

HISTORICAL DEVELOPMENT CONSENTS IN NSW

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Partially
Confidential

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Legislative Assembly Committee on Environment and Planning Inquiry into
Historical Development Consents in NSW

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Figure 1: 2023 Banner hung by local residents facing over the Great Western Highway Wentworth Falls (Bodington Hill area) against renewed attempts to build the 30 year old zombie "Croc Park" development.

TERMS OF REFERENCE

That the Committee on Environment and Planning inquire into and report on historical development consents in New South Wales, including:

- (a) *The current legal framework for development consents, including the physical commencement test.*
- (b) *Impacts to the planning system, development industry and property ownership as a result of the uncertain status of lawfully commenced development consents.*

- (c) *Any barriers to addressing historical development consents using current legal provisions, and the benefits and costs to taxpayers of taking action on historical development concerns.*
- (d) *Possible policy and legal options to address concerns regarding historical development consents, particularly the non-completion of consents that cannot lapse, and options for further regulatory support, including from other jurisdictions.*
- (e) *Any other matters.*

“THE CROC PARK”:THE ZOMBIE DEVELOPMENT CONSENT IMPACTING ON MY FAMILY AND MY NEIGHBOURS

“In 1989 the Blue Mountains City Council approved a development application (DA) for a Flora and Fauna Park. As some work commenced on the site in 1992, prior to the development approval expiring, the approval is deemed to still be active.” (Blue Mountains Conservation Society)

Aesthete No.14 Pty Ltd currently owns the development site at !0 Great Western Highway, Wentworth Falls in an area called Bodington Hill. While it fits as a classic zombie development “DA” it is actually an existing granted consent and is not a pending development application. None the less it still hangs over the Blue Mountains community as a yet-to-happen ecological disaster.

“A development consent was issued for a flora and fauna park on this site by the NSW Land and Environment Court in 1989. This consent has previously been the focus of community attention and has been referred to as a ‘zombie DA’ given it is an old approval that, despite lying dormant for decades, is free to be taken up by the land owner despite it not meeting contemporary expectations around protection of the environment.” (BMCC)

The community concern is very real. Last year the zombie almost lurched into life via an attempted expansion of the old approved consent foot print and works. This concluded with an unsuccessful appeal (SSD14793297) to the Planning Secretary for an amendment to the new project’s Environmental Assessment Requirements (SEAR).

As a local family we facilitated meetings of our alarmed neighbours in our home at [REDACTED]
[REDACTED] There is only one other property between us and the western boundary of the site.



Figure 2: First meeting of local residents objecting to proposals to amend the foot print of the approved Croc Park zombie consent. May 2023.

We and our neighbours were vigorous in campaigning in 2023 and came together to form the Bodington Hill Wildlife Resort Action Group ([BHWrag](#)). Our efforts saw the story covered as "Developers vow to pursue 30-year-old plans for Blue Mountains wildlife 'croc park', despite setback" (Rosemary Bolger ABC Radio Sydney)

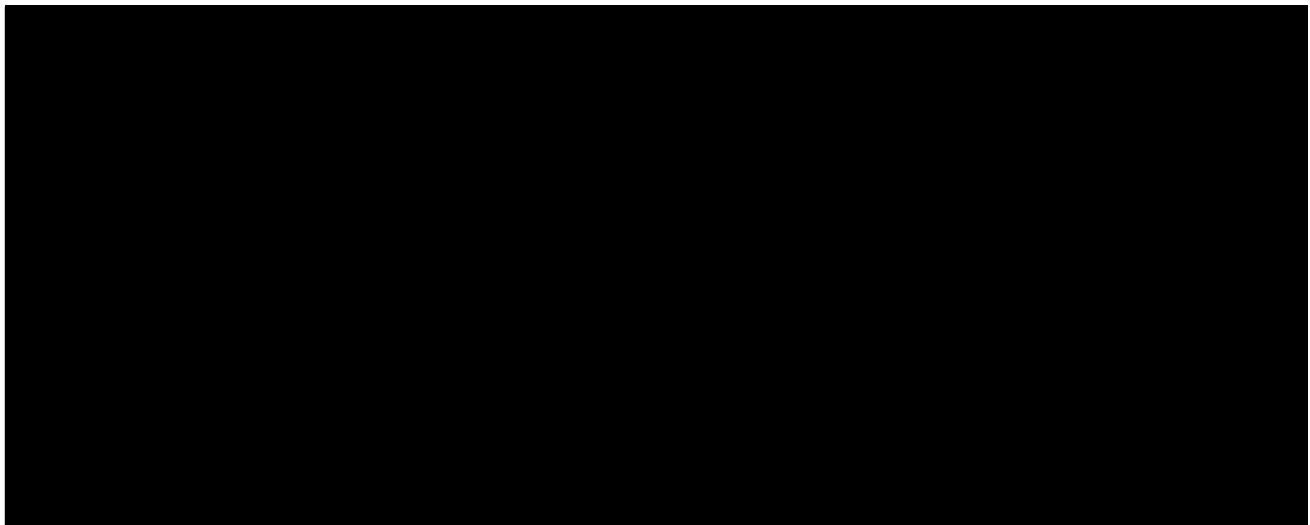


Figure 3: Bodington Hill Wildlife Resort Action Group (BHWRAG) members and supporters carry a banner in the Winter Magic Festival parade at Katoomba in 2023.

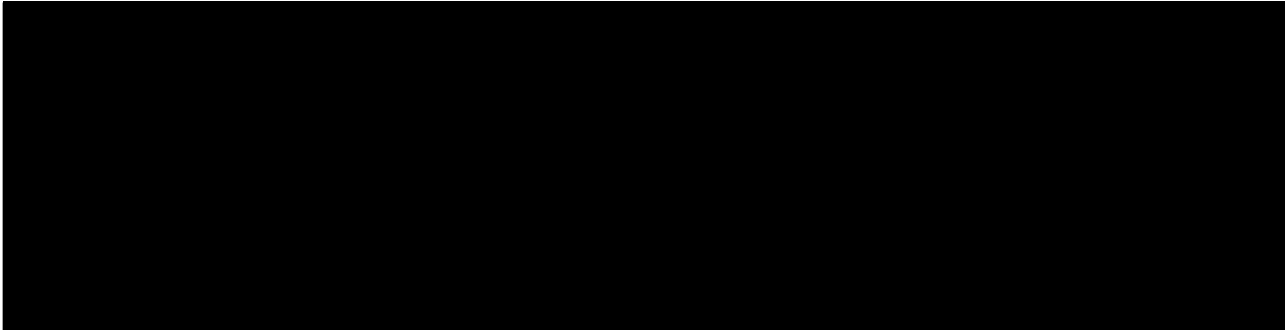
HOW THE “CROC PARK” ZOMBIE DEVELOPMENT CONSENT WILL IMPACT ON OUR LOCAL LIVES

Unresolved Vehicle Access Issues Impacting on Local Residents

Transport for NSW pointedly refused to give its support to last year’s proposals (under the now rejected SEERS amendments) that the development could be serviced by signalised entry and exit to the Great Western Highway.



Access is a key concern to my family as the still active 30 year old consent might have once allowed access via Miller Street, which we live on. Only a strong campaign by then residents of Miller Street and Tableland Road (which links Miller to the Great Western Highway) prevented it.



The obvious concern to us is that the possibility of access via either Miller Street or the Great Western Highway might one day be reassessed. The topography of the land becomes very steep east of the Miller Street cul de sac and the street itself is relatively narrow. When viewed on site it is easy to understand the concerns of residents. On the other hand if the Great Western Highway is attempted to be used it will have to require a signalized interchange if exiting tour buses want to turn right (east) to head back to Sydney. As noted above this option has been rejected by TfNSW for the *“increased risks to road user safety”*.

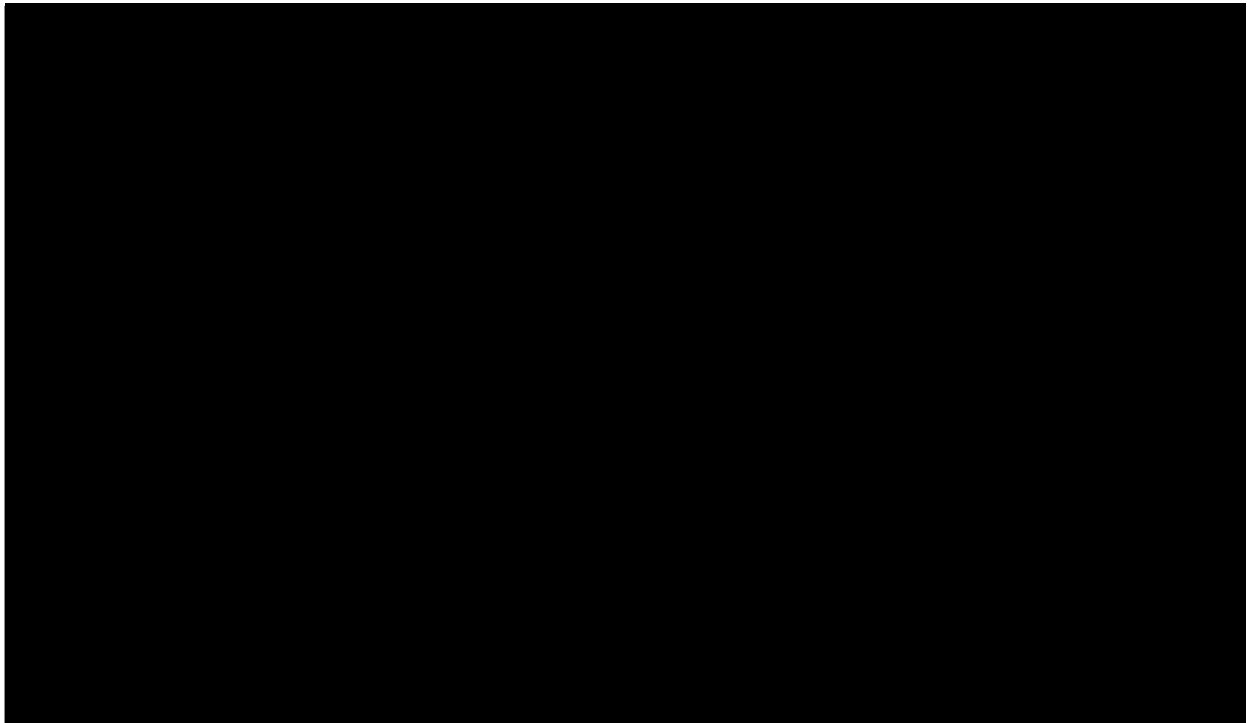


Figure 4: The close proximity of our home at [redacted] to the site of the Croc Park consent at 10 Great Western Highway, Wentworth Falls.

Ecological Impact on local residents

The 1989 consent predates the 2020 [“NSW National Parks & Wildlife Service Developments adjacent to National Parks and Wildlife Service lands Guidelines for consent and planning authorities”](#) document. It also obliged [Blue Mountains Local Environmental Plan 2015](#) to be adopted with a pocket of C3 Environmental Management zoning inside a broader area of C2 Environmental Conservation zoning that protects an area of sensitive hanging swamp ecology. The owners have already cleared (but not yet built on) the hanging swamp within the C3 pocket as they legally can under the 1989 consent. Local residents are hoping that the area will recover if no further work is permitted.

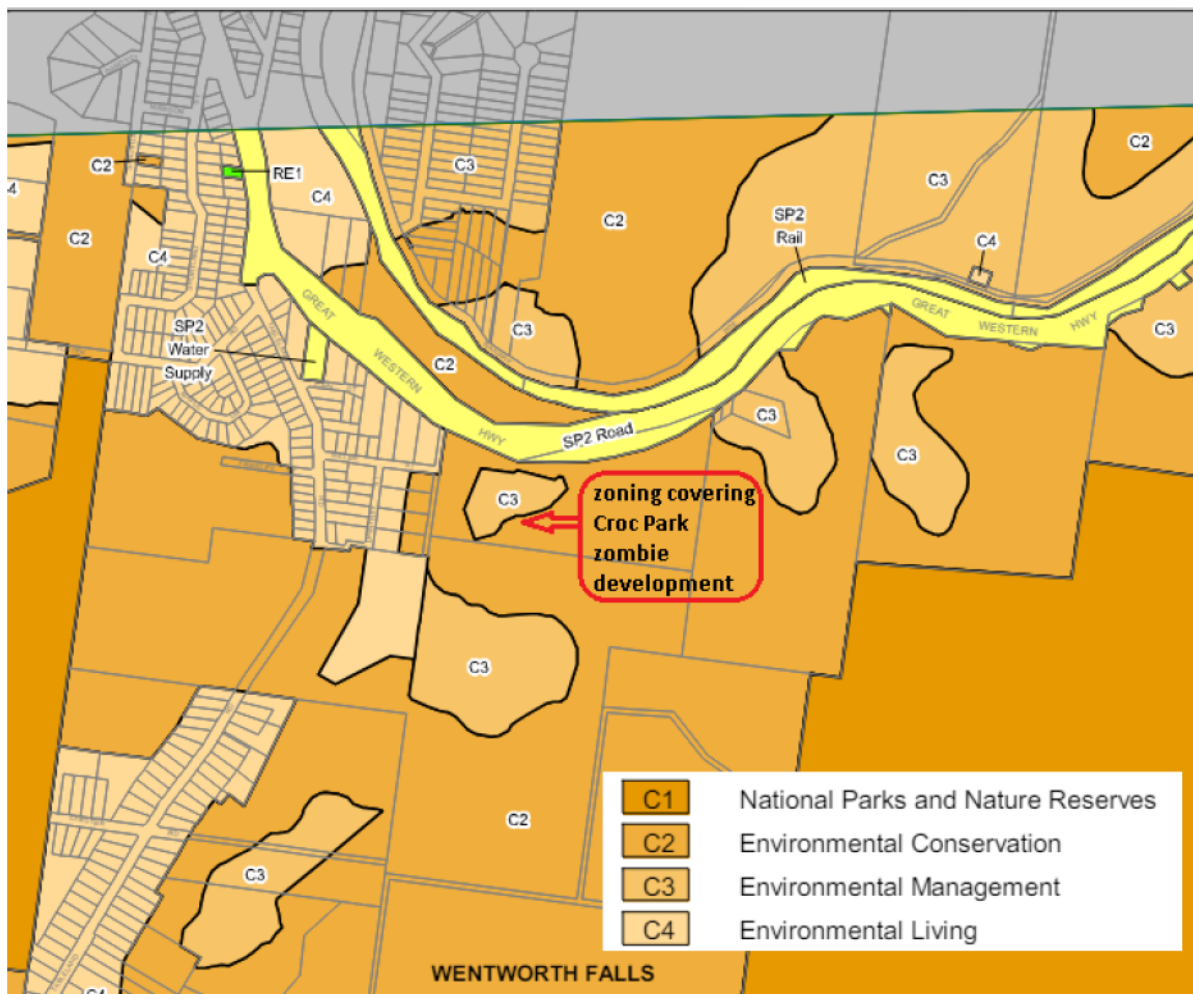


Figure 5: The 1989 Croc Park consent required Blue Mountains Local Environmental Plan 2015 to be adopted with a pocket of C3 Environmental Management zoning inside a broader area of C2 Environmental Conservation area protecting sensitive hanging swamp ecology.

reatened species populations, current conservation practice centres on maintaining essential habitat values. For example, it is thought likely that the retention of high-quality swamp environments will make it possible for the Blue Mountains water skink to survive, despite a very limited understanding of its distribution and ecology within the swamps. Likewise, by retaining and conserving bush rock in situ, species such as the endangered broad-headed snake are more likely to survive.” (Page 64 Environmental Management Plan 2002 - PLANNING STUDY Volume 2: Planning Context, BMCC). Figure 5 below shows the foot print of the 1989 consent and figure 4 places it relation to the covering conservation zones.

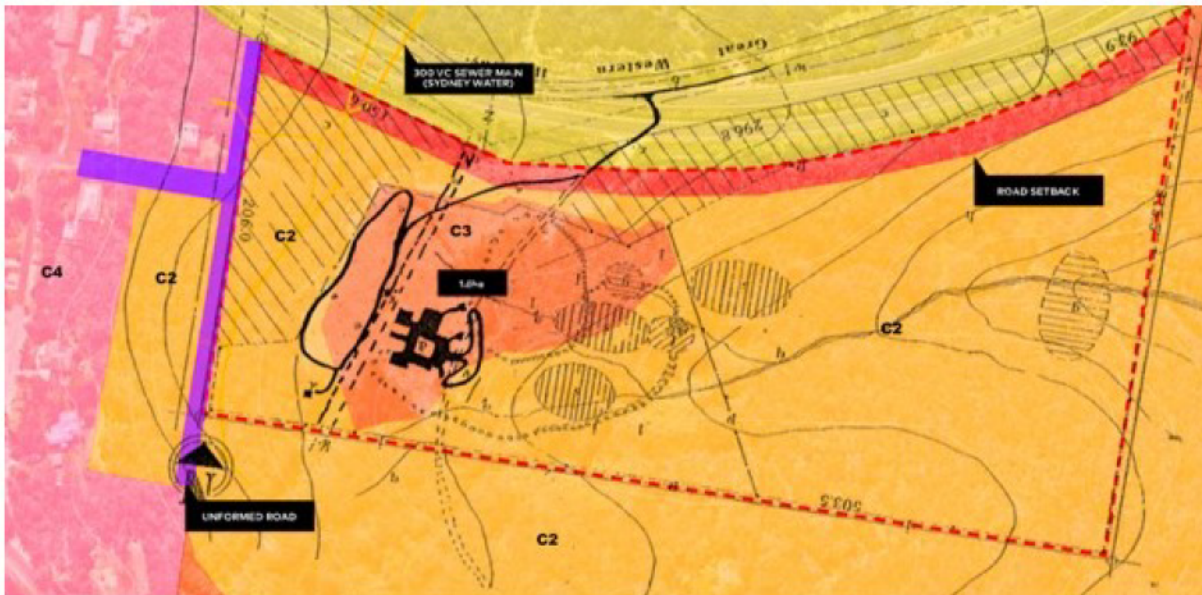


Figure 5 BUILDING FOOTPRINT OF APPROVED 'ZOMBIE' DA AND C2/C3 ZONING

Note: the 'C3- Environmental Management' zoned portion of the site is shown in red. The remainder of the site is zoned 'C2- Environmental Conservation'

Figure 6: Source unknown

ADDRESSING TERM OF REFERENCE (a) *"The current legal framework for development consents, including the physical commencement test."*

Background: The clearing of the C3 area in the case of the Croc Park consent was authorised by a private certifier under the provisions of the existing consent. This gave local residents little warning to make input prior to the ecological impact of the works.

Suggestion.

1. That local Councils, key stakeholders and individuals be allowed to petition the Director to add historical development consents to a register declaring their status. Tempting as it might be to name this resource as "The Zombie Register" it might be less contentious to call it "The Legacy Register".
2. This register should specifically declaring those early consents that were granted prior to the commencement test introduction as a pre-test category. Those consents that were granted after the introduction but still prior to the "tightened-up" modifications could be distinguished as an intermediate category. Consents issued after the modifications could be registered as a post-test category.
3. That legislative and/or regulator changes be implemented blocking private and non-private certifiers from issuing certificates authorising any works in relation to registry listed legacy

consents without having first obtained prior approval from the Director or the Director's appropriate delegated authority.

4. That alongside the commencement test a viability test be adopted to assess the above legacy categories. This suggestion is explored more under our addressing of Term of Reference (d) below.

TERM OF REFERENCE (b) *"Impacts to the planning system, development industry and property ownership as a result of the uncertain status of lawfully commenced development consents."*

Background: The Croc Park zombie development consent is an example of a lawfully commenced historical development consent that creates great uncertainty in the achieving of the objectives of both the C3 (Environmental Management) and zone C2 (Environmental Conservation) of Blue Mountains Local Environmental Plan 2015. It also circumvents the intent of the NSW National Parks & Wildlife Service Developments adjacent to National Parks and Wildlife Service lands Guidelines for consent and planning authorities guide.

The recognition of this undermining of the current planning instruments is addressed by the suggestion made above in the addressing of Term of Reference (a)

SUGGESTIONS RE TERM OF REFERENCE (c) *"Any barriers to addressing historical development consents using current legal provisions, and the benefits and costs to taxpayers of taking action on historical development concerns."*

Background: The current consent owner of the Croc Park has stated that it is not viable as it is being too small in area. Plus it can't get support from TfNSW for a signalised egress/ingress to the Great Western Highway (see above). Not only is it a zombie that won't die but it can't actual be finalized through development work. It is locked in purgatory with no where to go.

The current legal provisions do not allow for an authority to carry out its ecological objectives and obligations when dealing with an historical development consent that has been made non-viable or other wise unachievable by the passage of time and changing land usages. The history of the Croc Park demonstrates this. There needs to be much more legal weight in the acceptance that such a consent, having become non-viable, has now become a stranded asset and that its true financial worth has plummeted below what some might still be speculating it to be.

Suggestion.

That consents that have been made non-viable by time and changing land usages and which, by their existence are negatively impacting on other land usages, be transferred to the ownership of the State Government for resolution and their owners compensated by an amount equal to their true stranded asset value – and not what might have been their value at some point in their history.

SUGGESTIONS RE TERM OF REFERENCE (d) *“Possible policy and legal options to address concerns regarding historical development consents, particularly the non-completion of consents that cannot lapse, and options for further regulatory support, including from other jurisdictions.”*

Background: As noted above the Croc Park is an example of a zombie development that can't be mercifully killed off because it enjoys formal consent but which also can't actually be finalized due to being non-buildable or otherwise simply made non-viable by changing land use agendas. It is locked in purgatory with no where to go.

Suggestions:

That legislative changes be made that the Director of Planning has a formal obligation to initiate an assessment of a zombie development application or a zombie development as to whether it has become non-viable and that the owners be directed to take steps to seek the formally withdraw the application or to surrender the consent.

That legislative or regulatory changes be made to establish along side the commencement test a viability test in the case of recognised zombie applications and zombie consents.