Submission No 71

HISTORICAL DEVELOPMENT CONSENTS IN NSW

Organisation: Rise Projects Pty Ltd

Date Received: 3 June 2024

3 June 2024

RISE PROJECTS

Legislative Assembly Committee on Environment and Planning
Parliament of New South Wales
By email: environmentplanning@parliament.nsw.gov.au

Dear Committee Chair,

RE: Inquiry into Historical Development Consents in NSW

Rise Projects thanks the legislative assembly for the invitation to provide feedback on historical development consents. We have referred to the Committee's Terms of Reference in the drafting of this letter, however we believe that our submission will be clearer if written in terms of our direct experiences, as outlined below.

Rise Projects 'The Rocks' Development – Phillip Drive, South West Rocks

Our project is located on a five-hectare site located at Phillip Drive, South West Rocks. The project is now under construction, but when purchased was open terrain with scattered trees, and was considered 'managed land' – with vegetation being slashed by the vendor several times per year to maintain minimal vegetation loads and protect adjacent houses from bushfire.

Local environmental activists have tried to characterize the site as being pristine koala habitat, however it is difficult to reconcile that with the site having been almost wholly open grasses and scrub. Expert koala surveys failed to find any present or past evidence of koalas. There was no evidence of scats, nor long-term evidence such as koala scratchings on tree trunks. There were only 13 koala food trees over five hectares of land, which indicated that the activists' claims were disingenuous. Activists have also tried to claim the site is prone to sea level rise – had that been true it would have been unfortunate for the existing town, many areas of which are at lower elevations than the subject site and closer to the coast.

Rise purchased the site from a vendor who had obtained a historical development consent in 1993. The consent was an approval for a resort including 180 units (6 x 4 bed, 87 x 2 bed, and 59 x 1 bed units), together with a complex comprising shops, bar areas, conference auditoriums, restaurant and dining areas. The buildings approved on the site in 1993 were in the four and five storey height range. The present-day site has no height limit, is zoned medium density residential, and is scheduled in the Local Environment Plan for substantial additional uses including tourism, residential flat buildings, and food and beverage uses.

Rise had multiple positive meetings with Council officers in 2021 about the development of the site by means of a new current day medium density development consent. Rise originally proposed townhouses, and then incorporated medium density apartments given supportive feedback from Council officers. These positive conversations progressed into detailed discussions, for example how the mid-rise apartments and the landscaped surroundings should interact for good amenity for residents, demonstrating that the new medium density consent was certainly something that Council officers were putting their minds to in detail. The one key requirement that Council maintained, was that the development should not be able to be seen from the foreshore, which Rise was happy to comply with. It is noteworthy that Council's officers floated the idea of using the 1993 consent to clear the site during the productive 2021 meetings. [redacted]

Unfortunately those positive initial conversations changed rapidly due to a change of elected Councillors following the 2021 local government elections. The previous supportive comments from planning staff switched over to distant silence, and it was apparent that the newly elected Council opposed the proposed development. Every person in government that we've since spoken to says that's not how it's supposed to work, and that the Council officers work in isolation to the elected Councillors. That's a nice ideal, but it's simply not how things work in practice, particularly in regional Councils.

Rise lodged our new DA in April 2022, designed to comply with all modern environmental planning requirements. However given that Rise were confronted with strong opposition from the new post-2021 Council, we also chose to confirm the existing development rights under the 1993 DA as a backup plan. Rise offered to Council on multiple occasions that we would surrender any legal proceedings and the 1993 consent, if Council would expediently assess and determine the current-day DA, however Council would not engage with our offers. Council elected to simply not assess our DA during a period of time from October 2022 until April 2023 – over six months. The thing that prompted Council to restart the assessment was in March 2022 we succeeded in having the Land & Environment Court declare our 1993 consent as being valid and operative. At that point Council

decided to work with us once again, and restart assessment of our present-day DA, which we believe was intended to avoid us proceeding with the 1993 approval. Rise wonder how long Council would have continued to stall the project if the historical development consent had not been confirmed.

The NSW Planning System

Rise Projects have had consistently good experiences during planning process interactions with NSW Government agencies. We have found that agency assessments of applications and referrals have been consistently diligent, timely and clear. This reliable and responsible agency conduct provides confidence and clarity to the development sector and allows developers as private entities to have a clear understanding of requirements involved with proceeding with projects, with the end result being cheaper, faster delivery of housing for the people of NSW.

However, having dealt with councils across NSW and QLD, Rise have found that many NSW Councils lack the effective scale and institutional knowledge to assess and determine DAs in an efficient manner. We've found that they are regularly understaffed, and often the staff who are present are not familiar with their responsibilities or the appropriate processes. Even when staff are available and familiar with their responsibilities, often only one staff member works on a particular function, so if they go on a trip for two months, that Council function stops for two months.

We have found that Councils are regularly reactive to the vocal 'NIMBY' activist groups that seek to prevent new housing development. There is a widespread lack of institutional confidence that means that the easiest route through Councils' collective daily workload is to 'be a small target' and make inoffensive decisions, or defer decisions entirely, which becomes a compounding roadblock. We do recognise the difficulties of processing substantial development proposals for smaller regional Council's, as the pressure and volume of opposition from activist groups is louder than in the cities. The assessment costs are also very substantial, particularly when consultants, expert advisors, and legal staff are required for assessment matters.

NSW planning legislation and regulation outlines development assessment timelines, but in practice for many contentious proposals, there is no genuine or impartial Council assessment, and recourse to the Land & Environment Court is a foregone conclusion. This has become a vicious cycle in NSW, and clearly the planning system is showing institutional dysfunction when an entire sector of the economy is being deferred to the legal system to be decided. The LEC itself is now being overloaded as it becomes the 'business as usual' consent authority for timely and impartial development approvals.

As a developer, taking proposals to court is not our preference. It is costly and time consuming. However Councils recognise the value of delay and uncertainty as a tool to be used against developers, and instead of facilitating proposals, they deliberately try to 'wait them out or catch them out'. The time and cost of court is a lesser evil given it provides certainty and impartiality to the assessment process.

The costs of uncertainty and delay in the NSW development assessment system must be recognised. Wasted time in the assessment process adds cost to projects and results in a higher price for the delivery of homes to the people that need them. Higher forecast costs to allow for chronic assessment delays mean lower financial buffers, and projects that don't have enough financial buffer are deferred. Deferred projects mean less supply of homes for NSW residents. These aren't examples of developers being opportunistic, these are symptoms of a system with too much 'sovereign risk', where proponents need to work around the obstacles and risks that the system pits against them.

The Hon Rose Jackson, Housing Minister, has spoken at length in public forums at her exasperation in the face of the Council obstacles that the NSW Government faces in its efforts to deliver public housing. If the NSW Government can't navigate the system effectively, how can private developers?

Matters for the Committee to Consider

If Councils can refuse and limit housing as they wish and face no penalty from the NSW Government, it is clear they have no 'skin in the game'. Councils control the planning outcomes, but they currently don't make the decisions in the interests of our wider society, only in their own narrow institutional interest, which is often captured by local political interests and vocal activist groups. Councils limit development approvals because they have the obvious disincentive of NIMBY opposition, but they also limit development approvals as the additional population demand strains their finances and resources, without an adequate accompanying revenue increase.

The NSW Government needs to change the balance of incentives, and make Councils compete for new housing. Councils that boom in population should boom in funding, and those that shirk their housing responsibilities should be penalised.

The Committee needs to ask broader questions, with revised terms of reference if necessary:

- Does NSW need the full duplication of 128 separate government organisations to manage their development assessment processes? Do this many entities at such small scale have the processes and experience to effectively fulfil their roles? Do they have enough staff to do this? Are they following the appropriate processes, and conducting assessments impartially?
- Is the current local government cost structure sustainable, when Councils are regularly trying to follow special application processes to raise rates; are largely reliant on state government grants; and are cutting their existing services? Does evidence suggest Councils have the adequate financial incentive to deliver more housing, or not?
- Does this current development assessment system provide the best outcomes for the people of NSW? Does this efficiently deliver homes for the people of NSW during a housing crisis? Or is this a major cause for the current crisis?
- Given chronic Council planner shortages, why can't a larger proportion of development applications be assessed by the NSW Government, while maintaining substantial input from the local Councils?
- If applications are not assessed in an adequate amount of time, why can't the planning system automatically shift them over to regionally-based NSW Government assessment teams, to give more certainty?
- Why can't the development assessment process have a degree of separation built into it, particularly in regional areas with small Councils and vocal interest groups?

There will be high costs if the NSW government is to act directly to limit historical consents, given the effects on existing property rights. Many developers and landowners would seize the opportunity to obtain new current-day consents, with all the flexibility and benefits that they provide. However the development assessment process is too onerous to willingly confront, and so proponents would prefer to work with the approvals they already have in hand.

If the Committee is seeking a pathway to address historical development consents, the clearest pathway forward is to fix the structural issues in the NSW planning system that prevent new development proposals being assessed in a timely and impartial manner. This is a fundamental issue that has worsened in NSW in recent years, now at crisis point. NSW can be readily compared with other Australian states which have simpler, cheaper, faster planning systems. The recent downtrend in development volume comes as developers leave the industry due to the current risks. Development assessment is now considered by financiers to be a more uncertain, higher risk than cost inflation and contractor insolvency. The only thing that can prevent the NSW Government from fixing this is inertia, but we believe this committee has the opportunity to make real change for NSW. We welcome the opportunity to speak at the hearing.

Regards

Daniel Pszczonka

Director

Rise Projects