

**From:** [Peter Wittkuhn](#)  
**To:** [Minister.Carey](#)  
**Cc:** [Skinner, Julius](#)  
**Subject:** B&J Catalano Pty Ltd v Shire of Harvey - Lot 7 Runnymede Road, Wellesley - Ministerial Call-In of State Administrative Tribunal appeal (49212)  
**Date:** Friday, 31 May 2024 2:38:20 PM  
**Attachments:** [Supplem Section 24 Respondent's Bdl of Docs 31.05.24.pdf](#)  
[E Edwards supplem WS signed 31.05.24.pdf](#)  
**Importance:** High

---

You don't often get email from pwittkuhn@mcleods.com.au. [Learn why this is important](#)

Dear Minister,

1. I act for the respondent in this appeal, which was called-in by the former Planning Minister in April 2022, and remains un-determined at the present time.
2. There has been a recent significant change to the applicable planning framework, in that *Shire of Harvey Local Planning Scheme No. 2 (LPS 2)* has been gazetted to replace *District Planning Scheme No. 1*.
3. Therefore, further to the below email from the applicant's lawyer, the respondent seeks leave to rely on the following **attached** supplementary materials:
  1. Supplementary Respondent's Section 24 Bundle of Documents (this contains links to just three documents); and
  2. Additional Witness Statement of Elizabeth Edwards.  
Ms Edwards is the employed town planning expert witness who has given two witness statements in this matter to date on behalf of the respondent. Ms Edwards' attached witness statement addresses only changes that have come about by virtue of the gazettal of LPS 2.
4. The respondent invites the applicant to propose a timetable by which the applicant has leave in response to address the implications of the gazettal of LPS 2.
5. This email is copied to the lawyer for the applicant.
6. I look forward to confirmation that the respondent's attached materials can be taken into account in the determination of this appeal.
7. Please contact me if you wish to clarify any matter.

Kind regards,

**Peter Wittkuhn**

Partner



**E.** [pwittkuhn@mcleods.com.au](mailto:pwittkuhn@mcleods.com.au)  
**T.** [\(08\) 9424 6220](tel:(08)94246220)    **F.** [\(08\) 9383 4935](tel:(08)93834935)  
**A.** [220 Stirling Highway, Claremont WA 6010](#)

---

Liability limited by a scheme approved under Professional Standards legislation



**In the matter of:** an application for review which the Minister for Planning has called-in and decided to determine

**Pursuant to:** the *Planning and Development Act 2005*, sections 246 and 247

**Formerly:** State Administrative Tribunal proceeding DR 63 of 2022

**Applicant:** B & J Catalano Pty Ltd

**Respondent:** Shire of Harvey

**Relating to:** a proposed extractive industry Lot 7 Runnymede Road, Wellesley

---

**RESPONDENT'S SUPPLEMENTARY BUNDLE OF DOCUMENTS  
FORMING PART OF MATERIALS SUBMITTED ON BEHALF OF THE  
RESPONDENT**

---

**REASON FOR ADDITIONAL INFORMATION**

1. There has been a significant change in the local planning framework as the Shire of Harvey District Planning Scheme No. 1 (**DPS1**) was revoked on 12 April 2024 by the gazettal of the Shire of Harvey Local Planning Scheme No. 2 (**LPS2**).

**SUPPLEMENTARY DOCUMENTS HEREBY PROVIDED AS WEBSITE LINKS**

1. Shire of Harvey Local Planning Scheme No.2 scheme text:  
<https://www.wa.gov.au/system/files/2024-04/harvey2-schemetext.pdf>
2. Shire of Harvey Local Planning Scheme No.2 scheme map sheet 01:  
[https://www.wa.gov.au/system/files/2024-04/map1\\_harvey2\\_harvey\\_north\\_west.pdf](https://www.wa.gov.au/system/files/2024-04/map1_harvey2_harvey_north_west.pdf)
3. Kemerton Strategic Industrial Area Structure Plan:  
<https://www.wa.gov.au/system/files/2021-11/SPL-SPN0620-Harvey-Kemerton-Strategic-Industrial-Area.pdf>

PL Wittkuhn  
Partner  
McLeods Lawyers  
Lawyers for the Respondent

31 May 2024

**In the matter of:** an application for review which the Minister for Planning has called-in and decided to determine

**Pursuant to:** the *Planning and Development Act 2005*, sections 246 and 247

**Formerly:** State Administrative Tribunal proceeding DR 63 of 2022

**Applicant:** B & J Catalano Pty Ltd

**Respondent:** Shire of Harvey

**Relating to:** a proposed extractive industry Lot 7 Runnymede Road, Wellesley

---

**ADDITIONAL WITNESS STATEMENT OF ELIZABETH EDWARDS  
FORMING PART OF MATERIALS SUBMITTED ON BEHALF OF THE  
RESPONDENT**

---

**REASON FOR ADDITIONAL INFORMATION**

1. There has been a significant change in the local planning framework as the Shire of Harvey District Planning Scheme No. 1 (**DPS1**) was revoked on 12 April 2024 by the gazettal of the Shire of Harvey Local Planning Scheme No. 2 (**LPS2**).
2. Lot 7 Runnymede Road is now zoned "Strategic Industry" under LPS2 and is subject to Restricted Use No. 3 (**RU3**). Industry – Extractive is an "A" use under LPS2.
3. This statement is supplementary to my previous witness statements:
  - (1) Witness statement dated 18 July 2022 and lodged with the Minister's office on the same date (**18.07.22 Witness Statement**); and
  - (2) Witness statement dated 11 August 2022 and lodged with the Minister's office on the same date.
4. As a precursor to discussing the changes to the local planning framework, I reiterate my comments in paragraph 19 of my 18.07.22 Witness Statement that the Lundstrom Flora Report did not survey all the vegetation subject to this application. As the vegetation within the 1.17ha subject area forms part of the 16ha patch of Banksia Woodland TEC (as noted in paragraph 14 of the Witness Statement by Michael Just), all discussions following relate to the patch of Banksia Woodland TEC.
5. My 18.07.22 Witness Statement references the 'Matters to be Considered' pursuant to clause 67 of the Deemed Provisions, from paragraph 38.
6. Paragraph 39 provides commentary against clause 67(2)(a) of the Deemed Provisions,

being “The aims of provisions of this Scheme”.

7. I have undertaken a comparison of DPS1 and LPS2 aims/objectives and provisions relevant to this matter pursuant to clause 67(2)(a) of the Deemed Provisions, which is discussed below:

## **ADDITIONAL INFORMATION**

### ***Clause 67(2)(a): The aims and provisions of this Scheme***

#### Aims of the Scheme

8. As noted in paragraph 38 of my 18.07.22 Witness Statement, aim (g) in clause 1.6.1 of DPS1 stated as follows:

*“to protect and preserve the more important natural flora and fauna habitats (ecosystem, biodiversity, and essential ecological processes), and other environmentally sensitive areas that are prone to degradation on the principle that the extent and manner of use of these areas should be kept within their capabilities of being sustained without degradation in the long term.”*

9. Clause 9 of LPS2 includes 12 ‘aims’ of the Scheme and six of these have a relation to protecting natural environmental assets within the Shire.

10. The following table compares the objectives of DPS 1 against the ‘aims’ of LPS 2:

<b>DPS 1, clause 1.6.1</b>	<b>LPS 2, clause 9</b>
(a) to encourage and control the continued orderly development of land within the Shire in a manner that enhances the quality of life of the Shire community;	(1) facilitate the effective implementation of the Local Planning Framework, including the intentions and desired outcomes of the Local Planning Strategy; and
(b) to ensure that the existing standard of roads water supply, effluent disposal, electricity supply and other community services are sufficient for the additional demands proposed development would create;	(2) coordinate and integrate planning at the local level with planning at regional and state levels; and (3) facilitate the effective implementation of the State Planning Framework, including the Bunbury – Geopraphe Sub-Regional Strategy; and
(c) to promote economic development and tourism within the Shire and increase local employment opportunities;	(4) ensure the protection and sustainable use of agricultural land and minimise land use conflicts; and
(d) to provide opportunities for a wide range of lifestyles providing areas for urban and rural living;	(5) facilitate the sustainable use and development of land and water resources to promote the protection of environmental assets, efficient resource use and minimise waste; and
(e) to retain the pre-eminence of agriculture, and restrict development that detracts from the potential of significant agricultural land;	

<p>(f) to preserve and enhance places of natural beauty particularly along the coast, the rivers and inlets and the scarp, and to preserve historic buildings and objects of historical and scientific interest; and</p> <p>(g) to protect and preserve the more important natural flora and fauna habitats (ecosystem, biodiversity and essential ecological processes), and other environmentally sensitive areas that are prone to degradation on the principle that the extent and manner of use of these areas should be kept within their capabilities of being sustained without degradation in the long term.</p>	<p>(6) provide for the recognition and preservation of areas, places and objects of cultural and heritage significance; and</p> <p>(7) provide for a variety of residential densities to ensure the provision of a diversity of housing options and accommodation choices that meets the needs and aspirations of the community; and</p> <p>(8) facilitate a sustainable local and regional economy with a diverse range of business and employment opportunities; and</p> <p>(9) support and protect tourism throughout the Scheme area by providing for a range of accommodation types and land uses and embracing the historical and natural attributes and landscapes of the Scheme area; and</p> <p>(10) ensure the use and development of land does not result in significant adverse impacts on the physical and social environment and public health; and</p> <p>(11) facilitate a diverse and integrated network of open space catering for both the active and passive recreation needs of the community; and</p> <p>(12) preserve and protect native vegetation to enhance biodiversity, fauna habitat, land and water-based ecosystem function, ecological linkages and landscape and amenity values.</p>
---	---

11. The Shire's endorsed Local Planning Strategy has been discussed in paragraphs 58 and 59 of my 18.07.22 Witness Statement.

BGSrS referenced in LPS 2 clause 9(3)

12. The Bunbury – Geographe Sub-Regional Strategy (**BGSrS**) referenced in LPS 2 clause 9(3) was published in January 2022. It was Attachment ERE 3 to my 18.07.22 Witness Statement. A key planning issue identified by the BGSrS (page 4) is *“The need to sustainably manage natural resources, including minimising fill on development sites and encouraging lightweight construction and alternative road construction materials and methods”*.
13. A guiding principle identified by the BGSrS (page 9) includes *“Protect and enhance*

*environmental values in the context of climate change” and that “protecting and enhancing the many valued natural assets will ensure best outcomes for the sub-region’s environment, economy and community.”*

14. The relevant strategic directions for the guiding principle in paragraph 12 includes:

*“31. Require planning instruments to identify and protect, manage and enhance environmental assets such as forests, rivers, estuaries, coastlines and areas of remnant vegetation.”*

*“33. Preserve and enhance ecological linkages, including a presumption against further fragmentation of these linkages, in planning instruments.”*

#### Clause 9(5) of LPS 3

15. With regard to LPS 2 clause 9(5) quoted in the table at paragraph 10, I consider that the clearing of native vegetation that:

- Is regionally and nationally significant;
- Is nationally protected; and
- Provides, or has the potential to provide, habitat for nationally protected fauna

for the purpose of extracting the minor amount of 70,000m<sup>3</sup> of sand is not a sustainable use of the land and does not promote the protection of this environmental asset.

#### Clause 9(8) of LPS2

16. In reference to the aim of clause 9(8) quoted in the table at paragraph 10, whilst I acknowledge that extractive industries within the Shire contribute to the local and regional economy, I do not consider that supporting the clearing of native vegetation that:

- Is regionally and nationally significant;
- Is nationally protected; and
- Provides, or has the potential to provide, habitat for nationally protected fauna

for the purpose of extracting the minor amount of 70,000m<sup>3</sup> of sand facilitates a sustainable economy.

#### Clause 9(10) of LPS2

17. With regard to clause 9(10) quoted in the table at paragraph 10 above, the proposed use and development of Lot 7 Runnymede Road will result in adverse impacts on the physical environment due to the need to clear native vegetation.

18. It is my opinion that these adverse impacts are significant given that the native vegetation proposed to be cleared:

- Is regionally and nationally significant;
- Is nationally protected; and
- Provides, or has the potential to provide, habitat for nationally protected fauna.

### Clause 9(12) of LPS2

19. Clause 9(12) of LPS2 quoted in the table at paragraph 10 above, is comparable to clause 1.6.1(g) of DPS1 that has been discussed in paragraphs 38 to 44 of my 18.07.22 Witness Statement.
20. I refer to paragraphs 32 and 33 of my 18.07.22 Witness Statement that refer to the applicant's claim that environmental grounds should only be handled by the Department of Water and Environmental Regulation.
21. The Shire has successfully demonstrated that the previous local planning framework provided for the consideration of the environment when determining applications as referenced in paragraph 34 of my 18.07.22 Witness Statement. In comparison to DPS1, LPS2 has an even greater emphasis on the consideration and protection of the Shire's environmental assets.

### Conclusion as to aims of LPS 3

22. I conclude that an approval of the subject application to clear native vegetation that:
  - Is regionally and nationally significant;
  - Is nationally protected; and
  - Provides, or has the potential to provide, habitat for nationally protected fauna
 would be contrary to the aims of LPS2 at clause 9(1), (3), (5), (8), (10) and (12).

### Provisions of the Scheme: overview

23. The provisions of LPS2 relevant to this matter are:
  - Clause 20 – Restricted Uses
    - Schedule 2 – Restricted Uses
      - R3 – Kemerton Industry Buffer
  - Clause 32 – Additional Site and Development Requirements
    - Schedule 4 – Additional Site and Development Requirements
      - Clause 6 – Vegetation Protection
      - Clause 20 – Kemerton Strategic Industrial Area
  - Clause 36 – Special Control Areas
    - Schedule 6 – Special Control Areas
      - SCA2 – Basic Raw Materials

### Restricted uses

24. Clause 20 of LPS2 provides for Restricted Uses and the Restricted Uses relevant to the Shire are provided in Schedule 2.
25. Lot 7 Runnymede Road is subject to Restricted Use 3 (R3) in relation to the Kemerton Industry Buffer. The Restricted Uses are identified in row R3 of Schedule 2 to LPS 2. Each location/area subject to Restricted Uses (i.e. each row of Schedule 2) has objectives identified in the fourth column of Schedule 2.
26. Clause (3) of the objectives states *“Encourage the conservation of public recreation and flora and fauna.”*

27. Supporting the clearing of native vegetation that:

- Is regionally and nationally significant;
- Is nationally protected; and
- Provides, or has the potential to provide, habitat for nationally protected fauna.

for the purpose of extracting the minor amount of 70,000m<sup>3</sup> of sand would in my opinion be contrary to this objective of R3.

#### Additional Site and Development Requirements

28. Clause 32 of LPS2 provides for Additional Site and Development Requirements, which are detailed in Schedule 4.

29. Schedule 4, clause 6 contains provisions relating to "Vegetation Protection" with the following at subclause (4) being relevant to this matter:

*"In considering an application involving the clearing of native vegetation, the local government will have due regard to:*

- (a) the extent of clearing to be undertaken;*
- (b) the quality and type of native vegetation to be cleared;*
- (c) any re-vegetation carried out on the same land;*
- (d) the potential for the clearing to detrimentally impact:*
  - (i) quality of the soil, land or water;*
  - (ii) biodiversity of the native vegetation in the surrounding local area;*
  - (iii) landscape or amenity values of the surrounding local area; and*
  - (iv) ecosystem function of the native vegetation in the surrounding local area.*
- (e) the potential for the native vegetation to provide a habitat function for protected fauna species;*
- (f) the significance of the native vegetation and whether it is protected; and*
- (g) any measures to conserve, protect and manage other comparable native vegetation on the same land."*

30. Schedule 4, clause 20 of LPS2 contains the following provisions relating to the Kemerton Strategic Industrial Area being relevant to this matter:

*"(3) When considering applications with respect to land wholly or partly within the Kemerton Industry Buffer area (Restricted Use 3), the local government shall have regard to:*

*"(a) the provisions of Part 1 of the adopted Kemerton Strategic Industrial Area Structure Plan (as amended);"*

*"(e) recommendations of the chief executive officer of the Department of Mines, Industry Regulation and Safety in the administration of the Mining Act 1978 (as amended) and the chief executive officer of the Environmental Protection Authority in the administration of the Environmental Protection Act 1986 (as amended).*

*(4) When considering development and subdivision applications within the Strategic Industry zone, the decision maker shall have due regard to the Kemerton Strategic Industrial Area Structure Plan."*

Further discussion of the 'Vegetation Protection' Additional Site and Development Requirements

31. The matters outlined in schedule 4, clause 6(4) to be given due regard when determining applications to clear native vegetation are similar to those provided in State Planning Policy 2 identified in paragraph 46 of my 18.07.22 Witness Statement and further discussed in paragraphs 51 to 57 of my 18.07.22 Witness Statement.

32. The following discusses each matter to be given due regard:

(a) *the extent of clearing to be undertaken;*

I acknowledge that the area impacted by the proposed clearing is relatively minor at 1.17ha. Notwithstanding, I refer to paragraphs 40 to 47 of my 18.07.22 Witness Statement that details the extent and reasons for the Banksia Woodland TEC to be listed under the EPBC Act.

(b) *the quality and type of native vegetation to be cleared;*

Paragraphs 20 to 22 and 39 of my 18.07.22 Witness Statement details the subject vegetation as forming part of a patch of the Banksia Woodland TEC that is in good, very good, and excellent condition. The vegetation is listed under the EP Act as a Priority Ecological Community and is protected under the EPBC Act as a Threatened Ecological Community.

(c) *any re-vegetation carried out on the same land;*

The first approval for an extractive industry on Lot 7 Runnymede Road in 2011 for an area of 15.61ha required a 2.28ha portion adjacent to the western boundary to be retained and replanted as a buffer. Between this buffer and the extraction area, an area of 7.03ha was required to be retained as a natural buffer. The 15.61ha extraction area was permitted to be cleared on the basis that:

- the vegetation (canopy area of approximately 2.86ha) was in a 'parkland cleared' state,
- the vegetation was predominantly marri, jarrah and peppermint
- approval was obtained from the then Federal Department of Sustainability, Environment, Water, Population and Communities (**DSEWPaC**)
- the DSEWPaC required the maintenance of the 9.31ha vegetated buffer and the planting of a 2.81ha portion of the extraction area with native vegetation species suitable for black cockatoo habitat (to be located in the south-eastern corner of the extraction area.

Despite revegetation being carried out on the site, this revegetation was a direct result of previous clearing and therefore in my opinion should not be taken into account for the clearing the subject of this application.

(d) *the potential for the clearing to detrimentally impact:*

(ii) *biodiversity of the native vegetation in the surrounding local area;*

(iv) *ecosystem function of the native vegetation in the surrounding local area.*

The Flora and Vegetation Survey Report notes that the vegetation on Lot 7 Runnymede Road is part of the "Karrakatta Complex – Central and South". Further to paragraph 40 of my 18.07.22 Witness Statement, the TEC Conservation Advice (page

102) provides that as of 2015, this vegetation complex on the Swan Coastal Plain had suffered a 76.28% decline its 'Pre-European' extent.

Each occurrence of native vegetation clearing has a detrimental impact on the biodiversity and ecosystem function on the remaining vegetation in the area. Whilst acknowledging the area impacted by the proposed clearing is relatively minor at 1.17ha, approval of the proposed clearing will bring the sand extraction activity closer to the remaining Banksia Woodland TEC, thereby exposing it to "edge effects".

(e) *the potential for the native vegetation to provide a habitat function for protected fauna species;*

As provided in paragraph 20 of my 18.07.22 Witness Statement, the surveyed vegetation has the potential to provide breeding habitat and provides foraging and roosting habitat for the Black Cockatoos and contains potential habitat for the Western Ringtail Possum. As discussed in paragraph 4 of this Statement and paragraph 19 of my 18.07.22 Witness Statement, Lundstrom Flora Report did not survey all the vegetation subject to this application. As the vegetation within the 1.17ha subject area forms part of the 16ha patch of Banksia Woodland TEC, I consider it reasonable to deduce that this vegetation the subject of this application also has the potential to provide breeding habitat and provides foraging and roosting habitat for the Black Cockatoos and contains potential habitat for the Western Ringtail Possum.

(f) *the significance of the native vegetation and whether it is protected; and*

As discussed in paragraphs 20 to 22 and 39 of my 18.07.22 Witness Statement, the subject vegetation forms part of a patch of the Banksia Woodland TEC that is listed under the EP Act as a Priority Ecological Community and is protected under the EPBC Act as a Threatened Ecological Community. The vegetation is considered to be regional and nationally significant and protected.

(g) *any measures to conserve, protect and manage other comparable native vegetation on the same land."*

The eastern portion of Lot 7 Runnymede Road contains a vegetated area of approximately 47ha. Site inspections and extrapolation from vegetation surveys indicates this 47ha area as Banksia Woodland TEC. I expect the Banksia Woodland TEC on this 47ha area to have a condition of at least very good to excellent.

There are currently no measures or proposal to conserve, protect and/or manage this vegetation. Despite recognising that suspicions/events that 'may' occur are not a relevant planning consideration, I consider it highly likely that the proponent will in the future apply to clear additional area for further sand extraction. This is based on the intentions noted in the 2011 extractive industry application that indicated an area of approximately 15.87ha adjoining the eastern boundary of the current extraction area for "Future Reserves 15.87ha". This is taken to mean future sand extraction reserves.

If the subject application is approved by the Minister, it is my opinion that such an approval would set a precedent, or provide an expectation, for some or all of the remaining significant vegetation on the site to be cleared for the extraction of sand.

#### Further discussion of the Kemerton Strategic Industrial Area provisions as Additional Site and Development Requirements

33. I refer back to paragraph 30 of this witness statement.
34. Clause 4.8 of DPS1 had an appropriate equivalent to clause 20 of Schedule 4 of LPS 2. It referred to development within the Kemerton Strategic Industrial Area and stated

the following relevant to this matter:

*“4.8.1 The Kemerton Strategic Industrial Area is made up of the land zoned Kemerton Strategic Industry, Kemerton Ancillary Industry, and Kemerton Industry Buffer. The objectives of the Kemerton Strategic Industrial Area are to:”*

*“(b) provide industrial development areas that:*  
*iii. achieve beneficial economic, environmental and community outcomes;*  
*vii. enable environmental protection and management arrangements that minimise impact on the natural environment;”*

35. Part 1 of the Kemerton Strategic Industrial Area Structure Plan (**KSIA SP**) relates to implementation and clause 1.5 provides the following objectives relevant to this matter:

*To provide industrial development areas that:*

- achieve beneficial economic, environmental and community outcomes;*
- enable environmental protection and management arrangements that minimise impact on the natural environment;*

36. Clause 1.10.1 of the KSIA SP lists matters to be given due regard when considering applications. Subclause (e) is relevant to this matter:

*“any other relevant planning and environmental considerations including, but not limited to, provisions of the State Planning Framework”*

37. Paragraphs 38 to 66 of my 18.07.22 Witness Statement, in addition to this Statement, discuss the relevant planning and environmental considerations.

#### Special Control Area 2 provisions

38. Clause 36 of LPS2 provides for Special Control Areas, which are detailed in Schedule 6.

39. Lot 7 Runnymede Road is subject to Special Control Area 2 (SCA2) in relation to Basic Raw Materials.

40. Clause (b) of the objectives states *“encourage the mining of strategic resources in accordance with acceptable environmental standards.”*

41. It is my opinion that supporting the clearing of native vegetation that:

- Is regionally and nationally significant;
- Is nationally protected; and
- Provides, or has the potential to provide, habitat for nationally protected fauna.

for the purpose of extracting the minor amount of 70,000m<sup>3</sup> of sand would be contrary to acceptable environmental standards.

#### **CONCLUDING COMMENTS**

42. Whilst DPS1 did provide a local planning framework for the consideration of environmental matters, LPS2 provides a more robust local planning framework with

strengthened provisions to protect the Shire's natural environmental assets.

43. I consider that the provisions of LPS2 discussed in this Statement provides sufficient and demonstrated justification for the Minister to make a determination to refuse the application for review.



---

Elizabeth Edwards

31 May 2024