



Attachment 1 to Item 6

DA0196/20 - Hawkesbury Local
Planning Report - 21 April 2022

Date of meeting: 21 July 2022
Location: By audio-visual link
Time: 10:00 a.m.

HAWKESBURY LOCAL PLANNING PANEL MEETING

SECTION 1 – Reports for Determination

Meeting Date: 21 April 2022

SECTION 1 – Reports for Determination

Item: 005 CP - DA0196/20 - Lot 3 DP270515, 88B Bulgamatta Road, Berambing - (83531, 14283, 94598)

Previous Item: 003, 17 March 2022 (HLPP)

Directorate: City Planning

DEVELOPMENT INFORMATION

File Number: DA0196/20
Legal Description: Lot 3 DP 270515
Property Address: 88B Bulgamatta Road BERAMBING NSW 2758
Applicant: David Jones Building & Landscape Design
Owner: Berambing Sustainable Developments Pty Limited
Proposal Details: Tourist Facility – Use of two buildings as tourist facilities
Estimated Cost: \$288,000.00
Area: 20.4800Ha
Zone: RU2 Rural Landscape
Date Received: 22 June 2020
Advertising: 29 July to 12 August 2020
Submissions: Nil

Key Issues:

- ◆ Categorisation and Permissibility – Existing Use Rights
- ◆ Development History
- ◆ Bushfire

RECOMMENDATION:

Refusal.

EXECUTIVE SUMMARY:

Reason for Consideration by Local Planning Panel

Conflict of Interest – The subject property is owned by a relative of a Councillor.

Proposal

The proposal involves the use of two buildings at 88B Bulgamatta Road, Berambing, as cabins that are part of a tourist facility. The two cabins have been constructed and are identified as the 'Enchanted Cave' and the 'Treehouse'.

Development Consent No. MA1308/01 was originally issued for the construction and operation of a tourist facility on the subject land. This original consent approved six cabins within five buildings (one building was approved as an attached double cabin). The tourist facility has not been developed in accordance with the approved plans. The supplied documentation indicates that two of the six approved cabins have been constructed at this stage, although these have altered locations and designs in comparison to the approved plans. The modification of these two cabins, identified as the 'Dream Cabin' and 'Love Studio', is currently under assessment with Development Application No. S960048/20.

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The submitted application seeks to formalise the use of two additional cabins identified as the Enchanted Cave and Treehouse. The approval of the proposed development would permit a total of eight cabins on the property.

A report on this matter was previously considered by the Hawkesbury Local Planning Panel at its meeting of 17 March 2022. At this time the Panel resolved to defer the consideration of the application until 21 April 2022.

Permissibility

The site is zoned RU2 Rural Landscape under the provisions of Hawkesbury Local Environmental Plan (LEP) 2012. The proposed development may be categorised as 'tourist and visitor accommodation' or potentially as an 'eco-tourist facility'. Each of these uses are prohibited within the RU2 Rural Landscape under the Hawkesbury LEP 2012. With respect to eco-tourist facilities, it should be noted that such a use was prohibited within this zone at the time of the lodgement of this application. The Hawkesbury LEP 2012 has subsequently been amended to permit eco-tourist facilities within the RU2 Rural Landscape but, in the absence of a savings provision, such a use remains prohibited.

Instead, the subject development application has been submitted as a 'tourist facility' and is reliant on 'existing use' rights for permissibility. Development Consent No. MA1308/01 was issued for a tourist facility on 21 February 2003. This consent was issued under Hawkesbury LEP 1989, which included the following definition for tourist facilities:

Tourist facilities means a building or place that is used to provide refreshment, accommodation, recreation or amusement facilities for the travelling or holidaying public.

Legal advice submitted by the Applicant in support of the application suggests that Development Consent No. MA1308/01 has been secured, the use has not been abandoned and that the land benefits from an existing use right as a tourist facility. However, the supplied legal opinion does not consider Section 4.69 of the Environmental Planning and Assessment (EP&A) Act 1979 which prevents a use which has been unlawfully commenced from being treated as lawful for the purposes of an existing use right.

The relevant provisions outline that a use which has commenced in contravention of a development consent is unable to be categorised as an existing use right. In this regard the legal advice and documentation provided in support of the application outline that the use of the land as a tourist facility commenced in 2006. This indicates that the use operated in contravention of Development Consent No. MA1308/01 as the Construction Certificate and Notice of Intention to Commence Work were not issued until 2007, and no Occupation Certificate has ever been issued. Therefore, the use relied upon has been carried out unlawfully and the development is unable to be considered under the existing use right provisions of the EP&A Act 1979.

Consultation

The application was notified between 23 July and 12 August 2020 in accordance with Part A Chapter 3 of the Hawkesbury Development Control Plan (DCP) 2002. No submissions were received in response to the notification of the application.

The development is categorised as a 'special fire protection purpose' and was referred to the Rural Fire Service (RFS) as 'integrated development'. Upon review of a series of Bushfire Assessment Reports the RFS have issued their General Terms of Approval for the development.

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Key Issues

The key issues of the development application are:

- Categorisation and Permissibility – Existing Use Rights
- Development History
- Bushfire.

Recommendation

Council has advised the Applicant and owner to withdraw the subject application and instead prepare an application for an eco-tourist facility, which is now a permissible use under the Hawkesbury LEP 2012. This request to withdraw the application has been declined by the owner.

For the reasons detailed in this report, the proposal is unable to be considered under the existing use right provisions of the EP&A Act 1979. It is therefore recommended that Development Application No. DA0196/20 be refused.

REPORT:

Detailed Description of Proposal

Pursuant to Section 4.12(1) of the EP&A Act 1979 (as amended) this application seeks approval for the use of two buildings at 88B Bulgamatta Road, Berambing, as cabins that form part of a tourist facility. Plans of the proposal are included as **Attachment 1**.

Tourist accommodation known as the 'Love Cabins' is located on and operates from the subject property. The submitted application involves the use of two existing cabins that are identified as the Enchanted Cave and the Treehouse.

Development Consent No. MA1308/01 was originally issued for the construction and operation of a tourist facility on the subject land. This consent approved six cabins within five buildings, although only two cabins identified as the Dream Cabin and Love Studio have been constructed at this stage.

The subject application has been prepared on the basis that the consent has been secured and that the land benefits from an existing use right as tourist facility. A legal opinion obtained by the Applicant is included as **Attachment 2**.

The Enchanted Cave cabin is located approximately 158m off the property's northern boundary, whilst the Treehouse cabin is located approximately 72m off the northern boundary. The Enchanted Cave cabin has been constructed of concrete on the side of a rockface and has a Gross Floor Area (GFA) of approximately 50.8m². The Treehouse cabin has been primarily constructed of timber and is raised off the ground on timber poles. This building has a GFA of approximately 40.7m².

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Figure 1: *The Enchanted Cave Cabin*



Figure 2: *The Treehouse Cabin*

The facility is currently being used to provide short-term holiday accommodation. Bookings may be made through the Love Cabins' website, accommodation websites or via phone. The Operational Plan of Management indicates that each cabin may be occupied by a maximum of two guests and there is no fixed limit on the length of stay.

Cooking facilities and potable water is provided to each cabin. No meals are provided by the operator and guests are instead advised to bring their own provisions.

The Building Code of Australia (BCA) Report prepared in support of the application indicates that upgrading works will be required for both buildings. The cabins are serviced by all-weather parking bays.

The land is identified as bushfire prone land and forms of tourist accommodation are defined as a 'special fire protection purpose' under the integrated development provisions of the EP&A Act 1979 and Rural Fires Act 1997. A referral of the development to the RFS has been undertaken.

An Emergency Management Plan has been prepared for the development and identifies the Dream Cabin as the 'refuge shelter' for the development. An Asset Protection Zone (APZ) consisting of Inner and Outer Protection Zones has been established for the tourist facility. The Supplementary Bushfire Report outlines that the APZ will need to be maintained for a distance of 136m to the north, 120m to the east, 127m to the south and 100m to the west of the centralised Dream Cabin. The Enchanted Cave and Treehouse cabins are located within this APZ.

The Emergency Management Plan indicates that bookings will be cancelled during periods of extreme fire danger.

The application is being reported to the Hawkesbury Local Planning Panel for determination as the owner is a relative of a Councillor.

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Hawkesbury Local Planning Panel Meeting and Resolution

A report on this matter was previously considered by the Hawkesbury Local Planning Panel on 17 March 2022. Having considered requests from the Applicant and owner, the Panel resolved the following:

"The Panel unanimously resolved that:

The Hawkesbury Local Planning Panel as the consent authority defer this matter to the meeting of 21 April 2022, for Development Application No. DA0196/20 for the use of two buildings identified as the Enchanted Cave and Treehouse as tourist facilities on Lot 3 in DP 270515, known as 88B Bulgamatta Road, Berambing, for the following reasons:

Reasons for Deferment

- 1. The applicant has requested the opportunity to submit further material to substantiate the application and to respond to the Council Officer's report.*
- 2. Deferral of the Development Application ensures procedural fairness to the applicant.*
- 3. Deferral allows the opportunity for the applicant to consider the most appropriate future course of action, given the eco-tourist facility is now permissible use under the LEP 2012."*

Subsequent to this resolution and the deferral of the application, the assessing officer had discussions with both the Applicant and owner regarding the lodgement of a new development application that would be reliant on the eco-tourist facility definition for permissibility. Whilst the Applicant suggested that a new application would be prepared, the owner requested that the current application be reported to the next available Local Planning Panel Meeting for determination.

Site and Locality Description

The suburb of Berambing is located approximately 100km northwest of Sydney's CBD and approximately 40km northwest of Windsor.

The subject property forms part of a community title scheme and is legally identified as Lot 3 in DP 270515. Located north of Bulgamatta Road and Bells Line of Road, the land has a site area of approximately 20.4800Ha and is accessible via a sealed road within the community lot (Lot 1).

The property is currently operating as a tourist facility known as Love Cabins. Five tourist cabins are located on the property and form part of the existing tourist facility operations. Two of the cabins, the Dream Cabin and the Love Studio, have been developed under Development Consent No. MA1308/01, although they have not been constructed in accordance with the approved plans. Two additional cabins, identified as the Enchanted Cave and the Treehouse, are existing and their formalisation and use are subject to the current development application.

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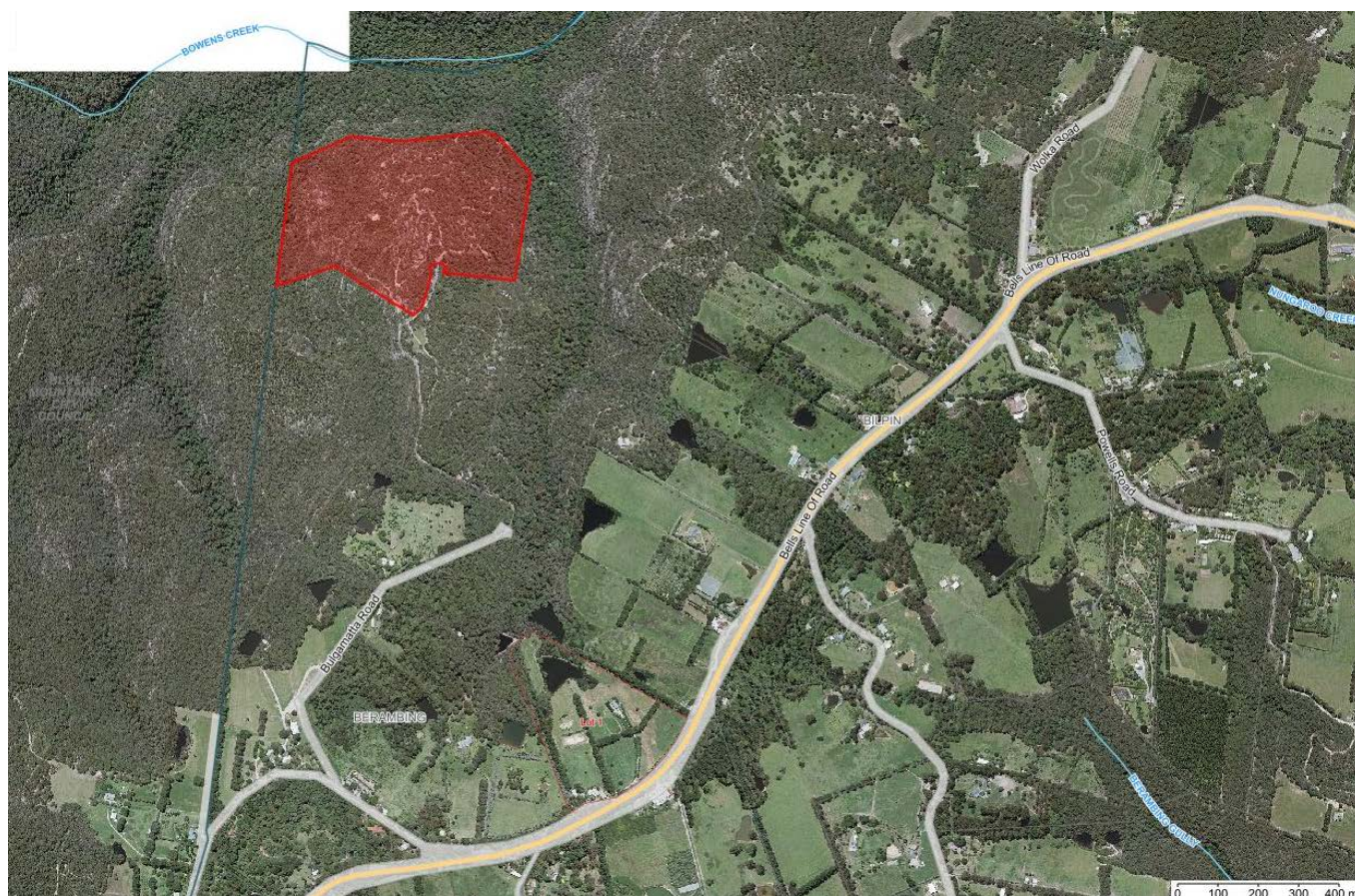


Figure 3: Aerial Imagery of Subject Property

A further cabin identified as the 'Love Teepee' is located on the southern portion of the site, approximately 36m west of the community lot. This cabin was not included in Development Consent No. MA1308/01 and to date no application has been submitted to formalise this structure.

Two outbuildings identified as the 'Rustic Shed' and a 'Storage Shed' are also located on the property. The Rustic Shed is used as an office for the Love Cabins, whilst the Storage Shed is under construction.

The property contains significant vegetation and is located within the vicinity of the Wollemi National Park. Surrounding development generally consists of rural properties, rural-residential properties and national park reserves. Bowens Creek is located approximately 190m north of the property.

Background and History

A review of Council's records identified the following applications of relevance to the subject matter:

Application	Date	Description	Determination
SA0007/94	19/12/1994	Subdivision – Community title subdivision to create to six rural lots and one community lot	Approval
MA1308/01	11/02/2003	Tourist Facility – Construction and operation of a tourist facility consisting of six cabins	Approval
DA0252/08	10/06/2008	Construction of two sheds	Approval

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The land subject to this application was created with the registration of Development Consent No. SA007/94.

Development Consent No. MA1308/01 authorises development described as a tourist facility. This original consent approved six cabins within five buildings, with one building approved as an attached double cabin.

The documentation supplied in support of the application indicates that two of the six approved cabins have been constructed at this stage, although these buildings have altered locations and designs in comparison to the approved plans. The modification of these two cabins, identified as the Dream Cabin and Love Studio, is currently under assessment with Development Application No. S960048/20.

Development Consent No. MA1308/01 included the following conditions relating to the obtainment of an Occupation Certificate:

36. *An occupation certificate is to be obtained on completion of all works and prior to commencement of the approved use. The occupation certificate will not be issued if any condition(s) of this consent are outstanding.*

39. *Completion of all road and drainage works required by subdivision consent SA0007/94.*

An Engineering Works Inspection was recorded on 18 July 2006 and appears to confirm that all works required under Condition 39 of the consent have been completed. However, no Occupation Certificate has ever been issued as required under Condition 36.

No applications have been submitted and no approvals have been issued for the existing Love Teepee cabin. A total of nine cabins would occupy the land with the inclusion of the Love Teepee, the completion of the approved development and the approval of the subject application.

It would appear the owner is reliant on Development Consent No. DA0252/08 for the approval the Rustic Shed and the Storage Shed. Both of these structures have altered designs and appearances, whilst the Rustic Shed is not located as shown in the approved plans.

Submissions

The application was notified between 23 July and 12 August 2020 in accordance with Part A Chapter 3 of the Hawkesbury DCP 2002. No submissions were received in response to the notification of the application.

Consultation

Internal Consultation	
Building	Council's Building Co-ordinator has inspected the building and reviewed the supplied BCA Report. The Building Co-ordinator is generally supportive of the development subject to the imposition of conditions. In this regard the upgrading of the buildings will be required in accordance with the recommendations of the BCA Report.
Engineering	The Development Engineer has raised no objection to the existing internal access arrangements and parking.

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Internal Consultation

Sewer

The Sewer Management Facility (SMF) Co-ordinator has advised that the existing onsite effluent systems have previously been inspected by Council. Should the application be approved the SMF Co-ordinator recommends the imposition of a condition requiring an updated 'Approval to Operate' Licence and inspections.

The submitted Wastewater Report outlines that relatively minor upgrading works are required.

External Consultation

Rural Fire Service

The RFS have undertaken a review of the Bushfire Assessment Report and Supplementary Bushfire Report prepared in support of the development. Upon review of this documentation the RFS have issued General Terms of Approval for the development.

Legislation, Council Policies, Procedures and Codes to which the Matter Relates

- State Environmental Planning Policy (Koala Habitat Protection) 2019 (Koala Habitat Protection SEPP)
- State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP)
- State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity and Conservation SEPP)
- Hawkesbury LEP 2012
- Hawkesbury DCP 2002.

Matters for Consideration under Section 4.15 of the Environmental Planning and Assessment Act 1979

In determining the application, Council is required to take into consideration the following matters as are relevant to the development that apply to the land to which the development application relates:

a) The provisions (where applicable) of any:

i. Environmental Planning Instruments:

State Environmental Planning Policy (Koala Habitat Protection) 2019

The provisions of the Koala Habitat Protection SEPP applied at the time of the lodgement of this application.

The Koala Habitat Protection SEPP aims to “*encourage the conservation and management of areas of natural vegetation that provide habitat for koalas to support a permanent free-living population over their present range and reverse the current trend of koala population decline*”. This Policy was amended by State Environmental Planning Policy (Koala Habitat Protection) Amendment (Miscellaneous) 2020 and largely reinstated the provisions of State Environmental Planning Policy No. 44 – Koala Habitat Protection (SEPP No. 44).

The site contains *Eucalyptus punctata* (Grey Gum) which is a known Koala (*Phascolarctos cinereus*) feed tree listed under Schedule 2 of the Koala Habitat Protection SEPP and SEPP No. 44. Koalas have been previously recorded within 5km of the subject site according to the NSW Bionet database.

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An Ecological Assessment Report has been prepared to address flora and fauna impacts however the report is considered inadequate as it does not specifically address the matters for consideration under Part 2 of SEPP No. 44.

State Environmental Planning Policy (Resilience and Hazards) 2021

State Environmental Planning Policy No. 55 – Remediation of Land (SEPP No. 55) has been repealed and consolidated into the Resilience and Hazards SEPP.

Clause 4.6(1) of the Resilience and Hazards SEPP outlines a consent authority “*must not consent to the carrying out of any development on land unless:*”

- (a) *it has considered whether the land is contaminated, and*
- (b) *if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and*
- (c) *if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose”.*

The suitability of the land to operate and function as a tourist facility was accepted with the approval of Development Consent No. MA1308/01. It is considered unlikely that the subsequent development and use of the land for tourist accommodation would have contaminated the land. No evidence or obvious signs of contamination have been observed by Council staff during site inspections.

Based on its development history the property is considered suitable having regard to the provisions of the Resilience and Hazards SEPP.

State Environmental Planning Policy (Biodiversity and Conservation) 2021

Sydney Regional Environmental Plan No. 20 – Hawkesbury-Nepean River (SREP No. 20) has been repealed and consolidated into the Biodiversity and Conservation SEPP.

Chapter 9 of the Biodiversity and Conservation SEPP aims “*to protect the environment of the Hawkesbury-Nepean River system by ensuring that the impacts of future land uses are considered in a regional context*”. This Policy requires an assessment of development applications with regard to the general and specific considerations, policies and strategies set out in the Policy.

Section 9.9(17) of the Biodiversity and Conservation SEPP further outlines that Council must consider whether “*the proposed development will be capable of connection to a Sydney Water Corporation Limited or council sewerage system either now or in the future*”.

The tourist accommodation facility is serviced by a series of onsite effluent disposal systems and has previously been subject to an Approval to Operate Licence and was inspected by Council. Council’s SMF Officer has advised that the existing systems should be adequate for the development and has recommended the imposition of a condition requiring an updated Approval to Operate Licence.

Hawkesbury Local Environmental Plan 2012

The site is zoned RU2 Rural Landscape under the provisions of Hawkesbury Local Environmental Plan 2012. The Dictionary of the Hawkesbury LEP 2012 provides the following definition for tourist and visitor accommodation and eco-tourist facilities:

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tourist and visitor accommodation means a building or place that provides temporary or short-term accommodation on a commercial basis, and includes any of the following:

- (a) backpackers' accommodation,
 - (b) bed and breakfast accommodation,
 - (c) farm stay accommodation,
 - (d) hotel or motel accommodation,
 - (e) serviced apartments,
- but does not include:
- (f) camping grounds, or
 - (g) caravan parks, or
 - (h) eco-tourist facilities.

eco-tourist facility means a building or place that—

- (a) provides temporary or short-term accommodation to visitors on a commercial basis, and
- (b) is located in or adjacent to an area with special ecological or cultural features, and
- (c) is sensitively designed and located so as to minimise bulk, scale and overall physical footprint and any ecological or visual impact.

It may include facilities that are used to provide information or education to visitors and to exhibit or display items.

The subject development may be categorised as tourist and visitor accommodation but such a use is prohibited within the RU2 Rural Landscape zone under the Hawkesbury LEP 2012. Alternatively, the proposed use could potentially be defined as an eco-tourist facility, however this use was also prohibited at the time of lodgement. The Hawkesbury LEP 2012 has subsequently been amended to permit eco-tourist facilities within the RU2 Rural Landscape zone but, in the absence of a savings provision, the use remains prohibited.

The submitted application has instead been lodged as a tourist facility and is reliant on the existing use rights provisions of the EP&A Act 1979 for permissibility.

Development Consent No. MA1308/01 was issued for a tourist facility under the Hawkesbury LEP 1989 on 21 February 2003. The Hawkesbury LEP 1989 provided the following definition for tourist facilities:

Tourist facilities means a building or place that is used to provide refreshment, accommodation, recreation or amusement facilities for the travelling or holidaying public.

The legal opinion supplied by the Applicant suggests that Development Consent No. MA1308/01 has not lapsed and is capable of being lawfully modified under the existing use right provisions of Section 4.66 of the EP&A Act 1979. Based on the Engineering Works Inspection record issued by Council and dated 18 July 2006 it is accepted that the completed road and drainage works was sufficient to prevent the lapsing of the consent on 21 February 2008. These works were originally required under Development Consent No. SA007/94 for the subdivision of the land but were also imposed under Development Consent No. MA1308/01.

However, the supplied legal opinion does not consider Section 4.69 of the EP&A Act 1979 which prevents a use which has been unlawfully commenced from being treated as lawful for the purposes of an existing use right.

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Section 4.69 of the EP&A Act 1979 specifically outlines that a use which has commenced in contravention of a development consent is unable to be categorised as an existing use right. With respect to the subject application, the legal opinion and documentation provided detail that the use of the land as a tourist facility commenced in 2006. This indicates that the use operated in contravention of Development Consent No. MA1308/01 as the Construction Certificate and Notice of Intention to Commence Work were not issued until 2007, and no Occupation Certificate has ever been issued.

The use has therefore been carried out unlawfully and the development is unable to be considered under the existing use right provisions of the EP&A Act 1979. As a result, the subject proposal constitutes prohibited development and the approval of the application is unable to be considered.

Confidential legal advice obtained by Council is provided as **Attachment 3** to this report.

ii. Draft Environmental Planning Instrument that is or has been placed on exhibition and details of which have been notified to Council:

Not applicable.

iii. Development Control Plan applying to the land:

Hawkesbury Development Control Plan 2002

The development has been considered against the provisions of the Hawkesbury DCP 2002:

Part A Chapter 3: Notification

The application was notified between 23 July and 12 August 2020 in accordance with Part A Chapter 3 of the Hawkesbury DCP 2002. No submissions were received in response to the notification of the application.

Part C Chapter 2: Car Parking and Access

The Enchanted Cave and the Treehouse cabins are each serviced by all-weather parking bays within their immediate vicinity. A communal parking area is also provided adjacent to the Rustic Shed.

Section 2.5.5 of Part C Chapter 2 of the Hawkesbury DCP 2002 does not establish parking rates for forms of tourist and visitor accommodation. The Operational Plan of Management outlines that each cabin will accommodate a maximum of two guests and accordingly the provision of a single parking space per cabin is considered adequate.

Council's Development Engineer has raised no objection to the proposal on parking or access grounds.

Part C Chapter 7: Effluent Disposal

As detailed previously in this report, the cabins are serviced by onsite effluent disposal systems. The Effluent Disposal Report prepared in support of the application indicates that minor upgrading of the systems may be required and Council's SMF Officer has recommended the imposition of a condition requiring the obtainment of an updated Approval to Operate Licence to oversee such works.

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- iv. **Planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4:**

Not applicable.

- v. **(Repealed)**

Not applicable.

- vi. **Matters prescribed by the Regulations:**

Should the application be approved, Council's Building Coordinator has advised that the upgrading of the buildings will be required in accordance with the recommendations of the BCA Report.

It should also be noted that whilst the Enchanted Cave and Treehouse buildings do not satisfy the accessibility requirements of the Disability (Access to Premises – Buildings) Standards 2010, it is intended that the Dream Cabin will serve as the accessible building.

- b) **The likely impacts of that development, including environmental impacts on both the natural and built environments and the social and economic impacts in the locality:**

These matters have been considered in the assessment of this application.

Council's vegetation mapping indicates that the vegetation onsite comprises Sydney Sandstone Gully Forest and Sydney Sandstone Ridgetop Woodland – Open Forest vegetation communities. The submitted Ecological Assessment Report identifies the vegetation as Sandstone Ridgetop Woodland and Gully Rainforest.

The vegetation onsite is not identified on the Biodiversity Values Map maintained by the Office of Environment.

Vegetation has previously been cleared for the establishment of an APZ around the Dream Cabin. The APZ is subject to ongoing maintenance to satisfy the requirements for Inner and Outer Protection Areas.

The submitted Ecological Assessment Report concludes that the development will have no significant impact on threatened species, communities, populations or their habitats. However, the Ecological Assessment Report is dated 18 March 2019 and has been prepared having regard to the provisions of the Threatened Species Conservation Act 1995. The transitional requirements of the Biodiversity Conservation (Savings and Transitional) Regulation 2017 ended on 24 November 2019 and, at the time of the subject application's lodgement, the provisions of the Biodiversity Conservation Act 2016 should have been applied instead.

- c) **Suitability of the site for the development:**

These matters have been considered as part of the assessment of the development application.

The site is identified as bushfire prone land and the tourist accommodation is defined as a special fire protection purpose under Section 100B of the Rural Fires Act 1997. In this respect the application was referred to the RFS as integrated development.

An APZ has been established and is to be maintained for the tourist facility. The centralised Dream Cabin is nominated as the refuge shelter for the development.

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The RFS have undertaken a review of the Bushfire Assessment Report, Supplementary Bushfire Report and Emergency Management Plan prepared in support of the development. Upon review of this documentation the RFS have issued General Terms of Approval.

The Hydro Line Spatial Data Map maintained by the Department of Finance, Services and Innovation indicates that the land is also burdened by a number of identified watercourses. However, both the Enchanted Cave and Treehouse structures appear to be in excess of 40m from these watercourses. Furthermore, the Natural Resources Access Regulator (NRAR) is unable to issue retrospective approvals for works that have already been completed. Consequently, a referral to NRAR under the Water Management Act 2000 is not required in this instance.

An inspection of the property did not indicate that the construction of the buildings had significantly disturbed the land or that erosion was an ongoing issue of concern.

d) Any submissions made in accordance with the Act or the Regulations:

The application was notified between 23 July and 12 August 2020 in accordance with Part A Chapter 3 of the Hawkesbury DCP 2002. No submissions were received in response to the notification of the application.

e) The Public Interest:

It is considered that the approval of the application would not be in the public interest given the issues identified within this report

Development Contributions

Based on the supplied value-of-works of \$288,000.00, the payment of a Section 7.12 (formerly known as 94A) Contribution of \$2,880.00 would be payable should the application be approved.

Conclusion

The application has been assessed in accordance with the provisions of the EP&A Act 1979 with all matters specified under Section 4.15(1) having been taken into consideration. The permissibility of the development has not been demonstrated and the refusal of the application is therefore recommended.

Reasons for Decision

The Hawkesbury Local Planning Panel has determined that the application be refused on 21 April 2022 on the following grounds:

1. The development application fails to demonstrate the permissibility of the development.
2. The development fails to address the provisions of the Biodiversity Conservation Act 2016.
3. The approval of the development would be contrary to the public interest.

RECOMMENDATION:

That the Hawkesbury Local Planning Panel as the consent authority pursuant to Clause 4.16(1)(b) of the Environmental Planning and Assessment Act 1979 (as amended) refuse Development Application No. DA0196/20 for the use of two buildings identified as the Enchanted Cave and Treehouse as tourist facilities on Lot 3 in DP 270515, known as 88B Bulgamatta Road, Berambing, for the following reasons:

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Reasons for Refusal

Prohibition of Development

1. The expansion of the tourist facility use is unable to be considered under the 'existing use' right provisions of the Environmental Planning and Assessment Act 1979 and is therefore prohibited under the Hawkesbury Local Environmental Plan 2012.

Particulars:

- (a) Tourist facilities, tourist and visitor accommodation and eco-tourist facilities are prohibited within the RU2 Rural Landscape zone under the Hawkesbury Local Environmental Plan 2012.
- (b) The tourist facility use has commenced in contravention of Development Consent No. MA1308/01 and the expansion of the development as an existing use right is unable to be considered under Section 4.69 of the Environmental Planning and Assessment Act 1979.

Insufficient Information

2. The Ecological Assessment Report fails to address the provisions of the Biodiversity Conservation Act 2016.

Particular:

- (a) The Ecological Assessment Report has been prepared having regard to the provisions of the Threatened Species Conservation Act 1995. The transitional requirements of the Biodiversity Conservation (Savings and Transitional) Regulation 2017 ended on 24 November 2019 and provisions of the Biodiversity Conservation Act 2016 should have been considered at the time of lodgement.

ATTACHMENTS:

AT - 1 Plans of the Proposal.

AT - 2 Applicant's Legal Opinion.

AT - 3 Council's Confidential Legal Advice - (*Distributed under separate cover to Panel Members only*).

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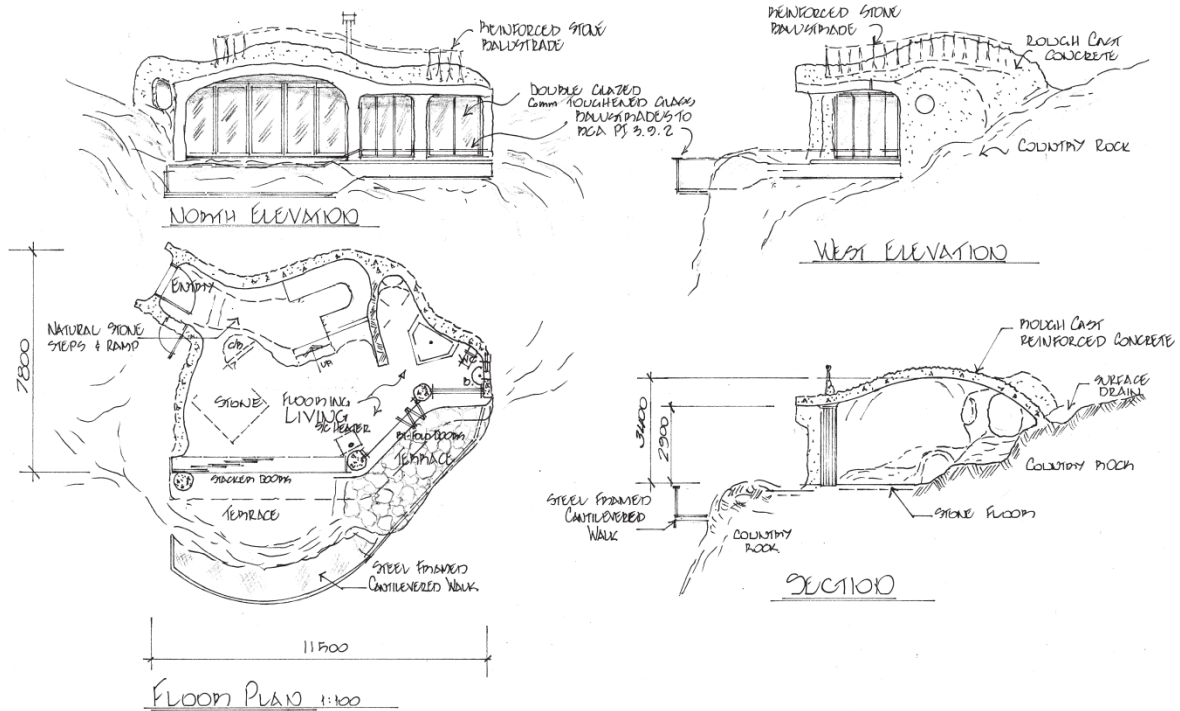
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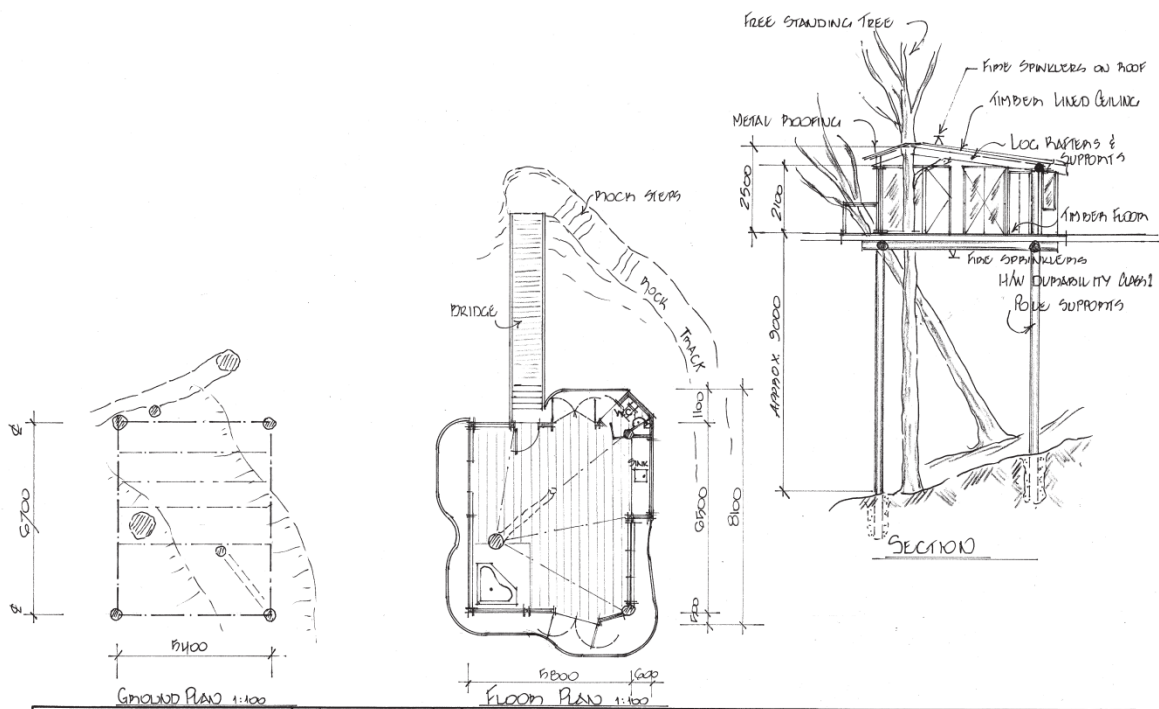
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WOLLEMI CABINS				DRAWN	ISSUE	AS SCALE
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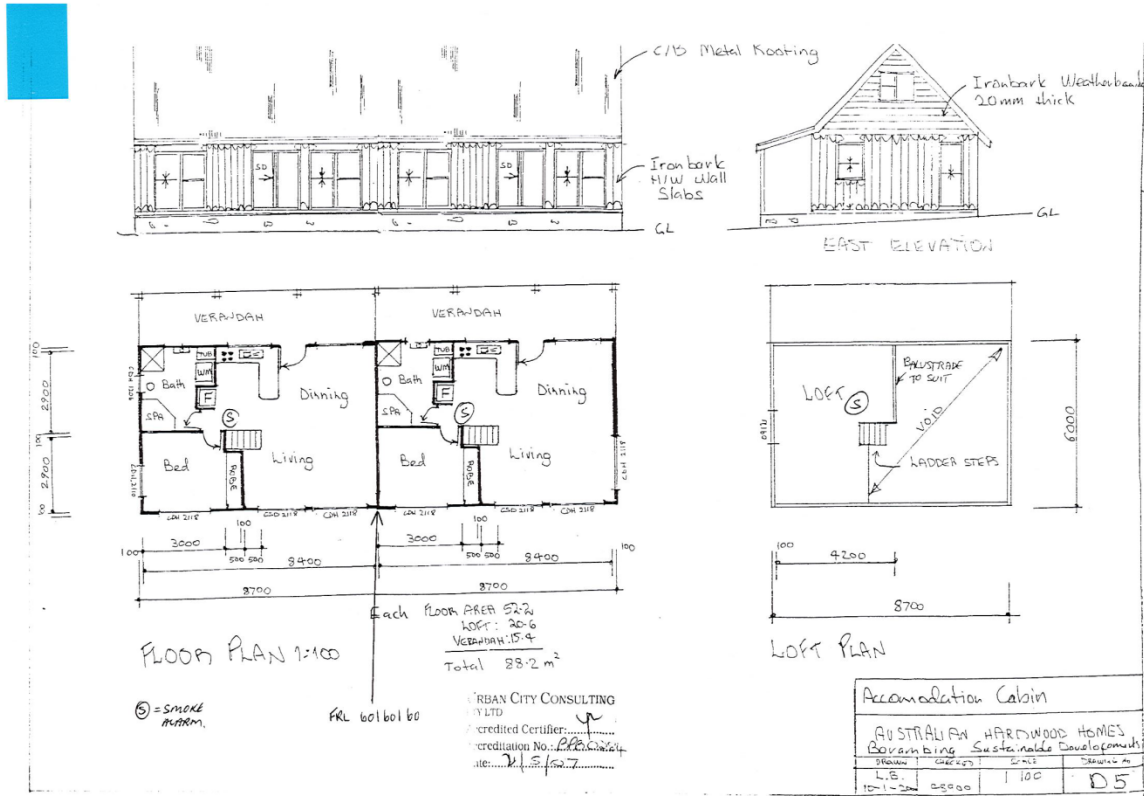
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"The House"				R.E. & P.A. COLLIS DESIGN		04/27 773588
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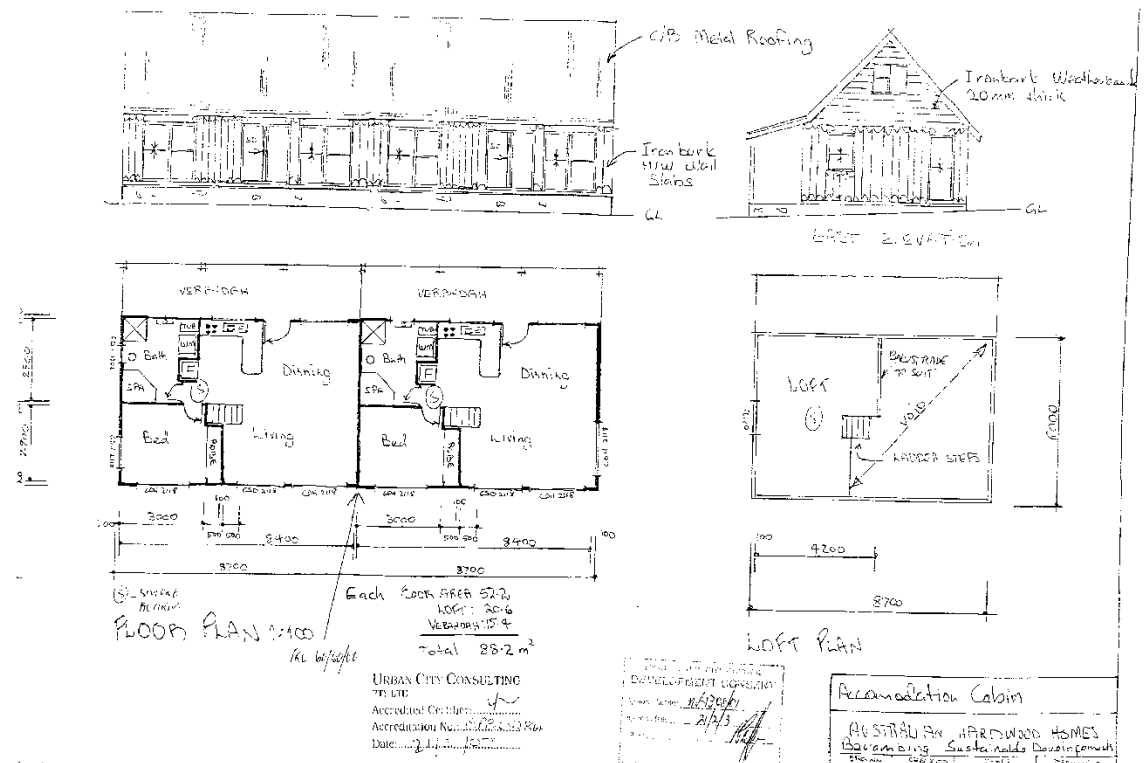
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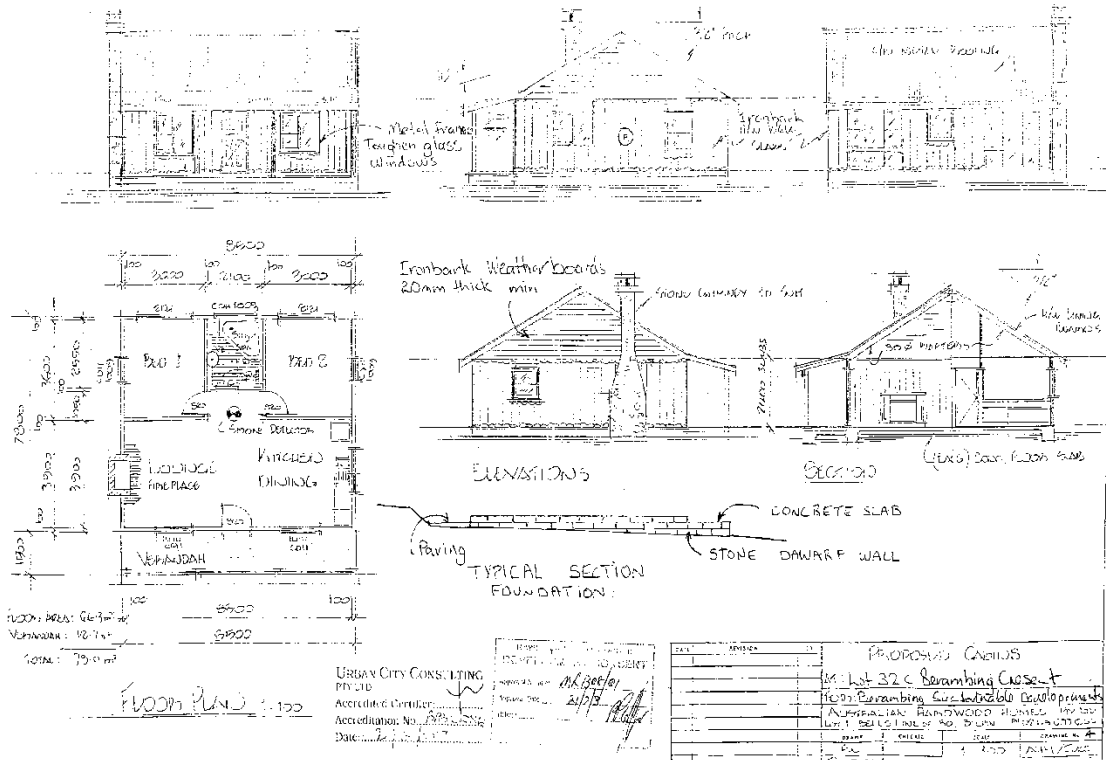


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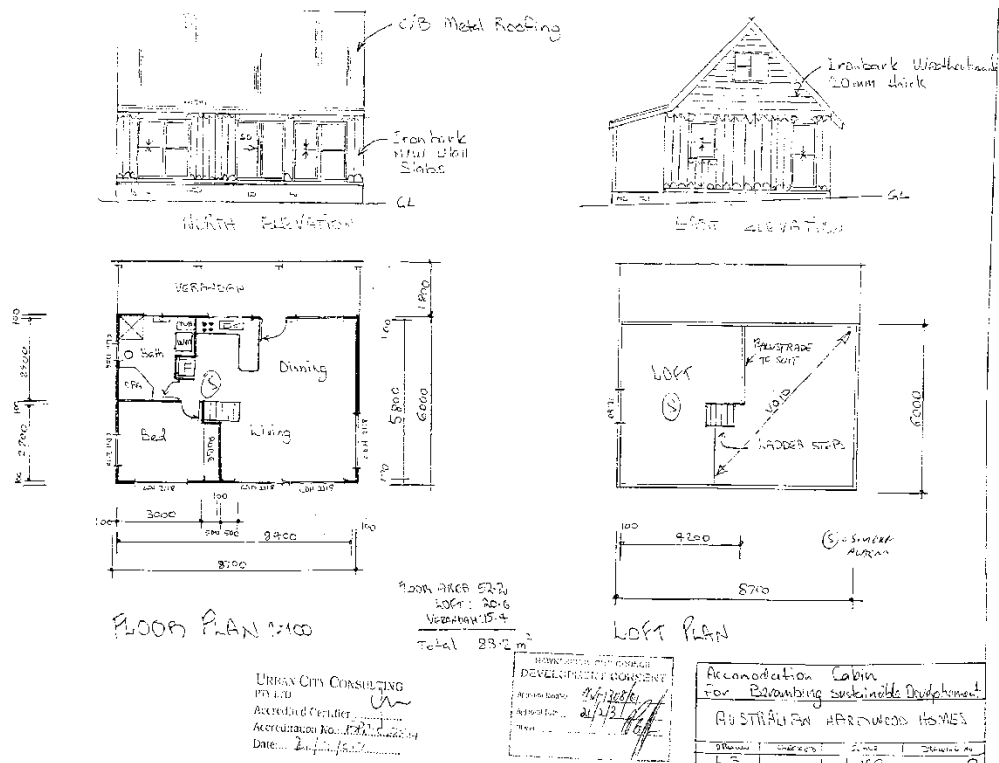
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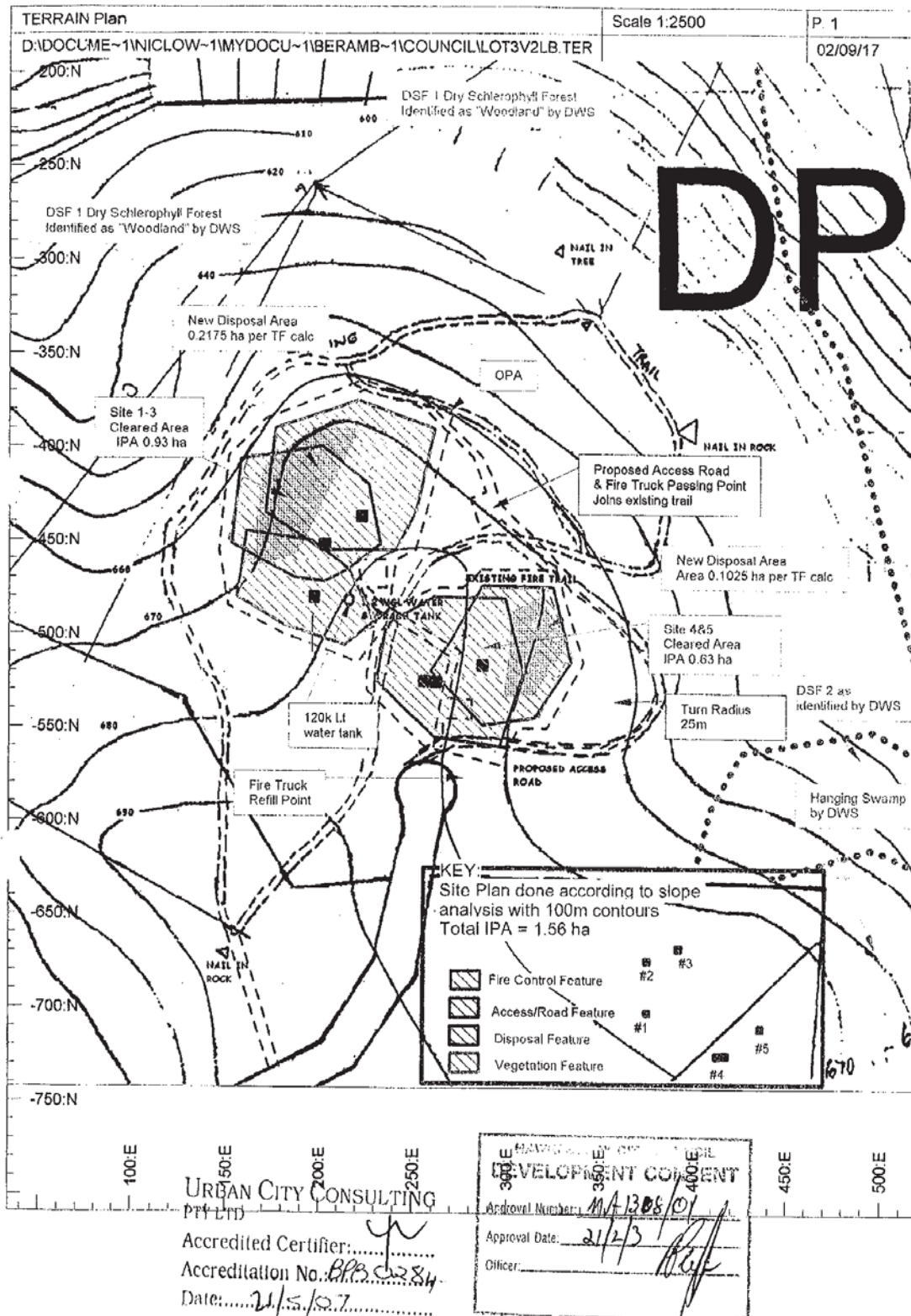


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AT - 2 Applicant's Legal Opinion

MEMORANDUM OF ADVICE

1. In this matter I am instructed by Williams & Co Solicitors in support of the interests of Berambing Sustainable Development Pty Ltd ACN 093419295 which is the registered proprietor of the land known as 88B Bulgamatta Road, Berambing, NSW being Lot 3 DP 270515 ("the site").
2. I have been asked to advise:

Has the consent given to Berambing Sustainable Development Pty Ltd ("BSD") for Development Application MA1308/01 of Hawkesbury City Council dated 21 February 2003 ("the Development Consent") been secured and can the Development Consent be lawfully acted upon particularly given that tourist and visitor accommodation is not permitted under the *Hawkesbury Local Environment Plan* 2012 and the Development Consent would need to rely upon the existing use right provisions. I have also been asked to identify that there was lawful commencement of the consent and to show the sequence of events that occurred inclusive of dates. This legal opinion is required to substantiate the lawful commencement.
3. I have been provided with:
 - Documents regarding DA MA 1308/01 namely
 - i. Notice of Determination in respect of MA1308/01 and conditions dated 21 February 2003;
 - ii. Plans; and
 - iii. Construction Certificate application dated 21 May 2003.
 - Documents regarding revised plans dated 2002 namely
 - i. Letter from Council dated 17 September 2002 with enclosures including
 - Revised site plan with cabin locations;
 - Letter regarding disposal areas;
 - Bushfire Hazard Assessment Report; and
 - Cabin Plans.

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- ii. Section 100B Authority from NSW Rural Fire Service dated 29 November 2002.
- Documents from Certifier
 - i. Construction Certificate No. 1229 dated 21 May 2007;
 - ii. Notice of Intention to Commence construction dated 21 May 2007; and
 - iii. Building Inspection Request/Result confirming Piers have been taken down to rock - dated 4 July 2007.

ADVICE

4. I begin by providing a brief review of the legislative framework which applies and a history of the planning controls affecting the site.

Relevant Legislation

5. The existing use provisions are found in Pt 4 Div 10 of the *Environmental Planning and Assessment Act 1979* ("the EPA Act").

"Existing use" is relevantly defined as follows:

106 Definition of "existing use"

In this Division, **existing use** means:

- (a) The use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for Division 4A of Part 3 or Division 4 of this Part, have the effect of prohibiting that use, and
 - (b) The use of a building, work or land:
 - (i) for which development consent was granted before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use, and
 - (ii) that has been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse.
6. To benefit from an existing use under s106(b) the consent must be granted "before the commencement of a provision of an environmental

planning instrument having the effect of prohibiting the use.” Applying the definitions contained in s4 of the EPA Act, an environmental planning instrument must be one that is ‘in force’. The relevant instrument is therefore the HLEP 2012 which has the effect of prohibition use for tourist facilities.

7. Once ‘a building work or land’ has been identified as benefiting from an existing use as defined in s 106, the operative provisions setting out the protections, privileges and advantages attaching to such existing use are contained in ss 107-109 EPA Act. Sections 107 and 108 are as follows:

107 Continuance of and limitations on existing use

- (1) Except where expressly provided in this Act, nothing in this Act or an environmental planning instrument prevents the continuance of an existing use.
- (2) Nothing in subsection (1) authorises:
 - (a) any alteration or extension to or rebuilding of a building or work, or
 - (b) any increase in the area of the use made of a building, work or land from the area actually physically and lawfully used immediately before the coming into operation of the instrument therein mentioned, or
 - (c) without affecting paragraph (a) or (b), any enlargement or expansion or intensification of an existing use, or
 - (d) the continuance of the use therein mentioned in breach of any consent in force under this Act in relation to that use or any condition imposed or applicable to that consent or in breach of any condition referred to in section 80A (1) (b), or
 - (e) the continuance of the use therein mentioned where that use is abandoned.
- (3) Without limiting the generality of subsection (2)(e), a use is to be presumed, unless the contrary is established, to be abandoned if it ceases to be actually so used for a continuous period of 12 months.

8. **108 Regulations respecting existing use**

- (1) The regulations may make provision for or with respect to existing use and, in particular, for or with respect to:

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- (a) the carrying out of alterations or extensions to or the rebuilding of a building or work being used for an existing use, and
 - (b) the change of an existing use to another use, and
 - (c) the enlargement or expansion or intensification of an existing use.
 - (d) (Repealed)
 - (2) The provisions ... of any regulations in force for the purposes of subsection (1) are taken to be incorporated in every environmental planning instrument.
 - (3) An environmental planning instrument may in accordance with this Act contain provisions extending, expanding or supplementing the incorporated provisions, but any provisions (other than incorporated provisions) in such an instrument that, but for this subsection, would derogate or have the effect of derogating from the incorporated provisions have no force or effect while the incorporated provisions remain in force.
9. The protection afforded by s107(1) and the limitations upon that protection, including the restriction of the protection to the area “actually physically used” are relevant to the present case, because BSD seeks to continue an existing use. Sections 107 and 108 are relevant to preserve the lawfulness of the present use.
10. The provisions referred to in s108 of the EPA Act are contained in Part 5 of the *Environmental Planning and Assessment Regulation 2000* (EPA Regulations) which allow reliance on an existing use for certain development in specified circumstances.
11. Sections 109 and 109 B of the EPA Act are also relevant for the purpose of determining whether the use of the land has been lawfully pursued.
- 12. 109 Continuance of and limitations on other lawful uses**
- (1) Nothing in an environmental planning instrument operates so as to require consent to be obtained under this Act for the continuance of a use of a building, work or land for a lawful purpose for which it was being used immediately before the coming into force of the instrument

or so as to prevent the continuance of that use except with consent under this Act being obtained.

(2) Nothing in subsection (1) authorises:

(3) Without limiting the generality of subsection (2)(e), a use is presumed, unless the contrary is established, to be abandoned if it ceases to be actually used for a continuous period of 12 months.

13. 109B Saving of effect of existing consents

(1) Nothing in an environmental planning instrument prohibits, or requires a further development consent to authorise, the carrying out of development in accordance with a consent that has been granted and is in force.

(2) This section:

(a) applies to consents lawfully granted before or after the commencement of this Act, and

(b) does not prevent the lapsing, revocation or modification, in accordance with this Act, of a consent, and

(c) has effect despite anything to the contrary in section 107 or 109.

(3) This section is taken to have commenced on the commencement of this Act.

History of Planning Controls

14. The presence or absence of existing use rights on the site will depend not only upon the use applied to the site, but also upon the history of planning controls affecting the site.

15. From 22 December 1989 with the gazettal of the *Hawkesbury Local Environmental Plan 1989* ("HLEP 1989") the 32C Berambing Land was zoned 7 (d) (Environmental Protection (Scenic)). The zoning table of that LEP shows in Clause 9 that "*Development for the purpose of*" "*Tourist facilities*" was permissible with consent in the zone.

16. Clause 5 of HLEP 1989 gives the following definition: "tourist facilities" means a building or place that is used to provide refreshment, accommodation, recreation or amusement facilities for the travelling or holidaying public.

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17. In 2002 the *Hawkesbury Development Control Plan 2002 (HDCP)* commenced. The use of the subject land as a tourist facility is consistent with the aims and objectives of HDCP which supports the local tourism economy and extended community networks.
18. On 21 September 2012 the *Hawkesbury Local Environmental Plan 2012* ("HLEP 2012") rezoned the subject land RU2 – Rural Landscape. Under that zoning a specific list of uses are permissible with consent (Item 3). The uses permitted in this zone with consent do not include "tourist facilities". The following uses are permitted without consent: *bed and breakfast accommodation; Environmental protection works; extensive agriculture; home occupations* (Item 2). Prohibited in this zone is any development not specified in item 2 or 3.
19. Thus the continued operation of a tourist facility on the site would be prohibited unless the Development Consent can rely upon the existing use falling within the definition of s106 (b).
Background to DA consent
20. On 11 February 2003 Hawkesbury City Council ("the Council") made a determination that the Development Application no. MA 1308/01 for a Tourist facility on land described as Lot 167 DP 1010953, 32C Berambing Crest, Bilpin NSW 2758 ("the 32C Berambing Land") be consented to on certain conditions which included approval for the construction of several tourist cabins, associated car parks and bushfire hazard reduction works ("the Development Consent"). The consent date as per the Notice of Determination was given as 21 February 2003.
21. Reference to HLEP 1989 shows that "a tourist facility" was a use permissible with consent the time.
22. Subsequent to the issuing of the DA consent in respect of the 32C Berambing Land, being old system title, the 32C Berambing Land was converted to Torrens title and subdivided in accordance with development consent SA 0007/94 ("Subdivision Consent") which was approved in 1994. The subdivision was completed apparently following satisfactory evidence being submitted to Council in accordance with a deferred development

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condition of that Subdivision Consent to the effect that suitable works would be undertaken to mitigate the impacts of a bushfire.

23. Following the subdivision of the 32C Berambing Land, Lot 3 DP 270515 also known as 88B Bulgamatta Road, Berambing, NSW (“the site”) was created. Notwithstanding the subdivision, the site retained the benefit of the Development Consent.

Commencement

24. The EPA Act determines the law as to commencement of a Development Consent. The provisions of the *EPA Act* relevant to the present Development Consent are set out below:

95 Lapsing of consent

(1) A development consent lapses 5 years after the date from which it operates.

...

(4) Development consent for:

- (a) the erection of a building, or
- (b) the subdivision of land, or
- (c) the carrying out of a work,

does not lapse if building, engineering or construction work relating to the building, subdivision or work is physically commenced on the land to which the consent applies before the date on which the consent would otherwise lapse under this section.

(5) Development consent for development other than that referred to in subsection (4) does not lapse if the use of any land, building or work the subject of that consent is actually commenced before the date on which the consent would otherwise lapse.

25. The DA was consented to on 21 February 2003. On 21 May 2007 the appointed Accredited Certifier, Troy Myers of Urban City Consulting Pty Ltd (“the Certifier”) issued a Construction Certificate for the Development Consent in accordance with the approved plans and specifications.

26. The Certifier subsequently issued a Building Inspection Report confirming that building work including engineering work had physically commenced upon the 32 C Berambing Land prior to 4 July 2007. The former included provision of “all weather access site building sites” and “sedimentation controls”, the latter included that “piers have been taken down to rock”.

27. I am instructed that there are additional documents which support and corroborate that commencement of work on the site occurred within the

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5 year time frame. These works supported by documentation dated pre February 2008 (being within 5 years of the date of consent) include:

- i) Road and drainage works were undertaken on the Lot 32C Berambing Land after the Development Consent issued and before the CC issued as required by Condition 39 of the Development Consent;
- ii) A section of the fire trail around the buildings was tar sealed;
- iii) Power and phone connections were installed to the site at the same time as the power to the subdivision SA 0007/94 was installed;
- iv) Road contractor completed driveway to the location of the buildings;
- v) Roller was hired and used for fire trails and pipes were laid for a section of the fire trails.

28. In *Hunter Development Brokerage Pty Ltd v Cessnock City Council*; *Tovedale Pty Ltd v. Shoalhaven City Council* [2005] NSWCA 169; (2005) 63 NSWLR 124; (2005) 140 LGERA 201 the Court said there were three relevant questions in deciding whether work had commenced, namely:

- (a) was the work relied on building, engineering or construction work; if so,
- (b) did it relate to the approved development; if so,
- (c) was it physically commenced on the land to which the consent applied prior to the relevant lapsing date? Also see *Fagin v Australian Leisure and Hospitality Group Pty Limited* [2018] NSWCA 273; *K and M Prodanovski Pty Ltd v Wollongong City Council* [2013] NSWCA 202; (2013) 195 LGERA 23.

29. As to the first question the work relied on was both building or construction work and engineering work.

30. It was work that directly related to the approved development. For example the construction of piers was a necessary part of the construction for one of the buildings for which approval had been granted.

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31. Third, the work was physically commenced on the site to which the consent applied prior to the lapsing date.
32. On the basis of the above I am of the opinion that commencement had occurred within the five year time frame.
- Use of site as a tourist facility
33. I am instructed that in accordance with the Development Consent the use of the site as a tourist facility commenced in 2006 and a tourism business as permitted by HLEP 1989 has operated continuously on the site without incident of any kind providing overnight and short stay tourist accommodation. There has been no abandonment of this use and it continues to this day. It is my understanding that Council and the Rural Fire Service have been aware of this continuing use of the site as a tourist facility and have been aware that several of the buildings which have been constructed on the site pursuant to the Development Consent provide tourist accommodation as permitted by the HLEP 1989. I am further instructed that the relevant buildings have current fire safety certificates, compliant procedures for dealing with fire and other emergencies, BCA reports, structural engineering certificates and waste water management certificates.
34. It may be inferred that this use was continuing when HLEP 2012 rezoned the subject land Rural RU2 Zone – Rural Landscape in 2012. Under this zoning “tourist facilities” were prohibited.
35. However the continued operation of the land as a tourist facility enjoys an “existing use” falling within the definition at s106(b) EPA Act. This is supported by the decision of the Court of Appeal in *Jojeni Investments Pty Ltd v Mosman Municipal Council* (2015) 89 NSWLR 760; [2015] NSWCA 147.
36. In my opinion existing use rights apply having regard to the fact that a development consent authorising the use of the 32C Berambing Land (which includes the site) for a tourist facility was granted on 21 February 2003. The site was therefore being lawfully used for a purpose that was prohibited by HLEP 2012 when that plan came into force in 2012.

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37. The use has not been abandoned and should be regarded as ongoing. The following considerations support this conclusion: There has not been an interruption or break in the use of such a kind as to bring about a termination or abandonment of use (*Woollahra Municipal Council v Banool Developments Pty Ltd* [1973] HCA 65; (1973) 129 CLR 138 at 144.) Further, the fact that BDS temporarily ceased using the premises as a tourist facility at the request of council in late December 2018 following the service on BDS of a Notice of Intention is not an abandonment of the use (*Woollahra Municipal Council v Banool* case).

Conclusion

38. Accordingly, for the reasons set out above I am of the opinion that the Development Consent was physically commenced within time and that the site benefits from existing use rights arising from the grant of consent in February 2003 but the existing use is defined by the terms of approval and the accompanying plans as modified.

I so advise.

DATED 15 AUGUST 2019



Fiona Sinclair

Barrister

Queen's Square Chambers

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