Submission No 53

HISTORICAL DEVELOPMENT CONSENTS IN NSW

Organisation: Hallidays Point Community Action Group

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Submission into 2024 NSW Legislative Assembly Historical Consents Inquiry

Introduction

Thank you for the opportunity to make a submission to this very important inquiry. This submission is made on behalf of the Hallidays Point Community Action Group (HPCAG). This is a local community group concerned with ensuring landuse planning is appropriate to maintain and protect the biodiversity and social wellbeing of Hallidays Point. Current membership is 353 local community members.

This Inquiry has developed out of awareness of the significant threat that historical land use development consents are having on remnant areas of habitat, in particular, for endangered and threatened species of wildlife.

This has led to the colloquial term "zombie DAs" meaning historical development consents that have been sitting inactive without being constructed as approved. These may well be some 20 – 40 years old but have managed to be renewed every 5 or 10 years by a token action of commencing development (such as cutting a few saplings, placing pegs around the block, etc).

However, in the intervening period the original studies, legislation, knowledge bases and standards have been superceded and the original assessments are no longer considered adequate by today's standard.

These consents are considered a form of property right for the developer and Councils feel they are powerless to make changes to the original consent or are afraid of ending up in the Land and Environment Court under challenge. **This concept in landuse planning legislation is flawed and needs to be changed.**

Local Example of a problem Zombie DA in Hallidays Point

At 361 Blackhead Rd Hallidays Point there is a 27 acre/10.63 hectare site with an approved DA for a dense aged care facility in high bushfire and flood prone land far from essential facilities.

This site is also a designated koala habitat/corridor (Hallidays Point Habitat Study 1999) that is heavily forested (over 2000 trees) and supports a range of wildlife on the threatened species and NSW Save Our Species list including koalas, brush-tailed phascogales, glossy black cockatoos, microbats as well as a vast number of smaller bird and amphibian species. Squirrel gliders are also known to frequent the area as are grey headed flying foxes.

Additional to this is the fact that this tract of bushland forms a critical corridor link between Darawank Nature Reserve in the south and Khappinghat Nature Reserve to the north.

All of these species, with the exception of the Glossy Black Cockatoo, are deemed irrelevant in consideration of this DA as it stands. Even the Glossy Black Cockatoo habitat may be compromised by the necessary widening of Blackhead Rd for such a dense development.

The DA was first approved in October 2004 and was due to lapse in October 2009. However, it was preserved in the last two days by the removal of some small saplings to establish 'physical commencement'. It is noteworthy that the receipt for the work completed was dated almost a month later on the 11th of November 2009 - obviously a last-minute action to stop this DA from lapsing.

In May 2020 the DA was again before Council this time with a modification from bricks and mortar to dwellings manufactured off-site. [redacted]
Nevertheless it was a hung decision but passed with a one councillor majority.

What was not clearly identified in the requested DA modification of 2020 was that the site was now subject to an upgraded Bushfire Risk Assessment (BFRA) which required that the whole 10.63 hectares must be managed for now and into perpetuity as an internal Asset Protection Zone. As such this internal Asset Protection Zone (APZ) requires the clearing and removal of almost all vegetation and instead installation of non-flammable surfaces of concrete and short mowed grass.

The updated BFRA internal APZ conditions requires the destruction of the whole of the habitat with almost no retention of any vegetation and the displacement and probable loss of all current wildlife - contrary to the original consent condition. It seems a glaring flaw in the consideration by Council that one of the original conditions of consent to protect a substantial amount of the vegetation on site had been totally ignored in approving this modified DA. After the 2019-2020 severe bushfires this land has been an important part of the wildlife recovery.

There is strong local community opposition to this DA going ahead with most locals extremely distressed by the loss of wildlife and also in disbelief that this is an appropriate place, remote from services and vulnerable to severe weather events, to site an elderly persons facility.
The clearing of this land will effectively create a major gap in the corridor that will impact the biodiversity of all of Hallidays Point. It will add to the local extinction of a number of threatened species including koala, phascogales, microbats and spotted tail quolls. It will also put elderly and infirm residents at risk in the event of the next bushfire.

Specific problems with the process Council followed in assessing and approving this DA:

(i) Despite recognition of the value of this site for threatened wildlife (as mentioned by one Councillor at the relevant Council meeting in 2004) in Council's original consideration of this DA, the original ecological survey and assessment was sadly lacking regardless of previous drought;

(ii) [redacted]

(iii) In 2009 this DA was again before Council with a report stating work had been undertaken to show "physical commencement" by the removal of saplings [number not specified] on site just two

days before the due date. The invoice for this work was submitted to Council nearly one month after this due date;

(iv) [redacted]

(v) The criteria allowing "physical commencement" is far too weak to be credible – in this case it did not even describe how many trees or for what reason, but this weakness in requirement was accepted, apparently without question;

(vi) The consideration of a further DA modification in 2020 was extremely inadequate – this proposed to change the development from bricks and mortar for high density living to imported manufactured homes which meant a new bushfire risk assessment was required. This then identified that all trees on site would need to be removed obviously very significant for biodiversity on this site however no consideration was given to undertaking an up-to-date ecological study to allow a thorough assessment of impacts.

(vii) The failure to consider the original condition of consent requiring retention of vegetation on site when assessing the modified DA in 2020 should be rectified in heads of consideration when assessing modifications to DAs.

(viii) This DA has gradually been modified into a significantly different development without proper recognition of the impacts or implications of the modifications on the social and environmental values of this site.

Actions Required to Deal with Current Inadequate Historical Consents

When asked for a list of Zombie DAs in our Local Government Area we are told this information is not available. It would appear from discussions amongst Coastal Residents United community groups up and down the NSW coast that this phenomena is widespread and numerous.

There is clearly a need for a stocktake of these "sleeper" DAs to help develop a process for far more effective assessment and treatment of these old approvals with up-to-date science, information and current day societal values.

It is recommended that the NSW Government develop and publish a Statewide database of all "Zombie DAs".

This database should then be overlain with maps of critical habitat for threatened species and specific DA's be identified for moratoriums until up to date studies and assessments are undertaken to meet today's standards and knowledge base.

Since developers will claim that these historical consents are equivalent to a "property right" which Government cannot change without some form of compensation, we need to change the game rules.

Developers with historical consents in areas of critical habitat need to be given clear and unambiguous notice that up to date studies are now required before any development takes place or the consent will be withdrawn. Should the studies prove unacceptable impacts will arise then the consent will also be withdrawn.

Government may wish to develop some compensatory mechanisms or other means to appease developers but it must be a scheme far more credible and acceptable than the flawed biodiversity offsets schemes.

Actions required to stop further Zombie DAs being created in the future

As Local Councils frequently claim, they are totally hamstrung when it comes to doing anything that might **change the nature of an approved DA** and this becomes increasingly evident when a Zombie DA comes forward for activation or amendment. Local Council staff believe this is equivalent to a "property right" which can never be altered. However all sorts of "property rights" have terms and conditions attached that can influence the nature of the property right e.g. in NSW, property rights have been introduced in water management and fisheries management.

When a DA is given consent it should be clearly stated that it will have conditions and terms attached to it, and that there will be a process of review if not substantially actioned within 5-7 years.

A solution to t**he Zombie DA issue was proposed to be addressed in 2008** by NSW Minister for Planning Frank Sartor amending the EP&A Act Section 95 referring to **lapsing consents.**

This particular amendment proposed an applicant had 5 years to "physically" commence. However, two years after that the work must be "substantially" commenced. This would require clear definition of substantial commencement. This amendment did not get supported in the House.

It is now time to revisit this proposed change given the how significant the problem of Zombie DAs has become evident up and down the NSW coast in recent years. There are many examples that have been illustrated by the Coastal Residents United Group in particular.

This Amendment Bill in 2008 proposed the following amendment to S.95 (now numbered S.4.53) as follows:

Section 4.53 currently says
*"(4) **Development consent f**or:*
(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.*

The amendment proposed - Section 95 Lapsing of consent
***Insert "However, the consent does lapse if that work is not substantially commenced within 2 years after that date." after "this section."** in section 95.*

Therefore, we are calling on this **amendment to now be made to S.4.53 of the current EP&A Act 1979.**

When an approved DA that is older than 10 years is presented to Local Council for "**significant amendment"** (such as different construction or realignment of buildings) there should be a requirement for Council to

notify the local community and provide opportunity for community comment if significant changes have occurred due to climate change and ecological knowledge.

Furthermore **Section 4.55** of the EP&A Act refers to **Modifications of Consents** and needs to be strengthened.

It reads:

*"(1A) **Modifications involving minimal environmental impact***
A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if—

(a) it is satisfied that the proposed modification is of minimal environmental impact, and

(b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and

(c) it has notified the application in accordance with—

(i) the regulations, if the regulations so require, or

(ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and

(d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.

*(2) **Other modifications** A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if—*

(a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), "

The definitions of "minimal environmental impact" and ''substantially the same development" need to be clearly defined in Section 4.55 of the EP&A Act. Any changes that have flow on effects as it did at 361 Blackhead Rd do not meet the Consent conditions. A new DA should be required in any such case.

Conclusion

The Terms of Reference for this Legislative Assembly Committee on Environment and Planning (as attached) clearly give this Inquiry the mandate to recommend and see through the required changes to the Environment and Planning Assessment Act 1979 to redress this problem evident in the landuse planning system in NSW.

As a concerned local community group Hallidays Point Community Action Group expects to see the report from this Inquiry and an explanation of how they have dealt with the problems arising from historical consents.

Yours sincerely
Barbara Richardson PSM
On behalf of the Hallidays Point Community Action Group
Contact: [redacted]
Dated 2 June 2024

Attachment

Terms of Reference

That the Committee on Environment and Planning inquire into and report on historical development consents in New South Wales, including:
(a) The current legal framework for development consents, including the physical commencement test.
(b) Impacts to the planning system, development industry and property ownership as a result of the uncertain status of lawfully commenced development consents.

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