

State Administrative Tribunal of Western Australia
Planning and Development Act 2005 (WA), section 252(1)

DR 63 of 2022

Called-in by the Minister for Planning
Planning and Development Act 2005 (WA), section 246

IN THE MATTER OF

B & J CATALANO PTY LTD

Applicant

and

SHIRE OF HARVEY

Respondent

APPLICANT'S RESPONSIVE SUBMISSIONS TO THE MINISTER

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*Terms used in this document are as defined in the Applicant' Submissions to the Minister dated 18 July 2022 (**Applicant's Submissions**).*

RESPONSE TO RESPONDENT'S SUBMISSIONS

1. The Respondent's Submissions dated 18 July 2022 (**Respondent's Submissions**) admittedly deal only with a couple of matters in addition to the contents of the Statements of Elizabeth Edwards and Michael Just, the responses to which are set out separately below, in paragraphs 14 to 43, and paragraphs 44 to 51, respectively. The submissions in paragraphs 2 to 13 below deal only with the matters that are dealt with in the Respondent's Submissions.

Respondent's decision not to do more than a "desktop review" of the vegetation on the Site

2. The Applicant accepts that there is an onus on a person lodging an application for development approval, to provide the decision-maker with sufficient information in support of the application, to enable the application to be determined. The Applicant says that it did this when it lodged the Application with the Respondent in September 2021, accompanied by the management plan and various reports prepared by Lundstrom Environmental Pty Ltd, which is **Annexure SGA2 to the Statement of Stephen Allerding**. That information is commensurate with the information that was lodged in support of each of the previous applications made by the Applicant for development approval in relation to Lot 7 (referred to in paragraphs 24 to 41 of the Applicant's Submissions), and also applications made by the Applicant for development approval in relation to the adjoining Lot 4 and other properties, over time.
3. The Respondent has the power to request further information in relation to an application for development approval, if it considers that there is insufficient information on which to make a determination, which it did not do in this matter, despite not determining the Application until February 2022, more than 4 months after it was lodged.
4. The Respondent determined the Application and issued the Refusal without carrying out its own investigation of the vegetation on the Review Site, or engaging any external consultant to do so, but instead relying solely on its own "desktop review" of the information provided with the Application. While this may have been sufficient for the purposes of the Respondent's own determination it is, with respect, not sufficient in circumstances where the Refusal was made the subject of an application for review to the State Administrative Tribunal, which has now been called-in by the Minister under section 246(6) of the PD Act. To the extent that the Respondent has raised the proposed clearing of the vegetation on the Review Site as the primary basis for the Refusal, the current condition of the

vegetation is clearly a relevant consideration. The Respondent was required to provide the Minister with any and all information that it wished the Minister to consider in that respect – part of the purpose of which is to allow the Applicant to then respond to that information. In that context, the Respondent chose not to submit any evidence as to the current condition of the vegetation and to continue to rely on a "desktop assessment" of the vegetation by reference to information dating from 2018, carried out on this occasion by Mr Michael Just.

5. Notwithstanding the above, the Respondent did in fact engage an external expert, Professor Kingsley Dixon of Curtin University (the same expert who was engaged by the Respondent to provide expert evidence in the matter of **Carbone Bros Pty Ltd and Shire of Harvey** [2021] WASAT 150 – the decision in which is discussed further below), who did carry out an actual inspection of the vegetation on the Review Site on 4 July 2022 and spoke at the time with a representative of the Applicant, Mr Peter Bennett. The Applicant anticipated that the Respondent would file a report by Professor Dixon following the inspection, which the Applicant would then be able to respond to, but the Respondent did not do so. As such, the Applicant now provides the following information regarding the discussions that took place between Professor Dixon and Mr Bennett on 4 July 2022, and reserves the right to provide a further response to any report that may now be lodged by the Respondent in respect of Professor Dixon's inspection of the vegetation on 4 July 2022, or any other inspection of the vegetation by a consultant engaged by the Respondent.
6. On 4 July 2022 –
 - (a) Professor Dixon attended Lot 2 and was escorted to the Review Site;
 - (b) after being escorted to the Review Site, Professor Dixon telephoned Mr Bennett to confirm that he was in the correct area, and it was established that he was;
 - (c) Professor Dixon said to Mr Bennett that he had not been sure he was in the correct area because there are only a limited number of trees within the area; and
 - (d) Professor Dixon said to Mr Bennett that, having inspected the vegetation on the Review Site, he was of the view that the vegetation in question is not a Threatened Ecological Community.

7. The Applicant's further response to the desktop assessment carried out by Mr Michael Just, and the content of Mr Just's Statement, is contained in paragraphs 44 to 51 below.

Decision in Carbone Bros Pty Ltd and Shire of Harvey [2021] WASAT 150

8. Paragraph 10 of the Respondent's Submissions contains extensive quotations from the decision of the State Administrative Tribunal in ***Carbone Bros Pty Ltd and Shire of Harvey*** [2021] WASAT 150 (***Carbone***).
9. The quotations from ***Carbone*** are not disputed, and the Applicant is familiar with the decision (Thomson Geer also acted for Carbone Bros Pty Ltd), but it was not specifically referred to in the Applicant's Submissions because the rationale for the decision in ***Carbone*** is wholly distinguishable from the present case. Not only was the zoning of the land in ***Carbone*** different to that of Lot 7 and the land in that case was identified as a "Place of Landscape Value" under the Scheme, the vegetation the subject of consideration in ***Carbone*** comprised 6 Tuart trees which the Tribunal found, on the evidence before it, were of an unusual (if not unique) size, were in excellent health, contained hollows of suitable size and orientation for use by Black Cockatoos for nesting, and that the clearing of the 6 was likely to have a significant impact on the "patch" of Tuart TEC that the trees were acknowledge to be a part of. As repeatedly stated by the Tribunal (see ***Carbone*** at [95], [108] and [109], by way of examples), it was these findings, relating to the ecological significance and significant ecological value of the particular 6 Tuart trees, that resulted in the Tribunal finding the clearing of those particular trees was not environmentally acceptable for the purposes of the provisions of the planning framework. There is no similar evidence before the Minister in the present case relating to any of the vegetation on the Review Site.
10. The Applicant otherwise refers to paragraphs 68 to 77 of the Applicant's Submissions.
11. To the extent that Respondent relies on the decision on ***Carbone*** as suggesting some more general principle than what is referred to above, and which is contrary to the principles set out in the Tribunal's decisions in ***Point Grey Development Company*** and ***SITA Australia Pty Ltd*** (referred to in paragraphs 75 and 76 of the Applicant's submissions), any such suggestion ought not to be accepted.
12. Additionally, to what is set out in paragraphs 68 to 77 of the Applicant's Submissions, the circumstances in ***Carbone*** were unusual in that in that case there had actually been an assessment report carried out by the DWER under

Part V of the EP Act which was available to be examined and considered by the Respondent (and by the Tribunal on review), in the context of determining an application for development approval. Ordinarily, however, and as in the present case, no such assessment report is available in that context. The Respondent's position in the present case therefore amounts to a requirement that a local government, as the planning decision-maker under its local planning scheme, must replicate and pre-empt the assessment to be carried out by the DWER. As referred to further below, and in the Mr Allering's Statement, there is no support for any such requirement in any part of the planning framework.

13. To the contrary, as set out further below, the appropriate approach, both generally and in the particular circumstances of the present case, for the purposes of determining an application for development approval that involves the clearing of native vegetation, is to impose a condition of development approval to the effect that –

Any proposed clearing of native vegetation is prohibited unless done under a Clearing Permit issued in accordance with the Environmental Protection Act 1986, or the clearing is exempt from the need for a clearing permit.

RESPONSE TO STATEMENT OF ELIZABETH EDWARDS

14. The following submissions incorporate comments that have been provided by Mr Stephen Allering, Mr Michael Lundstrom and Mr Lindsay Stephens by way of response to the contents of the Statement of Elizabeth Edwards dated 18 July 2018.
15. As to paragraph 13 of Ms Edwards' Statement, Lot 7 is not zoned 'General Farming' under the Scheme, but is zoned 'Kemerton Industry Buffer' as referred to in paragraph 8 of the Statement of Stephen Allering dated 18 July 2022.
16. Ms Edwards does not have any formal qualifications or experience in environmental sciences or in the assessment of environmental matters.
17. As to paragraphs 17 to 19 of Ms Edwards' Statement and **Attachment ERE-2** to Ms Edwards' Statement, it is apparent that any assessment by Ms Edwards for the purposes of the Respondent's submissions to the Minister regarding the vegetation on the Review Site is based solely on the mapping of the vegetation and information contained within –

- (a) the 2018 Flora Survey (which is **Annexure ML-1 to the Statement of Michael Lundstrom** and also **Document 2 of the Respondent's Bundle**); and
- (b) the information contained in the documents that were provided with the Application, which included a summary of the 2018 Flora Survey,

and not on any actual assessment of the vegetation by Ms Edwards. This applies in particular to the "*summary of the vegetation attributes*" provided in paragraph 20 of Ms Edwards' Statement, as well as to various other references to apparent environmental assessments of the vegetation on the Review Site in Ms Edwards' Statement at paragraphs 39, 44, 51, 55, 59, 63 and 64, which are referred to below. Further and in any event, to the extent (if any) that Ms Edwards purports to express her own opinion as to the environmental assessment of the vegetation on the Review Site in any of these paragraphs, Ms Edwards does not have any relevant expertise or experience in that field in order to do so.

18. Most importantly, the survey area for the 2018 Flora Survey comprised an area of 16 hectares of Lot 2. While this area includes all but a small portion of the 1.17 hectares of the Review Site, the Review Site is only a very small portion of the survey area for the 2018 Flora Survey, at the very north-western corner and edge of that survey area. It is therefore not appropriate or accurate to take the comments and conclusions regarding the vegetation in the survey area of the 2018 Flora Survey and treat those comments and conclusions as being applicable to the vegetation on the Review Site, without closer assessment.
19. Specifically as to paragraph 20 of Ms Edwards' Statement –
 - (a) While is correct, as noted in the first bullet-point, that a portion of the Review Site is classified by the 2018 Flora Survey as containing Banksia Woodlands TEC/PEC –
 - (i) the Review Site comprises an area of 1.17 hectares
 - (ii) 0.93 hectares of the Review Site is contained within the survey area for the 2018 Flora Survey ;
 - (iii) 0.6 hectares of vegetation within the Review Site is classified as Banksia Woodland by the 2018 Flora Survey (see Figure 1 below); and

- (iv) the more recent 2022 Survey concluded that "*The vegetation condition and species occurrence does not have the characteristics associated with the Banksia Woodland Threatened Ecological Community (TEC). Largely due to vegetation condition associated with side effects*" – see further below; and
 - (v) none of the additional area of 0.24 hectares of the Review Site that was not included in survey area of the 2018 Flora Survey, is classified as Banksia Woodland TEC;
- (b) While it is correct, as noted in the second bullet-point, that the Review Site is within the modelled distribution of the Forest Red-Tailed Black Cockatoo, Carnaby's Cockatoo and Baudlin's Cockatoo, the modelled distribution of these species incorporates approximately 6,480,000 hectares for the Red-Tailed Forest Cockatoo, 20,800,000 hectares for the Carnaby's Cockatoo, and 6,113,000 hectares the Baudin's Cockatoo¹. The Review Site is 1.17 hectares, of which 0.6 hectares is classified as Banksia Woodland, located immediately adjacent to existing, approved and operational sand extraction operations.
- (c) Further, while it is correct, as noted in the third bullet-point, that the 0.6 hectares of vegetation on the Review Site classified as Banksia Woodlands has the potential to provide breeding habitat and provides foraging and roosting habitat for the Black Cockatoo (on the basis that it is classified as Banksia Woodlands), the 2021 Fauna Survey showed that there are no habitat trees within the Review Site with hollows suitable for Black Cockatoos and no evidence of any actual nesting sites;
- (d) The matters noted in the fourth bullet-point are disputed. Neither the Review Site, nor the larger 16 hectare area of the 2018 Flora Survey, contain any Melaleuca swamps or Tuart trees;
- (e) As to the matters in the fifth bullet-point, the 2018 Flora Survey classified approximately 4% of the 0.93 hectares of the Review Site that was contained within the survey area as containing vegetation of "Excellent" condition, 2% as "Very Good", 58% as "Good" and the remaining 36% as "Degraded". The 2022 Survey, focussing on the whole of the 1.17

¹ Derived from DBCA published maps showing the distribution of the 3 cockatoo species

hectares of the Review Site, resulted in approximately 85% of the area being classified as "Degraded" (32%) to "Completely Degraded" (53%) and the remaining approximately 15% of the area as "Good" (see Figure 2 below).

- (f) As to the differences in classification of the vegetation on the Review Site as between the 2018 Flora Survey and the 2022 Survey, the Applicant refers to the following –
- (i) the differences in aerial imagery used for the 2018 Flora Survey and the 2022 Survey – The aerial imagery used for the 2018 Flora Survey was taken at an angle to the ground. The mapping method used to obtain the aerial extent of vegetation condition involves an examination of the flora while walking on the ground under the upper canopy and marking this condition on the aerial image. The skewed image and large shadows shown on the image results in an exaggeration of the areas mapped to the north-west. The November 2021 aerial imagery used for the 2022 Survey is directly overhead with minimal shadows showing, and the mapping using this imagery is therefore more accurate;
 - (ii) the passage of time – four years has now passed since the survey carried out for the 2018 Flora Survey, during which time there will have been incremental change in the vegetation condition, giving the compounding of historical clearing, increased threats (vectors/weeds) and reduction in native species germination (lack of geospores and bradysporous seeds); and
 - (iii) finally, there is inevitably a degree of subjectivity in the qualitative scales used for classifying vegetation condition. Gemma Maling, the botanist who carried out the assessment for the 2022 Survey, is confident in her assessment.
- (g) While it is correct, as noted in the sixth bullet-point, that the Review Area contained potential habitat for the Western Ringtail Possum, the 2021 Survey found *"No evidence of this species observe[d] suggesting it is absent or only occurs in low densities ... No significant impact on this species anticipated given small area involved"*.

- (h) While it is correct, as noted in the seventh bullet-point, that some of the vegetation on the Review Area is suitable to support a range of fauna, the 2021 Survey included consideration of the impact of clearing on all relevant species of fauna. It should be noted that the 2021 Survey covered a total area of 9.9 hectares, with the Review Site comprising a small portion of what is described in the 2021 Survey as the "southern zone" with an area of 7.9 hectares. The 2021 Survey concluded as follows –

Under the assumption that the entire survey area [that is, an area of 9.9 hectares] will be cleared the following conclusions have been drawn on the likely impacts based on observations made. In cases where some habitat is present and available information indicates at least some probability of the species occurrence, likely impacts are anticipated to be low primarily due to likely low population densities and the relatively small total area of vegetation/habitat present (ie. only a small number of individuals, if any will be affected).

No overall change in the conservation status of any fauna species currently utilising the survey area [that is, the area of 9.9 hectares] is therefore anticipated. While some small, localised residual loss of fauna habitat may occur for some species, regional impacts on the status of any one species are anticipated to be negligible/non-existence.

20. Further, to the extent that any portion of the vegetation on the Review Site contains Banksia Woodlands TEC/PEC, the assessment of the impact, if any, resulting from the clearing of that portion of vegetation, having regard to the condition of that vegetation and all other relevant environmental considerations, is and will be properly carried out by the environmental authorities under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**) and the *Environment Protection Act 1986 (WA)* (**EP Act**), as part of their respective assessments of –

- (a) the referral made by the Applicant under the EPBC Act (refer to paragraphs 26 and 27 of Mr Lundstrom's Statement and **Annexure ML-4 to Mr Lundstrom's Statement**); and

(b) the application made by the Applicant for a Clearing Permit under the EP Act (refer to paragraph 28 of Mr Lundstrom's Statement and **Annexure ML-5 to Mr Lundstrom's Statement**).

21. As referred to above, and set out further below, the appropriate approach in the circumstances of the present case for the purposes of development approval under the Scheme, and the approach which has been adopted by both the Shire and the Western Australian Planning Commission for other approvals issued for Lot 7, as well as the adjoining Lot 4 and Lot 21 (which are referred to in paragraphs 23 to 29 of Ms Edwards' Statement and are included as **Documents 18, 19 and 20 of the Applicant's Bundle**), is to impose a condition of development approval to the effect that –

Any proposed clearing of native vegetation is prohibited unless done under a Clearing Permit issued in accordance with the Environmental Protection Act 1986, or the clearing is exempt from the need for a clearing permit.

22. As to paragraphs 30 and 31 of Ms Edwards' Statement, it appears from **Document 3A of the Respondent's Bundle** (and the final sentence of paragraph 35 of Ms Edwards' Statement) that in addition to the matters referred to in paragraphs 30 and 31 of Ms Edwards' Statement, the Respondent also referred the Application to the Department of Water and Environment Regulation (**DWER**) for comment, and that the DWER provided its comments by email to the Respondent dated 9 November 2021 (**DWER Comments**). Amongst the DWER Comments, the clearing of native vegetation is identified as "Issue 2", and the only comment provided as part of the DWER's Comments is as follows –

Advice 2: *The proponent is to apply for a clearing permit under the EP Act*

In other words, for the purposes of providing its comments in relation to the Application, the DWER was content for any issues relating to the clearing of native vegetation to be dealt with by way of an application for a Clearing Permit under the EP Act. The DWER did not recommend the refusal of the Application on this (or any other) basis.

23. Clause 5.9 of SPP2.5 (referred to further below), specifically provides that planning decision-makers are to have due regard to advice of this nature from the DWER.
24. As to paragraphs 32 to 36 of Ms Edwards' Statement, the Applicant refers to its submissions regarding the **Carbone** decision at paragraphs 8 to 13 above.
25. As to paragraph 38 of Ms Edwards' Statement, the objective of the Scheme quoted by Ms Edwards is only 1 of 7 objectives that are set out in clause 1.6.1 of the Scheme. The other relevant objective, which is not referred to by Ms Edwards, is referred to in paragraph 34 of Mr Allering's Statement. The Scheme does not provide that any of the objectives are to be given greater weight than others.
26. Ms Edwards' Statement does not refer to any of the other relevant provisions of the Scheme, which are referred to in paragraphs 35 to 40 of Mr Allering's Statement, including provisions relating to the zoning of Lot 2 as 'Kemerton Industry Buffer' and as part of the Kemerton Strategic Industrial Area.
27. There is no provision of the Scheme that makes any specific reference to, or provides any specific protection for, vegetation on the Review Site or on Lot 7 generally. For example, neither the Review Site nor Lot 7 is identified as a "Place of Landscape Value" in Schedule 1 of the Scheme (as was the land under consideration in **Carbone**),
28. As to the matters referred to in paragraphs 39 to 44 of Ms Edwards' Statement, the Applicant –
 - (a) does not dispute the general information set out in paragraphs 40 to 42, which is taken from the Conservation Advice for Banksia Woodlands; but
 - (b) as to the opinions expressed in paragraphs 39 and 44 regarding the vegetation on the Review Site, the Applicant repeats its submissions at paragraphs 16 to 20 above.
29. Further, as to reference to "fragmentation" in paragraphs 41 and 42 of Ms Edwards' Statement, the clearing of the vegetation on the Review Site will not result in any fragmentation of any TEC/PEC, and nor does the vegetation on the Review Site serve as a linkage/corridor to other areas of TEC/PEC. There are large extents of native vegetation to the west, south and north of Lot 7 and the adjoining Lot 4.

30. As to paragraph 46 of Ms Edwards's Statement, while it is agreed that the quotes are taken from the provisions of SPP2.0 –

(a) Ms Edwards quotes only 1 of the 3 objectives of SPP2.0. The other objectives (clause 4, p.2050), which refer to the need to integrate environment and natural resource management with broader land-use planning and decision-making, and to promote and assist in the wise and sustainable use of and management of natural resources, are referred to in Table 2 of Mr Allering's Statement;

(b) Ms Edwards quotes from cl.4 of SPP2.0 (p.2050-2051), but the words that have deliberately omitted from that quote are as follows –

... The following policy measures recognise the significance of natural resources, and should be read in conjunction with the more specific statements on aspects of natural resources that follow ...

(c) Ms Edwards does not quote any of the more specific statements in SPP2.0 dealing with the significance of natural resources, which are referred to in Table 2 of Mr Allering's Statement.

31. As to paragraph 47 of Ms Edwards' Statement, while the quote referred to in that paragraph does come from clause 6.1(b) of SPP2.4, it is taken out of context and in any event is only 1 of 5 recommendations contained in clause 6.1 of SPP2.4 relating to the preparation of higher-order strategic planning instruments identified as region schemes, regional and sub-regional frameworks and sub-regional and district structure plans. The passage referred to is not relevant to the determination of an application for development approval under a local planning scheme. Further provisions of SPP2.4 that are relevant, including provisions relating to the identification of the Review Site as within an area of Significant Geological Supply for BRM, but which are not referred to in Ms Edwards' Statement, are set out in Table 2 of Mr Allering's Statement.

32. Further, it is important to note that SPP2.4 defines "Exclusion areas" as follows –

Exclusion areas contain known BRM resources but are considered unfavourable for excavation. These areas are likely to have protected environmental values or are excluded for planning or infrastructure reasons. There is a presumption against approval of extraction in these locations.

Neither the Review Area, nor any part of Lot 7 (or the adjoining Lot 4) are identified as Exclusion areas in SPP2.4.

33. As to paragraph 49 of Ms Edwards' Statement, while the quote referred to in that paragraph is 1 of 7 objectives of SPP2.5, and again is not referred to in context. Further provisions of SPP2.5 which directly relate to basic raw materials, including clause 5.9 dealing specifically with basic raw materials, and which are not referred to in Ms Edwards' Statement, are set out in Table 2 of Mr Allering's Statement.
34. As to the matters referred to in paragraphs 51 to 55 of Ms Edwards' Statement, the Applicant –
 - (a) does not dispute the general information set out in paragraphs 52 to 54, which is taken from the documents referred to those paragraphs; but
 - (b) as to the opinions expressed in paragraphs 51 and 55 regarding the vegetation on the Review Site, the Applicant repeats its submissions at paragraphs 16 to 20 above.
35. Table 2 of Mr Allering's Statement also sets out relevant provisions of the Greater Bunbury Strategy, Bunbury Geopraphe Sub-Regional Strategy and Greater Regional Bunbury Strategic Minerals and Basic Raw Materials Resource Policy, which are not referred to in Ms Edwards' Statement.
36. Paragraphs 22 to 28 of Mr Allering's Statement also refer to relevant provisions of the Greater Bunbury Region Scheme and the Kemerton Strategic Industrial Area Structure Plan, which are not referred to in Ms Edwards' Statement.
37. As to paragraph 58 of Ms Edwards' Statement, while the objective quoted is 1 of 12 objectives listed in clause 2 of the Local Planning Strategy, other relevant provisions of the Local Planning Strategy, not referred to by Ms Edwards, are set out in paragraphs 29 to 33 of Mr Allering's Statement. Also, as to the objective that is quoted, the Applicant also notes that there is no suggestion of the Review Site containing any conservation category wetlands or local/regional ecological linkages.
38. As to the opinions expressed by Ms Edwards in paragraph 59 of her Statement regarding the vegetation on the Review Site, the Applicant repeats its submissions at paragraphs 16 to 20 above.

39. As to paragraphs 60 to 63 of Ms Edwards' Statement, the Applicant –
- (a) does not dispute the general information set out in paragraphs 60 to 62, which is taken from the Conservation Advice for Banksia Woodlands; but
 - (b) as to the opinion expressed in paragraph 62 regarding the volume of sand the subject of the Application, the Applicant refers to its response to paragraphs 71 to 74 of Ms Edwards' Statement, below; and
 - (c) as to the opinions expressed in paragraph 63 regarding the vegetation on the Review Site, the Applicant repeats its submissions at paragraphs 16 to 20 above.
40. As to the opinions expressed by Ms Edwards in paragraphs 64 and 65 of her Statement regarding the vegetation on the Review Site, the Applicant again repeats its submissions at paragraphs 16 to 20 above
41. As to paragraph 66 of Ms Edwards' Statement, the general quote from SPP2.0 is not disputed, but insofar as Ms Edwards expresses an opinion that that general statement is relevant to the clearing of the vegetation on the Review Site, the Applicant again repeats its submissions at paragraphs 16 to 20 above.
42. As to paragraphs 71 to 74 of Ms Edwards' Statement, the Applicant does not agree with the assessment of the volume of sand that would be realised from an approval of the Application. The Applicant refers to the Statement of Mr Lindsay Stephens and specifically to the summary regarding sand volumes set out in paragraphs 46 to 49 of the Applicant's Submissions dated 18 July 2022.
43. Finally, as noted in paragraphs 64 and 65 of the Applicant's Submissions, the Application on its face gives rise to a range of "usual" relevant planning considerations, none of which are referenced in the reasons for the Refusal, or referred to at all in Ms Edwards' Statement (but are addressed in Mr Allering's Statement). It follows that all of those other planning considerations are not considered by the Respondent to provide any basis for refusing the Application.

RESPONSE TO STATEMENT OF MICHAEL JUST

44. The following submissions incorporate comments that have been provided by Mr Michael Lundstrom and Mr Lindsay Stephens by way of response to the contents of the Statement of Michael Just dated 18 July 2018 (**Mr Just's Statement**).

45. As to paragraphs 7 of Mr Just's Statement and **Attachment MJP-2** to Mr Just's Statement, it is apparent that any assessment by Mr Just for the purposes of the Respondent's submissions to the Minister regarding the vegetation on the Review Site is based solely on the desktop review of the mapping of the vegetation and information contained within –

(a) the 2018 Flora Survey (which is **Annexure ML-1 to the Statement of Michael Lundstrom** and also **Document 2 of the Respondent's Bundle**); and

(b) the information contained in the documents that were provided with the Application, which included a summary of the 2018 Flora Survey,

and not on any actual assessment of the vegetation by Mr Just.

46. In **Carbone** at [66], the State Administrative Tribunal made specific reference to the fact that the DWER's assessment of the Tuart trees in that case had been a similar "desktop" assessment, relying on photographs of the trees. The Tribunal commented –

In making our findings on the size, age and health of the Tuart trees we relied on the evidence of experts who had the benefit of visiting the site and were subject to cross-examination under affirmation. Consequently, we observe that the evidence on which we have based our findings on the condition and significance of the Tuart trees to the Tuart TEC is more reliable than the information available to the DWER at the time it prepared the DWER assessment report.

47. Further, paragraphs 8, 11, 12 and 16 of Mr Just's Statement all refer to the classification of the condition of the vegetation on the Review Site set out in the 2018 Flora Survey. As referred to in paragraphs 19(e) and (f) above, those classifications have been amended following the 2022 Survey. Mr Just's Statement does not take into account changes to the vegetation since 2018, when the survey for the 2018 Flora Survey was carried out.

48. With particular reference to whether the vegetation on the Review Site contains Banksia Woodlands TEC/PEC, the Applicant refers to paragraph 19(a)(iv) above and the conclusion contained in the 2022 Survey, following a site inspection of the vegetation, that "*The vegetation condition and species occurrence does not have the characteristics associated with the Banksia Woodland Threatened Ecological Community (TEC). Largely due to vegetation condition associated with side effects*",

49. As to paragraphs 20 to 22 of Mr Just's Statement, again the comments in these paragraphs are based only on the 2018 Flora Survey. Those matters have been updated by the 2022 Survey.
50. As to paragraph 23 of Mr Just's Statement, the Applicant refers to and repeats paragraphs 19(b), (c) and (h) above.
51. Since preparing his Statement, Mr Just has now inspected the vegetation on the Review Site (on 8 August 2022). The Applicant therefore reserves the right to respond further to Mr Just's Statement after considering any further report or Statement provided by Mr Just following his inspection of the vegetation.

CONCLUSION

52. The Applicant agrees with the statement in the final paragraph of the Respondent's Submissions, that the planning framework does not *subjugate* environmental matters to the public interest in the availability of basic raw materials. However, neither does the planning framework *elevate* environmental matters, as a relevant consideration within the planning process, to the extent that the Respondent has done in this matter (and others).
53. The environmental impacts of the clearing of native vegetation is a matter that is specifically and particularly the subject of expert consideration and determination under the EP Act and, where relevant, the EPBC Act. There is nothing in the planning framework that invests a local government, as a planning decision-maker under its local planning scheme, with the power or responsibility to carry out its own, separate assessment of any such environmental impact – and any suggestion to the contrary fails to recognise the primacy afforded to the EP Act both within the EP Act itself and the planning framework.
54. Finally, in the present case, the availability of sand resources within the Shire of Harvey and the Greater Bunbury Region must also be a strong consideration. As referred to in Mr Stephens' Statement, while there is sand available in the Myalup Pine Plantations, there is time delay of at least 2 years before any of those sand resources becomes available, and this is also dependant on the State Government releasing the land in question. In addition, the location of those sand resources will result in additional traffic, road and greenhouse gas impacts, which are also relevant environmental considerations.

55. Having regard to all of these matters, in the present case, in the absence of any specific protection for the vegetation on the Review Site within the planning framework (such as identification as an Exclusion Area under SPP22.4, or any specific identification in the Scheme), and having regard to the results of the 2018 Flora Survey, the 2021 Survey and the 2022 Survey, any planning considerations (including environmental matters that are relevant as planning consideration) arising from the clearing of the vegetation on the Review Site, are properly addressed by a condition of development approval, similar to that referred to in paragraph 21 above, to the effect of precluding clearing in the absence of a Clearing Permit granted under the EP Act.



Thomson Geer
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Figure 1



Figure 2