

## **Blue Mountains Conservation Society – submission to the Draft Blue Mountains Development Control Plan**

### **General: Impact of the new 10/50 clearing code**

The new 10/50 bushfire clearing code and legislation allows a property owner in a designated bushfire risk area to clear any vegetation within 10m of their home and any vegetation other than trees within 50m of their home. The impact of the clearing entitlement must be considered in any site analysis and development assessment on the assumption that all land owners within the designated entitlement areas will use their entitlement in full. In other words all developments must be assessed on the basis that vegetation will be removed consistent with the code.

The approach of considering the impact of the 10/50 clearing code in the development assessment process, including the assumption a landowner will use his or her full entitlement is supported by a recent NSW Land and Environment court case. In *Johnson v Hornsby Shire Council* [2014] NSWLEC 1215 the applicant wanted to build a two story home on a block of land that contained valuable remnant Blue Gum Forest. When the land had been subdivided (to create two building blocks where there had only been one) there was a restriction imposed on the use of the land 'to preserve the remnant Blue Gum High Forest' .

The proposed development would have brought trees in that Forest within 10 metres of the home and the landowner could then have been able to rely on the 10/50 rule to clear those trees. Hornsby Council refused the application to build the proposed home and the owner appealed to the Land and Environment Court.

The Court concluded that granting consent to this proposal would allow more than half of the remnant Blue Gum High Forest in the Restricted Development Area, identified as a critically endangered ecological community pursuant to the Threatened Species Conservation Act 1995, to be lawfully removed. The court was not satisfied that this represented a reasonable balance between the development of the newly created and approved allotment and the preservation of the remnant Blue Gum High Forest. For this reason, the proposal was refused.

It should also be noted that one unintended consequences of the new laws is that it does allow people to use the laws to clear the land for reasons other than bushfire mitigation. Landowners do not need to prove that the clearing was for bushfire mitigated, as long as the clearing was consistent with their 10/50 entitlement (eg to open up their view in a way that would not otherwise be allowed see the Victorian case of *Nillumbik Shire Council v Potter* [2010] VCAT 669 where similar vegetation exists).

The draft DCP in its current form does not make clear that any development must include the 10/50 entitlement, including the development footprint, and that in the assessment of the impacts the clearing entitlement must be considered on the assumption that all land owners within the designated 10/50 entitlement areas will use their entitlement in full.

## Site Analysis

An additional objective should be considered which specifically outlines that the bulk and scale of the development not just the siting needs to be considered as part of the site analysis. This allows the site analysis to consider that the site can only accommodate a large development or dwelling. The suggested amendment would read

“to determine the most appropriate form/scale of development that a site can accommodate”.

The site characteristics which should be included in the site analysis need to link back to the requirements of the draft LEP, any relevant State Environmental Planning Policies and the requirements in later parts DCP in terms of what environmental issues need to be mapped and considered. For instance Part C of the DCP has specific requirements in terms of Site Analysis which are not included in the Site Analysis section

The following characteristics at a minimum need to be included as part of the Site Analysis requirements at C2:

- A locality map indicating whether the property is located adjacent or near the Blue Mountains National Park Identify the location, extent and nature of any native vegetation buffer areas required within the site to protect the Blue Mountains National Park (see Aims and clause 6.1 (2) of the Draft LEP and p94 of the DCP). As an alternative this could be included in Context Analysis B1.2
- Whether the property is within the Sydney Drinking Water Catchment (see State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011 and the Aims of the draft LEP). As an alternative this could be included in Context Analysis B1.2.
- Location of any significant habitat features, such as watercourses or waterbodies, trees with hollows, caves, crevices or other rock habitat features (see Aims and clause 6.1 (2) of the Draft LEP and Part C p76 of the draft DCP )
- Location and identification of any rare species of flora (see Aims and clause 6.1 (2) of the Draft LEP and Part C p80 of the draft DCP)
- The hydrological aspect of the site (see Aims and clause 6.1 (2) of the Draft LEP)
- Identify the location, extent and nature all watercourses, wetlands and riparian land that occur within the site, relative to the development proposal (see Aims and clause 6.1 (2) of the Draft LEP and p87 of the draft DCP).
- Identify the location, extent and nature of all threatened species (both flora and fauna), threatened flora and fauna populations and endangered ecological communities that occur within the site, relative to the development proposal. This is consistent with the Aims of the LEP and the requirements of the DCP at p78. Fauna needs to be expressly included as native vegetation controls are emphasised throughout the draft DCP while controls to

protect fauna are often left out.

- Identify the location, extent and nature of all significant vegetation communities that occur within the site, relative to the development proposal (see Aims and clause 6.1 (2) of the Draft LEP and requirements of the DCP at p80).
- Identify the location, extent and nature of all existing and potential fauna corridors that occur within the site, relative to the development proposal (see Aims of the Draft LEP and requirements of the DCP at p82).
- Identify the location, extent and nature of all flora and fauna ecological buffer areas that are required within the site, relative to the development proposal (see Aims of the Draft LEP and requirements of the DCP at p84).
- Identify the location, extent and nature of all geological and landscape features comprising escarpment areas within the site, relative to the development proposal (see p91 of the DCP)
- The site analysis plan should map the maximum extent of vegetation that can be removed under the 10/50 vegetation code, including the location, extent and nature of the vegetation which could be removed.

The following information was required in LEP2012 (cl 43) and has not been transferred to the DLEP 2013 or included in this Draft DCP as part of the site analysis plan. Some of the requirements listed below also relate to or are required to determine the application of the Water Management controls at p164 and following. It is therefore recommended that the following from cl 43 (2) be re-instated by inserting additional requirements:

the qualifications & experience of the person who supplied the details on flora & fauna

the location and identity of all vegetation to be removed

the total area of vegetation to be removed

the location of, and measures proposed to protect vegetation, including vegetation to be retained

the location and extent of all existing and proposed water permeable areas, including lawns, and shrub/garden beds

the total area of the lot covered or proposed to be covered by water permeable surfaces in square metres and the percentage of the lot covered by water permeable surfaces

the location of all existing and proposed hard or impervious surfaces on the site, including areas covered by buildings, sealed driveways or paving

the total area of the lot covered or proposed to be covered by hard surfaces in square metres and the percentage of the lot that will be covered by hard surfaces when the proposed development has been carried out

the location of all slopes greater than 20 per cent and the direction of fall or drainage from those areas

the soil type, structure and characteristics of any part of the site that has slopes greater than 20 per cent on which development or clearing is proposed to be located

the location of any watercourse corridor on the site, or within 100 metres of the site with the potential to receive surface water run-off or sub-surface water from the site

## **Part C – Environmental Management**

### **Impact of the 10/50 vegetation clearing code**

As stated above the new 10/50 bushfire clearing code and legislation allows a property owner in a designated bushfire risk area to clear any vegetation within 10m of their home and any vegetation other than trees within 50m of their home. The impact of the clearing entitlement must be considered in any site analysis and development assessment on the assumption that all land owners within the designated entitlement areas will use their entitlement in full. In other words the impact of a development on biodiversity and natural resources must be assessed on the basis that vegetation will be removed consistent with the code. This must be made clear in this section of the DCP.

### **The phrase “unless no practical alternative is available”**

This phrase appears after many of the environmental safeguards in the draft DCP. Places where the wording “unless no practical alternative is available” appears include p79 C2; p81 (b); p82 C2; p 82 C3 (b); p 84-85 C2; p 85 C3 (a); p87C3; and p 92 (c).

There are a number of problems with this clause which need to be addressed including:

- The phrase is ill defined and open to wide interpretation. What is meant by practical? Who defines what is practical and what is not?
- It assumes that the development will proceed unaltered to the detriment of the environmental aspects of the site.
- The phrase is inconsistent with the draft LEP (see Part 6 clauses) which adopts the impact hierarchy approach described below.

The well established planning approach of requiring avoidance of impacts should be adopted instead. This includes, if avoidance cannot be achieved, that the next requirement is to alter the development to minimise impacts, then manage the impacts and finally mitigate any impacts which cannot be avoided or minimised. Such an approach is consistent with the Draft LEP.

The Society strongly recommends that the phrase “unless no practical alternative is available” and the following phrase is used instead (amending C2 (c) p79 is used as an example)

*The location, design and implementation of the development and any asset protection zone is to demonstrate achievement of the following:*

.....

*Firstly be sited outside of land containing the threatened species, threatened populations and endangered ecological communities and their habitat, and the ecological buffer areas*

*required to protect them and to avoid any adverse environmental impact. If that impact cannot be avoided—the development should be designed, sited and managed to minimise that impact, or if that impact cannot be minimised—the development should be managed to mitigate that impact.*

### **Biodiversity and natural resources**

P 75 C3 This clause needs to be amended to reflect the 10/50 vegetation clearing code. We recommend the following:

add “and 10/50m vegetation clearing entitlement” be inserted added after “asset protection zone in para a)

add “and 10/50m vegetation clearing entitlement after fuel reduction.

P 75 C4 - add “Sydney’s drinking water catchment ”

p. 76 C6 “small scale” needs to be defined

### **Threatened Species**

p. 77 C1.2 The heading for this section should have “Threatened Ecological Communities” not “Endangered Ecological Communities” as “Endangered” is a level of listing (Vulnerable, Endangered and Critically Endangered)

The inclusion of a lower Mountain’s example in the list of Threatened Flora would be appropriate eg *Leucopogon fletcheri* subsp. *fletcheri*

The distribution for *Pultenaea villifera* should say “in the Springwood, Winmalee and Warrimoo areas...”

**All** Threatened Ecological Communities should be listed not just some. Council should produce a document that lists all threatened entities ie species, populations and ecological communities that occur in the LGA, indicating the status of each entity under the TSC and EPBC Acts. This should be a companion document to the DCP and available electronically. Such a list could then be updated as needed and complement Council’s flora and fauna assessment and VMP guidelines. The information is readily available on line at the website of the relevant and Commonwealth agencies and just needs to be complicated.

### **Significant vegetation**

C1 p80 insert after ‘development proposal’ and at C2 p80 after asset protection zone “including the total permitted area to be cleared under the 10/50 Code”.

C1.3 p80 The explanation should refer to the schedule of significant vegetation in DLEP13 rather than the two studies which are not readily accessible and are out of date (2001 and 1995).

## Ecological Buffer Areas

These clauses address ecological buffer areas in terms of protecting significant vegetation communities from edge effects but not ecological buffer areas to protect critical fauna habitats (some of these are not vegetation dependant eg Broad-headed Snake and rock outcrops). This section should be amended to clearly include critical fauna habitats eg

To protect, enhance and restore ecological buffer areas necessary to protect and maintain *significant habitat features, such as watercourses or waterbodies, trees with hollows, caves, crevices or other rock habitat features* and significant vegetation including BMLEP 2014 Schedule 6 Significant vegetation communities, or other flora determined to have regional, State or Commonwealth significance, in their natural condition;

The controls should be amended to add the following

If significant habitat features confirmed to be present during the preparation or assessment of the development application, then the development is to be sited to provide an adequately sized ecological buffer area to protect that significant habitat features....

The existing Better Living DCP has an important development standard D8.2.5 that does not appear to have been retained **in the new DCP**

“Unmapped or unvalidated significant vegetation communities should assume a 60m wide buffer zone until determined by a detailed environmental assessment”

## Riparian land and watercourses

C3 p 87 - insert after ‘development’ ..”including the permitted cleared area under the 10/50 Code”

The existing Better Living DCP has an important development standard D8.2.6 that appears to have been reduced in the case of subdivisions:

“Unmapped or unvalidated watercourses should assume a 20m wide corridor measured from the top of each bank until determined by a detailed environmental assessment”

## Landscape

At Part C3 the major section heading on p.113 (green page) should be “Landscaping” not “Landscape”. This is a section on landscaping and all the green sidebars have “landscaping”. Whole section needs to be checked for inconsistency of terminology and changed where appropriate.

The Society strongly supports the clauses in this section.

## **Bushfire**

Generally the Society supports this section of the DCP as comprehensive and sensible in its approach to balancing bushfire risk and conservation of natural values. However, an important provision of LEP 2005 cl 44 (7) (c) related to APZs does not appear to have been carried over to the LEP or this DCP. This is about the location of APZs ...”not be located on any land that has contiguous areas of slope greater than 33%.... “.

Bushfire prone land definition on p137 should also include the definition of land where the clearing entitlement under the 10/50 Code applies.

It is unclear how the requirements for an APZ on p139 and the clearing entitlement under the 10/50 Code interact. The code is an entitlement which a resident can enforce without any approvals – however the APZ requirements under the draft DCP are a requirement of development consent. For instance, if a resident plans to use their 10/50 clearing entitlement does this fulfil some of the requirements of an APZ as outline in this section.

## **Tree and Vegetation Management**

p. 158 C1 (f) (ii) The Society is concerned that native vegetation can be cleared for a distance of 50 metres from an approved development to establish gardens. This is an extensive area especially if the clearing occurs on all sides of the building.

## **Water Management**

The Society strongly supports the requirements in these clauses.

## **Dictionary**

The term “environmentally constrained land” used throughout the draft DCP is not defined in the Dictionary of the draft DCP. It is assumed it has the same meaning as the definition of the term used in the draft LEP Dictionary then the DCP Dictionary should include this definition.

There is no definition of ESD (used at p74) in the draft DCP dictionary and this needs to be included.