Submission No 52

HISTORICAL DEVELOPMENT CONSENTS IN NSW

Organisation: Urban Development Institute of Australia NSW (UDIA)

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Urban Development Institute of Australia
New South Wales

2 June 2024

Mr Clayton Barr MP
Member for Cessnock
Chair,
Legislative Assembly Committee on Historical Development Consents in NSW
NSW Parliament
Macquarie Street
Sydney NSW 2000

RE: Legislative Assembly Committee on Environment and Planning – Inquiry into Historical Development Consents in NSW

Dear Mr Barr,

The Urban Development Institute of Australia NSW (UDIA) is the state's leading development industry body. We represent leading participants in the industry and have more than 450 members across the entire spectrum of the industry including developers, financiers, builders, suppliers, architects, contractors, engineers, consultants, academics and state and local government bodies.

UDIA invests in evidence based research that informs our advocacy to state, federal and local government, so that development policies and critical investment are directed to where they are needed the most. Together with our members, we shape the places where people will live for generations to come and in doing so, we are city shapers. In NSW alone, the property industry creates more than $581.4 billion in flow on activity, generates around 387,000 jobs and provides around $61.7 billion in wages and salaries to workers and their families.

UDIA welcomes the opportunity to make a submission to the NSW Legislative Assembly Committee on Environment and Planning Inquiry into Historical Development Consents in NSW. In preparing a submission we have had an opportunity to canvass a number of our members who have had practical experience dealing with Historical Development Consents.

Context

The Committee's Media Release of 19 March 2024 noted that the Inquiry is concerned with what have been termed 'zombie developments' or zombie development applications ('Zombie DAs'). The term 'Zombie DA' was first coined in the context of a dispute in the Blue Mountains, over the Blue Mountains Wildlife Park, that the Blue Mountains Conservation Society Inc. labelled it in the media as the 'Zombie Croc DA'.

The issues relate to development consents granted under the *Environmental Planning and Assessment Act 1979 (EP&A Act)*, where the development was physically commenced prior to the lapsing period (typically 2 to 5 years after the consent was granted). In this situation, where physically commencement has occurred, the consent become "operational" under the provisions of the EP&A Act and will no longer lapse given the passing of time.

The UDIA has noted in our research that many of the concerns around historic consents are largely (but not always) centred on, development applications for residential subdivisions involving more than 10 hectares in coastal towns on the Far North and Far South coasts of the State.

With this context in mind, the UDIA provide the following recommendations in relation to the terms of reference.

Recommendations:

1. **That the current legal framework for these consents remains as currently drafted to ensure certainty to landholders, on the basis appropriate environmental protection and assessment are in place.**
2. **That Government Agencies accept determinations undertaken as part of the original development consents.**

Background:

NSW, unfortunately is renowned as one of the hardest states in Australia to obtain development approval and consents. It is particularly hard if the land needs to be rezoned prior to a development application being lodged. By the time a development consent has been issued, significant investment has been made by the applicant and often feasibility is the key issue precluding development being completed once consent has been obtained.

Once consent is obtained, there are often conditions of consent which must be satisfied, and further approvals required from third parties, often resulting in delayed commencement of construction.

The UDIA considers the number of development consents that are called out as 'Zombie DA' development consents are:

- Relating to a small number of consents.
- In need of re assessment and can't simply just be activated without further approvals and reassessment.
- Consents obtained without significant time lapsing since the development approval.

Development feasibility

The need for new housing is critical across NSW. This is reflected in policy interventions from all levels of government, and most notably, the Housing Accord which has set targets with 377,000 new well located homes between 2024 2029 in NSW, equating to 75,400 annually.

Market conditions, the price of land and the cost of construction have created a challenging environment for project feasibility, and the ability for industry to meet these ambitious targets. In some cases, development consents have been obtained for projects, however, start dates will inevitably be delayed until market conditions provide for financially feasible projects. In such situations, Industry has banked on the legislative environment remaining unchanged. Maintaining this certainty is critical for industry confidence, allowing projects to commence, and development approval numbers translating into constructed home for the NSW community.

Physical Commencement:

The test for whether development has 'physically commenced' is well known and understood. It is possible for a Council or a resident group to seek a declaration from the Land and Environment Court about whether the development has physically commenced. To change the definition only creates more uncertainty for the industry in a time where feasibility is already compromised.

In response to calls in 2019 to address concerns about 'Zombie DAs', the then Planning Minister, the Rob Stokes MP, lifted the threshold for what could be regarded as physical commencement to ensure that more substantial works had to be carried out to ensure a

consent would not lapse. Given this only applied to consents granted after that date, it is premature to confirm whether the new test is working.

The existing 5 year timeframe for physical commencement is appropriate. During COVID a temporary extension was granted for an additional two years. This was in recognition of the fact that commencement could be difficult in a period of lockdown, or where financing may be difficult in a period of economic uncertainty. This is a recognition that even 5 years is sometimes not adequate. However, given the length of time it has been set at this level and the general acceptance of this period, it should remain.

Existing Legislative Triggers for New Approvals:

The current provisions under S4.57 of the Act enable a development consent to be revoked or modified. This provision already exists with no new legislative power needed to deal with concerns about old development consents. Introducing new legislation to enhance this power, such that a development could cease to exist mid project, bringing considerable uncertainty to the NSW Planning System. Given existing uncertainties in the NSW Planning System, to change the status quo would seriously hamper future investment, noting that it is not unusual to spend $1 million on rezoning and DA costs (leaving aside purchase and holding costs)

Where development was approved as integrated development, the general terms of approval lapse after 3 years, so the consent holder will have to seek those approvals again, with the potential for new conditions of consent being imposed to align with new requirements. Most older development consents will need to be modified to accommodate:

- The Biodiversity Conservation Act (BCA).
- Other agency approvals.
- Meet the conditions of the consent.
- Flood levels or changed status of flood planning levels.
- External influences including customer demands.

Approved subdivisions layouts near bushland often haven't considered details such as Planning for Bushfire Protection and so must be revised by way of lodging a modification application. Modifications must consider the relevant environmental planning instruments and the consent authority has the power to impose conditions beyond

those sought by the consent holder in the modification application. The same applies to approvals needed under the Water Management Act for works within 40 metres of a creek or watercourse. A fresh assessment is to be required including appropriate and up to date riparian corridors.

Consent authorities often have objective based conditions of consent imposed on a development consent. To meet those objectives, modifications are often required because of a change in circumstances e.g. changes in flood levels.

Where a modification application is lodged, the requirements in the BCA apply where a modification will increase the impact on biodiversity values, including consideration of Serious and Irreversible Impacts (SIIs).

Regardless of whether there is an application to modify or not, there is considerable overlap between threatened species at both the NSW and national level so that where the carrying out of development will is likely to significantly effect a Matter of National Environmental Significance (MNES) Commonwealth approval under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) is required. The EPBC Act adds another layer of protection ensuring environmental impacts are reassessed if there is a significant impact on matters of national environmental significance.

Conclusion:
In summary, the legislative provisions are adequate and consent authorities have the ability through their powers to impose conditions of consent and modification applications as well as through third party approval processes to address changes in circumstances where necessary.

We would like to thank the Committee for taking the time to consider our submission. Please reach out to **Director – Infrastructure, David Petrie** at [redacted] or call via [redacted] if you would like to discuss the matters raised in our submission further.

Kind regards,

[redacted]

Stuart Ayres
Chief Executive Officer,
UDIA NSW