

**Submission  
No 38**

## **HISTORICAL DEVELOPMENT CONSENTS IN NSW**

**Organisation:** Blue Mountains Conservation Society Inc

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**Nature Conservation Saves for Tomorrow**

## **Submission to Inquiry into historical development consents in NSW, NSW Legislative Assembly Committee on Environment and Planning**

Lodged online 30 May 2024

The Blue Mountains Conservation Society (the Society) is a community-based volunteer organization with over 850 members. Its mission is to help protect, conserve, and advocate for the natural environment of the Greater Blue Mountains.

The Society commends the Minister for Planning, Paul Scully, for requesting that the Committee convenes an Inquiry into historical development consents in NSW. For the past 5 years we have been advocating for legislative reform on these so-called 'zombie' (in perpetuity) development approvals through the Member of Parliament for Blue Mountains, Trish Doyle. This followed the shock clear felling of around 2-3 hectares of native vegetation under a 1989 development approval for a 'flora and fauna park' at Wentworth Falls (see details later). Given our longstanding interest in this issue we are pleased to be able to make a submission to the Inquiry.

The Society's perspective on the issue is informed by the significant upgrade in environmental protection standards in Blue Mountains Local Environmental Plans following the declaration of the Greater Blue Mountains World Heritage Area (GBMWA) in 2000. Our particular concern is that 'zombie' developments approved before this time are nevertheless permitted to proceed under the weaker environmental standards in force at the time of approval. These standards are totally inappropriate in the GBMWA context and do not reflect current knowledge about environmental impacts of development and the imperative to protect the GBMWA. These developments are highly unlikely to be approved today.

Further, rapidly changing circumstances and the planning required for climate adaptation mean that the current standard 5-year commencement period before approval lapses is too long. The requirements of the original consent may have become seriously outdated during that time.

### **Recommendations**

1. The Society's view is that, **unless a development has significantly advanced within 2 years of having been 'commenced', the development approval should lapse or at least be required to be re-assessed against current local, state and federal environmental legislation and provisions.** If re-assessed, the conditions of consent should be revised if necessary.
2. **Any new legislation requiring re-assessment or lapse of consent 2 years after 'commencement' should also apply retrospectively to current 'zombie' approvals.** This is especially needed in the most egregious cases where the original

conditions of consent do not reflect current environmental protection standards and completing the project would result in unacceptable environmental damage.

3. **The physical commencement test itself should also be further tightened to ensure there is sufficient intention to complete the project.** For example, 'commencement' could be redefined as physical works to the value of 10% of the claimed Capital Investment Value of the project. This would also help discourage landowners from 'DA banking'.
4. **The current standard 5-year commencement period before approval lapses should be reviewed.** At the time the projects in our case studies were approved, the standard commencement period after approval was 2 years, plus a maximum 1-year extension. The Society supports reinstating this shorter commencement period.
5. **Consent authorities' powers to modify or revoke development consents considered to not be in the public interest should be clarified and strengthened.** Many if not most pre-2017 approvals for 'zombie' developments were granted by local councils before planning reforms saw councils stripped of their approval powers for certain large or contentious development applications. In response to various representations to the Department of Planning and the Minister for Planning about local 'zombie' developments, we have often been told that council could revoke its consent for these developments at any time. But this power can apparently only be exercised in a particular circumstance - in relation to the provisions of a *proposed* state or local planning instrument. Councils, as far as we are aware, have never revoked or modified consent in this circumstance. Their reluctance to use these powers, because of the costs to ratepayers in court cases and compensation to the landowner, makes this provision ineffective.

## **Background to recommendations**

The Society presents two case studies of historical development consents in the Blue Mountains that date from 1989 and 1998/2001 to illustrate why there must be legislative reform. Both these development consents are still valid because they were deemed to be legally commenced, either through a ruling of the NSW Supreme Court or through the actual construction of part of the approved development. Both illustrate the unsatisfactory situation of land sitting vacant for up to 35 years with the benefit of a development approval which is not compliant with current environmental and development standards.

### **Case study 1. Flora and Fauna Park, 10 Great Western Highway Wentworth Falls**

The proposed Flora and Fauna Park, the subject of a controversial rezoning and development approval process over 1988-89, is located on a steeply sloping 10 ha block of previously uncleared bushland with features that meet the current criteria for 'environmentally sensitive land'. The development didn't proceed at the time of development approval because of various court cases. In 1996 the NSW Supreme Court ruled that minor works on the site constituted commencement and therefore the development consent was still valid.

Even with development approval, no further work was done at the site for 23 years until it was sold and the new owner clear-felled 2-3 ha of bushland in the development zone in 2019. This was authorized under a construction certificate issued by a private certifier for 'site clearing only' under the original 1989 development approval. This construction certificate became the subject of a complaint by the Society to the then Building

Professionals Board (BPB) alleging the certifier issued the certificate for 'site clearing only' in breach of the NSW EPA Act and Regulation. The Society's complaint was upheld and a Penalty Infringement Notice (PIN) was issued to the certifier. However, the certifier opted to have the matter heard in court and in response the BPB withdrew the PIN. Following the land clearing incident no further works occurred at the site and the bushland has been regenerating.

In 2021 the landowner successfully applied for a Secretary's Environmental Assessment Requirement (SEARs) and State Significant Development (SSD) status for a proposed Blue Mountains Wildlife Park (zoo). The SEARs expired on July 1 2023 after the owner failed to lodge the Environmental Impact Statement by the due date.

Over this period, the owner consistently stated his intention to act on the original 1989 development consent if the SSD project failed to be approved. There is no sign yet that the owner intends to do this, but the Blue Mountains community is left with the threat of the original 'zombie' development coming back to life with what we believe would be environmentally devastating consequences on this sensitive site.

Following are some of the changed circumstances of the site and changes to the planning regime that has come about through improved knowledge about the environmental impacts of development. This includes more accurate identification and mapping of environmentally sensitive land and threatened and endangered flora and fauna species. Higher environmental protection standards in Blue Mountains LEPs also reflect the City's international obligations to protect the World Heritage Area surrounding us.

*Changes in the planning regime since 1989:*

- **When the original 'flora and fauna park' development was approved in 1989 the Greater Blue Mountains World Heritage Area had not been declared (2000).** This means that approval for this development (located 300m from the boundary of the national park) was not based on planning provisions that were applied to development following World Heritage listing; notably, the provisions of Blue Mountains LEP 2005. These provisions include stringent controls on stormwater management regulating the quality, quantity and velocity of storm water flowing from the development into the World Heritage Area. There are no such requirements applying to the approved 'flora and fauna park'.
- **When the original development approval was given in 1989, Blue Mountains LEP 1991 had not yet come into force.** LEP 1991 has since been superseded by LEP 2015 which incorporates the planning principles and provisions established in LEP 1991 and LEP 2005. The LEP 2015 provisions applying to the site post-1989 are:
  - Protected Area – land between towns (CI 6.13). Designed to conserve the bushland character of land between Blue Mountains towns through minimising any adverse visual impact of development
  - Protected Area – vegetation constraint area (CI 6.6). Development is required to avoid or mitigate any adverse impact on any significant vegetation community and the buffer required to protect that community (this mainly applies to Blue Mountains Swamps on the site)
  - Protected Area – ecological buffer area (CI 6.7). Restricts development within buffers to significant vegetation communities
  - Protected Area – slope constraint area (CI 6.4). Restricts development on slopes greater than 20% to minimise vegetation clearing and soil disturbance and erosion

- Protected area – riparian lands and water courses (CI 6.8). Development must not have any adverse impact on the water quality and flows within the watercourse, and on aquatic and riparian species
- Stormwater management as above (CI 6.9)

Many aspects of the 1989 approved development do not or would likely not comply with these current provisions.

One of the Blue Mountains Development Control Plan (DCP) 2015's provisions applying to the site recognises its important role as a fauna corridor connecting the north and south portions of the Blue Mountains National Park (BM DCP 2015 Part C1.4). Again, this recognition and provision occurred post-approval. The then Roads and Maritime Services installed a fauna tunnel under the Great Western Highway in 2015, with the southern entrance opening on to the site. The development layout and conditions of the 1989 development consent therefore do not recognise the function of the site as a fauna corridor, nor address the current requirement of development to avoid adverse impacts on fauna corridors.

- **The site was not surveyed for the rezoning and development applications for the 1989 'flora and fauna park'.** A development application for an unsurveyed site would not be accepted nowadays but at the time it meant that the extent and position of the local, state and commonwealth-listed Blue Mountains Swamps on the site were not accurately mapped until *after* development consent was granted. (An accurate site survey, since confirmed by council, was done for an unsuccessful legal challenge to the council's approval of this development.) This means that if the development is built to the approved 1989 plans, encroachment into the swamp and other environmentally sensitive land and their buffer areas is unavoidable.
- **Zone boundaries have changed since the original 1988 enabling 'spot rezoning' (LEP 79 amendment to LEP 4).** The delineation of land assessed as appropriate for development and land considered necessary for environmental conservation has been refined with better mapping technologies and ground truthing in each subsequent planning instrument that has applied to the site. The result is that the development zone (C3) on the site has shrunk considerably since 1989. This means that some approved activities and structures for the development, if constructed, will likely encroach upon the C2 Environmental Conservation zone and environmentally sensitive areas on the site including the swamp and its buffer area.
- **Since the 1989 approval, the Great Western Highway has been widened to 4 lanes at the site and traffic has increased significantly.** Traffic and highway safety was a major concern for the consent authority when it granted approval in 1989, but the issue was never resolved because the development didn't proceed at that time. Should the developer decide to proceed with the approved development, providing access to the site from the highway only (a condition of the 1989 consent) will be even more challenging today on traffic flow and highway safety grounds.

## **Case study 2. Hotel, 142-150 Narrow Neck Rd, Katoomba**

This case study illustrates another unacceptable situation where the original development application first approved 30 years ago is still valid.

A 120-bed hotel was one component of another controversial rezoning and development application that first gained council approval in 1995. The approval was subsequently

declared void by the NSW Land and Environment Court and Supreme Court. After being resubmitted, the rezoning and development application was approved through a deferred commencement consent in 1998, with final approval given in 2001.

The approved development was complex, involving several components (residential units, a hotel and refurbishment of the Katoomba golf clubhouse) and the subdivision and sale of part of the council-owned Katoomba golf course as each component was developed. The development has been gradually completed over the past 20 years except for the hotel, the site for which was sold in 2019. The 1998/2001 development consent for the hotel is still valid, having been secured through the commencement of the residential units.

The approved 120-room hotel is located on a partly cleared, visually prominent site on a ridgetop at the western edge of Katoomba township, around 300 m from the escarpment/national park to the south. The site abuts and overlooks the remaining council-owned old Katoomba golf course which in 2023 become a dedicated Planetary Health Precinct.

The hotel site uphill of the golf course/Planetary Health Precinct sits on a water recharge area which feeds the springs and creek that run downhill under and through the golf course and discharges into the local, state and commonwealth-listed Blue Mountains Swamps in the precinct. Water discharging from the swamp feeds into the nearby Kedumba River which flows over Katoomba Falls into the Greater Blue Mountains World Heritage Area. The river also lies within Sydney's drinking water catchment.

As with the Flora and Fauna Park in Wentworth Falls, the approved hotel does not comply in several respects with current local planning provisions introduced after the declaration of the World Heritage Area and carried forward into Blue Mountains LEP 2015.

These provisions include:

- **Stormwater Management.** What is incomprehensible (and certainly not permitted) today is that the original 1998/2001 conditions of consent for the development (including the residential component) allowed for the system of ponds on the adjoining public property downhill – the golf course/Planetary Health Precinct – to be used as sediment traps and stormwater detention basins during construction and operation. Given the bowl-shaped topography of the golf course/precinct, all these ponds drain downhill into the swamp areas.

Under the provisions of the current LEP and DCP, as explained previously, stringent stormwater controls are mandated for development in the Blue Mountains. This is in order to encourage water conservation and re-use and to manage the quality (sediment and nutrient pollution), quantity and velocity of water entering downstream creeks and ultimately the World Heritage Area. Further, stormwater controls are required to be located within the boundaries of the development and not impact on surrounding properties. The use of the council-owned Planetary Health Precinct to manage the hotel's (and residential development's) stormwater runoff not only transfers the cost to the council and ratepayers but is inconsistent with the objectives of the new Planetary Health Precinct which include "To develop and demonstrate innovative water management as integral to restoration, recharge, stormwater management, the design of infrastructure and site activations".

Both the development's construction, requiring deep excavation into a steep hill, and its rudimentary stormwater management system (the golf course ponds) threaten the actual fabric and hydrology of the golf course/Planetary Health Precinct. Of most concern is the potential for the stormwater system to be simply overwhelmed in

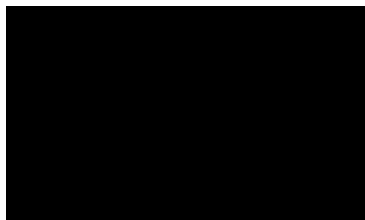
heavy rain events, which the Blue Mountains is increasingly experiencing, by overland flows and the combined flows from the residential development and the hotel, when it is built. This is an unacceptable situation with potentially catastrophic impacts on the swamps, waterways and residential properties downhill.

- **Non-compliance with current zoning.** The current zoning of the hotel site (R3 Medium Density Residential) does not permit a hotel or motel. The new owner must enact the original development approval for the hotel, including the unsatisfactory stormwater management methods, otherwise a new development application will be required. However, this could not be for a hotel but a medium density housing development would be permitted. This would be the subject of a new development application and would have to comply with current LEP and DCP provisions, including stringent stormwater controls.
- **Over-height.** Because of the site's position on a ridgetop in a visually prominent location, the current height limit for the site in LEP 2015 is 8 m. The original approved plans for the hotel show a height of 21.6 m. At this height the hotel soars above the ridge top and treeline, certainly affording a commanding view of Mount Solitary and the Kedumba Valley for hotel guests but also creating a highly visibly intrusive landmark in Katoomba township and beyond, perhaps even from within the World Heritage Area.

These case studies highlight the significant increase in environmental protection and building standards since the original approvals were granted and the GBMWHA declared. We believe the case studies support our argument for a time limit on development approvals after commencement and for retrospectivity in any legislative reform. The ability to revoke consent in cases such as these, without penalty to the original consent authority, is critical and we hope the Committee will give this serious consideration.

We would welcome the opportunity to appear at an Inquiry hearing.

Yours sincerely,



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