

Blue Mountains Conservation Society Inc.



## Planning and Development Resource Kit

### Information sheet: Development control in the Blue Mountains

The Blue Mountains Local Government Area (LGA) is uniquely situated in a National Park and World Heritage Area. To protect our natural environment, and the economic and other benefits it provides, controls on development are stringent—on paper at least.

The overarching legal framework regulating land use and development in NSW is the [Environmental Planning and Assessment Act 1979](#) (EP&A Act).

The EP&A Act provides for two types of Environmental Planning Instruments (EPIs):

- Local Environmental Plans (LEPs)
- State Environmental Planning Policies (SEPPs)

Both types of EPIs stipulate what kind of development is prohibited or can be carried out with or without consent, and for 'exempt' and 'complying' development.

#### **Local Environmental Plans (LEPs)**

Development on all land (public, private, leased) in LGAs like the Blue Mountains is controlled by a legally enforceable instrument, a Local Environmental Plan (LEP). The *Blue Mountains LEP 2015* covers the Blue Mountains Local Government Area. To access LEP 2015 click [here](#).

LEPs prescribe permissible land uses through applying zones to blocks of land. Zones contain objectives which include the principal purpose of the land e.g. residential, commercial, industrial, environmental protection etc. Each zone also specifies what kinds of developments are permitted with consent, permitted without consent or prohibited altogether. A list of these may be found in the Land Use Tables in LEPs. The zones and provisions are determined through studies undertaken as part of the process of developing LEPs e.g. environmental studies, residential character studies. LEPs also specify standards which regulate the extent of development within the zones e.g. minimum lot sizes. There are also additional development constraints applying to particular areas and blocks, for instance the presence of environmental features like steep slope, watercourses, swamps, significant vegetation communities and threatened species, and where the block is designated 'bushfire prone land'. To view the zones and other constraints that apply to a specific block of land, go to the Blue Mountains City Council's interactive maps. See the **How to View BMCC Interactive Maps** page to find out how to use the maps.

Developers are also sometimes able to apply for a deviation from a development standard (e.g. height of a building) under the provisions of Part 4.6 of *Blue Mountains LEP 2015*.

### ***Development Control Plans (DCPs)***

In addition to LEPs, Development Control Plans (DCPs) set out further development controls and standards that apply to development proposals in local government areas. DCPs are not legally enforceable but provide specific, comprehensive guidelines for certain types of development, or area- and site- specific requirements. The Blue Mountains LGA is covered by the [Blue Mountains Development Control Plan 2015](#).

The *Blue Mountains DCP* is a useful resource, providing a summary of development constraints, controls and standards in LEP 2015 as these apply to specific types of developments e.g. dwelling houses, granny flats, subdivisions, Bed and Breakfast establishments. The DCP also summarises the documentation required for Development Applications for these types of developments, including the situations in which flora and fauna assessments, bushfire threat assessments and detailed environmental assessments, amongst others, are required.

### ***State Environmental Planning Policies (SEPPs)***

The NSW government also creates its own State-wide legally enforceable planning policies on matters of State significance which impact on development control in local government areas. SEPPs override all other planning instruments and policies, including local LEPs. For example, a LEP might prohibit residential development in a particular zone but a SEPP might allow it if it achieves one of the SEPP's aims. SEPPs may be in direct conflict with or have more relaxed controls than the Blue Mountains LEP and DCPs but the SEPP always overrides the LEP and DCPs. Click [here](#) for a full listing of SEPPs (see under 'Environmental Planning Instruments' in force). An outline of the SEPPs that have most significance for development in the Blue Mountains follows.

#### **SEPP (Exempt and Complying Development Codes) 2008**

The SEPP that is most relevant to residential development is the [State Environmental Planning Policy \(Exempt and Complying Development Codes\) 2008](#) (the Codes SEPP). This SEPP allows development to be carried out without Council consent ('exempt' development) or without the need for a Development Application ('complying' development).

- **Exempt** development includes things like garden sheds, gazebos, pergolas and water tanks if they comply with certain standards in the SEPP. Exempt developments are not subject to environmental assessment and approval processes.
- **Complying** development includes houses that are built to the standards of the General Housing Code in the SEPP and medium density housing which complies with the Low Rise Housing Diversity Code<sup>1</sup>. Complying developments don't need to go through a Development Application process but are instead approved through a Complying Development Certificate issued by the Council or by a private accredited certifier. This means that certain kinds of homes and home alterations and additions which comply with specified standards (site

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<sup>1</sup> Parts 3 and 3B of the Codes SEPP. See also <https://www.bmcc.nsw.gov.au/housing-diversity-code>.

requirements, building heights and setbacks etc) in certain zones can be approved very quickly, within 10 days. Neighbours will be notified of a development proposal 14 days before a complying development certificate is issued but there is no opportunity for the public to make submissions on the proposal. Neighbours will be notified 7 days before construction begins.

### Restrictions on ‘exempt’ and ‘complying’ development

Developments cannot be deemed ‘exempt’ and ‘complying’ in certain circumstances (see Clause 1.19 and 1.19A of the Codes SEPP) including:

- where the proposed development is in an identified environmentally sensitive or protected area in a Local Environmental Plan
- on land covered by a private land conservation agreement under the [Biodiversity Conservation Act 2016](#)
- where the development requires clearing of a certain amount of native vegetation
- where the development is on high-risk bushfire land
- where the development does not meet the development standards in the relevant SEPP or Council’s *Development Control Plan*, or requires concurrence (agreement or approval) of another authority such as the NSW Department of Planning, Industry and Environment, Transport for NSW etc.

For further information on restrictions see [State Environmental Planning Policy \(Exempt and Complying Development Codes\) 2008](#).

‘Exempt’ and ‘complying’ developments under the Codes SEPP are a concern because neighbours are not consulted and no environmental assessment is required. This means there are no controls on environmental impacts.

### SEPP (Biodiversity and Conservation) 2021

Another SEPP relevant to the Blue Mountains is the [State Environmental Planning Policy \(Biodiversity and Conservation\) 2021](#). This SEPP incorporates previous SEPPs and Regional Environmental Plans relating to native vegetation clearing in urban and environmental areas (see Scenario 1), koala habitat protection, the Sydney drinking water catchment and the Hawkesbury-Nepean River.

Chapter 8 of the Biodiversity and Conservation SEPP applies to development in the **Sydney Drinking Water Catchment**, which is south and west of the Great Western Highway from Wentworth Falls to Mount Victoria, and out to Bell. Click [here](#) to see a map of the catchment. Development in the catchment is required to have a “neutral or beneficial effect” on water quality. However, this requirement does not apply to development under the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008.

Further information is available on the WaterNSW website <http://www.waternsw.com.au/water-quality/catchment/development>.

## **Other development controls**

### **NSW State government**

#### ***Threatened species***

The [Biodiversity Conservation Act 2016](#) Schedules 1 and 2 list threatened species and threatened ecological communities. Development proposals exceeding certain thresholds for area, location or impact of native vegetation clearing are assessed under the new Biodiversity Offset Scheme (BOS) and a Biodiversity Development Assessment Report (BDAR) must be submitted with a Development Application. For developments not triggered by the threshold, the 'test of significance' in Part 7 (7.3) of the *Biodiversity Conservation Act 2016* (the old '7 part test' in the now repealed Section 5A of the EP&A Act) must be used to determine whether a development is likely to significantly affect threatened species. Where a significant effect is likely, the proponent must carry out a detailed assessment in relation to the identified impacts in a BDAR and show how the effects will be 'offset'. Further information can be found on the NSW Department of Planning and Environment 'Threatened Species' website: <https://www.environment.nsw.gov.au/topics/animals-and-plants/threatened-species>

#### ***Development near waterways***

The [Water Management Act 2000](#) requires that, if a development or works are proposed on land within 40 metres of the bed on either side of a waterway (permanent and intermittent) or lake, a 'controlled activity' approval may be required. Exemptions to requiring such an approval are listed under Schedule 4 of the [Water Management \(General\) Regulation 2018](#). Exemptions include development carried out in connection with a dwelling house or dual occupancy that is 'exempt' or 'complying' development, or a development which has a development consent and is not on or in the bed or bank, or bed or shore, of any river or lake. Under the *Water Management Act* the term river applies to any permanent or intermittent waterway.

#### ***Development adjacent to National Parks***

There are guidelines for development adjacent to National Parks which you can access by clicking [here](#).

#### ***Vegetation clearing***

If land to be cleared for development is in a rural area (Megalong Valley, Sun Valley, Mt Wilson, Mt Irvine, Mt Tomah) the [Local Land Services Act 2013](#) and [Biodiversity Conservation Act 2016](#) may apply. If the land to be cleared is zoned for urban purposes or for environmental conservation, Chapter 2 of the [State Environmental Planning Policy \(Biodiversity and Conservation\) 2021](#) may apply.

The 10/50 bushfire vegetation clearing law and [10/50 Vegetation Clearing Code of Practice for NSW](#) allows landholders in NSW to clear trees on their property within 10m of a home and clear

underlying vegetation such as shrubs (but not trees) within 50m of a home without formal approval. However, there are some conditions e.g. the land must be in a Vegetation Clearing Entitlement Area (which includes most of the Blue Mountains). For further information go to the NSW Rural Fire Service's [10/50 vegetation clearing](#) website.

See **Scenario 1: Land Clearing** for details of the NSW state land clearing laws.

### ***Integrated Development***

Division 4.8 (cl 4.46) of the [Environmental Planning and Assessment Act 1979](#) lists the approvals required from State Authorities under other Acts during the development assessment process (including some of those listed above). Development requiring an approval under any Act listed in Division 4.8 (cl 4.46) is categorised as 'integrated development'. Such approvals are required before development consent can be granted and may include a Bush Fire Safety Authorisation, approvals related to the *Heritage Act 1977* e.g. developments involving land, a building or a place subject to a conservation order, and approvals relating to the *Water Management Act 2000* etc.

### ***Subcatchments***

Chapter 9 'Hawkesbury-Nepean River' of the [State Environmental Planning Policy \(Biodiversity and Conservation\) 2021](#) identifies conservation sub-catchments that are to be protected. In the Blue Mountains, these are the Grose River, Glenbrook and Erskine Creek sub-catchments. Development controls and matters for consideration by the consent authority apply when subdivisions or new zoning is being considered.

### **Commonwealth government**

The Commonwealth [Environmental Protection and Biodiversity Conservation Act 1999](#) (EPBC Act) applies in very specific situations e.g. where the development will have, or is likely to have, a significant impact on nationally listed threatened or migratory species, ecological communities and World Heritage areas. It is the developer's responsibility (whether a private developer or government body such as the Council) to refer such matters to the relevant Commonwealth department for a separate assessment and approval. If a proposed development is referred to the Commonwealth for determination on whether it is a 'controlled action' under the EPBC Act, public comment is invited.

**For detailed information on these legal frameworks, consult the Environmental Defenders Office 'Fact Sheets' by clicking [here](#).**

**Sources of information for this page:** Blue Mountains City Council, Commonwealth Department of Environment, Environmental Defenders Office, NSW Department of Planning and Environment, NSW Office of Environment and Heritage.

See Environmental Defenders Office's Fact Sheet on [How to have your say in developments across NSW](#).