

DA Conditions Response - Position Paper

Ref D16/51766, T6-02-109 (Rev 3). LA 33166

Modification of Development Consent T6-02-109 Seventy Eight (78) Rural Land Sharing Community Lot 1 DP1191860, Nevertire Road and Illa Langi Road, Crescent Head.

I think that we have a good case to fight the condition of our DA in either the Land & Environment Court or submit a complaint through the NSW Ombudsman.

Council has an obligation under the Environmental Planning and Assessment Act to issue conditions that are sensible and enforceable.

In addition the NSW State Ombudsman has set out reasons for councils to avoid issues with developers in respect to conditions. Conditions are often drafted with some overall objective in mind, but with little thought to whether these conditions are enforceable and effective, thereby giving way to these conditions being unworkable in practice and the subject of ongoing complaints.

Legal

Having reviewed the information that Goolawah Co-operative has provided to Council over the years I believe that the Cooperative has correctly highlighted the points that are not sensible and not enforceable in law.

However, in presenting these facts to Council instead of before the Land & Environment Court or the Ombudsman, the Co-operative has had very little success with this matter over time. In addition, Goolawah failed to cite the legislation which directs Council to use their Development Control Plan (DCP) as the basis for setting standards of access, and therefore cannot place more onerous conditions on the developer for such.

This being the case Council has used its position to unjustly manipulate Goolawah Cooperative to fund a project which has imposed an unreasonable burden on the community, and in fact not enforceable taking into consideration the legislation's reference to the Kempsey Shire DCP.

In law is where we can challenge the conditions, before the Land & Environment Court and the Ombudsman. Although Council can set conditions for various reasons, condition 4 for access must be based on its Development Control Plan. In particular the law states in section 4.15 of the Environmental Planning & Assessment Act a number of points including the DCP (refer to Appendix B), and that the Certifying Authority (KSC) is not to apply more onerous conditions than in the DCP (refer to section 8.3 of the DCP and Appendix A attached). The DCP specifies an "all weather road" for rural development and that sealing is not required unless it is an extension of an existing sealed road or a new road.

I also note this section in the DCP being quoted in Goolawah's S96 submission dated 24 June 2016, which Council rejected.

For the proper purpose

I believe Council's primary purpose in sealing Nevertire Road is to save costs and to ensure that other developers do not regard an unsealed access road to Goolawah Cooperative as setting a precedent for them too (refer to Council minutes on denying Goolawah Cooperative's S96 rev 2), and not as specified, to cater for the level of traffic generated by the development (refer Council minutes 13.3.15).

Since inception Council has regarded Goolawah's SEPP 15 Rural Land Sharing development as an extension of a Community Title Scheme (refer to minutes 2015) and therefore imposed certain requirements of a subdivision.

So Council's purpose in maintaining these conditions is contrary to the reasons for a Rural Land Sharing Community and low cost housing development.

In addition, Council has stated that the access conditions for sealing the road are to limit dust to the five neighbours and to ensure safety on the road. However, I have not found any complaints from the neighbours on Nevertire road. I believe we can take this as not supporting the council's claims on dust as an issue. Regardless, Goolawah had offered to seal the section of road in front of the neighbours' dwellings situated on Nevertire road. Council rejected the offer.

As also stated in the S96 dated 24 October 2016. Council will be creating unsafe conditions by intending to increase the speed limit to 80km/hr on the upgraded Nevertire Road. Council has also insisted on removal of the cattle grid between Maria River Road and Nevertire Road, which would permit cattle onto Nevertire road. Although they have insisted on a barrier and a low speed sign at the corner of the road, the conditions are unsafe considering the rural environment and the fact that cattle and wildlife will still be on the road until Maria River Road is sealed.

In addition requests from the Cooperative for a safe speed limit of 40km/hr have been ignored.

On several occasions Goolawah Cooperative had discussed with KSC the sealing of Nevertire in front of neighbours' dwellings as an alternative to the unreasonable costs of sealing the entire road. Council had appeared supportive during discussions but responded without approval afterwards.

Ambiguous

Condition 4 is uncertain. Particularly, Sections 4b, 4c and 4d which impose condition to provide a second access on Illa Langi road, to handover to KSC and for Goolawah Cooperative to maintain in perpetuity, which is not enforceable, as a second access is not required in Kempsey DCP. It becomes uncertain for several reasons.

Primarily as the Crown road, which Council have refused to take control of to date, runs mostly along a path on DP1053841, DP839888, DP811534, DP 75441, DP 1143537, DP1191860 and DP556364 which Goolawah Cooperative do not control or own. Secondly, Illa Langi Road does not run solely along the Crown land envelope, as it has been built partly on private land. The only possibility for Goolawah Cooperative to "hand over" Illa Langi Road to Council is to purchase the road from Crown Lands, including the section to Maria River Road, which requires approval from all parties and adds another unreasonable cost to the Cooperative.

All the above creates uncertainty on these conditions.

Unreasonable and Unfair

Compliance with Condition 4 poses an unreasonable burden upon the community. The costs to date for road design and geo-technical testing have been over \$32,000. Costs for maintaining the unsealed road over the last twenty years have been upwards of \$100,000.

The expected cost for upgrading Nevertire road to a sealed road is expected to be between \$400,000 and \$500,000. The ongoing management and upgrade of Illa Langi Road to Maria River Road has been approximately \$10,000 per year and we would expect this cost to be ongoing.

Council have disregarded the high costs to the community (refer to Council minutes for S96 refusal) and other S96 requests to remove the condition. In April 2019, KSC (Shane Reinhold) issued more onerous conditions in an updated Amendment Rev 3, with conditions to seal the entire road in a set timeframe and continued conditions to maintain Illa Langi Road in perpetuity. The revision and the dates in this revision were not requested by the Cooperative by an Amendment request but were inserted at KSC's own volition. I note the Amendment request submitted by the Cooperative would have expired 40 days after submission in March 2018.

This would be regarded as an unreasonable burden on the community (requiring another \$8000 of every member), which is not financially capable of affording this amount. It is certainly unfair.

Unnecessary

We understand Condition 4 was set to improve access to Goolawah Cooperative development. However, SEPP 15 states that Council must consider the access to a property before it has been approved. KSC however approved the development in 2002 with the condition that the Cooperative upgrade Illa Langi Road to a Type 3 sealed road. Other than this condition placing an unreasonable expense on Goolawah Cooperative, whose purpose is low cost housing development as a SEPP 15, KSC has not accepted the liability of providing a standard of public access to the land, but imposed it on the Cooperative.

Considering that Goolawah Cooperative has maintained the road for the last 20 years and it has served the purpose to this date, the imposition of the cost of sealing Nevertire Road and maintaining Illa Langi Road becomes unnecessary and not applicable.

Untimely and Unworkable

When Amendment Rev 3 with condition 4 (a to d) was given to Goolawah in April 2019, the dates within the condition for each stage of Nevertire Road upgrade were set with very restrictive time-lines. Goolawah had limited input into these dates and had commenced physical work on the condition before the revision, through design with DEX, and again shortly after receiving the revision through design with Kevin Hall. The date for completion of Stage 1 was set as 1 May 2020, and as of the writing of this paper Council has not given Construction Certificate approval to the Cooperative. In addition, the Cooperative has requested a halt on the timing of the condition, but KSC (in the March email response from Shane Reinhold) has refused, stating that a CC must be issued first. However, as can be seen KSC had created unworkable dates in Rev 3 before a Construction Certificate, so the dates indicated in the Amendment are unworkable.

Wayne Skinner
3 May 2020

Appendix A

Kempsey Development Control Plan 2013

8.3 Roads and Access Desired Outcomes

DO1 - An all-weather road system to provide a legal, functional and safe vehicular access to each allotment is provided.

DO2 - Battle-axe lots have an access handle width sufficient to:

- Accommodate the minimum driveway width;
- Accommodate any necessary services; and
- to have no adverse effect on the rural character of the area.

DO3 - A right of carriageway is only used: • sparingly;

- where they minimise points of conflict on public roads; and
- where the size of the subdivision does not justify establishing a new public road.

DO4 - Access to rural subdivisions are designed/planned to:

- minimise future conflicts over maintenance and access;
- make the burden on the community (eg maintenance) commensurate with the number of potential new rate payers; and
- avoid reliance on non-dedicated public roads (eg Crown and Forestry roads etc).

Development Requirements

1. A) SEALING OF THE ROAD PAVEMENT IS REQUIRED:

1. (I) FOR ANY NEW ROAD TO BE PROVIDED IN CONJUNCTION WITH THE PROPOSED SUB-DIVISION; AND
2. (II) FOR THE EXTENSION OF ANY ROAD WHICH WILL BE AN EXTENSION OF AN EXISTING SEALED ROAD.

ON ALL NEW ROADS AND EXISTING ROADS WHICH WILL BE AN EXTENSION OF EXISTING SEALED ROADS.

2. B) MINOR SUBDIVISION IN ISOLATED RURAL AREAS REQUIRE ALL-WEATHER 2 WHEEL DRIVE ACCESS ROADS SUITABLE FOR ALL YEAR ROUND ACCESS FOR ESSENTIAL SERVICES (EG SCHOOL BUS, AMBULANCE ETC). EACH PROPOSAL WILL BE ASSESSMENT ON ITS MERITS AND THE FOLLOWING GUIDELINES:

1. (I) THE STATUS OF THE ROAD;
2. (II) EXISTING ROAD SURFACE CONDITIONS;
3. (III) FLOODING FREQUENCY AND HAZARDS OF CREEK OR RIVER CROSSINGS; AND
4. (IV) POTENTIAL POPULATION CATCHMENT.

3. c) All lots to be created are to have legal access to a dedicated public road.

Note – Crown Roads and Forestry Roads are not “dedicated public roads”. Contact Council for advice should any proposed lots require sole access from a Crown Road or Forestry Road.

Appendix B

Environmental Planning and Assessment Act 1979 No 203

Current version for 25 March 2020 to date (accessed 3 May 2020 at 14:26)

[Part 4 T Division 4.3 T Section 4.15](#)

4.15 Evaluation (cf previous s 79C)

(1) **Matters for consideration—general** In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application—

(a) the provisions of—

(i) any environmental planning instrument, and

(ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and

(iii) **any development control plan, and**

(iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and

(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),

(v) (Repealed)

that apply to the land to which the development application relates,

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

(c) the suitability of the site for the development,

(d) any submissions made in accordance with this Act or the regulations,

(e) the public interest.

(2) Compliance with non-discretionary development standards—development other than complying development If an environmental planning instrument or a regulation contains non-discretionary development standards and development, not being complying development, the subject of a development application complies with those standards, the consent authority—

(a) is not entitled to take those standards into further consideration in determining the development application, and

(b) must not refuse the application on the ground that the development does not comply with those standards, and

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Environmental Planning and Assessment Act 1979 No 203 [NSW]

(c) Must not impose a condition of consent that has the same, or substantially the same, effect as those standards but is more onerous than those standards,

and the discretion of the consent authority under this section and section 4.16 is limited accordingly.

(3) If an environmental planning instrument or a regulation contains non-discretionary development standards and development the subject of a development application does not comply with those standards—

(a) subsection (2) does not apply and the discretion of the consent authority under this section and section 4.16 is not limited as referred to in that subsection, and

(b) a provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied to the non-discretionary development standard.

Note. The application of non-discretionary development standards to complying development is dealt with in section 4.28(3) and (4).

(3A) Development control plans If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority—

(a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards—is not to require more onerous standards with respect to that aspect of the development, and

(b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards—is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development, and

(c) may consider those provisions only in connection with the assessment of that development application.

In this subsection, *standards* include performance criteria.

(4) **Consent where an accreditation is in force** A consent authority must not refuse to grant consent to development on the ground that any building product or system relating to the development does not comply with a requirement of the *Building Code of Australia* if the building product or system is accredited in respect of that requirement in accordance with the regulations.

(5) A consent authority and an employee of a consent authority do not incur any liability as a consequence of acting in accordance with subsection (4).

(6) **Definitions** In this section—

(a) reference to development extends to include a reference to the building, work, use or land proposed to be erected, carried out, undertaken or subdivided, respectively, pursuant to the grant of consent to a development application, and

(b) *non-discretionary development standards* means development standards that are identified in an environmental planning instrument or a regulation as non-discretionary development standards.

Appendix C

State Environmental Planning Policy No 15—Rural Land-sharing Communities

Repealed version for 14 January 2011 to 4 August 2016 (accessed 3 May 2020 at 16:26)

[Clause 12](#)

12 Subdivision prohibited

(1) If development is carried out on land pursuant to this Policy, the issue of a certificate of the general manager of a council, under the *Local Government Act 1919*, or of a council's certificate under the *Strata Schemes (Freehold Development) Act 1973*, required for the subdivision of the land is prohibited.

(2) Subclause (1) does not apply with respect to the subdivision of land for the purpose of any one or more of the following:

- (a) widening a public road,
- (b) making an adjustment to a boundary between allotments, being an adjustment that does not involve the creation of any additional allotment,
- (c) rectifying an encroachment upon an allotment,
- (d) creating a public reserve,
- (e) consolidating allotments,
- (f) excising from an allotment land that is, or is intended to be, used for public purposes, including drainage purposes, bush fire brigade or other rescue service purposes or public conveniences.