

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 SUPPLEMENTARY 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**) and the Applicant's Responsive Submissions to the Minister dated 11 August 2022 (**Applicant's Responsive Submissions**).*

INTRODUCTION

1. As set out in the email from Thomson Geer to the Minister dated 17 March 2023, several matters have arisen since the parties lodged their responsive submissions and Statements of Evidence in this matter, in August 2022. By letter dated 27 April 2023, the Minister allowed for those matters to be addressed in these Supplementary Submissions.

INADVERTENT PROVISION OF DRAFT VERSION OF ATTACHMENT

2. As noted in the email from Thomson Geer dated 17 March 2023, it has come to the Applicant's attention that the version of the Reconnaissance Vegetation Survey – Lot 7 Runnymede Road dated July 2022 (**2022 Survey**) that was provided as **Annexure ML-3** to the Statement of Mr Mike Lundstrom dated 18 July 2022 was in fact marked as a "draft" version of the 2022 Survey. Attached to these submissions is a copy of the final version of the 2022 Survey, which should replace the version that was previously provided.
3. Apart from some minor typographical corrections, the only changes of any significance from the draft version of the 2022 Survey to the final version of the 2022 Survey are as follows –
 - (a) in the first paragraph under the heading Results – Vegetation Structure and Description on page 2, the reference to "*one specimen of Banksia attenuate*" has been corrected to simply refer to *Banksia attenuate* as one of the overstorey species observed and identified. This reflects the fact that more than one specimen was in fact observed and identified; and
 - (b) the second paragraph under the same heading, which appears in the draft version of the 2022 Survey, was deleted in the final version of the 2022 Survey

RESPONSE TO NEW INFORMATION CONTAINED IN THE RESPONDENT'S RESPONSIVE STATEMENTS

4. As noted in the email from Thomson Geer to the Minister dated 17 March 2023, much of the substantive evidence submitted by the Respondent was only

submitted for the first time by way of the Respondent's Responsive Statements, including in particular –

- (a) the Statement of Mr Michael Just dated 10 August 2022, prepared after Mr Just had physically inspected the Review Site for the first time on 8 August 2022, and which is primarily a review of the 2022 Survey; and
 - (b) the Statement of Dr Michael Bamford dated 10 August 2022, which is primarily a desktop review of the fauna assessment survey carried out by Mr Greg Harewood dated November 2021 (**2021 Fauna Survey**), a copy of which was provided as **Annexure ML-3** to the Statement of Mr Mike Lundstrom dated 18 July 2022.
5. In particular, the Applicant notes that the review of the 2021 Fauna Survey by Dr Bamford was only a desktop review, and Dr Bamford did not attend the Review Site in order to carry out the review. The Applicant repeats its previous submissions as the shortcomings of desktop assessments, as recognised by the State Administrative Tribunal in decisions such as ***Carbone Bros Pty Ltd and Shire of Harvey*** [2021] WASAT 150 at [66].
 6. The Applicant also notes that the Respondent did not file any Statement by Professor Kingsley Dixon, despite the fact that Professor Dixon attended the Review Site on 4 July 2022 on behalf of the Respondent and carried out an inspection of the Review Site. The Applicant repeats paragraphs [5] and [6] of the Applicant's Responsive Submissions in this respect.
 7. The Applicant and its experts do not agree with a number of the comments made by Mr Just in response to the 2022 Survey and by Dr Bamford in response to the 2021 Fauna Survey, but save for the information that is referred to in paragraph 12(c) below it is not necessary to address those comments in detail and neither is it necessary for the Minister to resolve any differences of opinion between the environmental experts on matters relating to the presence or condition of flora and/or fauna. This is because, to the extent that these environmental issues are in dispute they can and will be properly and appropriately addressed in the present case by the consideration and determination of the separate and specialised environmental approvals that are also required for the clearing and the extraction industry operations proposed by the Applicant.
 8. The Applicant repeats paragraphs [68] to [77] of the Applicant's Submissions and paragraphs [8] to [13] of the Applicant's Responsive Submissions, setting out the proper role of environmental issues in the planning process, particularly in

circumstances where the separate and specialised statutory regimes for both environmental approvals and the review of such approvals are being carried out. These submissions are supported by the decisions of the State Administrative Tribunal as referred to, and also by a recent decision of the Regional Joint Development Assessment Panel, referred to below.

9. In circumstances where a proposed development requires development approval and is also subject to the separate and specialised statutory regimes for environmental approvals, including approval for the clearing of native vegetation, the appropriate course in respect of the application for development approval (if development approval is to be granted having regard to other relevant planning considerations), is to impose a condition of the development approval to the effect that the proposed development is not to be commenced until such time as the required environmental approval is obtained. With specific reference to the clearing of native vegetation, the appropriate condition is as set out in paragraph [13] of the Applicant's Responsive Submissions.

APPROVAL OF EXTRACTIVE INDUSTRY ON NEIGHBOURING LOT 9 RUNNYMEDE ROAD

10. On 5 October 2022, the Regional Joint Development Assessment Panel (**RJDAP**) considered an application by McDougall Quarries Pty Ltd for development approval for an extractive industry on a portion of Lot 9 Runnymede Road (**Lot 9**), which is in close proximity to the Review Site on Lot 7 Runnymede Road. The application also involved the clearing an area of 7.64 hectares of native vegetation within the 16-hectare extraction area.
11. The Respondent in the present case recommended to the RJDAP that the application be refused, and the Responsible Authority Report (**RAR**) prepared by the Respondent sets out essentially the same reasons as were given for the Refusal in the present case, relating almost exclusively to the proposed clearing of native vegetation.
12. Copies of the presentations made to the RJDAP meeting on 5 October 2022 can be found as part of the agenda for the meeting – [here](#). Amongst the information contained in those presentations was the following –
 - (a) an application for a clearing permit in respect of the clearing of the 7.64 hectares of native vegetation on Lot 9 had been lodged with the DWER and was awaiting determination;

- (b) a referral had also been lodged under the *Environmental Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**) in respect of the proposed clearing of the 7.64 hectares of native vegetation, and was also awaiting determination;
- (c) as part of its presentation, MBS Environmental, the environmental consultants for McDougall Quarries Pty Ltd, specifically noted the references in the RAR to the native vegetation within the extraction area on Lot 9 being a foraging area and potential habitat for Black Cockatoos, but explained that –
 - (i) Black Cockatoos will forage in areas up to 12km from their nest during breeding season, and in areas up to 20km from their roosting habitat during non-breeding season; and
 - (ii) vegetation mapping showed areas of retained native vegetation of similar or better quality of approximately 11,372 hectares within 12km of the extraction area on Lot 7 (in close proximity to the extraction area in the present case on Lot 9) and of approximately 23,663 hectares within 20km of the extraction area on Lot 7;
- (d) Thomson Geer, acting for McDougall Quarries Pty Ltd made a presentation to the RJDAP mirroring the submissions made at paragraphs [68]-[76] of the Applicant's Submissions and paragraphs [9]-[13] of the Applicant's Responsive Submissions; and
- (e) MBS Environmental concluded in its presentation materials –

... the recommendation for refusal appears to be based on the recent approach by the Shire of Harvey to refuse any developments proposing to remove native vegetation that provides fauna habitat, without a more detailed assessment of the clearing impacts by an appropriate regulator.

13. The RJDAP agreed with the presentations and submissions made on behalf of McDougall Quarries Pty Ltd, rejected the Respondent's recommendation for refusal in the RAR, and resolved to approve the application subject to comprehensive conditions and advice notes, including the following Advice Notes –

7. The proponent is advised of their obligations under the Environment Protection and Biodiversity Conservation Act 1999.

13. 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.

14. Advice Note 13 was originally proposed by the Respondent as Condition 29, as part of an alternative recommendation for approval that had been requested by the RJDAP, and Condition 29 was supported by McDougall Quarries Pty Ltd, but the RJDAP resolved to delete several conditions (including Condition 29) and instead impose them as advice notes because "*These conditions relate to separate third-party obligations and are best suited for reference as Advice Notes rather than conditions*".

CLEARING UNDERTAKEN BY THE SHIRE

15. Notwithstanding the Shire's approach to refuse (or recommend refusal of) any development proposing the clearing of native vegetation, without regard to whether or not the clearing is approved by the DWER and other specialist regulators, the Shire appears to apply a different standard to its own development or works. Recent examples include clearing carried out –
- (a) pursuant to Clearing Permit CPS8850/1 granted to the Shire in March 2022 for the clearing of approximately 2 hectares of native vegetation (completed in late-2022) for the extension of Kingston Drive, Australind. As noted in the Clearing Permit, the vegetation in question comprised habitat for the threatened Western Ringtail Possum and 3 threatened Black Cockatoo species, and also included Banksia Woodland TEC; and
 - (b) pursuant to Clearing Permit CPS8486 granted to the Bunbury Harvey Regional Council in 2021 for clearing of 8.41 hectares of native vegetation for the expansion of the Stanley Road Waste Management Facility, which also included habitat for the Western Ringtail Possum and Black Cockatoos and vegetation representative of Banksia Woodland TEC.
16. The Shire was willing in these instances to accept the authority of the DWER and other specialist regulators in relation to the approval for the clearing of the native

vegetation, and the clearing was carried out in accordance with those approvals, which is consistent with the approach taken by the RJDAP as referred to above, and with the approach that the Applicant submits ought to be taken in the present case.

UPDATE AS TO THE APPLICANT'S APPLICATIONS FOR ENVIRONMENTAL APPROVALS FOR CLEARING OF NATIVE VEGETATION ON LOT 7 RUNNYMEDE ROAD AND LOT 4 RUNNYMEDE ROAD

17. The Applicant's application to the DWER for a clearing permit in respect of the clearing of native vegetation proposed by the Applicant remains with the DWER pending determination, and is awaiting progress in relation to the Applicant's concurrent referral of the proposed clearing under the EPBC Act (as referred to in the Statement of Mr Mike Lundstrom dated 18 July 2022, and see **Annexure ML-4** to that Statement).
18. In relation to the EPBC Act referral, after some initial conferral between the Applicant and the DCCEEW regarding the scope of the referral, the Applicant received notification in January 2023 that the application was considered to be a controlled action and would be assessed by a combination of preliminary documents and further information. The Applicant subsequently received a Request for Further Information from the DCCEEW, including a requirement for a targeted survey that will be best carried out in November 2023. The Applicant is currently in discussions with the DCCEEW regarding the need for and scope of this survey, and in the meantime is addressing other aspects of the Request for Further Information.
19. The current status of these applications to the specialist environmental regulators is essentially identical to what was before the RJDAP when it dealt with the application for development approval by McDougall Quarries Pty Ltd on the adjacent Lot 9 Runnymede Road, referred to above.

CHANGES TO THE PLANNING FRAMEWORK

20. The only change to the planning framework since the Applicant's Submissions and the Applicant's Responsive Submissions is that the Respondent's draft Local Planning Scheme No.2 (**Draft LPS2**) has been advertised for public comment and submissions, which closed on 6 April 2023.

21. The Draft LPS2 does not propose any material change to the planning framework as it applies to the present case. In particular –

- (a) extractive industry is to remain a permissible, discretionary land use under the zoning proposed for the Review Site;
- (b) clause 29 of the Draft LPS2 provides that SPP2.4 and SPP2.5 (amongst others) continue to be read as if they are part of the Scheme; and
- (c) the Review Site falls within the proposed Special Control Area No.2 (**SCA2**), the purpose and objective of which is stated to be as follows, in Schedule 6 –

Purpose: To identify [and] provide guidance for land use and development on land identified within the Scheme that contains mineral resources and basic raw materials of State or regional significance and identified in the Greater Bunbury Region Scheme Strategic Minerals and Basic Raw Materials Resource Policy.

Objectives:

(a) ensure that the strategic resources of State or regional significance are not sterilised from incompatible land uses and development;

(b) encourage the mining of strategic resources in accordance with acceptable environmental standards; and

(c) promote the rehabilitation and restoration of mining and extraction sites, after works have been completed, in a way that is consistent with the long-term use of the land.

22. The Draft LPS2 was also prepared by reference to the provisions of the Shire's Local Planning Strategy (**Strategy**) and is consistent with the provisions of the Strategy, the contents of which are referred to in the Statement of Evidence of Mr Steve Allerding dated 18 July 2022 at paragraphs [29]-[33].

UPDATE REGARDING AVAILABILITY OF SAND RESOURCES

23. Finally, the Applicant refers to the information provided as part of the Applicant's Submissions and Applicant's Responsive Submissions, and in the Statement of Evidence of Mr Lindsay Stephens dated 18 July 2022, dealing with the current and predicted future availability of sand resources in the Peel-Bunbury Region.

Since that information was provided, there has been no material improvement to the situation as described. The approval granted by the RJDAP for the extractive industry on Lot 9 Runnymede Road will provide some additional supply when it becomes available, but the demand for sand resources as outlined by Mr Stephens has also increased as a result of changes to the design and specification for the Bunbury Outer Ring Road (**BORR**), the Albermarle lithium processing plant and other major projects, in addition to the continued demand for sand for use in both residential subdivision and development generally.

24. The Applicant has calculated approximate volumes of remaining material to be extracted from its current extractive industry operations on both Lot 4 and Lot 7 Runnymede Road, as shown on the **attached** images, as follows –

- (a) Lot 4 – approximate remaining resource if extracted to a level of 8.0m AHD – 226,100 cubic metres; and
- (b) Lot 4 – approximate remaining resource if extracted to a level of 7.5m AHD – 530,000 cubic metres;

but of this total of approximately 756,000 cubic metres –

- (c) a minimum of 300,000 cubic metres is committed to the BORR; and
- (d) approximately a further 80,000 cubic metres is committed to the Albermarle project,

leaving a balance of approximately 376,000 cubic metres, of which -

- (e) approximately 100,000 cubic metres of screened sand is currently being supplied per annum to developers and builders for subdivision and development projects; and
- (f) a further amount of approximately 100,000 cubic metres of washed sand is now conservatively anticipated to be supplied to concrete manufacturers throughout the south-west.

25. Also **attached** is a copy of an article published by the ABC South West on 21 November 2022, supporting the above and the evidence of Mr Stephenson.

CONCLUSION

26. The matters referred to above all support the conclusions in the Applicant's Submissions and the Applicant's Responsive Submissions. In particular, the approval by the RJDAP of an extractive industry on the adjacent Lot 9 Runnymede Road subject to the Advice Notes referred to above, despite the Respondent's recommendation for refusal on the same grounds as its refusal in the present case, supports the Applicant's submission that any planning considerations arising from the clearing of the vegetation on the Review Site are properly addressed by way of either a condition of development approval, or Advice Notes in the same terms.



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Lawyers for the Applicant