

HISTORICAL DEVELOPMENT CONSENTS IN NSW

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INQUIRY INTO HISTORICAL DEVELOPMENT CONSENTS IN NSW

A submission from Voices of South West Rocks Community Inc.

South West Rocks is a small coastal community on the Mid North Coast of NSW, already experiencing the impacts of climate change. The community is increasingly concerned about the future impacts of sea level rise, increased severity and frequency of extreme weather events and the survival of local flora and fauna. Unsustainable development across our town has highlighted some of the limitations of our current planning system in NSW. Planning Policy urgently needs to be reviewed and restructured to address

outdated development consents and address the twin environmental and climate crises we face.

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1. Introduction

Thank you for the opportunity to provide comments to the Legislative Assembly Committee on Environment and Planning on the inquiry into historical development consents in NSW.

The Voices of South West Rocks Community (VOSWRC Inc) represents more than 2000 community members who advocate for conservation of South West Rock's biodiversity, culture, heritage, infrastructure and sustainability. We are multi-generational and cover a diverse demographic from South West Rocks. Our purpose is to protect and maintain a healthy environment, where coastal forests, waterways, wildlife and cultural landscapes thrive.

VOSWRC recognises that regional areas must plan for future population growth, but that development should be planned sustainably to avoid unacceptable impacts to the community, the environment, the economy, and the cultural landscape.

South West Rocks is experiencing a surge in development for housing subdivisions, despite being constrained by the coastline, flooding, bushfire risk, wetlands and threatened species. Overdevelopment and the increasing population is adding pressure on amenities, health services, sewage treatment, traffic congestion and community wellbeing.

New housing developments from decades old 'Zombie' Development Applications have destroyed areas of high biodiversity value. Hectares of healthy coastal forest have been bulldozed, leaving no wildlife corridors and further fragmenting refuges for wildlife. The current NSW Planning system works in favour of developers and not nature. Our local government has been powerless to stop Zombie DAs and in one instance were taken to the Land and Environment Court adding a huge financial burden to our Council. Community consultation has been minimal, with local concerns and expertise ignored.

Most of the land clearing is based on eroded environmental protection measures and loopholes in the planning system, allowing Zombie DAs to commence despite being totally out of step with the community and the latest science.

South West Rocks has a population of less than 6,000 people. There are 13 new development sites and 9 under construction or approved. Six of the DAs under construction were first submitted between 1993 - 2017. This date range preceded the amendments to the Environmental Planning and Assessment Regulation 2000 in May 2020 that provided clarification on what constitutes physical commencement.

We urge this Committee to adopt planning reform that prevents further biodiversity loss, protects our environment and protects the community from development in high-risk areas that are vulnerable to climate impacts.

2. Recommendations

1. Review the current process that allows development to bypass local government planning approvals. Give Councils additional financial or legislative protection to allow them to challenge inappropriate developments, including zombie DAs, to reduce financial loss such as legal fees.
2. Close the loopholes that allow land-clearing under historical development consents that then allows for newer DAs to proceed on unsuitable land.
3. Development Applications older than 5 years should be reviewed and assessed with up-to-date biodiversity data, climate modeling and ecosystem impacts considered. Inappropriate approvals must redesign or swap land.
4. The NSW Planning system must rule out development in areas of high biodiversity value, especially with Endangered Ecological Communities and cultural sites and this should apply retrospectively to historical development consents.
5. All wetlands must be protected, not only with buffers but by factoring in the ongoing stresses, pressures and cumulative impacts that adjacent developments are likely to have on wetlands. Coastal wetland protection must be written into planning laws.
6. Strengthen the planning legislation to protect hollow-bearing habitat trees and koala food trees in all developments.
7. Have a strategic approach to wildlife corridors that consider high biodiversity land and wildlife movement for increased protection of important connective corridors with a whole of town/region assessment. And linking up with a whole-of-NSW coastal plan for climate refugia and protection of connective corridors to allow movement of wildlife as conditions change.
8. Strengthen protections of parcels of land reserved as corridors as part of development conditions to prevent them becoming future staged lots.

3. Summary of Historical Development Consents in South West Rocks

There is a significant portion of South West Rocks currently under development, or expected to be developed in the future. The developments outlined below are DAs that were initially older than 10 years.

Urban settlement

Key Observations

- The town settlement has incrementally expanded over time to accommodate a growing population
- The most recent development has been mostly in the form of lower density subdivisions, and some smaller scale apartment developments
- The density and character of different aged areas of settlement are highly varied.

Initial conclusions

Any future proposed development should consider locations within the existing settlement boundary with good connections to complimentary uses.

Areas of (new) development should maintain 'green corridors' and 'green buffers' to preserve the scenic qualities, environment and habitat value of vegetation and waterways.



Figure 27: Existing Settlement Boundary, including existing development and currently undeveloped land.

Source: Kempsey Shire Council's South West Rocks Structure Plan

Rise Development

The Rise Project's development is located on Phillip Drive. It was purchased several years ago with a 1993 development approval for 180 villas. Kempsey Shire Council argued that development consent had lapsed on that DA as substantial works had not commenced. This development went to the LEC and on appeal in March 2023 the developer was awarded consent and the site was cleared under the 1993 DA consent.

[The appeal was won on the grounds that sulphate soil testing](#) (to test for impacts from the nearby decommissioned oil terminals) was undertaken by a third party before the original development consent lapsed in 1998, which constituted commencement of 'substantial works'.



Photograph: Lindsay Moller/The Guardian

This site is home to six listed threatened species and runs adjacent to saltwater creek, an important state-significant waterway that runs from saltwater lagoon through to the ocean (when open). There have been several koala sightings in close proximity to the Rise development site, including the NPWS land that runs behind it, Brighton Park, Horseshoe Bay, German Bridge, Gregory St and around the South West Rocks Primary school. The Rise site is an important wildlife corridor. **Rise stated they will plant more koala food trees, resulting in a net gain but koalas will not be able to use those trees for 20-30 years by which point the NSW government anticipates they will likely be extinct in NSW.**

Considering the proximity to the beach and ocean, this site is at risk of the impacts of sea level rise, storm surge and flooding. Predictive mapping of the area in 2100 shows that it is at significant risk of inundation from sea level rise and flooding.

This 1993 DA has since been superseded by a new DA for stage 1, approved in August 2023. This new DA is compliant with the most current planning legislation, however the land was clear-felled in May 2023 under the 1993 DA, which allowed for the approval of the August 2023 DA as many of the hollow-bearing and Koala food trees were cleared. It is also worth noting that the developer held onto and continued to do work under the 1993 development consent for a number of months after August 2023 DA was approved, only handing the old DA in when they had done all the land clearing under the previous development consent.

The second stage of this development is currently being assessed. If the stage 2 development goes ahead it will fundamentally alter the character of our small coastal village. The developer seeks to build 5 x six-storey buildings and 4x 5-storey buildings in a town where almost all areas are zoned with an 8.5m height limit. Unfortunately the former KLEP didn't specify a height limit for this land – an oversight that was addressed in the updated KLEP currently moving through

the system – which has amended a height limit of 8.5m for this land. If passed, these buildings will loom far over the coastal heath beach foreshore that currently has no building higher than two storeys anywhere nearby.

This development caused significant [community backlash](#).

Settlers Ridge

Settlers Ridge is a 154 lot sub-development that was approved in 2013. This development was approved by the NSW Department of Planning. Construction commenced in 2013/1014 with the development of roughly 12 lots to ensure development consent didn't lapse. No further work was undertaken until April 2023, when all native vegetation was clear-felled, including hollow-bearing habitat trees.



Evidence of lorikeets nesting inside the tree hollows during clearing was obtained (pictured left).

Coastal forests make a significant contribution to mitigating the major cause of climate change, carbon dioxide, in that they act as a carbon sink, absorbing it from the atmosphere.

Mature forests also play an important role in mitigating some of the effects of Climate Change such as creating humidity and help generate rainfall, absorb rain, filter the water and release it into streams, reducing topsoil run-off and erosion.

Importantly for our health, trees can reduce the temperature by up to 10 degrees, critical during increasingly intense and prolonged heat waves, the biggest killer of recent times.

Large hollow-bearing habitat tree with nesting lorikeets, which was felled for Settlers Ridge Development, South West Rocks



Settlers Ridge aerial view during clearing, South West Rocks

This developer has a Biodiversity Stewardship agreement with Kempsey Shire Council, behind the site. However, there is no guarantee that it will be maintained for biodiversity into the future or protected in perpetuity. The NSW Planning Department identified the development site at Keith Andrews Ave as having high biodiversity values and being "sensitive to impacts from development and clearing." Yet the biodiversity of this site was destroyed.



Keith Andrews Avenue, South West Rocks

Seabreeze/Saltwater Estate

Seabreeze Estate is a 221 lot sub-development adjacent to saltwater lagoon, a nationally important wetland. This development was originally challenged in the Land and Environment Court in 2004 on the basis that Kempsey Shire Council did not refer the development to the state government for development consent under State Planning Policy No. 71 (Friends of South West Rocks Inc vs. Machro Pty Limited and Ors). In 2016 a new development application for Stage One of the revised Saltwater Estate was rejected by the Northern Joint Regional Planning Panel, this was then challenged and lost in Land and Environment court in 2019.

The former Friends of South West Rocks Inc community group fought to preserve this land from development for close to thirty years. The close proximity to Saltwater Lagoon, bushland that was home to threatened species, such as the Squirrel Glider and Brush-tailed Phascogale, and the impacts of climate change, sea level rise and flooding continue to be key concerns for this development.



Seabreeze Estate, Saltwater Lagoon South West Rocks

4. Impacts of Climate Change

The impacts of climate change, including more frequent and severe weather events, rising sea levels, and changes in temperature, are becoming increasingly evident in our region. South West Rocks is vulnerable to flooding, sea level rise, tidal inundation and bushfires and the town has been regularly cut off by floods from the Macleay River.

As a community, we believe that a robust and adaptive planning system is crucial in preparing for and responding to the challenges posed by climate change.

The NSW Government also prioritises Climate change as a Key Threatening Process (KTP) to native plants and animals in New South Wales. In particular, Anthropogenic Climate Change, or human induced climate change is identified as a high risk.

Sea level rise is already impacting on the estuarine ecosystems in the Macleay, with transitional ecosystems of seagrass, mangrove and saltmarsh migrating upslope. This migration is limited to locations where there is no infrastructure such as flood gates, drains or solid impediments such as walls. This is likely to put further strain on infrastructure to mitigate the impacts.

Our community urges the implementation of comprehensive planning policies that consider these factors when approving developments and infrastructure projects along the coast. Ruling out developments in high-risk areas, protective measures, and sustainable development practices should be prioritised.

The increasing frequency and severity of extreme weather events will have continued impacts on South West Rocks. Some of the key concerns include:

- Isolation during flooding. With only one road in and out, South West Rocks routinely becomes isolated during major flooding. This isolation usually only lasts a couple of days, however if severity increases, so will the length of isolation.
- Bushfire risk
- Poor air quality during bushfires
- Storm damage and coastal
- Storm water run-off and flash flooding. With increasing development and a reduction in trees, we've seen localised flash flooding around development sites
- Coastal erosion - making beach access unsafe and constant upkeep of access points are an increasing burden on Council and NSW NPWS



Storm water run off from Settlers Ridge development site, July 2022



Looking towards South West Rocks during March floods 2021



Looking towards Hat Head from Smoky Cape November 2019

AdaptNSW's climate change observations have forecasted that many of the changes related to climate that have been observed over recent decades will worsen in the future. It is no longer

enough for developments to meet the bare minimum of compliance. We need safeguards built into our planning system that ensures developers are creating housing that is built to withstand the impacts of climate change well into the future, while also avoiding further contributing to Anthropogenic Climate Change. Outdated historical development consents must be reassessed against updated planning policy and development must be avoided in areas that are vulnerable to bushfire, flooding, sea level rise, and other climate impacts.

5. Wetlands: Saltwater Creek and Saltwater Lagoon

Wetlands are incredibly important ecological systems, they act as carbon sinks, sequestering carbon up to 40 times higher than rainforests and act as a buffer against extreme weather events¹. Studies have found that every remaining hectare of healthy coastal wetland averts over \$4,200 AUD of storm damage annually.² No new development should be approved where they threaten the health or extent of any coastal wetland.

Saltwater Lagoon is considered a Nationally Important Wetland. There is increasing pressure on Saltwater Lagoon and Saltwater Creek from encroaching development. The impacts of increased runoff from sediment, housing, including garden runoff that may include synthetic fertilisers or an imbalance of chemicals.

The Saltwater Creek Coastal Management Program report states³:

"Virtually all of the estuary is designated as state-significant coastal wetlands, and a significant biodiversity is present including notable species of birds, fish, reptiles and mammals.

"However, the estuary is facing increased pressure from urban development within its catchment. The South West Rocks area is projected to experience a 40% increase in population over the next 15 years, and a series of major developments are planned for the study area catchment during this period. Catchment runoff and urban stormwater discharge are already a major source of water quality issues across the estuary, which as an ICOLL comprises a sensitive receiving system."

Two of the developments linked to historical development consents (Rise & Seabreeze/Saltwater) in South West Rocks are located extremely close to the coastal wetlands of Saltwater Lagoon and Saltwater Creek.

¹ https://www.natureaustralia.org.au/content/dam/tnc/nature/en/documents/australia/MOW_Report_Web.pdf

² Mulder, O.J., Mulder, K.P., Kubiszewski, I., Anderson, S.J., Costanza, R., & Sutton, P., 2020, 'The value of coastal wetlands for storm protection in Australia', *Ecosystem Services*, vol. 46, p. 101205

³ <https://www.watertech.com.au/projects/saltwater-creek-coastal-management-program-stage-1/>

6. Objections Against Historical Development Consents

South West Rocks is continuing to witness the impacts that historical development consents have on sensitive ecosystems. These dormant development applications, often referred to as Zombie DAs, are based on outdated environmental science and climatic projections. We have no visibility of how many additional Zombie DAs exist in South West Rocks, something that not even Kempsey Shire Council has easy visibility over.

These old approvals do not take into account the impacts of the 2019 and 2023 bushfires, 2021 and 2022 floods, and the increasing severity of weather events. They do not account for sea level rise or coastal erosion. They do not account for the rapid rate of species extinction. They do not account for climate change. They do not consider current housing trends or meaningfully engage with communities.

A solution must be found to ensure that Zombie DAs cannot continue to wreak havoc on our environment and on our communities.

It is vital that planning legislation and controls are strengthened to conserve the remnant native vegetation, recognising that remnant habitat in the area has incredibly high biodiversity value as wildlife refuges after the 2019/20 and 2023 bushfires.

7. First Nations Wisdom

We acknowledge the importance of Wuumung (South West Rocks) to the Traditional Custodians, the Dunghutti people.

VoSWRC fully supports the Dunghutti community's aspirations to manage and care for Country. For too long Indigenous Wisdom and knowledge on caring for Country has been overlooked by commercial development.

The historical development consents and overdevelopment in South West Rocks is not culturally respectful and has lacked genuine engagement with Traditional Custodians. In some instances the local Dunghutti community were not given prior notice of clearing and sites of cultural significance were irreversibly destroyed.

Early input from First Nations Australians into planning solutions will lead to better outcomes for communities that are at the forefront of climate fuelled extreme weather events and lead to better planning decisions. Historical development consents ignore this knowledge and the deep connection that Traditional Custodians have with the land.

8. What does a planning system that balances housing development with nature protection look like?

In 2012, former NSW Minister for the Environment, Bob Debus, presented the [*The National Wildlife Corridors Plan: A framework for landscape-scale conservation*](#), to the Federal Government. The plan was created and adopted to “encourage the progressive design and implementation of a national network” of connective corridors to provide for the movement of wildlife across the country as the climate changes and shore up important habitats across the country.

Though adopted, Mr Debus has said the document “has only had a faint influence upon formal policy” and so implementing something like this on the state level, aimed at protecting and restoring coastal wetlands and biodiverse forests, would be a real solution to the ‘death by a thousand cuts’ that coastal communities in NSW are experiencing via destructive over-development. It would also be an investment in carbon sinks and protection against some of the extremes of climate change.

Voices of SWR has been a key advocate of properly protecting connective corridors and high biodiversity value land. There is a need to protect important forests and wetlands that aren’t zoned as C1 and are falling through the gaps. Even land zoned as C2 is vulnerable to rezoning even though the environmental values of the land haven’t changed.

There is also the trend of developers setting aside parts of their land as ‘wildlife corridor’ but then developing it when market conditions are favourable. There should be proper protection for these parcels of land which are often part of the reason that those who make the decisions allow medium density housing on environmentally sensitive land.

There is no doubt our planning system is allowing increasing fragmentation of important habitat for threatened species. On a local level many have observed that the local population of koalas increased after the devastating 2019/20 bushfires. Animals were able to find refuge in the parts of unburnt bushland here as many places around burnt.

The high biodiversity bushland in parts of South West Rocks containing many hollow-bearing trees allows hollow-dependent threatened and endangered species to continue increasing their numbers and shield others against joining animals on the threatened species list.

9. Considerations

We ask the Legislative Assembly Committee on Environment and Planning to consider the following key concerns:

- Historical development consents are based on outdated environmental science and do not address the increasingly changing climate.

- Furthermore historical development consents do not reflect changes in community sentiment or acknowledge Indigenous Wisdom.
- Coastal communities with one road in and out have land carrying limitations that need to be factored into planning and that may not have been evident when historical development consents were first approved.
- Infrastructure and amenities are already stretched in South West Rocks and many other coastal towns, which is currently not taken into account when historical development consents are allowed to proceed. Many residents cannot readily access a local GP or have to travel significant distances to get a specialist medical appointment.
- The clearing of old growth habitat for development has far reaching impacts - habitat loss and species vulnerability, contributions to climate change, erosion and flash flooding, localised extinctions, detrimental impact on the mental and physical health of the community. Historical development consents have the biggest impacts on these old growth habitat sites.
- South West Rocks' economy is driven by tourism. One of the key draw cards for visitors to South West Rocks is its untouched, natural beauty. If we continue to clear nature for development we will detrimentally impact our tourist economy.