Proforma J – Hallidays Point – 5 responses

SUBMISSION TO THE NSW LEGISLATIVE COUNCIL INQUIRY INTO THE PLANNING SYSTEM AND THE IMPACTS OF CLIMATE CHANGE ON THE ENVIRONMENT AND COMMUNITIES

This submission is from the Halliday's Point Community Action Group on the Mid-north Coast of NSW. Our group has some 400 local residents as members and our core focus is seeking/ensuring development in our area is appropriate and sustainable with minimum impact on biodiversity values.

The Petition from this group raised nearly 800 signatures supporting action on Zombie DAs such as 361 Blackhead Rd, at Hallidays Point.

The full Terms of Reference are available at Attachment 1.

This submission will address problems with the Environmental Planning and Assessment Act 1979 in NSW related to each **Term of Reference**:

(a) developments proposed or approved:

(i) In flood and fire prone areas that have become more exposed to natural disasters as a result of climate change,

The NSW State Government needs to **legislate a ban** on any future residential development being approved within floodprone land as defined by the 1:100 year flood return period. Given the occurrence of extreme flood events exceeding these historic levels in the past 10 years, the Bureau of Meterology should be consulted on the need for **new flood frequency maps** in areas of repeated castastrophic flooding.

This policy has been recommended time and time again over the past 30 years and never adopted due to resistance from the economic sector. It is now clearer than ever that this should have been adopted a long time ago.

Perhaps for residential development in **floodprone lands adjacent** to currently mapped 1:100 year flood return frequency homes should only be demountables able to be moved should flood intensity and return frequencies increase in the future as forecast.

Given the significance of climate change now evident in floodprone lands, parts of the NSW coast and the severity of bushfire, it would seem essential for Government to **amend the EP&A Act 1979 Part 4 Section 4.15** to include the potential impacts of climate change and proposals for adaptation in matters to

be considered in Development Applications. One might consider if a SEPP would be useful in providing a clear consideration of climate change.

The Environmental Impact Assessment for any proposed residential development should provide a clear and transparent assessment of the most recent flood hazard or bushfire risk data using the information presented on NSW Adapt website and the NSW and Australian Regional Climate Modelling (NARCliM). If there is no data presented, then the reasons need to be explained. This should apply equally to those Zombie DAs prior to commencement of work given there may be a considerable lapse in time since the original environmental assessment was done and many characteristics such as vegetation cover and bushfire risk, could have changed.

Any development application needs to address how the development can demonstrate adaptation to future changes in the climate as modelled and projected by NARCliM over the life of development. The DA should also outline the strategies to be employed to manage human risk such as infrastructure required, evacuation management strategies, emergency services access needs and nearby refuges.

Climate modelling such as NARCliM should be re- evaluated against any new IPCC Reports such as AR6, rather AR4 as published on the NSW ADAPTR website.

(ii) In areas that are vulnerable to rising sea levels, coastal erosion or drought conditions as a result of climate change,

The Environmental Impact Assessment for any development vulnerable to coastal hazards requires assessment based on requirements under the Coastal Management Act 2016. The most recent IPCC AR6 in 2023 outlines that sea level rise, coastal erosion and coastal storm events may well be significantly under estimated. Clearly the benchmarks and modelling for coastal hazards (NARCliM) will need to be continually reviewed in the light of emerging new science eg. melting of ice caps and thermal expansion of oceans which is reportedly occurring much faster than previously projected.

Any Zombie DAs when activated should be required to reassess risks based on the most up to date climate science. Strategies for managing the risks arising

from coastal erosion need to be detailed in the assessment and carefully reviewed by Councils or State Government agencies.

(iii) In areas that are threatened ecological communities or habitat for threatened species

As at 2020–21, 1,043 species and 115 ecological communities are listed as threatened under NSW legislation including 78 species declared extinct. These statistics clearly demonstrate we are not effectively protecting biodiversity in NSW.

As result an Independent Review of the Biodiversity Conservation Act 2016 was undertaken by a Committee led by Dr Ken Henry and supported by a secretariat from the Department of Planning and Environment. This review reported in August 2023 and found the Biodiversity and Conservation Act 2016 was not meeting its fundamental objectives and changes were required.

On page p 66 of this Review the report refers to 'Zombie DAs' stating that "Some legacy development consents were granted before the Biodiversity and Conservation Act commenced and are able to proceed with no up to date biodiversity assessment or offsetting because these requirements did not exist when they were approved. There are no legal options to stop these developments proceeding if the proponent had physically commenced work within five years of approval being granted. To ensure development proceeds in line with current social, cultural and environmental standards, the Review Panel suggests the government should consider whether a periodic refresh of approvals or expiry on new development applications should be required."

In the summary of this Review it concludes that the Biodiversity and Conservation Act objectives "lack primacy, being undermined by a range of other legislation including specific Acts relating to: -native vegetation management, including on rural land, land use planning and approvals".

Two final recommendations from this Review are relevant to the Terms of Reference for this Inquiry:
Recommendation 55: Consider whether the current institutional arrangements could be improved to ensure environmental considerations have the primacy required for achieving a nature positive outcome.
Recommendation 56: Consider legislative reform to align relevant Acts with a nature positive outcome.

The ineffectiveness of EIS documents to thoroughly address impacts of development on biodiversity and conservation may provide a case for a separate SEPP to be prepared to guide assessment of biodiversity and threatened fauna and flora.

It is also clear from recent reviews that the Biodiversity Offsets Scheme is not achieving meaningful trade-off to maintain biodiversity and needs to be scrapped or modified significantly to achieve biodiversity positive outcomes.

(b) The adequacy of planning powers and planning bodies, particularly for local councils, to review, amend or revoke development approvals, and consider the costs, that are identified as placing people or the environment at risk, as a consequence of:

(i) the cumulative impact of development ,
(ii) climate change and natural disasters,
(iii) biodiversity loss, and
(iv) rapidly changing social, economic, and environmental circumstances.

Capacity for local Councils to review, amend or revoke development approvals:

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 have indicated that 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 eg. 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 7 years.

A solution to t**he Zombie DA issue was proposed to be addressed in 2008** by 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.

This Amendment Bill 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 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 problems with this SectIon of the EP & A Act were evident when the Zombie DA for 361 Blackhead Rd came before Council for amendment. The developer requested a change to the type of construction from bricks and mortar to off-site manufactured home construction for some 96 dwellings. Clearly this was considered a minor amendment <u>or</u> that the development was substantially the same as that originally granted consent. Either way it was approved without any consideration of the significant flow on effect for the vegetation and biodiversity (threatened species) on this site.

However Council thought it prudent to call for a new bushfire risk assessment which indicated how significant this change to the development was by then classifying the whole site as an Internal Asset Protection Zone requiring most vegetation to be removed and replaced with concrete and grass.

The definitions of "minimal environmental impact" and ''substantially the same development" needs 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.

Cumulative Impact

Around the world, almost two-thirds of national environmental laws require a decision-maker to consider **cumulative impact**. Recent legal reforms in some Australian states, such as Western Australia, Victoria and the Northern Territory, and policy advances in NSW, do the same. Not only do current once-in-a-decade reforms to national environmental law present an opportunity to protect nationally important species and places from cumulative impact, but also this reform needs to substantially made to the NSW environmental legislation.

There is no current methodology that defines how cumulative impact should be assessed in NSW. Planning Policy officers need to examine other models being used and adapt these to NSW Planning Legislation.

Often the argument is given that there is "not sufficient data available". There is scope for Environmental Impact Statements and other Assessment documents to have to demonstrate what data and information has been sourced and used to make a cumulative impact assessment. This will help drive further development of relevant information to enable better assessments.

The Wentworth Group of Concerned Scientists presented a Submission to the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 in April 2020. This Submission addresses legislative amendment to turn back the decline in biodiversity across Australia while simplifying and streamlining assessment and approval processes for business. **The focus is on establishing a clear legal framework for consideration of cumulative impact and enhancing the role of Regional Environment Plans**. This Report finds Regional Planning can assist Cumulative Impact Assessment.

This Submission is published on the website for The Wentworth Group of Concerned Scientists under Publications – Submissions.

(c) short, medium and long term planning reforms that may be necessary to ensure that communities are able to mitigate and adapt to conditions caused by changing environmental conditions and climate conditions, as well as the community's expectation and need for homes, schools, hospitals and infrastructure

The key issue for communities to be able to mitigate and adapt to conditions caused by changing environmental conditions is the need for readily available and easy access to simple English information that enables people to understand what the science and new information means. Your everyday person is not going to seek out the IPCC Assessment Reports and be able to translate what that means for their local area or site.

The NSW Government and local Councils need to provide this information in a readily accessible form for developers, community and planning consultants to be able to easily access up to date information to understand, analyse and present the risks associated with climate change.

(c) Alternative regulatory options to increase residential dwelling capacity where anticipated growth areas are no longer deemed suitable, or where existing capacity has been diminished due to the effects of climate change

The NSW Government should impose a levy on residential estate developers to contribute to a fund for the purchase of land for the purposes of relocating floodprone houses and assisting resettlement of individuals who have suffered repeated catastrophic flood loss.

SUMMARY OF RECOMMENDATIONS:

(1) The NSW State Government needs to **legislate a ban** on any future residential development being approved within floodprone land as defined by the 1:100 year flood return period.

(2) **Amend the EP&A Act 1979 Part 4 Section 4.15** to include the potential impacts of climate change and proposals for adaptation in matters to be considered in Development Applications

(3) Amend S.4.53 of the EP&A Act 1979 to require "substantial" commencement within 7 years of consent being granted or consent lapses to stop future Zombie DAs.

(4) The definitions of "minimal environmental impact" and ''substantially the same development" needs to be strengthened in the definition applying to **Section 4.55 of the EP&A Act** to tighten the process of amendment to DAs.

(5) 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 local community** and provide opportunity for community comment if significant changes have occurred due to climate change and ecological knowledge.

(6) When an approved DA that is older than 10 years is presented to Local Council for "**significant amendment"** there should should be a requirement for Council to **notify local community.**

(7) The EP&A Act needs to require **cumulative impact assessment** in the environmental assessment prescribed through applying accepted methodology described in a SEPP or the Regulations to the EP&A Act.

(8) NSW Government should impose a **levy on residential estate developers** to contribute to a fund for the purchase of land for the purposes of relocating floodprone houses.

ATTACHMENT 1

LEGISLATIVE COUNCIL

PORTFOLIO COMMITTEE NO. 7 – PLANNING AND ENVIRONMENT

Inquiry into the planning system and the impacts of climate change on the environment and communities

TERMS OF REFERENCE

That Portfolio Committee 7 inquire into and report on how the planning system can best ensure that people and the natural and built environment are protected from climate change impacts and changing landscapes, and in particular:

(a) developments proposed or approved:
  (i) in flood and fire prone areas or areas that have become more exposed to natural disasters as a result of climate change,
  (ii) in areas that are vulnerable to rising sea levels, coastal erosion or drought conditions as a result of climate change, and
  (iii) in areas that are threatened ecological communities or habitat for threatened species

(b) the adequacy of planning powers and planning bodies, particularly for local councils, to review, amend or revoke development approvals, and consider the costs, that are identified as placing people or the environment at risk as a consequence of:
  (i) the cumulative impacts of development,
  (ii) climate change and natural disasters,
  (iii) biodiversity loss, and
  (iii) rapidly changing social, economic and environmental circumstances

(c) short, medium and long term planning reforms that may be necessary to ensure that communities are able to mitigate and adapt to conditions caused by changing environmental and climatic conditions, as well as the community's expectation and need for homes, schools, hospitals and infrastructure

(d) alternative regulatory options to increase residential dwelling capacity where anticipated growth areas are no longer deemed suitable, or where existing capacity has been diminished due to the effects of climate change

(e) any other related matters.

The terms of reference for the inquiry were self-referred by the committee on 24 August 2023.[1]

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1 *Minutes*, NSW Legislative Council, 24 August 2023, p 427.