

**Submission  
No 42**

## **HISTORICAL DEVELOPMENT CONSENTS IN NSW**

**Organisation:** Goulburn Mulwaree Council

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31 May 2024

Contact: Scott Martin

Committee on Environment and Planning  
NSW Legislative Assembly

Dear Sir/Madam

Subject: NSW Legislative Assembly Inquiry into historical development consents in NSW

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Goulburn Mulwaree Council (GMC) would like to thank the Committee for the opportunity to make this submission into the inquiry for historical development consents in NSW. In this regard the following comments are provided.

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

For the most part, the current legal framework for development consents is considered satisfactory insofar as no viable alternative currently exists, and generally provides a level of flexibility to the consent authority to set a commencement date up to 5 years after a determination has been made, or issue time-limited consents.

However, changes to the physical commencement test over time, whether via case law, legislative amendments, planning circulars or the like, has led to a system that can be interpreted and applied with vast inconsistencies between different Local Government Areas.

Until recently, GMC has provided written confirmation of commencement to developers. As a result, we are aware of numerous active development consents that rely on such confirmation, however given the rate of change that has occurred within the NSW Planning Framework, current approaches to these consents would have rendered them to be lapsed. As such, there are no sensible mechanisms in place to enable Council's to revoke such advice without significant legal recourse, such as financial compensation.

As a rule of business, GMC no longer provides written confirmation with regard to commencement, but rather directs the developer to the relevant legislation and case law and advises that the developer must satisfy themselves that they can demonstrate commencement should the need arise in the future.

We are aware however that some Councils will still provide written acknowledgement confirming their acceptance of commencement, therefore demonstrating inconsistency across the industry.

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

Council's abovementioned change in business practice was in-part driven by a practice where developers, upon realisation that a consent was about to lapse (typically only 1-2 months out) would place unreasonable pressure on Council to not only assess their claim but accept sub-quality evidence to demonstrate commencement. Fundamentally, developers would rely on this process to cash-in on any uplift in land value afforded by the consent.

In recent times, local community groups with an interest in development have sought for Council to revoke or invalidate consents for development sites that rely on historical approvals. This position demonstrates that over time, a development proposal can become less acceptable due to shifting attitudes within a community.

An example of this is the increased recognition on the importance of biodiversity within the GMC LGA, and the significant change in biodiversity legislation within the past decade. As such, Council are now being lobbied from within the community about the need for time-limited consents that deal with biodiversity-affected land. Whilst this can be considered for future determinations, there is no opportunity to retrospectively apply time limits for existing 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.*

Many historic consents contain conditions that require further approvals to be acquired by the developer prior to works commencing. Often, such approvals were to be sought under legislation that has now been repealed. Again, biodiversity is a good example of a space where this is occurring. In the GMC LGA, there is one current example being experienced by a developer of a rural subdivision requiring vegetation removal.

This component requires approval under repealed legislation, and as such, what is now required in order to action this is a further development consent, which under the current framework may not be supported. The result is a half-completed subdivision, an anxious developer that continues to lose money, and pressure being applied to Council to approve a sub-standard and non-compliant development application, but with no feasible or legal conclusion in sight.

Another example is historical consents not keeping pace with legislative change focused on community safety, including bushfire and flood prone land mapping. There are residential subdivisions that have been developed, and registered, but not built upon for many years that are now being activated. Council has found that the standards applied to these developments don't often allow for the inclusion of the required standards relating to bushfire or flood, such as the ability to apply an Asset Protection Zone, or the ability to facilitate safe access and egress in the event of an emergency.

- 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.*

Council would like to see legislative provisions introduced that require dormant consents with the benefit of commencement to be subject to a modification process, or similar assessment, that would enable the application of updated conditions or standards. Additionally, this would also serve as a hold-point for development proposals that are no longer reflective of community and environmental values, thus enabling another mechanism for lapsing.

Regardless of physical commencement, there should be another hold-point or opportunity for the consent authority to assess the appropriateness of the concept of an endless consent.

- e) *Any other matters.*

GMC is also of the belief that many developers take advantage of zombie consents as a foundation of land banking. The current housing crisis could foreseeably be eased if there was a mechanism for consent authorities to force the activation of banked land that has the benefit of a development consent.

Should you require any further information, I can be contacted on [REDACTED].

Yours faithfully

[REDACTED]

Scott Martin  
**Director Planning & Environment**