to develop an appropriate mechanism for reducing the rate of tree loss within the Hornsby LGA.

## **The Commission's Advice**

41. The Commission has undertaken a review of Council's planning proposal and the Department's Gateway Determination as requested. In doing so, the Commission has considered the Material identified in Section 3.1, including submissions by Council and the reasons given in the Department's Gateway Report and Gateway Review Report.
42. The Commission recommends that the Department's Gateway Determination should stand subject to an amendment to Reason 6, that is Reason 6 should be:
- removed; or
  - amended to identify specific priorities or actions that PP-2020-3920 is inconsistent with.
43. Noting the 2021 NSW State of the Environment Report found clearing of native vegetation, and the destruction of habitat that is associated with it, has been identified as the single greatest threat to biodiversity in NSW (Coutts-Smith & Downey 2006 in [NSW State of the Environment 2021](#), page 53), the Commission further recommends that:
- Council should consider undertaking further work to substantiate the root cause(s) and rate of tree loss within the Hornsby LGA; and
  - the Department works with Hornsby Shire Council (and other Councils across NSW) to find and implement appropriate alternative mechanism(s) to reduce tree loss.

**Terry Bailey (Chair)**  
Member of the Commission



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