

**Submission
No 197**

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

Organisation: Friends of Coila
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Portfolio Committee 7 – Planning and Environment
NSW Legislative Council
Parliament House
Macquarie Street
Sydney

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

Friends of Coila Inc is a community group based in Tuross Head, formed in 2022 to oppose a housing development at Coila Lake ('41 Anderson Avenue, Tuross Head') that was approved in 1984, and to add our voices to the many others protesting about the inappropriate developments threatening the NSW coastline and endangering fragile coastal environments.

Residents of Tuross Head have been expressing their concerns about this development to Eurobodalla Shire Council (ESC) for decades. Having communicated extensively since 2021 with both state and local government, it seems to us that there is little or no appetite at either level to act to prevent irreversible damage to hundreds of hectares of our precious coastline. We submit that the current 'system' of managing and controlling development is inadequate.

Coila Lake and surrounds are cherished by locals and visitors alike for their beauty and ecological value. The area supports native wildlife, including threatened species and Endangered Ecological Communities (EECs) listed at the state and national levels, and is prized as a place for recreational and social activities. It is listed as a Wetland of National Importance and mapped as a coastal wetland under the Coastal Management State Environmental Planning Policy (SEPP; now the Resilience and Hazards SEPP) which identifies environmental assets that require protection.

It is also of significance to the local indigenous population: it marks the start of the Bingie dreaming track, includes an Aboriginal burial ground and contains thousands of Aboriginal artefacts, including many in the development site itself. The area was designated part of a culturally sensitive landscape in the Eurobodalla Aboriginal Heritage Study Stage 4 December 2008.

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Our submission addresses the terms of reference in order.

(a) The development approved at Coila Lake is:

(i) in a flood and fire prone area that has become more exposed to natural disasters as a result of climate change,

(ii) in an area vulnerable to rising sea levels and drought conditions as a result of climate change, and

(iii) in an area that abuts threatened ecological communities or habitat for threatened species.

Sections of the proposed development on the foreshore of Coila Lake are currently less than 3 metres above sea level. Adapt NSW predicts a sea level rise of between 0.21 metres and 1.06 metres by 2100 for the central coast of NSW, with a 'slightly lower' rise for the south coast. As this prediction does not factor in melting ice sheets, it is probably a significant underestimate. It is likely that dwellings built on some of the blocks within the subdivision will be affected by rising sea levels together with storm surge and will be uninsurable in the foreseeable future.

The development is exposed to flood risks from Coila Lake and to local flooding. The development site will require an enormous amount of fill to bring the low lying, flood prone blocks up to Council standards. This will impact substantially on the hydrology of the lake foreshore and the endangered vegetation it supports.

Coila Lake is an intermittently closing and opening lake (ICOLL) and is currently artificially opened when the water level reaches approximately 2 metres above sea level and/or impacts the private land, businesses and homes near Coila Creek to the northwest of the lake. As the sea level rises, more frequent artificial openings will be required, which will necessitate increased infrastructure and will further damage the lake foreshore. And, at some point, the ocean will encroach on the lake, causing the opening system to fail, and impacting the lower blocks of the proposed development.

The south coast of NSW is currently experiencing drought and further drying is predicted due to climate change.

The first major bushfire of the 2023/2024 season began in September – months before summer – at Coolagolite, just over 40 km south of Tuross Head, and burned over 7,000 hectares.

The village of Tuross Head has no bushfire or heatwave haven, and no formal evacuation centre. Currently the neighborhood 'safer' places designated by NSW Rural Fire Service (RFS NSW) as assembly points in case of fire or other hazard are a car park, and a playing field which was considered an unsafe assembly point in the 2019/2020 bushfires. The only access road between Tuross Head and the Princes Highway is approximately 6 km long and skirts bushland for about 2-3 km. The development site itself is shown as bushfire prone on the RFS NSW website's bushfire mapping guide. In their review of the bushfire assessment

report for this proposed subdivision, the RFS noted that the vegetation adjoining lots on the site had been misclassified as 'forested wetlands' instead of 'forest' which means that the asset protection zones stipulated are an underestimate. This means that more vegetation will need to be cleared from the site than originally acknowledged, increasing impacts on the adjacent EECs and the sensitive receiving waters of Coila Lake.

In 2019/2020, vast areas of the south coast burned. In January 2020, the RFS NSW map showed Tuross Head as 'ember prone' and advised evacuation. Wind change favoured us on that occasion, and Tuross Head did not burn. But local resources were stretched beyond capacity. For three days we were unable to leave and were without power, without adequate water pressure and without any means of communication other than battery-operated radios. By the third day, we were running short of essential supplies.

Since 2019/2020, the local RFS has had a much-needed boost in numbers of volunteers and in training and equipment. But, otherwise, the local situation remains the same. Any increase in population will obviously further stretch resources in the inevitable event of a future bushfire emergency.

The proposed development site will directly or indirectly impact three EECs: Coastal Saltmarsh, Coastal Swamp Oak Forest and Swamp Sclerophyll Forest. Coastal development has been the greatest cause of the collapse of these EEC's, which are on the brink of extinction. The fragile coastal environment of Tuross Head, like so many others, is already under pressure. If the development at Coila Lake proceeds, these pressures will only increase and all species dependant on these ecosystems will suffer.

A 2023 desktop environmental assessment conducted on behalf of Friends of Coila found that the development would require the removal of approximately 5.46 hectares of native vegetation and indirect disturbance to approximately 16.49 hectares of native vegetation; it will also cut through the proximity zone of a wetland mapped under the Coastal Management SEPP.

The development will directly impact two EECs listed under the NSW Biodiversity Conservation (BC) Act and identified on the NSW Biodiversity Values Map as land with high biodiversity value which is particularly sensitive to impacts from development: Swamp Oak Floodplain Forest and scattered remnants of Swamp Sclerophyll Forest on Coastal Floodplains.

The development will indirectly impact a third EEC. It is next to, and directly upslope of, the Coastal Saltmarsh EEC listed as threatened at both the state (BC Act) and federal (Environmental Protection and Biodiversity Conservation; EPBC Act) levels; this EEC will be indirectly impacted by changes in hydrology resulting from vegetation clearing, contaminated runoff from the development site, as well as the large amount of fill required to raise parts of the development above flood levels.

This endangered vegetation provides potential habitat for several flora and fauna species listed as threatened at the state and national levels including the Gang Gang Cockatoo, Grey-headed Flying-fox, the Yellow-bellied Sheath-tail-bat and the Dusky Woodswallow. Threatened flora species include: *Thesium australe*; *Wilsonia backhousei*; *Wilsonia rotundifolia*; *Cryptostylis hunteriana*; *Haloragis exalata* subsp. *exalata*; *Persicaria elatior*.

The development site is also adjacent to important Migratory Shorebird habitat identified in the Important Area Mapping under the Biodiversity Assessment Method (BAM; NSW Department of Planning & Environment 2022) and is likely to cause indirect impacts to this habitat which is considered essential to support critical life stages of migratory bird species including the Far Eastern Curlew and the Bar-tailed Godwit, which overwinter in the Southern Hemisphere and forage on the Coila Lake foreshore during their non-breeding season. The Far Eastern Curlew is listed federally and internationally as critically endangered, its population worldwide having declined by 80% in the past 30 years, due mainly to habitat loss. The Bar-tailed Godwit is listed federally as vulnerable; this species makes the longest migration of any shorebird and is known to be very loyal to its feeding sites, hence extremely vulnerable to habitat loss.

Many other bird species use the lake and its foreshore. Of these, two species that are experiencing population decline are the White-bellied Sea Eagle and the endangered Grey Falcon.

The disruption caused by clearing and construction of the development and subsequent disturbance associated with the increase in the number and density of residences will impact on these species and may cause them to abandon this site.

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(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.**

We submit that the current system of planning powers and planning bodies is inadequate to protect our precious coastal environment as outlined. We consider that significant changes need to be made to the planning system to address these shortcomings.

We understand that government at all levels faces major challenges in attempting to balance the needs of our environment with the competing demands of the human population for housing and other development. The challenges are obviously increasing due to climate change and the associated increase in natural disasters, with rapidly escalating biodiversity loss.

Our experience to date with local and state governments has not been encouraging. It is clear to us that what is required is communication and cooperation between all three levels of government. Instead, our local council refers us to state legislation and state government ministers refer us back to our local council, and round and round we go.

We do not believe that local councils generally have the expertise or the financial resources to manage this complex balancing act. It is understandable that, with limited financial and other resources, they are not keen to engage in disputes with well-resourced property development companies, who are likely to challenge their decisions in court.

Unfortunately, ESC has thus far shown itself to be inadequate to the task of appropriately assessing and determining the Coila development.

1. ESC has provided, and continues to provide, incorrect information. We include two examples:
 - i. In February 2023, Friends of Coila received a letter from ESC advising that they had issued a modified development consent in March 2022 and ‘therefore there is no legal means of requiring a further environmental assessment.’ This contradicts s.4.57 of the Environmental Planning & Assessment Act 1979 NSW, which states that council can revoke or modify a consent. The error was raised at a meeting with Council staff in February 2023, but no explanation or response of any kind was received.
 - ii. In contrast to the Adapt NSW predictions regarding sea level rise, the ESC website displays information from the South Coast Regional Sea Level Rise Planning and Policy Response and adopts predictions from 2014 of a 23 cm sea level rise by 2050 and 72 cm by 2100. Council staff have acknowledged that these predictions are out of date. But at the time of writing this submission, the ESC website still displays the 2014 predictions.
2. ESC has failed to follow the correct process when considering and approving a modification to the original development application (DA).

The original approval was without a comprehensive biodiversity assessment; therefore, it would have been difficult for Council to conclude that the development would result in minimal environmental impact. In 2020, a modification to the original DA was lodged, increasing the number of dwellings from 61 to 72. ESC did not request an environmental impact assessment, despite this being a significant change to the original DA. Between the original approval (1984) and the application to modify the proposal, the development had not significantly commenced within the subject site. Regardless, Council approved the 2020 modification, stating that it was permissible without any biodiversity assessment under the NSW Biodiversity Conservation (Savings and Transitional) Regulation 2017 Act. The Regulations to this Act state, however, that it applies only to applications prior to August 2017, and should therefore not have been applied to a 2020 modification application. ESC also refused at that time to hear community members’ objections.

3. ESC has failed to comply with Friends of Coila’s application under the Government Information (Public Access) Act 2009 (NSW; GIPA Act).

In January 2023 we requested all documents relevant to this DA. ESC acknowledged receipt of the application on 24 January 2023 and set a decision due date of 15 March 2023. It then failed to comply by the deadline, and the application was deemed refused.

4. In a letter to Friends of Coila, ESC has accepted no responsibility for ensuring that the developer has complied with their obligation under the federal EPBC Act.

The proposed development has been identified as impacting Matters of National Environmental Significance (MNES) and therefore requires the developer to make a referral to the (federal) Department of Climate Change, Energy, The Environment and Water (DCCEEW) under the EPBC Act 1999. ESC has advised us in writing that they are under no obligation to ensure that the developer has made the required referral. Even if this is legally correct, it seems to us that it would nevertheless be the responsible thing to do. Otherwise, there is a serious flaw in the system, where the developer chooses whether to make the required referral and – apparently – the local council does not follow this up before issuing a Subdivision Works Certificate.

5. Finally, even if there were the collective will at ESC to revoke consent for the Coila development, it is understandable that a council in such a poor financial position would avoid taking action that would no doubt prompt the developer, McCloy Group (who paid \$13.2 million for the land in 2022) to seek compensation via the Land and Environment Court. ESC website states that it is ‘facing a serious, ongoing operating deficit’, currently over \$10 million, in its general fund.

Unfortunately, our communication with NSW government has not inspired confidence in the operation of the planning system at the state level. Neither the previous NSW Liberal government nor the current NSW Labor government has shown any interest in providing a solution to the issue of ‘zombie’ developments such as that at Coila. A change to the Environmental Planning and Assessment Act Regulation in 2020 which introduced more stringent criteria for demonstrating ‘physical commencement’ will potentially limit future zombie development, but it does nothing in relation to the numerous existing zombie developments up and down the coast.

It was particularly disappointing that a letter from Friends of Coila to the current Minister for the Environment was passed on to the current Minister for Planning without even an acknowledgment. Surely the Minister for the Environment has some responsibility to consider the impact of development on the environment? We see a link between planning and the environment! There should be better communication and cooperation between departments within the state government as well as between all three levels of government.

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(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

It has become obvious to Friends of Coila as we have communicated with local, state and federal governments that there is next to no communication or collaboration between the various bodies responsible for planning and the environment. It appears that it is left to community members, for example, to check whether a developer has made the required referral to the Federal Government under the EPBC Act. We see a need for coordination and transparency instead of buck passing and obfuscation.

Friends of Coila also submit that the current system works in favour of property developers, placing more importance on the financial profit of private companies than on the needs of our environment. We do not suggest that developers should not receive a return for their investments. But the current system appears to value this to the detriment of any other factors, including care of the environment. We have been told repeatedly that, while the environment is important, investors should be able to make money from their investments. We question whether the desire of a few to make money should outweigh the needs of our beleaguered environment, which underpins our economy as well as our general well-being.

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(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

The members of Friends of Coila are aware of the current housing shortage, and we understand the urgent need for more housing, particularly affordable housing, in our shire as well as in many other regions of NSW. As a community group with a specific focus and limited resources, we do not believe that we have the necessary expertise or means to address this issue fully. But we would argue that the provision of housing blocks in inappropriate places, particularly when they are marketed as 'boutique' developments and attract prices commensurate with the label, is not the answer to the housing shortage. Friends of Coila would prefer to see new housing built in and around towns, with access to a full range of services, rather than on flood- and fire-prone land in small, relatively remote communities with limited resources and a lack of basic services.

We recommend that the NSW government:

1. introduce a moratorium on 'zombie' developments, including the one proposed for Coila;
2. amend legislation to ensure that all developments approved five or more years ago are subject to a current environmental impact assessment;

3. establish a statewide planning body which identifies appropriate sites for housing development and has the power to require developers to provide a proportion of housing blocks at prices within the reach of low- and average-income earners;
4. increase the provision of public housing by building and/or buying existing housing;
5. encourage local councils to set targets for affordable housing, ensuring that private developers provide a proportion of affordable housing in all future developments, making development approval conditional on this;
6. in view of the large number of houses in coastal villages such as Tuross Head that remain empty for much of the year, legislate to advantage long term rentals over short stay accommodation by introducing a cap on the number of days that non-hosted holiday accommodation can be made available and/or an income cap;
7. legislate to stop unscrupulous developers from taking advantage of planning loopholes, ensuring strict probity safeguards apply to developers.

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(e) any other related matters.

Background information

Jeffrey McCloy is the ex-Lord Mayor of Newcastle and the Chairman of the property development company, McCloy Group, current owner of the land at Coila Lake.

Mr. McCloy gave evidence at The NSW Independent Commission against Corruption (ICAC) ‘Spicer’ investigation, where he admitted to giving \$10,000 each to candidates Tim Owen and Andrew Cornwell, before the 2011 NSW State election. ICAC found that Mr McCloy and one of his companies had given a total of more than \$40,000 in direct and indirect political donations.¹

In 2014 Mr. McCloy commenced proceedings in the High Court of Australia, arguing against a cap on political donations and the prohibiting of property developer donations. The case was unsuccessful.²

¹ <https://www.icac.nsw.gov.au/investigations/past-investigations/2016/nsw-public-officials-and-members-of-parliament-operation-spicer>

² https://www.hcourt.gov.au/cases/case_s211-2014