

HISTORICAL DEVELOPMENT CONSENTS IN NSW

Organisation: Friends of CRUNCH Inc
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Partially
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LEGISLATIVE ASSEMBLY, COMMITTEE ON ENVIRONMENT AND PLANNING
INQUIRY INTO HISTORICAL DEVELOPMENT CONSENTS IN NSW

A Submission by Friends of CRUNCH Incorporated (“CRUNCH”)

To the Committee Chair and panel members,

The environment is at breaking point and the impacts of climate change are clear, yet NSW is about to make things worse with a rash of inappropriate property development along the eastern coast of Australia. With the NSW Community already experiencing the rapidly escalating impacts of climate change on their daily lives, CRUNCH submits to this Inquiry that there is now an inescapable need for the NSW government to urgently take legislative action to address these historical development consents which are, in many instances, many decades old.

Further, CRUNCH submits that the NSW Government needs to urgently move to a “Nature First” approach to planning and development to ensure the NSW Community attempts to properly mitigate the effects of climate change. Those impacts have been played out in real time in regional and coastal communities in particular with devastating bushfires, drought, erosion, flooding as well as the inexcusable species loss of both flora and fauna that has followed these catastrophes.

In this respect, the Commonwealth Government is now a signatory to the Leaders’ Declaration resolved at COP 26 in Glasgow to “...*halt and reverse forest loss and land degradation by 2030...*”.

We submit that the NSW Government should accordingly work to honour the international commitments entered into by the Commonwealth.

We submit that the steps required by the NSW Government must necessarily include urgent legislative reform to address the legislative failings which have allowed development consents issued decades previously to be acted upon now, where those developments are clearly not longer appropriate and will result in significant damage to the environment, the destruction of biodiversity and developments occurring in locations which simply cannot safely or sensibly support those developments.

These so-called “*zombie developments*” are in most instances now proposed to proceed to development in areas which have, with the progression of scientific understanding and the changing of community values, subsequently been declared as:

- (a) flood and/or bushfire prone;
- (b) high in biodiversity values;
- (c) holding significant cultural and heritage significance; and
- (d) otherwise hold the remaining vestiges of precious flora and fauna which were not destroyed in the catastrophic Black Summer bushfires.

Friends of CRUNCH Inc. (“CRUNCH”) is a community association based in Tura Beach, located just north of Merimbula, on the Far South Coast of New South Wales. CRUNCH stands for Concerned Residents in Nolan Drive, Casuarina Drive and High Crescent and was formed in 2022 in response to one such “zombie development” proposed to be acted upon by RCL Merimbula Pty Ltd.

The relevant development site is located at Mirador. The site was consented for development in 1989 by the Bega Valley Shire Council (“BVSC”) as part of a staged development.

Since consent was issued by the BVSC over three decades ago, Stage 13 has sat in abeyance without the developer seeking the issuing of a Subdivision Works Certificate or Subdivision Construction Certificate pursuant to the *Environmental Planning and Assessment Act 1979 (NSW)* (“the EPA”) until the last 18 months.

In August 2022, without any further consideration of the environment or biodiversity on this site, the BVSC issued a partial Subdivision Works certificate which will permit the consent holder to raze vegetation including the absolute destruction of one of only two locations of the endemic and critically listed Merimbula Star-Hair. This is in addition to the obliteration of the habitat which plays host to a raft of species of flora and fauna listed as endangered, threatened or critical by both the New South Wales and Commonwealth governments, as set out below.

Of significant concern is that following submissions being made to the BVSC by CRUNCH, the BVSC's stated position is that it does not need to consider or comply with the requirements of any modern planning legislation or instruments, nor any of the requirements of the *Biodiversity Act 2016* (NSW) because, on its understanding of the law, the development consent issued three decades earlier does not require it to do so.

Such a position is plainly wrong at law given the decision of the Land and Environment Court of New South Wales in *Palm Beach Protection Group Incorporated v Northern Beaches Council* [2020] NSWLEC 156. Yet, despite the legal position, the community is left to try and resource and defend this critical environmental resource in the face of the hapless determinations of the BVSC as the designated local government decision-maker under the EPA.



What should be of significant concern to this Inquiry, and which CRUNCH submits warrants careful examination as a case study, is that there can be no doubt that if the proposed Mirador Stages 8, 9 and 13 (the final stages in the 1989 development consent which are still not yet commenced) were to be evaluated and assessed under current legislative and planning instruments, they simply could not be consented to by the BVSC due to extent to the destruction of endangered, threatened and critically listed flora and fauna species on the site.

It remains astounding that the legislature has not acted decisively to date to prevent anachronistic planning that allows these Zombie developments to proceed and drive development across New South Wales with a complete disregard for the environmental damage which they cause.

This patently absurd situation has been the focus of CRUNCH's sustained community campaign since June 2022, amongst other campaigns, which focuses on the key objective of halting the development of the remaining Mirador sub-division stages given the inevitable and irreparable ecological and heritage destruction that will follow should they be permitted to proceed under the apathetic gaze of the BVSC.

In this submission we will provide information on the farcical Mirador development situation and make recommendations to the Committee for their consideration as to practical and pragmatic ways in which the State government may implement additional or new processes to existing NSW planning and environment legislation to address these Zombie development consents. We further anticipate that these recommendations and outcomes from the Enquiry are presented to the Commonwealth government for its consideration as to inclusion in the EPBC Act and we would embrace the Committee raising the terrifying spectre of these "zombie developments" and ways to address them at the Commonwealth government level.

In making these submissions, we also wish to make clear that CRUNCH, as community organisation is not anti-development. Rather, CRUNCH recognises the need for development to not only address a critical housing shortage, felt acutely on the Far South Coast, but also to drive economic growth and community advancement.

What CRUNCH calls for ultimately is that this Committee urgently address inappropriate and absurd developments that have been allowed to subsist due to legislative defects and oversights and instead work to encourage and promote sustainable and sensible development which considers and applies modern scientific thinking and learning.

During our time advocating in relation to this issue, CRUNCH has approached and had discussions at all levels of Local, State and Commonwealth governments as well as communicating directly with the developer of the site over the past 18 months.

Whilst Local and State government representatives in particular have openly acknowledged the devastating impact to a highly sensitive ecology and accepting that the development consent could not be approved under current legislation, the general message at governmental level has been at best a wringing of hands and at worst an active refusal to examine or consider any alternatives to the development proceeding.

Perhaps ironically in the face of the seeming Local and State government ennui, the developer has openly indicated a willingness to work with the Local and State governments as well as the local community to explore alternatives to this development proceeding. Those options have included:

- (a) A land swap with either NSW Crown Lands or the BVSC;
- (b) Working in partnership with other private landholders in the Bega Valley and the BVSC to identify and arrange to develop a more appropriate site; and
- (c) The vesting of the site in the NSW Biodiversity Trust as a purchase or in exchange for proper compensation in the form of biodiversity credits and offsets.

It seems that despite that willingness on the part of the developer, as a private landowner and the ultimate consent holder, to explore those other options, that that preparedness to discuss and explore alternatives has been met by a combination of (particularly) Local government ineptitude and inaction and a critical lack of proper government funding (both at a Local and State government level) to support a proper discussion and examination of such alternatives.

We recognise that a developer facing those two issues is left in an invidious position.

This is particularly so where the only seeming alternative being offered by Local and State governments at present is for the developer to attempt to proceed with a clearly inappropriate development, which will inevitably face expensive and protracted litigation in the Land and Environment Court of New South Wales. Such litigation of course has no certain outcome and comes at further significant public expense when the use of the Court's time and resources is considered.

In addition to that matter, it has been our experience and observation while advocating for the local community that the current NSW Planning framework as a whole is unacceptably fractured and flawed. Some specific observations at that at present the framework:

- (a) Places the values, needs and expectations of communities far below those of the development industry and private development profits.
- (b) Provides no proper support, guidance, or certainty of legislative instruction to Local Government to enable implementation of the objectives in State and Regional level planning documents such as the South-East and Tablelands Regional Plan 2041, 2041 NSW Housing Strategy and the NSW Saving our Species Program.
- (c) Seemingly places too much of the burden of delivering housing targets on Local Councils, who in regional areas are experiencing significant staffing and budgetary issues.
- (d) Financial pressure invariably results in those local Councils refusing to exercise their present statutory powers to vary, or revoke, inappropriate development consents, such as the remaining stages of the Mirador development, to try and pretend that they are seeking to meet arbitrary and unachievable housing targets imposed on them.
- (e) Despite the EPA Act providing for an express power to revoke or modify development consents at any time, Local government are not supported by State government either financially or legally to ensure that the following developer compensation claims resulting from such a decision under the current legislative regime can be met.
- (f) The State government provides no resourcing, support or guidance to Local governments to properly meet any legal challenges resulting from issuing modifications (or revocations) or Zombie development consents to ensure they comply with modern legislative requirements.

- (g) Displays no substantial commitment by any level of government to addressing the real concerns of affordable housing. Instead, there appears to be a continuing focus on promoting any, and all, development in “desirable” coastal locations. CRUNCH recognises and commends to the Committee the excellent work of the Honourable Senator Cate Faehrmann in her recent report, *“Concreting Our Coast”*, as well as the following work being undertaken across the New South Wales coast by the recently established peak body, Coastal Residents United.
- (h) Is not designed to be responsive to current recommendations to mitigate risks associated with climate change and the unacceptable loss of biodiversity.
- (i) Significantly undermines work being done by other State and Commonwealth departments to try and protect vulnerable ecological communities, biodiversity, threatened species’ habitat, waterways and the economies of coastal towns. We observe that by its very nature and present structure, the fact that the current State government Environment Department sits under the umbrella of the broader Planning Department rather than being a free-standing and independent Department enabling it to provide a voice equal to, and independent of, that of the Planning Department should be of concern to the Committee and the consideration of comment.
- (j) Does nothing to prevent development in inappropriate locations or to truly incentivise affordable development in existing urban centres or on land that is already cleared or of low biodiversity. In this respect, the ongoing impairment of the developer of the Mirador site to be able to engage in a sensible and open discussion about alternatives despite being willing to do so, is damning.

Key Proposed Recommendations

We submit that this Committee should make findings and recommendations that:

1. The State government place an immediate moratorium on any Development Consent given by any Local Government more than five years ago which has not since lapsed.
2. The State government “sunset” any geriatric development consents given by Local governments more than five years ago by inserting into the EPA:
 - a. A requirement that any development consent holder with a development consent older than 5 years must apply for a new development consent to be issued within 2 years;
 - b. The application for a new development consent must be assessed by the local government decision-maker under all current environmental and planning legislation, and
 - c. The development consent lapses unless that application is made to the local government decision-maker within 2 years.
3. The current EPA Act be amended to ensure that any compensation that may be payable upon the lapsing of any such development consent older than 5 years is:
 - a. Capped to prevent inappropriate roting of public finances by development consent holders who have chosen to hold but not act on these ancient development consents; and
 - b. Statutorily define compensation to be zero for any development consent more than 10 years old with a rebuttable presumption that the holder of the consent had no intention of acting on the consent unless they prove, to the civil standard, that they have undertaken “substantial commencement” in the last 2 years (as now defined in the EPA and Regulations following the 2016 amendments and not under the law as it was).

4. All Zombie development consents in NSW be identified and catalogued (we propose that include any development consent older than five years) to properly understand the cumulative size and impact on these disparate developments on biodiversity loss and environmental damage.
5. The Environment Department and NSW Crown Lands be directed to immediately take all steps to compulsorily acquire the land situated at Stage 13 Mirador in order to permanently protect the endemic Merimbula Star-Hair, the critical hollow-bearing trees as well as the numerous other endangered, threatened and critically listed species of flora and fauna which reside on the site.
6. A State government fund be established for the express purposes of:
 - a. Properly funding compensation claims made by the holders of Zombie development consents which are “sunsetted”;
 - b. Purchasing any privately held land identified by the NSW Environment Department as holding special biodiversity values for that land to be retained in perpetuity by the NSW Biodiversity Trust; and
 - c. Funding NSW Crown Lands to arrange land swaps with private land owners where the land owner voluntarily surrenders the biodiversity rich land in exchange for Crown Land or part exchange of land and compensation to equal monetary market value.
7. The program currently underway as part of the Crown Land 2031 initiative (<https://www.crownland.nsw.gov.au/about-us/our-vision-future/first-action-plan> - Focus area 4) be expanded to include use of that land for affordable housing solutions for rural communities and to permit part of those Crown lands to be used as part of land swaps with private land holders presently holding these ancient development consents to ensure that developments can proceed in more appropriate areas.

8. Enact legislation to ensure there is a process for public re-exhibition and community consultation for all development consents approved more than 5 years ago so that when those consent holders seek approval from local governments for the issuing of a construction certificate, subdivision works certificate or equivalent, the local communities have an opportunity to be heard on the issue.
9. Require that any development consent holder seeking the issuing of a construction certificate, subdivision works certificate or equivalent in areas gazetted as high biodiversity value, must provide to the Local government decision-maker an independent environmental assessment completed within 6 months of the request for such certificates to issue.
10. Increase the funding committed to the current Biodiversity Offset Scheme and introduce an independent body to perform oversight of all biodiversity credit holdings at least annually to ensure that the credit scheme is being utilised as it was intended and not as a “developer loophole” by caching or banking credits in order to press for inappropriate developments to proceed.
11. Pass legislation banning any person or entity from offering residential land lots for sale in “pre-registration” phase for any residential development where the development consent was given more than five years ago.

To support those recommendations, we now provide the Committee with the following case study of the Mirador site which exhibits the need for those recommendations.

Case Study for Zombie Development Consents: Mirador, NSW



The development known as Mirador stages 8, 9 and 13 are a total of approximately 40 hectares of approved development as part of DA 1989/1180. The site is located at Lot 1087/-/1240676 (between Tura Beach and Merimbula on the Far South Coast of NSW).

The original consent was granted by the designated consenting authority under the EPA Act, the BVSC, for the entirety of the 13-stage subdivision, however these 3 stages have not yet commenced development despite some 34 years passing since the original consent was granted. This development consent was approved under the dictates of the EPA Act 1979 in its modified form as applicable in 1989.

Perhaps trite to observe, but that legislation falls well short of the current legislative regime and certainly in no way reflected the realities which the environment is facing with regard to climate change and loss of biodiversity. Simply put, the development consent would not and could not be granted under the current planning and environment legislation including the *Biodiversity Conservation Act 2016* (NSW).

As set out above, this Case Study primarily focuses on the area on the site known as “Stage 13” because the developer has only recently recommenced activity on the site by requesting the BVSC issue a Subdivision Works Certificate. Both stages 8 & 9 are equally as important and present other unique biodiversity and environmental challenges, however those stages are not presently slated for “imminent” destruction. At present, physical work on Stage 13 has been halted and has not yet commenced due entirely to community action.

In summary, the proposed Stage 13 development will cause the clear felling of 10ha of sensitive coastal sclerophyll bushland, based on an environmental assessment which was carried out in 1989 as part of the original consent process. The proposed area also sits at the head of a gully which runs to the South-East directly into the Back Lake at Merimbula. Clear-felling as proposed will invariably result in significant siltation of that riparian and estuarine area as well as the resulting damage.

The location of Stage 13 and the area marked for clear-felling is shown as follows:





The development poses serious concern for the loss of biodiversity and the flow-on impacts this will bring to the area including the following:

1. **Threatened Species, Habitat Trees, Ecosystems**

This is an area of remnant mature coastal forest with a high number of hollow bearing trees and quality ground cover habitat that support a range of threatened flora and fauna species including – but not limited to – the Merimbula Star-Hair (see point 2 below), the Long-nosed Potoroo, the hollow-dependent Yellow-bellied Glider, Glossy Black-cockatoo, and Gang-gang Cockatoo. The Powerful Owl and Barking Owl are frequently heard calling and possibly breed here. It provides foraging habitat for the Grey-headed Flying Fox and the critically endangered Swift Parrot (see point 3).

Five of the above species are listed as threatened under national legislation in addition to NSW. Countless other creatures live there including and are part of a thriving, functional ecosystem.

There are also populations of mange-free Wombats, Echidnas, Lace Monitors. Long-nosed Bandicoots, Eastern Grey Kangaroos, Swamp Wallabies and Red-necked Wallabies who reside in or traverse the Lot.

A local ecologist and registered NSW ecological assessor, Ms Elisabeth Larsen, has prepared a threatened species evaluation table based on her personal knowledge and from a review of the threatened species records from the locality that are available in the public domain, NSW BioNet Atlas database most importantly.

Threatened Species Evaluation Table at Stage 13, Mirador prepared by Elisabeth Larsen, ecologist, 17/08/2022 is available for download as a PDF at:

https://drive.google.com/file/d/1GN2ralQ-a6duEdI7tSohtcYs782m-TAg/view?usp=drive_link

2. **Merimbula Star-Hair**

There is a significant number of the critically endangered plant known as the Merimbula Star-Hair on the proposed development site.

This plant is endemic to the Tura Beach area and has special protection in NSW where it is listed as a SAA species under the *Biodiversity Conservation Act 2016* (NSW) being a species at risk of 'Serious and Irreversible Impact' of development. Following the introduction of the BC Act, the consent authority must not grant development approval if it is determined that a development proposal is likely to have a serious and irreversible impact on this plant (Clause 6.7 of the Biodiversity Regulation 2017).

To date over 220 plants have been recorded and officially lodged with the BioNet database by a community member in June 2022. This was a quick survey on the eastern fringe of the Stage 13 site. A thorough and scientific survey would invariably observe and record a much higher occurrence throughout the site. Notably, this site is one of only two locations in the world where this plant is known to exist, the only other being a very small remnant stand on the Victorian border.

3. **Swift Parrot**

The locality is a known and regular stop-over foraging point for the Swift Parrot in their migration from their breeding grounds in Tasmania to the South-Eastern Australian mainland in winter.

We understand that this locality is, or historically has been, one of the NSW Department of Environment's chosen monitoring points for the Swift Parrot.

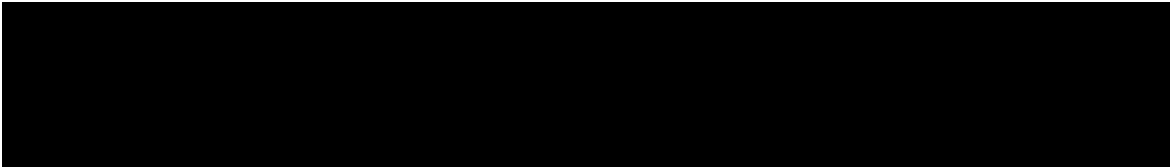
Observations have been informally recorded via photos, audio and video by residents living on the edge of Stage 13 feeding in the flowering ironbark and bloodwood mature "eucalypts" in the forest.

4. **Yellow-bellied Glider**

A GIPA request was issued to BVSC after the BVSC refused to provide access to public documentation related to the 1989 DA and has revealed that disturbingly, the BVSC were aware of the existence of a colony of Yellow-Bellied gliders in Stage 13 as early as 1996.

It is unclear as to the methodology of the observations and the time period this occurred. A review of the other documentation obtained from the BVSC under the GIPA request, shows that this information was assiduously ignored in each subsequent modification application to the development consent and ultimately was also ignored by the BVSC when it determined to issue the partial Subdivision Works Certificate in August 2022.

For context, the locations of all points on the map provided by [REDACTED] [REDACTED] are located solely and directly within the proposed Stage 13 development.



Included in documentation provided to Bega Valley Shire Council in July 2022 in the developers application for subdivision works was a document “D22-75654 9970-06-CC200-CC280 Revised SWC received July 2022”. That document was an Eco Logical Australia assessment completed in 2014. The BVSC relies on that document to confirm the appropriateness of issuing a Subdivision Works Certificate.

Page 40 of 41 of that document provides detail on the proposed tree removal on the site. Specifically, on the 10ha site, only 3 sap feeding trees were identified however not the “species” of tree. Yellow-bellied gliders feed off the sap of primarily Bloodwood Eucalyptus trees of which there are many more than 3 in the area known as Stage 13. Also not identified in any documentation provided by the developer was Yellow-bellied Glider habitat trees.

A copy of page 40 can be downloaded as a PDF at https://drive.google.com/file/d/1JHuhIYG-T1N1_MCFhwHxkoFTNV3h7I2X/view?usp=drive_link

5. **Wildlife Corridor**

This land provides a critical East-West corridor for animals to move between the Bega Aboriginal Land Council land, immediately adjoining the site to the North and West, and the Bournda National Park then adjacent to that land. To the East of the site are the proposed Stages 8 and 9 of Mirador, also yet to be developed. This “corridor” of stages 8, 9 and 13 (coastal forest) enables ground dwelling and arboreal animals to move freely to fresh water sources (both Pages Creek that runs through the stages as well as Pages Dam and Back Lake at Merimbula directly behind the beach).

Allowing all this land to be developed, will result in complete removal of critical habitat and also the isolation of native fauna in a small coastal zone bordered by urbanisation with no movement corridors and access to freshwater.

The following satellite images clearly show the critical corridor (*image 1*). Overlays show the locations of Bournda National Park, Aboriginal land Council Land and stages 8, 9 and 13 of Mirador are provided for context (*image 2*).

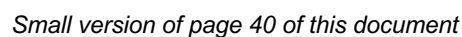
Image 1



Image 2



See (4) Yellow-bellied Glider for more detail on this.



https://drive.google.com/file/d/1JHuhIYG-T1N1_MCFhwHxkoFTNV3h7l2X/view?usp=drive_link

The tree-clearing regime proposed means that tree-dwelling animals (such as gliders) will not be able to move between any sparse trees left due to the sheer distance between. In short, all arboreal and tree-dwelling fauna will be wiped out of this area. In addition, historically trees that have been identified by BVSC to be kept as part of the previous stages, have been felled directly after works received completion status by private land-owners.

6. Sedimentation, runoff and pollution

As set out above, DA 1989/1180 will cause clear felling of 10ha of sloping land in a gully on sandy soils in a protected riparian and watercourse zone comprised of Pages Creek, which is part of the Merimbula Back Lake catchment. Notably, the same developer has already been investigated by Council and issued a Prevention Notice under the Prevention of the Environment and Operations Act for allowing pollution from earlier stages of the Mirador development to run into the Back Lake at Merimbula. We refer in this regard to an article from About Regional 22 March 2019 providing more detail on this event <https://aboutregional.com.au/merimbulas-back-lake-turns-brown-again/291256/>

The 2014 Honours Thesis by Alison Borrell clearly shows how the increasing development and devegetation in the vicinity of Back Lake has increased sediment runoff and water quality, impact to marine life and estuarine processes. <https://ro.uow.edu.au/thsci/71/>

In earlier stages of the development in Mirador that back directly onto Pages Creek the “offset” zone (that was defined as 40-50m that should have remained untouched or if it was, then remediated to its original habitat is now a site of barren rock fill and compacted clay soil that continues to erode with wind and rainfall, and continues to pollute the waterways.

Local Landcare group members have provided anecdotal evidence of the occurrence of natural springs within the area of Stage 13, above the official “start” of Pages Creek and the following gully. This stands to reason as the creek always flows, even in times of low rainfall, with the immediate vicinity of the creek/riparian zone exhibiting attributes of temperate rainforest growth. The presence of permanent resident Superb Lyrebirds in this part of the forest attest to this.

Zoning Issues

The screenshot below from the NSW Planning Portal Spatial Viewer, shows the Stage 13 zoning is R2, a zoning applied as part of the original 1989 Mirador DA. What is clearly illustrated is how out of context the zoning is to the surrounding land and usage.

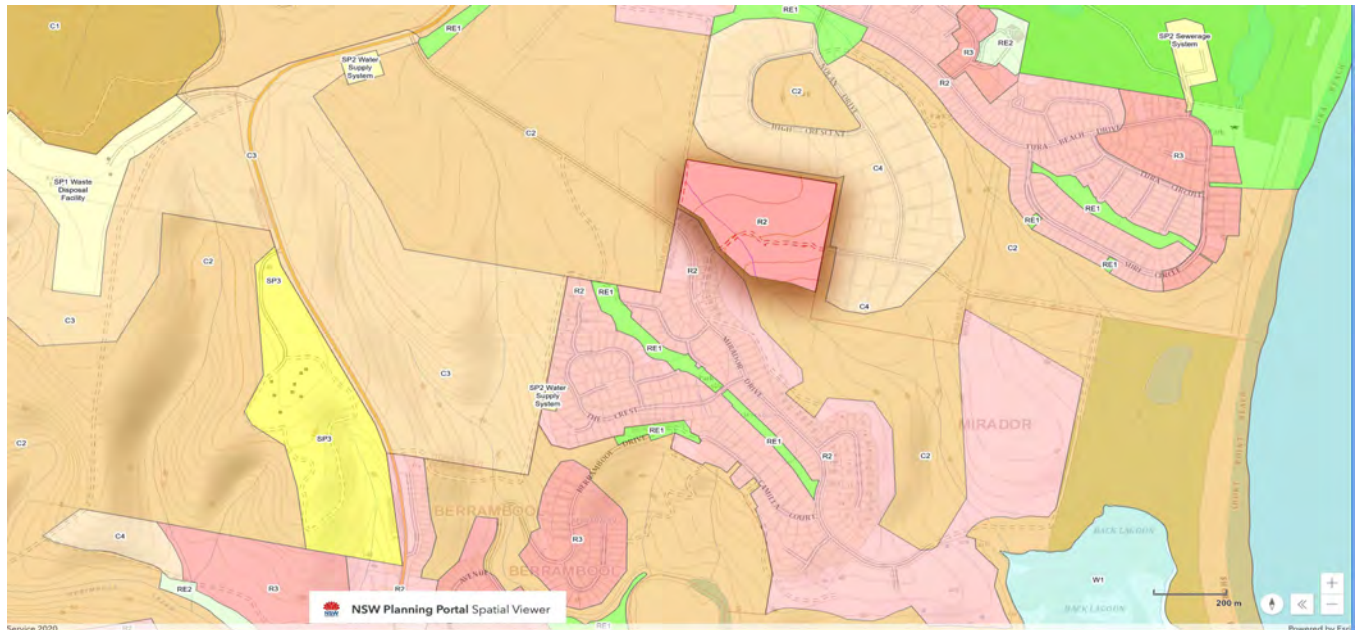


Image from NSW Planning Portal showing zoning of Stage 13 and surrounding environment.

For some context of the colourings and zonings:

- (a) immediately to the east and north is zoned C4 Environmental Living, with large lots between 1-2 acres.
- (b) To the west of stage 13 and to the east of the C4 zones, is zoned C2 - Environmental Conservation. This is made up of Bega Aboriginal Land Council Land, with a small C2 zoning defined as the Tura Beach Flora and Fauna Reserve; land that was once slated for development, but now conserved in perpetuity and managed by a council-appointed committee of local residents.
- (c) To the south east and between Stage 13 and the proposed stages 8 & 9 of Mirador the zoning is C2.
- (d) To the south is R2 - these are the previously developed stages of Mirador.

(e) To the west of the C2 land (Aboriginal Land Council managed) is C1 - Bournda National Park.

That R2 zoned land in this day and age can adjoin C1, C2, C3 and C4 zoned land is clearly inappropriate, especially when it results in the removal of a critical wildlife corridor and loss of threatened species as set out above.

The current owner of Stage 13, RCL Merimbula Pty Ltd have held ownership since 2011. In 2013 the developer submitted a modification to Stage 13 to seek a change in the zoning from R2 to R3 thereby increasing the number of approved lots from 33 to 116, and the minimum allowed lot size of 2000m² to 450m².

This was discussed at a BVSC meeting on 5 March 2013 as 8.2 Proposed Zoning of Stage 13 Mirador Estate under Bega Valley Local Environmental Plan 2013.

The full minutes of the BVSC meeting are available at:

https://begavalley.infocouncil.biz/Open/2014/03/OC_05032014_AGN_AT.htm#:~:text=8.2.%C2%A0%C2%A0%C2%A0%C2%A0%C2%A0%C2%A0%C2%A0%C2%A0%C2%A0%20Proposed%20Zoning%20of%20Stage%2013%20Mirador%20Estate%20under%20Bega%20Valley%20Local%20Environmental%20Plan%202013%C2%A0

The following is an excerpt from the BVSC meeting:

Council at its meeting held on 12 June 2012 gave consideration to the staff report on the draft BVLEP 2010 and resolved to defer any decision on the Stage 13 land. The land was deferred from BVLEP 2013 and included in Appendix 3 pending a review of the feasibility of town sewerage for Stage 13 in the overall context of the master plan for Mirador, with a further report to be submitted to Council following the review.

For reasons not made public, the modification was withdrawn by the developer. However, it seems clear from the requested change of zoning, decrease of lot size and over 3x increase in the amount of lots, that if the developer can prove that a reticulated sewerage system is able to be adequately supported they may try in the future through whatever instruments are available to them try again to amend the DA to allow for as many lots as possible with the ultimate aim to have in the vicinity of 116 lots.

Additionally, a review of the website of the environmental consultancy preferred by the developer previously engaged to complete work on this site (Eco Logical Australia), makes it clear that their customers are sourced from the resources and large urban development sectors. Notably, their client and project history support this.

Bega Valley Shire Council

On the long weekend in early June 2022, the local community first became aware that Stage 13 was reactivating for development when, without any prior notification to the community by the developer BVSC, fencing was erected and earthmoving machinery and industrial materials were placed on the edge of the site.

Concerned local residents immediately raised their concerns with BVSC and were (and continue to be) met with a response that can only be described as obstructive and contemptuous. That prevailing attitude has continued in all BVSC dealings with community requests for information, action or explanations about why this development consent remains active over three decades after it was issued.

From the outset, the BVSC have expressed a misguided opinion that there has been no change to the original development consent given in 1989 and accordingly they, as the relevant consenting authority, could proceed to issue a Subdivision Works Certificate without any regard to modern planning framework including the BC Act. The BVSC have since issued a partial Subdivision Works Certificate to allow clearing of the land to support some infrastructure works.

Remarkably, and to its credit, no works have been commenced by the developer to date after community backlash raised a need for proper assessment of the site and a referral to be completed to the Commonwealth Department of Environment under the EPBC Act.

The original development consent, and all subsequent modifications, have stated that BVSC can “revoke” consent at any time and for any reason. That much is clear in any event from the powers granted to the BVSC under the EPA Act.

Despite holding that power, the BVSC has continually sought to mislead and misdirect the local community by insisting in its communications with community members that there is no need for BVSC to require compliance with any current legislation and that it has no power to do anything except issue the Subdivision Works Certificate.

On 1 July 2022, in response to a direct enquiry, [REDACTED] responded to a local community member stating:

[REDACTED]
[REDACTED]
[REDACTED]

Further, a closer inspection of the terms of the original development consent granted by BVSC on 27 October 1989 include an express provision requiring the developer to:

*The following determination of Development Application No 89.1180 relates to the subdivision as a whole. **Should it be intended to proceed with the subdivision in separate stages, a new development application is required to be submitted for each separate stage.***

Finally, the developer, to its credit, has openly stated that it would be willing to explore alternative development options including a potential land swap for other suitable land within the Bega Valley that would meet the BVSC's stated development goals. Direct communication with the BVSC indicated that the developer had not approached them to discuss any alternatives however in subsequent direct communication with the developer, it was revealed that BVSC staff had refused to meet with the developer and declined several meeting requests to discuss alternatives to proceeding with this ancient development consent.

A subsequent meeting was finally brokered and arranged by CRUNCH between the BVSC and the developer. It became clear from the meeting that the BVSC had no intention of exploring any alternatives, stating it did not have any land in its holdings which it wished to consider offering in a land swap arrangement for the Site. This position has been adopted despite the BVSC having subsequently issued its *Residential Land Strategy 2040* which

nominates numerous areas in the region, including land owned by BVSC, which has been identified for proposed development in the coming 15 years.

Cultural and Heritage Value

There are 2 key cultural and heritage considerations that form part of this land and the areas immediately adjacent:

1. Aboriginal cultural heritage

The Bega Aboriginal Land Council manages a large parcel of land between the Mirador estate and the Bournda national Park. It also bounds the western side of Stage 13 biodiversity corridor.

2. Tramway

In the midst of the Mirador development and just to the south/south east of Stage 13 (and east of stages 8 & 9) lies the Merimbula Tramway, a now heritage protected item.

As part of previous stage developments in the Mirador estate, when the sewer line was being constructed to Merimbula, a member of the community discovered that the development construction was damaging the stone foundations of the several bridges that used to carry the tramway and then the water pipeline down the hillside. They contacted the Heritage Office that then instructed Council to stop the work while the situation was assessed and an alternate route for the sewer line was designed.

In July 2021 a residual lot was constructed around this area and heritage listed.

Applicable legislation

The Lot has been declared by the NSW Department of Planning, Industry and Environment as both “Biodiverse Riparian Land” and “Threatened species or communities with potential for serious and irreversible impacts”. We further understand that the Lot has recently been rezoned by the NSW Department as C2 (environmental conservation zones) (being declared by the NSW Department on 5 November 2021).

Further, under the *Bega Valley Local Environmental Plan 2013* (“BVLEP”), the Council declared the entire Lot to be a Heritage area (on 21 July 2021) as well as a Riparian and Watercourse. Again, due to the age of the development consent, Council have indicated that they do not consider that any of the environmental and other development requirements in the BVLEP apply.

As far as we are aware, no current Biodiversity Development Assessment Report or Species Impact Statement has been completed in relation to the Lot by either Council or the developer.

The BVSC, as the consenting authority, have indicated they do not believe they are required to comply with any of the applicable statutory and other protections including the *Biodiversity Act 2016* (NSW) because the Council had issued a development consent in 1989. That consent was, however, subject to further approval by the Council prior to any works being undertaken.

We have notified the Council that we consider their present approach to be legally incorrect and, in any event, we consider there are real concerns that the development consent itself may have lapsed. Those issues will need to be determined by the Land and Environment Court, with all the attendant costs and delays which that litigation will inevitably entail, before any resolution of those issues can be achieved. As a test case on this issue, we anticipate Court proceedings would attract significant media attention.

Cumulative impacts of disparate coastal inappropriate development

Through our campaigning to raise awareness of this development we have become a member of the citizens alliance “Coastal Residents United”.

https://www.catefaehrmann.org/coastal_residents_united_launched_new_alliance_of_community_groups_fighting_inappropriate_development

This has only highlighted there is a scourge of dormant DAs becoming active (in addition to other forms of inappropriate development). It illustrates that when viewed as a whole, the cumulative effect of deforestation and biodiversity loss of all this land is without doubt, horrifying. This alliance we are sure represents only a small portion of communities in NSW impacted by inappropriate developments that exacerbate the impacts of climate change. Without this approach, the reality is “death by 100 cuts”.

The NSW Save Our Species program, an initiative of the NSW Department of Planning and Environment stated the main object of the program is to

“Increase the number of threatened species that are secure in the wild in New South Wales for 100 years and control the key threats facing our threatened plants and animals.”

One of those key threats is inappropriate development and the systemic failures of the current NSW planning system are undermining the very objective of Save Our Species.

In addition, Cate Faehrmann, NSW Greens MP has visited many communities along the NSW coast facing the reality of inappropriate development in their communities and released a report in January 2023 “Concreting our Coast: The developer onslaught destroying our coastal villages and environment”. This highlights 20 case studies including Stage 13 (Mirador/Tura Beach).

See more:

- Report https://www.catefaehrmann.org/new_report_shows_coastal_nsw_as_we_know_and_love_it_at_risk_from_unchecked_development overview
- Case studies <https://www.catefaehrmann.org/coastal-dev-content>

- Framework and principles to address inappropriate development
https://www.catefaehrmann.org/framework_save_our_coast
- Full report
https://drive.google.com/file/d/10-W_U1wl5vUTSCdxJZs8JWKFWdVWuWjN/view?usp=drive_link

Engagement with the NSW Department of Planning, Industry and Environment

Since June 2022 members of the community have had various communications with the NSW Department of Environment expressing their concern over this development proceeding and the impact to the high biodiversity loss.

The Department indicated they were more than amenable to trying to work with landowners to mediate better outcomes through options like a Biodiversity Stewardship, however throughout the past 15 months it is clear that within the current system they lack any power and have limited funding.

An example of correspondence received from DPIE in relation to this is at https://drive.google.com/file/d/1rIU6dSTxFJsmSZvDkDb2fC_valsa5O9/view?usp=sharing

Community members have continuously written to ministers and members of the DPIE and extended this to other ministers and representatives from all parties, including local member Michael Holland who has expressed deep concern over this potential development, previous coalition ministers Griffin, Roberts and Keene, as well as current ministers Penny Sharp and Paul Scully.

In addition, community members had a meeting with Paul Scully in late 2022 when he was Shadow Minister for Planning where he indicated that should Labour win the 2023 NSW election and he became Minister, his hands were tied, however he would consider acting as a “broker” between the community and council. This was not an acceptable response from our perspective.

Various members of the community have also written to our local federal MP Kristy McBain who has expressed serious concern over this issue and Federal Environment Minister Plibersek, the matter now firmly on her department's radar. Minister Plibersek's office has also notified the developer they are aware of this dormant DA and plans to proceed with development.

Proposals for Alternatives to Development of Stage 13

The community via our legal representative has provided what we believe to be 3 proactive and viable alternatives to the development of Stage 13 (and by extension stages 8 & 9). Below is an extract what was provided to the NSW Department of Planning, Industry and Environment on 6 September 2022.

The terms of the letter sent to the Department, which was also sent to various NSW Ministers and Shadow Ministers holding those roles at the time was as follows:

We have now had the opportunity to speak with the Council and the developer jointly. To its credit, the developer has indicated that it is open to considering alternatives to proceeding with the works on the site which will inevitably result in the loss of biodiversity and irreparable damage to the environment.

Following that meeting between the Council and the developer, three possible alternatives to development of the Lot were identified as follows:

1. The site be transferred/sold to another private commercial developer and then transferred immediately to the NSW Biodiversity Trust or otherwise dedicated as a Biodiversity Stewardship Site.

The proposed private commercial developer who was proposed has recently received development consent from the Council to build a Bunnings Warehouse on a nearby commercial site in Tura Beach. We understand that that commercial development is presently stalled as the development consent is subject to a condition requiring the private commercial developer to offset the loss of biodiversity on that site, including the loss of the extremely rare Merimbula Star-Hair, before construction begins.

This alternative would likely be greatly assisted by input from officers within the Biodiversity Conservation Trust and the NSW Department of Planning, Industry and Environment.

2. The site be transferred/sold directly to the NSW Biodiversity Trust or otherwise dedicated as a Biodiversity Stewardship Site providing biodiversity offsets for the developer in relation to other projects or for sale on the biodiversity credits market.

This alternative would also likely be greatly assisted by input from officers within the Biodiversity Conservation Trust and the NSW Department of Planning, Industry and Environment.

3. The Lot be the subject of a direct land swap for a parcel of Crown land situated elsewhere in the Bega Valley or region. The Lot could then be acquired as Crown Land or as National Park land.

The Council have indicated they do not presently hold any land parcels that they consider would be a viable swap for the Lot. Accordingly, this alternative would require the input and assistance of the NSW Department of Planning, Industry and Environment and NSW Crown Lands.

Given that the Crown land to be swapped would then presumably be developed by the developer, it might also be of assistance for the Council to be involved in any such land swap so that there can be an open discussion with the developer and NSW Departments to try and ensure that any Crown land swapped for the Lot will best meet the needs and interests of the developer and Council. Given the Council released its *Bega Valley Shire Council Affordable Housing Strategy* in July 2022, which identifies certain sites for proposed future development, there may well be Crown land sites that can be easily identified in a short timeframe.

We consider all the alternatives set out above present significant and real benefits to all parties.

In alternative 1, the developer has the benefit of achieving a financial outcome from the land while avoiding unnecessary destruction of

biodiversity and environment and the costs, risks and delay of Court proceedings. Benefits will also accrue to the Council, the private commercial developer and the local community in having a consented commercial development proceed while sensibly balancing the biodiversity and environmental impacts of that commercial development in protecting the extensive range of threatened, endangered and other flora and fauna present on the Lot as well as the wider local environment.

In alternative 2, the developer has the benefit of achieving a financial outcome from the land which avoids the costs, risks and delay of Court proceedings and any unnecessary destruction of biodiversity and environment. The Council and the local community will benefit from the protection of a range of threatened, endangered and other flora and fauna present on the Lot.

In alternative 3, the developer will have the benefit of undertaking development on another site within the Bega Valley or surrounds in a way that better suits the needs and goals of the Council and the local community without the unnecessary destruction of biodiversity and environment and the costs, risks and delay of Court proceedings. Further, the Council will have the benefit of having input into the land swap which would enable it to work with the developer and the NSW Departments to identify sites of Crown land which are more suitable to achieving its development needs and goals including sites on which it can zone areas for more affordable housing (noting the Lot will only yield 32 large-area blocks not suitable for such affordable housing demands).

The NSW Departments will have the benefit of achieving their stated goal of better aligning the allocation and use of Crown land in NSW to align with contemporary priorities which undoubtedly include the urgent need to protect environmental assets such as the precious biodiversity and environment present on the Lot. This alternative will also allow the NSW Departments to take a flexible and innovative approach to the use of Crown land that balances the need for that environmental protection against their imperatives of ensuring economic progress and development in this part of regional NSW.

Further, we consider the present circumstances in which a private developer has indicated a willingness to work with the Council, the NSW Departments and the local community present a unique opportunity to undertake a very real case-study as to how private developers, local Councils and the NSW Departments can work together to achieve an outcome which best suits the needs of all parties.

As representatives of the local community most directly impacted by this proposed development, we would be grateful if the NSW Departments would urgently agree to work with us to try and achieve an alternative outcome to development that has all the hallmarks of becoming a positive benchmark case-study on how future development can be undertaken in NSW. We have also raised this issue and the proposed alternatives directly with the NSW Minister for Planning, the NSW Minister for Environment and our local State MP, Dr Michael Holland as well as the Federal Minister for the Environment.

To date, the Department has simply not engaged any further with CRUNCH to discuss or explore any of the proposed alternatives.

Pre-Registration Sale of Development Consented Sites

One final point that we would wish to submit upon on behalf of the community is that the pre-registration sale of blocks under which these ancient development consents is unreasonable and unhelpful, as it leaves both developers and purchasers in a bind, where it is discovered that development cannot then proceed (due to environmental issues or legal challenges etc.).

In this respect, CRUNCH has been approached by some purchasers in Stage 13 Mirador, with concerns that they may “lose their investment” or alternatively lose what they see as their “right” to build on a site in the development where, at the stage of the pre-registration sale, there had been no application for, nor the issuing of, a Subdivision Works Certificate to even permit the first of the relevant services to be installed.

While CRUNCH understands that many of these pre-registration sales contracts contain terms which allow the purchaser to require the return of the deposit in full where the site is not ready for settlement of the contract within a certain nominated time period, there is obviously disappointment which flows from the feeling of having personally missed out where a purchaser believes they have a “right” for which they have paid.

The exchange of monies on pre-registration contracts for these ancient consents at a time before the local government decision-maker even has a Subdivision Works Certificate application before it, leads to an invidious situation in which the local government decision-maker is then under enormous pressure to issue a Subdivision Works Certificate regardless of the environmental, heritage and other damage that proceeding with the project would cause. This is particularly so in a small regional community such as the Bega Valley, where those pressures are felt much more keenly than in larger local government areas.

Further, having then “sold” the sites, the developer is then under pressure to enter into a process where it must apply for the Subdivision Works Certificate and is therefore more likely to become blinded to considering any alternatives to proceeding with the development or even from considering other ways in which the site may more appropriately be used, such as for biodiversity offset sales or in a land swap process.

Given the issues which it presents in the context of these ancient development consents, CRUNCH submits that the Committee should consider making a recommendation that no pre-registration sales may be made for sites where the development consent is more than five years old.

Appendix 1

Videos showing Glossy Black Cockatoos, Gang Gang Cockatoos and Swift Parrots within the bounds of Stage 13 observed and recorded by the local community.

- Swift Parrots – August 2022:

https://drive.google.com/file/d/1nrTsafle6L0FkhLb6vKMdwC4elrD_eVN/view?usp=drive_link

- Gang Gang Cockatoos - February 2023:

https://drive.google.com/file/d/1mMnrCjH06UfLe0NDqTox7_87jBwnbg4y/view?usp=drive_link

- Glossy Black Cockatoos - July 2022 (mating pair and juvenile were part of this observation):

https://drive.google.com/file/d/1H7aZCMDfkt1rW7cNWBiqN3QJwcDFzcKe/view?usp=drive_link