



Appeals Convenor
Environmental Protection Act 1986

**REPORT TO THE
MINISTER FOR ENVIRONMENT**

APPEAL AGAINST DECISION TO GRANT A CLEARING PERMIT
**CPS 8166/1: CLEARING OF UP TO 0.24 HECTARES OF NATIVE
VEGETATION ON BEDFORD STREET ROAD RESERVE, MOUNT
HELENA**

PROPONENT: SHIRE OF MUNDARING

Appeal Number 015 of 2019

August 2019

Appeal Summary

This is a report on an appeal against a decision of the Department of Water and Environmental Regulation (DWER) to grant a permit to clear up to 0.24 hectares of native vegetation through a local road reserve at Mt Helena, for the purpose of constructing a local road.

The appellants contended that the clearing posed a risk to the flora and fauna values of remnant bushland, particularly impacts to habitat for threatened black cockatoo species. The appellants also contended that the proposed clearing was inconsistent with zoning under the local town planning scheme, and that other options should be explored before remnant native vegetation is cleared to provide for the proposed road extension.

In its assessment of the application, DWER found that the proposed clearing is unlikely to impact on conservation significant flora or ecological communities. In relation to fauna, DWER determined that the clearing may lead to the loss of habitat trees that are suitable nesting habitat for black cockatoo species but considered that the clearing was acceptable subject to the applicant implementing conditions to avoid, minimise and mitigate potential impacts.

Having regard to the issues raised in the appeal, the purpose and extent of the proposed clearing, advice provided by DWER, and information obtained in discussion with the appellants and permit holder, DWER's assessment of the vegetation under application is supported and its decision to grant the permit subject to conditions was justified. It is considered that the conditions specified in Clearing Permit CPS 8166/1 are appropriate to ensure that activities are undertaken in a manner which minimise the risk of potential environmental impacts and mitigate significant impacts resulting from the clearing of native vegetation within the application area.

Recommendation

It is recommended that the appeal be dismissed.

INTRODUCTION

This report relates to an appeal lodged by J and A Perlinski (the appellants) in objection to the grant and specifications of Clearing Permit CPS 8166/1 (the clearing permit), which was granted by the Department of Water and Environmental Regulation (DWER) to the Shire of Mundaring (the applicant/permit holder) on 8 March 2019.

The clearing permit authorises the clearing of up to 0.24 hectares (ha) of native vegetation for the purpose of road construction within the Bedford Street road reserve (PIN 11464128 and 11837356), Mount Helena, Shire of Mundaring (the application area). The location and extent of the clearing are shown in Figures 1 and 2 respectively.

Figure 1 – Proposal location



(Source: Google Maps June 2009)

On 15 August 2018, DWER received an application from the applicant to clear 0.24 ha of native vegetation within the application area.

The applicant is proposing to upgrade Bedford Street in Mount Helena by connecting two end points to make a through road along the road reserve.

The application was advertised on DWER's website on 6 September 2018 with a 14-day submission period, with one public submission being received outside the submission period. The submission objected to the clearing on the basis that the Bedford Street road reserve contains habitat trees for native fauna.

On 8 March 2019, DWER granted Clearing Permit CPS 8166/1 subject to conditions, including requirements to avoid, minimise and reduce the impacts and extent of clearing, implement fauna management and dieback and weed management, and keep records and report on activities done in accordance with the permit.

It was against DWER's decision to grant the clearing permit that the appeal was received.

This document is the Appeals Convenor's formal report to the Minister for Environment under section 109(3) of the *Environmental Protection Act 1986* (EP Act).

Figure 2 – Extent of clearing activities (outlined in yellow)



(Source: DWER CPS 8166/1)

OVERVIEW OF APPEAL PROCESS

In accordance with section 106 of the EP Act, a report was obtained from DWER in relation to the issues raised in the appeal. The applicant was also given the opportunity to address the matters raised in the appeal.

During the appeal investigation the Appeals Convenor met with the appellants to discuss the issues raised in the appeal and visited the application area with a representative of the applicant.

The environmental appeals process is a merits-based process. For appeals in relation to a DWER decision to grant a clearing permit, the Appeals Convenor normally considers the environmental merits of the assessment by DWER based on principles as set out in Schedule 5 of the EP Act, as well as other environmental factors. Questions of additional information

not considered by DWER, technical errors and attainment of relevant policy objectives are normally central to appeals.

OUTCOME SOUGHT BY APPELLANTS

The appellants requested that the clearing permit be refused on the basis that DWER's assessment of the clearing application was flawed, or if the clearing permit is not refused then the appellants requested that the permit holder consider an alternative proposal to establish a track along the appellants' firebreak for local traffic only and avoid the need to clear native vegetation.

GROUND OF APPEAL

The matters raised by the appellants have been broadly summarised under the following grounds:

1. Assessment of the environmental values of the application;
2. Impacts to fauna; and
3. Planning matters.

GROUND 1: ASSESSMENT OF THE ENVIRONMENTAL VALUES OF THE APPLICATION

The appellants submitted that DWER's assessment of clearing application CPS 8166/1 had incorrectly applied the Keighery Condition Scale in determining that the native vegetation within the application area is in a 'good to degraded' condition. The appellants were of the view that the condition of the vegetation is 'very good to good'. The appellants questioned the timing of DWER's site inspection, noting that the peak flowering period for the area is weather dependant and limited in duration, making it difficult to identify some flora species outside the flowering period. The appellants also submitted that recent clearing along a neighbour's fence line and weed incursion into the application area may have affected DWER's assessment.

Consideration

DWER's assessment of the application, detailed in the Decision Report, determined that the vegetation within the application area is in a 'good to degraded' condition (Keighery 1994).

In response to this ground of appeal, DWER advised that the type and condition of the native vegetation within the application area was determined through the site inspection undertaken by DWER officers, using the Keighery Condition Scale derived from *Bushland Plant Survey: A Guide to Plant Community Survey for the Community*¹. DWER's Site Inspection Report² states that the site inspection was undertaken on 30 November 2018.

DWER advised that the application area had obvious signs of disturbance that had severely impacted the vegetation structure, and that there are areas of vegetation where the undergrowth was limited by sheoak litter. DWER noted that the suppression of the undergrowth by litter is a natural process, and that such vegetation could be considered to be in a very good condition. DWER submitted in response to the appeal, that the condition of the vegetation within the application area is very good to degraded, with vegetation predominantly in a good condition.

¹ Keighery, BJ (1994) *Bushland Plant Survey. A Guide to Plant Community Survey for the Community*. Wildflower Society of WA (Inc), Nedlands, Western Australia

² DWER, *Response to the Appeal*, 17 May 2019, Att. 1.

The Keighery Condition Scale is illustrated in Appendix 1, which outlines the various levels of vegetation condition and the difference between the levels, including 'very good', 'good' and 'degraded'.

DWER's published Guide 2, *A guide to the assessment of applications to clear native vegetation*³ outlines that condition is a rating given to bushland to categorise disturbance related to human activities. The rating refers to the degree of change in the structure, density and species present in the bushland in relation to undisturbed bushland of the same type. Guide 2 states that in assessing the vegetation condition for clearing permit applications, assessors require the current condition of the vegetation, and that vegetation communities have the ability to regenerate following natural disturbance events to which the ecosystem is adapted (e.g. fire). Guide 2 also states that to ensure the vegetation's ability to regenerate is acknowledged in condition ratings, where a natural disturbance event has occurred, consideration is also given to the vegetation's regenerative capacity and environmental values of the site which have the ability to return with time without intervention.

In this case, DWER advised that while some areas of vegetation within the application area are in a better condition than stated through its assessment, it would not have altered the variance levels of each of the clearing principles, or have changed the decision to grant the clearing permit subject to conditions.

DWER advised that the condition of the vegetation is considered when assessing the clearing principles related to biodiversity, and in this instance, the condition of the vegetation was not considered to be a determining factor when assessing the application against each of the relevant clearing principles.

In this regard, DWER advised that:

- Clearing principles (a) biodiversity and (c) threatened flora were determined not likely at variance. A review of available datasets identified that two threatened flora, five Priority 3 and three Priority 4 species had been recorded within 10 kilometres of the application area. However, the Decision Report concluded that habitat types for the threatened flora are not present in the application area and if Priority 3 and 4 species are present within the application area, the proposed clearing is unlikely to impact upon the conservation status of these species.
- Clearing principle (b) significant habitat was determined to may be at variance as the application area has habitat trees that may be suitable for nesting black cockatoos.
- Clearing principle (d) threatened ecological community (TEC) was determined not likely at variance as no threatened ecological community or priority ecological community (PEC) have been recorded in the vicinity of the application area.
- Clearing principle (e) significant remnant was determined not likely at variance as the vegetation complex represented in the application area, and the native vegetation within the local area, have a greater than 30 per cent cover of their pre-European extent.

In relation to the appellants' concern around the timing of DWER's site inspection, Guide 2 indicates that the level of effort required with respect to surveys to assess biodiversity should correspond with the existing data for the area. That is, where less existing information is available then a greater survey effort would be required.

³ Department of Environment Regulation, *A guide to the assessment of applications to clear native vegetation – Under Part V Division 2 of the Environmental Protection Act 1986*, Guide 2, December 2014.

In this instance, DWER conducted a desk top assessment of available data sets and identified that two threatened flora, five Priority 3 and three Priority 4 species had been recorded within the local area. The Decision Report identifies the threatened flora species as *Acacia aphylla*, which is associated with granite outcrops on hillsides, and *Grevillea flexuosa*, which grows on ridgetop plateaus and associated breakaways.

In this regard, the Site Inspection report states that:

The area did not contain granite outcrops, or ridgetop plateau and associated breakaways associated with *Acacia aphylla* and *Grevillea flexuosa*, respectively, which have been recorded in the local area.

In relation to the risk of impacts to priority flora species, DWER concluded that the proposed clearing is unlikely to impact upon their conservation status, due to it is understood, the relatively small scale of the clearing footprint.

The Decision Report states that DWER's assessment of available data sets also found that no TEC or PEC have been recorded in the vicinity of the application area.

In relation to clearing principle (e), the Decision Report states that the application area is located within the Jarrah Forest (IBRA) bioregion and within the mapped South West Forests vegetation D2 complex, which retain approximately 53 and 82 per cent of their pre-European vegetation extents respectively, and that the local area (10 kilometre radius) retains approximately 45 per cent native vegetation cover. The *National Objectives and Targets for Biodiversity Conservation 2001-2005*⁴ include a target to have clearing controls in place that prevent clearance of ecological communities with an extent below 30 per cent of that present pre-1750. Given this, DWER determined that the proposed clearing is not likely to be at variance to clearing principle (e).

Noting the above, particularly DWER's advice with regards to the assessment of vegetation condition within the application area and in relation to the potential risks to conservation significant flora and ecological communities posed by the intended clearing, it is considered that DWER's assessment of the clearing application against clearing principles (a), (c), (d) and (e) was appropriate and supported by the available evidence.

DWER's assessment of the clearing application against clearing principle (b) is examined in Ground 2.

GROUND 2: IMPACTS TO FAUNA

The appellants contended that the application area has been identified as potential habitat for black cockatoo species, and that the proposed clearing will have unacceptable impacts on black cockatoo and other fauna which use the area.

The appellants noted that the site inspection undertaken by DWER had identified three potential habitat trees for black cockatoo within the application area and were of the view that it was unacceptable to replace cleared trees with artificial nesting hollows.

The appellants also contended that pruning of remaining trees to remove large branches (dead or alive) overhanging the proposed road within the application area would destroy fauna habitat provided by branch hollows.

More broadly, the appellants submitted that the native vegetation within the application area and adjoining lands currently provide significant refuge and a corridor for local fauna, and that

⁴ Commonwealth of Australia, *National Objectives and Targets for Biodiversity Conservation 2001-2005*, Canberra, 2001.

the proposed clearing and construction of the road will lead to an increase in traffic, vehicle speeds and incidents of fauna road kill.

Consideration

As discussed in Ground 1, DWER has submitted that on review, it appears that the condition of the vegetation within the application area is very good to degraded, with vegetation predominantly in a good condition. It is noted that this description is directed to the condition of understorey vegetation, and that the level of understorey disturbance does not detract from the habitat value of the overstorey for black cockatoo and other fauna.

DWER's Site Inspection Report states that there are three large mature trees within the vicinity of the application area, one containing hollows possibly suitable for black cockatoo nesting. In this regard, the Decision Report states that the application area has been identified as potential habitat for Carnaby's cockatoo (*Calyptorhynchus latirostris*), Baudin's cockatoo (*Calyptorhynchus baudinii*) and forest red-tailed black cockatoo (*Calyptorhynchus banksii naso*).

The three species of black cockatoo identified in the clearing permit are listed as having conservation significance. The species use tree hollows for nesting, and the clearing of such vegetation for agriculture and urban development has led to population declines.

DWER's mapping identifies the vegetation the subject of this application as being part of confirmed breeding habitat for Carnaby's cockatoo, and within the buffer of unconfirmed roost sites and potential feeding habitat for the species.

It is noted that in granting the permit, DWER determined that potential impacts to black cockatoos from the clearing could be managed through conditions applied to the permit. The Decision Report also indicates that the application area is not known to support other species of conservation significant fauna.

Guide 2 outlines that native vegetation clearing should only be considered after all other reasonable attempts to mitigate adverse impacts have been exhausted, and that potential environmental impacts should be addressed using the impact mitigation sequence.

Consistent with this Guide, it is noted that DWER applied the impact mitigation sequence through Condition 1 to the clearing permit to minimise the impact of clearing. The condition requires the permit holder to:

- avoid the clearing of native vegetation;
- minimise the amount of vegetation to be cleared; and
- reduce the impact of any clearing on any environmental value.

DWER advised that the permit holder had habitat trees assessed by an arborist with the intent of retaining the trees deemed to be structurally sound. During the appeal investigation, the Office of the Appeals Convenor undertook a site visit with the permit holder's representative who advised that the road alignment has been designed to avoid and minimise clearing, particularly larger trees within the application area.

DWER has also applied fauna management conditions which require the permit holder to undertake the following measures with respect to black cockatoo:

- fauna specialist to inspect suitable black cockatoo nesting trees immediately prior to clearing (Condition 4 (a));

- if suitable nesting tree/s are occupied by black cockatoos then no clearing is to occur within 10 metres until a fauna specialist verifies that the tree/s are no longer occupied by black cockatoos (Condition 4 (b)); and
- prior to clearing a suitable nesting tree that was previously occupied by black cockatoos, an artificial black cockatoo nest hollow is to be appropriately installed, monitored and maintained within the specified areas adjacent to the application area, for a period of at least ten years (Condition 5).

Noting the above, it is considered that DWER's assessment of the clearing application against clearing principle (b) was appropriate and justified by the available evidence, and that the requirements of the permit will assist in mitigating any potential impacts to black cockatoos from the clearing of native vegetation within the application area.

GROUND 3: PLANNING MATTERS

The appellants contended that road access along Bedford Street was adequate and that other options should be explored before remnant native vegetation is cleared to provide for the proposed road extension.

The appellants advised that they have proposed an alternative option to the proposed clearing and road construction to the Shire of Mundaring. The appellants have suggested the alternative of using their existing firebreak for use by local traffic and for emergency use. The appellants are of the view that a six metre wide sealed bitumen road is unnecessary and that their gravel firebreak would be sufficient to provide through access for local traffic between the southern and northern sections of Bedford Street.

The appellants also contended that the area is zoned 'Special Rural' and is designed to maintain intact the local flora and fauna values.

Consideration

By section 51O of the EP Act, in considering an application for a clearing permit, the CEO of DWER (and by extension, the Minister on appeal) is required to have regard to:

- the clearing principles so far as they are relevant to the matter under consideration; and
- any planning instrument, or other matter, that are considered relevant.

Guide 2 outlines the planning and other matters that might be relevant when making a decision on a clearing permit. With regard to planning matters, Guide 2 states that DWER will have regard for planning instruments, relevant local and regional level planning strategies, by-laws and policies.

In relation to the appellants' concerns with regards to zoning, DWER advised that:

In the Shire of Mundaring Local Planning Scheme No. 4, the area proposed to be cleared is within Bedford Street road reserve, Mount Helena which is zoned as 'other local roads'. The areas adjacent to the road reserve and the surrounding area is zoned 'rural residential'.

In section 4.2.2 of the Shire's Local Planning Scheme No 4, Rural Residential is defined as:

- a) To provide for residential use in a rural setting, in suitable and appropriate locations in reasonable proximity to services.
- b) To conserve the natural environment as far as possible for the enjoyment of residents as well as the maintenance of ecological and landscape values,

particularly by the protection of native vegetation (trees and understorey) and by water-sensitive development...

The Delegated Officer had regard for the zoning of the road reserve and considered that the purpose of the clearing is consistent with the zoning of 'other local roads'.

Guide 2 also states that in determining the necessity of the clearing, higher priority will be given to clearing for public use than private benefit or commercial gain.

In relation to the consideration of alternatives to the proposed clearing, DWER advised that:

The Permit Holder has indicated on their application form that alternatives to avoiding and minimising the need for clearing have been considered. In particular, the Permit Holder had the habitat trees assessed by an arborist with the intent of retaining the trees deemed to be structurally sound.

The Permit Holder is responsible for planning, building and maintaining the road network in its jurisdiction. It is DWER's function to conduct an assessment of the proposed clearing area against the clearing principles, identify the environmental values and potential impacts from clearing, and impose conditions to mitigate and minimise these impacts.

The Permit Holder may amend or surrender the clearing permit, if the Appellant's offer is a suitable alternative.

During the site visit undertaken by the Office of the Appeals Convenor, the permit holder's representative advised that the alternative road alignment suggested by the appellants had been considered. However, it was indicated that forming a six metre wide sealed bitumen road along the alignment of the existing firebreak would require more clearing than the 0.24 ha authorised under the clearing permit.

It is noted that the selection process for the road alignment and the merits of alternative options, is beyond the scope of DWER's assessment process.

OTHER MATTERS

The appellants disagreed with the applicant's claim that a large leaning tree within the application area is at risk of falling and submitted that the subject tree has been in the same condition for over 35 years and is alive, stable and provides significant habitat for fauna.

During the site visit undertaken by the Office of the Appeals Convenor, the permit holder's representative indicated that the leaning tree was outside the road alignment, however an arborist had assessed the tree and recommended that it be removed for safety reasons.

The Decision Report states that the removal of a tree to prevent imminent danger is exempt from requiring a clearing permit provided the clearing is undertaken in accordance with Regulation 5, Item 2 ('Clearing resulting from accidents or to reduce danger') of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (Clearing Regulations). The removal of the leaning tree, in accordance with the Clearing Regulations, is therefore considered to be beyond the scope of the appeal rights in respect to the grant of a clearing permit.

CONCLUSION AND RECOMMENDATION

Having regard to the issues raised in the appeal, the advice from DWER and the applicant, and the information obtained in discussion with the appellants, it is considered that the DWER was justified in its decision to grant the clearing permit. In particular it is noted that:

- in response to the appeal, DWER advised that some areas of vegetation within the application area are in better condition than stated through its assessment, however it would not have altered the outcome of the assessment;

- DWER advised that the proposed clearing is unlikely to significantly impact conservation significant flora or ecological communities within the vicinity of the application area;
- the clearing permit authorises the limited clearing of up to a maximum of 0.24 ha of native vegetation within a well-vegetated landscape;
- DWER determined that the clearing may lead to the loss of habitat trees that are suitable nesting habitat for black cockatoo species but considered that the clearing was acceptable subject to fauna management conditions to mitigate potential impacts to black cockatoos. Conditions 4 and 5 require the permit holder to inspect potential habitat trees, delay clearing until habitat trees are no longer in use (where identified as being occupied), and install artificial hollows to replace confirmed habitat trees;
- the permit also contains requirements to keep records and report on activities carried out under the permit; and
- the purpose of the clearing is consistent with the zoning of the area proposed to be cleared, which is located within the Bedford Street road reserve, and zoned as 'other local roads' under the Shire of Mundaring Local Planning Scheme No. 4.

It is therefore recommended that the appeal be dismissed.

Emma Gaunt
APPEALS CONVENOR

Investigating Officer:
Michael Power, Senior Appeals Officer

APPENDIX 1

Keighery Condition Scale (Keighery 1994)
<p>Pristine Pristine or nearly so, no obvious signs of disturbance</p>
<p>Excellent Vegetation structure intact; disturbance affecting individual species; weeds are non-aggressive species</p>
<p>Very good Vegetation structure altered; obvious signs of disturbance <i>For example, disturbance to vegetation structure caused by repeated fires; the presence of some more aggressive weeds; dieback; logging; grazing</i></p>
<p>Good Vegetation structure significantly altered by very obvious signs of multiple disturbances. Retains basic vegetation structure or ability to regenerate it. <i>For example, disturbance to vegetation structure caused by very frequent fires; the presence of some very aggressive weeds at high density; partial clearing; dieback; grazing.</i></p>
<p>Degraded Basic vegetation structure severely impacted by disturbance. Scope for regeneration but not to a state approaching good condition without intensive management. <i>For example, disturbance to vegetation structure caused by very frequent fires; the presence of very aggressive weeds; partial clearing; dieback; grazing</i></p>
<p>Completely Degraded The structure of the vegetation is no longer intact and the area is completely or almost completely without native species. <i>These areas are often described as 'parkland cleared' with the flora comprising weed or crop species with isolated native trees or shrubs.</i></p>

(Source: Australian Government and Department of Environment and Conservation 2009)