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Senders ref: PP-2019-WAGGA-011-00 (LEP19/0004)

Ms Crystal Atkinson
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PO Box 20
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Via email: council@wagga.nsw.gov.au

31 January 2020

Dear Crystal

Subject: Planning Proposal 2019_WAGGA_011_00 (LEP19/0004) – reduce minimum lot size at various lots at Plumpton Road and Brindabella Drive, Wagga Wagga

Thank you for your letter dated 27 November 2019 regarding the abovementioned planning proposal and seeking comments from the Biodiversity and Conservation Division (BCD) of the Department of Planning, Industry and Environment (the Department).

BCD has statutory responsibilities relating to biodiversity (including threatened species, populations, ecological communities, or their habitats), Aboriginal cultural heritage and flooding. For matters relating to national parks estate matters please refer these to the National Parks and Wildlife Service.

We have reviewed the documents supplied and provide the following comments at **Attachment A**.

Our support for the proposal is contingent on Council being satisfied that overland flood risks associated with the subject land are of minor significance consistent with the Ministerial Direction 4.3 of the *Environmental Planning and Assessment Act (1979)*.

We acknowledge that the land is subject to the Order conferring biodiversity certification on the *Wagga Wagga Local Environmental Plan 2010*. Biodiversity Certification is taken to mean that the proposal does not cause harm for the purposes of the *Biodiversity Conservation Act 2016*. However, this does not negate the need to gain consent for tree removal, or address Matters of National Significance according to Commonwealth legislation.

We encourage Council to consider the proposal in a broad context and ensure that it does not compromise the improvement and maintenance principles of the Biodiversity Certification Order by limiting its assessment to habitat loss and impacts on threatened species on the subject land alone.

Regarding potential impacts on Aboriginal cultural heritage, we recommend that Council demonstrate due diligence in accordance with the 'Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW'.

If you have any questions about this advice, please contact Marcus Wright, Senior Conservation Planning Officer via rog.southwest@environment.nsw.gov.au or 02 6983 4917.

Yours sincerely



Andrew Fisher

Senior Team Leader Planning

South West Branch

Biodiversity and Conservation Division

Department of Planning, Industry and Environment

Attachment A Detailed comments – Planning Proposal 2019_WAGGA_011_00 (LEP 19/0004) – reduce minimum lot size at Plumpton Road and Brindabella Drive, Wagga Wagga.

Attachment A

Detailed comments – Planning Proposal 2019_WAGGA_011_00 (LEP 19/0004) – reduce minimum lot size at Plumpton Road and Brindabella Drive, Wagga Wagga.

Flooding

The primary objective of the NSW Government's Flood Prone Land Policy is to reduce the impact of flooding and flood liability on individual owners and occupiers of flood prone land, thus reducing private and public losses resulting from floods. The most appropriate method to assess the development of flood prone land is through the floodplain risk management process, which is detailed in the NSW Floodplain Development Manual 2005.

A primary objective of Section 9.1 Direction 4.3 'Flood Prone Land' of the *Environmental Planning and Assessment Act 1979* is to ensure that development of flood prone land is consistent with the NSW Government's Flood Prone Land Policy and the principles of the Floodplain Development Manual 2005. The City of Wagga Wagga has been progressing their Floodplain Risk Management Program through the completion of several studies and plans covering flood prone areas within their LGA.

Most notably is the Wagga Wagga Major Overland Flow Floodplain Risk Management Study and Plan (WW MOF FRMS&P) project which is due for completion. The subject land lies within the area covered by this study. Given the existing flood risk on the subject land identified in this study, we strongly encourage Council to consider the planning proposal strategically, assessing how appropriate it is to increase the density of development on the subject land.

The flood mapping developed as part of the WW MOF FRMS&P project indicates that the subject land is prone to overland flow flooding. However, that flood hazard has not been identified or discussed in the planning proposal. The onus is on the developer to justify to Council how the inconsistent elements of the planning proposal could be considered of "minor significance" given that the WW MOF FRMS&P project is not yet complete. Demonstrating this may require some site-specific flood modelling and mapping.

For efficiency, we recommend that the applicant demonstrate that the planning proposal is appropriate and commensurate with the flood risks at this planning proposal stage, including all anticipated development associated with it. Doing so will negate the need for subsequent multiple development applications to each demonstrate minor significance in the future.

Our support for the proposal is contingent on Council being satisfied that overland flood risks associated with the subject land are of minor significance consistent with the Ministerial Direction.

Biodiversity

We note that the land is subject to the Order conferring biodiversity certification on the *Wagga Wagga Local Environmental Plan 2010*. Biodiversity Certification is taken to mean that the proposal does not cause harm for the purposes of the *Biodiversity Conservation Act 2016* (BC Act)

However, Council should consider the proposal in a broad context and ensure that it does not compromise the improvement and maintenance principles of the Biodiversity Certification Order by limiting its assessment to habitat loss and impacts on threatened species on the subject land alone.

Given the presence of remnant native vegetation on the subject land, increasing the number of sublots on the site increases the likelihood of clearing that native vegetation and the potential to cause harm to threatened species or their habitat across the landscape. BCD's preference is that

Council consider the nature of likely harm to threatened species, and any measures to mitigate and remedy that harm, at the planning proposal stage.

The Wagga Wagga Development Control Plan includes a Tree Preservation Order. This establishes the need for applicants intending to remove trees to first gain a permit from Council. This requirement is not diminished by the requirements of the BC Act.

We recommend that Council consider the potential of this proposal to cause harm to any Box Gum Woodland, noting that such habitat is subject to protection under the Commonwealth *Environmental Protection and Biodiversity Conservation Act 1999*.

Aboriginal Cultural Heritage

BCD has a statutory role under the *National Parks and Wildlife Act 1974* (NPW Act) in the protection and preservation of Aboriginal sites. It is an offence to do any of the following things without an exemption or defence provided for under the NPW Act and penalties apply:

- Knowingly harm or desecrate an Aboriginal object (the 'knowing' offence)
- Harm or desecrate an Aboriginal object or Aboriginal place (the 'strict liability' offence).

We note the information provided in the Planning Proposal does not include an assessment or due diligence process for Aboriginal cultural heritage. We recommend that Council demonstrate due diligence in accordance with the 'Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW' (www.environment.nsw.gov.au/resources/cultureheritage/ddcop/10798ddcop.pdf) at this planning stage.

Prior to undertaking works any future proponents need to ensure that all reasonable precautions are taken to prevent the occurrence of damage to Aboriginal objects (known and unknown). As a minimum, the proponent needs to demonstrate due diligence in accordance with the Due Diligence Code of Practice (the Code) in determining whether the proposed activity will harm ACH.

Investigations under the Code include the following:

- A search of the Aboriginal Heritage Information Management System (AHIMS) to assist in the identification of previously recorded Aboriginal objects or places in the project area
- Identification of landscape features including, land within 200 metres of water, dune systems, ridge tops, headlands, land immediately above or below cliff faces and/or shelters
- Desktop assessment including a review of previous archaeological and heritage assessments and any other relevant material
- Visual inspection of the project area for the identification Aboriginal objects (if present)
- Assessment as to whether an AHIP is required.

Attention is drawn to the generic due diligence process steps 1-4 and flowchart on pages 10-14 of the Code. The proponent should be aware that if ACH is harmed while carrying out the proposal they could be liable to prosecution under the strict liability unless they can demonstrate they have followed a due diligence process. The code sets out reasonable and practical steps which individuals and organisations need to take in order to:

- To identify whether or not Aboriginal objects are, or are likely to be, present in the proposed development area
- To determine whether or not the proposed activities are likely to harm Aboriginal objects (if present)
- To determine whether further assessment in the form of an Aboriginal Cultural Heritage Assessment (ACHA) and/or an Aboriginal Heritage Impact Permit (AHIP) application is required.

It is important that all statements and conclusions made in relation to ACH are confirmed with appropriate supporting material. If Aboriginal objects are found to be directly or indirectly adversely affected by the proposed development, the proponent will need to apply for, and be issued, an Aboriginal Heritage Impact Permit (AHIP) by BCD to comply with the NPW Act. Details on how to apply for an AHIP can be obtained from the website at:

www.environment.nsw.gov.au/resources/cultureheritage/20110280AHIPguideforapplicants.pdf.

Should it be determined that an AHIP is not required, then documentation of the due diligence process can be used to support a defence against prosecution in the event of unanticipated harm.