



Independent Planning Commission
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15 February 2024
Matter 82721291
By Email

Dear Commissioners

Hills of Gold Windfarm Written submission on behalf of the Proponent

We act for Hills of Gold Windfarm Pty Ltd (**the Proponent**) in relation to the proposed Hills of Gold Windfarm (SSD 9679) (**Project**) currently before the Independent Planning Commission (**IPC**).

We refer to Tamworth Regional Council's (**TRC**) written submission dated 12 January 2024, and in particular, the letter from Maddocks dated 25 January 2024 enclosed with that submission (**Maddocks' Legal Opinion**). The focus of that opinion is on the validity of the Department of Planning, Housing, and Infrastructure (**DPHI**)'s recommended conditions B32 and B33 (which relate to road upgrades, repair and make good) being standard conditions designed to provide the Proponent practical flexibility around the implementation of such works.

We are instructed by the Proponent to provide this letter in response to the legal opinions raised in the Maddocks' Legal Opinion.

1 Maddocks' Legal Opinion

The Maddocks' Legal Opinion asserts that:

- a consent authority is required to assess and determine a development application with finality and certainty;¹
- further to the above, a consent authority must assess all impacts a proposed development will have on the environment and cannot leave parts of the proposed development for later consideration and assessment either by the assessing body or an alternative assessing body;² and
- as currently drafted, recommended conditions B32 and B33 are unlawful and granting such conditions would be *ultra vires* because they lack finality and certainty to the extent that:
 - allowing the Planning Secretary to agree 'otherwise' could have the effect of allowing road upgrades to be "radically changed" or "completely removed" from the Project;³ and
 - the dispute resolution requirement under recommended conditions B32 and B33 is "unclear and ambiguous".⁴

¹ Maddocks' Legal Opinion, paragraph 3.2.

² Ibid.

³ Ibid paragraph 3.3.1.

⁴ Ibid paragraph 3.7.

2 Response to Maddocks' Legal Opinion

In our view, the Maddocks' Legal Opinion is legally flawed and incorrect.

In particular, we disagree with the position advanced by Maddocks for the following reasons:

- there is no applicable authority for the proposition that a consent authority must assess and determine a development application with finality and/or certainty. It is not necessary for the exercise of a statutory power to be certain or final in order to be valid;⁵
- the power to grant consent subject to conditions pursuant to the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) is wide. It neither expressly nor impliedly requires a condition to be final or certain in order to be valid.⁶ There is no reason to read that power down;⁷
- the authorities relied on by Maddocks do not establish otherwise.⁸ In particular, the decision of Cripps CJ in *King*⁹ related to an entirely different set of factual circumstances and is authority for the principle that: *the jurisdiction of a local council to entertain a development application is not dependent upon there being included in the application land the use of which is necessarily involved in the use the subject of the application*;¹⁰
- in any event, the road works contemplated under conditions B32 and B33 have been comprehensively assessed by the Proponent;¹¹
- it is entirely appropriate and commonplace for conditions of consent to defer the assessment of impacts¹² or to nominate a person that is not the consent authority, to assess ancillary aspects of the development to that person's satisfaction.¹³ To that end, imposing such a condition is clearly within the parameters of the statutory framework and cannot be interpreted as the IPC abrogating its responsibility as a consent authority.¹⁴

⁵ *King Gee Clothing Co Pty Ltd v Commonwealth* (1945) 71 CLR 184 at 194–195; cited in *Ulan Coal Mines Ltd v Minister for Planning and Moolarben Coal Mines Pty Limited* [2008] NSWLEC 185 (*Ulan*) at [49].

⁶ *Ulan*, [74].

⁷ *Ibid* [75].

⁸ *King v Great Lakes Shire Council* (1886) 58 LGRA 366; *Jungar Holdings Pty Ltd v Eurobodalla Shire Council* (1989) 70 LGRA 79.

⁹ *King v Great Lakes Shire Council* (1986) 58 LGRA 366.

¹⁰ *Ibid* 380.

¹¹ See Department of Planning and Environment, *Hills of Gold Wind Farm State Significant Development Assessment Report* (SSD 9679) (December 2023) 6.4.1, Table 14: "The Department notes that the Applicant proposes a number of road upgrades in Tamworth LGA to facilitate the movement of heavy vehicles to the site. These road upgrades are outlined in detail in the EIS and supporting documentation. Road upgrades would be required to be undertaken to the satisfaction of the relevant roads authority"; see also, Biosis, *Hills of Gold Wind Farm Biodiversity Development Assessment Report* (Response to RFI 290523 Attachment F.1) (25 May 2023), 1.5.1 (item 6) and Table 13; Rex J Andrews, *Route Study: Hills of Gold Wind Farm* (Response to RFI 290523 Attachment D) (24 October 2022); ENGIE, *Hills of Gold Wind Farm Amendment Report No. 2* (Appendix H Traffic and Transport Assessment) (1 November 2022).

¹² See for example, section 4.17(4) of the EP&A Act that permits conditions to be expressed in terms of outcomes or objectives (which must then be later assessed against).

¹³ See for example, section 4.17(2) of the EP&A Act which provides that a consent may be granted subject to a condition that a specified aspect of the development that is ancillary to the core purpose of the development is to be carried out to the satisfaction, determined in accordance with the regulations, of the consent authority or a person specified by the consent authority.

¹⁴ *Jungar Holdings Pty Ltd v Eurobodalla Shire Council* (1989) 70 LGRA, 89 (which we note is the authority relied upon in the Maddocks' Legal Opinion).

- the correct test as to the validity of conditions is set out in *Kindimindi*; that is, a consent will only fail for uncertainty where it leaves open the possibility of a **significantly different development**.¹⁵ In *Kindimindi*, the Court of Appeal held that conditions of consent would not fail because of mere imprecision or uncertainty;¹⁶ and
- contrary to Maddocks' view, no reasonable person in the shoes of the decision-maker could consider that imposing recommended conditions B32 and/or B33 would result in a significantly different development. In particular:
 - enabling the Planning Secretary to agree 'otherwise' gives the Proponent some degree of flexibility in the implementation of its road upgrades, if required. Retaining such flexibility is "appropriate and inevitable" for SSD projects such as this one.¹⁷ It does not have the effect of allowing road upgrades that are "radically changed" or "completely removed" from the Project;¹⁸
 - incorporating a provision for the Planning Secretary to agree 'otherwise' to road upgrades is common, especially in the context of SSD projects.¹⁹ For example, the IPC granted consent to the Bowmans Creek Windfarm (SSD 10315) on 6 February 2024 which included the following condition (**emphasis added**):

Unless the Planning Secretary agrees otherwise, the Applicant must implement the road upgrades identified in Appendix 5...;²⁰
and
 - the deferral of any dispute relating to recommended conditions B32 and B33 to the Planning Secretary is not 'beyond the powers' of the IPC as contended in the Maddocks' Legal Opinion. This requirement is routinely incorporated into SSD development consents.²¹ If Maddocks' position were to be accepted, almost all developments consents for SSD in NSW would be susceptible to challenge for invalidity.

¹⁵ *Kindimindi Investments Pty Ltd v Lane Cove Council* [2006] NSWCA 23 (***Kindimindi***), [28].

¹⁶ *Ibid* [57].

¹⁷ *Ulan*, [80]; *Kindimindi*, [54].

¹⁸ Maddocks' Legal Opinion, paragraph 3.3.1.

¹⁹ See for example, *Development Consent granted to the Bowmans Creek Wind Farm project (SSD 10315) by the NSW Independent Planning Commission*, conditions B1-B2; *Development Consent granted to the Uungula Wind Farm project (SSD 6687) by the Minister for Planning and Public Spaces*, condition B30; and *Development Consent granted to the Yanco Delta Wind Farm project (SSD 41743746) by the Minister for Planning and Public Spaces*, condition B35.

²⁰ See for example, *Development Consent granted to the Bowmans Creek Wind Farm project (SSD 10315) by the NSW Independent Planning Commission*, condition B2.

²¹ See for example, *Development Consent granted to the Bowmans Creek Wind Farm project (SSD 10315) by the NSW Independent Planning Commission*, conditions B2-B4; *Development Consent granted to the Uungula Wind Farm project (SSD 6687) by the Minister for Planning and Public Spaces*, condition B30; *Development Consent granted to the Liverpool Range Wind Farm project (SSD 6696) by the Minister for Planning*, condition 29; *Development Consent granted to the Yanco Delta Wind Farm project (SSD 41743746) by the Minister for Planning and Public Spaces*, condition B35; *Development Consent granted to the Crudine Wind Farm project (SSD 6697) by the Minister for Planning*, condition 30; *Development Consent granted to the Flyers Creek Wind Farm project (MP 08-0252) by the Minister for Planning and Infrastructure*, condition F.15A; *Development Consent granted to the Crookwell 3 Wind Farm project (SSD 6695) by the Land and Environment Court of NSW*, condition 33; and *Development Consent granted to the Bango Wind Farm project (SSD 6686) by the Land and Environment Court of NSW*, conditions 25-26.



In light of above, the wide power of the IPC (as a consent authority) to impose conditions ought not to be read down by requiring absolute finality and certainty.

Yours sincerely

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