



Blue Mountains Conservation Society Inc

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Nature Conservation Saves for Tomorrow

14 November 2022

Mr Anthony Roberts
Minister for Planning and Homes
Parliament House,
Macquarie St, Sydney NSW 2000
Lodged online: <https://www.nsw.gov.au/nsw-government/ministers/minister-for-planning-and-homes>

Dear Mr Roberts,

Re:

- **Inadequate stormwater controls in *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (the Codes SEPP)*; particularly, the Low Rise Housing Diversity Code.**
- **Conflict between the Codes SEPP and the *State Environmental Planning Policy (Biodiversity and Conservation) 2021* regarding protection of Sydney's drinking water catchment.**

The Blue Mountains Conservation Society (the Society) is a community-based volunteer organization with over 900 members. Its mission is to help conserve the natural environment of the Greater Blue Mountains and to increase awareness of the natural environment in general.

The Society wishes to draw your attention to an anomaly in the NSW planning regime that allows development under *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (the Codes SEPP)*, and specifically under the Low Rise Housing Diversity Code (the Low Rise Code), to bypass local planning controls on stormwater and state planning policy provisions protecting Sydney's drinking water catchment. These controls and provisions are essential for the protection of the environmental values of the World Heritage listed Blue Mountains National Park and the quality of Sydney's drinking water.

As Minister for Planning, we urge you to support the Blue Mountains City Council's proposed amendments 13A and 16A to the *Blue Mountains Local Environmental Plan 2015* (the LEP). These amendments seek local variations to the Low Rise Code that would require LEP development standards and stormwater controls to be applied to development under the Code in the Blue Mountains.

We also draw your attention to WaterNSW's submission to the recent exhibition of Council's proposed amendment 13A. In its submission, Water NSW expressed similar concerns about the potential adverse impact of development under the Low Rise Code on stormwater quality and quantity in Sydney's drinking water catchment and indicated

its support for the Council's amendment. It also stated that it would be taking up the matter of stormwater management with the Department of Planning and Environment.

Background

The Blue Mountains Local Government Area is uniquely located in a World Heritage listed national park. Situated on ridgelines, the urban areas of the Blue Mountains drain into the surrounding World Heritage Area. Governments at all levels have an obligation to protect the region's World Heritage values from the adverse impacts of urban development on the ridgetops. At the local government level, these environmental protections are effected through the *Blue Mountains Local Environmental Plan 2015* (LEP) and *Blue Mountains Development Control Plan 2015*. In the specific instance of stormwater controls, the LEP contains Clause 6.9 whose objective is for development "to avoid the adverse impacts of urban stormwater on land on which development is located and on adjoining properties, native bushland and receiving waters". However, SEPPs over-ride local planning controls leading to the anomalous situation where development in the Blue Mountains which is assessed by Council must meet the stringent stormwater management requirements of the LEP while development under the Codes SEPP requires only that stormwater be "connected to a drainage system". This is particularly problematic in the case of development under the Low Rise Code where intensified development and increased impervious surfaces create a greater volume and velocity of stormwater runoff.

Further, a significant area of urban development in the Blue Mountains falls within Sydney's drinking water catchment. Development within the drinking water catchment is regulated through Chapter 8 of the *State Environmental Planning Policy (Biodiversity and Conservation) 2021*, which imposes a 'neutral or beneficial' effect on water quality test on development within the catchment. There is an apparent conflict between the Codes SEPP and the Biodiversity and Conservation SEPP in that each contains a clause which states that if there is an inconsistency between the SEPP and any other environmental planning instrument, then it prevails to the extent of the inconsistency. However, we understand that the provisions of the Biodiversity and Conservation SEPP protecting Sydney's drinking water do not apply to development under the Codes SEPP. This again creates an anomalous situation where development in the Blue Mountains which is assessed by Council must meet the stringent stormwater management requirements for development in Sydney's drinking water catchment while 'complying' development does not.

The Blue Mountains City Council is currently attempting to mitigate the adverse impact of the Low Rise Code through local variations to the Code. This is being pursued through two Planning Proposals: Amendments 13A and 16A to *Blue Mountains Local Environmental Plan 2015* (the LEP). Amendment 13A seeks to mitigate the adverse impacts of the Low Rise Code in the Blue Mountains by applying LEP controls on Floor Space Ratios, and Site Coverage and Pervious Area to development under the Code. The proposed Amendment 16A seeks to require development under the Low Rise Code to comply with LEP controls on Minimum Lot Size and stormwater management. Applying LEP controls on stormwater to development under the Code is proposed to be achieved through amending clause 3B.59 of the Code to read:

A complying development certificate cannot be issued for development under this Code unless it has been demonstrated by a suitably qualified engineer, that the requirements of Blue Mountains LEP 2015 clause 6.9, and associated DCP controls have been met.

The Society strongly supports the Council's actions on this matter. We supported the Council in its calls for the Blue Mountains LGA to be exempted from the Low Rise Code and, when that failed, we lodged a submission in support of the recently exhibited Draft Amendment 13A (attached), as did WaterNSW. In our submission the Society stated that, while Draft Amendment 13A goes some way in mitigating the potential adverse impacts of the Low Rise Code on the built character of the Blue Mountains towns and on the significant environmental values of the surrounding World Heritage Area, it is not enough. We therefore indicated our strong support for Draft Amendment 16A, whose main objective is to strengthen stormwater management controls to protect the surrounding World Heritage listed Blue Mountains National Park consistent with the provisions of the LEP.

In the face of the compromised protection of the environment values of the World Heritage Area and the quality of Sydney's drinking water created by the introduction of the Low Rise Code in the Blue Mountains, the Society urges you to support the Blue Mountains City Council's requested amendments to the Low Rise Code. The provisions of Chapter 8 of the *State Environmental Planning Policy (Biodiversity and Conservation) 2021* regarding the protection of Sydney's drinking water catchment should also be applied to development under the Codes SEPP.

This matter has also been taken up by Local Government NSW and the Nature Conservation Council of NSW. At their recent conferences, both these organisations resolved to make representations to the NSW government in support of the Blue Mountains City Council's proposed amendments to the Low Rise Code and the application of the provisions of Chapter 8 of the *State Environmental Planning Policy (Biodiversity and Conservation) 2021* to development under the Code.

We look forward to receiving your response on this important matter.

Yours sincerely,

A solid black rectangular box used to redact the signature of Madi Maclean.

Madi Maclean
President, Blue Mountains Conservation Society
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cc. Ms Trish Doyle MP for Blue Mountains, Mr Mark Greenhill, Mayor, Blue Mountains City Council.



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Nature Conservation Saves for Tomorrow

Dr Rosemary Dillon
Chief Executive Officer
Blue Mountains City Council
Civic Place
Katoomba NSW 2780

2 August 2022

By email to: council@bmcc.nsw.gov.au

Re: Support for draft Amendment 13A to Blue Mountains LEP 2015 Low Rise Housing Diversity Code

The Blue Mountains Conservation Society (the Society) is a community-based volunteer organization with over 900 members. Its mission is to help conserve the natural environment of the Greater Blue Mountains and to increase awareness of the natural environment in general. The Society is pleased to have the opportunity to comment on Amendment 13A to Blue Mountains LEP 2015 which varies the Low Rise Housing Diversity Code (Low Rise Code) to take account of important issues specific to the Blue Mountains Local Government Area. The Society further submits that additional amendments to LEP 2015 are required to protect Sydney's drinking water.

The Society strongly supports Amendment 13A to incorporate into the Code controls in LEP 2015 pertaining to Floor Space Ratios and Pervious Area. This will go some way in mitigating the potential impact of the Code on the built character of the Blue Mountains towns and on the significant environmental values of the surrounding World Heritage Area.

However, the Society is concerned about the Department of Planning's non-support for amendments to the Code that would address minimum lot size and, in particular, stormwater management and the impact on Sydney's drinking water. The Low Rise Code's 'one size fits all' approach to stormwater management is incompatible with the geographic character of the Blue Mountains and its World Heritage values, and the critical public purpose of protecting Sydney's drinking water.

The importance of stormwater management in the Blue Mountains

Stormwater management (quality and quantity) is particularly important in the Blue Mountains LGA. As a city sitting atop a World Heritage Area all stormwater discharges into the national park downstream through a network of rivers, creeks, watercourses, waterfalls and hanging swamps. It is therefore critically important that developments assessed under the Code meet the same strong stormwater management controls as developments assessed under Blue Mountains LEP 2015.

The objective of the LEP clause pertaining to stormwater management (Clause 6.9) is to “Avoid the adverse impacts of urban stormwater on lands on which development is located and on adjoining properties, native bushland and receiving waters”. This clause is not only critical for the protection of the natural environment and World Heritage Area but for the protection of residential properties in areas where the Code applies. Given the ridgetop development pattern in areas where the Low Rise Code applies in the Blue Mountains, it is unacceptable that new developments under the Code have no requirement for appropriate stormwater management other than connection to a drainage system.

The application of the Low Rise Code exacerbates the problem of stormwater management (quality and quantity) in the Blue Mountains. The Code allows developments with greater site coverage and impermeable area than permitted under local provisions. This increases the volume of stormwater entering the system, increasing the volumes and velocity of water flowing into waterways in the World Heritage Area. It also poses a risk to neighbouring residential properties. Recent severe rainfall events have shown how important stormwater management is in the Blue Mountains, with water inundation and damage experienced in some residential areas. Exacerbating the problem through permitting inadequate stormwater controls in developments under the Code is unacceptable.

Given these known issues with stormwater management in the Blue Mountains, the Society is extremely disappointed that the Department of Planning did not support the Blue Mountains City Council’s request to include in Amendment 13A local variations to the Low Rise Code ensuring adherence of developments under the Code to Clause 6.9 of Blue Mountains LEP 2015 and associated Development Control Plan provisions.

In response, the Council has prepared a proposed Amendment 16A to the Low Rise Code that seeks such a local variation. The proposed wording is:

A complying development certificate cannot be issued for development under this Code unless it has been demonstrated by a suitably qualified engineer, that the requirements of Blue Mountains LEP 2015 clause 6.9, and associated DCP controls have been met.

The Society strongly supports Council’s proposed Amendment 16A and emphasises again that it is essential that the current strong stormwater management controls in LEP 2015 Clause 6.9 be incorporated into the Low Rise Code for the protection of surrounding properties and the fragile receiving environment of the Blue Mountains World Heritage Area. It will also make the requirements for developments under the Low Rise Code more consistent with the requirements for development under LEP 2015.

Failing appropriate amendments to the Low Rise Code we are faced with the anomalous situation where there are two different development standards regarding stormwater management operating in the Blue Mountains (and, potentially, on adjoining properties): complying development under the ‘one size fits all’ Low Rise Code, which has no meaningful provision for stormwater management, and other development which is required to comply with the stringent stormwater management standards in LEP 2015.

Protecting Sydney's Drinking Water

Measures to protect Sydney's drinking water are established by Chapter 8 of *State Environmental Planning Policy (Biodiversity and Conservation) 2021* (Biodiversity and Conservation SEPP). The aims of Chapter 8 are identified thus:

8.1 Aims of Chapter

The aims of this Chapter are—

(a) to provide for healthy water catchments that will deliver high quality water while permitting development that is compatible with that goal, and

(b) to provide that a consent authority must not grant consent to a proposed development unless it is satisfied that the proposed development will have a neutral or beneficial effect on water quality, and

(c) to support the maintenance or achievement of the water quality objectives for the Sydney drinking water catchment.

Clause 8.5 of the SEPP declares a Sydney drinking water catchment. A large portion of the Blue Mountains LGA on the southern and western sides of the Great Western Highway between Mt Victoria and Wentworth Falls is located in the Sydney drinking water catchment.

Clause 8.7 of the Biodiversity and Conservation SEPP requires developments or activities on land within the Sydney drinking water catchment to incorporate Water NSW's current recommended practices and standards.

Clause 8.8 of the SEPP provides that:

*(1) A consent authority **must not grant** consent to the carrying out of development under Part 4 of the Act on land in the Sydney drinking water catchment unless it is satisfied that the carrying out of the proposed development would have a neutral or beneficial effect on water quality.*

(2) For the purposes of determining whether the carrying out of the proposed development on land in the Sydney drinking water catchment would have a neutral or beneficial effect on water quality, the consent authority must, if the proposed development is one to which the NorBE Tool applies, undertake an assessment using that Tool.

Developments within the drinking water catchment are required to meet the 'neutral or beneficial effect on water quality' test and incorporate current recommended practices or performance standards to help achieve this and the consent authority – which is usually the Council – is responsible for ensuring that this occurs. The consent authority is prohibited from granting consent if not so satisfied.

Clause 8.6 of the SEPP ("Relationship with other environmental planning instruments") provides that if there is an inconsistency between Chapter 8 and any other environmental planning instrument, whether made before or after the commencement of Chapter 8, Chapter 8 prevails to the extent of the inconsistency. Confusingly, *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* includes a similar provision (cl.1.8). Although uncertain, it seems probable that the critical public purpose of protecting Sydney's drinking water

would prevail over the *Exempt and Complying Development Code SEPP*, to the extent of inconsistency.

The Low Rise Code is complying development which requires consent, and that consent is supplied by a [complying development certificate](#) issued by either a [consent authority](#) or a [registered certifier](#) (s.4.2). Registered certifiers are not a “consent authority” either by definition (Div.4.2) or deemed as such by the provisions of the Act relating to complying development (Div.4.5).

The result would appear to be that:

- If an application for a complying development certificate is made to the Council (or another consent authority), the Council (or consent authority) will be required to comply with cl.8.7 and cl.8.8 of the Biodiversity and Conservation SEPP; and
- If an application for a complying development certificate is made to a registered certifier, the registered certifier will be required to comply with cl.8.7, and rely upon s.4.26(1)(b)(ii) to impose a condition to that effect, but apparently not cl.8.8.

As a consequence, at least five different development schemes will apply to low rise/medium density housing development in the Blue Mountains:

- Development under the existing medium density housing provisions of the Blue Mountains LEP 2015 (which adequately protects Sydney’s drinking water);
- Development under the Low Rise Code within the Sydney drinking water catchment:
 - Where the Council determines the application for a complying development certificate (which also adequately protects Sydney’s drinking water – provided the Council can take into account Chapter 8 of the Biodiversity and Conservation SEPP);
 - Where a registered certifier determines the application for a complying development certificate (which does not adequately protect Sydney’s drinking water);
- Development of land under the Low Rise Code outside the Sydney drinking water catchment:
 - Where the Council determines the application for a complying development certificate;
 - Where a registered certifier determines the application for a complying development certificate.

This introduces a level of complexity and uncertainty far beyond the benefits of the Low Rise Code in the Blue Mountains. The Society recommends that the existing medium density housing provisions of the Blue Mountains LEP 2015 be the 'one stop shop' for all low rise/medium density housing development in the Blue Mountains.

Background to stormwater management controls in LEP 2015

To reiterate: in not supporting Council's proposed amendment to the Low Rise Code regarding stormwater management, it seems the Department of Planning has lost sight of the critical role that such controls play in a city located in a World Heritage Area. However, this was not the case at the time of the passage of LEP 2015 when the Department and the state government recognised the Blue Mountains' unique natural environment and government agencies' obligation to protect the World Heritage Area.

When LEP 2015 was being developed the challenge was to fit the existing strong environmental protection provisions of LEP 2005 in particular into the Standard Instrument LEP template. The Society at that time strongly supported the Council's strategy to transfer these provisions into the draft Standard Instrument LEP 2013 and ran an extensive public engagement and education campaign. Draft LEP 2013 was subject to extensive ongoing negotiations between the Council and the Department of Planning, with the sticking point being 7 key provisions, one of which was stormwater management. The dispute was over the water quality test that would be applied to stormwater discharge and the wording of the proposed Clause 6.9. The Council proposed that the objective of the clause be to "Avoid the adverse impacts of urban stormwater on lands on which development is located and on adjoining properties, native bushland and receiving waters". The Department of Planning preferred the weaker stormwater management standard of "no significant adverse impact on ...". The council's preferred wording and provisions of Clause 6.9 ultimately prevailed.

The finalised Blue Mountains LEP 2015 is regarded as the most highly locally tailored Standard Instrument Local Environmental Plan in the state. At the time the NSW Government issued a press release in which it "recognised the unique position the Blue Mountains holds in NSW" before acknowledging:

The Blue Mountains community is rightly proud of its historic towns and villages, its local environment, all living amidst a world-heritage listed National Park....This plan provides direction for the future of the area while protecting the historic atmosphere and environment that local people love.

Notwithstanding this, since then the Society has supported the Blue Mountains City Council in its defence of LEP 2015 against ongoing pressure to increase development intensity and allow inappropriate development through a variety of state government 'one size fits all' planning policies. One of these is the Low Rise Housing Diversity Code

Low Rise Housing Diversity Code

When the Exempt and Complying Development SEPP 2008 was first proposed to be amended in 2016 to incorporate medium density housing (low rise housing) as 'complying' development, the Society lodged an objection to the Department of Planning and Environment. In its submission, the Society noted that the Blue Mountains community had just completed a long and hard-fought process to roll its

existing Local Environmental Plans into a Standard Instrument LEP template while retaining existing strong environmental and city character protections. The Society said then and restates now its concern that the changes to the Exempt and Complying SEPP allowing medium density housing as 'complying' development will significantly undermine current standards and protections through weaker development standards than the existing local controls.

In a later submission on the Blue Mountains Local Strategic Planning Statement, the Society supported Council's proposed actions to seek an exemption from the then-named Low Rise Medium Density Housing Code and to ensure these housing forms were appropriate to the Blue Mountains context, including character, landscape qualities and sustainability. It is therefore very disappointing to the Society that the Department of Planning has refused an exemption from the Code for the Blue Mountains LGA.

However, stormwater management (quality and quantity) *must* be addressed in such a sensitive environmental area. Recent severe weather events over 2021-22 have only highlighted the importance of stormwater management in the Blue Mountains. We agree with Council that it is disappointing that the Department of Planning has not recognised the importance of this issue and the need for stronger stormwater management controls to address best practice. A reduction in protection for the environment and nearby residential properties through a lack of appropriate stormwater management in developments under the Low Rise Code is unacceptable in a city surrounded by a World Heritage Area.

We hope that the Department of Planning will reconsider its position and support appropriate stormwater controls for developments under the Low Rise Code in the Blue Mountains by quickly progressing Council's proposed draft Amendment 16 to LEP 2015 intact.

Yours sincerely,

A black rectangular redaction box covering the signature of Madi Maclean.

Madi Maclean
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