OUR FUTURE SHOALHAVEN

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with

KEEP JERVIS BAY UNSPOILT

Inquiry into historical development consents in NSW

A. Terms of Reference

That the Committee on Environment and Planning inquire into and report on historical development consents in New South Wales, including:

(a) The current legal framework for development consents, including the physical commencement test.

(b) Impacts to the planning system, development industry and property ownership as a result of the uncertain status of lawfully commenced development consents.

(c) Any barriers to addressing historical development consents using current legal provisions, and the benefits and costs to taxpayers of taking action on historical development concerns.

(d) Possible policy and legal options to address concerns regarding historical development consents, particularly the non-completion of consents that cannot lapse, and options for further regulatory support, including from other jurisdictions.

(e) Any other matters.

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B. Introduction

Our Future Shoalhaven is an organisation dedicated to support community-lead initiatives about protecting the environment and assuring the wellbeing of the residents of the Shoalhaven. **Keep Jervis Bay Unspoilt** (KJBU) is a project of OFS spurred by the development of 4 Murdoch St in Huskisson. 4 Murdoch St is a historical development consent that got revived a few years ago and is used in this submission as an illustration of substantive issues we wish to highlight to the inquiry.

4 Murdoch is not the only example of historical development consents that are causing problems in the Shoalhaven. OFS and KJBU is aware of, and supports, other submissions to the inquiry by Callala Matters, Culburra Residents and Ratepayers Action Group, Manyana Matters and residents of Edendale Street Woollamia. One of the additional problems with historical development consents is that information about them is inaccessible. The number and detail that still exist is unknown.

We point out that it is not just formal development consents that cause problems, but also the historic zoning. The new Local Environment Plans (which was concluded in 2014 for the Shoalhaven) were essentially a transference of 'like for like' from the old zoning plans. The process was intended to make the zoning consistent across the state. This meant that zones mapped out in the 1980s or likely earlier were mostly transferred across and were not revisited on environmental grounds, or urban planning principles and likely not revisited since.

It is therefore important that historical development consents, just like ANY new DA should be able to be refused based on the new environmental and urban planning knowledge, irrespective of the land zoning.

Our first petition to the Inquiry is that ANY new DA can be refused based on the new environmental and urban planning knowledge[1], irrespective of the land zoning.

[1] New environmental and urban planning knowledge – we use this phrase to cover the new ecological knowledge that we are gaining that might include a greater complexity and interdependence than we'd otherwise understood, or changes to the vulnerability of populations or communities and which makes its way into our legislation ex development on riparian zones guidelines. We also use this to refer to changes to our understanding around what makes a healthy urban environment and how planning contributes to that. For example, the benefits of an urban canopy, the benefits of linear trails connecting open / green space.

C. The current legal framework for development consents, including the physical commencement test

Physical commencement clarification is an improvement but does not affect pre-2020 DAs

In recent years, NSW has clarified what is meant by 'physical commencement'. This change was made to help the construction industry and provide greater certainty about when a DA has commenced or not. The explanation for the changes on the Department's website is (Source: COVID-19 response | Planning (nsw.gov.au)):

> *The provisions in the Environmental Planning and Assessment Regulation 2021 provide greater certainty to landowners, developers and the community about development that has 'physically commenced'.*
>
> *In response to the impact of COVID-19 on the construction industry, it was necessary to allow the construction industry more time to physically commence works to ensure that development consents do not automatically lapse. New provisions will clarify that certain minor works do not satisfy the requirement for physical commencement. This will ensure that the commencement of works demonstrates a sufficient intent to complete the development.*
>
> *The provision does not apply to development approved prior 15 May 2020.*

The main change was the exclusion of particular actions constituting 'commencement'. As such the following is no longer considered commencement:

> *1) For the purposes of section 4.53(7) of the Act, work is not taken to have been physically commenced merely by the doing of any one or more of the following—*
>
> *(a) creating a bore hole for soil testing,*
>
> *(b) removing water or soil for testing,*
>
> *(c) carrying out survey work, including the placing of pegs or other survey equipment,*
>
> *(d) acoustic testing,*
>
> *(e) removing vegetation as an ancillary activity,*
>
> *(f) marking the ground to indicate how land is to be developed.*
>
> *2) This clause does not apply to a development consent granted before the commencement of this clause.*

We consider the removal of the activities a) to f) above an improvement to the regulations around development consent. However we do not agree with allowing ones older than 2020 being excluded (pt2), which is the case at present. These changes to the definition of commencement should be applied retrospectively. The DA's most likely to present environmental or social harm are the oldest ones and as such it makes no sense to exempt them from the exclusions of particular actions listed above.

Our second petition to the Inquiry is that the changes to the meaning of commencement should be applied to all DAs no matter when they were approved.

Historical consents ignore current Reality to the detriment of the Common Good.

The current legal framework seems to prioritise the rights of the landowner over and above the rights of the community:

- to have a healthy environment,
- to have urban spaces that consider emergent hazards,
- to avoid environmental depreciation caused to the area through new developments,
- opportunities to maximise the common good.

Historical development consents are speculative instruments. One invests in a piece of land, and a DA, sitting on it for a few years in the hope of making a profit in the future. In this regard, it is similar to investing in financial instruments subject to interest rates. When the government decides to adjust interest rates for the common good, investors are affected by the fluctuation. By not being affected by new rules and regulations, they are impervious to changes made in the name of the Common Good; it puts them above the Common Good.

Our submission argues that in many cases both 'old' land zoning, and historical development consents are problematic because they don't consider:

- changed community expectations around development standards
- changed community expectations and professional understanding of desired urban development
- changed understanding of the environment, and its local sustainability
- new practices and guidelines and standards affecting construction methods and outcomes
- changes due to climate change that alter the hazards of the site
- changes to threatened species ie MORE species listed as vulnerable
- loss of habitat of listed threatened species
- inconsistent approach to investment with a privileging of property investment over other investment types.

Our third petition to the Inquiry is that no DA should be put above the Common Good of a healthy environment, and liveable and safe urban areas.

Community can't appeal planning consents

In addition, the community doesn't have any ability to appeal planning decisions and consents. The appeal system is set up to support the developer overcome regulations put in place by local and state planning bodies: only the developer can appeal decisions. This part of the judiciary system should change.

Our fourth petition to the Inquiry is that the judiciary system determining development applications, their approval and implementation provide equal access and consideration to all parties with any concerns to any part of the planning process.

Example – 4 Murdoch St

We believe that development on 4 Murdoch St[2] would not be approved under contemporary planning regimes. Two apartment blocks were approved for development in 2011 (DA10/1377) on land zoned 3(g), which is now MU1. The block essentially sat idle until its sale in 2018; soon after the sale an amended DA was submitted to Shoalhaven City Council.

4 Murdoch St, Huskisson is an example of many of the problems caused by the historic zoning and development consents. These problems are illustrated below:

1. They don't take into account changed community behaviours and expectations.
   The pre 1980s zoning of Murdoch St is at odds with the current community expectation to keep Moona Creek and Jervis Bay pristine. The community now understands that riparian zones, and mangroves are essential to healthy marine and aquatic environments, as well as the protection of old growth trees. The loss of the riparian zone land and marine estuaries to development in other coastal places demonstrates the damage that is likely to occur to Jervis Bay. The primary use of Moona Moona creek is a family reserve, providing safe water and other recreational activities particularly for small children and families. Community consultations over the past decade have demonstrated the desire that Huskisson keeps its low scale development character – both for the local residents and visitors.

2. There are changed community expectations and professional understanding of desired urban development
   The pre-1980s zoning of B4/MU1 in this area is now illogical in planning terms as creating an additional commercial centre here will centre will negatively impact the activity of the town's principal commercial centre, namely Owen Street. Whilst Owen St does very well in the busiest of times, as a primarily tourist commercial centre it is still vulnerable. Creating an additional mixed use / commercial area on the creek might have once seemed plausible, but now risks splitting the market which currently

[2] And 2 Murdoch St, and 1 Moona St

concentrates on Owen St. See Figure 1

Figure 1: Old zoning that no longer works

3. There is a changed understanding of the environment and its local sustainability
   The historic zoning from the pre-1980s was at a time when the interdependencies of land and sea, plus the fragility of the natural environment were less adequately understood. It was also a time when there was a culture of development and growth. We now understand that growth cannot be at the cost of the environment, which is the primary reason why people choose to live and visit the area. The approval of 4 Murdoch Street 14 years ago is perplexing because the Water Management Act 2000, and concern about riparian zones existed at the time. Policy and Guidelines for Fish Habitat Conservation and Management (2013 update) would mean this development wouldn't go ahead as it clearly sits within a 50-100m buffer of a Type 1 marine vegetation. Presumably, the council felt obliged to approve the DA because the land was zoned 3(g) – Business G (Development area). Clearly the land to be developed sat within the land intended to be protected in the riparian zone – Figure 2, but it is unknown why the Water Management Act riparian guidelines weren't

enforced. Nor why an appeal on the grounds of these failures is not now possible in the courts.

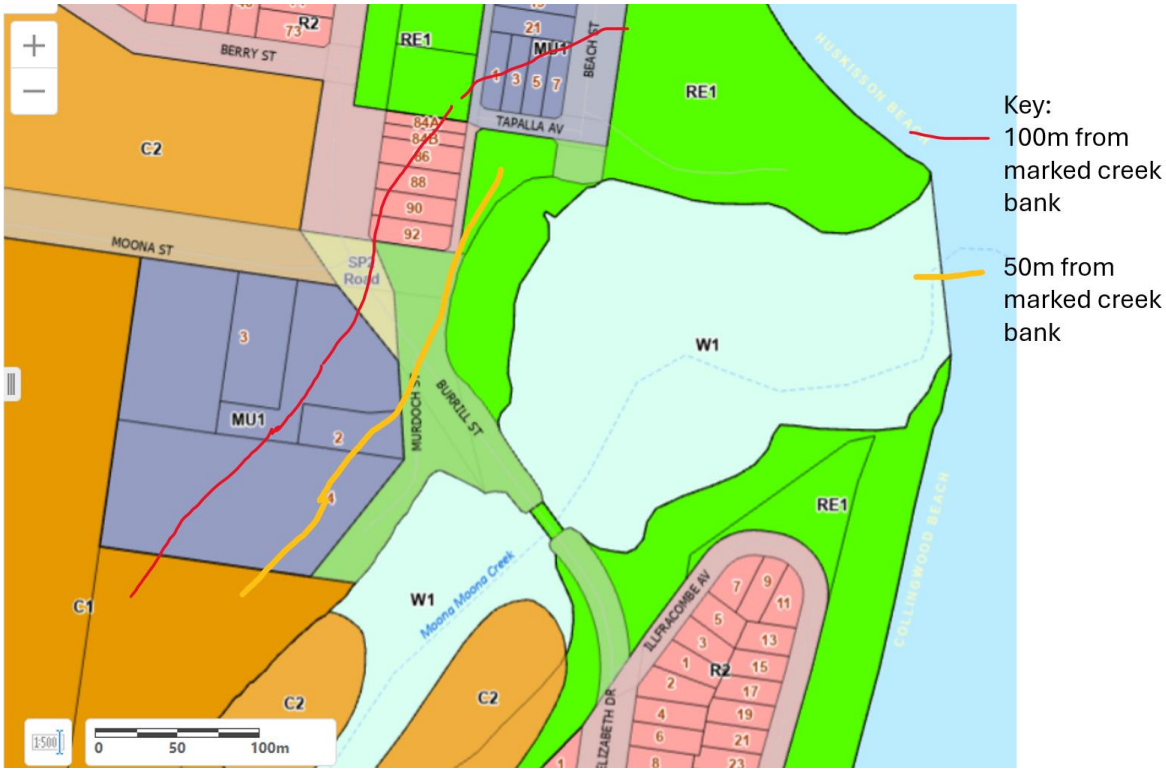

Figure 2: DPI said they wouldn't normally approve development in the 50m zone from a Type 1 Highly sensitive fish habitat

The Policy states (our emphasis).

> *3.2.3.2 Policy and guidelines for harming marine vegetation*
> *In addition to the general policies stated in Chapter 3, the following specific policies apply to harming marine vegetation:*
> *4**) NSW DPI will generally not approve developments or activities that do not incorporate foreshore buffer zones of 50-100 m width adjacent to TYPE 1 marine vegetation and at least 50 m width adjacent to TYPE 2 marine vegetation**. Where a buffer zone of at least 50 m is physically unachievable due to land availability constraints, the available buffer width must be maximised to achieve protection of TYPE 1 and 2 marine vegetation (i.e. from edge effects, changes to water quality, flood protection and to allow for climate change adaptation). The buffer zone should not be used for other asset protection purposes (e.g. as a bushfire or mosquito buffer). Please note that this policy does not apply to developments involving maintenance to existing, or construction of new roads or bridges crossing a waterway, but may apply to developments involving roads that are adjacent to, but not crossing a waterway (e.g. new subdivisions, rezoning proposals involving new*

access roads, new road developments along a new alignment).

Source: Policy and guidelines for fish habitat conservation and management 2013, p 20.

It is clear that other local government areas are taking these guidelines seriously (see example in Figure 3 below). Our suggested changes to historical development consents would allow the guidelines / legislation to be properly enacted. In the case of 4 Murdoch St, it would allow the rectification of this oversight or mistake.

Northern Beaches Council aims to protect, enhance and restore waterways and riparian land while ensuring protection of public and private property across the Northern Beaches. The protection for our watercourses and wetlands is consistent with Council's Community Strategic Plan 2018-2028, Towards 2040 - Local Strategic Planning Statement (LSPS) and the Northern Beaches Environment and Climate Change Strategy 2040.

Step 9: Wetland Buffers

100 metre buffers were applied to the wetlands identified in Step 8 in accordance with the State Environmental Planning Policy (Coastal Management)

Figure 3: Excerpt from Draft watercourse, wetland and riparian lands study. Northern Beaches Council 2022.

4. New practices, guidelines and standards affecting construction methods and outcomes
   Technological advances in construction machinery area more accessible to developers for construction activities, such as underground carparks, that are potentially far more destructive to surrounding wetlands and the generation of pollution to the adjacent marine sanctuary. Another example is the practice of tourists wishing to bring boats and jet skis to their accommodation requiring an entirely new and extensive supportive infrastructure which further impacts the environment and public facilities.

5. Changes due to climate change that alter the hazards of the site
   The NSW government has made adaptation to Climate Change a major initiative in their mission. While they take actions on carbon emissions, they are doing little to mitigate the consequences that are already apparent in terms of land use. For example, sea rise data relevant to 4 Murdoch Street indicate it will be seriously affected long before its intended life expectancy is reached. The practice of selling

units within a development on their completion is moving the cost unfairly from the developer of inappropriate constructions to individual owners. This is an issue emerging across the whole State. New conditions and knowledge would normally affect any speculative investments and historical development consents should not be treated any differently.

6. Changes to threatened species, that is, MORE species are listed as vulnerable. Sadly, the list of vulnerable and endangered species is getting longer (Table 1), and the 2019 bush fires only made the situation worse. Why would historical development consents be exempted to account for such species? In the case of 4 Murdoch St, work on the land has been halted two seasons in a row to allow a pair of Gang-gang cockatoos to nest in peace. Gang-gangs are on the list of endangered species. The clearing was stopped and Gang Gang breeding only occurred because the community was monitoring the site and alerted council to the bird's nesting. Under current Planning and EPBA laws the developer could not be stopped from clearing the native forest between the endangered birds breeding seasons. After clearing no Gang-gangs have been observed in the near vicinity, let alone seen nesting or breeding as they had done in the previous years.

   Table 1 compares the list of endangered species in 2011, when DA10/1377 was approved with the current list

   Table 1: Evidence of increasing numbers of threatened species

NSW	**Australia**
December 2014 999 species listed as threatened in NSW[3]	2016 1774 threatened species across Australia[4]
2021 • The number of species considered at risk of extinction continues to rise with 1,043 NSW species listed as threatened, 18 more than reported three years ago. A further 116 ecological communities are also listed as threatened.	2021 1918 threatened species across Australia

[3] https://www.epa.nsw.gov.au/about-us/publications-and-reports/state-of-the-environment/state-of-the-environment-2015/12-threatened-species

[4] https://www.sydney.edu.au/news-opinion/news/2022/07/19/state-of-the-environment--the-findings.html#:~:text=The%20number%20of%20plant%20and%20animal%20species%20listed,2021%20was%201%2C918%2C%20up%20from%201%2C774%20in%202016.

• The conservation status of 64% of land-based NSW vertebrates is presently not considered to be threatened. • Freshwater fish communities are in very poor condition across the state and are declining. • Invasive species are widespread across the state's land and aquatic environments and regarded as a major threat.[5]	

7. Loss of habitat of listed threatened species
   The 2022 NSW State of the Environment report stated that 7.7 million hectares of habitat for land based threatened species was cleared between 2000 and 2017. Then the Black Summer fires burned more than 8 million hectares of native vegetation. The State's failure to protect habitat and threatened species makes it even more important that small, and continuous, habitat is protected – especially where that habitat links (or might link in the future) to existing land or aquatic habitat.

8. Inconsistent approach to investment with a privileging of property investment over other investment types.
   As pointed out above, historical development consents, and land banking, are speculative instruments. One invests in a piece of land, and a DA, sitting on it for a few years in the hope of making a profit in the future. By not being affected by new rules and regulations, they are impervious to changes made in the name of the Common Good. It puts them above the Common Good. There is no reason to do this, an investor's gamble may or may not pay off. A decision not to build one year and to build later is the owners choice. To pay attention to changing events, housing needs, and most importantly the climate crisis is the responsibility of the owner. It is the Government and Council's responsibility to care for the common good.

[5] https://www.soe.epa.nsw.gov.au/sites/default/files/2022-02/21p3448-nsw-state-of-the-environment-2021_0.pdf

D. Impacts to the planning system, development industry and property ownership as a result of the uncertain status of lawfully commenced development consents

Our concern is not with the 'uncertain status' of commencement. It is our understanding that the 2020 changes were made to clarify and make less 'subjective' what constitutes commencement.

We agree that the status of commencement should be clear.

We do not support the sale of a property with an existing DA.

Our concern is that properties with historical development consent fuel speculation, and provides a relatively easy 'value add' mechanism to land. Unfortunately they also exempt developers from some new rules and regulations, but also constrict changes that might be easily made to a DA application that proposes a DA more in line with current community expectations and environmental conditions. But what is particularly hard for the community is that a DA that they'd never heard about before is suddenly about to be fulfilled and the existing community has no opportunity to point out the current issues with the development /build.

It makes such properties appealing to unscrupulous developers who do not value the community which they are expected to serve. Additionally, it potentially prevents a developer from abiding to new rules and regulations in the respect of community wishes and the Common Good short of starting from scratch. In short, it penalises investors and developers animated by a desire to be respectful of community values and working for the Common Good, and rewards investors and developers driven solely by capital gain to the detriment of the Common Good, and the wellbeing of the Community.

Our concern is that during the process of obtaining a DA the owner/developer acquires a lot of knowledge of the proposed development and its impact on the surrounding community and the related natural environment. The knowledge, and the relationships that the knowledge flows through are not recorded or available in a tangible form to the purchaser of an approved DA. What is not being acknowledged or valued is the human, community and natural environmental context of the DA.

Whilst the new owner of a traded DA can amend the DA, objections from the community can only address the amendments not the flaws in the original DA that make the amendments untenable.

Our fifth petition to the Inquiry is that all traded DA be subject to a review against the laws and regulations operating at the time of the sale. A certificate verifying the DA meets current requirements should then be attached to the DFA at the time of the sale. That is, the responsibility for such a certificate is the responsibility of the seller.

E. Any barriers to addressing historical development consents using current legal provisions, and the benefits and costs to taxpayers of taking action on historical development concerns.

Barriers to addressing historical development consents

We can see that the main barrier in addressing historical development is the likelihood of needing to compensate a developer for the rescinding or amendment of an existing DA.

However, in our experience, the concern of the community is that many of the historical development consents are in locations that are now considered inappropriate for the following reasons:

1. The land is flood-prone, which will be worse with climate change
   The site experienced flooding in 2020, Figure 4 exemplifies the level of flooding that is currently expected.

Figure 4: flooding from runoff July 2020 in the front portion of 4 Murdoch St.

2. The land hosts habitat, which has now become more precious as preserved habitat is being rapidly diminished as a result of:
   a. increased clearing,

"The main driver of clearing in New South Wales is agriculture.

More than 88,000 hectares of primary forest was cleared in New South Wales.
Reclearing takes the state's entire land clearing tally to 663,000 hectares.
That makes our 1-kilometre wide strip of cleared land almost 7,000 kilometres long, roughly stretching from Perth to Cairns via Brisbane.
In 2017, New South Wales relaxed its native vegetation clearing laws, however the impact that has had on land clearing is expected to show up in the reporting periods for 2019 and 2020.
A leaked report from the Natural Resources Commission last year suggested that land clearing may have surged by as much as 13 times."
Source: Land clearing in Australia: How does your state (or territory) compare? - ABC News – 17 Dec 2020.

From the Guardian based on the 2021 State of the Environment report clearing has essentially tripled over the last decade:

> *"Clearing of woody vegetation increased to an annual average of 35,000 hectares between 2017 and 2019, up from 13,000 hectares between 2009 and 2015. The rate of clearing for non-woody vegetation such as shrubs and grasses was even higher."*
> Land clearing in NSW tripled over past decade, State of the Environment 2021 report reveals | Logging and land-clearing | The Guardian

We sadly note that these figures are 3 years old and expect that the situation is much worse now.

b. Increased bushfires and loss of habitat and increased number of threatened species (see points made above)

3. The land zoning is no longer appropriate e.g. zoning 4 Murdoch St MU1 zone needs to be rethought as it is within the 50-100m riparian corridor, and should not be built on at all.

For these reasons, in the longer term, the costs in addressing the historical development consents are likely to be lower than amending the existing approvals or repairing the damage sustained by inappropriate developments (e.g. 2022 Lismore Flood costs).

Our sixth petition to the Inquiry is that DAs not commenced should be extinguished when land use laws are changed to accommodate emergent hazards from climate change or other natural phenomena.

Benefits to taxpayers of taking action on historical development concerns

By action, we mean reviewing historical DAs in the light of new regulations and new understandings of what is needed for a:

- healthy ecology and
- healthy urban environment.

The benefits of requiring the historical development consent to be assessed against current regulations and predicted conditions, and the ability to rescind the DA (presumably with some level of compensation) are that taxpayers would not have to shoulder the costs caused by the environmental issues created or worsened by the development. The community would also have the benefit of modern urban planning principles that include liveability. To illustrate how these issues would be addressed, 4 Murdoch St development proposal would be expected to result in the rescission of the DA based on:

In summary the benefits to the taxpayers from addressing the inappropriate zoning, and in the case of 4 Murdoch St, withdrawing approval will be:

- Future owners won't face damages costs caused by increased flooding, which would likely be partly covered by the taxpayers.
- Future owners won't face distressful rescues – which would be covered by the taxpayers.
- The community as a whole will benefit from the protection of the marine park by protecting the riparian zone, including the tourism industry.
- The ultimate cost of conservation of our biodiversity will be less because less damage will have been done.

These decisions clearly have a long-term economic cost and benefit, however economics is only one criterion. Decisions should also be based on principles of good urban planning, ecosystem health and overall community wellbeing.

Our seventh petition to the Inquiry is that the building of houses should not occur in locations that will likely lead to loss of life, or resources to existing resident or established community. Nor should the building of houses contribute to a decline in Australia's ecosystems.

The building of houses should not occur in locations that will likely lead to loss of life, or resources to residents or community. Nor should the building of houses contribute to a decline in Australia's ecosystems. A DA should be considered within the eco-system, community where it is located, and the impact on the whole, including in relationship to other DAs. This requirement should exist for new and old DAs.

All Planning approvals, including historical ones requiring re-assessment as suggested in this submission, should be seen in terms of its cumulative impact. So often arguments for exceptions to DA criteria are made because of a precedent set by an approval elsewhere. Consideration should be given to the overall impact a proposed development will have in an area, is it sustainable in the bigger picture?

F. Possible policy and legal options to address concerns regarding historical development consents, particularly the non-completion of consents that cannot lapse, and options for further regulatory support, including from other jurisdictions.

In summary Our Future Shoalhaven and Keep Jervis Bay Unspoilt offer the following petitions or suggestions regarding historical development consents that have not been **completed**.

Our first petition to the Inquiry is that ANY new DA can be refused based on the new environmental and urban planning knowledge[6], irrespective of the land zoning.

Our second petition to the Inquiry is that the changes to the meaning of commencement should be applied to all DAs no matter when they were approved.

Our third petition to the Inquiry is that no DA should be put above the Common Good of a healthy environment, and liveable and safe urban areas.

Our fourth petition to the Inquiry is that the judiciary system determining development applications, their approval and implementation provide equal access and consideration to all parties with any concerns to any part of the planning process.

Our fifth petition to the Inquiry is that all traded DA be subject to a review against the laws and regulations operating at the time of the sale. A certificate verifying the DA meets current requirements should then be attached to the DFA at the time of the sale. That is, the responsibility for such a certificate is the responsibility of the seller.

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