

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 SUBMISSIONS RESPONSIVE TO APPLICANT'S SUBMISSIONS OF 12 MAY 2023

The respondent utilises the paragraph numbering of the applicant's supplementary submissions.

- 4 With regard to the Michael Just and Michael Bamford statements reflecting investigations undertaken only after the commencement of the review proceeding, the reasons for this were:
- (a) Ms Edwards of the Shire, acting under delegation, considered that the applicant's environmental material demonstrated on its face, without the need for separate Shire-commissioned investigations, that the correct and preferable decision was to refuse: witness statement of Elizabeth Edwards dated 11 August 2022 (**Edwards**), paragraph 1; and
 - (b) the need for the Just and Bamford investigations arose out of the post-commencement-of-review circumstances referred to in Edwards paragraphs 25 – 32.
- 6 Professor Dixon became seriously ill shortly after he visited the site, and was hospitalised. Given his unavailability, Michael Just was engaged.
- 7-9 The respondent relies on paragraphs 8 – 12 of Edwards.

There is no principle that says that it is inappropriate for a planning authority to base its decision on environmental grounds. *Carbone Bros and Shire of Harvey* [2021] WASAT 150 was an example of a SAT decision based on environmental grounds. The fact that other environmental specific agencies have a separate function under separate legislation is a strong factor but can never be determinative.

In the present case, being a Ministerial appeal, it is particularly apposite that the Minister should weigh the environmental considerations in the balance, because the applicant is relying on considerations (demand for sand) which normally lie outside of the conventional scope of planning considerations. It is respectfully submitted that the applicant should not be heard to say, that sand supply problems significantly justify the current proposal, whilst at the same time denying that countervailing environmental considerations should be given minimal weight only.

11-14 Whilst the Shire's recommendation to the Regional Joint Development Assessment Panel for the Lot 9 Runnymede Road application was partly based on the habitat function of vegetation, the Runnymede application was also distinguishable from the present because it did not include clearing of a Banksia Threatened Ecological Community.

12(e) It is incorrect to state that the Shire has a policy position or practice of refusing any development proposing vegetation clearing. Assessments are undertaken against the planning framework and the merits of the case.

15 It is denied that the Shire applies a different standard to its own development or works.

15(a) The Shire says:

(i) the extension of Kingston Drive, Australind, has been an infrastructure work the subject of collection of development contributions under Shire of Harvey and Shire of Dardanup Joint Town Planning Scheme No. 1 since that Scheme was gazetted in March 2006 (and had been earmarked as such over a long consultation period prior to the formal gazettal). The moral, and trust-impressed-legal obligations associated with that intended infrastructure work, transparently on the public record over such a long period, is in a very different category from the applicant's proposal here, which was always inherently subject to merits-based development assessment when the proposal was made. **Attachment A** to this document is a copy of the JTPS 1 scheme map. The relevant section of red road – Kingston Drive – is the section between Clifton Drive in the north and Ditchingham Place in the south. This would join up the two pre-existing sections of Kingston Drive to the north and south. The JTPS 1 scheme text can be found for example at: <https://www.dardanup.wa.gov.au/documents/52/joint-town-planning-scheme-text>. **Attachment B** comprises 'before and after' aerial photos.

(ii) the Kingston Drive extension is a public work benefiting the broader public, and forming a key, strategic part of the long-term regional planning;

(iii) despite the above considerations, every effort was made to confine the impact of the clearing works to the smallest possible envelope.

15(b) With regard to the Stanley Road Waste Management Facility expansion:

(i) the proponent was not the Shire, but rather the Bunbury Harvey Regional Council;

(ii) the Shire, in point of fact, expressed environmental concerns about the expansion: see **Attachment C**;

(iii) the Shire's tenure was that of freehold owner, but subject to a lease to the Regional Council;

(iv) the waste facility expansion required no development approval under either a local planning scheme or the Greater Bunbury Region Scheme, because it was

a public work, and therefore exempt from development approval;

- (v) being a public work, it inherently carries a broad and obvious public benefit;
 - (vi) the nature and configuration of the clearing required was, partly, in between two existing cleared areas, and partly at the northern edge of an already-cleared area: see **Attachment D**; and
 - (vii) the expansion of the waste facility, which occasioned the clearing, was itself required as a response to a DWER-identified environmental issue, associated with the projected insufficiency of landfill cell capacity. It could accurately be said that one form of environmental degradation (clearing of vegetation) was being reluctantly undertaken in order to overcome another environmental risk.
- 16 It is not a case of the Shire being 'willing' to accept the authority of the DWER and other specialist regulators. There simply was no development approval process that provided the trigger for full planning assessment, in relation to the public works the subject of the applicant's paragraphs 15(a) and (b).
- 17 It would appear that, by pure omission, the Section 24 Bundle of relevant documents was omitted from the materials filed by the Shire on the original round of lodgement of materials. This has only come to our attention at this stage. We apologise if this has caused the Minister's office unnecessary difficulty in identifying the base documents relevant to the review. It is intended to lodge the Section 24 bundle at the same time as this document.



PL Wittkuhn
Partner
McLeods, Barristers & Solicitors
Solicitors for the Respondent

SHIRE OF HARVEY AND DARDANUP JOINT TOWN PLANNING SCHEME NO. 1

EAST AUSTRALIND/EATON DEVELOPMENT SCHEME SCHEME MAP

Note:

1. This Scheme does not envisage to rezone or reserve land. The map's land use proposals are indicative only and is to be used as a framework for more detailed planning at the rezoning and subdivision stage.
2. The provision for general infrastructure and open space have not been identified as scheme works under this Scheme. This can be addressed through an amendment to this scheme or the respective district town planning schemes.
3. The location of selected proposed distributor roads and the proposed Collie River Bridge are indicative and the purpose of the Scheme Map is to identify the nature of scheme works which are to be subject to a cost sharing arrangement. Any significant alteration to the location of the roads or bridge shall be effected by a structure plan as adopted by Council and endorsed by the Western Australian Planning Commission. All land use details are a reflection of endorsed structure plans.
4. An adequate acoustic and landscaping buffer (approximately 40 metres) is required along the Australind Bypass Road to secure the amenity for the residential areas and provide an aesthetic approach to the City of Bunbury. The exact distance and make up of the buffer will depend on circumstances but can be determined in negotiation with the Western Australian Planning Commission.

Constructed and no further works required.

Constructed and no further works required.

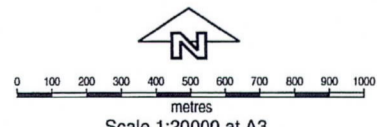
Part Lots 1 and 2 are subject to further detailed structure planning including the determination of a location for school sites.

SCHEME WORKS

1. Ditchingham Place construction/upgrade to Local Distributor Road Standard.
2. Kingston Drive construction/upgrade to District Distributor Road Standard.
3. Collie River Bridge construction for 2 lanes.
4. Eaton Drive construction/upgrade to District Distributor Road Standard.

LEGEND

RESERVES	
	PARKS, RECREATION AND DRAINAGE
	FLOODWAY
	WATERWAYS
ROAD	
	DISTRICT DISTRIBUTOR
	LOCAL DISTRIBUTOR
	PUBLIC PURPOSES (As Denoted)
	PS PRIMARY SCHOOL
	HS HIGH SCHOOL
	CS CHURCH SCHOOL
ZONES	
	RESIDENTIAL
	MIXED BUSINESS
	COMMERCIAL
	DC DISTRICT CENTRE
	LC LOCAL SHOPPING CENTRE
	INDUSTRIAL
	OTHER COMMUNITY
	SPECIAL USE
	SPECIAL RURAL
OTHER	
	SCHEME BOUNDARY
	LOCAL GOVERNMENT BOUNDARY
	BUFFER - 40 metres (approximately) See part 4 in the Notes



July 2004
Produced by Cartographic Section
Bunbury Office
Department for Planning and Infrastructure

Attachment B



30/05/2023

1:5000





30/05/2023

1:6000



Attachment C

From: Elizabeth Edwards <elizabeth@harvey.wa.gov.au>
Sent: Tuesday, 24 September 2019 4:35 PM
To: 'Nicole Zago'
Cc: Simon Hall
Subject: RE: Clearing Application -- CPS 8486/1 19/21452

Hi Nicole,

With respect to the above clearing application, the Shire has today confirmed that the proposed development resulting in the requirement for the clearing application is exempt from requiring development approval under the Greater Bunbury Region Scheme. Notwithstanding, the Shire advises that it remains unsupportive of the proposed clearing on the basis that insufficient information has been provided to properly assess the impacts of the proposed clearing on the following:

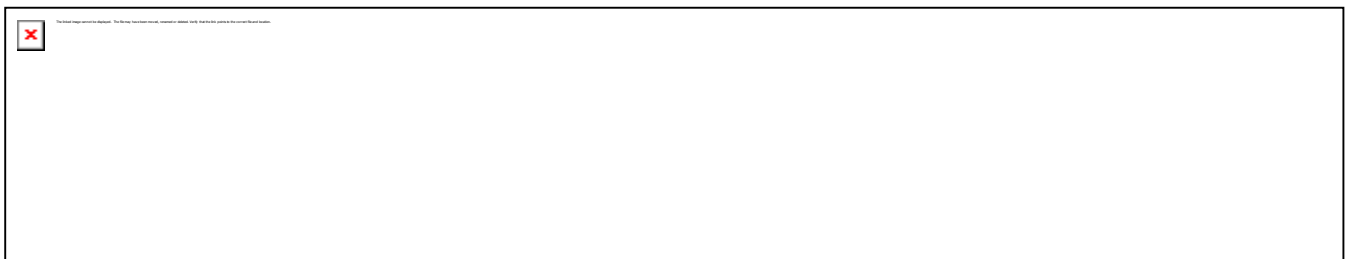
- Clearing is proposed within proximity to an environmentally sensitive area (conservation category wetland)
- As DWERs records will confirm, the subject site and adjoining Lot 42 are contaminated with the source being the subject site's landfill activities. Insufficient information has been provided to demonstrate if clearing additional vegetation and excavation will exacerbate the current contamination;
- Albeit the adjoining Lot 42 is not a sensitive receptor, the existing vegetation is considered to provide an appropriate environmental and visual buffer;
- Lot 42 (DWER references DMO 10379 and PA18783, RF13852~4) has experienced development restrictions due to the contamination from the subject site and vegetation removal is likely to further restrict the use and development of the adjoining Lot 42;
- Given previous comments from DWER regarding Lot 42 and the development requirements due to the contamination, the Shire considers it appropriate that DWER provides a copy of the subject application to adjoining Lot 42 for comments; and
- No flora/fauna survey or environmental assessment to ascertain habitat for threatened ecological communities and species.

Regards

Elizabeth Edwards
Senior Planning Officer
Shire of Harvey

P: 9729 0348
F: 9729 2053
E: elizabeth@harvey.wa.gov.au

102 Uduc Road Harvey WA 6220
PO Box 500, Harvey WA 6220



From: Nicole Zago [<mailto:Nicole.Zago@dwer.wa.gov.au>]
Sent: Friday, 12 July 2019 12:19 PM

To: Elizabeth Edwards <elizabeth@harvey.wa.gov.au>
Subject: RE: Clearing Application -- CPS 8486/1 19/21452

Hi Elizabeth

Thank you for the below comments. I will contact you upon my return to work on 22 July to get some more context on the items below as I am on leave next week.

Kind regards
Nicole

Nicole Zago
Environmental Officer
Native Vegetation Regulation, Regulatory Services

Department of Water and Environmental Regulation
Prime House, 8 Davidson Terrace, JOONDALUP WA 6027
Locked Bag 10, Joondalup DC, WA 6919
T: (08) 6364 7319
E: nicole.zago@dwer.wa.gov.au | www.dwer.wa.gov.au
Twitter: [@DWER_WA](https://twitter.com/DWER_WA)

If you call, please leave a message.



From: Elizabeth Edwards [<mailto:elizabeth@harvey.wa.gov.au>]
Sent: Wednesday, 10 July 2019 2:21 PM
To: Admin NVP <admin.nvp@dwer.wa.gov.au>
Cc: Samantha Pickering <Samanthap@harvey.wa.gov.au>; Simon Hall <Simonh@harvey.wa.gov.au>
Subject: Clearing Application -- CPS 8486/1 19/21452

Good afternoon,

With respect to clearing application CPS 8486/1 for Lot 45 Stanley Road, Australind, I advise that insufficient information has been provided to make an informed decision on the proposal. The following matters have been identified:

- Clearing is proposed within proximity to an environmentally sensitive area (conservation category wetland)
- No flora/fauna survey or environmental assessment to ascertain habitat for threatened ecological communities and species
- The Shire has no record of development approval being obtained for the development the purpose of the proposed clearing

Regards

Elizabeth Edwards

Acting Manager of Planning Services
Shire of Harvey

P: 9729 0348
F: 9729 2053
E: elizabeth@harvey.wa.gov.au

102 Uduc Road Harvey WA 6220
PO Box 500, Harvey WA 6220



From: Admin NVP [<mailto:admin.nvp@dwer.wa.gov.au>]
Sent: Thursday, 13 June 2019 9:45 AM
To: shire e-mail
Subject: DWER Correspondence

Dear Mr Parker

Please find attached correspondence from the Department of Water and Environmental Regulation's, Native Vegetation Protection. Please note, this has not been posted.

If you would like to respond to this correspondence please use the contact details located on the top right of the attached letter or email info@dwer.wa.gov.au.

Kind regards,

Native Vegetation Regulation
Department of Water and Environmental Regulation
Prime House, 8 Davidson Terrace, JOONDALUP WA 6027
Locked Bag 10, Joondalup DC, WA 6919
T: (08) 6364 7000 |
www.dwer.wa.gov.au
[Twitter: @DWER_WA](https://twitter.com/DWER_WA)

Disclaimer: This e-mail is confidential to the addressee and is the view of the writer, not necessarily that of the Department of Water and Environmental Regulation, which accepts no responsibility for the contents. If you are not the addressee, please notify the Department by return e-mail and delete the message from your system; you must not disclose or use the information contained in this email in any way. No warranty is made that this material is free from computer viruses.

--
This email was Malware checked by UTM 9. <http://www.sophos.com>

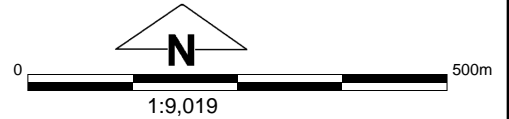
Disclaimer: This e-mail is confidential to the addressee and is the view of the writer, not necessarily that of the Department of Water and Environmental Regulation, which accepts no responsibility for the contents. If you are not the addressee, please notify the Department by return e-mail and delete the message from your system; you must not disclose or use the information contained in this email in any way. No warranty is made that this material is free from computer viruses.

Attachment D CPS 8486/1 - Map



Legend

- Imagery
- Clearing Instruments Proposals
- Local Government Authority



(Approximate when reproduced at A4)

GDA 94 (Lat/Long)

Geocentric Datum of Australia 1994

..... Date