

**Submission
No 61**

HISTORICAL DEVELOPMENT CONSENTS IN NSW

Organisation: Camden Council

Date Received: 3 June 2024

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3 June 2024

Mr Clayton Barr MP
Committee on Environment and Planning
NSW Parliament
6 Macquarie Street
SYDNEY NSW 2000

Dear Mr Barr

RE: PARLIAMENTARY INQUIRY INTO HISTORICAL DEVELOPMENT CONSENTS IN NSW

I am writing to you regarding the NSW Legislative Assembly Committee on Environment and Planning inquiry into historical development consents in NSW. Please note that this submission, whilst prepared by Council officers, is not formally endorsed via a resolution of Council.

The below information, that follows the headings in the terms of reference, is provided to assist the Committee conducting the inquiry:

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

As the Committee would be aware, the legal position as to what is required to prevent a consent from lapsing has changed over time. Currently Section 4.53(4) of the Environmental Planning and Assessment (EP&A) Act 1979 prescribes that:

(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.

Importantly, from 15 May 2020, the inclusion of Section 96 of the Environmental Planning and Assessment (EP&A) Regulation 2021 provides additional direction as to what constitutes physical commencement. Section 96 of the EP&A Regulation 2021 prescribes that:

(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.*

While this new regulation is beneficial in defining physical commencement, it does not apply to development consents granted before 15 May 2020. Furthermore, the matters excluded from constituting physical commencement are not exhaustive and a person acting on a consent is still only required to carry out relatively minor preparatory works to prevent the consent from lapsing.

The current threshold that works be '*physically commenced*' is not considered sufficient to prevent a consent from lapsing in perpetuity. It is considered that the threshold should be heightened to '*substantially commenced*' and that the EPA Regulations should provide clarity as to what constitutes '*substantial commencement*'. Alternatively, if the current threshold of physical commencement is maintained, there should be sunset provisions that ensure works continue after the initial physical commencement.

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

What constitutes physical commencement has been the subject of numerous court cases. Prior to 15 May 2020, minor preparatory works (such as survey work) were sufficient to meet the 'physically commenced' test. While Section 96 of the EP&A Regulation provides greater direction/clarity as to what constitutes physical commencement, it does not remedy the issue of 'zombie developments'. Even under the current standards a person acting on a consent is only required to carry out relatively minor preparatory works to prevent a consent from lapsing and such works are often not perceptible to the casual (or even trained) observer.

Consent authorities, neighbours and interested persons are often not aware of the existence of a 'zombie development' until an owner looks to re-enact an approval. Given the legal position has changed over time, it is often difficult for a consent authority to be satisfied that a consent has been physically commenced. It can also be difficult to explain to the casual/untrained observer that minor preparatory works (such as survey work) is/was sufficient to meet the 'physical commencement' test. As these minor preparatory works were completed a number of years earlier, there is often no physical evidence that they occurred at all, further diminishing the notion that the consent was 'physically commenced'.

'Zombie developments' often don't comply with current planning laws and can result in adverse impacts for the natural and built environment. These developments can also result in unreasonable amenity impacts for residents of adjoining and surrounding developments.

(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.

As noted above the principal barrier to addressing historical development consents is that consent authorities, neighbours and interested persons are often not aware of the existence of a 'zombie development' until an owner looks to re-enact an approval.

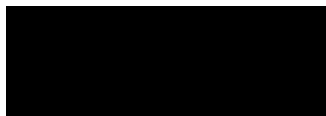
Once aware of the existence of an historical development consent, there are limited options to remedy any substandard outcomes. Section 4.57 of the Environmental Planning and Assessment Act allows a council (or the Planning Secretary) to revoke or modify a development consent. However Section 4.57 can only be enacted when having regard to the provisions of any proposed local environmental plan or State environmental planning policy. Furthermore, if a development consent is revoked or modified the person aggrieved by the action is entitled to seek compensation *"for expenditure incurred pursuant to the consent during the period between the date on which the consent becomes effective and the date of service of the notice under subsection (3) which expenditure is rendered abortive by the revocation or modification of that consent"*. Given the person aggrieved by the action is entitled to seek compensation this is not a power that is often utilised by consent authorities.

(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.

As suggested above it is considered that the current threshold of 'physically commenced' should be raised to 'substantial commencement'. This would ensure that persons acting on a consent were not simply carrying out minor preparatory works to prevent a consent from lapsing. Alternatively, if the current threshold of physical commencement is maintained, there should be sunset provisions that ensure works continue after the initial physical commencement.

I trust the above will assist the inquiry however should you require any further information please contact myself on [REDACTED] or [REDACTED] or alternatively Jamie Erken, Manager Statutory Planning on [REDACTED] or [REDACTED]

Yours sincerely,

A large black rectangular box redacting the signature of Nicole Magurren.

Nicole Magurren
DIRECTOR PLANNING AND ENVIRONMENT



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