

**Submission
No 49**

**INQUIRY INTO PLANNING SYSTEM AND THE IMPACTS
OF CLIMATE CHANGE ON THE ENVIRONMENT AND
COMMUNITIES**

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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 on my behalf as a concerned citizen residing at Wallabi Point on Mid-north Coast of NSW and also in support of the Hallidays Point Community Action Group. We seek to ensure that development in our area is appropriate and sustainable with minimum impact on biodiversity values.

I recognise and adopt the research and work of Barbara Richardson on behalf of the Hallidays Point Community Action Group

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 Environmental Impact Assessment for any proposed development for residential development should provide a clear and transparent assessment of the most recent flood hazard or bushfire risk data, especially if climate change has caused increased frequency, storm intensity, vegetation cover and frequency of occurrence over the past decade. If there is no data presented, then reasons need to be given. This should apply equally to activated Zombie DAs given there may be a considerable lapse in time since the original environmental assessment was done.

The DA approved in 1997 for Lot 5 DP 258637 Saltwater Road Wallabi Point is a sound illustration of a Zombie DA which is in low-lying and flood prone land. Current models of the impact of flooding

and future sea-level rises differ vastly from those considered in 1997. The Wallabi Point site is highly bushfire prone, as demonstrated by fires in November 2019. In addition access, and more importantly, egress, is via one road only, which services the whole of Wallabi Point, Old Bar, Manning Point and associated rural communities.

The development proposal needs to address how the development can demonstrate adaptation to further changes in the climate as modelled and projected by BOM and CSIRO and the strategies to be employed to manage human risk such as infrastructure required, evacuation management strategies, emergency services access needs and nearby refuges.

- (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 potentially vulnerable to coastal hazards requires assessment based on requirements under the Coastal Management Act 2016. The most recent IPCC report in 2023 outlines that sea level rise, coastal erosion and coastal storm events may well be significantly underestimated. Clearly the benchmarks and guidelines for assessment of coastal hazards will need to continually reviewed in the light of emerging new science eg. melting of ice caps and thermal expansion of oceans 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 recognised science. Strategies for managing the risks arising from coastal erosion need to be detailed in the assessment process by Councils.

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

The information base and classification system for threatened species and ecologically endangered communities continues to be modified with increasing loss of habitat, bushfire loss, and ecological surveys. Therefore all current DAs need to meet the special consultation requirements outlined in S.3.25 of the EP&A Act 1979. However in the case of Zombie DAs, current surveys and information needs to be assessed before any granting of amendments to a DA. This has not happened at 361 Blackhead Rd, Hallidays Point and much has changed since the original DA was assessed such as vegetation cover, threatened species recorded at this site and significance of this particular wildlife corridor.

(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:

Local Councils 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.

A solution to the **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 for:

- (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 or 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 be 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 to have ready 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 needs to provide this information in a readily accessible form for developers, community, planning consultants and local Councils 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 State Government needs to legislate a ban on 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 Meteorology or the NSW Office of Water should oversee preparation of **new flood** return maps in areas of recent catastrophic 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.

For residential properties already existing on floodprone land, the NSW Government should impose a levy on residential developers within that LGA 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.) Development applications need to address how the development can demonstrate adaptation to further changes in the climate as modelled and projected by BOM and CSIRO and the strategies to be employed to manage human risk such as infrastructure required, evacuation management strategies, emergency services access needs and nearby refuges.

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.

- (2.) The benchmarks and guidelines for assessment of coastal hazards under the Coastal Management Act 2008 will need to be continually reviewed in the light of emerging new science recognised by the IPCC.
- (3.) All current DAs need to meet the special consultation requirements outlined in S.3.25 of the EP&A Act 1979. However in the case of Zombie DAs, current surveys and

information needs to be assessed before any granting of amendments to a DA.

- (4.) Amendment to be made to S.4.53 of the EP&A Act 1979 as was proposed in 2008 to require “substantial” commencement within 7 years of consent being granted or consent lapses.
- (5.) 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.
- (6.) The EP&A Act needs to require cumulative assessment in the environmental assessment prescribed through applying a methodology described in the Regulations to the EP&A Act.
- (7.) The NSW Government needs to provide up to date information on climate change trends in a readily accessible form for developers, community, planning consultants and local Councils to be able to easily access up to date information to understand, analyse and present the risks associated with climate change.
- (8.) The NSW State Government needs to legislate a **ban** on residential development being approved within floodprone land as defined by the 1:100 year flood return period and provide up-dated flood maps resulting
- (9.) NSW Government should impose a levy on residential developers within that LGA to contribute to a fund for the purchase of land for the purposes of relocating floodprone houses.

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