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Nature Conservation Saves for Tomorrow

2nd May 2017

Mr Robert Greenwood
General Manager,
Blue Mountains City Council
Locked Bag 1005
Katoomba NSW 2780
council@bmcc.nsw.gov.au

Re: **Blue Mountains City Council Draft Enforcement Policy**

Dear Mr Greenwood

The Blue Mountains Conservation Society is a community based volunteer organisation with some 850 members. The goal of the Society is to promote the conservation of the environment in the Greater Blue Mountains region.

The Society supports the implementation of a strong and clear enforcement policy. The Draft document currently on public exhibition is a good starting point and the Society has some comments and suggestions for improvement as follows, listed as per the document's paragraph listing.

3. Organisational approach (page 2)

a) Why are compliance and enforcement important?

- first dot point. The Society would argue this point should read "... safety, property **and** the environment;" rather than using "or".

- The Society strongly supports eighth dot point "to encourage reports about possible unlawful activity from the community;" The Society would like to see better information on Council's website such as a dedicated page about how community members can report unlawful activity, what information Council needs from community members when they report unlawful activities and improved reporting back by Council to the community on enforcement actions. The Society is frequently approached by community members reporting unlawful activity, largely due to a lack of clear guidance on Council's website.

c) proactive compliance activities

The Society is surprised there is no mention of environmental compliance in the dot point list. For example, the Noxious Weeds Team carries out targeted compliance inspections as part of the overall environmental effort.

Compliance activities associated with development approvals, especially those related to environmental protection conditions, are also not listed. We

suggest a suitable dot points be added to the list to reflect the full suite of Council's environmental proactive compliance activities.

6. Compliance and enforcement principles

The Society strongly supports Council's stated commitment to transparency in this and other areas. In practice, however, we have concerns that current practices are not successfully meeting these principles.

7. Responsibility

The Society strongly supports Council's statements and goals in this section, particularly the second paragraph. It is not clear in this section what internal education or training will be provided to Council staff to ensure they are aware of the policy and their obligations, especially Council staff who are not involved in enforcement activities on a daily basis but do have a responsibility to report possible unlawful activity as per the policy (eg work crews).

8. Responding to concerns about unlawful activity

This is the section where the Society sees some difficulties. We support the first section of preamble on page 5. On page 6, the first paragraph includes the very important commitment to provide "*regular feedback*" and "*reasons for delay*". This is strongly supported, while understanding the qualifications mentioned. The following (2nd) paragraph on page 6 is sufficient, as long as the promised transparency is observed.

Confidentiality of people who report allegations of unlawful activity

The Society does have concerns with this sub-section.

There should be a clear statement that Council will not reveal the identity of the person reporting an allegation unless Council has permission to reveal the identity from that person, and that this will only be sought where it limits Council's ability to investigate the matter or to proceed in taking legal action.

The statement that "*People who report ...should not expect that their identities will remain confidential*" does not engender confidence in the community to report serious offences. Neither does the statement that it "*will take seriously any concernsabout their physical safety*".

We have recommendations on the dot points as follows:

"Council may have to disclose information that identifies them in the following cases:"

- "*the disclosure is necessary to investigate the matter;*" It should be clearly stated that this would only occur with the consent, preferably in writing, of the person making the report.
- "*their identity has already been disclosed to the subject of their report directly or in a publicly available document;*" In this circumstance, Council does not have to comment or confirm/deny the information. Further, conjecture of statements made by third parties purporting to identify reporters must not be confirmed or denied by Council. In addition, circumstantial information must not be provided to unauthorised people, either within or outside Council, that would allow them to deduce the identity of the person reporting alleged unlawful activity.

- "*the report is subject to a Government Information (Public Access) Act 2009 application;*" Why cannot Council redact identifying information in this instance?
- "*the individual consents in writing to their identity being disclosed;*" Agreed.
- "*the disclosure is required to comply with principles of procedural fairness;*" Again, this should only proceed with the written consent of the reporter.
- "*the matter proceeds to court.*" Again, not without consent.

It is assumed that a system could be implemented to achieve these requests. This should have the added benefit to Council of minimising the number of reports that may be withdrawn at a late stage of an investigation due to confidentiality issues.

The Society, as mentioned above, frequently is approached by community members reporting possible unlawful activity. In these instances the Society either asks the community member to pass on the report to Council, or if the informant requests confidentiality, the Society passes on the information to Council after first undertaking some due diligence in terms of checking the facts of the report. In these instances, the Society will only reveal the original reporter with their consent.

What parties can expect from council staff

The Society strongly supports the clear statement about what people who report can expect from council staff in reporting back. The Society would also like to see better information on Council's website such as a dedicated page about how community members can report unlawful activity, what information Council needs from community members when they report unlawful activities and improved reporting back by Council to the community on enforcement actions.

Anonymous reports

The Society agrees with Council's ideas as drafted. However, there is an implied power for discretion to be used in order to investigate "*significant threat*" anonymous reports; perhaps this could be explicitly stated.

Unlawful activity outside business hours

Whilst we respect the limitations on resources outside of business hours, it is a major concern of the Society that a significant amount of unlawful land clearing and tree felling occurs at these times.

The statement that such reports will be assessed on the basis of "... *risk of harm to health, welfare, safety, property or the environment* ..." needs a more specific statement, otherwise potential transgressors will be likely to take a risk of not getting caught, or if caught not prosecuted. This should not be an outcome of an enforcement policy. It needs to be made clear in this section that reports of unlawful activity outside of business hours will be appropriately recorded by Council and may mean that investigations may not commence at the time of reporting, but out of business hours reports will be investigated appropriately consistent with the policy.

9. Investigating alleged unlawful activity

Relevant factors guiding decisions as to whether to take action:

The second dot point to exclude investigation because it is "... *premature as it relates to unfinished works* ..." should clearly state the exception of sediment and erosion control (for example) which is required during all stages of construction work.

The Society strongly supports the inclusion of points 7 and 8, as repeat offenders should be investigated diligently as it maybe evidence of a pattern of behaviour. For example, the Society understands that Council has taken action a number of times in the last five years against the Fairmont Resort in relation to a number of developments commenced without consent.

Another relevant factor which should be included, is whether the alleged offender will be financially advantaged by the alleged offence. It should be noted that if Council fails to take enforcement/remedial action it is giving a financial advantage to those who do the wrong thing. For example a builder who does not allow for proper erosion and sediment control when bulldozing a large tract of land will be able to underquote the builder who takes care to protect the environment and minimise impact.

10. Taking enforcement action

Considerations about the alleged offence and impact:

Considerations about the alleged offender should explicitly include any and all history of previous offences by the alleged offender, whether eventually concluded or not. This is stated in the following dot paragraphs but should be included as a key consideration in terms of assessing the alleged office and impact.

Considerations about the impact of any enforcement action:

The Society strongly supports dot points one and two, dealing with the need to deter future unlawful activity and using educative approaches where appropriate.

It would be useful to the community if Council describe more fully what the suite of enforcement actions that are available to them such as education, formal letters, volunteer agreements, notices, fines, and court proceedings. While the policy at this point outlines some criteria in terms of whether to use education rather than formal enforcement, and some issues that need to be considered in terms of legal proceedings, this section seems to overlap with Section 11. As a result it is very unclear what enforcement actions are available and in what circumstances they will be used, including what criteria Council uses to determine what enforcement action is appropriate.

Considerations about the potential for remedy

The Society is concerned at dot point 2 in terms of retrospective consent for by repeat offenders. We believe there must be a strong disincentive for such offenders to continue to start illegal (i.e. unapproved) works on a regular basis and lodge a DA later, when "caught".

Considerations about the potential for remedy should include a process to ensure compliance with that remedy, and enforcement if required.

There are many examples of remedies where Council has not ensured compliance to an adequate level going back many years, such as the swamp damaged adjacent to the Minne Ha Ha Reserve at 68 Fifth Avenue Katoomba. This has now no resemblance to a swamp and just another message to the community that you can destroy swamps with impunity to establish your 'home beautiful' lawn.

The Society can provide more examples of inadequate enforcement and its consequence if useful to Council.

11. Options for dealing with confirmed cases of unlawful activity

As mentioned above, it would be useful to the community if Council describe more fully the suite of enforcement actions that are available to them such as education, formal letters, volunteer agreements, notices, fines, and court proceedings.

The Society would like to see more specific detail in the level of risk table on page 13. Council's "transparency" goal should dictate a column indicating how the level of risk is determined, including what considerations are used to determine the risk and examples of activities which fall into each risk category. It is assumed that the risk is determined by the two dot points listed (ie prevention/minimisation of harm and influencing behaviour change) but this is very unclear as these are described as Council's key concerns, not the determinants for assessing risk. The suite of enforcement actions should also be used to escalate enforcement action, where previous actions have failed.

The Society is very keen for Council to be much more transparent in terms of assessing risk and what enforcement option will be used as the Society is concerned that intentional and unintentional "managerial" risk-aversion may block appropriate enforcement action taking place. This situation potentially undermines Council staff who carry out their work diligently and it sends the wrong message to the community that environmental damage can be done with impunity.

The Society is also concerned that the current enforcement approach policy has in some instances not resulted in actions by council staff to protect the environment against significant environment. Council call centre personnel, for instance, may not be fully trained to evaluate issues and risks relating to environmental accidents, abuse or protection. Any risk assessment in terms of whether investigation and enforcement should proceed therefore needs to be:

- Undertaken by a trained environmental staff member
- Using clear and detailed criteria of what constitutes each level of risk (as identified in Section 11 of the policy).

Other Matters

The Society has two additional suggestions:

- That Council develop and implement a Council Land Encroachment Policy to address degradation of bushland reserves caused by encroachment by neighbouring private landholders. The Society included the development of such a policy in its 2016 Vote for the Environment Candidate Election Survey, and it was overwhelming supported by all elected Councillors (go to <http://www.bmce16.info/index.shtml>). We also understand that a number of Bushcare groups have recently written or contacted Council with concerns of long term and extensive encroachment into public Bushland reserves by adjacent landholders actively managed by Bushcare groups.
- That Council consider employment of a specialist environmental enforcement staff such as a dedicated ranger suitably trained in environmental matters. Again this idea was included in the 2016 Vote for the Environment Candidate Election Survey, and was supported by the majority of elected Councillors.

Summary

The Society supports Council's review of its Enforcement Policy and is available for further discussion if necessary.

Thank you for considering our submission.

Yours sincerely,

A handwritten signature in cursive script that reads "T. Cameron".

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