

REPORT TO BLUE MOUNTAINS CITY COUNCIL

**PROPOSED RECLASSIFICATION OF COUNCIL LAND
KATOOMBA CIVIC CENTRE, PART COLLEGE LANE AND FROMA LANE**

Reclassification from Community to Operational Land

Report on a Public Hearing Held in Accordance with the Provisions of Section 29 of the Local Government Act 1993 & Section 68 of the Environmental Planning and Assessment Act 1979

Prepared by

Peter Walsh

Independent Chairperson

SEPTEMBER 2007

1. INTRODUCTION

1.1 Context

There is a proposal before Blue Mountains City Council (Council) to reclassify certain land located in Katoomba. The instrument for this proposal is *Blue Mountains Local Environmental Plan 2005, Draft Amendment 9* (the draft LEP). The proposal provides for the classification of an area of public land to “operational” land under the Local Government Act 1993 (LG Act).

The public land subject to the hearing is known as the Katoomba Civic Centre (Town Centre Arcade), 81-83 Katoomba Street, Katoomba (marked (A) in Figure 1 below) and land within College and Froma Lanes (marked (B) in Figure 1).

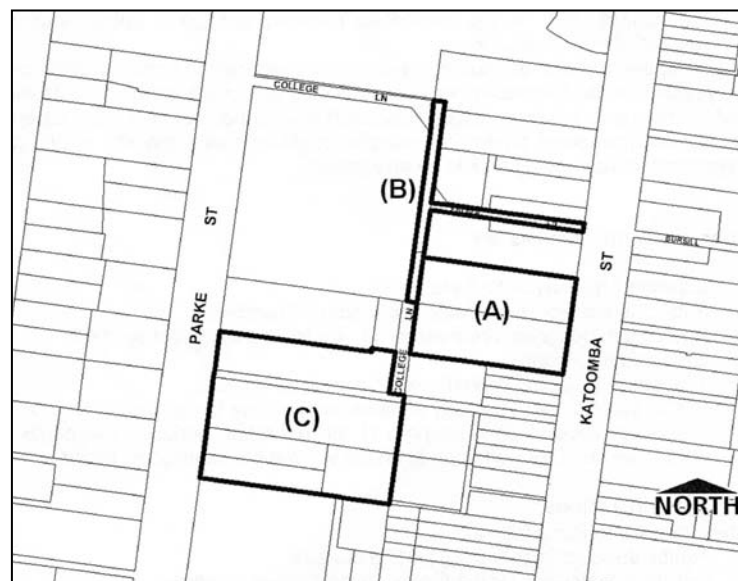


Figure 1: Areas Subject to draft LEP Amendment.

Note only areas (A) and (B) are subject to the reclassification proposal.

1.2 Classification of Public Land

Under the regime for the classification of public land introduced with the LG Act, all public land must be classified as either community or operational land. Public land comprises all land “vested in or under the control of the council”¹. As such, both land which a council may have under its control for use by the community, and land which a council may hold, say, for investment purposes or for storage of plant and equipment, are all designated as public land. The principal effect of the classification of public land is to “restrict the alienation and use of the land”.

Operational land has no special restrictions other than those that may apply to any piece of land. Community land is different. Classification as community land reflects the importance of the land to the community because of its use or special features. Generally it is land intended for public access and use.... This gives rise to the restrictions in the (LG Act), intended to preserve the qualities of the land. Community land:

- *Cannot be sold*

¹ There are exceptions noted in the Dictionary to the LG Act. For example a public road is not subject to classification under the LG Act.

- *Cannot be leased, licensed or any other estate granted over the land for more than 21 years*
- *Must have a plan of management prepared for it.*

(Department of Local Government)²

1.3 Public Hearing

Where there is a proposal to reclassify community land to operational land, section (s) 29 of the LG Act provides that Council must arrange a public hearing in accordance with the provisions of s68 of the Environmental Planning and Assessment Act 1979 (EPA Act). Section 68(2) of the EPA Act provides that at the conclusion of a public hearing:

... (a) report of the public hearing shall be furnished to the council and the council shall make public the report.

Section 47G(2) of the LG Act provides as follows:

The person presiding at a public hearing must not be:

- a) a councillor or employee of that council holding the public hearing, or*
- b) a person who has been a councillor or employee of that council at any time during the 5 years before the date of his or her appointment.*

In accordance with the above provisions I was appointed to preside over the hearing and prepare a report. This document is intended to comprise the report of the public hearing in accordance with the requirements of s68(2) of the EPA Act.

The general administration of the public hearing was undertaken by Council officers. I understand that due notice of the public hearing was given in accordance with the requirements of the Environmental Planning and Assessment Regulation 2000. The hearing itself was conducted on the evening of 1 August 2007 at Council's Katoomba Administration Centre Office. Two members of the public attended in Mr Robert Stock and Mr Ivan Jeray. The proceedings generally followed the following program:

1. Welcome and introduction to hearing process from chairperson
2. Outline of the proposal by Council staff
3. Public submissions and questions with regard to the proposal
4. Concluding remarks and comments on next steps from chairperson.

1.4 Scope and Structure of Report

With the appointment of an independent chairperson/report author, a public hearing provides the opportunity for a party at "arms length" from a council to consider the submissions and provide an independent report for due consideration by that council.

The body of this report summarises the submissions to the hearing. Conclusions and recommendations are provided based on the oral and written submissions to the hearing itself and consequent analysis.

1.5 This Report and Future Council Decisions

As s68(3) of the EPA Act provides:

² Department of Local Government, *Public Land Management – Practice Note 1 Revised May 2000*, ISSN 1320-6788.

The council shall consider the submissions and the (public hearing report) and make any alterations it considers are necessary to the draft local environmental plan arising from its consideration of submissions or matters raised at any public hearing.

Mindful of s68(3) and informed of public submissions and the findings of this report, Council would make the decision it feels is appropriate with regard to this matter.

2. SUBMISSIONS

2.1 Council's Submission

Council's Mr Paul Cashel and Ms Janne Yardy outlined the details of the proposal to the hearing. In summary, the key points made in the Council submission were as follows:

- The proposed reclassification is closely related to the Katoomba Cultural Centre project which provides for a number of facilities of benefit to the local community including a major new library.
- The proposed reclassification of the Civic Centre site was "precautionary only" in that it had been Council's previous intent that the land be classified operational, however some legal questions had arisen concerning the original classification process.
- It was appropriate to ensure that the land was appropriately classified to ensure that development plans for the Civic Centre site were legitimate. These plans for the Civic Centre site were related to the Katoomba Cultural Centre project and included:
 - redevelopment of the Civic Centre's podium level to provide a direct pedestrian link between the new Cultural Centre/Shopping Facilities and Katoomba Street
 - some relocation of existing community facilities given that the library would be relocated.
- Any such development proposal would be subject to a development application (DA) and the required consultation and assessment processes.
- In Council's view there was a community benefit in this reclassification going ahead, this benefit principally associated with expanded community amenities offered with the proposed Cultural Centre .

2.2 Public Submissions

Mr Ivan Jeray

Mr Jeray made oral and written submissions to the hearing³. In his submission Mr Jeray raised a number of questions of a procedural nature. While some of these questions are matters for Council, the questions themselves and responses, where I am in a position to provide them, are addressed at **Attachment A**.

Mr Jeray raised objections to the proposed reclassifications. The merits issues raised by Mr Jeray were centred on the question of "whose interests are being served by the proposed amendments". Mr Jeray believed that community interests were "succumbing" to private interests. Particular concerns raised by Mr Jeray included:

³ Mr Jeray tabled a written submission at the hearing and an email (dated 7 August 2007), including wider comments on LEP Amendment 9, was also provided to me.

- Council has acknowledged the high community value of the Civic Centre (indicated that Council has identified the site as comprising a “high value community asset”) why then was it to be reclassified away from community status.
- Civic Centre and Town Centre Arcade should remain community land as a change will alter the character of the area adversely, and there are no guarantees that the loss of community assets will be offset by the proposed Cultural Centre and associated development.
- The public have a right to be properly informed before any change in classification.
- Whether any conditions of the “Development Deeds” pressure the Council to unfairly reclassify the lands.
- Laneways should be dedicated as pedestrian ways rather than a road way which seems to be concerned with assisting basement parking for the proposed supermarket facility associated with the Civic Centre.

Questions Raised by Chairperson at Hearing

Prior to the conclusion of the hearing I indicated that I would be inviting Council to provide further information in regard to the following matters:

- Any further details in relation to the classification status of the Civic Centre site.
- Any further particulars on proposed changes to the provision of community facilities should the reclassification proceed.

Council’s responses to this invitation are among the matters considered in the following section⁴.

3. KEY ISSUES

3.1 Classification Status of the Land

Advice based on Council reports indicates that:

- A resolution was passed on 21 June 1994 seeking to classify the site (among some 630 other parcels of public land) as operational land. At face value, the resolution had the effect of classifying the Civic Centre/Town Centre Arcade as operational land.
- Council acknowledges that notwithstanding this resolution, should the land be found to be subject to a “trust for a public purpose” or other qualification within clause 6(2) of Schedule 7 to the LG Act, that land is “taken to have been” classified as community land. This would render void the Council resolution to classify it as operational.
- A review by Council’s solicitor suggests that the Civic Centre/Town Centre Arcade “may” be subject to trust for a public purpose. Although there is no clear evidence provided which suggests this to be the case.

Council is therefore seeking to ensure the land is classified operational through this process.

⁴ Mr Paul Cashel and Mr David Hewetson of Council have each provided feedback on the queries raised.

Comment

It seems to me that Council's previous intent is of little material relevance to the now proposed land reclassification. If the concern is that the land may, in law, have community classification, this classification (and any doubt surrounding it) would only reasonably be changed/removed through a full merits analysis of the case for reclassification. It is this principal which has been followed in the drafting of the public hearing report.

3.2 Purpose of the Proposed Reclassification

The proposed reclassification of the subject lands have a key association with proposals for the development of a new Cultural Centre and shopping facility in lands to the west of the Civic Centre.

Reclassification of Civic Centre

There seems to be three key dimensions to the proposed reclassification of the Civic Centre site.

Responding to Major Library Changes

Council's report of March 2004 describes well the many benefits to the community which an enlarged and modernised library could provide. These benefits are very persuasive, and would include a capacity to accommodate innovative learning initiatives such as touring exhibitions, and follow on from a strategic consideration of Council's Library Service⁵. The report also discusses the synergies which could be brought by the libraries location to the Cultural Centre site including a capacity to bring a significant number of people into the Cultural Centre precinct site, and presumably, vice versa.

Mr Hewetson of Council⁶ has advised of the following intent:

The existing library is approximately 400 m² in area, which will be replaced by the new library in the Cultural Centre (approx. floor area of 800 m²);

As the library is to be replaced, the Civic Centre library space, or more correctly, the approximate floor area equivalent, is no longer required on the Civic Centre site. It follows that there may be an opportunity for reclassification of some lands.

Associations with Proposed Enhanced Connectivity Between the Main Street and Cultural Centre/New Shopping Area and Effects on Existing Community Facilities in the Civic Centre

Council's plans provide for an enhanced commercial and retail presence in the Civic Centre environs as it provides for a key pedestrian link between Katoomba Street and the proposed new shopping facilities and Cultural Centre:

The creation of this connection (to the new cultural centre/supermarket) through the Civic Centre along its northern edge would have the effect of reducing the size of the existing community hall significantly. In addition it is seen as critical that the pedestrian connection is active and attractive to users, and that this is best achieved by the establishment of retail shops fronting the pedestrian connection.⁷

⁵ Referenced as Council Ordinary Meeting of 17 February 2004.

⁶ Email of 4/9/07

⁷ BMCC Ordinary Meeting, 9/3/04, p73

Consideration of options that would allow the community hall to be retained and the pedestrian connection achieved, included the construction of a new library on the cultural Centre site to coincide with the construction of the mixed-use cultural and commercial development on the TAFE East and RTA sites. This approach would allow the community hall to be relocated (and the current size of the hall to be retained) in the building vacated by the current library.

Commercial Returns

It is envisaged that there will be positive commercial opportunities through increased retail floor space within the site.

Reclassification of the Laneway Areas

The purpose of the reclassification of the laneways is described in the December 2005 report.⁸

College Lane, a constructed carriageway, separates the Civic Centre and the site of the Blue Mountains Cultural Centre and retail complex. However, there are two parcels of land (Pt Lot 18 Sec 2 DP 692 and Pt Lot 20 Sec 2 DP 692) which are located within College Lane and that do not form part of a gazetted road as shown in Attachment 1. Ordinarily a public road is not 'public land' for the purpose of the LG Act 1993. In ensuring that there are no impediments to the two parcels being gazetted as a public road in the future it is proposed that this land should also be classified as operational land as part of the draft amendment. This will ensure that the parcels are not deemed community land or subject to trusts, estates, interests or the like.

The December 2005 report also outlines the non-road status of Froma Lane describing it as Pt Lot 23 Sec 2 in DP692. Council advises that there is a similar intent with respect to Froma Lane. That is to provide for it as an unzoned road in the LEP and to remove it from community land status and its potential encumbrances.

Comment

I acknowledge and agree with the comments from Council that there is public use of College Lane for service vehicles, and in some instances College Lane provides the only "road" access to properties. Given this situation, it seems important that College Lane be dedicated as road. Froma Lane (east west) also appears suitable to have a formal dedication as a public road or its equivalent as a dedicated pedestrian pathway.

Public roads do not have a classification status under the LG Act and given the activities involved on these lands it appears appropriate that they be dedicated under the Roads Act as soon as may be opportune. In the immediate term it is acknowledged that an operational classification can increase flexibility as to the uses that may occur. In law a reclassification to operational land allows a council, including a future council, the opportunity to sell off the land as a commercial interest. It is important that Council's resolutions in regard to the land commit the laneway areas to future public access. While Froma Lane may one day be subject to proposals for redevelopment which provide alternative access arrangements, no such proposals have been outlined in this current process. It would seem important that any changes of that kind should be subject to a transparent public consultation process⁹.

⁸ Ordinary Meeting, 13/12/05, p6

⁹ For the record I note that I have no awareness whatsoever of any proposal to change Froma Lane from its current physical form.

3.3 Considering Potential Disbenefits of Reclassification of Civic Centre Site

As documented at **Section 2**, the submission by Mr Jeray queries whether the commercial interests at stake here will unreasonably prejudice the community and its access to facilities. It is worthwhile to consider any losses to the community or risks of such losses which may come about with the proposed reclassifications.

Civic Centre

Noteworthy is the effect on the existing (and future) Civic Centre activities. Council has responded to my request for more information on this matter (in part) as follows:

The existing Senior Citizen's centre, lounge and dining hall are to remain in their existing location; The existing community hall (approx. 400 m² in area) will be relocated to the existing library area as part of the redevelopment process. The relocation of the commercial kitchen facilities is still be determined, whether to remain in situ with the dining room or included in the redevelopment of the community hall where the library currently is.

The existing community hall will be redeveloped with (at this indicative stage) a 6 metre wide corridor linking the upper level of the Civic Centre to College Lane and the Cultural Centre. The remaining area is proposed for conversion into retail/shop facilities. The exact configuration is yet to be determined, and will be the subject of a separate DA.

It was suggested that “the quantity of community facilities is not going to be degraded as a consequence of the reclassification of the Civic Centre; and, possibly, may be improved as existing facilities are relocated (e.g. the library) or upgraded.” It was further suggested that “overall, the quantity of community facilities will be improved if one takes into account the additional amenities (interpretive centre and gallery (830m²), theatrette (83m²), etc.) provided in the new Cultural Centre.

Comment

The Council plan appears to have a clear intent which provides for:

- Major improvement to library facilities on offer
- Maintain the other community facilities within the Civic Centre, albeit with some relocation of these facilities to occur.

On the face of it this proposal brings a net community benefit.

It is reasonable to take steps to ensure that in fact there is a maintenance or if possible improvement of the other Civic Centre facilities (Senior Citizen's centre, existing community hall) as the major changes occur around them. This would suggest the need for ongoing consultation with the stakeholders of these facilities as the changes occur, and taking practical steps which may be available to ensure the community classification status of these facilities is reinstated in due course or an equivalent arrangement is set in place (see **Section 3.4**).

3.4 Extent of Land that Needs to be Reclassified

It is clear that Council has questioned the extent of land which needs to be classified. Its resolution of 9 March 2004 sought to reclassify “some” of the Civic Centre land only¹⁰. The proposal does now however seek to reclassify all of the Civic Centre lands. Council’s December 2005 report addresses this point as follows::

(In making a recommendation to classify all of the site including current areas used for community facilities), it is recognised that the Civic Centre/Town Centre Arcade is a significant and highly valued community asset. On this basis it is proposed that upon finalising the modifications of the Civic Centre that Council review the classification of those parts of the site held for public or community purposes, as distinct from commercial or retail facilities. Such a review would be directed to ascertaining which parts of the site should be appropriately managed as community land in accordance with the LG Act 1993.

The recommendation and resolution on this point taken at Council's December 2005 meeting was less explicit:

That in relation to (the reclassification resolution), Council:

(a)...

(b) review the classification of land associated within the Civic Centre (Town Centre Arcade) upon the completion of modifications to the site in association with the adjoining Blue Mountains Cultural Centre, with a view to determining whether any parts of the site set aside for public purposes should be classified as community land.

In my view it is appropriate that the remaining community facilities in the Civic Centre site be “managed as community land” in the sense described in the LG Act. In this sense it is seen as desirable that the identified areas be classified as community land under the LG Act when plans for the location of the facilities are finalised. This would seem to require classification of strata title land. I am not aware that there is a problem with having different classification for different lots in a strata title plan, however it is a matter which warrants further investigation by Council.

However in my opinion, retaining a community classification for the Senior Citizens Centre and community hall is not of such significance as to jeopardise the major project which is at hand. It would be reasonable for Council to do what it practically can to lock in long term commitment to the continued community management of these facilities. This could be through zoning, development control plan provisions, encumbrances on the title, or perhaps other instruments which Council has an awareness of.

4. CONCLUSIONS & RECOMMENDATIONS

Based on reports and documents provided to me, it appears that there will be significant community benefits forthcoming from Cultural Centre project. The relocation of the library from the Civic Centre to this Cultural Centre facility, and the proposed connections to the Katoomba Street area are key drivers for this reclassification proposal.

It is appropriate to do what can be practically done to ensure that the Senior Citizens Centre and community hall and the amenity which community members enjoy from these facilities

¹⁰ Item 10 of Minute 89 10. Ordinary Meeting, 9 March 2004 provides as follows:

That reclassification of some of the Civic Centre land be undertaken in concert with the rezoning and development approval process for the Cultural Centre land to allow additional Civic Centre retail development.”

are maintained as this major project is undertaken. Indeed it seems to me that there are good prospects that the facilities may well enjoy some revitalisation with increasing passing pedestrian traffic. Land classification under the LG Act, is one of the means of ensuring that community interests are not overtaken by commercial interests as property management decisions are taken by a council. It seems reasonable to continue the community classification of the identified areas by way of strata subdivision of the Civic Centre building and classification of the appropriate strata titles as community land.

Similarly it is recommended that in determining to reclassify the relevant areas of College Lane and Froma Lane that Council also resolves to act to dedicate the areas as public road as soon as may be practical given its stated interest in this occurring.

Recommendations

1. The submission to the public hearing be noted.
2. Council support the classification to operational land status, of the areas indicated in Figure 1 of this report and identified as the Civic Centre site, parts of College Lane and Froma Lane, and advance the required further statutory processes to gain State government approval for such classification.
3. Council endorse its support for the Library, Senior Citizens Centre and Community Hall as key community facilities in Katoomba, and acknowledge plans for the level of facilities to be maintained or improved with the planned redevelopment works, and that key stakeholders of these facilities be involved as detailed planning for the facilities is finalised.
4. Subject to there being no legal impediment to so doing, Council express its support for the areas within the Civic Centre which are to be used for community facilities being classified as community land, and that this be undertaken as soon as may be practicable. If legal impediments exist, these community areas be secured for long term community management as may be practical including consideration of zoning, DCP provisions and encumbrances on the title to the land.
5. In respect of the College Lane and Froma Lane areas, Council express its support for dedication of the areas as public roads or public right of way, and that this dedication occur as soon as may be practical.

Attachment A

Procedural Queries Raised by Mr Jeray

In his submission Mr Jeray raised a number of procedural questions. While these questions are generally matters for Council, in the table below I respond to them as I am able to.

Peter Walsh
Independent Chairperson

Query	Comment
How did BMCC choose Peter Walsh to act as Chairperson and report on public hearing	Matter for Council. P&A Walsh Consulting Pty Ltd was invited to make a submission to Council to conduct the hearing and was advised that it had been successful in this submission.
Does Mr Walsh have any interests in BMCC or any other parties associated with the issues of this public hearing including the supermarket/retail/cultural centre development.	Not to my knowledge. For example our consulting practice is not engaged in any work for supermarket operators or any of the retailers in the site vicinity. Nor have we any interest that we are aware of with respect to the cultural centre project.
Has Mr Walsh previously acted as a Chairperson at a public hearing for BMCC or another Council.	Yes I have been appointed to conduct hearings by a number of NSW Councils, including previously by BMCC..
Has BMCC given Mr Walsh a mandate for the public hearing report	The point of the hearing is that a party independent of the sponsoring agency (in this case the Council) hear submissions and consider findings. There has been no instructions as to the conduct or findings of the hearing from Council or any other party.
Will the report by Mr Walsh provide recommendations to BMCC and how will these be determined.	While not mandatory, it is common practice for a hearing of this nature to provide recommendations. In this case recommendations are provided.
Why is the public hearing held after the close of the submission period considering issues raised at the hearing could have been used as part of a submission.	The timing of the hearing is a matter for Council, but it is common for hearings to be held after the public consultation period.