

Our Ref: 1015645

10<sup>th</sup> January 2010

Mr Garry Fielding- Chair  
 Hunter and Central Coast Region JRPP  
 c/ Port Stephens Council  
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Dear Mr Fielding

**Proposed Eight (8) Lot Subdivision 155 Salamander Way, Salamander Bay – 811/2009, in Port Stephens LGA**

We act for the Tomaree Ratepayers & Residents Association (“TRRA”) in relation to the abovementioned development application. TRRA is very concerned amongst other matters about the possible impacts the development may have on the local Koala population. We understand that the Council has referred this matter to the Hunter and Central Coast Region JRPP for their approval on the basis that as the proponent of this development it would not be appropriate for it to exercise its functions as a consent authority in this case.

As a Community Legal Centre that specialises in public interest environmental law, we draw to your attention the following legal issues associated with this development that may impact on your decision in this matter.

We understand that the JRPP is making a decision about this development. We are instructed that in May 2010, Port Stephens Council purported to waive compliance with the Port Stephens Koala Plan of Management (PSKPoM) for this DA. The Statement of Environmental Effects for this development found that it did not comply with the Performance Criteria set out in the PSKPoM. On the basis that the development of community facilities in the public interest outweighs koala habitat it sought a waiver from the PSKPoM.

We draw your attention to *State Environmental Planning Policy no. 44 – Koala Habitat Protection* (“SEPP 44”) and the PSKPoM which constitutes compliance with SEPP 44 for relevant matters in the Port Stephens local government area. As you would be aware, the requirements of s.79C of the *Environmental Planning and Assessment Act 1979* states in determining a development application, a consent authority is to take into consideration (i) any environmental planning instrument. SEPP 44 states at clause 9

*(1) Before a council may grant consent to a development application for consent to carry out development on land to which this Part applies that it is satisfied is a core koala habitat, there must be a plan of management prepared in accordance with Part 3 that applies to the land.*



(2) *The council's determination of the development application must not be inconsistent with the plan of management.*

It is therefore not possible for the JRPP to consider SEPP 44 without complying with the requirements of the PSKPoM.

The principal aim of the PSKPoM is to encourage the proper conservation and management of areas of natural vegetation that provide habitat for Koalas to ensure a permanent free-living population over their present range and to reverse the current trend of Koala population decline. The Koala is an animal of national and international significance. Therefore, any adverse impact on local Koala populations has a national and international context. Both Council and an independent expert have acknowledged that the proposed development does not comply with the PSKPoM and SEPP 44, and accordingly Council sought a waiver from compliance. Our clients are concerned that Council has granted itself a waiver from compliance with its own Comprehensive Koala Plan of Management when Salamander Bay is an environmentally sensitive area identified as preferred Koala habitat, the most important category of Koala habitat in the Port Stephens Local Government area and Koalas are listed as a vulnerable species under the *Threatened Species Conservation Act 1995*.

We are of the view that the waiver Council has purported to give itself should not be followed by the JRPP. There are significant issues about whether the decision is affected by bias and appropriate in the circumstances where the Council is also the consent authority. Procedurally Appendix 4 of the PSKPoM sets out a clear procedure for waiver of the PSKPoM. It has not been followed in this case. In particular, it states that the criteria can only be waived for the purposes of establishing a building envelope and associated works, and only if certain criteria as follows are satisfied:

1. That the building envelope and associated works include fire fuel reduction zones cannot be located in such a way that would avoid the removal of native vegetation with Preferred or Supplementary Koala Habitat, Habitat Buffers, or Habitat Linking Areas or removal of preferred koala food trees;
2. That the location of the building envelope and associated works minimises the need to remove vegetation as per 1 above;
3. That in the case of subdivisions, they are designed in such a way as to retain and enhance koala habitat on the site and are consistent with the objectives of this appendix; and
4. That koala survey methods (as per the Guidelines for Koala Habitat Assessment in Appendix 6) have been used to determine the most appropriate location for the building envelope and associated works (so as to minimise the impact on koala habitat and any koala populations that might occur on the site).

There is not sufficient information or application of these criteria to the waiver in this case. We are of the view therefore that no such waiver could be provided to the Council in this case. Any failure to provide such analysis would leave the JRPP open to judicial review proceedings by any person dissatisfied with any decision about the application of the PSKPoM in this case.

Please do not hesitate to contact me if you have any questions or queries about this letter.

Yours sincerely

**Environmental Defender's Office (NSW) Ltd**

  
**Kirsty Ruddock**  
Principal Solicitor

