

**Submission
No 34**

HISTORICAL DEVELOPMENT CONSENTS IN NSW

Organisation: Eurobodalla Shire Council

Date Received: 28 May 2024

Our Reference: S006-T00001

28 May 2024

The Secretariat
Legislative Assembly Committee on Environment and Planning
environmentplanning@parliament.nsw.gov.au

Dear Sir/Madam

Eurobodalla Shire Council welcomes the opportunity to provide a submission to the Inquiry into Historical Development Consents in NSW.

On 21 May 2024, a report (attached) was prepared for the Ordinary Meeting of Council and the following Motion was determined:

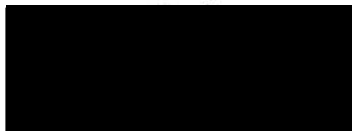
MINUTE 24/51

THAT Council:

1. *Acknowledges that the NSW Government is responsible for the legislative framework that determines when a development consent is valid or lapses in accordance with the Environmental Planning and Assessment Act 1979 and its associated Regulations.*
2. *Support amendments made to the Environmental Planning and Assessment Act 1979 and its associated Regulations that provide greater certainty around when a development consent is said to have lapsed and conversely specifically what works, or extent of works need to occur for the consent to remain valid.*
3. *That Council's submission includes the request that the State Government consider a time constraint for developments including an exploration of risks and benefits.*

Should you require any further information, please do not hesitate to contact me on 02 4474 1087 or via email gary.bruce@esc.nsw.gov.au.

Yours sincerely



Gary Bruce
Acting Director Planning and Environment

Attach.

**PSR24/008 COUNCIL SUBMISSION TO INQUIRY INTO HISTORICAL
DEVELOPMENT CONSENTS IN NSW - LEGISLATIVE ASSEMBLY
COMMITTEE ON ENVIRONMENT AND PLANNING**

**S006-
T00001**

Responsible Officer: Gary Bruce - Acting Director Planning & Environment
Attachments: Nil
Community Goal: 3 Our region of vibrant places and spaces
Community Strategy: 3.1 Balance development between the needs of people, place and productivity
Delivery Program Link: 3.1.2 Provide receptive and responsive development assessment services
Operational Plan Link: 3.1.2.1 Assess and determine development applications

EXECUTIVE SUMMARY

The purpose of this report is to outline Council's submission to the Legislative Assembly Committee regarding historical development consents (zombie developments). Councillors will be aware from recent and first-hand experience that these types of developments can be controversial in the community.

This is fundamentally because an approval can be quite dated (in this Shire's experience 40 years old) but enable development to occur without the assessment rigor that would occur with more contemporary assessments and approvals.

The legislation around seeking an approval and commencing a development is quite well known and although it has been altered, the fundamental rule is that if you commence your development through physical works, then the development consent will remain valid forever.

This does create problems for communities when they are caught unaware of historic (or zombie) development approvals, but it also provides certainty for developers seeking and maintaining their finance.

It is therefore recommended that Council submit that if the legislation is to be amended or reviewed, that more certainty could be provided in the *Environmental Assessment Act 1979* and *Regulations* about what constitutes physical works and commencement of an approval. This would benefit both the community and development industry.

RECOMMENDATION

THAT Council:

1. Acknowledges that the NSW Government is responsible for the legislative framework that determines when a development consent is valid or lapses in accordance with the *Environmental Planning and Assessment Act 1979* and its associated Regulations.
2. Support amendments made to the *Environmental Planning and Assessment Act 1979* and its associated Regulations that provide greater certainty around when a development consent is said to have lapsed and conversely specifically what works, or extent of works need to occur for the consent to remain valid.

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BACKGROUND

Local councils in New South Wales are regulated from a town planning perspective by legislation enacted by the NSW Government. The *Environmental Planning and Assessment Act* regulates all planning decisions in NSW. This includes provisions around when a development application/consent is considered to be operative and also when it is said to have lapsed.

Under the previous and current planning legislation, a development consent can be enacted or 'kept alive' by physical works. The legislation has changed over the years but in essence, works associated with the development consent that occur on the site and within the consent period (usually five years) constitute physical commencement and the consent will therefore last forever.

An example of an historic development consent (zombie development) occurred at Anderson Avenue, Tuross Head. The consent was issued in 1984 and physical works occurred within a year to extend the sewer to the development. This, in accordance with the cited legislation, means that the consent remains valid or "stays alive" for the landowner/developer to construct the subdivision. Under the current legislation, there is no end date to this scenario and the ability to carry out the activities authorised by the consent last forever.

The subdivision was approved at a time when ecological and cultural heritage were assessed but not with the same rigour as they are now. This means that the community's concerns with works occurring that impact on the environment today, but the assessment of that impact occurred 40 years ago, are fair and not ideal.

Whilst these concerns are real, it does not take away the legal reality that the consent has been commenced and the landowner/developer is entitled to carry out works in association with the consent. Much of our current real estate market and financing provisions are also reliant on this fact and any changes to the legislative framework may have consequences for financing.

Council will be aware that in 2020, and under the same provisions, the landowner/ developer had the ability to seek to modify the approval. In accordance with the planning legislation, Council can only assess the changes proposed and not what was originally approved but this modification did require the applicant to obtain an Aboriginal Heritage Impact Permit (AHIP) and did require additional environmental controls through consultation with the Batemans Marine Park Authority and the Natural Resource Access regulator (NRAR). The development was also brought up to conformity with current bushfire protection measures through consultation with the NSW Rural Fire Service.

In essence, the experiences of this Council with historic development consents (zombie developments) were not an ideal situation and councils are balancing the community's expectations (in 2024) with their functions as a planning authority. It must be said that there was a lot of angst, and a lot of time and resources were expended in dealing with the situation.

It does have to be pointed out that the legislative framework is a product of the NSW Government, and they are the only body that has the ability to change the situation.

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CONSIDERATIONS

Policy

The *Environmental Planning and Assessment Act* is the overarching piece of legislation that controls planning and land use decisions in NSW. Acts are enacted by the NSW Parliament.

Environmental

A further piece of legislation that affects planning and land use decisions in NSW is the *Biodiversity Conservation Act*. It is also enacted by the NSW Parliament and whilst it does not provide provisions around commencing and lapsing of development consents, it does have savings provisions that recognise older approvals. This was a determining factor in why the Anderson Avenue development was not required to provide updated ecological reports.

Community and Stakeholder Engagement

Council is participating in an inquiry developed by the NSW Legislative Assembly Committee on Planning and Environment regarding historical developments. Council will provide a submission stating that if the legislation is to be amended or reviewed, more certainty could be provided in the *Environmental Planning and Assessment Act 1979* and *Regulations* regarding what constitutes physical works and commencement of an approval.

CONCLUSION

The purpose of this report is to outline the submission to the Legislative Assembly Committee regarding historical development consents (zombie developments). Council will be aware from recent and first-hand experience that these types of developments can be controversial and difficult for the community to comprehend.

It is therefore recommended that Council submit that if the legislation is to be amended or reviewed, that more certainty could be provided in the *Environmental Planning and Assessment Act 1979* and *Regulations* about what constitutes physical works and commencement of an approval. This would benefit both the community and development industry.