Submission No 62

HISTORICAL DEVELOPMENT CONSENTS IN NSW

Organisation: Clarence Valley Conservation Coalition Inc

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Clarence Valley Conservation Coalition inc

PO Box 1015 Grafton NSW 2460
clarencevcc@gmail.com
www.clarencevalleycc.blogspot.com.au

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Legislative Assembly Committee on Environment and Planning
NSW Parliament
Macquarie Street
Sydney NSW 2000

By webform at: https://www.parliament.nsw.gov.au/committees/inquiries/Pages/lodge-a-submission.aspx?pk=3037

Inquiry into historical development consents in NSW

The Clarence Valley Conservation Coalition (CVCC) is a community group based in the Clarence Valley in the NSW Northern Rivers. Formed in 1988, the CVCC has been involved with environmental issues – both locally and beyond – since that time. It has had a long-term interest in the conservation of biodiversity, climate change, waste management, the water cycle and protecting the environment of our local area and further afield.

The CVCC has maintained a close interest in developments proposed for areas of native vegetation, in coastal areas and on our floodplain, an interest that has expanded over recent decades due to concerns regarding the climate emergency.

We welcome the opportunity to provide input to the inquiry into Historical development consents (also known as 'zombie developments') in NSW. In this submission, the CVCC provides comments on the Inquiry's terms of reference as follows:

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

The CVCC understands that section 4.53 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) provides that, if a development has not physically commenced within a certain period of time (previously 5 years, now 2 years) the development consent is deemed to be no longer valid.

The use of the term 'physically commenced' (as opposed to 'substantially commenced' which is used in other Australian jurisdictions) has provided a huge loophole that has given life to DAs that may be decades old but still considered valid just because a sign was installed, or some soil testing was carried out.

The CVCC is aware that, under appeal, development consent for the original Rise development at South West Rocks was found to be still valid despite the fact that the only activity undertaken as part of that development was testing for acid sulphate soils. However, it became immediately clear that the only part of that development consent Rise intended to use was the ability to clear all vegetation on the land. Once the site was cleared, a new concept development application was lodged for a completely new development. That new development was no longer constrained by the presence of any native vegetation and so did not trigger the need for a biodiversity development assessment report and entry into the biodiversity offsets scheme.

The CVCC understands that the Environmental Planning and Assessment Regulation 2000 was amended in May 2020 to prevent exactly this situation by excluding minor investigative or survey work from being evidence that work had 'physically commenced'. But we remain puzzled why that clause (now clause 96 of the EP&A Regulation 2021) specifies that these limitations would not apply to development consents granted before May 2020.

As the Rise development case proves, the current loophole was exploited to enable a new development – not to allow a previously approved development to be completed.

The CVCC recommends that this loophole be eliminated through amendment to the EP&A Regulation 2021 by removing clause 96(2). The definition of 'physically commenced' must be tightened for all development consents, irrespective of the date of approval.

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

The wording of this term of reference is curious. The CVCC would contend that, as the courts have demonstrated time and time again, lawfully commenced development consent currently experience no uncertainty in terms of whether the development may be completed as approved over whatever timeframe the developer wants.

The CVCC suggests that greater uncertainty would be appropriate and should be introduced through legislative reforms. For example, we consider that after a certain period of time (e.g. 5 or 7 years), the development consent should be suspended (not cancelled) until further assessment is carried out in line with current requirements. These further assessments should focus on how the constraints on the development site should be addressed under the contemporary regulatory framework and would consider:

- threatened species – what species present on the site have been listed as threatened in the past 5–7 years or are now known to be present? What offsets would be required for the loss of threatened species or their habitat?
- endangered ecological communities – what is the status of any native vegetation that still exists on the site and is proposed to be cleared? What offsets would be required for that?
- coastal wetlands, littoral rainforests and their proximity zones
- Aboriginal cultural heritage – are there any new records in AHIMS or new locational information relating to existing known sites?
- bushfire risk – what changes may be required to meet standards of the current version of *Planning for Bushfire Protection*?
- flood-prone lands – has new modelling of flood risk identified floodways or the need for new residential buildings to have a higher minimum floor height?
- sea level rise and other coastal hazards – will public infrastructure (e.g. roads, and stormwater management and sewerage systems) be impacted and require modification?

The CVCC recommends new provisions that suspends all development consents (including historic consents) every 5–7 years until a contemporary environmental impact assessment of the remaining part of the yet-to-be completed parts of the development is carried out and considered by the consent authority for potential modification to the consent.

(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 far as the CVCC can tell, it is the implementation of the EP&A Act and EP&A Regulation by consent authorities that provide barriers to effectively addressing historical development consents. Section 4.57 of the EP&A Act gives the Planning Secretary or a council the power to revoke or modify a development consent but only if the development is not consistent with a proposed environmental planning instrument. Further, the developer is entitled to recover compensation.

Even when the circumstances of section 4.57 exist, this power is rarely or ever enforced.

For example, in 1997, *State Environmental Planning Policy* (SEPP) *No 50 – Canal Estate Development* prohibited future canal development in New South Wales, consistent with an election commitment made by the incoming Carr Government in 1995. It is therefore surprising that a canal estate in Yamba is still under development. No effort was made over the past quarter century to revoke or modify the development consent for Yamba Quays. The 1998 aerial photos show little physical development had occurred in Yamba Quays by that date.

While the legislation flags that compensation is payable, it also states that this is limited to the expenditure incurred between the date on which the consent became effective and the date of which the revocation or modification is notified. It isn't compensation for potential lost income from the sale of the development or lost property value. It is therefore puzzling why this power is not more widely used to cancel zombie developments if little or no physical work has been done on the property.

The CVCC believes the circumstances under which section 4.57 powers may be exercised should be widened. It should not depend on the existence of a proposed amendment to the local environmental plan or a proposed SEPP. This power should be able to be exercised if new information comes to hand regarding the development site which brings into question its suitability for development.

There may be considerable public benefit in revoking or modifying a zombie development. Wetlands and floodways, previously disregarded as 'rubbish land', can have their hydrological function preserved, protecting other housing and public infrastructure from floods. Newly discovered populations of threatened species can be protected, enhancing survival prospects for the species and biodiversity outcomes. Lands at risk of floods or coastal erosion can be left undeveloped, meaning that there will not be a requirement for the NSW Government to compensate landowners whose properties are destroyed by these natural disasters.

The CVCC recommends legislative change to remove the requirement for the revocation/modification power to be exercised by a consent authority only after having regard to a proposed environmental planning instrument.

The CVCC also recommends that Planning NSW provides clearer guidance on when revocation or modification by a consent authority can occur, and how to calculate the compensation the developer is entitled to claim.

(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.

The CVCC understands incomplete developments are posing an increasing headache for councils and landowners, as developers and building companies are failing in the face of increasing costs. We are not aware of what options are currently available to councils to require completion or demolition of the partially built structure. It is presumed a costly process involving court orders for demolition or completion (similar to what exists in Western Australia) may exist but makes no comment on those. The CVCC believes that the above recommendations for legislative changes regarding suspension of development consents (Point (b)) and revocation/modification of development consents (Point (c)) would assist in this regard.

(e) Any other matters.

It is often impossible to find information on historic development consents. The planning portal and online DA trackers are relatively recent creations. Some of the zombie developments that exist in the Clarence Valley were approved before the current Clarence Valley Council was formed in 2004 and the relevant files from the previous councils (Maclean, Copmanhurst, Grafton City, Pristine Waters, Nymboida or Ulmarra Shires) are not readily available even to current planning staff employed by Clarence Valley Council. This makes it nearly impossible to determine what historic developments may still be valid and may be re-activated.

In conclusion, the CVCC highlights the fact that the conditions of consent for zombie developments do not comply with current community expectations with respect to the wide range of environmental factors. Their completion based on these outdated conditions is not desirable from a social, cultural or ecological point of view.

We request the Inquiry to make strong recommendations to resolve this matter and prevent future zombie developments.

Leonie Blain
Hon Secretary