

# GATEWAY DETERMINATION REVIEW

Vegetation Mapping Planning Proposal

October 2022



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# INTRODUCTION

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This report has been prepared to support the Gateway Determination Review lodged with the NSW Department of Planning and Environment (the Department) by Hornsby Shire Council with respect to the draft Vegetation Mapping Planning Proposal (Planning Proposal). The Planning Proposal applies to areas across the Hornsby Local Government Area (see **Figure 1**).

The Planning Proposal was prepared by Council to better protect vegetation communities within Hornsby Shire. The Planning Proposal seeks to:

- amend the Hornsby Local Environmental Plan 2013 (HLEP 2013) Terrestrial Biodiversity Map by mapping all vegetation communities (National, State, Regional and locally significant or common communities) and apply a 10m buffer; and
- amend the definition of 'Terrestrial Biodiversity' to 'Environmentally Sensitive Land'.

This Gateway Determination Review documentation package has been prepared to be consistent with the Local Environmental Plan Making Guideline, dated September 2022, prepared by the NSW Department of Planning and Environment and includes:

- A completed application form;
- A copy of the Planning Proposal and supporting information as submitted with the Gateway Application;
- Justification of why an alteration of the Gateway Determination is warranted, including, where relevant, responses to issues raised by the original Gateway decision-maker (this report); and,
- If relevant, disclosure of reportable political donations\*.

*\* It is noted that no disclosure of reportable political donations is required in terms of Section 10.4 of the Environmental Planning and Assessment Act 1979.*

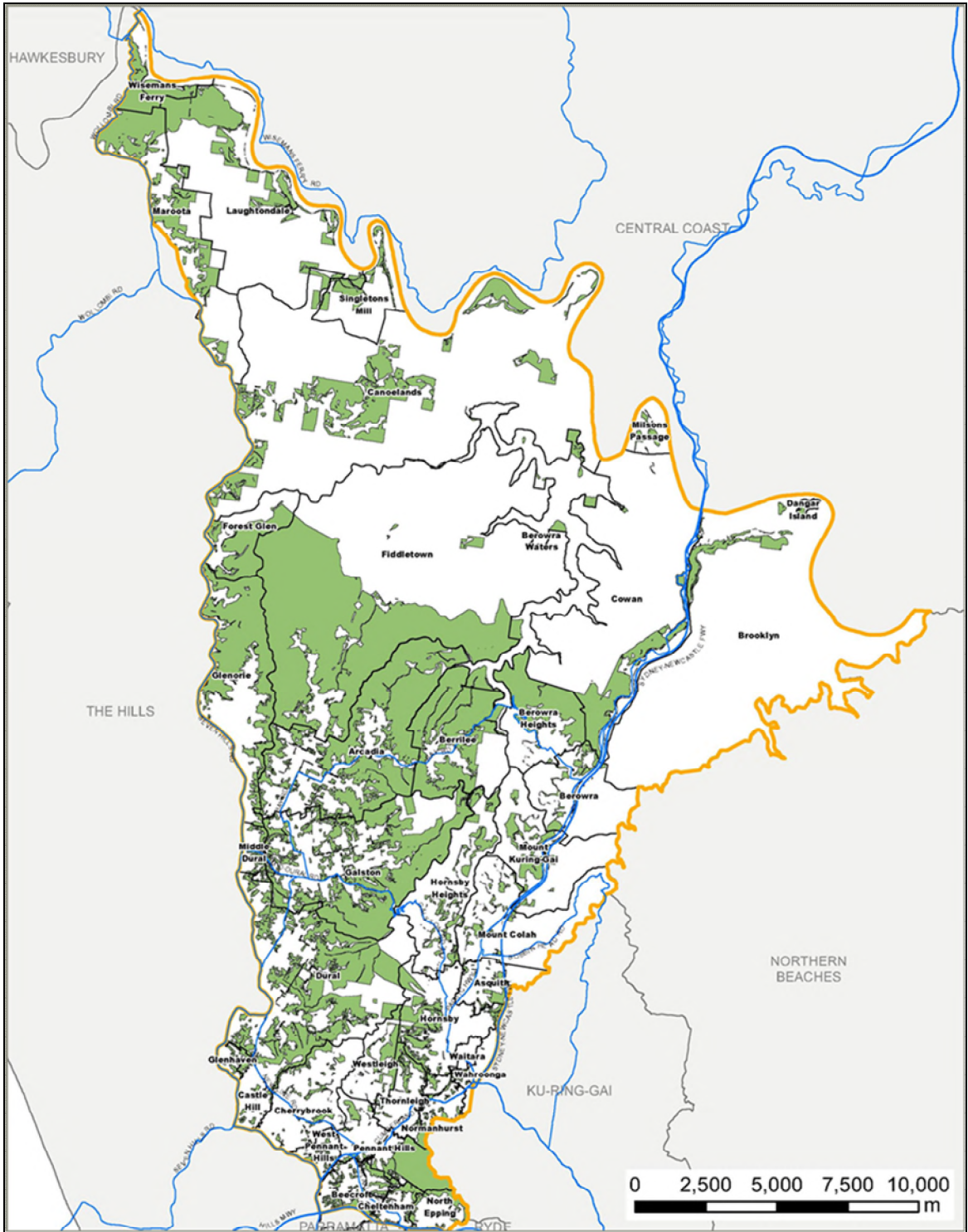


Figure 1 – Proposed Terrestrial Biodiversity Map, Hornsby Local Government Area

## **BACKGROUND**

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At its meeting on 14 October 2020, Council considered Director's Report No. PC21/20 and a corresponding Planning Proposal. Council resolved that:

- 1. Council endorse the progression of the Planning Proposal attached to Director's Report PC21/20 to update and expand the Terrestrial Biodiversity Map within the Hornsby Local Environmental Plan 2013 for submission to the Department and Planning, Industry and Environment for a Gateway Determination.*
- 2. The Planning Proposal be publicly exhibited in accordance with the Gateway Determination and consultation strategy identified in Director's Report No. PC21/20.*
- 3. Council endorse the amendments to the Hornsby Development Control Plan attached to Director's Report No. PC21/20 for exhibition concurrently with the Planning Proposal.*
- 4. Following exhibition, a report on submissions be presented to Council for its consideration.*

The Planning Proposal was subsequently lodged with the then Department of Planning, Industry & Environment (DPIE) on 28 October 2020 via the NSW Planning Portal.

On 25 January 2021, the then DPIE requested clarification to assist with assessment of the Planning Proposal. The information requested included

- clarification around the use of the term 'environmentally sensitive land';
- application of the State Environmental Planning Policy (Exempt and Complying Development) 2008 (Codes SEPP) under the proposed changes;
- response to concerns the mapping of all vegetation will set a precedent for switching off the application of the Codes SEPP; and
- the potential for reduced protections for land identified as 'terrestrial biodiversity' within Hornsby Shire.

A response was provided by Council staff on 24 February 2021.

On 3 March 2022, written correspondence was received from the Department formally requesting that Council withdraw the Planning Proposal and resubmit an amended proposal that addressed the Department's concerns, including:

- the proposed vegetation types to be mapped;

- amendments to model clauses and standard instrument definitions;
- application of the Housing SEPP 2021; and
- planning and economic implications.

On 4 April 2022, Council sent a letter to the NSW Minister for Planning, Mr Anthony Roberts, advising that Council does not wish to withdraw the Planning Proposal and requesting a meeting to discuss opportunities for Council to progress the Planning Proposal. The Department was forwarded a copy of the letter. A meeting with the Minister for Planning was subsequently held on 10 June 2022.

On 30 August 2022, a Gateway Determination not supporting the progression of the Planning Proposal was issued by the Department. The reasons for not supporting the progression of the Planning Proposal include:

- non-support of the broad inclusion of locally significant and common vegetation communities as 'Terrestrial Biodiversity';
- the lack of suitable economic analysis that demonstrates implications for local property and business owners;
- non-support for the removal of the complying development pathway under the Codes SEPP;
- non-support for replacement of the definition of 'Terrestrial Biodiversity';
- enhancement of tree protections within Hornsby LGA should be sought through expansion of Council's Tree Preservations Order within the Hornsby Development Control Plan 2013; and,
- the Planning Proposal does not give effect to the North District Plan.

On 14 September 2022, Council considered a Mayoral Minute No. MM12/22 regarding the Gateway Determination for the Vegetation Mapping Planning Proposal and resolved that:

1. *Council submit a formal Gateway review request with supporting justification to the Department of Planning and Environment to seek progression of the Vegetation Mapping Planning Proposal.*
2. *A further meeting with the Minister for Planning and other relevant State members be requested to outline the strategic and environmental importance of the Proposal.*

## **JUSTIFICATION OF GATEWAY REVIEW**

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Council's Vegetation Mapping Planning Proposal to amend HLEP 2013 by updating mapping to include all vegetation communities plus a 10m buffer and amend the definition of 'Terrestrial Biodiversity' to 'Environmentally Sensitive Land' was prepared to better protect all vegetation communities within Hornsby Shire.

Council considers that the proposed amendments under the Planning Proposal hold significant local and State strategic merit and align with the priorities and actions of the:

- Greening Our City Premier's Priority;
- Greater Sydney Region Plan;
- North District Plan;
- Hornsby's Local Strategic Planning Statement; and
- Hornsby's Community Strategic Plan.

The Planning Proposal was prepared after careful consideration by Council and significant financial and resource expense with the intention of updating mapping and further protecting vegetation communities within the Shire.

Council requests an alteration of the Gateway Determination to allow the Proposal to proceed, in acknowledgement of the need for accuracy of mapping and the importance of additional protection for all types of vegetation communities to be elevated into Council's Local Environmental Plan. The careful balance of appropriate development while retaining tree canopy and remaining the 'Bushland Shire' is aided by having the right information available to support quality outcomes.

## **Responses to issues raised in the Gateway Determination**

The Gateway Determination advises that the Planning Proposal should not proceed for a number of reasons. These are listed below with a response from Council to each issue raised.

### **1. *Inclusion of local significant and common vegetation communities***

The Department believes there is not appropriate justification for grouping locally significant and common vegetation communities with significant Federal, State and Regional vegetation under land mapped as 'Terrestrial Biodiversity' in the Standard Instrument – Local Environmental Plan.

#### **Council response**

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.

### **2. *Economic analysis***

The Department is concerned with the lack of economic assessment to allow Council and the public to fully understand the impacts on property and business owners.

#### **Council response**

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.

### **3. *Effect on the application of the Codes SEPP***

The Department has stated that mapping of local and common communities will have a significant effect on the Codes SEPP and that the weakening of this development pathway is not fully justified in light of the communities to be mapped.

#### **Council response**

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.

#### **4. Replacement of definition of Terrestrial Biodiversity**

The Department does not support the proposed updating of Standard instrument definitions with the request to amend 'Terrestrial Biodiversity' to 'Environmentally Sensitive Land'.

##### **Council response**

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.

##### **5. *Tree protection through other methods***

The Department supports Council's intention to enhance tree protection. It suggests other policies and strategies which may be employed without expanding the current Terrestrial Biodiversity threshold of HLEP 2013. Specifically, the Gateway Determination Report suggests that Tree Preservation Orders and landscape provisions in the Hornsby DCP 2013 and minimising tree canopy loss within Council's 'Greening Our Shire' initiatives are sufficient in achieving the intended outcomes of the Planning Proposal.

##### **Council response**

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.

#### **6. Does not give effect to the North District Plan**

The Department has found that the Planning Proposal does not give effect to the North District Plan in accordance with Section 3.8 of the EP&A Act 1979. This is because of the Department's views, as described above, that the mapping criteria is not supported and a lack of sound justification.

For reference, Section 3.8 of the EP&A Act 1979 requires that (in part):

*(1) In preparing a draft district strategic plan, the relevant strategic planning authority is to give effect to any regional strategic plan applying to the region in respect of which the district is part.*

*(2) In preparing a planning proposal under section 3.33, the planning proposal authority is to give effect—*

*(a) to any district strategic plan applying to the local government area to which the planning proposal relates (including any adjoining local government area),*

#### **Council response**

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.

## CONCLUSION

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Council believes that there is a justified case to support the Vegetation Mapping Planning Proposal update and expand the Hornsby Local Environmental Plan 2013 by mapping all vegetation communities (National, State, Regional and locally significant or common communities) plus a 10m buffer and amend the definition of 'Terrestrial Biodiversity' to 'Environmentally Sensitive Land' for the following reasons:

- All vegetation communities are of high biodiversity significance and the inclusion of locally significant and common vegetation communities would enhance the protection and management of bushland by ensuring the appropriate level of consideration and assessment is undertaken
- This approach to mapping terrestrial biodiversity is appropriate and is consistent with Council's current interpretation of Terrestrial Biodiversity Mapping under the Codes SEPP
- The Planning Proposal would not restrict development but would ensure that biodiversity is considered appropriately as part of a development application. The Department has not identified why inclusion of local and common vegetation communities is not supported.
- The Gateway Determination does not explain how increasing the rigour of assessment by reducing the application area of a SEPP outweighs the clear strategic intent of Council's LSPS and the State's Regional and District Plans and their priorities and actions related to the natural environment and associated ecological and health outcomes.
- There is clear precedent for understanding the economic implications of the Planning Proposal through a Gateway Determination condition
- This approach provides appropriate legislative weight to the 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.

Accordingly, Council seeks a review of the Gateway determination on the Vegetation Mapping Planning Proposal, dated 30 August 2022, to enable progression of the Proposal.