

**Submission
No 56**

HISTORICAL DEVELOPMENT CONSENTS IN NSW

Organisation: Blue Mountains City Council

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Blue Mountains City Council Submission to the Parliamentary Inquiry into historical development consents in NSW

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

Introduction

The community's expectations of the planning system evolve over time. In the Blue Mountains, protecting our unique natural environment and the character of our townships, has never been more important. Transparency, accountability, and the orderly development of land are key to maintaining community trust in the planning system.

Once an approved development has been 'physically commenced' the consent is considered to have been 'secured'. Once secured, a development consent can remain valid in perpetuity. This means that historical development consents are stuck at the point in time when they were approved. The resurrection and conduct of a development under a development consent that may have been granted decades ago can be a shock for local councils and communities, can conflict with contemporary expectations around environmental and character protection, and erodes all-important community trust.

On behalf of the Blue Mountains community, this Council has made numerous resolutions and representations to Ministers and relevant State agencies seeking reform in this area. Blue Mountains City Council therefore welcomes the Parliamentary Inquiry into this important matter.

In this submission, Council has identified five areas of potential reform:

1. Clarification of thresholds for the securing of development consent and formalisation of a process for the securing of consent.
2. Shortening the period in which approved development must commence and providing local government with powers to enable commenced development to be completed.
3. Providing for review and updating of historical consents as time goes by to address critical matters and ensure the operability of historical consents.
4. Improving transparency around historical development consents so that local communities know what is approved in their local area.
5. Strengthening the ability of local authorities to 'buy back' consents that are not in the public interest.

1. 'Securing' development consent

One of the key challenges that has arisen in managing several historical development consents in the Blue Mountains LGA has been the satisfactory demonstration of 'physical commencement' and consequently that the development consent has been secured and not lapsed.

Section 4.53 of the Environmental Planning and Assessment Act 1979 provides the following

(4) Development consent for—

(a) the erection of a building, or

(b) the subdivision of land, or

(c) the carrying out of a work,

does not lapse if building, engineering or construction work relating to the building, subdivision or work is physically commenced on the land to which the consent applies before the date on which the consent would otherwise lapse under this section.

In many matters dealt with by Council, demonstration of physical commencement has been tenuous. Often, the nature of the commenced work has not represented a substantial proportion of the overall development. The scope of work relied upon to demonstrate physical commencement does not serve as a commitment to completion of the work as minimal resources have been invested.

Section 96 of the Environmental Planning and Assessment Regulation 2021 defines what does not constitute physical commencement:

(1) Work is not taken to have been physically commenced merely by the doing of 1 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 will be developed.

Clearly, under the current Regulation, the requirement for physical commencement of a development is not intended to be satisfied by minor site works. However, there is no current identification of the actions or works that will constitute physical commencement. Demonstration of commencement is therefore a subjective test largely left to the developer to determine.

There is currently no formal requirement for the securing of a consent to be confirmed at the lapse date. This means that councils and local communities are left in the dark as to whether a development can proceed or not. It is only when works on site occur, complaints received and investigation by Council officers occurs that the developer is prompted to show records of physical commencement demonstrating their right to undertake the works.

This situation does not serve anyone's interests. The community gets angry, the Council must expend resources to establish facts and the developer potentially has to cease works with great uncertainty over the validity and enforceability of the development consent until the Council accepts that the consent was secured.

Further, when property owners, developers and contractors change over decades, records of physical commencement can become difficult to produce upon request. This means uncertainty for developers and often leads to difficulty in financing developments.

Council sees the current legislation as setting the bar too low for developers to establish physical commencement. Concern exists that the existing arrangements allow for developers to secure consents in perpetuity with minimal site works being undertaken, often with no intention of finalising the development. This leaves the community unclear about a future of the development site and contributes to land speculation, increased land prices and flow on impacts to housing affordability and project viability.

Council suggests a twofold approach to reform in this area:

1. Increase the test for physical commencement by the inclusion of specific indicators that demonstrate a commitment to the approved development and an intention to complete it as approved. For example:
 - a) 10% expenditure of estimated development cost thus demonstrating commitment to the project; and/or
 - b) a proportion of approved work completed (e.g. 10%); and/or
 - c) that particular elements of the development are completed, such as site preparation and footings or slab.

2. Formalise a process for confirming at the consent lapsing date that the consent has been secured. This process could involve an active confirmation of commencement by means such as:
 - a) Introduction of a new application type, perhaps by the NSW Planning Portal, allowing for developers to apply to confirm that their consent has been secured. Applications could be submitted with evidence demonstrating physical commencement before the lapse date (as per point 1 above). A Commencement Certificate could be issued by the Council (or a Principal Certifier), confirming that the development has commenced and is secured; and
 - b) Commencement Certificates should be required to be renewed every 10 years thus allowing for a review of associated conditions of consent (see below); and
 - c) Timeframe for completion of the development should also be nominated on the certificate.

2. Commencement and completion periods

Most Councils grant development consents with a 5 year commencement period, in accordance with Section 4.53 of the Act. This is pushed out to 7 years if the consent benefits from the Covid extension under Section 4.54. Council considers that this is a substantial time frame to commence minimal work on a site in order to secure a consent.

There is no onus on a developer under the Act to complete a development once that development has been physically commenced.

The original EPA Act assented to in 1979 provided shorter time frames for commencement, with extensions of 1 year permitted if good cause could be shown. The Act also provided the ability for completion dates to be set in a Notice issued by the consent authority, through provisions such as former s99, which read:

Section 99

- (1) A consent granted under this Division to a development application shall lapse –*
- (a) Unless the development the subject of that consent is commenced-*
 - (i) except as provided in subparagraph (ii) – within 2 years (or, if the consent authority so approves in accordance with subsection (3), 3 years) of the date upon which that consent becomes effective in accordance with subsection 93 (in this section referred to as “the prescribed date”); or*
 - (ii) where within one year of the prescribed date a provision of an environmental planning instrument is made having the effect of prohibiting the development – within one year of the date upon which that provision comes into force; and*

(b) where a notice referred to in subsection (5) is in force under subsection (6) – unless the development the subject of that consent is completed within the time specified in that notice.

(2) For the purposes of subsection (1)(a) –

(a) where development comprises the erection of a building or the carrying out of a work or the subdivision (involving physical work) of land (including where applicable, the subsequent use of that building when erected, that work when carried out, or that land when subdivided) – that development is commenced when building, engineering or construction work relating to that development is physically commenced on the land to which the consent applies; or

(b) where development comprises the use of any land, building or work (not being use referred to in paragraph (a)) – that development is commenced when the use of that land, building or work is actually commenced.

(3) The consent authority may approve a 3 year period for the purposes of subsection (1)(a)(i) –

(a) upon application being made in the prescribed form by the applicant or any other person entitled to act upon the consent, being an application made within 2 years of the prescribed date; and

(b) if the consent authority is satisfied that the applicant has shown good cause for the grant of the approval.

...

(5) Where development is commenced within the period specified under subsection (1) but is not completed within that period, the consent authority, at any time after the expiration of that period, may, subject to this section issue a notice requiring completion of the development within such time (not being less than 12 months from the date of service of this notice) as the consent authority considers reasonable having regard to all development circumstances including the nature of the development.

...

(10) The consent authority may extend the time stipulated in a notice issued under subsection (5)

–

(a) upon application being made in the prescribed form by the applicant or any other person entitled to act upon the consent, being an application made within the time so specified; and

(b) if the consent authority is satisfied that the applicant has shown good cause for the extension of time.

Council contends that the intent of the Act has been watered down over time and that this watering down has contributed to the existence of historical consent issues. Clearly the original Act was designed to ensure that approved developments were commenced and completed in a more defined time and manner than the current version of the Act, while still allowing for flexibility through the grant of an extension of time to the developer if ‘good cause’ was shown. There are clear benefits to reinstating these elements – the regular use of shorter lapse periods and conferring on consent authorities the power to set completion dates.

3. Review and update of historical consents

Historical consents often contain outdated requirements relating to areas such as environmental protection, bushfire construction and accessibility. As time goes by, ownership patterns and development staging can differ from that which existed, or that which was intended, when consent was granted. This results in a haphazard and disorderly uptake of the consent and a messy development process.

Additionally, multiple LEPs can come and go over the life of a development consent. This can result in permissibility issues. In some cases, an approved development may become prohibited under a new instrument. This results in a disjuncture between the historical approval, the community's expectations of what can be developed at a site and a council's ability to enforce planning controls.

It is recommended that the ability to review and update historical consents be provided at key junctures in the life of an approval, including:

1. Application to confirm that a consent has been secured by physical commencement.
2. A requirement for consent confirmation on each 10 year anniversary of the date of the Commencement Certificate.
3. Upon the submission of modification applications.
4. Upon any comprehensive LEP update.

Matters for review should be defined and limited to critical matters – elements that will ensure an operable consent and the orderly development of land. The intent would be to allow for a revisiting of conditions for currency and practicality based on progress of the development.

It is in the developer's best interests to comply with the current standards, for example fire safety and accessibility, rather than complying with the standards set by condition in a historical consent. Currently there is no mechanism to review and update these conditions.

4. Public access to information

One of the challenges Council experiences in relation to reactivation of historical consents is the community being unaware that a consent was in-force on a site that had been dormant for a long time, sometimes decades. It is currently not possible for a member of the community to easily and quickly understand what development consents remain in force and effect in their local area.

The NSW Planning Portal could easily serve this function by providing a public repository for 'in force' development consents. Importantly, the Portal should allow for easy differentiation between 'approved' development consents, which can lapse if not 'secured', and secured development consents, which remain in-force in perpetuity. In-force approvals should be able to be searched by site, ideally via a map-based platform such as the already available NSW Planning Portal spatial viewer.

This would be a boost for transparency by providing local communities a more complete understanding of what the developments that have been approved and are able to be built in their local area.

5. Ability to buy back consents

Authorities charged with upholding the public interest should be able to buy back consents considered to not be in the public interest. Currently, the powers conferred on a local authority to revoke a development consent are extremely limited.

Section 4.57 of the Act allows a council to revoke or modify a development consent, but only when a new State or local planning instrument is proposed. To take that action a council must conclude, having regard to the provisions of any proposed local environmental plan, that the approved development should not be carried out or completed. Should this power be exercised, and a consent revoked, the council concerned must compensate the party having the benefit of the consent for expenditure incurred pursuant to the consent during the period between the date on which the consent became effective and the date of service of a notice revoking the consent.

In the Council's view, the scope of this power is too narrow. The power to revoke a development consent should not be confined by the provisions of any proposed local environmental plan. A broader range of public interest and merit-based issues should be considered, including matters such as environmental outcomes and occupant safety, to enable historic consents that have not been pursued to completion and that negatively impact the environment, or are at odds with contemporary safety standards, to be revoked.

Current limitations include that the consent must not have been issued by the Land & Environment Court or the Minister. This restriction should be lifted. If a consent issued by the Court or the Minister is incompatible with contemporary expectations as set out in a new LEP, or in any other specified circumstances, then the identity of the consent authority, or of the body exercising consent authority functions, should have no bearing on the power to revoke.

Council submits that the legislation should be amended to further clarify the compensation payable to the relevant parties which a consent is revoked. That clarification should recognise the public interest and impose some financial consequence for parties who do not act on consents in a timely manner to bring an approved development to completion.

The decision to revoke a consent may currently be appealed to the Land & Environment Court. This leaves local authorities looking to revoke historical consents with little clarity regarding the final costs associated with such action. To assist, the scope of appeal rights should also be clarified and limited.