

Ms Carolyn McNally  
Secretary  
Department of Planning and Environment  
GPO Box 39  
SYDNEY NSW 2001

5 April 2018

Dear Ms McNally

**Determination of Modification Request  
Cobaki Concept Plan Approval (MP 06\_0316 MOD 9)**

Thank you for your Department's letter received on 9 March 2018 referring the above modification request to the Independent Planning Commission (the Commission) for determination under Ministerial delegation of 14 September 2011. I, Mr David Johnson (chair), and Professor Richard Mackay, AM constituted the Commission to determine the request.

The modification request was lodged by Leda Manorstead Propriety Limited (the applicant) to modify condition C19 of the Concept Plan Approval (MOD 1), (see **Appendix 1**) for the Cobaki Lakes Residential Development to:

- reduce the on-site offset requirements for Swamp Sclerophyll Forest (SSF) Endangered Ecological Community (EEC) from 6.77 hectares (ha) (see **Appendix 2**) to 5.31 ha (see **Appendix 3**);
- retire 128 SSF ecosystem credits to offset the residual impacts associated with clearing 3.8 ha of SSF EEC on-site;
- reclassify 0.01 ha of Lowland Rainforest on Floodplain EEC to Lowland Rainforest EEC and reduce on-site offset from 13.3 ha to 12.96 ha (-0.34 ha) (see **Appendices 4 and 5**); and
- implement an Amended Site Revegetation and Regeneration Plan to reflect the proposed changes to the offset arrangements and the reclassification of the Lowland Rainforest on Floodplain EEC.

The Commission considered carefully the Department of Planning and Environment's (the Department) environmental assessment report, all of the information provided by the proponent, recommendations from government agencies and Tweed Shire Council, submissions from the public and the provisions of section 75W of the *Environmental Planning and Assessment Act 1979* (EP&A Act). The Commission notes the proposed modification does not fundamentally change the essential nature of the development and considers that the proposed changes are within the scope of section 75W.

On 1 March 2018, the EP&A Act was amended. The project is a transitional Part 3A project under Schedule 2 of the EP&A (Savings, Transitional and Other provisions) Regulation 2017. The ability to modify transitional Part 3A projects under section 75W of the EP&A Act is being discontinued, however as the request for this modification was made before 1 March 2018, the provisions of Schedule 2 continue to apply.

As part of the Commission's assessment of the proposal, the Commission met with the Department, the applicant and Tweed Shire Council. Notes of these meetings are attached in **Appendix 6**. The Commission also attended a site inspection. There were no public submissions.

The key matters of this proposal considered by the Commission are outlined below:

### **Quantum of Offsets for the Swamp Sclerophyll Forest (SSF) Endangered Ecological Community (EEC)**

Under condition C19 of the Concept Plan (MOD 1), a total offset area of 22.7 ha was approved to mitigate the removal of 3.8 ha of SSF EEC. This consisted of 6.77 ha on-site offset requirement plus additional lands (either on or off-site) in the order of 16 ha. The applicant states in its application that the 6.77 ha on-site offset requirement cannot be provided on the development site, but states that a 5.31 ha on-site offset can be provided. This would be implemented through the approved *Revised Site Regeneration and Revegetation Plan* (James Warren & Associates (JWA) June 2017).

In their assessment report, the Department states that it does not support the proposed total offset requirements for the SSF EEC. The Commission notes that this position was supported by advice from an independent peer review undertaken by Ecological Australia (ELA) at the request of the Department. However, the Department also states that as the proposed reductions are minor and both the BioBanking Assessment Methodology (BBAM) and Framework for Biodiversity Assessment (FBA) permit offsetting the balance via the retirement of ecosystem credits, or the payment of funds into the Office of Environment and Heritage's (OEH) Biodiversity Conservation Trust, the reduction of on-site offsets is supported.

The Commission notes that Tweed Shire Council objected to the modification request. It raised concerns about the proposed reduction in the offsets for this EEC. Although OEH did not object to the modification request, it also raised concerns about the proposed reduction in the offsets for this EEC.

OEH and Council state that they would prefer that the 6.77 ha on-site offset be accommodated within the development site.

OEH also stated that it does not support assessing the ecological integrity of the site in its most recent state as the quality of vegetation may have declined over time thereby impacting the number of credits required to offset the proposal.

At its meeting with the Commission, Council submitted that on-site offsetting could be achieved within the development site. Council also provided a map to the Commission and the applicant outlining potential areas for on-site offsetting, which is attached in **Appendix 7**. The applicant stated to the Commission that there would be instances where road corridors or Asset Protection Zones (APZs) for bushfire risk would make offsetting on these potential areas difficult. The applicant contended that this approach would decrease the residential area and create conflict with other land uses. The Commission notes that the applicant has not provided evidence to support this position. The Commission inspected some of the areas which Council contends would be potential areas for on-site offsetting, and concluded that insofar as land previously allocated to on-site offsets for the SSF EEC has now been allocated for infrastructure, replacement lands for on-site offsets could be made available in other parts of the development site.

At its meeting with the applicant the Commission was informed that the total offset requirement for SSF EEC quoted in the OEH's submission to the Department was incorrect. The applicant stated that after the reduction in the required offset requirement for SSF EEC the total should read 16 ha, not 14 ha.

The Commission acknowledges that current government policy permits a number of options in the provision of offsets, including offsite, onsite and monetary payments. However, on review of the information provided by the applicant, the Department and agencies, the Commission finds that the applicant has not provided sufficient evidence to support the reduction in on-site offsets, and that the modification would result in an unjustified loss of SSF EEC offset from the site and the wider locality, and such loss is not considered an appropriate biodiversity outcome or deemed to be in the public interest.

## **Reclassification of the Lowland Rainforest on Floodplain EEC and reduction in on-site offset**

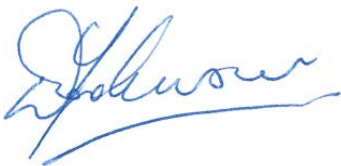
An on-site offset for Lowland Rainforest on Floodplain EEC of 13.3 ha was approved under Concept Plan MOD 1. The applicant seeks to reclassify 0.01 ha of Lowland Rainforest on Floodplain EEC to rectify its mapping error which resulted in vegetation outside the floodplain being classed as Lowland Rainforest on Floodplain EEC. The subsequent reduction in on-site offset by 0.34 ha to 12.96 ha would be as a result of the *Revised Site Regeneration and Revegetation Plan* (2017). The applicant considers this reduction to be inconsequential.

A peer review undertaken by ELA at the request of the Department concluded that insufficient justification had been provided to support this reclassification. The Commission notes that both Council and OEH support this position. Further, OEH does not agree with the applicant's statement that the proposed reduction constitutes an inconsequential impact. Notwithstanding, the Department concludes that the proposal is acceptable as the proposed offset remains sufficient.

The Commission notes that since this peer review there has been no further information submitted to the contrary of this conclusion.

The Commission finds, on review of the information provided by the applicant, the Department and agencies, that there has been insufficient evidence and justification provided by the applicant to support the reclassification of Lowland Rainforest on Floodplain EEC to Lowland Rainforest EEC. Without such evidence it is not considered appropriate to subsequently reduce the on-site offset area requirement for Lowland Rainforest on Floodplain EEC. The Commission also finds that the modification request would result in an unjustified loss of Lowland Rainforest on Floodplain EEC offset for the area, which is not considered an appropriate biodiversity outcome or deemed to be in the public interest.

For the reasons set out above, the Commission has determined to refuse consent to the modification request for the reasons set out in the instrument of refusal.



David Johnson  
**Member of the Commission (Chair)**



Prof Richard Mackay, AM  
**Member of the Commission**

cc. The Hon. Anthony Roberts, MP  
Minister for Planning  
GPO Box 5341  
SYDNEY NSW 2001

## APPENDIX 1

### MODIFICATION TO CONDITION C19 OF CONCEPT PLAN APPROVAL (MOD 1)

- (b) Schedule 2 Part C – Requirements for Future Applications, Condition C19 is amended by the insertion of the **bold and underlined** words and deletion of the struckout words/numbers as follows:

#### **C19 Biodiversity Offsets**

~~(1) Details of biodiversity offsets for the loss of Swamp Sclerophyll Endangered Ecological Community on the site must be submitted with any development application for works in Precinct 6.~~

~~(2) Total offsets for Swamp Sclerophyll on Coastal Floodplain must be as follows:~~

- ~~a. 6.77ha on-site in accordance with the approved Revised Ecological Assessment, April 2013; plus~~
- ~~b. additional lands<sup>1</sup> either on-site and/or off-site to compensate for the loss of the offset (as a result of 06\_0316 MOD 1), of an area as agreed with OEH.~~

~~<sup>1</sup>Note: The department has noted that using the biobanking calculator, this offset could be in the order of 16 hectares.~~

**(1) To offset the loss of 3.8 ha of Swamp Sclerophyll Forest Endangered Ecological Community (EEC) the Proponent shall:**

- a. provide a 5.13 ha on-site offset in the location identified in Figure 9 of the Amended Site Revegetation and Regeneration Plan (June 2017) prepared by JWA Pty Ltd;**
- b. revegetate 5.13 ha of Swamp Sclerophyll Forest EEC in accordance with the Amended Site Revegetation and Regeneration Plan approved by the Secretary under Condition C19A; and**
- c. Prior to the commencement of construction, the Applicant must retire 159 Swamp Sclerophyll Forest EEC biodiversity credits to the satisfaction of the OEH. The retirement of the credits must be carried out in accordance with the NSW Biodiversity Offsets Policy for Major Projects and can be achieved by:**
  - (i) acquiring and retiring "biodiversity credits" within the meaning of the Biodiversity Conservation Act 2016; or**
  - (ii) making payments into an offset fund that has been developed by the NSW Government; or**
  - (iii) providing supplementary measures, as agreed with the Office of Environment and Heritage.**

Note: Following repeal of the *Threatened Species Conservation Act 1995* on 25 August 2017, "biodiversity credits" created under that Act are taken to be "biodiversity credits" under the *Biodiversity Conservation Act 2016* by virtue of clause 19 of the *Biodiversity Conservation (Savings and Transitional) Regulation 2017*

**(2) To offset the loss of 0.11 ha of Lowland Rainforest vegetation, the Proponent shall:**

- a. provide a 12.96 ha on-site offset in the location identified in Figure 9 of the Amended Site Revegetation and Regeneration Plan (June 2017) prepared by JWA Pty Ltd; and**
- b. revegetate 12.96 ha of Lowland Rainforest vegetation on-site in accordance with the Amended Site Revegetation and Regeneration Plan approved by the Secretary under Condition C19A.**

- (c) Schedule 2 Part C – Requirements for Future Applications, after Condition C19 add new Condition C19A as follows:

**C19A Site Revegetation and Regeneration Plan**

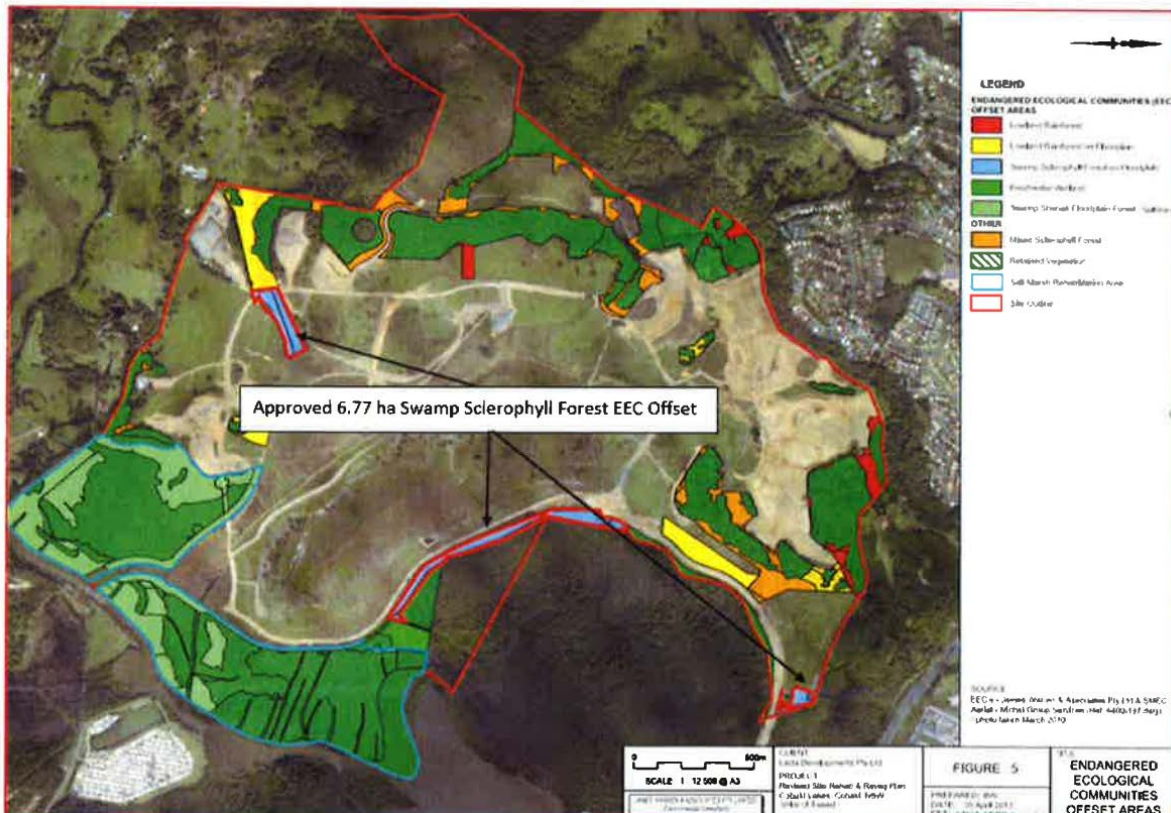
**Within three months of the date of determination of MP 06 0316 MOD 9, the Proponent shall prepare and submit an Amended Site Revegetation and Regeneration Plan to the Secretary for approval. The amended plan must:**

- a. **reflect the offset requirements identified in Term C19 of the Concept Approval;**
- b. **update Section 3.3 to identify the Swamp Sclerophyll Forest EEC is located on-site;**
- c. **ensure no areas of Lowland Rainforest on Floodplain EEC within the on-site offset areas are reclassified; and**
- d. **remove all changes to the EEC offset areas identified in Figure 9 that are not described in the modification request for MP 06 0316 MOD 9<sup>1</sup>.**

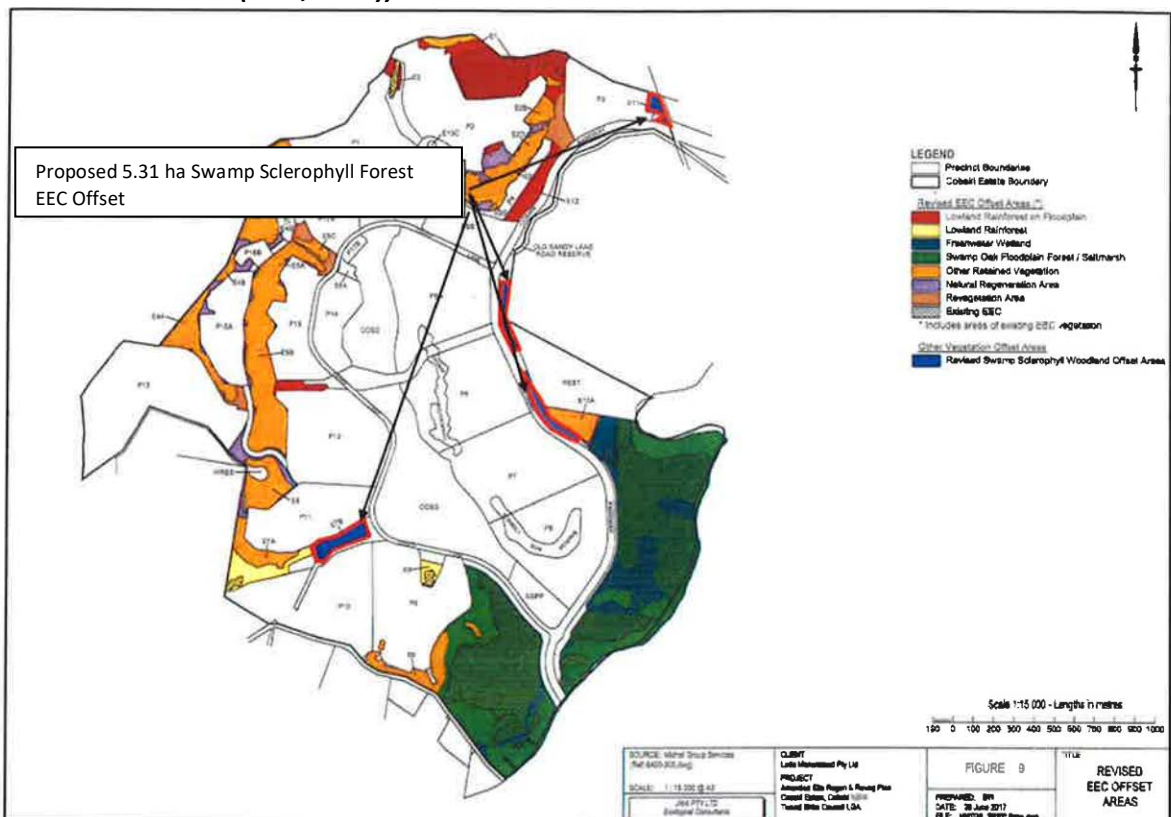
**Note<sup>1</sup>: For clarity, the changes requested under MP 06 0316 MOD 9 relate to the reduction of the Swamp Sclerophyll Forest EEC on-site offset area from 6.77 ha to 5.13 ha, the reduction of the Lowland Rainforest on-site offset area from 13.30 ha to 12.96 ha, and the reclassification of 0.01 ha of Lowland Rainforest on Floodplain EEC to Lowland Rainforest EEC.**

**End of Modification**

**APPENDIX 2 – APPROVED SWAMP SCLEROPHYLL FOREST EEC OFFSET (SOURCE: REVISED SITE REVEGETATION AND REGENERATION PLAN (JWA, 2013))**



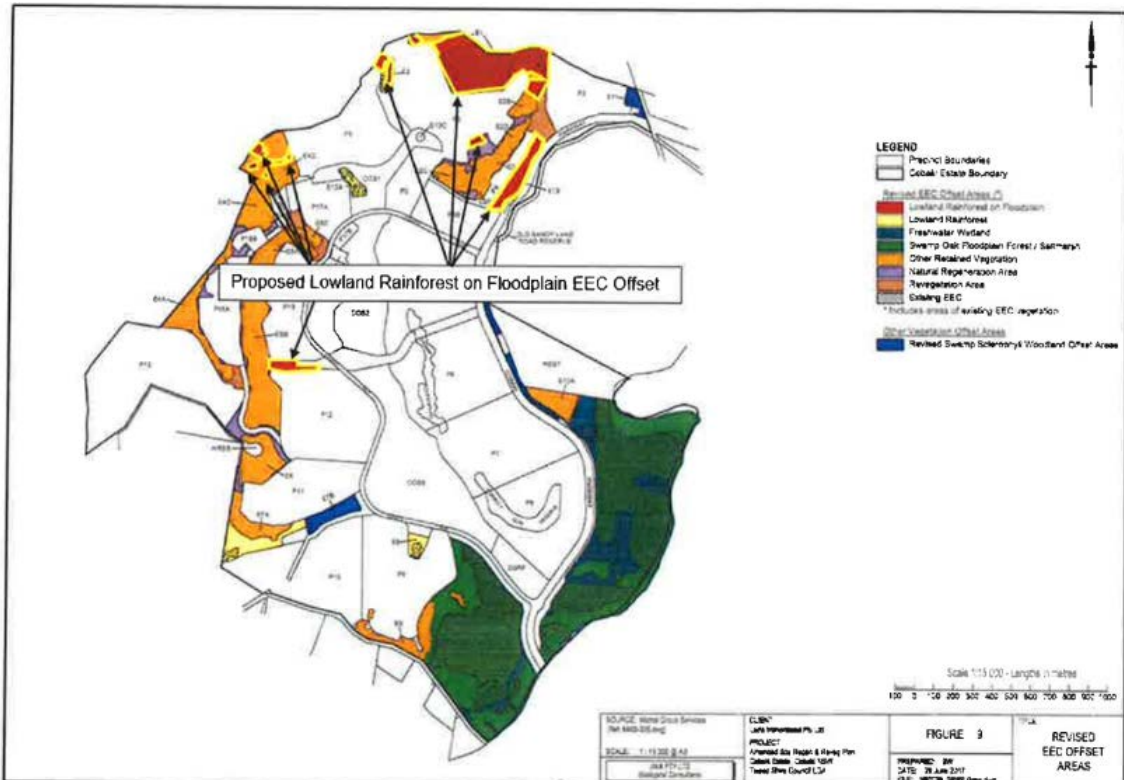
**APPENDIX 3 – PROPOSED SWAMP SCLEROPHYLL FOREST EEC OFFSET (SOURCE: AMENDED SITE REVEGETATION AND REGENERATION PLAN (JWA, 2017))**



**APPENDIX 4 – AREA OF LOWLAND RAINFOREST ON FLOODPLAIN EEC CURRENTLY IDENTIFIED ON-SITE  
(SOURCE: REVISED SITE REVEGETATION AND REGENERATION PLAN (JWA, 2013))**



**APPENDIX 5 – PROPOSED AREAS OF LOWLAND RAINFOREST ON FLOODPLAIN EEC (SOURCE: REVISED SITE REVEGETATION AND REGENERATION PLAN (JWA, 2017))**





## APPENDIX 6 RECORDS OF COMMISSION MEETINGS

### MINUTES

DETERMINATION OF MODIFICATION TO COBAKI CONCEPT PLAN APPROVAL (MOD 9)

IPCN BRIEFING WITH THE DEPARTMENT OF PLANNING AND ENVIRONMENT

IPCN OFFICES, 201 ELIZABETH STREET, SYDNEY

19 MARCH 2018 AT 11.30AM

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### ATTENDANCE

#### The Commission

Commission Members: David Johnson, Prof Richard Mackay, AM

Commission Secretariat: Matthew Todd-Jones (Senior Planning Officer), David Koppers (Team Leader)

#### Department of Planning and Environment

Anthony Witherdin (Director, Modification Assessments)

Kate McDonald

### THE FOLLOWING MATTERS WERE DISCUSSED:

#### Swamp Sclerophyll Forest Endangered Ecological Community (SSF EEC)

- The total offset requirement for SSF EEC should remain the same.
- The Department is satisfied that any on-site reduction will be offset off-site.
- The Department noted that the applicant is seeking to use a different methodology to determine the offsets for the SSF EEC, using the BioBanking Assessment Methodology (BBAM) 2014 calculator rather than BBAM 2008.
- Having commissioned an independent review, the Department considers that the BBAM 2008 calculations are correct, not the 2014 calculations.

#### Lowland Rainforest on Floodplain EEC

- The Department has received insufficient information from the applicant to justify the reclassification of the EEC.
- The Department is satisfied with the proposed reduction in offsetting.
- The reclassification and offset methodologies are not intrinsically linked in this proposal.

#### Condition C19 (iii) – Biodiversity Offsets

- This is a standard condition for offsetting, which allows for different types of offsets.





# Independent Planning Commission

- The condition allows for the applicant to find a site and come up with a biobanking agreement.

## **Other matters**

- The applicant is proposing to retire 128 biodiversity credits, but the Department has concluded that this should be 192 biodiversity credits.
- The Department understands that Council want to keep as much offsetting onsite as possible and the total offset should remain the same.

**MEETING CLOSED AT 12.00PM**



## MINUTES

DETERMINATION OF MODIFICATION TO COBAKI CONCEPT PLAN APPROVAL (MOD 9)

IPCN MEETING WITH TWEED SHIRE COUNCIL

MIKE RAYNER ROOM, TWEED HEADS ADMINISTRATION BUILDING, BRETT STREET, TWEED HEADS

26 MARCH 2018 AT 9.00AM

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### ATTENDANCE

#### The Commission

Commission Member: Prof Richard Mackay, AM

Commission Secretariat: Matthew Todd-Jones (Senior Planning Officer), David Koppers (Team Leader)

#### Council

Colleen Forbes (Team Leader, Development Assessment)

Marama Hopkins (Biodiversity Projects and Planning Officer, Natural Resource Management Unit)

### THE FOLLOWING MATTERS WERE DISCUSSED:

#### Administrative matters

- The most recent plans from 2017 should be reflected in Condition A3 c and d. The condition could either stay the same or the documents need to be updated.
- The approval should be consistent with the most up to date documents.
- Condition A3 8) should maybe read MOD 9, rather than MOD 8.
- The Statement of Commitments should also be updated. This hasn't been mentioned by the Department of Planning and Environment.
- Previous Statements of Commitments haven't been clear and up to date.
- Condition C19 1) a and b should read 5.31ha, not 5.13ha.
- Condition C19 1) c should reference works that would impact on SSF EEC area.
- More clarity is needed to determine what 'prior to the commencement of construction' means.

#### On-site offsets

- Council's preference is for all offsetting to be done on-site and that it should occur prior to impacts.
- Other areas of SSF EEC have already been reduced on site to accommodate infrastructure such as sediment basins and roads. This has disrupted ecological corridors.
- Council is trying to achieve a good offset outcome.
- Council has a map showing 15 ha of land where SSF EEC offsets could be provided on site.



# Independent Planning Commission

- This has been provided to the applicant but they informed Council that some of these areas encroach on residential land.
- Council believes that off-site offsets are likely to be located outside of the Council area and would therefore prefer to retain as much offset on-site as possible.
- Targets and timing requirements need to be made clearer in the applicant's revised Site Revegetation and Regeneration Plan.

## **Condition C19A**

- Council requested that there should be wording added to this condition so that consultation with Council is required.
- Council stated that they could provide with the Commission with a draft condition which would include a schedule of all the documents with which any new approval should be consistent.

**MEETING CLOSED AT 9.50AM**



## **MINUTES**

**DETERMINATION OF MODIFICATION TO COBAKI CONCEPT PLAN APPROVAL (MOD 9)**

**IPCN BRIEFING WITH THE APPLICANT, LEDA MANORSTEAD PTY LTD**

**APPLICANT SITE OFFICE, PIGGABEEN ROAD, COBAKI LAKES**

**26 MARCH 2018 AT 10.40AM**

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### **ATTENDANCE**

#### **The Commission**

Commission Members: David Johnson, Prof Richard Mackay, AM

Commission Secretariat: Matthew Todd-Jones (Senior Planning Officer), David Koppers (Team Leader)

#### **Applicant**

Dale Scotcher (Development Manager, Leda Holdings)

Adam McArthur (JWA Ecological Consultants)

### **THE FOLLOWING MATTERS WERE DISCUSSED:**

#### **Swamp Sclerophyll Forest (SSF) Endangered Ecological Community (EEC)**

- There are 57 trees in the paddock where the SSF EEC is located, which is within residential zoned land.
- The Department's condition reads that the proponent shall provide a 5.13 hectares (ha) on-site offset. The applicant agreed that this should read 5.31 ha.
- The applicant has been negotiating with the Council for 18 months.
- The applicant stated that the total amount of EEC on the site will increase from 118.83 to 120.70 ha (A schedule showing the breakdown of this area was tabled).
- The Office of Environment and Heritage's (OEH) submission states that the offsite offset area will be reduced to 14 ha, but this figure should be 16 ha.

#### **Reduction of Lowland Rainforest on Floodplain EEC**

- The removal of 0.11 ha of the Lowland Rainforest on Floodplain EEC will have a negligible impact on the EEC.

#### **Other matters**

- The applicant noted Council's proposed areas of on-site offsets but stated that there are instances where road corridors or Asset Protection Zones (APZs) make this more difficult. This approach would decrease the residential area and create conflict with other land uses.

**MEETING CLOSED AT 11.00AM AND WAS FOLLOWED BY A SITE VISIT**

# APPENDIX 7 - TWEED SHIRE COUNCIL - POTENTIAL AREAS FOR ON-SITE OFFSETTING

- LEDA EEC offset proposal 18-10-16**
- Swamp sclerophyll
  - Lowland rainforest on floodplain
  - Lowland rainforest
  - Rehabilitation Areas
- Offset options**
- Retain
  - Revegetation



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