

HISTORICAL DEVELOPMENT CONSENTS IN NSW

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CLARENCE ENVIRONMENT CENTRE Inc

87-89 Skinner Street
South Grafton 2460
Phone/ Fax: 02 6643 4611
Web site: www.cec.org.au
E-mail: admin@cec.org.au

Submission to the Inquiry into Historical development consents in NSW by the LA Committee on Environment and Planning

Introduction

The Clarence Environment Centre (CEC) has had a long history of environmental advocacy and has been frustrated by seeing historic legacy developments (i.e. “zombie developments”) going ahead with no requirement to comply with today’s laws or regulations.

The NSW *Environmental Planning and Assessment Act 1979* (EP&A Act) has created the ability for zombie developments to sit dormant for a long period of time as long as the developer has “physically commenced” the approved development within the prescribed timeframe of the consent or section 4.53 of the Act. Amendments in 2020 shortened the timeframe under the Act to 2 years and provided limits on the definition of ‘physically commenced’ in the EP&A Regulation. Unfortunately, as determined by the courts, the latter definition apparently did not retrospectively apply to older development. And so, for the developments approved before 2020, as long as there is only even minor works that indicate the development has ‘physically commenced’, the development consent is deemed to remain valid with no sunset clause.

The fundamental issue with historic legacy developments is that they have very outdated controls placed on them. In the time since development consent was granted:

- planning laws have changed
- environmental protections have been improved in order to better manage the impacts of developments
- additional species have been listed as endangered or threatened with extinction
- we have greater understanding of the risks posed by sea level rise.

The CEC has long lobbied to have laws changed to bring older developments in line with current planning laws. We believe that, unless a development has been substantially completed, all development approvals older than 7 years should be immediately suspended, and that additional assessments (as required under current planning laws) should be completed before works may recommence.

Background

In the Clarence Valley, we have the unique problem of dealing with zombie developments that were not granted by a current consent authority. Some of these developments could have been

approved by one of the 6 former local government authorities that existed 2 decades ago.

- Maclean Shire, Copmanhurst Shire, Grafton City and Pristine Waters councils, along with 2 county councils, were subjected to a forced amalgamation in 2004.
- Nymboida Shire and Ulmarra Shire councils had amalgamated to form Pristine Waters Council just 5 years earlier.

Consequently, attempting to locate records pertaining to earlier approvals is a problem for the public and also for Council staff. It is unfortunate that most of the planners currently employed by Clarence Valley Council seem to fully depend the proponents wanting to act on a historic development approval to provide the relevant details and documents.

The current situation and the consequences

The fact that a zombie approval, sometimes decades old, can be allowed to proceed without the need to comply with updated regulations, and not be required to provide offsets or mitigate impacts on species that have been listed as threatened, is unacceptable and must be addressed.

We have decided to illustrate these problems with two case studies from the Clarence Valley LGA, that highlight not only highlight those problems, but also shortcomings in the assessment process generally. See **Attachments 1 and 2** to this letter.

In conclusion

By allowing old development approvals to go ahead, when so much has changed in the interim, we are contributing in a significant way to the accelerating extinction rate of a plethora of threatened species. **This situation must end!**

The CEC requests the Inquiry recommends:

- a moratorium of work on all developments approved before 2016, until the NSW Government response on the findings of the NSW parliamentary inquiry into Historical development consents in NSW
- an immediate review of the impact of projected sea level rise on coastal developments approved before 2016
- amendments to the EP&A Regulation 2021 to remove the caveat in section 96(2) and so ensure the limits of what works can be considered as evidence of 'physically commenced' will apply to all developments, even those approved before 15 May 2020
- amendments to the EP&A Act to suspend development approvals after 7 years if it is not substantially completed and require additional assessment based on contemporary planning legislation before works may recommence.

We thank the Committee for providing this opportunity for input to the Inquiry, and sincerely hope that our observations are helpful.

Yours sincerely

Mark Purcell
Secretary
Clarence Environment Centre

2 June 2024

Attachment 1

Case study 1. Woombah Woods Caravan Park extension

For over 25 years, the CEC and other community groups have tried unsuccessfully to prevent approvals for development that involve the destruction of biodiversity-rich wildlife habitat on the Iluka peninsula. Destruction of Koala and Coastal Emu habitat has been ongoing and virtually unchecked for over 30 years.

In the case of Woombah Woods Caravan Park, Council took their standards down to a whole new level, allowing land to be cleared in 2020 under a 36-year-old approval granted by the former Maclean Shire Council, seemingly based on the opinion provided by the proponent's own planning consultants.

That opinion was reported as follows:

We understood this development was always planned to be staged, with Stage 1 completed decades ago. We strongly believe that Maclean Shire should have provided a sunset clause for the later stage by which its approval would lapse. According to the paperwork unearthed by the proponent, this was not the case.

In the CEC's opinion, being able to act on an approval that was almost 40 years old is ridiculous, even by the worst zombie development standards.

The CEC had assumed that some sort of environmental impact assessment had been provided with the original DA in 1983, but we were unable to obtain a copy of any such report from Council. Given the DA was lodged in the early days of the EP&A Act, perhaps an impact assessment was not even a requirement back then.

Environmental legislation has changed enormously since the submission of the original DA. Since 1983 we have seen the introduction of additional NSW and Commonwealth environmental legislation including:

- *Protection of the Environment Operations Act 1997* (NSW)
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth)
- *Endangered Fauna (Interim Protection) Act 1991* (NSW), which was then replaced by the *Threatened Species Conservation Act 1995* and now by the *Biodiversity Conservation Act 2016*
- *State Environmental Planning Policy (SEPP) No 44 – Koala Habitat Protection (1995)* and various iterations of a *SEPP (Koala Habitat Protection)* which are now in the *SEPP (Biodiversity and Conservation) 2021*.
- *SEPP No 46 – Protection and management of Native Vegetation (1995)* and various subsequent laws to control land clearing.

And there have been many (probably hundreds!) of amendments to the EP&A Act.

Yet, with all the above environmental regulations being introduced in the interim, and with a Comprehensive Koala Plan of Management in place for the area, the 1983 approval overrode it all and allowed the bulldozers to do their work with no intervention whatsoever.

This is unacceptable. Koalas and Emus were relatively numerous on the peninsula back in 1983, with neither species listed as threatened. In 2002, when Maclean Shire Council initiated work to develop a Koala Plan of Management (KPoM), they focussed on healthy Koala populations in the Iluka, Woombah and Ashby areas. That early KPoM was later used to develop Clarence Valley Council's plan. Today, the Coastal Emu population is listed as endangered as are Koalas, with both species now all but extinct on the Iluka peninsula.

The site was destined to be cleared under the terms of the existing approval but, instead of carrying out the rest of the development as approved in 1984, a DA was lodged before the clearing had even been completed for a completely new development: the transformation of the caravan park into a manufactured home estate called the "Horisen Lifestyle Community".

The site still contained prime Koala habitat when that later DA was lodged. Koalas were still known to occur in the area. In recognition of the importance of this population, fencing and a crossing for Koalas was required to be installed as part of the nearby Pacific Highway upgrade.

The response to concerns expressed in submissions about the ongoing clearing when the new DA for the property was exhibited, was as follows:

Woombah is identified as a Koala Habitat Area in Council's Draft Koala Plan of Management. As there is no clearing proposed as part of this application and the development footprint generally occurs within the existing disturbed areas, it is unlikely that there will be any impact to the environment or conservation areas".

Thus, there was no impact assessment of the clearing required for the manufactured home estate. The trees that gave Woombah Woods its name were deemed to no longer exist because they could be destroyed under the 1980s development consent. At that stage there were still more than 10 koala feed trees per hectare on the block, mostly Grey Gum and Tallowwood. The NSW Government's Bionet (Wildlife Atlas) recorded a number of threatened species occurring in proximity to the site, including Green-thighed Frog, Grey-crowned Babbler, Common Planigale and, of course, Koala. However, impacts on these species were not required to be assessed by Council.

It seemed clear that after the planned construction of the large number of manufactured homes is completed, there will be no room for 'woods' or wildlife.

This, unfortunately, is typical of what we have become accustomed to in recent years, a 'develop at all costs' approach which is driving Koalas and other wildlife ever closer to extinction.

Attachment 2

Case Study 2. Gulmarrad development proposal

One of the most disappointing aspects over the years has been Council's acceptance of what we assert are poor quality environmental impact assessments.

Unlike the Woombah Woods example, the approval of this development proposal (DA SUB2006/0081) was relatively recent, having been granted on 10 May 2007. This followed consideration of an impact assessment that included what was claimed to be a full flora and fauna assessment. Hence, when a modification was lodged in 2021, no further flora and fauna assessment was required by Council.

The following are some of the CEC's concerns raised in 2021, particularly regarding the quality of the assessment which was never questioned by Council.

Bushfire assessment

In 2006, the NSW Government released the second edition of Planning for Bushfire Protection. However, compliance with this document was not considered necessary by Council. The proponent's consultants had asserted the following:

This would not incorporate the required asset protection zone for each residential building and other infrastructure likely to be constructed on each of the blocks.

We have been advised by a qualified assessor that, in its current format, the necessary provision of Bushfire Asset Protection Zones, boundary fencing, roads, driveways, clearing for housing and effluent disposal fields, will result in the total destruction of all native vegetation at the site. This is the common situation across most other rural residential developments in the Gulmarrad area.

We believe, this clearly outdated bush fire assessment should not have been accepted at the time, and should be sufficient reason for the original approval overturned.

Biodiversity assessments

If this project were assessed today with current legislation and regulations, it would trigger entry into the Biodiversity Offset Scheme and an assessment of impacts based on the Biodiversity Assessment Method (BAM). The BAM requires the avoidance and minimising of impacts which this subdivision development in its present state does not have. The provisions of avoid, minimise and offset that may ensue could limit what will be significant and devastating if allowed to occur as currently approved.

The flora / fauna survey submitted along with the DA in 2006 was a disappointingly casual, half day, one person, meander across the property probably involving a survey effort of only 4 hours during daytime with no night-time surveys.

Flora assessment

While half a day should have been sufficient to identify most flora species present, only 24 species were listed in the report. To give you an idea of how pathetic this effort was, after spending one hour on the property, a CEC volunteer identified 65 native species to be present.

The report submitted with the DA lacked any evidence of basic fact-checking. The flora report included many errors, including:

- misidentifying one of the forest dominants (listing the spotted gum as *Eucalyptus maculata*, a species that had been renamed *Corymbia maculata* at least a decade earlier and determined to occur only south of the Manning River)
- missing out on four other tree species that are relatively common on the site, namely a Stringybark (*Eucalyptus globoidea*), the Pink Bloodwood (*Corymbia intermedia*), and two wattles, *Acacia disparrima* and *Acacia leiocalyx*.

These errors were made despite the bibliography listing “Flora of NSW” (G. Harden) as a reference used for the report, any use of which should have clearly resulted in correct species identification.

Fauna assessment

The report acknowledged there were 15 threatened fauna species likely to occur on the site based on records obtained in 2005 from the NSW Wildlife Atlas (now Bionet). Since then, surveys for large developments as well as records from Clarence Valley WIRES of animals killed or brought into care, have greatly increased the number of species now known to occur in the Gulmarrad area, making any assessment based on those old records obsolete.

It appears no fauna survey was completed to inform the impact assessment. Certainly there is no mention of survey effort at night despite almost all of those 15 threatened species acknowledged to be present being nocturnal. Survey techniques employed at the time were not used. So there was no call play-back, no spotlighting, no trapping of any kind, no ultra-sonic sound detection and no motion detection cameras.

The brief meander undertaken by the proponent’s consultants made no sightings of fauna. At least, no animals, birds or reptiles were recorded as having been seen. CEC members had recorded Glossy Black-cockatoos regularly feeding and potentially nesting at the site, along with Rufous Bettongs, Squirrel Gliders and the Coastal Emus (by then an Endangered population).

However, the treatment of these species in the assessment report for the DA was shockingly poor.

The assessment of Squirrel Glider is typical. Having written that the species, “*occurs in coastal forest and in some wet forest bordering rainforest*”, and that it: “*Roosts and nests in tree hollows*”, for some inexplicable reason, the ecologist then determines that: “*Preferred habitat is not located at the site*”, and that “*no further assessment is required*”. The CEC and WIRES can confirm preferred habitat for Squirrel Gliders does occur at the site in abundance, and the species is known to occur in the locality.

Likewise, there was no recognition of the importance of the area for Glossy Black-cockatoos. This is inexplicable given the species was known to regularly forage at the site with chewed fruits scattered across the forest floor, and the birds believed to nest either on the site or nearby. Because there are major concerns for the future of this species, the Glossy Black-cockatoos is currently under management under the *Saving our Species* program in the area and asking the public for records of feeding and nesting sites. They are also funding the CEC to collect seed for propagation and planting of the only two feed tree species to help conserve the cockatoos in a joint project with Maclean Landcare. Yet, because 18 years ago, surveying ecologists failed to do their job, which then led to Council granting approval to destroy the bird’s habitat, we are told the original flawed approval cannot be overturned.

Site context

It is incompetence of this level that placed a serious question mark over the entire environmental impact assessment process in this particular case. Simple matters such as the

claim that Yuraygir National Park, located 7 km to the east, was the nearest protected area, demonstrates just how little effort was made to present true facts. Yaegl Nature Reserve, dedicated in 2003, is 4 km to the north and Woodford Island Nature Reserve, only 5 km to the west, had been reserved some 5 years earlier than that.

As is invariably the case, when assessing the threats posed to fauna by the expected habitat destruction at this development site, the assessing ecologist hides behind the argument that “we are only destroying 000.2% of available habitat, and there’s plenty more in the region, therefore the species won’t become extinct”. This identical justification of habitat destruction is made hundreds of times each year with every DA presented to Council. Never is there any mention, much less consideration, of the cumulative impacts.

As we see it, if an animal is listed as threatened (i.e. that species will become extinct if current trends are not reversed) and the main identified threat is loss of habitat, then any further loss – no matter how little – **will be a significant impact** as it will only speed up the extinction process!

Mitigation measures

The entire mitigation and amelioration section of the report is a cynical exercise aimed at making someone believe that they are caring for the environment! One and a half pages of dot point suggestions to minimise ecological impacts are interspersed throughout with ‘weasel’ phrases like “where possible”. This was a monstrous green-washing exercise.

The absence of any survey effort was pointed out in the CEC’s submission at the time and yet it was approved by Council. It appeared that Council planners were satisfied with a near zero level of assessment.