

**Submission
No 78**

HISTORICAL DEVELOPMENT CONSENTS IN NSW

Organisation: Hornsby Shire Council

Date Received: 3 June 2024



3 June 2024

The Hon. Clayton Barr, MP
Chair, Committee on Environment and Planning
Parliament House
Macquarie Street
Sydney NSW 2000

Via submission portal

Dear Chair,

Submission - NSW Parliamentary Inquiry into Historical Consents in NSW

Thank you for the opportunity to make a submission to the Parliamentary Inquiry into Historical Consents in NSW.

This submission addresses the terms of reference relevant to Council's experience. Please note the comments contained in this letter are officer-level comments only as the matter has not been reported to the elected Council for a formal view or resolution.

Physical Commencement

An issue for councils in managing development consents is the satisfactory demonstration of 'physical commencement' and confirmation the consent has not lapsed in accordance with section 4.53(4) of the *Environmental Planning and Assessment Act 1979*.

Current legislation allows a developer to secure consents in perpetuity with minimal site works and the *Regulation* does not identify the actions and/or works needed to constitute physical commencement. Furthermore, where works have not been completed, legislation does not include a process to confirm physical commencement with the relevant council prior to lapsing of the consent.

As a result, there may be uncertainty for the council, developer, and community as to the likely development outcomes for a site and associated timeframes. In most circumstances, historical consents come to the attention of council in response to complaints from members of the community. Often residents are unaware of a consent when works recommence or seek confirmation of the status of an approval where uncertainty may negatively impact their own property when seeking to sell. Council officers initially request evidence of physical commencement to support the ability of the developer to continue works.

In accordance with Section 4.53 of the Act, Hornsby Council grants most development consents with a 5-year commencement period, providing an appropriate timeframe to commence work. However, there is no legislative requirement for a developer to complete a development once physically commenced. As a development consent belongs to the land, when property owners, developers and contractors change, records of physical commencement may become difficult to produce, resulting in uncertainty for developers. This in turn may impact the viability of the development and obtaining finance to complete the works.

To address these issues, consideration should be given to formalising a process to confirm a consent has not lapsed with the relevant council including specific requirements to demonstrate physical commencement.

Outdated Requirements of Consents

Over time, legislative requirements change in response to factors including community expectations, technological advancements, environmental conditions, and economic considerations. For example, older consents may contain outdated requirements relating to environmental protection, building sustainability, bushfire construction and accessibility. Changes to environmental planning instrument can also result in permissibility issues, whereby an approved development may be prohibited under a new instrument.

Development sites left vacant in commercial centres can also impact adjacent sites or reduce economic activity in a centre. This may occur where a developer experiences financial difficulty as a result of unforeseen increases in construction costs. Alternatively, developers may “land bank” sites, speculating on increased prices for commercial and residential or uplift in the zoning or development potential of an area.

Consideration should be given to a process to require a landowner to seek a review and update of a historical consent to ensure the orderly development of land and compliance with current legislation as currently there is no mechanism to review and update conditions.

Development Contributions

Council's assessment process generally includes conditioning relevant consents to require the payment of any applicable development contribution prior to the issue of the construction certificate. However, this has not always been the practice of Council and older consents may have been conditioned to require payment of contributions prior to occupation.

Historical consents are problematic for councils in both in terms of the administrative process for ensuring that relevant contributions are paid and also planning for the provision of infrastructure to meet future demand where completion of developments is uncertain. A process to require a review of conditions, including payment of contributions, would be appropriate to ensure the receipt of funds and infrastructure projects under the relevant council delivery programs are coordinated.

Legal Action

Council powers to revoke a development consent are limited and the costs involved uncertain. The decision to revoke a consent may be appealed to the NSW Land & Environment Court and financial implications of this process including any compensation that may be required to be paid makes this option unattractive for councils. To provide greater certainty for both councils and developers, the scope of appeal rights and compensation payable should be clarified.

Thank you for the opportunity to make a submission to the Parliamentary Inquiry. Should you wish to discuss Council's submission as part of the inquiry process, please do not hesitate to contact me on [REDACTED] or [REDACTED] or Council's Director, Planning and Compliance, Mr James Farrington on [REDACTED]
[REDACTED]

Yours sincerely

[REDACTED]
Steven Head
General Manager