Community Environment Network Inc.

An alliance of community & environment groups.

and

A community group working towards advocating all levels of Government to improve planning outcomes and achieve more environmentally sustainable, ecologically sound and liveable environments for our communities.

2 October 2023

Director – Industry Assessments
Planning and Assessment
Department of Planning, Industry and Environment
Locked Bag 5022, PARRAMATTA NSW 2124

Re SSD – 14082938, Education Establishment St Philip's Christian College, CHARMHAVEN

Dear Sir/Madam,

This submission is in response to the State Significant Development (SSD) -14082938, Education Establishment St Philip's Christian Collee, CHARMHAVEN. This submission is a joint submission prepared on behalf of the Community Environment Network (CEN), Dr Guy Dutson and the Central Coast Community Better Planning Group (CCCBPG).

The CEN is the Central Coast's peak environmental organisation on the Central Coast. The mission of CEN is to advocate in favour of Ecologically Sustainable Development (ESD) and oppose threats to ESD. Due to the complexity of the biodiversity issues associated with this application the CEN worked closely with Dr Dutson to gain a better understanding of the implications of how the local biodiversity will be impacted by this application.

Dr Guy Dutson is the Director of a small consultancy based in the Central Coast of NSW specialising in biodiversity offsets. I understand that Dr Dutson has worked for governments, corporates and civil society on biodiversity conservation for 35 years, on biodiversity offsets for 12 years and have written guidance for the Australian government biodiversity offsets policy. Dr Dutson has informed me that he has no financial or other interests with the project or the proponent. Dr Dutson assisted in preparing this submission without any payment for financial benefit to myself and his input is based on a personal assessment of the site as well as reference from subject experts.

The Central CCCBPG includes representatives from all five Central Coast Council wards with a professional or close interest in local planning matters. The Better Planning Group meets weekly via zoom meetings to discuss planning on the Central Coast.

Both CEN and the CCCBPG are particularly concerned about habitat loss across the Central Coast due to ongoing clearing of native bushland on public and private property to make way for housing and infrastructure. It is our concerns about habitat loss that have prompted us to make this joint submission in response to this SSD.

Executive Summary

1. *We understand this application is reliant upon the NSW offsetting policy. We direct the Departments attention to the review undertaken by the NSW Auditor-General in 2022 as "not effectively designed" and "key concerns around the Scheme's integrity, transparency, and sustainability are also yet to be fully resolved". Assessment should be subject to the outcomes of the Auditor-General's recommendation that "By July 2023, Department of Planning and Environment (DEP) should implement a long-term strategic plan for the Scheme that defines biodiversity goals with respect to the Biodiversity Conservation Act 2016 (BC Act)".*

2. *We believe the direct, indirect and cumulative impacts associated with the application risks being the first violation of the Commonwealth Government's commitment to 'no new extinctions'.*

3. *We hold the view that the application contravenes the fundamental first principle of offsetting – which is to avoid impacts where feasible, and only to offset as a last resort – the NSW government's response to the Auditor-General stating that "The Scheme is consistent with the global frameworks and best practice" is incorrect (as detailed below) and the statutory review of the BC Act recommends that "Action should be taken to reduce the demand for credits through giving greater primacy to avoiding and minimising impacts…"*

4. *Our analysis indicates that there is no consideration of indirect or cumulative impacts (on biodiversity).*

5. *The application will have significant impacts on Matters of National Environmental Significance and requires referral under the EPBC Act.*

6. *The application contravenes many NSW government actions for threatened species.*

7. *The biodiversity fieldwork underpinning the application is demonstrably deficient and the analysis is ecologically weak.*

8. *We understand that the applicant is relying upon clause 3.43 of State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP TI) to override the prohibition of*

and educational establishment in in the RU6 Transition zoning under Central Coast Local Environmental Plan 2022 (CCLEP 2022), we believe this generates conflict.

We present the following comments and respectfully request you consider our objection to this SSD on the following grounds.

1. The application is reliant on a NSW policy audited as 'not effective' and under review

This application proposes to destroy >21 ha of native vegetation and multiple species listed as threatened with extinction and protected under State and Commonwealth laws (NSW *Biodiversity Conservation Act 2016* [BC Act] and the Commonwealth *Environmental and Conservation Biodiversity Act 1999* [EPBC Act]). This is only permitted by 'offsetting' – i.e., demonstrating a compensatory gain of similar magnitude and type.

However, in 2002, the NSW Auditor-General reviewed the NSW offsetting process and concluded that it was "not effectively designed" and "key concerns around the Scheme's integrity, transparency, and sustainability are also yet to be fully resolved"[1]. The NSW government is now violating the Auditor-General's recommendation that "By July 2023, DPE should implement a long-term strategic plan for the Scheme that defines biodiversity goals with respect to the Act".

The NSW Government's response to the NSW Auditor-General's recommendation "That the NSW Government define a set of scientifically sound principles that govern the operation of the Biodiversity Offsets Scheme, and ensure these are embedded in the *Biodiversity Conservation Act 2016*" is that "The statutory review of the BC Act has now commenced and presents an opportunity to consider the principles of best practice biodiversity offsetting through the Scheme"[2] yet this review states that "The Review Panel found that the present *Biodiversity Conservation Act 2016* is not meeting its primary purpose of maintaining a healthy, productive and resilient environment, and is never likely to do so."[3]

Biodiversity Goals such as 'no new extinctions' and 'no net loss' for each species are fundamental prerequisites of biodiversity offsets as defined in academic literature, inter-governmental policies e.g. International Union for Conservation of Nature (IUCN), most government policies (including the Commonwealth of Australia EPBC Act) and relevant corporate policies. These goals are even embraced by Australia's big banks who have signed up to them through the Equator Principles. Given that the current NSW offsetting process violates these goals and prerequisites, and is currently under review, the offsetting process for this application should be aligned with that of the EPBC Act (and IUCN Policy and Equator Principles).

[1] https://www.audit.nsw.gov.au/our-work/reports/effectiveness-of-the-biodiversity-offsets-scheme
[2] https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2822#tab-reportsandgovernmentresponses
[3] https://www.parliament.nsw.gov.au/lc/tabledpapers/Pages/tabled-paper-details.aspx?pk=186428&houseCode=lc

2. The application risks being the first violation of the Commonwealth commitment to 'no new extinctions'

The Commonwealth Threatened Species Action Plan: Toward Zero Extinctions has a primary objective to prevent new extinctions[4]. The application proposes destroying land on which experts have found populations of species which are (1) listed under the EPBC and BC Acts as Critically Endangered and (2) listed under the BC Act as serious and irreversible impact (SAII) species. (Note that only State Significant projects are allowed to impact SAII species and it could be argued that a private denominational school does not meet the intention of 'State Significant' projects.)

The world expert on the orchid *Genoplesium insignis* (listed under the EPBC and BC Acts as Critically Endangered and SAII) states that "one population is known to remain on the site" and estimates that "about half of the global population is close to the development site" but a more precise estimate cannot be made without more fieldwork[5]. The world expert on the orchid *Corunastylis branwhiteorum* (listed under the EPBC and BC Acts as Critically Endangered and SAII) states that "two populations are known on the site" and estimates that "about 80% of the global population is close to the development site".[6]

Given that these orchids only survive away from the development site is small, fragmented and unsecured populations, there is a significant risk that this application and its indirect impacts will drive *Corunastylis branwhiteorum* (and/or possibly *Genoplesium insignis*) to be the first 'new extinction' under this Commonwealth government.

Concern is also raised in respect to the analysis undertaken on the impact of PCT 1636, which is almost entirely contained within a precautionary area of impact around the project. However, further comments are not able to be provided at this stage by not having access to any data in the area and the percentage of clearing.

3. The application contravenes the fundamental first premise of offsetting –to avoid impacts where feasible, and only to offset as a last resort

The NSW government's response to the Auditor-General states that "The Scheme is consistent with the global frameworks and best practice" and "The Scheme reflects the internationally recognised best practice biodiversity risk mitigation hierarchy: avoid, minimise and offset the impacts of development on biodiversity to facilitate ecologically sustainable development[7].

This hierarchy is key to ensuring development avoids impacts on biodiversity to the greatest extent possible. The Biodiversity Assessment Method (BAM), the scientific method which underpins the Scheme, provides guidance on how proponents can avoid and minimise impacts. Only after all reasonable steps to avoid and minimise biodiversity impacts have been exhausted

[4] https://minister.dcceew.gov.au/plibersek/media-releases/minister-launches-threatened-species-action-plan-toward-zero-extinctions;
https://www.dcceew.gov.au/environment/biodiversity/threatened/publications/action-plan-2022-2032
[5] B. Branwhite in litt. September 2023
[6] B. Branwhite in litt. September 2023
[7] https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2016_RES_059_EN.pdf

are residual impacts calculated for the purpose of offsetting. Avoid, minimise and offsetting requirements are set out in a development application's conditions of consent."[8] The NSW government cited the offsets policy of the IUCN of which the Australian government is a member, which has a Policy Statement that "Under the specific conditions outlined in this policy, it is IUCN's position that biodiversity offsets can contribute to positive conservation outcomes. However, biodiversity offsets are only appropriate for projects which have rigorously applied the mitigation hierarchy (avoid, minimise, restore/rehabilitate and offset) and when a full set of alternatives to the project have been considered.

- Offsets must only occur after all previous steps in the mitigation hierarchy have been considered and no alternatives are available. Avoidance is the first and most important step in the mitigation hierarchy. Biodiversity offsets must never be used to circumvent responsibilities to avoid and minimise damage to biodiversity, or to justify projects that would otherwise not happen.
- The mitigation hierarchy must be applied at the landscape or seascape level with mitigation actions designed and implemented at a site or project level. Governments should ensure the mitigation hierarchy is embedded in the framework of landscape and seascape level planning and legislation and is part of existing and future strategic development plans.
- Only after applying the earlier steps in the mitigation hierarchy should biodiversity offsets be employed to address the residual impact in order to achieve at least No Net Loss and preferably a Net Gain at the project level. The terms No Net Loss or Net Gain refer to the outcome achieved compared to a reference scenario. This reference
- scenario can be what is likely to have occurred in the absence of the project and the offset, or one that provides a better outcome for biodiversity conservation. Societal values should also be accounted for and used to inform the design and implementation of biodiversity offsets.
- In certain circumstances, residual impacts on biodiversity (after completing the avoidance, minimization and rehabilitation steps of the mitigation hierarchy) cannot be offset. Additionally, there are some components of biodiversity for which impacts could theoretically be offset, but with a high risk of failure. Under these circumstances, biodiversity offsets are not appropriate, and this means the project as designed should not proceed."

The IUCN Policy goes on to state that "An appropriate application of the mitigation hierarchy must follow at a minimum the following fundamental principles" [4 out of 15 principles are cited here]:

- "Explicitly consider the project within a broader landscape or seascape context.
- Thoroughly examine lower impact alternatives in the project design, including not proceeding with the project at all, recognising that not all impacts can be offset to achieve No Net Loss.
- Give priority to avoiding any damage to biodiversity.
- Take full account of direct, indirect and cumulative impacts, geographically and over time."

[8] https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2822#tab-reportsandgovernmentresponses

And "The mitigation hierarchy should first be applied at the landscape or seascape level, and then at the site or project level. This is essential for moving beyond a reactive project-by-project approach to an approach that is pro-active in applying the mitigation hierarchy, supports mitigation actions at the right ecological scale, recognises cumulative effects and delivers better outcomes for conservation and sustainable development."

However, this application violates these instructions and assesses avoidance as within-site avoidance – i.e., it assumes that the project must go ahead within the small proposed development lot, and determines what (very) small proportion of this lot can be set-aside or avoided. For this application to meet the NSW government's claim that it is consistent with the global frameworks and best practice and the internationally recognised best practice biodiversity risk mitigation hierarchy, then avoidance must be undertaken at a landscape-scale. This implies looking across the catchment of the proposed school and choosing a location that avoids significant impacts to biodiversity.

This would result in the application being re-located to another site on land with low biodiversity values and an appreciate Council zoning. This is perfectly feasible, albeit the applicant would be liable for greater land-purchase costs. (This principle needs to be applied to other impacts such as and bushfire risk, localised increased traffic, transport connectivity for students across the school's catchment.)

This requirement for a landscape-scale reassessment of avoidance options would help to address a recommendation of the statutory review of the BC Act that "Action should be taken to reduce the demand for credits through giving greater primacy to avoiding and minimising impacts..."[9].

4. There is no consideration of indirect or cumulative impacts (on biodiversity)

As noted above, the NSW government states that its offsets scheme is consistent with the offsets policy of the IUCN. This policy states that "An appropriate application of the mitigation hierarchy must follow at a minimum the following fundamental principles: [inter alia] Take full account of direct, indirect and cumulative impacts, geographically and over time." However, the application makes no reference to well-documented indirect impacts on biodiversity such as the ecological 'edge' effect of increased light, noise, weeds and pests, and the likely impact of bushfire hazard reduction activities.

This would have a net result of significant increasing the impact beyond that calculated in the application. As a specific example, the application states that "The proposal sits within the western portion of the lot which avoids impacts to the current C2 zone, with the exception of two access bridges". It also states that "The riparian buffer, as required by the Department of Natural Resources Access Regulator (NRAR) specifications, will not be impacted by the proposal, with the exception of the two bridge crossings."

[9] https://www.parliament.nsw.gov.au/lc/tabledpapers/Pages/tabled-paper-details.aspx?pk=186428&houseCode=lc

However, the proposal includes a carpark within 30 m of the creek and a cricket field extending to within 40 m of the creek. The run-off from these (and other) land-uses plus the inevitable requirements for bushfire hazard management will result in significant impacts to the conservation functions of the C2 zone and the hydrological functions of the riparian buffer.

More importantly, the application makes no reference to the indirect impacts that it will enable and catalyse (and perhaps even mandate) further development around its periphery. Given that the application is for a school, but the land immediately to the north and east is undeveloped native woodland, it is very likely that the application will indirectly results in the development of some of this land. These indirect impacts need to be assessed if the application is to meet the NSW government's claims about its offsets scheme but are not mentioned at all in the application.

The application makes no reference to cumulative impacts. Given that most of the habitat for these threatened species has already been cleared for development and given the current ongoing rate of loss and degradation, the impacts of the application need to be contextualised within a cumulative impact assessment. To meet the NSW government's claims about its offsets scheme, the application must be revised to take full account of direct, indirect and cumulative impacts, geographically and over time.

5. The application requires referral under the EPBC Act

Appendix F of Appendix G14 of the application accepts that the application will have significant impacts on a Matter of National Environmental Significance (MNES). Appendix G14 omits reference to the two MNES orchids *Genoplesium insignis* and *Corunastylis branwhiteorum*. These are excluded from the applicant's biodiversity impact assessment because they were not seen by the proponent's consultants, despite the well-known challenges in finding such inconspicuous plants that flower unpredictably depending on the seasonal weather conditions.

However, the world expert on these species has documented that the site has a significant proportion of the global population of both species[10]. Also, *Corunastylis branwhiteorum* (and probably *Genoplesium insignis*) are recorded from the site in the confidential records in the NSW BioNET database which have been made available to the proponents' consultants. As such, the application needs to be referred to the EPBC Act for each of these species.

Any consideration of the acceptability of the biodiversity impacts should await the outcomes of referral under the EPBC Act.

6. The application contravenes many NSW government actions for threatened species.

The application would impact many listed threatened species and contravenes their Commonwealth and NSW threatened species recovery plans. For example, the NSW government lists the following Priority Actions for the threatened tree *Anophora inopina*:

[10] B. Branwhite in litt. September 2023

- "Seek to increase the level of legislative protection for sites through land-use planning mechanisms and conservation agreements. Retain vegetative linkages between sites where possible.
- Ensure that sites on crown land are appropriately classified and managed.
- Incorporate site specific threat abatement measures for the species into Plans of Management for on-park sites.
- Prepare and implement management plans for sites that are located on non DEC public land.
- Liaise with private and public landmanagers to facilitate the preparation and implementation of management plans that address threatening processes"[11]

However, the application will undo the level of legislative protection for sites through land-use planning mechanisms (through rezoning) and permit the threatening processes of land clearance.

As another example, 100% of this area is mapped by the NSW government as an Important Area for the Critically Endangered Swift Parrot. The NSW government cites the key threat to this species as "Loss of key Eucalypt habitat and foraging tree species" but, instead of protecting these important areas, it is investing $400,000 of taxpayers' money in the Central Coast and Northern Sydney area (plus more in other regions), mostly to plant trees that, when they mature in 50-100 years' time, might be suitable for this species unless it has gone extinct by then[12].

7. The biodiversity fieldwork underpinning the application is demonstrably deficient and the analysis is ecologically weak.

The application states that "As Held records were obtained from OEH [for *Corunastylis branwhiteorum*], of which a record was mapped within the subject land. Owing to the cryptic nature of the species and variable flowering period, surveys were undertaken over two flowering periods. The species was not detected during targeted surveys, (refer to Table 8), therefore no further assessment is required for the species." Australian terrestrial orchids are well-known to be inconspicuous (i.e., easily overlooked) and unpredictable flowerers (i.e., might not be flowering in the two flowering periods surveyed). To know that the species has been recorded from the site in the last few years and to conclude that no further assessment is needed and to exclude it from the impact assessment is ecologically flawed.

The status of *Genoplesium insignis* is probably similar – the application states that "Secondary targeted surveys near As Held OEH Bionet records are not displayed within Figure 4 and Figure 5 due to the sensitive nature of the records" which suggests that these OEH records known to the proponent's consultants are from the site. For this species, the application states that "Known locations/populations of plants exhibit dormancy for greater than four years (likely to persist underground for greater than four years). Therefore, absence in a given year may be a 'false absence' and the plants can re-emerge once conditions are favourable (e.g. rainfall in winter and

[11] https://www.environment.nsw.gov.au/threatenedSpeciesApp/PasSearchSpecies.aspx?speciesName=Charmhaven+Apple&generalType=Trees

[12] https://www.lls.nsw.gov.au/help-and-advice/natural-resource-management/threatened-species/swift-parrot

appropriate disturbance)." Given this statement, it is again ecologically flawed to conclude that no further assessment is needed and to exclude it from the impact assessment.

The world expert on these Critically Endangered orchids at the site has stated that ***"The terrestrial orchid part of the survey has not been efficient enough to portray an accurate assessment of the site's Orchidacea and should be conducted by expert terrestrial orchid consultants."***[13] We are in agreement with this opinion, surveys need to be replicated for these inconspicuous and unpredictable species, by a recognised species-expert.

8. ***We understand that the applicant is relying upon clause 3.43 of State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP TI) to override the prohibition of and educational establishment in in the RU6 Transition zoning under Central Coast Local Environmental Plan 2022 (CCLEP 2022), we believe this generates conflict.***

As the DPE would be aware under CCLEP 2022 an education establishment in the RU6 Transition zone is prohibited. Notwithstanding that an education establishment is prohibited in this zoning the applicant is relying upon the provision of clause 3.43 of SEPP TI to override this prohibition. In overriding the prohibition of the local planning instrument in favour of the state policy we call upon the Department to consider the following:

- We note on page 72 of the EIS it states:

  > *"The subdivision and sale of the 12 hectare Eastern portion is a logical option for (the Proponent) and is conducive to funding the construction of the educational establishment".*

  Acknowledging the conflict between the SEPP TI and the CCLEP 2022, if the DEP were to grant consent to the education establishment as a condition of consent to maintain the integrity of both the CCLEP 2022 and BC Act that the Department does not agree to the subdivision of the land. Rather that portion of the land be set aside as a condition of consent as a biodiversity offset that no future development is permitted except for the management of the biodiversity.

- We note with the EIS that PFAS pollutants have been detected within the development site adjacent to the Rural Fire Service (RFS) Headquarters, which was the source of the contamination. We understand in 2022, that Robert Carr and Associates (RCA) were given the task of detailed preliminary site contamination report. The report found that:

  > *There were elevated concentrations of PFAS in accumulated water near the boundary with the RFS facility and low concentrations of PFAS within the upstream creek sample, closest to the RFS facility; low concentrations of PFAS have also been identified in the sediment along the extent of the creek. Concentrations of metals in excess of ecological criteria (Ref [9]) were identified within the creek samples.*

  A plan for the RFS was to excavate down to 500 mm extensively, demolishing a concrete pad and various smaller areas, removal of about 200 cubic metres of soil to be disposed of at the State's Kemps Creek near Leppington disposal area in Western Sydney.

[13] B. Branwhite in litt. September 2023

The above removal of PFAS soils and waste firstly needs to be completed prior to any site work. We recommend that once the material is removed that as a condition of consent the area then be re-test to ensure that all PFAS have been removed. In addition to retesting the area of rehabilitation we recommend the drainage lines be tested for any PFAS that may have escape the site since the testing was undertaken.

Thank you for your consideration of this submission.

Yours sincerely

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Chair
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