



3 July, 2012

The Managing Director  
Crighton Properties  
Suite F, Level 1, 2 Reliance Drive  
TUGGERAH NSW 2259

*Our Reference:* 0043707L##

**Attention:** Geoff Cox

Dear Geoff,

**RE: MANAGEMENT OF BIODIVERSITY OFFSETS - RIVERSIDE TEA  
GARDENS**

As you are aware, the NSW Office of Environment and Heritage (OEH) have on previous occasions, voiced its concerns with regard to the management of Conservation lands and delivery of Bio Banking credits by Community Association, with respect to the Riverside site. In particular it has suggested that merely requiring the Community Association to undertake land management of conservation assets, will not constitute, in itself, an appropriate delivery mechanism.

Instead, it has been suggested by OEH that it would be more comfortable with an enforceable mechanism such as a Bio-Banking agreement or Voluntary Conservation Agreements (VCA) etc., possibly in conjunction with an 88B instrument and / or zoning provisions.

Whilst the Bio Banking Assessment prepared by GHD foreshadows that the delivery of credits will be addressed in more detail at a later date, as part of the proposed "Offsetting Package", it is apparent that OEH may benefit from an outline of options at this early stage.

It is most likely, that a number of appropriate solutions exist for long term management that either meet or exceed the requirements of OEH. It is possible that OEH are currently unaware of these options and the operation of Community Association. We hope that this letter helps to identify and explain some of the options available, and in doing so provide OEH with a greater level of certainty that an appropriate delivery mechanism for Bio Banking Credits does exist for the Riverside Project.

Before consideration of the options available it is important to understand that the structure of Community Association. The following points should be made clear;

1. The Myall Quays Community Scheme encompasses the majority of the Riverside Site (excluding Lot 10).
2. The majority of existing zoned 7a and 7b lands on the site, are contained within the 'Community Parcel' and are owned by Crighton Properties as part of a residual 'Community Development Lot' – which is private land. While this land has not yet transferred to "Pt 1 Association Land" it has always been proposed that the 7a and 7b land within Community Masterplans will become Pt 1 Association Land.
3. Upon the transfer of any land from the "Community Development Lot" to "Pt 1 Association Land", the land will be required to be managed by the Community Association (as with all other "Pt 1 Association Land" under its control), in accordance with the 'Community Statement' and various management plans.
4. Land cannot be 'added' to a Community Scheme under current legislation – I.e. the extent of the Community Scheme cannot be increased.
5. Land can only be 'removed' from a Community Scheme with a unanimous resolution of the Community Association and the consent of Council (in the form of a Development Approval). It is unlikely that such a resolution would be provided if the 'removal' adversely impacted upon the Community Association in respect of either amenity, or financial implications.
6. Community Association DP270100 (the Myall Quays Community Association) is a legal entity in its own right;
  - a. It owns Land
  - b. It undertakes works and management
  - c. It carries insurances (public liability)
  - d. It raises funds (including sinking funds) to undertake its activities via Community Title Levies.
  - e. The Association owns and manages the "Pt 1 Association Land" within the developed areas of Myall Quays, including the Myall Quays Lake and its foreshores.

- f. The Association is an Association incorporated under the Community Land Management Act 1989.
- g. The Association is managed under the terms of the Community Land Management Act 1989. The Association is administered by a contracted Management Company (currently BCS in Newcastle) in accordance with the Act.

It should be noted that as a legal entity in its own right, Community Association DP270100 is accountable for its own actions, much the same way as any individual or corporation would be. It is free to enter into (and be contractually obliged to comply with) agreements with third parties, as is any other legal entity – subject to such agreements being in accordance with the objectives of the Association. This is an important point, which may not be fully appreciated by the OEH, to this extent the Community Association may actually be an entity which possesses far greater stability and longevity than many other individuals, or corporations which the OEH may, otherwise be prepared to enter into agreements with. It is certainly an entity which should be considered as having greater financial stability, due to contributions across a broad base of members.

Having established the legal status of the Association, it is worth considering some options for long term delivery of credits from both on-site and off-site Bio Banks.

## *On-site Credit delivery*

A number of options would appear to exist with regard to credit delivery for the onsite Bio-bank.

### **1. Developer VCA / Association VCA**

As a legal entity in its own right, and as owner of the Community Land, the Myall Quays Community Association is ideally positioned to implement the long term management of the Bio-Banking site. This could be implemented in two stages;

- Initially, the Developer be responsible for on-site land management by entering into a Voluntary Conservation Agreement (VCA) with the Minister (as the developer is the owner of the 'development lot' in the short term) which has a sunset date linked to development on the site. The sunset date could be a specific day, or the reaching of a particular development target (EG. registration of the 600<sup>th</sup> Lot). The VCA would be registered on Title of the land, so that if the land ever changed hands, the VCA and its management requirements would transfer to the new developer.
- At the same time of the entering into of the Developer VCA, a VCA is also entered into with the Community Association. This second VCA has a delayed start date which matches up with the sunset date of the Developer VCA which requires the land to be transferred to "Community Land" from the "Community Development Lot" and continue to be managed by the Community Association in perpetuity.
- As additional security the extent of proposed conservation lands, where applicable could be zoned to a new Conservation zone under Great Lakes Comprehensive LEP or, a subsequent administrative amendment to the LEP if timing does not permit the former.

This option has the benefit of the initial land management work (which is likely to be of greatest expense) being undertaken by the Developer, in accordance with the VCA, whilst it has a financial interest in outcomes upon the site.

In addition to the legal avenues of enforcement of implementation of the VCA, the added benefit exists whereby, if the developer is ever in breach of commitments within the VCA, the opportunity exists to withhold further planning approvals (such as Project Plan Approvals), until the situation is rectified.

## **2. Developer VCA / Association Bio-Banking**

As a variation on the above model;

- Initially, the Developer be responsible for on-site land management by entering into a Voluntary Conservation Agreement (VCA) with the Minister (as the developer is the owner of the 'development lot' in the short term). The VCA would have a sunset date linked to / near completion of development on the site. As lots are released upon the site and sold, a portion of lot sales revenue is placed within a trust account, the quantum of which, at completion of development is intended to equate to the Bio Banking credit costs for ongoing management of the site from that day forward.
- Upon completion of development, or a certain mile stone being reached, funds are transferred from the trust account to the Bio-Bank and the Community Association (as owner of the land) continue to manage the land under a Bio-Banking Agreement.
- As additional security the extent of proposed conservation lands, where applicable could be zoned to a new Conservation zone under Great Lakes Comprehensive LEP or, a subsequent administrative amendment to the LEP if timing does not permit the former.

This option has the same up front benefits of management by the developer during the initial phases and security of a formal Bio-Banking agreement with the Community Association in the long term.

### 3. Developer VCA / Dedication to third party.

As a further variation on the above model;

- Initially, the Developer be responsible for on-site land management by entering into a Voluntary Conservation Agreement (VCA) with the Minister (as the developer is the owner of the 'development lot' in the short term). The VCA would have a sunset date linked to / near completion of development on the site. As lots are released upon the site and sold, a portion of lot sales revenue (if required) is placed within a trust account, the quantum of which, at completion of development is intended to equate ongoing management costs following dedication.
- Upon achieving the milestone, the land (along with the management funds) is transferred to National Parks, Council or another established Environmental Trust – should that party wish to act in that capacity. NB. This transfer will require a resolution from the Community Association, as land would be removed from the Community Scheme. However, this resolution for future dedication could be pursued in the short term, rather than at the time of dedication, thereby giving certainty to all parties.
- As additional security the extent of proposed conservation lands, where applicable could be zoned to a new Conservation zone under Great Lakes Comprehensive LEP or, a subsequent administrative amendment to the LEP if timing does not permit the former.

This option has the same up front benefits of management by the developer during the initial phases and security of a dedication to a third part (with an alternative structure for ongoing management).

## **Off-Site Credit delivery**

It would appear from Bio-Banking Calculation to date, that credits generated by the management of on-site conservation lands, will be inadequate to offset full development of the site. As such, further credits will likely be required to be retired to offset full development.

It is proposed within the EA that early stages of development will be offset completely by the provision of on-site offsets, using one of the mechanisms outlined above. This will give greater opportunity for the consideration of options with regard to delivering the further credits required for full site development. It is highly likely that additional bio banking sites and credits will be available in the market for consideration by this time.

A number of options exist for delivery of further off-site credits;

### **4. Developer to Purchase Bio-Banking Credits**

In conjunction with any of the options outlined above (1-3) the developer can allocate a proportion of proceeds of sales toward the purchasing of further Bio-Banking credits to allow for the release of subsequent stages of development. This can be effectively controlled through staged development approvals, or staged subdivisions certificates. Such a process would replicate current process of collection Section 62 charges (for head works) or Section 94 contributions for public amenity.

Bio-Banking credits could be purchased on an incremental basis to allow for the release of subsequent stages, or at key milestone points such as 1/3 and 2/3 of development impact. In all cases, the credit requirement would precede the impact.

### **5. Developer to establish Bio-Banking site for ongoing management by Community Association.**

In conjunction with any of the options outlined above (1-3) the developer can allocate a proportion of proceeds of sales toward the purchasing and establishment of a Bio Banking site. The developer may wish to continue to hold the Bio Banking site and act as land manager, or it could transfer ownership of the site to the Community Association which continues to manage the site under a Bio-Banking agreement with the Minister.

To conclude, it is obvious that a number of options exist for delivery of both on-site and off-site Bio-Banking credits. Further options and / or hybrids of those outlined above may also be applicable.

The challenge is likely to be not in finding a suitable solution, but selecting which one!

We trust, based on this outline, that OEHL may satisfy itself that a number of options exist for credit delivery, and at this early stage, turn its attention to the quantum of credits required, and allow the delivery mechanism to be fully refined within the foreshadowed "Offsetting Package".

Should you have any further questions please do not hesitate to contact the writer directly.

Yours sincerely,  
for Environmental Resources Management Australia Pty Ltd

Peter Childs  
Development Consultant