

PLEP Clause 7.6 Biodiversity Land is SEPP HSPD- Schedule 1 Environmentally Sensitive land.

I object to this amended DA2017/1274 as Biodiversity land under PLEP Clause 7.6 should be considered to be Schedule 1 Environmentally Sensitive land and SEPP HSPD is therefore not permitted on this land.

I request that this important legal permissibility issue be referred to a Judge to decide the following question of law:

Is PLEP Clause 7.6 Biodiversity Land SEPP HSPD Schedule 1 Environmental Land, and if answered in the affirmative, then is SEPP Seniors Housing permissible on this land for which consent is being requested in amended DA2017/1274?

This amended DA should be refused as this type of development is not permitted on this land as it is SEPP HSPD Schedule 1 land.

I agree with the Sydney North Planning Panel's conclusion that Biodiversity land is Schedule 1 land which does not permit SEPP HSPD developments.

I intend to show in this objection that this DA proposal is not permissible on Biodiversity land by references to court cases and analysis of the PLEP 7.6 against these criteria for Schedule 1 land.

The descriptions in PLEP 7.6 Biodiversity clearly reference many of the descriptions in Schedule 1.

This point has also not yet been refuted by any court cases Northern Beaches Council has in the past advised us in writing that they believe Biodiversity land IS schedule 1 affected land. I also received advice from the Environmental Defenders Office NSW which supported this argument.

The interpretation of the case:

Pepperwood Ridge Pty Ltd v Newcastle City Council [2006] NSWCA 122, is of importance to determine if Biodiversity is schedule 1 land.

Specifically the interpretation of point 41 of this Pepperwood case:

Pepperwood Ridge Pty Ltd v Newcastle City Council [2006] NSWCA 122

<https://www.caselaw.nsw.gov.au/decision/549fb8553004262463b9866c>

41. "For the words of objective (b) to Zone 7(c) to satisfy the foregoing test, it would, in my opinion, be necessary to find that the words identify the land by describing it by reference to the conservation values that are to be conserved"

This is EXACTLY what the objective of PLEP clause 7.6 biodiversity does.

PLEP Clause 7.6 (1) has very specific references to the precise conservation values which need to be conserved.

Is the **land identified** in an LEP as being Biodiversity Land?

Yes: refer:

PLEP 2014 - Part 1 Clause 1.7

Part 7 Clause 7.6

(2) This clause applies to land identified as "Biodiversity" on the [Biodiversity Map](#).

https://www.legislation.nsw.gov.au/maps/3571334d-a040-4960-982c-5a5f7c292167/6370_COM_BIO_011_01_0_20140217.pdf

and

https://www.legislation.nsw.gov.au/maps/0237ec1d-0fad-4c6e-8a95-a6142a320575/6370_COM_BIO_012_010_20140217.pdf



PLEP legislation where the land is “identified” as Biodiversity
<https://legislation.nsw.gov.au/#/view/EPI/2014/320/part7/cl7.6>

Clause 7.6 (1) (objectives)

The objectives of clause 7.6(1) indeed only reference conservation values (protection, maintenance of values) and what needs to be conserved.

As is required per point 41 of *Pepperwood Ridge Pty Ltd v Newcastle City Council* [2006] NSWCA 122, these are in **specific terms** not general terms

Clause 7.6 does not discuss any other matters in this description and objective.

It should be clear from the main description of the objectives that this is ALL about environmentally sensitive land and conservation of Biodiversity on the land so designated.

The word Biodiversity: means

<https://dictionary.cambridge.org/dictionary/english/biodiversity>

“the number and types of plants and animals that exist in a particular area or in the world generally, or the problem of protecting this:”

*“the existence of a wide variety of plant and animal species in their natural environments, which is the aim of conservationists concerned about the destruction of rainforests and other habitats
Collins English Dictionary. Copyright © HarperCollins Publishers”*

<https://www.qld.gov.au/environment/plants-animals/biodiversity/about>

Most definitions of Biodiversity include some reference to conservation of this Biodiversity.

Pittwater Council (now Northern Beaches Council) mapped out land as Biodiversity land under PLEP7.6 to ensure its conservation.

There was little other reason to map this land out other than to ensure its conservation and survival of endangered or rare species of flora and fauna in the Bayview (and other) areas.

In an email from Council, in which they reference the objectives in the 7.6 (1) clauses and council states that in council's opinion they are 'like descriptions' to schedule 1 words : 'conservation' and 'environment protection'.

Council maintains the opinion that Biodiversity does fall within the definition of schedule 1.

We also sought advice from the Environmental Defenders Office NSW (EDO NSW) who also advised us that PLEP 7.6 Biodiversity has like descriptions to schedule 1 words Conservation and Environment Protection and that they fit the criteria of point 41 of the Pepperwood case.

I agree with EDO NSW and Council's conclusion, and the consistency with the references in point 41 of the Pepperwood Ridge Pty case.

The PLEP Clause 7.6 (1) objectives are actually described very specifically with words about environmental values and protection of the environment and habitat.

These PLEP clause 7.6 words are not 'generic' or 'general' terms but are significantly specific wording and descriptions to make them 'like descriptions' for schedule 1, as is referenced in point 41 of the Pepperwood case, as being the requirement:

Point 36 of Pepperwood makes reference to Punnett case and it's definitions:

36 Punnett is authority for the proposition that in determining this issue the Court is not confined to the short name given to the relevant zone. Nonetheless, there must be words in the text of the LEP, or the map referred to as part of the LEP, which are "used descriptively with reference to the subject land": Punnett (Mason P) at 35

PLEP 7.6 Biodiversity uses words descriptively with reference to the subject land (which has been clearly identified in the PLEP maps. Land is identified in 7.6 with the reference to it's identification in clause 7.6 (2): (2)

This clause applies to land identified as "Biodiversity" on the Biodiversity Map.

point 41 of this Pepperwood Appeals case:

*"For the words of objective (b) to Zone 7(c) to satisfy the foregoing test, it would, in my opinion, be **necessary to find that the words identify the land by describing it by reference to the conservation values that are to be conserved**"*

The objective of PLEP 7.6 is definitely a "an identifying description of that land" (refer last sentence in point 41 of the case)

AND

The objective of PLEP 7.6 definitely describes the land with several references to the **conservation values which need to be conserved:**

I.e Conservation values are specifically being listed as: maintain Terrestrial, riparian and aquatic biodiversity

And (a), (b) and (c) of this clause state what needs to be specifically protected or conserved.

These are NOT just incidental general objectives, these are specific objectives which are identifying descriptions of that land.

This places Biodiversity land within schedule 1.

Analysis of the objectives, descriptions and wording in PLEP Clause 7.6 Biodiversity.

The objective in 7.6 (1) lists the conservation values of:

Maintain (=Conserve) - Terrestrial, riparian and aquatic biodiversity.

- (a) **protecting** native fauna and flora, and (fauna and flora = environment)
- (b) **protecting** the ecological processes necessary for their continued existence, and
- (c) encouraging the **conservation** and recovery of native fauna and flora and their habitats

This clause 7.6 details, still in the objectives clause and description, HOW this conservation needs to be done, by:

protecting (conservation of) Native fauna and flora, ecological processes necessary for continued existence of native fauna and flora and their habitats.

In addition, the description in this PLEP clause continues to clarify this objective of **conservation values to be conserved** by more detailed descriptions of what is required when assessing these DA's. The 'conservation values' are clearly defined in the next section of clause 7.6(3).

The clause 7.6(3) descriptions provide very specific goals and definitions of what is to be achieved.

The objectives and wording in PLEP 7.6 provide very specific goals and definitions of what is to be achieved.

The words in the objective of 7.6 (1) are indeed more than just "a general objective to be sought". (as is required as point 41 of Pepperwood case)

They specifically state the conservation values that are to be achieved on the LAND IDENTIFIED by this designation of Biodiversity land.

Maintenance (through avoiding adverse impacts) of the **ecological value** and significance of the fauna and flora **on the land** is clearly stated

Maintenance (through avoiding adverse impacts) of the vegetation **on the land** to the habitat and survival of native fauna is clearly stated

Prevent potential to fragment, disturb or diminish the biodiversity structure, function and composition **of the land**, is clearly stated

Prevent any adverse impact (maintain) on the habitat elements providing connectivity **on the land** is clearly stated.

In conclusion:

The **land** (52 Cabbage Tree Road Bayview) is **identified** in an LEP Map as Biodiversity land (schedule 1 land)

The land is described:

by any of the following descriptions or by like descriptions or by descriptions that incorporate any of the following words or expressions:

- (b) *conservation*
- (d) *environment protection,*

In fact, not only are the descriptions of the objective like descriptions, even the very precise word and expressions of Conservation and the use of like description of "Environment protection" (protecting *native fauna and flora*) are incorporated into the descriptions in very specific terms as set out as requirements in point 41 of the Pepperwood case.

For the purposes of this SEPP HSPD (seniors housing) DA 2017/1274 the 'biodiversity' objective description provides sufficient reason this land is protected under schedule 1 SEPP HSPD and why SEPP HSPD is not permitted.

The result should be that cl 4(6)(a) of the SEPP is engaged, and that the SEPP HSPD DOES NOT APPLY to the site and the proposed development is NOT permissible.

There are also merits arguments as to why the site is not suitable for the development, based on harm to the biodiversity value of the land that cannot be readily offset due to the lag time of replacing mature habitat trees with saplings.

Based on the above analysis and arguments, one can conclude that the answer to the question:

**Is PLEP Clause 7.6 Biodiversity Land SEPP HSPD Schedule 1 Environmental Land,
Should be yes.**

And the answer to the second question:

and if answered in the affirmative , then is SEPP Seniors Housing permissible on this land for which consent is being requested in amended DA2017/1274?

Should be no.

SEPP HSPD is not permitted on 52 Cabbage Tree road as it is SEPP HSPD Schedule 1 land and this DA should be refused.