

# PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Everett v Hinchinbrook Shire Council and Department of Natural Resources and Water & Ors* [2009] QPEC 38

PARTIES: **MARK EVERETT and GAIL EVERETT as Trustees  
(Appellants)**

**AND**

**HINCHINBROOK SHIRE COUNCIL  
(Respondent)**

**AND**

**CHIEF EXECUTIVE, DEPARTMENT OF NATURAL  
RESOURCES AND WATER  
(First Co-Respondent)**

**AND**

**CHIEF EXECUTIVE, DEPARTMENT OF THE  
ENVIRONMENTAL PROTECTION AGENCY  
(Second Co-Respondent)**

**AND**

**CHIEF EXECUTIVE, DEPARTMENT OF MAIN  
ROADS  
(Third Co-Respondent)**

**CHIEF EXECUTIVE, DEPARTMENT OF  
TRANSPORT  
(Fourth Co-Respondent)**

FILE NO P&E Appeal No 35/08

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING COURT: Planning and Environment Court of Queensland, Townsville

DELIVERED ON: 19 June 2009

DELIVERED AT: Townsville

HEARING DATES: 18, 19, 20 & 21 August 2008 and Final Submissions 20 October 2008.

JUDGE: Durward SC DCJ

ORDERS:

1. The application is refused.
2. The appeal is dismissed.
3. No order as to costs.

- CATCHWORDS:** Development Application refused by local authority at direction of concurrence agency – Whether preliminary approval should be granted – Eco-tourism and residential development in environmentally sensitive site.
- ENVIRONMENT AND CONSERVATION** – Whether current extent of essential habitat and viable network of wildlife habitat maintained for endangered fauna species – Mahogany glider and southern cassowary
- PROCEDURE – HEARING DE NOVO** – Whether preliminary approval should be granted on basis of concept subject to subsequent development of conditions.
- CONSTRUCTION OF POLICIES & CODE** – Vegetation Management Act 1999 – Whether analogous to construction of planning schemes – Weight to be given to policies and code that commenced after development application filed.
- VEGETATION MANAGEMENT ACT 1999** – Clearing of vegetation that is essential habitat – Sufficiency and viability of offset vegetation – Fire management – Delay in maturation of offset planting – Loss of biodiversity – Maintenance of ecological processes – Maintenance of connectivity between existing remnant vegetation on site.
- PRECAUTIONARY PRINCIPLE** – Application in circumstances of this appeal.
- CASES:** Leatch v National Pks & Wildlife Service (1993) 81 LGRA 270; Luke v Maroochy Shire Council (2003) 447; Wingate Properties Pty Ltd v Brisbane City Council (2001) QPELR 271; Vadale v Landsborough Shire Council (1985) QPLR 338; Histpark Pty Ltd v Council of the Shire of Maroochy (2002) QPELR 134; Titanium Enterprises Pty Ltd v Caloundra City Council (2007) QPELR 154; Modie v Gainriver Pty Ltd (No 2) (2002) QCA 546; Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 353; Westfield Management Limited v Brisbane City Council (2003) QPELR 520; SDW Projects Pty Ltd v Gold Coast City Council (2006) QPELR 121; Mansell v Maroochy Shire Council (2007) QPEC 122; Pinjarra Hills v Brisbane City Council (1995) QPLR 333; Jeteld Pty Ltd v Council of the City of Toowoomba (1997) QPELR 213; Nifsan Pty Ltd v Gold Coast City Council (1998) QPELR 66; Yamauchi v Jondaryan Shire Council (1998) QPELR 452; Edgarange Pty Ltd v Redlands Shire Council (2001) QPELR 241; Coty (England) Pty Limited v Sydney City Council (1957) LGRA 117.
- LEGISLATION:** Integrated Planning Act 1997; Vegetation Management Act 1999; Body Corporate and Community Management Act

1997.

COUNSEL: J Haydon for the appellants  
Mr EB Messer for the respondent  
E Morzone for the first co-respondent

SOLICITORS: Freehills for the appellants  
Roberts Nehmer McKee for the respondent  
Crown Solicitor for the first co-respondent

- [1] The appellants are the proprietors of land located at Bemerside, north of Ingham, described as follows: Lot 125 on CWL 2515, Lot 1 on CWL 2514 and Lot 32 on CWL 74, Parish of Marathon comprising an area of about 263 hectares.
- [2] The property is currently zoned rural. It was partly grazing land (about 25% of the total) with significant fencing that has now been substantially removed following cessation of the grazing activity.

### **THE APPLICATION**

- [3] The appellants made a Development Application in August 2006 to the respondent for:
- (1) A material change of use (“MCU”) for tourist accommodation, tourist facilities and residential subdivision purposes; and
  - (2) Reconfiguring a Lot (“RaL”) comprising the subdivision of three lots into 147 residential lots and one balance lot.
- [4] The development application was impact assessable: that is, an assessment (other than Code assessment) of:
- (a) the environmental effects of the proposed development; and
  - (b) the ways of dealing with the effects.

### **THE PROPOSAL**

- [5] The proposal was described in the Development Application (my summary) as follows:
- *“The applicant proposes to develop the site for residential and tourist purposes including self-contained cabins, restaurant and conference centre, general store and information centre and gymnasium...”*

- *The projects purpose is to maintain and enhance the integrity and beauty of the location, including its flora and fauna, whilst providing limited access for a balanced community of residents and holiday makers...*
- *The proposal will include ... self contained cabins located in secluded elevated positions...*
- *The existing dwelling at the top of Mt Separation is to be converted to a restaurant with a separate conference facility established nearby offering 360 degree views of the Hinchinbrook Channel, Hinchinbrook Island, Mt Cudmore and views over canefields towards the township of Ingham.*
- *Two cabin types have been developed by the applicant to respond to the natural features and constraints of the site.*
- *A general store and information centre will be located on the lower slopes of Mt Separation towards the river flats.*
- *The balance areas west of the north coast railway along the river flats and the lower slopes of Mt Separation and Mt Cudmore will be offered as open space and recreation areas provided for the enjoyment of the residents and guests.*
- *The area east of the north coast railway ... will remain undeveloped.*
- *The residential lots, when developed, will provide a range of lot sizes from 600 square metres to 2000 square metres under a community management scheme...*
- *A bush fire buffer will be provided around each dwelling to minimise the risk of bushfire and harm to human life.*
- *The subdivision will be designed to ensure the long term conservation and sustainability of the land and native flora and fauna.”*

## **THE REFUSAL OF THE APPLICATION**

- [6] The respondent was supportive of the application but refused it solely on the direction of the first co-respondent (“DNRW”) in its capacity as concurrence agency (the direction being contained in its response dated 16 October 2007), by way of decision notice dated 20 December 2007.

## THE INTEGRATED PLANNING ACT 1997

- [7] The DNRW directed the refusal of the application pursuant to the following provisions of the Integrated Planning Act 1997 (“the Act”):

### “3.3.16 Referral Agency’s response

- (1) If a concurrence agency wants the assessment manager to include concurrence agency conditions in the development approval, or to refuse the application, the concurrence agency must give its response (*a referral agency’s response*) to the assessment manager and give a copy of its response to the applicant, during the referral agency’s assessment period.

### 3.3.18 Concurrence Agency’s Response Powers

- (1) ...
- (2) Alternatively, a concurrence agency’s response must, within the limits of its jurisdiction, tell the assessment manager –
- (a) ...
- (b) to refuse the application.

### 3.5.12 Decision if Concurrence Agency requires refusal

If a concurrence agency requires the application to be refused, the assessment manager must refuse it.

## GROUNDS OF REFUSAL

- [8] The DNRW’s Statement of Reasons dated 16 May 2007 (attached to the decision notice) include the grounds of refusal: that is, in summary –
- Loss of biodiversity; and
  - Loss of viable networks of wildlife habitat.

## THE DISPUTED ISSUES IN THE STATEMENT OF REASONS

- [9] The disputed issues in the Statement of Reasons were the findings of facts and reasons in the decision in relation to DNRW’s Policy for MCU, namely that the application has not met Concurrence Agency Policy:-
- For MCU performance requirement PR A2.7; and

- For RaL performance requirement PR A.8.

### THE VEGETATION MANAGEMENT ACT 1999

[10] The relevant legislation is the Vegetation Management Act 1999 (“VMA”) which regulates the clearing of vegetation over all tenures in both urban and rural areas. The VMA states as its purpose the regulation of the clearing of vegetation in a way that –

(1) ...

“(a) *conserves the following:*

(i) *remnant endangered regional eco systems*

(ii) *remnant of concern regional eco systems*

(iii) *remnant not of concern regional eco systems*

(b) *conserves vegetation in declared areas; and*

(c) *ensures the clearing does not cause land degradation; and*

(d) *prevents the loss of biodiversity; and*

(e) *maintains ecological processes; and*

(f) *manages the environmental effects of the clearing to achieve the matters mentioned in paragraphs (a) to (e); and*

(g) *reduces green house gas emissions.*

*Significant challenges exist to achieve the State’s vegetation management objectives whilst recognising other goals of government that include accommodating population growth, maintaining the quality of life for existing and future communities and providing infrastructure.*

*Vegetation offsets can assist in balancing these interests in some circumstances, as they provide a mechanism for particular development to proceed while ensuring long term conservation of remnant regional ecosystems.*

*The VMA Codes set out performance requirements that development applications for clearing native vegetation must meet.*

...

*An offset is a means of meeting relevant performance requirements of an applicable code under the VMA.*

*An offset may be proposed by an applicant as a solution to meet a number of performance requirements. This policy sets criteria and provides guidance for what would constitute an acceptable offset under the VMA applicable code.*

*Offsets are not a suitable option where the impacts of development have an irreversible effect on biodiversity."*

## **THE VMA POLICIES AND CODE**

[11] The relevant policies and code in this matter are as follows:

### A. Concurrence Agency Policy for Material Change of Use dated 27 June 2005

The purpose of the Policy is said to be to achieve the purpose of the VMA.

Figure 1 in the policy document sets out a flow chart of the policy. Where there is clearing of assessable vegetation and no purpose-specific policy applies, the relevant Part is Part A, including performance requirement PR A2.7 which provides as follows:

Performance Requirement	Acceptable solution <i>(applicants can propose an alternative solution to meet the performance requirement)</i>
PR A2.7 To prevent the loss of biodiversity and to maintain ecological processes, viable networks of wildlife habitat maintained.	AS A2.7.1 Any clearing of assessable vegetation as a result of the MCU does not occur in an area which is identified on a map prepared by the chief executive of the agency which administers the <i>Nature Conservation Act 1992</i> and certified for use for the purposes of this policy by the chief executive of NR & M as an area of essential habitat for a species of wildlife listed as vulnerable, rare, near threatened or endangered under that Act.

### B. Concurrence Agency Policy for Reconfiguring a Lot dated 27 June 2005

The purpose of the policy is to achieve the purpose of the VMA. The policy assesses the implications of RaL and any future clearing of native vegetation associated with

RaL. Where all performance requirements are met, the Chief Executive will not direct that the RaL application be refused. Where an acceptable solution is stated, the acceptable solution represents one way in which the relevant performance requirement is met. Applications that do not meet the acceptable solution must demonstrate how the performance requirements will be met. An application must meet each performance requirement by either:

- Complying with the acceptable solution; or
- Satisfying the Chief Executive that the performance requirement is met through another solution.

In determining whether an application meets the acceptable solution, or whether another solution provided by the applicant meets a performance requirement, the precautionary principle will be applied.

If the Chief Executive considers that the application contains insufficient information to determine that Part C, D or E applies, the application must be assessed against Part A or Part B of the Policy. The relevant Part is Part A, which provides as follows:

Performance Requirement	Acceptable solution
PR A.8 To prevent the loss of biodiversity and to maintain ecological processes, viable networks of wildlife habitat are maintained.	AS A.8.1 The RaL will: 1) not locate a road or allotment boundary, and 2) provide measures any buildings, reasonably associated structures, infrastructure in a fluent disposal areas are not located, in an area which is identified on a map prepared by the Chief Executive of the agency which administers the <i>Nature Conservation Act 1992</i> and certified for use for the purposes of this policy by the Chief Executive for the Department of Natural Resources and Mines, as an area of essential habitat for a species of wildlife listed as vulnerable, rare, near threatened or endangered under that Act.

C. *Interim Policy for Vegetation Management Offsets dated 27 April 2006.*

This was an interim policy. Where an application proposes an offset to meet the following performance requirement (or similar): - to conserve remnant endangered regional ecosystems, remnant of concern regional ecosystems, and remnant not of concern regional ecosystems, the current extent of remnant endangered regional ecosystems and remnant of concern regional ecosystems and remnant not of concern

regional ecosystems and category 1, category 2 and category 3 areas shown on a property map of assessable vegetation are maintained.

There are ten criteria that must be met, prior to the development approval being granted. These are a comprehensive list of requirements directed to the quality and viability of the offset, including management plans. The following are of particular significance in the context of this case.

- “9. *The offset must become ecologically equivalent to the area proposed to be cleared. Factors to consider in regard to ecological equivalence are:*
- a. ...
  - b. ...
  - c. *Whether revegetation and/or restoration of the offset area is required. Offsetting existing intact vegetation is preferable to an offset involving revegetation of a severely degraded area. A revegetated area is generally of less biodiversity value, at least in the short to medium term, than an intact natural vegetation community, and there is a higher chance of the offset succeeding over time if the vegetation is intact; and*
  - d. *Time necessary to achieve remnant status. The longer the time necessary for non-remnant vegetation to achieve remnant status the higher the risk of failure. For instance, less area will be required for an offset where the vegetation can be expected, through protection and management to achieve remnant status in 5 years than an area where the vegetation is expected to achieve remnant status within 20 years; and*
  - e. *Connectivity of the offset to other areas of native vegetation. If the offset is linked to other areas of native vegetation, there is a greater chance of achieving remnant status and thus providing long term conservation outcomes.*
  - f. ...”

For offsets proposed to meet performance requirements relating to essential habitat for threatened species, the offset proposal must demonstrate how it will meet the performance requirement relative to the species involved. Table 1 of the policy document is a guide to minimum standards for offsets.

D. *Concurrence Agency Policy for Material Change of Use dated 23 August 2007*

The purpose of the policy is to ensure that clearing as a result of the MCU achieves the purposes of the VMA. Table 1 in the policy document provides that clearing as a

result of the MCU for any purpose not specifically provided in the Table is referable to criteria Table H2. This criteria is expressed as follows:

Performance Requirement	Acceptable solution
PR A.8 To prevent the loss of biodiversity and to maintain ecological processes, viable networks of wildlife habitat are maintained.	AS A.8.1 The MCU will: 1) not locate a road or allotment boundary, and 2) provide measures any buildings, reasonably associated structures, infrastructure in a fluent disposal areas are not located, in an area which is identified on a map prepared by the Chief Executive of the agency which administers the <i>Nature Conservation Act 1992</i> and certified for use for the purposes of this policy by the Chief Executive for the Department of Natural Resources and Mines, as an area of essential habitat for a species of wildlife listed as vulnerable, rare, near threatened or endangered under that Act.

*E. Concurrency Agency Policy for Reconfiguring a Lot dated 23 August 2007.*

This is the current policy. It provides that clearing of assessable vegetation that involves clearing of the boundary fence lines for each proposed allotment or clearing for infrastructure in the reconfiguration of the lot, is clearing of assessable vegetation.

Clearing as a result of RaL is allowed by the Department if a development application complies with the assessment criteria outlined in the Policy. The applicant has to provide sufficient evidence to demonstrate it adequately meets the development scenario in the Table in the policy document which contains performance requirements that must be met. The relevant criteria table is "H" which sets out performance requirements for purposes not specifically referred to in the Table.

[12] The following area of particular significance in the context of this case:

10. *“Where a **Criteria Table** links to performance requirements within the relevant code, the acceptable solution listed represents one way in which the relevant performance requirement can be achieved. Applications that do not adopt the acceptable solution must demonstrate how the performance requirement will be achieved through an alternative means. Consequently an application must meet each performance requirement by either complying with the acceptable solution or satisfying the Chief Executive that the performance requirement is met through another solution.*
11. *In determining whether an application meets the acceptable solution, or whether an alternative solution provided in the application meets a performance requirement, the precautionary principle will be applied.*
12. *When assessing a RaL application, a reference to “clearing” in the relevant code is taken to mean clearing as a result of the RaL as identified in item 2 of this policy.*
13. *If an application does not satisfy all performance requirements within a **Criteria Table** then the application is ineligible for assessment against that **Criteria Table** and must be assessed against another relevant **Criteria Table**.*
14. *Where a development application does not achieve all of the relevant performance requirements required by any **Criteria Table**, clearing as a result of the RaL is inconsistent with the purposes of the VMA. In these circumstances, the RaL fails this policy and the Chief Executive will direct the Assessment Manager to refuse the application.”*

The relevant performance requirement is PRH2: clearing as a result of RaL is assessed under the Table only where the RaL can demonstrate that the level of conservation and biodiversity outcomes ensured by the project significantly exceed the extent and value of the area proposed to be cleared in the requirements of the Vegetation Management Offsets Policy and assessment of a number of factors has been taken to determine the values of this site to be cleared and the proposal: size of the area, location, regional ecosystem type, habitat values, condition, landscape features - including connectivity, the importance of the biodiversity of the area - including its value as a refugium or centre of endemism - and the environmental values unique to the site.

F. Regional Vegetation Management Code for Coastal Bio-regions dated 20 November 2006.

The Code is used to assess applications for the particular relevant purposes shown in Figure 1 in the Code document, in this case requirements for clearing for infrastructure. The relevant performance requirements and acceptable solutions are as follows:-

Performance Requirement	Acceptable solution <i>(applicants can propose an alternative solution to meet the performance requirement)</i>
<p>PR P.4: Conactivity To regulate the clearing of vegetation in a way that prevents the loss of biodiversity and maintains ecological processes - areas of remnant vegetation are retained that are - a) of sufficient size and configured in a way to maintain ecosystem functioning; and b) of sufficient size and configured in a way to remain in the landscape in spite of any threatening processes; and c) located on the lot(s) that are the subject of the application to maintain conactivity to remnant vegetation on adjacent properties.</p>	<p>AS P.4 P.4.1 Where clearing is less than - a) 10m wide; or b) 2 hectares; clearing does not - i) reduce the width of remnant vegetation to less than 200m; and ii) occur where the width of remnant vegetation is less than 200m; OR P.4.2 Clearing does not - a) reduce areas of contiguous remnant vegetation to less than 10 hectares; and b) occur in areas of contiguous remnant vegetation that are less than 10 hectares; and c) reduce the width of remnant vegetation to less than 200m; and d) occur where the width of remnant vegetation is less than 200m; and e) reduce the total extent of remnant vegetation to less than 30%; and f) occur where the total extended remnant vegetation is less than 30%.</p>

Performance Requirement	Acceptable Solution
PR P.8: Essential habitat To regulate the clearing of vegetation in the way that prevents the loss of biodiversity - maintain the current extent of <u>essential habitat</u>	AS P.8 P.8.1 Clearing does not occur in an area shown as <u>essential habitat</u> on the <u>essential habitat map</u>

*G. Policy for Vegetation Management Offsets dated 28 September 2007.*

- [13] This is the current policy. An offset may be proposed as a solution to meet a performance requirement where the performance requirement requires that a development "maintain the current extent" of certain vegetation or habitat.

An offset must meet criteria 1-7 in the policy in accordance with the guidelines. So far as is relevant, in the offset criteria the selection and location of appropriate regional ecosystem proposed offsets must have the same pre-clearing regional ecosystem as the area proposed for clearing when offsetting essential habitat; and the proposed offset must become ecologically equivalent to the area proposed for clearing. Ecological equivalence must be demonstrated using all of the following factors: location, strategic position, area, comparable vegetation community attributes, condition of vegetation, regaining remnant status and landscape context attributes. Ecological equivalence is achieved when the ecological equivalence of factors achieve equivalence overall, despite one or more factors not achieving equivalence. Table 1 in the policy document contains guidelines proposed to determine ecological equivalence.

In so far as connectivity is concerned, reference is made to wildlife corridors being areas of native vegetation (both remnant and non-remnant) that link other native vegetation with an otherwise clear landscape. The guidelines state that corridors are an important tool to mitigate the impact of habitat loss and fragmentation and play an important role on both providing habitat and assisting in wildlife movement and genetic flow.

- [14] The Table relevantly in the context of this case, refers to risk of failure to achieve remnant status as being "higher" where this effect comprises significant revegetation.

*"From an on-ground perspective, remnant vegetation – from the VMA – is vegetation, part of which forms the predominant canopy of the vegetation:*

- a) covering more than 50% of the undisturbed predominant canopy; and*
- b) averaging more than 70% of the vegetation's undisturbed height; and*

- c) *composed of species characteristic of the vegetation's undisturbed predominant canopy."*

## DISCUSSION

- [15] The Appellant submitted that the DNRW policies required the referral agency to assess the application against the policies that were extant at the time the application was made, with consideration of any subsequent policies being permissible. That is, that the policies and guidelines were a tool that should be applied with appropriate flexibility and discretion with a view to achieving a best outcome, rather than applied as a rigid and strict formula: *Vadale v Landsborough Shire Council* (1985) QPLR 338; *Histpark Pty Ltd v Council of the Shire of Maroochy* (2002) QPELR 134; and *Titanium Enterprises Pty Ltd v Caloundra City Council* (2007) QPELR 154.
- [16] The Respondent submitted that the policies and code were not merely guidelines. Whilst the policies extant at the time of making the application applied, appropriate weight should be given to subsequent policies. Further, Mr Morzone submitted that the regional vegetation management code for coastal bioregions had legislative status under the VMA and the subsequent policies had been recognised in the State planning policies. Hence it was submitted they were not merely a flexible tool such as submitted by the appellant.
- [17] The State Planning Policy deals with what might compendiously referred to as safety issues – landslides and bushfire prevention and management. To that extent the policy might recognise some of the content of the VMA policies and code.
- [18] Mr Morzone was unable to point to any judicial authority regarding the construction of the policies and code. Nevertheless, he applied by analogy the principles developed in the cases about the construction of planning schemes, in a sense, namely that the policies and code should be construed broadly, as a whole and in a way which best achieves the purpose: *Westfield Management Limited v Brisbane City Council* (2003) QPELR 520; and *SDW Projects Pty Ltd v Gold Coast City Council* (2006) QPELR 121. I agree that this is an appropriate approach to their construction. They are more than mere guidelines. Some parts of them are specifically referred to as 'guidelines'. They are directive in their terms in many instances, although I do not consider that this amounts to rigidity or inflexibility in their application. Indeed, that is clear in my view from the manner of expression used in their formulation.

## CONDITIONAL APPROVAL RELATING TO PR A2.7

- [19] "PR A.7 is met with the following conditions:

- Endorsement of the bush fire management plan.
- Fire break distances

- No clearing of assessable vegetation in or within fire break distance of an endangered or of concern region eco system.

## **NON-APPROVAL RELATING TO PR A8.8**

PR 8.8:

In this case:

*“The application is considered to fail this performance requirement because viable networks of wildlife habitat will not be maintained as a result of the RaL. Both the EPA and the applicant have provided information on whether the application meets this requirement.*

*The applicant has stated that viable networks of wildlife habitat will be maintained despite the impacts of the RaL and that any negative effects will be overcome with twelve months. However the applicant has failed to support these claims with sufficient evidence. In addition, some of the information provided by the applicant is consistent with that provided by the EPA in identifying negative impacts that the development will have on the networks of wildlife habitat on the subject site.*

*The advice received from the EPA addresses each of the key elements of the definitions of viable networks and wildlife habitat. The evidence given in their report is supported by a range of sources including peer-reviewed primary resources in government publications. This evidence in many cases conflicts with claims made by the applicant.*

*The Precautionary Principle must be employed in this due to the conflicting opinions stated in the reports delivered by the applicant and the EPA and the lack of reliable evidence provided by the applicant compared to the evidence provided by the EPA. The delegated officer has determined that there is a reasonable foreseeable threat of serious and irreversible environmental damage as a result of the proposed RaL. These threats are considered to be immediately obvious to a reasonable person, supported by reputable published evidence and are able to be shown by empirical research.”*

## **THE PROVIDED SOLUTIONS IN THE APPELLANT’S RESPONSE TO INFORMATION REQUEST.**

- [21] The provided solutions in relation to A2.7.1 and a 2.8.1 were expressed in the same terms, as follows:

*“A2.7.1 There is some proposed clearing of vegetation within areas that have been nominated as essential habitat (cassowary habitat). These areas of clearing are relatively small and cassowary have not been spotted in these areas. Cassowaries sighted on site frequent the area that has been put aside as a corridor, but have*

*not been sighted in the other areas of essential habitat along this stretch of road. It is hoped that these areas will be approved for clearing as an offset to the fact that large portions of land will be revegetated (cassowary and mahogany glider habitat), and all remaining post development vegetation will be protected as nature reserves (spelling has been corrected)”*

## **THE ISSUES IN THE APPEAL**

[22] The issues appear in paragraph 4 of the notice of appeal:

*“4.1 The application should have been approved subject to lawful conditions for the following reasons:*

- (a) The proposal meets Performance Requirement PR A2.7 of the DNRW’s policy for material change of use and PR 8.8 of the DNRW’s policy for reconfiguring a lot.*
- (b) In the alternative, to the extent the development proposed does not meet the performance requirements identified in 4.1(a) above, the application should still be approved having regard to DNRW’s policies for material change of use and reconfiguring a lot when read as a whole;*
- (c) Further, in the alternative, the development application should be approved as it has not been consistent with:
 
  - (i) Any other laws, or parts of laws that are administered by, the policies or parts of policies that are reasonably identifiable as policies applied by DNRW; and*
  - (ii) Any other applicable concurrency agency code of part thereof.**
- (d) But for the DNRW directing the Respondent to refuse the application, the application would have been approved subject to conditions.”*

## **APPELLANT’S FURTHER AND BETTER PARTICULARS**

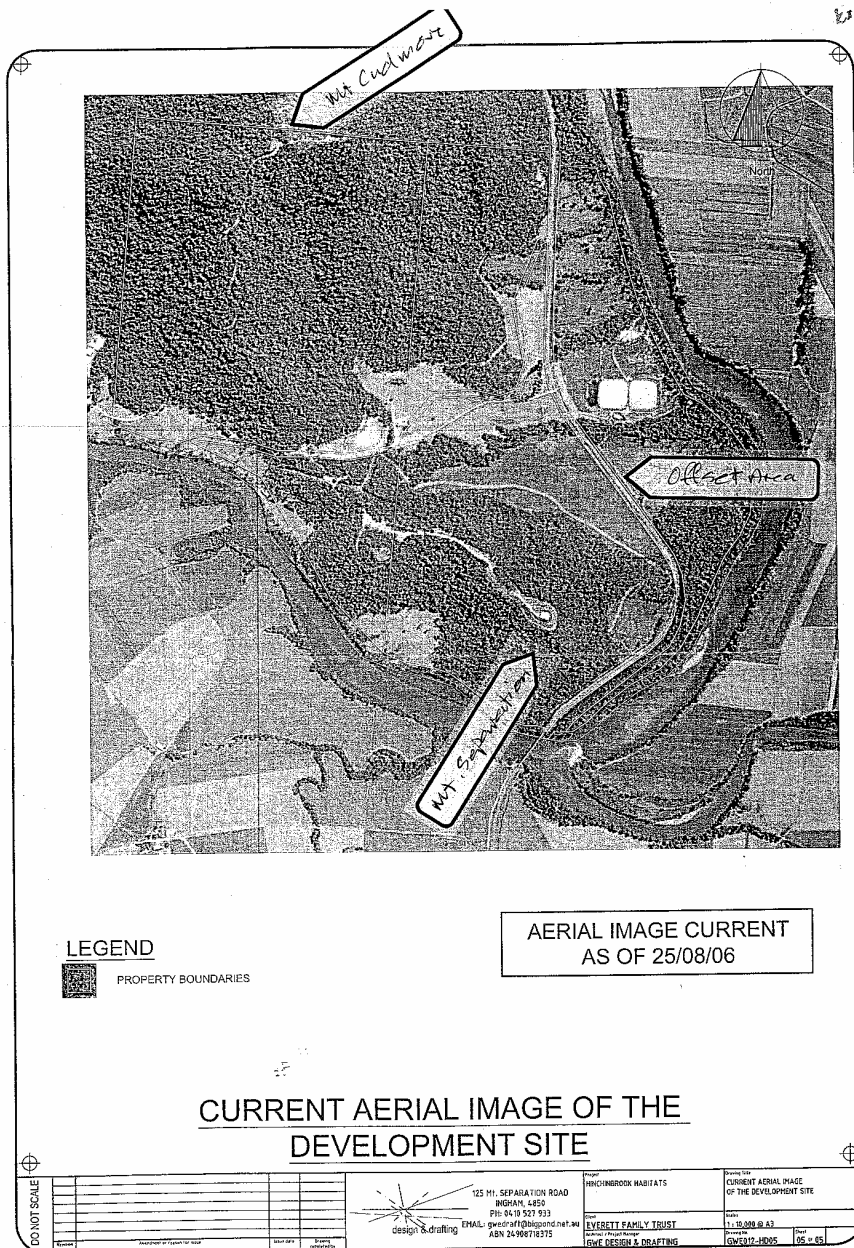
[23] The appellants provided, so far as is relevant, further and better particulars of its notice of appeal:

*“4.1(b) The aspect of the Policies for MCU & RaL which permit the proposes development to be approved notwithstanding non-compliance PR A2.7 & PR A.8 respectively are:*

- (i) *As indicated in the Department of Natural Resources and Water Concurrency Agency Response dated 16 October 2007, all other performance requirements of these policies have been met by the application either with or without conditions.*
- (ii) *Otherwise, the appellant relies on the whole of these policies for their full terms, meaning and effect.”*

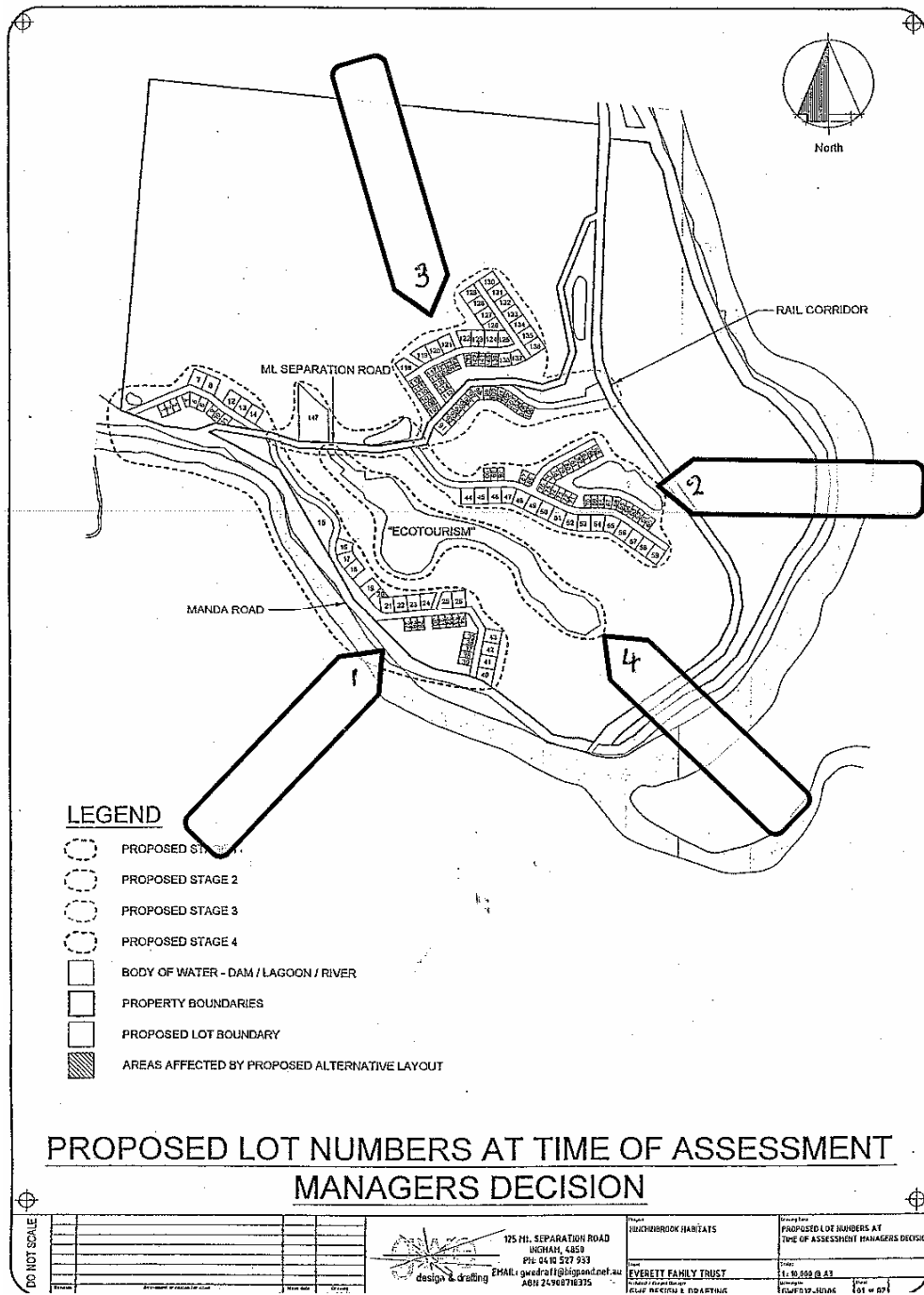
**THE SITE**

[24] The aerial image of the current site shows the site as it protrudes into a cul de sac bordered by the river, Mt Cudmore to the north, the main railway line and the location of the offset area generally to the east and Mt Separation to the south. The old prawn ponds are to the east of the railway line.

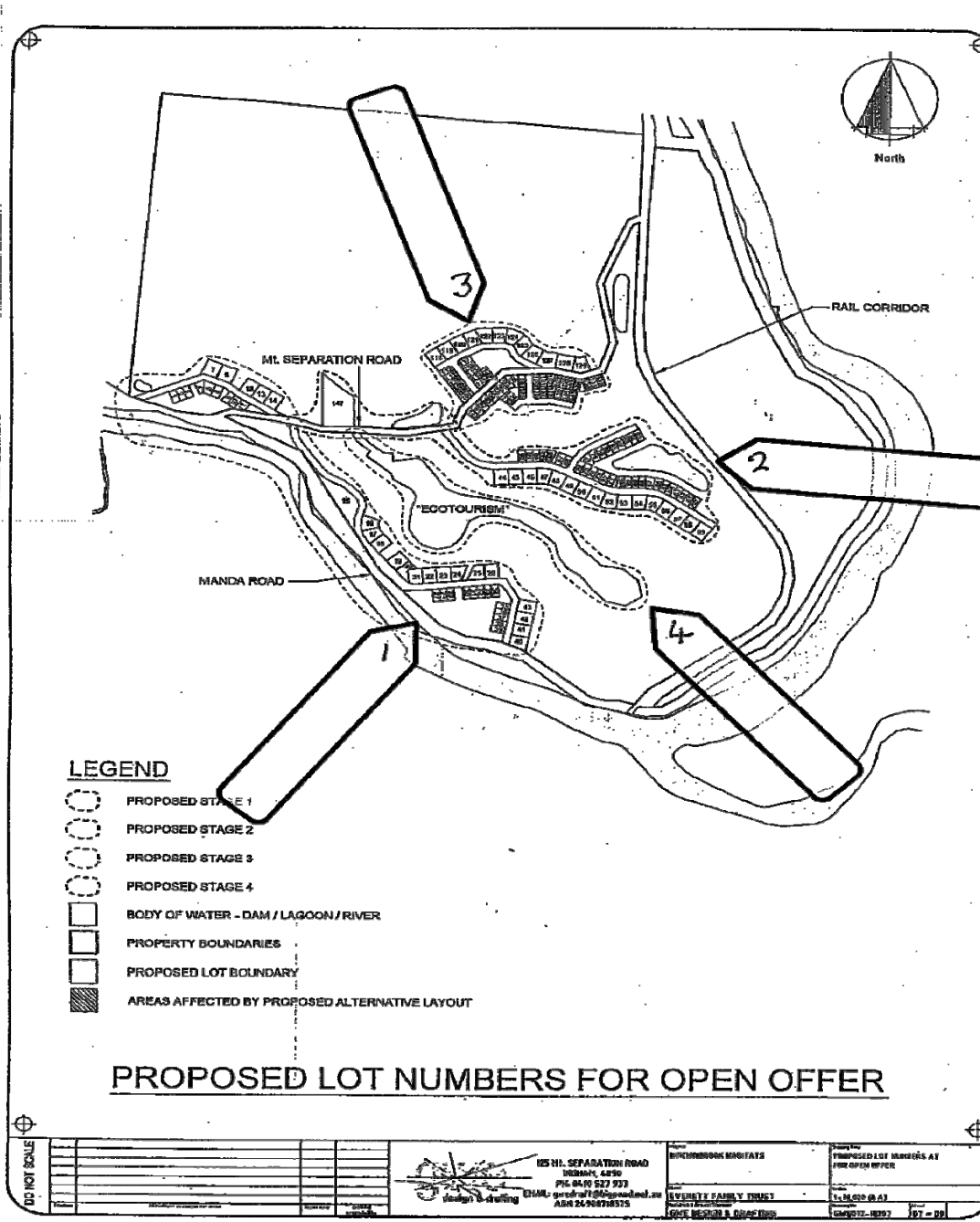


**CHANGES TO THE DEVELOPMENT APPLICATION**

- [25] A number of changes were made to the drawings to accommodate environmental concerns, during their consideration period including relocation of some Lots. These were the subject of evidence in the course of the appeal.
- [26] The two layout designs following are self-titled. The changes to the ridgeline in the north of the site are self-evident. The four stages are identified by the arrowed numbers 1 to 4.



[27] The original drawings, amongst other things, had located Lots along a ridge line on Mt Cudmore. Subsequent drawings were produced (styled an open offer) which made a number of changes including the moving of the ridge line Lots lower down the slope of the mountain. A further draft alternative proposal was produced in the course of the evidence of Dr Olsen which showed how the development might appear on drawings if clearing of any essential habitat was avoided, this being achieved by moving the lots out of the forest on to adjacent cleared land. Hence the concept in the proposal was treated in the appeal as a dynamic one.



## THE PARTIES

- [28] The respondent did not seek to be heard, save for appearance, on the appeal and the second co-respondent and third co-respondent were excused from appearance on the appeal. The respondent had supported the Development Application subject to its statutory duty to refuse it on the direction of the DNRW. The second co-respondent and third co-respondents had no litigable issues with any other party, having notified conditions on the Development Application.

## THE EVIDENCE

- [29] A site inspection was conducted on the first day of the hearing. The evidence in the appeal hearing was given by a number of experts within fields that were relevant to the issues in the appeal: Dr Olsen, Mr Chenoweth and Mr Wannan in respect to flora; Mr Agnew in respect to the mahogany glider and the southern cassowary; Mr Buosi in respect of the southern cassowary; and Dr Jackson in respect to the mahogany glider.
- [30] The principle matters of evidence were the impact of the proposed development on the flora of the site and whether the removal of vegetation could be adequately recompensed in the way required in the VMA by the provision of offset areas of new vegetation and the provision or maintenance of sufficient flora coverage to meet the environmental concerns with respect to two specific fauna, namely the mahogany glider and the southern cassowary.

### *Dr. Olsen*

- [31] Dr Olsen had prepared reports with respect to flora issues. He referred to an area of 8.98 hectares to be cleared in the development, within mapped remnant vegetation along the margins of existing tracks, roads and clearings across the property. An offset of 40.53 hectares of remnant native vegetation was to be provided as an alternative acceptable solution. This offset he said was essential habitat and in some cases 'critical' habitat for the southern cassowary and the mahogany glider. He referred to two performance requirements that DNRW considered were non-compliant, namely: that viable networks of wildlife habitat will not be maintained as a result of the MCU (PR A2.7); and that viable networks of wildlife habitat will not be maintained as a result of the RaL (PR A8).
- [32] He identified other relevant issues as PR P.4 'connectivity' and PR P8 'essential habitat' but qualified that by reference to those matters having never been part of the joint discussions between the experts or having been mentioned in the decision notice.
- [33] He described the property as forming an ecological "cul de sac" and referred to the invasion of grassy understory in the woodlands and open forests across the site, with vine forests making the site less suitable as habitat for mahogany glider but more suitable for the southern cassowary. He referred to the fire management plan, proposed by the appellant as a component of the management of the property, as a means to check the advance of vine forests. The natural regeneration of former

native woody canopy, which he claimed was evident in clear areas of former pasture, was proposed to be supplemented by in-fill plantings to accelerate the rate of recovery and regeneration of the former native vegetation in those areas.

- [34] Dr Olsen concluded that the development provided the best ecological outcome for the site "in an urban development or continuing rural use scenario". He opined that the proposed offsets would increase biodiversity values across the property. He said that this would be achieved by reducing the fragmentation of the landscape, restoring connectivity, providing for greater habitat resources and providing a more secure environment than current land use or alternative urban usage would.
- [35] Specifically he was of the view that insofar as the MCU was concerned, there was no suitable alternative to the embedding of the development infrastructure into the landscape. With the offsets proposed he claimed that there would be minimal impact and that they would provide essential habitat across the site - the viable networks would be enhanced and there would be a reduction of area of the disturbed lands.
- [36] Insofar as the RaL was concerned, the additional benefits in his view were a reduction in the fragmentation of the site and an increase in connectivity together with a reduction and exotic weed growth - much of the presently fractured vegetative links across the site would be reconnected and the historical clearing of the site would be addressed. In his view the vegetative management offsets would not only maintain, but would increase the current extent of essential habitat. It was his view that DNRW had not given adequate weight to the offset options.
- [37] In an addendum report, he referred to the revised plans (which are the changes – the open offer drawings - that I previously referred to insofar as the location of lots were concerned). The removal of lots to the edges of vegetation or their being embedded in completely cleared areas he considered ensured compliance. He opined that the offsets restored the former native vegetation "mosaic" and exceeded DNRW Codes and Policies in respect of connectivity and fragmentation.
- [38] Mr Morzone was very critical of Dr Olsen's evidence in his submissions: he submitted that the evidence of Dr Olsen should be given little weight because of what he termed outlandish statements and proposals or observations that did not accord with common sense. In particular he referred to Dr Olsen's use of the expression 'critical habitat', from which the witness was reluctant to resile, that he submitted was an expression no longer used and was meaningless. He submitted that would create a lack of confidence by the Court in the opinions expressed by the witness. He also referred to Dr Olsen's observation about providing offsets in cane fields.
- [39] I must say that I was somewhat non-plussed by some of the evidence of Dr Olsen, particularly that expressed above and his evidence about the quality of the natural regeneration of the vegetation on the degraded former grazing land. In regard to the latter I did not think that his confidence in its viability or coverage was warranted on the objective evidence. I do not doubt his expertise, but of all of the witnesses he seemed to me to be less willing or able to make reasonable concessions and to be a more partial witness in his support of the appellant. He quite properly deferred to the fauna experts when his evidence went into areas strictly not within his expertise. I preferred the evidence of the other flora experts over that of Dr Olsen where there was conflict or disagreement.

***Mr. Wannan***

- [40] Mr Wannan focussed on the degree to which the proposed offsets met the criteria contained in the interim policy for vegetation management offsets and the subsequent policy for vegetation management offsets. He considered that the latter policy provided a better test and should be given more weight. I accept that the criteria in the policies and code are in the circumstances of this case critical to the determination of the appeal. There is a common thread through the interim policy and the subsequent policies which, whilst expressed in a different way, may in a general sense be akin to a 'test'.

***Mr. Chenoweth***

- [41] Mr Chenoweth focussed on biodiversity and habitat conservation: communities, ecosystems and assemblages of species; species and sub-species across distributional range; and genetic variation within each species. Biodiversity was defined by artificial edges, size shape and connectivity, proportion of the edge to the internal area, central core and "hot" and "cool" fires.
- [42] So far as connectivity was concerned he referred to opportunities for movement between vegetation patches, tolerances of gaps and barriers, aggressive "edge-dwellers", the restoration of gaps through regeneration and barrier mitigation devices. He considered that offset regeneration was a poor substitute for retention of interconnected habitat, the repair to fragmented areas being preferable to the length of time that offset vegetation would take to reach a sufficient maturity to achieve its purpose. He considered that this was a case for the application of the 'precautionary principle.'
- [43] He considered that from a nature conservation perspective, the property was exceptionally biodiverse in a regional or district context: it contained riparian, lowland, lower slope and mountain terrain. Hence it was a mosaic of land and flora types with interconnection. This view of exceptional biodiversity was generally accepted by all of the experts.
- [44] He expressed concern about the proposed intrusion into remnant vegetation and the fact that the areas to be cleared were "essential habitat" for the two relevant species of fauna. In his view whilst managed regeneration on currently cleared areas would eventually provide offsets for the loss, such offsets were not consistent with the intent of performance requirements PR A2.7 and PR A8.
- [45] He considered that performance requirement PR 4 related to the proposed clearing of remnant vegetation along the ridge line but that had now been resolved by the new plans (the open offer drawings) in respect of the northern ridge, which moved the location of the lots below the ridge line.
- [46] He concluded that habitat was a part of a viable network - connecting remnant vegetation and habitat and allowing movement of fauna. The proposed development intruded upon that function. Whilst the proposed regeneration was desirable in the long term, he did not consider that it would act as an offset. Other impact-minimisation measures (such as the banning of pets and the maintenance of community - as distinct from individual - lot title) was also not sufficient to avoid

immediate and ongoing degradation of habitat. He considered that the proposal failed to maintain connectivity and failed to meet the performance requirements.

- [47] I agree with Mr Chenoweth's reservations about the impact of the clearing upon the viability of the network and about the uncertainty with respect to the offsets.

***Joint Expert Report***

- [48] Dr Olsen, Mr Wannan and Mr Chenoweth provided a joint expert report. This is best summarised in the following way: all three witnesses agreed on the following propositions:

- That the development would require clearing of remnant vegetation in several areas where the habitat was already fragmented and/or the proposed clearing and habitat loss would represent only a minor change to the current edge between cleared and remnant vegetation.
- That PR A2.7 remained an issue.
- That PR A8 remained an issue.
- That the current certified mapping for the site depicted the extent of remnant regional ecosystems.
- That the development footprint intruded into areas of the mapped remnant regional ecosystem listed as not of concern.
- That the development footprint intruded into areas of the mapped remnant regional ecosystem 7.12.1 and 7.12.53.
- That the development would not result in the loss of any mapped extent of endangered or of concern remnant regional ecosystems.
- That the development included the introduction of domestic fauna that may have a negative environmental impact.
- That the offset requirements for the loss of current mapped extent of the not of concern remnant regional ecosystems related only to essential habitat.
- The essential habitat map for the site related to the southern cassowary and the mahogany glider.
- The proposed offset areas would eventually provide remnant regional ecosystems conforming to the not of concern regional ecosystems as well as the endangered regional ecosystem that is a habitat factor for both fauna.
- That, with some qualifying comment, the proposed offsets would increase the area of habitat for both native flora and fauna on the site.

- [49] All three agreed that the issue of clearing of remnant vegetation on the ridge on Mount Cudmore to the north of the site would be resolved by the revised plan. However, there was no agreement in respect of the impact of the development upon biodiversity and currently viable networks of wildlife habitat. There was also no agreement as to the suitability of the proposed offsets. There was also no agreement by Dr Olsen with the view expressed by Mr Wannan and Mr Chenoweth that the development would reduce the frequency of bushfires and thereby cause or exacerbate changes to vegetation.
- [50] I prefer the evidence of Messrs. Wannan and Chenoweth in respect to the matters upon which Dr Olsen did not agree. I found them to be more objective and convincing witnesses. Their evidence seems to me to reflect the intent of the VGA and the policies and code in respect to the issues of maintenance of biodiversity and currently viable networks and the issue of the offset.

***Dr Jackson***

- [51] Dr Jackson's expertise is in the field of study involving the mahogany glider. He described "habitat" as being the native environment or specific surroundings where a plant or animal naturally grows or lives.
- [52] The mahogany glider is a large, gliding mammal that is restricted to an area of lowland and foothill open forests in North Queensland and is considered an endangered species and endangered wildlife due to its naturally limited distribution, the large area of its habitat that has been cleared and the small amount of remaining habitat protected within national parks. Its ecological role, in summary, by reason of its nectar feeding habits, was as an important pollinator of various species of trees. The low density population was such that his view was that any loss of habitat could have a significant effect and that the species relied upon a diversity of plants for food and required intact habitat to allow them to glide between, trees because they did not readily travel along the ground.
- [53] He opined that the subject property was important to the conservation of the mahogany glider because it was within the known limited distribution of the fauna, contained large areas of ideal habitat and the animal is known to occur near to the property. There were good linkages between the property and surrounding foothills and continuous habitat to the southwest and north. He considered that the habitat on this property was important and that if it was cleared the impact upon the mahogany glider would be: a decrease of the occupancy of the species by 8.5 hectares, subject to long term remediation through offsets; a decrease in the value of the surrounding vegetation and therefore the viability of the mahogany glider in the immediate area; a risk to the viability of the sub-population of this area, which was one of only five that remained; and that additional clearing would add to the cumulative impact of clearing and further increase the likelihood of extinction of the species.
- [54] He was of the view that viable networks (permanent areas of connectivity) were likely to be affected by the reduction in essential habitat, the edge effects and loss of ability to burn. There would be a reduction of connectivity between the two mountains which would have a funnelling effect. The 20m road width proposed within the development would compromise the viability of the species and increase predation. He did not consider that the rainforest had taken over the species'

habitat to the extent submitted by the appellant. He was sceptical of the acceptable solution provided on behalf of the appellant because it was not clearly stated or did not have sufficient specificity.

[55] So far as the offsets were concerned, whilst the area proposed was significant and would have some utility to the species, it was not as optimal as the areas to be cleared. In addition there was a timing issue: it would take 5 to 10 years for food to be provided; 19 to 25 years for the maximum height for 70% food productivity; and some 30 to 50 years for nesting hollows to be created. He considered that so far as connectivity was concerned there would be a decrease in the mobility of the mahogany glider between the two mountains. The proposal failed to maintain the current extent of essential habitat.

[56] Dr Jackson concluded that there would be a significant impact on long term viability of the mahogany glider on Mount Separation, an increase in predation; and a short to medium term impact with management issues concerning edge effects, weed invasion, fire management, unauthorised clearing, introduction of domestic pets and predators.

[57] Dr Jackson did provide some observations in respect of potential conditions that might be imposed if the appeal was granted, namely: the locating of the developments as far as possible down the slopes, amalgamation of areas, reducing width of the road and shortening it, the restriction on the location of buildings, the elimination of barb wire fences, the maintenance of large trees, the banning of pets, and proscribed burning with "cool" burns.

[58] However, it is abundantly clear to me that his primary position is that the application should not succeed. His references to conditions that may be applied to any approval were a sensible secondary and less favoured position. I accept that Dr Jackson is a highly credentialed expert in respect of the mahogany glider. I prefer his evidence over that of Dr Olsen in that regard, particularly on the issues of connectivity and the uncertainties about the offset proposal.

***Mr Buosi***

[59] Mr Buosi is an expert with respect to the southern cassowary. Mr Buosi considered the development to be a threat to the southern cassowary through loss of habitat by clearing of vegetation and the impact of predators, human contact, vehicle movements and disease.

[60] He considered that the development would result in the clearing and degradation of the lowland habitat, thus reducing the area available for the foraging, movement and shelter of the species.

[61] The offsets, in the long term, he agreed would re-supply the loss of physical habitat but that the movement of the species would be compromised. He considered there was a risk to access to and the utility of nearby water sources through consequent reduction of the value and viability of remnant habitats.

[62] In my view Mr Buosi's concerns about the proposal as a whole are more significant for the southern cassowary than to the mahogany glider. Whilst the offsets may compensate the loss of essential habitat more quickly for the southern cassowary

than for the mahogany glider, the clearing would nevertheless pose a significant risk to the former in this locality.

***Mr. Agnew***

- [63] Mr Agnew referred to site characteristics and habitat values. He considered that there were two major concerns for the mahogany glider and the southern cassowary, namely: the infestation of vine in the first stage; and the impact of clearing. He also referred to the encroachment of rain forest and the thickening of the vegetation as matters of concern.

***Joint Expert Reports***

- [64] Mr Agnew agreed with Dr Jackson in their joint expert statement. However, he thought that if agreed strategies and measures could be implemented then a ‘modified’ development proposal would not result in a significant impact to the mahogany glider. Mr Buosi and Mr Agnew also agreed to the common issues in their joint expert Report.
- [65] In my view the imposition of conditions will not eliminate or reduce the risks or concerns referred to by Dr Jackson and Mr Buosi. I prefer their evidence.

**THE PRECAUTIONARY PRINCIPLE**

- [66] Section 1.2.3. of the Integrated Planning Act 1997 sets out several matters to be considered in advancing the purpose of the Act:

- (a) *“Ensuring decision-making processes –*  
...  
*(iii) apply the precautionary principle*  
...
- (c) *Avoiding if practicable or otherwise lessening, adverse environmental effects of development. ...”*

- [67] The ‘precautionary principle’ is defined in section 1.2.3 (2) of the act as “the principle that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment if there are threats of serious or irreversible environment damage.”

- [68] Generally speaking, where the precautionary principal is applied, it is not necessary for an appellant to prove the absence of any possibility of serious environmental harm in the future, with scientific certainty. The application of the precautionary principle has been judicially considered:

- [69] The application of the precautionary principle has been judicially considered. In *Leatch v Director General of National Parks & Wildlife Service & Anor* (1993) 81 Igra 270 Stein J referred to the international history of the principle and the adoption of the principle in Australian Legislation. He said in respect of its application in Australia, the following:

*“In my opinion the precautionary principle is a statement of common sense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities) decision-makers should be cautious.”*

- [70] Hence the precautionary principle is an objective of the Act. It is also a specific requirement of the DNRW policies.

## **ORAL SUBMISSIONS**

### ***First Co-Respondent***

- [71] The parties made short oral submissions on the fourth day of the hearing, including a short written document providing headings for submissions provided by the appellant. Subsequently submissions in writing were provided by the co-respondent on 12 September 2008 and the appellant on 6 October 2008. I received the first co-respondent’s response submissions on or shortly after 26 October 2008.
- [72] In his oral submissions Mr Morzone for the first co-respondent submitted that the appellant had left critical details in the appeal to a later stage and had not addressed the issue of successful implementation of conditions, but proposed that they be postponed and dealt with either at the preliminary approval stage or the development permit stage or at both. However, he submitted that the clearing of the essential habitat was not being postponed. If it did proceed he submitted that it would be irreversible, regardless of whether any conditions that might subsequently be imposed were successful or not. He referred to a number of matters of concern about detail including the dimensions of the lot envelopes not being known; the accuracy of the remnant mapping line not being certain; the extent of clearing necessary potentially being less than the proposed 8.9h thus leaving open the possibility of further clearing elsewhere on the site to use up the balance not originally cleared.
- [73] It was submitted that even if the application had been assessable only against the Act, the DNRW policies and code not being applicable, nevertheless the State Policy would apply and environmental concerns would still have to be addressed.
- [74] Mr Morzone listed the matters which he submitted should lead to the appeal being refused:
- There was an “alternative site” available which would avoid any clearing of essential habitat.
  - The proposal did not “maintain essential habitat” because it involved clearing as a first element and the non replacement of it in the immediate term.

- The offsets proposed no immediate impact and involved timing issues, delay uncertainty of regeneration and the extent of infilling with plant stock together with uncertainty of weather conditions and fire management issues.
- Loss or threats to biodiversity generally was acknowledged by all the experts. Loss of connectivity had to be assessed, not by reference to offsets but between existing habitats.
- The enforceability of proposed management plans was questionable.
- The critical issue could be summed up in the word “if”; that is, there may be a better outcome “if” the vegetation issue conceded, for example. As to the situation of there being “no offset”, if the appellant’s view was correct in that an offset would comprise natural regeneration and in-filling with vegetation stock, then the natural regeneration – in the absence of some other use of the area proposed for the offset – may of itself achieve something akin to an offset.
- A better outcome overall might involve a condition of no clearing until the remnant vegetation in the offset area was established and proved to be viable to a stage where it provided at least the beginning of what was considered necessary for an essential habitat.

[75] Finally, Mr Morzone submitted that this case was one where the precautionary principle should be applied.

### **Appellant**

[76] Mr Haydon addressed the headings of what would ultimately be his written submissions. I can best deal with those by reference to the latter, which included a response to a number of the matters submitted in the oral submissions of Mr Morzone.

## ***WRITTEN SUBMISSIONS***

### ***Appellant***

[77] Mr Haydon submitted that the court should conduct a merit assessment of the proposed development concept. He described the proposal as an eco-tourism development on Mt Separation with residential houses on parts only of the site with the balance area to be conserved. Trees were already being grown through the nursery stage and he submitted that vegetative cover from regeneration and in-filling of gaps would over time provide for movement of fauna and for food sources for both affected species. He also referred to conditions which ameliorated other potential concerns.

[78] He submitted that the DNRW’s jurisdiction as a Concurrence Agency is limited to the regulation of the clearing of vegetation (not to land use) in the context of conservation of remnant endangered and remnant not of concern regional eco systems; prevention of loss of biodiversity; maintenance of ecological processes;

- and management of the environmental effects of vegetation clearing. In so far as those matters were concerned, it was submitted that the proposal provided for the clearing of weed infestation edges and management of new edges with a vegetation management plan; a fire management plan; and revegetation of cleared areas.
- [79] Mr Haydon developed his submission in regard to the imposition of conditions on any approval. This flowed from the process which he submitted ought to be followed by the court; that is, a flexible approach based upon a consideration of the proposal as a “concept” which would involve conditional approval of the “concept”, the provision of further design to meet the conditions of the preliminary approval then the grant of development permits for reconfiguration and operational works with agreed or court imposed conditions which must be “not inconsistent with the conditions of the preliminary approval”.
- [80] He submitted that a preliminary approval under the Act approves development but does not authorise assessable development to occur to the extent stated in the approval and subject to the conditions in the approval. A development permit authorises assessable development to occur to the extent stated in the permit and subject to the conditions in the permit and any preliminary approval relating to the development the permit authorises including any conditions in the preliminary approval: That submission reflects the content of s 3.1.5 of the Act.
- [81] I note that in so far as conditions are concerned, they must be relevant or reasonable in the following sense provided for in s. 3.5.30 of the Act:
- “(a) be relevant to, but not an unreasonable imposition on, the development or use of premises as a consequence of the development; or
  - (b) be reasonably required in respect of the development or use of premises as a consequence of the development. this applies despite the laws administered by and the policies reasonably identifiable as policies applied by, an assessment manager or concurrence agency.”
- [82] The raft of conditions referred to by Mr Haydon in that context were as follows: a plan of development, community title scheme, identification of management regimes, fire management plans, vegetation and weed management plan, adequate connectivity over roads, environmental education programme for residents and guests, ban on feeding cassowaries, prohibition of cats or dogs on site, traffic management, and retention of all hollow bearing trees.
- [83] It was submitted that the conditions would be binding and would attach to the land (s 3.5.28 of the Act) and that the Community Management Statement provides for obligations of community title holders to run with the land. He submitted that the experts were generally in agreement about the benefit of a Community Title Scheme under the *Body Corporate and Community Management Act 1997*.
- [84] He submitted that the nature of the appeal was such that the court simply determine whether the approval should or should not be given for the particular

- use proposed on the site, without regard to the “best site” or “best use” tests, as described in *Luke v Maroochy Shire Council* (2003) QPELR 447 and *Wingate Properties Pty Ltd v Brisbane City Council* (2001)QPELR 271.
- [85] Further, he submitted that the expression “alternative site” where used in the DNRW policies is limited to an alternative clearing site in the relevant site as a whole, to which the proposal relates. I think that is clearly correct.
- [86] It was submitted that this approach reflected the “purposive approach” to statutory interpretation (s 14A *Acts Interpretation Act*) and reflected the judgments in *Mudie v Gainriver Pty Ltd* (2002) QCA 546; and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 353.
- [87] It was submitted that even if the proposal did not comply with all aspects of the relevant policies, it nevertheless achieved the purpose of the VMA. That is, that the proposal was consistent with the relevant policies. Alternatively, it was submitted that if there was inconsistency the court nevertheless had power to approve the development notwithstanding that inconsistency because of the merit of the proposal, the preferred approach to the use of the policies and guidelines and the power of the court to impose conditions.
- [88] It was submitted that the first co-respondent’s submission of a suitable alternative site (the alternative lot layout and use of already cleared land) was untenable and would not achieve the policy objectives.
- [89] Mr Haydon submitted that in the absence of any vegetative clearing (if that approach was a viable alternative, which he submitted it was not), the DNRW would not have an interest in the proposal and hence there would be no offsets, no policy oversight by DNRW and no involvement by that agency in the development of any conditions.
- [90] It was submitted that the proposal met the requirements of clearing in the context of maintaining viable networks of wildlife habitat and maintaining the current extent of essential habitat (performance requirement PR A2.7 in the policies and PR A8in the code), through the regime of conditions that were postulated in the submission. In respect to performance requirement PR P4 in the code, it was submitted that relevant connectivity over the site would be improved over time.
- [91] It was submitted that the offsets would be achieved through regeneration of tree species that make up the habitat of the southern cassowary and the mahogany glider. The site already comprised a mix of cleared areas, open woodland and rainforest (exhibit 29) and the essential habitat map for the southern cassowary described the essential habitat (exhibit 12) in terms that could be achieved by the imposition of conditions. In so far as the mahogany glider habitat was concerned, it was generally open woodland, open tree canopy and under storey structure) (exhibit 13). It was submitted that this habitat is already under challenge from weed infestation including forest vine and the spread of rainforest species with the resulting in vegetation density. The proposal in its conservation management regime would be preferable to the gradual degradation of the site so far as the mahogany glider was concerned.

***First Co -Respondent***

- [92] Mr Morzone submitted that the proposal did not sufficiently identify the areas of essential habitat that were in fact to be cleared and that this was a significant omission. The essential habitat for the southern cassowary and mahogany glider were important. The site is within the southern extent of cassowary distribution (exhibit 12) and the vegetation proposed to be cleared is one of the regional ecosystems forming essential habitat for the southern cassowary and there was evidence of the use of the site by that species. The site also contained essential habitat for the mahogany glider and was within the known limit of distribution of the species. The proposal, it was submitted, would increase the degree of habitat fragmentation and the size of the fragments of habitation and expose the mahogany glider to the risk of extinction on the site.
- [93] In so far as biodiversity was concerned, the experts were in agreement that the site was very bio-diverse in a regional/district context.
- [94] It was submitted that the proposal did not meet the performance requirements of either MCU policy or RaL policy: that is, clearing could only occur where there was no alternative site. Mr Morzone submitted there was an alternative site: that is, moving the houses and tourist cabins out of the forest onto cleared land to avoid any clearing of vegetation. It was submitted that the proposal should be refused because it failed the "alternative site" performance requirement under the previous and current policies and failed to maintain the current extent of essential habitat and viable networks of wildlife habitat. In so far as fire management plans were concerned there was no agreement between the experts and it remained an issue which the appellant had failed to discharge in the proceedings. Enforcement of such a plan was a real issue.
- [95] The proposed offsets it was submitted did not meet all of the criteria of the policies and hence the offsets were not an alternative solution. Insofar as the interim policy for vegetation management offsets was concerned, Mr Morzone submitted that weight should be given to the current policy. He referred to the difference in species proposed in the offset from those in the areas to be cleared and to the time delay for the offset on previously cleared land to mature to the extent of providing essential habitat for the affected species. He referred to what he implied was the unsatisfactory nature of Dr Olsen's evidence. He referred to the evidence that the offset vegetation would take many years to achieve sufficient maturity for flowers and fruiting, for development of hollows, and for sufficient height to allow gliding movement. There was uncertainty of successful regeneration and infilling on offset areas. There was a distinction between a long term outcome (as was proposed) and the maintenance of the current extent of essential habitat. He posed the rhetorical question of "what happens to the species in the meantime?"
- [96] It was submitted there would be a loss of biodiversity - a loss of viable network, particularly between Mt Separation and Mt Cudmore.
- [97] In this case it was submitted that the precautionary principle should be applied and was warranted in the circumstances.

- [98] There were no detailed conditions that could satisfy the Court that the relevant performance requirements would be met. See *Mansell v Maroochy Shire Council* (20070 QPEC 122 (at para 137); *Pinjarra Hills v Brisbane City Council* (1995) QPLR 333; *Jeteld Pty Ltd v Council of the City of Toowoomba* (1997) QPELR 213; *Nifsan Pty Ltd v Gold Coast City Council* (1998) QPELR 66; *Yamauchi v Jondaryan Shire Council* (1998) QPELR 452; *Histpark (supra)*; and *Edgarange Pty Ltd v Redlands Shire Council* (2001) QPELR 241.
- [99] Mr Morzone said the proposal was replete with uncertainty of impacts and lack of detailed management and implementation provisions. The thrust of the applicant's submission, he said, was to rely on fixing things later but nevertheless to do the clearing now. That would, he said, create a position where clearing would be irreversible.
- [100] He referred to the reservations expressed by the experts: Mr Agnew's reference to the proposal requiring considerable management, Mr Buosi's reference to the difficulty of putting management plans and measures in place that was good for both species of fauna; Dr Wannan's statement that the offset areas were starting from a very low position of almost nothing, they being essentially pasture grasses and the lengthy period that would be required to even approximate the quality of the current remnant essential habitat. Mr Chenoweth's reservations as to the offsets achieving their intent, given their current bare state and the paucity of natural regeneration currently in place; and Dr Jackson's view that there were so many provisos applicable to the proposal that one needed to take heed of the precautionary principle.

***Response by the First Co –Respondent***

- [101] The written submissions were filed a little out of order for reasons that don't matter here save that the co-respondent's response submissions came after the appellant's submissions which were filed second in time.
- [102] Mr Morzone sought to correct an issue about a fire management plan. It seems to me that he is correct in asserting that the fire management plan that was in issue in the proceedings is not the plan which was already the subject of conditions. The bushfire management plan, properly called, in the conditions related to an area of land that is not part of any issue in the proceedings. It had as its purpose the protection of vegetation to the west of the railway line from fire. The fire management plan which is in issue in this appeal relates to fire management of essential habitat, primarily for the mahogany glider.
- [103] Mr Morzone referred to the primary evidentiary position adopted by the first co-respondent's experts. I do not think there is any doubt that their primary position is that the development should not proceed. As I have already indicated in one instance, where there were discussions of appropriate conditions they were conducted in the context of an approval being granted and making the best of what then would be necessity for conditions upon such approval: that is, a secondary position. He also referred to the weight that might be given to the subsequent policies and to avoiding compromise of the current policies by a decision based upon former or interim policies, in the context of what he submits as an analogous position with the implementation of a new planning scheme yet to come into effect which might be frustrated by approval of the development based on a former scheme

as that principle is articulated in *Coty (England) Pty Ltd v Sydney City Council* (1957) 2 LGRA 117.

- [104] The appellant had raised the issue of the first co-respondent's obligations as "the perfect litigant". That submission, which I do not need to go into in detail, was advanced in the context of the cooperative development of conditions that might apply to the subsequent operational permits following a preliminary approval of the application.
- [105] There is no question that conditions can be imposed by the court as part of the process of an appeal but Mr Morzone submitted that the fundamental and critical issue went beyond that and to the very question of whether an approval should be granted at all. I agree with this view.

### **FURTHER DISCUSSION**

- [106] The submission to the effect that conditions would be binding and would attach to the land does not have regard to the fact that conditions and bylaws can be amended by resolution of a body corporate under the *Body Corporate and Community Management Act 1997*. hence the certainty of the inviolability of conditions imposed by the court is not as watertight as the appellant submits it would be.
- [107] I do not accept that if there was no vegetative clearing the principles applied by DNRW would or could be avoided. It seems to me that the policies are still of relevance either through the Act or, indirectly and to a more limited extent, through the State Planning requirements.
- [108] I have been very troubled by two primary and important matters in this appeal: the first is the process that the court might adopt in dealing with its decision on the application; and secondly the type, content and execution of a range of conditions that might be applied to any preliminary approval. I have also been concerned about the effect of a preliminary approval in so far as a permit to clear vegetation is concerned, even if that were postponed by undertaking until the conditions were imposed. It is the execution phase of the conditions – that is, whether they are capable of being achieved – that are of the most immediate concern. If the conditions imposed were unable to be implemented for reasons either not anticipated in the formulation process or by events out of the control of the parties or the court or indeed by impossibility of performance (since we are dealing here with matters over which nature has the primary control) then the approval process would be thwarted and the intent that might accompany any preliminary would fail to be achieved. In that sense, the approval process would be irreversibly flawed.
- [109] The present unknown or speculative content and quality of any conditions that might be agreed or through imposition by the court be attached to relevant approvals or permits presents, in my view, a significant problem for the appellant. Whilst there is authority for proceeding in the way that the appellant submits is appropriate, the court is being asked in this case to do so in a factual context which is quite different from that which was the case in the authorities to which I have been referred.

- [110] The first co-respondent has adopted the position that the appellant has failed to discharge the onus it bears in the appeal, it having been open for them to have done so by dealing with the issues that it seeks to postpone, in the appeal.

## **CONCLUSION**

- [111] In my view there is a great deal of uncertainty in the effectiveness or security of execution of the conditions that have been postulated in the appeal. In so far as the offset is concerned, I am not satisfied that even a less than optimal achievement of a viable offset is able to be achieved at all and most certainly within the time frames referred to in the evidence. Even at its best, it is unlikely that the offset vegetation would become essential habitat in less than 20 years. Hence the conservation of this regional eco system would be significantly affected. The risk of a loss of biodiversity and the threat to the maintenance of ecological processes is so significant that I do not think that it can be addressed by the process advocated by the appellant.
- [112] I am satisfied that there is a suitable alternative site for the proposal which does not involve the clearing of essential habitat. Whilst the alternative may not be as attractive from a tourist development point of view, it is nevertheless viable from a residential perspective. The development on the crest of Mt Separation, scaled down to providing a community facility without the clearing of the surrounding vegetation, would nevertheless I would have thought be attractive and of utility in any development. The essential habitat, rather than in effect enveloping residential premises would be simply adjacent to them where they are constructed on land that is already cleared. The present degradation of the edges of the essential habitat would seem to me to be capable of being addressed by appropriate husbandry measures without the destruction of vegetation mapping line or the habitat itself. Similarly, controlled burning within the essential habitat could proceed without there being as great a risk as might potentially be caused to residences that might otherwise be embedded in the vegetation.
- [113] Above all, it seems to me that this is a case where the precautionary principle should be applied and that finally persuades me that the appellants should not succeed on the appeal.

## [114] **ORDERS**

- 1 The application is refused.
- 2 The appeal is dismissed.
- 3 No order as to costs.