

Natural Environment Referral Response - Biodiversity

Application Number:	DA2017/1274
Responsible Officer	Lashta Haidari
Land to be developed (Address):	<p>Lot 1 DP 662920 , 52 Cabbage Tree Road BAYVIEW NSW 2104</p> <p>Lot 1 DP 19161 , 52 Cabbage Tree Road BAYVIEW NSW 2104</p> <p>Lot A DP 339874 , 1825 Pittwater Road BAYVIEW NSW 2104</p> <p>Lot 1 DP 986894 , 1825 Pittwater Road BAYVIEW NSW 2104</p> <p>Lot 2 DP 986894 , 1825 Pittwater Road BAYVIEW NSW 2104</p> <p>Lot 3 DP 986894 , 1825 Pittwater Road BAYVIEW NSW 2104</p> <p>Lot 150 DP 1003518 , 1825 Pittwater Road BAYVIEW NSW 2104</p> <p>Lot 191 DP 1039481 , 1825 Pittwater Road BAYVIEW NSW 2104</p> <p>Lot 300 DP 1139238 , 1825 Pittwater Road BAYVIEW NSW 2104</p>

Reasons for referral

This application seeks consent development on land, or within 40m of land, containing:

- All Development Applications on
- Actual or potential threatened species, populations, ecological communities, or their habitats;
- Wildlife corridors;
- Vegetation query stipulating that a Flora and Fauna Assessment is required;
- Vegetation query - X type located in both A & C Wards;

And as such, Council's Natural Environment Unit officers are required to consider the likely potential environmental impacts.

Officer comments

Updated Biodiversity Referral Response – 19/07/2018

This referral response has been prepared to address additional information and submissions in relation to DA2017/1274 at 52 Cabbage Tree Bay Rd, Bayview.

Summary

With consideration of the additional information submitted to Council (Clements et al 2018), Council's Natural Environment and Climate Change – Biodiversity section recommends refusal of the Development Application (DA) based on non-compliance with Section 5a of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

The proposal is also inconsistent with the Pittwater LEP Part 7.6 Biodiversity Protection and Pittwater

21 Development Control Plan 2014 Control B4.6 Flora and Fauna Enhancement Category 2 and Wildlife Corridor.

Detailed Assessment

1. Section 5A of the EP&A Act

Application of Relevant Planning Provisions

The initial development application was submitted under Part 4 of the EP&A Act 1979 in December 2017. The application was therefore submitted prior to commencement of the new *Biodiversity Conservation Act 2016* (BC Act 2016) and constitutes a 'pending or interim planning application' as defined under Part 7, Clause 27 (1) (e) of the *Biodiversity Conservation (Savings and Transitional) Regulation 2017*. Part 7, Clause 28 of the regulation identifies that the application is to be assessed under the former planning provisions which include Section 5a of the EP&A Act 1979.

Additional information submitted by the applicant in July 2018 includes a comparison (refer to Clements et al 2018, section 2B.1) between the legislative requirements for the 'Assessment of Significance' under Section 5a of the EP&A Act 1979 and the new assessment requirements under Section 7.3 of the BC Act 2016. Appendix 4 of the additional information (Clements et al 2018) includes assessments of impacts upon threatened species prepared in accordance with Section 7.3 of the BC Act 2016. As identified above, the application should have included Assessments of Significance prepared in accordance with the former planning provisions and therefore, the impact assessments in Appendix 4 of the additional information are not valid.

As identified by Clements et al 2018, the main difference between the relevant planning provisions is that Section 5a of the EP&A Act 1979 requires that the assessment consider 'whether the action proposed is consistent with the objectives or actions of a recovery plan or threat abatement plan.' The approved Recovery Plan for Large Forest Owls (DECC 2006) is considered relevant to the application given usage of the site by Powerful Owls and proximity of the development site to an active nest. The National Recovery Plan for Magenta Lilly Pilly *Syzygium paniculatum* (OEH 2012) is also applicable to the proposal given the occurrence of this species in proximity to the site. Of further relevance are the more recently published threatened species recovery strategies and actions identified online within the NSW Office of Environment and Heritage threatened species profiles and as part of the associated Saving our Species program.

On the basis of the above, the impact assessments provided as additional information do not adequately address the former planning provisions including Section 5a of the EP&A Act.

Assessment of *Rhodamnia rubescens* – Scrub Turpentine – Preliminary listing as Critically Endangered

The additional information and impact assessment (Clements et al 2018, appendix 4) completed for *R. rubescens* identifies that the habitat of this species will not be modified or impacted by the proposal. Council staff have recently identified the occurrence of habitat and an individual plant within the development footprint, close to the proposed maintenance facility shed and associated infrastructure. The recorded individual appeared to be suffering from myrtle rust; however, the trunk was alive at the time of observation.

On the basis of the above, further assessment is required in relation to the occurrence of this species on site.

2. Planning Instruments

Pittwater LEP 2014 Part 7.6 Biodiversity Protection

The proposal does not comply with Pittwater LEP 2014 Part 7.6 Biodiversity Protection with reference to the following:

Before determining a development application for development on land to which this clause applies, the consent authority must consider:

- (a) *the development is designed, sited and will be managed to avoid any significant adverse environmental impact, or*
- (b) *if that impact cannot be reasonably avoided by adopting feasible alternatives—the development is designed, sited and will be managed to minimise that impact, or*
- (c) *if that impact cannot be minimised - the development will be managed to mitigate that impact.*

It is acknowledged that, based on the revised Bushfire Report and RFS requirements, no trees are proposed for removal within the required bushfire 'Asset Protection Zones' (APZs). In relation to siting of the proposal and impacts upon biodiversity, it is located within a heavily modified environment (golf course fairway as opposed to natural bushland); however, a large number of significant mature trees require removal within the development footprint. Large trees on this site are considered to have a high ecological value and contribute to canopy connectivity within a mapped wildlife corridor. Measures including the proposed conservation works and replanting of trees are noted but considered a very long term investment which does not sufficiently mitigate the impacts resulting from the proposal. The loss of significant canopy trees onsite is therefore considered to be inconsistent with Part 7.6 Biodiversity Protection of the Pittwater LEP 2014.

Pittwater 21 DCP parts Control B4.6 Flora and Fauna Enhancement Category 2 and Wildlife Corridor

It is acknowledged that tree-covered slopes immediately south and west of the development are no longer proposed to be designated as APZs (Building Code & Bushfire Hazard Solutions Pty Limited, 9 July 2018). Furthermore, it is acknowledged that no trees are proposed to be removed for the APZs adjoining the proposal (Clements et al, 2018, section 3B.1). On this basis, the additional information has clarified some inconsistencies between the bushfire protection requirements and proposed retention of trees identified in the arborist report adjacent to the development.

Due to the bulk and scale of the proposed development, approximately 50% of the width (measured from north-east to south-west) of the mapped high priority wildlife corridor will be blocked by infrastructure, diminishing connectivity within the local landscape. Uncertainty remains about the proposed 'thickening' of fairway vegetation within the required APZs close to the development and how the proposed conservation areas surrounding the development area are able to be managed and still be an APZ. On balance, the proposal is considered to be inconsistent with Pittwater 21 DCP Control B4.6 Flora and Fauna Enhancement Category 2 and Wildlife Corridor.

Initial Biodiversity Referral Response - 26/04/18

Recommendation

Council's Natural Environment and Climate Change (NECC) - Biodiversity section recommends refusal of the Development Application (DA) based on non-compliance with the *Environmental Planning and Assessment Act 1979* (EP&A Act) and Pittwater 21 Development Control Plan 2014 (DCP) Controls.

These are as follows:

1. Section 5A of the EP&A Act
2. DCP control B4.6 Flora and Fauna Enhancement Category 2 and Wildlife Corridor
3. DCP control C1.1 Landscaping

Details

1. Section 5A of the EP&A Act

Documents reviewed:

Part A Assessment of flora and fauna environmental constraints and opportunities, Part B Vegetation Management Plan and Part C Assessment of the significance of the proposal (including all associated appendices and maps) prepared by Ann Clements & Associates Pty Ltd 5 December 2017 (ecology report).

The DA did not provide sufficient information for the Council to assess the impact of the development on threatened species under Section 5A of the EP&A Act.

The ecological report did not provide the following information:

- a) Assessment of the likelihood of occurrence for threatened and migratory species identified in database searches (i.e. NSW Bionet search and Commonwealth Protected Matters Search Tool).
- b) Assessment of Significance (7-part test) for known/likely/potential threatened species to determine whether the development will have a significant effect on threatened species, populations or ecological communities or their habitats under Section 5A of the Environmental Planning and Assessment Act 1979.
- c) Conclusions summarising the results of the assessment and the need for a Species Impact Statement.

In particular, the ecology report did not assess the impacts of the development on *Ninox strenua* (Powerful Owl) and threatened microbat species known to occur in the site.

Therefore, the DA does not comply with Section 5A of the EP&A Act.

2. DCP Control B4.6 Flora and Fauna Enhancement Category 2 and Wildlife Corridor

Documents reviewed:

- Waterbrook Landscape DA Report prepared by Site Design and Studios November 2017 (landscape plan)
- Vegetation Management Plan prepared by Ann Clements & Associates Pty Ltd 5 December 2017 (VMP)
- Arboricultural Impact Assessment prepared by Footprint Green Pty Ltd November 2017 (arborist report)
- Planning for Bushfire Protection Rural Fire Service 2006 (PBP)
- Standards for Asset Protection Zones, Rural Fire Service (APZ standards)
- RFS correspondence re APZ conditions for DA2017/1274 dated 30/01/2018 ref D18/100 DA18011011219CC

The DA does not comply with DCP Control B4.6:

- a. Inconsistencies between the landscape plan, VMP, and the bushfire report, RFS APZ conditions 30/01/2018, PBP and APZ Standards.
- b. Insufficient information provided in the arborist report with regards to the extent of tree removal required in the IPA.

a. Inconsistencies between the landscape plan, VMP, and the bushfire report, RFS APZ conditions 30/01/2018, PBP and APZ Standards.

The RFS APZ conditions 30/01/2018 provided the following conditions for APZs:

At the commencement of building works, and in perpetuity, the area around the proposed buildings shall be managed as outlined within section 4.1.3 and Appendix 5 of Planning for Bushfire Protection 2006, and the NSW Rural Fire Service's document Standards for Asset Protection Zones as follows:

- West: inner Protection Area (IPA) for a distance of 80m
- North West: IPA for a distance of 100m from building D
- South West: IPA for a distance of 80m
- All other directions: IPA to the property boundary

The bushfire report (section 7.05 pg. 13) provides the following recommendations regarding management and extent of the APZ:

The proposal will rely on management of the area within the Golf Course Grounds adjacent the development area as an Asset Protection Zone to the northern boundary, for a minimum distance of 100 metres to the northwest south and southeast and 80 metres to the west and southwest of the proposed development. This can include the retention and embellishment of vegetation including that along Cabbage Tree Road, however, management is to ensure that the area is maintained as either an Asset Protection Zone / Inner Protection Area.

The landscape plan and VMP have designated conservation areas, revegetation areas and bush regeneration areas within the APZ IPA directly adjacent to, and surrounding all dwellings (refer to External landscape strategy 13/11/18 and VMP). This includes management and enhancement of all vegetation designated as part of the APZ IPA to a distance of up to 40 metres from the subject site boundary, directly adjacent to the proposed villas.

The APZ standards provide the following guidance on the management and structural composition of an APZ:

Fuels can be controlled by:

1. Raking or manual removal of fine fuels Ground fuels such as fallen leaves, twigs (less than 6 mm in diameter) and bark should be removed on a regular basis. This is the fuel that burns quickly and increases the intensity of a fire. Fine fuels can be removed by hand or with tools such as rakes, hoes and shovels.
2. Mowing or grazing of grass. Grass needs to be kept short and, where possible, green.
3. Removal or pruning of trees, shrubs and understorey. The control of existing vegetation involves both selective fuel reduction (removal, thinning and pruning) and the retention of vegetation. Prune or remove trees so that you do not have a continuous tree canopy leading from the hazard to the asset. Separate tree crowns by two to five metres. A canopy should not overhang within two to five metres of a dwelling. Native trees and shrubs should be retained as clumps or islands and should maintain a covering of no more than 20% of the area.

Designating conservation and bush regeneration areas within an IPA is inconsistent with the APZ standards: these areas must be managed by manual removal of fine fuels/mowing, pruning and removal of trees, maintaining a canopy tree separation of 2-5 m, and maintaining native trees and shrub cover to a system of clumps or islands with an overall cover of 20% of the APZ. It is a contradiction to propose a managed APZ be maintained as a bushland conservation area to minimise the impacts of removal of wildlife corridor vegetation within the subject site: the intended structure and function of the APZ is a simplified form of unmanaged bushland. Whilst it is recognised that retained vegetation within the APZ can provide some benefits and protection to wildlife, the vegetation must be maintained reduced structure and function and subject to ongoing management in perpetuity and cannot function as a conservation area.

The VMP does not provide any specific detail on how the proposed conservation areas surrounding the development area to be managed. Management objectives appear to be captured broadly in the overall vegetation management objectives provided for the revegetation and enhancement within the retained golf course area to the east of the development site. These objectives refer to techniques such as direct seeding of ground cover and mid storey native species and are generally in direct conflict with management techniques required to achieve APZ standards.

b. Insufficient information provided in the arborist report with regards to the extent of tree removal required in the IPA.

The report does provide information that 16 trees (out of 159) will be required to be removed as part of the APZ. However, an assessment of all trees within the APZ IPA has not been provided in the arborist report and therefore it is not clear how many additional trees will require removal/thinning to comply the RFS APZ standards.. Therefore, to understand the full extent of tree removal required for the provision of the APZ, the APZ must be assessed in its entirety and all trees requiring removal to comply with the RFS APZ standards need to be identified.

3. DCP Control C1.1 Landscaping

The DA does not comply with the DCP Control C1.1: All canopy trees and a majority (more than 50%) of other vegetation shall be locally native species. It is noted the landscape plan provides recommendations to plant primarily non-native species and cultivated native varieties.

Referral Body Recommendation

Recommended for refusal

Recommended Natural Environment Conditions:

Nil.