

INQUIRY INTO PLANNING PROCESS IN NEWCASTLE AND THE BROADER HUNTER REGION

Organisation: Whitebridge Community Alliance

Date received: 23/10/2014

Partially Confidential

Submission to:

Reverend the Hon Fred Nile MLC

Committee Chairman

Select Committee on the Planning Process in Newcastle and the Broader Hunter Region

NSW Legislative Council

newcastleplanning@parliament.nsw.gov.au

Submission from:

Whitebridge Community Alliance

Spokesperson

Mr Sean Brown

Dear Sir,

The members of the Whitebridge Community Alliance appreciate your invitation to make this submission to the inquiry. We believe we also speak on behalf of the wider community of Whitebridge in regard to the Whitebridge development plan in Lake Macquarie, specifically DA 1774/2013.

We request that the Upper House Inquiry considers this matter to determine whether proper processes have been followed at both State and Local Government levels. We recommend that all decisions made in regard to the initial rezoning of the land and the sale to Simhil Living Pty Ltd, a company co-owned by Simon Livingstone and his father-in-law, Hilton Grueon, should be examined and reconsidered to determine if proper processes have occurred.

Summary:

This submission considers the planning process undertaken in rezoning the land, the tender process and sale of the land, and the assessment process of the development application to date.

Section 1 Brief description of the amended Whitebridge Development Proposal, including community concerns.

Section 2 Body of the submission

Section 3 Timeline of events

Attachments

Links to media articles

Link to Submission from WCA regarding DA1774/2013

Link to submissions from C McCartney and J Clulow regarding DA1774/2013

Video excerpt from WCA Public meeting of Dec 7 2013

File note from LMCC website regarding ICAC contact

Brief Description of the Amended Whitebridge Development Proposal

The initial proposal was not accepted by the Lake Macquarie City Council, the councillors, the community or the Mines Subsidence Board. As a result SNL Building Constructions Pty Ltd amended the proposal, but have ignored all concerns about the density of the project and have in fact increased the number and height of units planned. We believe they have also ignored the objectives and intended outcomes which were the basis for the rezoning of the land when the East Charlestown Bypass was abandoned.

The items listed below are as described by the developer in the revised DA (1774/2013) documents.

- “Demolition of two dwelling houses and associated outbuildings on Kopa St; Construction of 20 x 2-3 storey dwellings as small lot housing; Construction of 6 x 3-4 storey residential flat buildings containing 49 dwellings; Construction of a 4-5 storey mixed use development containing 22 dwellings and 325m² -commercial space;
- Construction and dedication of public roads, parking and storm water management facilities;
- Landscaping and revegetation; and
- Associated earthworks, roads, access, infrastructure and utility services.”

To clarify, the developers are planning:

- One point of access to the development, off a local dead end road (Kopa St);

This will result in exacerbating the existing traffic problems on Lonus Avenue and Dudley Road.

- Construction of 91 dwellings and 3-4 commercial units;
- Construction of basement car parking in over 50% of the large buildings;
- Construction of buildings to 10 metres in height and up to 14 metres in height along Dudley Road, exceeding the height limits of DCP No. 1;
- Construction of unarticulated buildings up to 14 m in length, again exceeding the limits set under DCP No. 1.

The proposed building heights, bulk and intense density are totally out of character with the surrounding built environment. Moreover, they do not comply with the basis on which the land was rezoned by LMCC. Amendment 53 of LMLEP 2004 specifically states that the rezoned land in Whitebridge (which includes land to the north of this site) should support approximately 50 dwellings in total.

- Use of the Conservation Zone for construction of a 2-2.5m wide public path, linking paths as well as basins and swales for storm water retention. These changes to the natural environment will be immediately adjacent to the popular heritage Fernleigh Track.
- Use of public land outside the boundaries of the site for a private driveway to one townhouse and also for part of the paved “Whitebridge Square” area off Dudley Road.

These plans allow for maximum development on the land zoned 2(2) and 3(1) to the detriment of the environment and the community.

- Removal of all the trees on the site, including those originally identified by their arborist as having high retention value;
- Removal of the trees in Kopa St road reserve to allow private driveway access to the buildings in that NE corner, above Fernleigh Track and to form part of the Asset Protection Zone;

This will result in the partial destruction of the narrow green corridor now linking Glenrock State Conservation Area to the north and Awabakal Nature Reserve to the south.

- Proposed dedication of the Conservation land, public roads and a small park to Lake Macquarie City Council with the request that Council waive the requirement of the developers to pay any S94 contributions to Council.
- Proposed landscaping use of plant species which do not comply with the guidelines of LMCC or the Rural Fire Service.

The concerns of the community with the amended DA are the same, if not greater.

These include:

- the effect on local infrastructure, especially roads
- traffic congestion, lack of parking in the Whitebridge neighbourhood centre
- safety of motorists and pedestrians

- social impact due to the density and resultant lack of private space
- impact on the natural environment
- visual impact due to the bulk and scale of the proposal
- impact on the privacy and amenity of nearby residents
- the effect on the heritage Fernleigh Track
- poor planning in the Bushfire Prone Land zoning
- lack of a proper study of the impact on endangered flora and fauna
- lack of consultation with, and disregard for, the local community
- the developer's attitude that the success of the DA is a foregone conclusion
- the inability of the developer to comply with requirements of the Mines Subsidence Board.

In this submission we refer particularly to planning processes impacting on the proposed development of the land at Whitebridge purchased by Simhil Living Pty Ltd and the subject of DA 1774/2013.

The Initial Rezoning Process

In 2008 the NSW Department of Planning advised Lake Macquarie Council that there was no need for an environmental study in accordance with sections 57 and 61 of the Environmental Planning and Assessment Act 1979. The Lake Macquarie City Council did, however, produce an Environmental Review as an alternative, in 2010. This Review provides the strategic justification for Amendment 53 to the LEP 2004 which rezones the land in question.

[Source of this information – Environmental Review– East Charlestown Bypass (Stage One) prepared by Integrated Planning LMCC 2010].

This Review and subsequent Planning Proposal for Amendment 53 to Lake Macquarie LEP 2004 identifies the high environmental value in much of the corridor and the presence of threatened plant and animal species.

“The land comprising Stage 1 (North) supports native vegetation, exotic vegetation species, and cleared land. The vegetation provides habitat and corridors for the movement of fauna between the site and surrounding vegetated areas including Glenrock State Conservation Area and the vegetation south of Dudley Road. Based on information from surrounding or nearby development, it is possible that the following endangered species / ecological communities are located in the vicinity of Stage 1 (North): *Tetratheca juncea* (Black-eyed Susan), *Crinia tinnula* (Wallum Froglet), and Swamp Sclerophyll Forest on Coastal Floodplains (SSFCF). In addition, it is likely that squirrel gliders, forest owls, and bats are present in the area. A large proportion of the southern route of the East Charlestown Bypass is wetland vegetation, is part of the Belmont State Wetlands Park, and contains habitat for

threatened species, endangered ecological communities, and internationally recognised migratory species.”

Yet they then ignore concerns regarding the critical severance of the link between major habitats along this corridor at the site of 142-146 Dudley Rd, Whitebridge, where the environmentally zoned land is not wide enough to allow for a viable fauna corridor.

- Critically, why wasn't a study required by the Department of Planning under other sections of the EPA Act 1979, specifically sections 5A, 78A-8(b) and 79B 5(e) given the occurrence of threatened fauna species in this area?

[For a more fulsome account of the environmental significance and the impact on threatened species habitat refer to the emailed submissions by McCartney and Clulow on the Lake Macquarie Development Application Tracking system for DA 1774/2013 Dated 11/7/14 reference DO7058337].

http://appttracking.lakemac.com.au/modules/DocumentMaster/ViewDocument_Normal.aspx?key=2La2d4Zy0%2fDnWigcBVVsng%3d%3d&size=1564734

- Why was the only submission from the public acted on during rezoning one which sought an increase to residential land zoning? Other submissions seeking a decrease to the 2(2) zoning and increase 7(2) zoning and decrease the commercial area due to current over supply and lack of parking were dismissed and LMCC did not adequately answer the concerns, merely supplied speculative or generic responses.
- In its planning comment, the Review states:
“A key focus of draft Amendment No. 53 is to protect native vegetation and wetland environments and maintain vegetation corridors. All of the specific areas referred to by the Hunter-Central Rivers CMA will be protected using conservation zones. With regard to the land between Lonus Avenue and the Fernleigh Track, the draft

Amendment extends the residential and commercial zones only where the land is predominately cleared. The draft Amendment proposes to introduce a conservation zone to act as a buffer between the Fernleigh Track and the urban areas adjacent to Lonus Avenue. The buffer has a width of between 20 metres and 80 metres (20 metres is the minimum width required to minimise edge effects such as weed invasion).”

The environmental buffer for the Whitebridge land rezoned 2(2) is only 20 metres wide and in fact, at one point, the width is reduced to a mere 8 metres. While the minimum width required to act as a weed buffer is 20 metres, the minimum width for ensuring a viable corridor for squirrel gliders in Dr Clulow’s estimate is 80-100 metres. The lack of consideration for necessitating viable fauna corridors is a worrying omission.

The suggested rezoning required for viability is illustrated below:



Fig. 4. The location of the bottleneck in the Fernleigh Track squirrel glider corridor occurring at Whitebridge. The current corridor exists as a narrow line of trees along the Fernleigh Track between Kopa St and Dudley Road, where it is bisected by Dudley Road as it crosses the Fernleigh Track. Gaps between trees of 20 metres or more occur at the pedestrian path leading to Kopa St. The break in the corridor at Dudley Road is substantial (gaps of 30+ metres; see Fig. 5). The recommended boundary for restoration of the corridor is shown in yellow. Restoration within this boundary would reach about 50% of the minimum corridor dimensions recommended by Smith (2002), and establish viable glide paths across Dudley Rd to remove a substantial break in the corridor at that point.

[Source of above image and explanation: an extract from Dr John Clulow's submission objecting to DA 1774/2013]

The narrowing of the environmental corridor along the Fernleigh Track near Lonus Avenue and Dudley Road seems premised more on the convenience of already charted DP lines rather than from taking genuine environmental concerns into account.

Lack of Effective Consultation

- Why was direct notification of changes to zoning limited to adjoining property holders only, given the significance of the rezoning to the broader community?
- Why were prescient concerns by those who did submit objections to the rezoning not given due consideration, especially in light of the Environmental Review's claims?
- Why was there no consultation with any manager for the major environmental stakeholder, the Glenrock State Conservation Area, which has a stated strategy to *"Support, encourage and promote the retention and enhancement of links to adjoining areas of bushland through cooperation with local governments, other land managers, residents and landholders that adjoin the park."* ?

Recommendations:

1. A review by an independent body such as the Land and Environment Court with regard to the decision making on which the rezoning is premised.
2. Before any irreversible decisions are made, a full environmental study of the site should be carried out which involves experts and representatives for all the major environmental areas linked by this corridor.
3. The securing of an agreement from the consent authority to provide for restoration of threatened species habitat – perhaps as indicated under Section 79B) of the EPA Act 1979, or, widening and rehabilitating the area of land zoned Environmental, in consultation with experts, to ensure its viability as habitat for the threatened species in this area.
4. Ask the Minister [refer Part 2 of EPA Act -7- Responsibility of Minister- (f)] to make remedial action to rezone current 2(2) land to ensure a viable environmental flora and fauna corridor.

Piecemeal Approach to Environmental Protection of the Land after Rezoning

Since Amendment 53 was enacted, there have been a number of interventions to correct issues which have arisen. All of which have sought to strengthen environmental protection for the corridor. Strangely the most impacted area did not benefit from any review.

The former State Member for Charlestown supported the deferment of the auction of five lots of land off Lonus Avenue (also part of the surplus RMS land and zoned 7(2)). This occurred on April the 22nd 2013.

- Why then, when the sale of this land was being deferred, was the same consideration not applied to either the environmental portion of the land at 142-146 Dudley Rd, or indeed to the entire site? The recognised environmental significance of the land adjacent to the Fernleigh Track which provides a corridor between the Glenrock State Conservation Area, Awabakal Nature Reserve and Belmont Wetlands State Park was under obvious threat by the disruption to this corridor at 142-146 Dudley Rd. Why was it overlooked?
- At this time, the tendering process for 142-146 Dudley Rd was not concluded and no sale had gone through. Did Andrew Cornwell, who had by this time received money ('to curry favour') from Mr Gugeon, one of the developers tendering for this site, not consider this site due to this relationship?
- Why, in October 2013, did Andrew Cornwell refuse to support the Fernleigh Protection Bill stating "local land is better protected by Council than by the State Government"?

Tendering Process

There are many questions from the community about the awarding of the tender for this site to Simhil Living Pty Ltd. There is an extreme departure between what is requested in the DA and what was acknowledged as a possibility in Amendment 53 to the LEP which covers this site. Many are concerned about the balance between personal gain and public interest and the processes which may have tipped the scales in favour of this developer.

The following is taken from the Final Planning Proposal for Amendment 53 to the Lake Macquarie LEP 2004. On the question, "Is there a net community benefit?" it made the following definitive statements

Draft Centres Policy Criteria	East Charlestown Bypass Planning Proposal
Will the LEP be compatible with agreed State and regional strategic direction for development in the area (e.g. land release, strategic corridors, development within 800 metres of a transit node)?	Yes. The LEP will facilitate a small amount of infill development (approximately 50 dwellings) and this is considered consistent with working towards achieving the Lower Hunter Regional Strategy 2006 dwelling targets for the region.
Will the LEP impact upon the supply of residential land and therefore housing supply and affordability?	Yes. The LEP will create an additional 1.48ha of 2(1) Residential zone land as well as 3.1 ha of 2(2) Residential (Urban Living) zone. This will increase the amount of infill residential development in an existing urban area. The Lower Hunter Regional Strategy estimates development potential of 12 dwellings per hectare. Based on this, approximately 50 houses may be developed thus increasing housing supply in an existing urban area.

The devastating shift that has occurred between the initial intention in this Amendment to the LEP on the question of density and retention of local character has not been clearly or effectively communicated. The change in intended use from less than 40 dwellings for this site to 91 cannot be considered minor.

We seek answers to questions relating to the criteria and rationale on which the tender was awarded to this developer over others, and about the understandings which were given with regard to the use of this site. Our understanding is that it is a major overdevelopment; at least a 100% increase on the initially stated intended use for infill housing proposed. It is unclear where the understanding that this increase in density was acceptable first formed.

- Did Ray White Real Estate (agent for the vendor, the RMS) act in the public interest?

Ray White was the agency which then went on to act for Mr Grugeon's development by advertising on the same billboard it had used to advertise for the EOI. The overlaid sign, which appeared sometime soon after tendering closed, read, "Coming Soon Residential Development. Register your interest now!

charlestown.nsw@raywhite.com".

- Does this present a danger of sharing commercial confidences? And, or, constitute a conflict of interest when producing a short list of tenders to present to the RMS for a client you will significantly profit from?
- How was the tender negotiated and what were the conditions and criteria set down for the sale of this parcel of land? For example, was there a clear guide to the allowed number of dwellings for the site?
- Were there any other parties with influence involved in the tender process?
- Which other companies or individuals submitted tenders and what were the proposals submitted by the other tenders?
- Why was the tender from Simhil Living Pty Ltd considered the best tender? Why was it chosen over others?
- Were there any indications of probable yield from the land presented in tender negotiations e.g. number of dwellings?

- In the public interest, can the RMS make public all expressions of interest and show just cause for their awarding of the tender to Simhil Living Pty Ltd?
- What were the terms of settlement?
- Why was there a lengthy delay of between exchange of contract and settlement – did this provide any untoward benefit to Simhil Living Pty Ltd?
- Was there any political influence on the sale of the land?

Weighting of Developer's Financial Gain vs Public Interest

Mr Grugeon stated in a filmed interview available on YouTube that the project would still be viable with half the number of dwellings proposed at that time, **which would be the 40 the Amendment 53 to the LEP originally envisaged.**

http://www.youtube.com/watch?feature=player_detailpage&v=hlonlUrC_mo [comment at 3'15"].

At ICAC [14th August 2014 am session page ref 5307T] Mr Grugeon said that he stood to make about 3 million dollar profit on this development.

Yet others believe there will be a 'windfall' profit anticipated by the developer given the yield asked for in the DA [91 dwellings, 3-4 shops]. A yield which is at least twice the amount stated at the time of rezoning, in Amendment 53 of the LEP 2004.

- Did the sale of the land return adequate market value for the land use presented in DA 1774/2013 and therefore give a proper return to the people of NSW?
- Is there a significant discrepancy between the tender presented and the current DA?
- Has a business model been provided which assesses the profit margin on this development as it is proposed?

Recommendations:

- Making tendering criteria on public land open to the public with reasons given for the determination, after the process has been finalised.
- Notify the wider community by mail of rezoning and DA's which have a significant local impact.

Council Referral Reviews of Development Application which appear to interpret Council's plans, policies and strategies in favour of the developer

Many of the Council Reviews of the DA, though not all, appear to offer a perverse encouragement to over-develop the land in light of the initial Council intention put before the public in the Draft Amendment 53 to the LEP 2004 and in relation to their strategies in Lifestyle 2030. There appears to be encouragement by Integrated Planning in LMCC for the scale of development asked for. Where council strategies and plans are 'grey', many comments made seem heavily weighted to the developer's aims at the cost of local character, resident concerns and environmental sustainability. There is a community perception that many council referral responses have ignored, or paid scant attention to many aspects of the development application which are problematic.

- During what period did he work there? Was he involved in any way in creating documents pertaining to this parcel of land?

- What discussion around the use of this land has had both officially and unofficially with Council Staff?
-
- Does have access to other people or information in LMCC that creates a conflict of interest?
- What advice has he been given with regard to how staff will interpret and give weight to different parts of their policies and strategies?
- Why is the RMS still listed on the LMCC website as the owner of the land despite this being queried several times and despite the updating of other changes in information?

In one of the more robust LMCC Referral Responses to the DA – CP-Public Lands 31st January 2014, there is reference to negotiations between Council and the developer, “According to the LM S94 CP No. 1, the required contribution for open space is 45.82 m² per person or 114.8 m² per lot. This development contains 87 dwellings. Based on the ratio of 114.8 m² per lot, the open space requirement would be **9,987 m²** (Table 1, page 9). In its negotiations with the proponent, Council reduced its requirements to **2,000 m²** in order to achieve a positive community outcome, but this has been rejected by the proponent.”

- We note a mere 1,000 m² has been allowed as a ‘public’ park and the developers seek to waive the S94 contribution due to what it perceives as contributions that provide Material Public Benefit. What other negotiations regarding public interest have been made between LMCC and SNL in regard to this project which have either been ignored by the developer, or waived public benefit?

Recommendation

- That an inquiry is made into the probity of the relationships between the developers, employees of the developer and Council staff.
- That Council offers an explanation to the community for the extreme deviation from the stated intentions of Amendment 53 to LEP 2004 to the situation we currently face.
- That Council reviews the DA for the affected land in light of the indicated minimal impact argued for in its Environmental Review of the site.

Other Anomalies

Mr Grugeon claimed at the ICAC inquiry [14th August 2014 am page 5313T] that Mr Cornwell, rather than supporting the development had “To my knowledge, sir, he supported the residents, those few that were objecting to the development at Whitebridge which, which, which I had no objection to him doing because that was his job.” Despite this account by Mr Grugeon, Mr Cornwell did not give any public support to oppose the development. He merely gave generic advice on process and lectured the public on probity. When asked about the possibility of getting the RMS to put an extra exit onto Dudley Rd he stated the development was a Council, not a State, matter. Similarly, when asked about the possibility of retrospectively seeking a broader tract of environmental zoning on the site, he dismissed this as too problematic, as it would require Land and Environment Court action. Councillor Denton, former staffer to Andrew Cornwell has asserted that Mr Cornwell wrote a submission objecting to the development but it has not appeared on the Council website. He was looking into its non-appearance.

At a public meeting called by the WCA on 7th of December 2013, Andrew Cornwell and Wade Morris shared a joke about ICAC in the background after a question relating to the

independence of the JRPP.

http://www.youtube.com/watch?feature=player_detailpage&v=ROcKcCs4WC4 at 2'20"

In the DA's [Statement of Environmental Effects 1.3] it states that the developers had consultation with Andrew Cornwell during the process via written briefings and discussions.

- What was the nature of these discussions?

On, or around, the 25th March 2014 a billboard erected on the land by owned by Simhil Living Pty Ltd depicted the LMCC councillors or staff as "Bookies". Hilton Grugeon is depicted as the winner of the race, having passed all the "posts" yet to be met (in reality), including the LMCC and JRPP assessments, waving cash in the air.



- Why have Hilton Grugeon and employees from the outset behaved with such arrogant certainty, stating that this DA was '100% compliant' and 'not negotiable', when it was proven not to be on quite a few major points?

On August 11th 2014, a file note regarding a call from ICAC to Council was put on to the Council's application tracker site then quickly removed.

- What implications does the public display of this note have?

Recommendations

- Council asserts its mandate for consultation and, in major developments such as this one, ensures that this is mediated by an independent body.
- That checks and balances are ensured where a conflict of interest or perceived conflict of interest between Council Officers, developers and politicians is likely. There are guidelines already written by ICAC and available on its website.

Timeline

2006

- 20th September East Charlestown Bypass Road formally abandoned by State Government by Minister for Roads.
- RTA and Dept of Planning directed Council to remove road reservation and acquisition status of bypass corridor.

2008

- 8th December - Lake Macquarie City Council resolved to prepare a draft LEP rezoning plan.
- In response Department of Planning advised an Environmental Study in accordance with 57 and 61 of EPA Act was not required

2010

- September LMCC Dept of Integrated Planning Environmental Review offered in lieu of Environmental Study for rezoning of RMS land
- October A. Cornwell receives \$10,000 from J. McCloy
- 20th October to 30th November- LMC Council placed zoning plan on public exhibition
- December (?) A. Cornwell "sells" H Grugeon a painting for \$10,000

2011

- 7th March Draft Amendment 53 LMLEP adopted 7th March .
- 9th June Certified above by LMCC General Manager Brian Bell
- 2nd September Amendment 53 of the LMCC 2004 Plan published on NSW Legislation website

2013

- 1st March – Expressions of Interest advertised through Ray White Real Estate.
- 10th April closing date for EOI with Ray White.
- 22nd April Cornwell and others moved a motion at LMCC to look at increasing the environmental zoning of RMS land.
- 23rd April Newcastle Herald and Andrew Cornwell's office report deferral of sale of 5 lots of Lonus Ave land zoned 7(2) - concerns re its environmental value as corridor. Major block not considered (?)
- 29th April the tendering process closed – top 6 considered- awarded to Simhil Pty Ltd [owned by Hilton Grugeon and son-in-law Simon Livingstone]. Sold October 2013.
- 30th April Contracts exchanged on 142-146 Dudley Rd, Whitebridge.
- 11th May – Auction of 2 Kopa St for \$386,000. Sold June 2013.
- Tight time-frame between close of expressions of interest, awarding and contract exchange.
- 29th June 4 Kopa St . Contract Commencement Date 29/06/2013. Sold August 2013.
Contract for 142-146 Dudley Rd not able to be found on same site.

[Ref.http://www.rms.nsw.gov.au/doingbusinesswithus/downloads/contracts/class_1.pdf]

- 14th September SNL conduct limited letter box drop informing residents of their proposal.
- 19th September- SNL conduct "public consultation" meeting on site under the For Sale sign.
- October Final settlement of payments made to RMS for 142-146 Dudley Rd
- October Draft Fernleigh Track Preservation Bill put before State Parliament by Voltz, Hornery and Hall. Cornwell against it wants Council to have the protection of the land left with Council.
- 21st November SNL lodged DA 1774/2013 with LMCC. RMS listed as owner, despite sale of land to Simhil Living Pty Ltd.
- 28th November LMCC issued notification letter to about 400 residents.
- 30th November Inaugural WCA meeting held
- 7th December First public meeting convened by WCA held in Kopa Street.

2014

- 1st February Second public meeting convened by WCA held in Kopa Street.
- 12th February Submissions to Council close. Approx 400 written submissions and 1,000 petition signatures
- 25th March – appearance of the “Fernleigh Track Race 7 Future Whitebridge Cup” billboard by artist Judy Nadin.

Whitebridge Community Alliance Submission to Legislative Council Select Committee on the Planning Process in Newcastle and the Broader Hunter Region

- 9th July SNL hold a Community Meeting to show new plans at “The Place”, Charlestown, asked WCA to ‘promulgate’ this information on SNL’s behalf.
- 14th August Mr Grugeon before ICAC – questioned about Whitebridge development.
- 28th August notification from LMCC that they had received an amended DA 1774/2013
- 26th September closing date for submissions on the amended DA.