Submission No 70

HISTORICAL DEVELOPMENT CONSENTS IN NSW

Organisation: Better Planning Network Inc

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NSW Legislative Assembly

Committee on Environment and Planning

Submission: Inquiry into Historical development consents in NSW

About BPN

Better Planning Network (BPN) is a state-wide, volunteer-based, not-for-profit incorporated community organisation. Established in 2012, our aim is for a robust and visionary planning system for NSW – one that fosters best practice environmental, heritage, social sustainability and design outcomes.

The problems (terms of reference (a) (b) & (c))

In too many cases, no work is undertaken on approved Development Applications (DAs) for significant periods of time after approval. While there can be genuine and legitimate reasons (most commonly failure to obtain the necessary finance and changes in personal or business circumstances) failure to commence or complete approved works can also be just for financial convenience, in expectation of greater returns in the future (land-banking).

The low threshold for 'physical commencement' compounds the problem. While changes to the Regulations in 2020 disqualified some specific minor works[1] from being accepted as substantial commencement (but only for DAs post May 2020), it remains the case that relatively minor work on a site within five years of approval can have the effect of extending the approval indefinitely.

Many DAs therefore sit 'unused' for long periods of time, and neighbours and local communities can be surprised to find development commencing on a site which few if any people 'remembers' as having consent in the distant past. For this reason, such historical consents are popularly, and appropriately, known as 'zombie DAs'.

After even a few years:

- there will usually have been significant turnover in the resident population, so many people will not have been able to have their say about the DA when it was approved.
- the legal requirements for developments are likely to have changed, both in terms of assessment criteria, building standards, and other controls (e.g. in Local Environmental Plans (LEPs) and Development Control Plans (DCPs). This means that developments are able to go ahead with lower standards than would now apply.

[1] Fortunately 'removing vegetation' is one of the works which for post 2020 DAs is no longer accepted as 'physical commencement', which means that there is no longer an incentive for landowners to clear sites within 5 years even where they are not ready to start work, simply to extent the life of the approval. This may save much vegetation, at least in the short term.

- relevant circumstances will have changed – at the very least the general effects of climate change, but also specific changes to e.g. biodiversity concerns, changes to the classification of ecological communities, flora and fauna species as vulnerable, threatened or endangered, and changes to the neighbouring environment e.g. other clearing and development, increased traffic, vulnerability to flooding or coastal inundation etc.

Without a requirement at least for updated environmental, social and economic impact assessments, developments are able to proceed which would no longer be acceptable.

Examples

Many of BPN's member groups have specific examples of 'zombie' DAs and their adverse impacts, and the Committee will have received submissions explaining many of these examples. We have not included them in this submission, which addresses the overall problem.

Solutions (terms of reference (d))

It would clearly not be reasonable or practicable to require proponents to start work immediately after receiving development approval, but under the current regime approval last far too long and are too easily extended indefinitely, contrary to the public interest as expressed in the objectives of the Environmental Planning and Assessment Act 1979 (EP&A Act)

There are two obvious major reforms that would address the problems identified above.

'Use it or lose it' – Landowners and others holding approvals for development should have to substantially commence the approved works within a more limited time period, after which the approval should lapse, unless a genuine start has been made, with a reasonable prospect of completion within another relatively short period. We submit that a period of 2 or at most 3 years would be appropriate both for commencement and for subsequent completion.

A higher threshold for 'physical commencement' as grounds for extending the life of development consent.

Another desirable change would be to give consent authorities the power to revoke or modify development consents, and their conditions, where there has been a material change to relevant environmental circumstances, or to relevant environmental and planning controls and standards.

Relevant experience elsewhere

We understand that other jurisdictions have different regimes which incentivise commencement and completion of approved developments. We hope that the Committee will seek out evidence of laws, policies and practices elsewhere that could be adopted or modified to address the obvious problem of 'zombie' developments in NSW.

Moratorium on certain coastal development (term of reference (e))

We support the NSW Nature Conservation Council (NCC) petition calling for a moratorium on coastal developments approved before 2016 on land containing or adjacent to endangered or threatened ecological communities or habitat of endangered or vulnerable fauna species. Such moratorium to be at least until the completion of this Inquiry and until a review has been undertaken of the impact of predicted sea level rise on any such approved developments not yet commenced.

Benefits and Costs (term of reference (c))

We submit that there would be significant benefits to the community of the changes we have suggested to address the issue of 'zombie DAs'. The changes would help to restore some of the faith in the planning system that has been lost due to unexpected and unwelcome impact of developments approved in the past but not acted upon.

There would be no direct cost to taxpayers of the changes, other than the minor administrative costs of statutory amendments.

We have no objection to this submission being made public, in full and unredacted.

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