Submission No 76

HISTORICAL DEVELOPMENT CONSENTS IN NSW

Organisation: Urban Taskforce Australia

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Urban Taskforce
AUSTRALIA

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Mr Clayton Barr MP
Chair
Legislative Assembly Committee on Environment and Planning
Parliament House
Macquarie St
SYDNEY NSW 2000

Submitted via email

Dear Mr Barr

Inquiry into historical development consents in NSW

I write in relation to your committee's inquiry and will address the issue of development consent as it impacts the industrial, commercial and residential development industry in NSW.

Property rights are a key cornerstone to the legal, economic and democratic underpinning of the nation.

As the former Chief Justice of the High Court of Australia, Robert French AC said in a speech:

> *"… Property rights and interests are valued and protected in the legal tradition of the common law, which is part of the Australian legal tradition. They are also protected to varying degrees by statute law, limiting the purposes for which property can be affected by planning decisions, and providing compensation for compulsory acquisition and injurious affection…"*[1]

Any move to erode property rights must be treated with the utmost caution by Government.

Arbitrary changes impacting such rights are a direct affront to these rights and must be backed by comprehensive and actionable data insights, rather than an oversimplified notion that there is a 'problem' out there.

Risk and time kill development

A corollary of property rights and interests is the need for certainty in the property development industry. It is of fundamental importance that there is certainty

[1] Chief Justice Robert French AC, Property, Planning and Human Rights, PIA National Congress, 25 March 2013

around consents issued under the *Environmental Planning and Assessment Act 1979* (the Act).

Governments need to be conscious of developer costs. More often than not, it is blithely assumed that risks and delay is part and parcel of the NSW development system, and that developers must simply factor in these aspects as part of their business.

A key contributor to the current crisis in housing supply is the uncertainty and commensurate risk imposed by the planning system.

The NSW Productivity Commission's review into the Planning System in 2021 concluded that NSW is the slowest planning system in the nation going on to say that approvals take more than twice as long than the next slowest state. [2]

Delays by under resourced councils, endless requests for further information (RFIs), delays from pertinent agencies like TfNSW and SES to which development application are referred, all add to already long application processing times.

Time is a critical factor for developers, and delays in development mean that the developer must wear an array of costs whilst there is no return being received from the initial investment.

Developers by their very nature take on risk. Market risk and construction risk are ever present.

A critical part of the housing supply crisis has been the increasing risk around planning. Increasing uncertainty around planning pathways has added time, cost and risk to the development of housing. This impacts feasibility of development and threatens the ability of developers to secure finance on acceptable terms.

DA consents can be attained with market conditions, with The Market changing character soon after. Changes in interest rates, supply shocks that impact construction and labour costs, insolvencies are all matters that have negatively impacted the development and construction industry in recent years.

The time taken to secure a planning approval is, as noted above, the worst in NSW for all categories of DA application. During this time, market conditions often change. Further, the planning assessment process often results in DA consents which deliver a significantly lower yield than that applied for. No bank will lend money for construction if proceeding with the DA does not achieve the minimum profit margin required by the bank and any presale requirements have not been achieved.

[2] NSW Productivity Commission, White Paper, Rebooting the Economy, p.288

This is not "land banking", as those often opposed to housing label it. This is a financial reality.

It is critical to address the misconception that 'land banking' of development consents is a prevalent practice within our industry. In reality, the economic climate, especially post-COVID, with its unprecedented rise in interest rates, imposes significant costs on holding under-utilised land.

The primary impediment to initiating development projects is their current economic non-viability. Development decisions are fundamentally driven by financial feasibility rather than speculative 'land banking'.

Introducing punitive measures based on this misconception would not only be misguided but could exacerbate existing housing supply challenges.

To add the prospect of sovereign risk to the picture, where the State could essentially wipe a consent issued under the EP&A Act would be a dramatic step backwards which would increase the risk profile of development in NSW. This would particularly be the case under a "use it or lose it" scenario. This would create unwelcome disruption in the financing of development, already under strain in an environment of rising interest rates and costs of construction. Adding more risk and uncertainty in a fragile nature of development financing must be avoided at all costs.

Urban Taskforce members would be extremely concerned if the Government sought to unilaterally remove or dilute consents issued under State legislation.

Any risk associated with the status of approvals under the Act could have a deleterious effect on private property rights and confidence in the NSW planning system. Such risk also adds uncertainty to land valuations that are relied upon by the banks to underpin financing to landowners and developers. Risk around financing is a significant threat to the delivery of housing.

Once a construction certificate is secured, it is reasonable to assume there is a demonstrable intention to convert the consent and commencement to completion. What is occurring in the property development market are shocks, both exogenous and indigenous, that are creating waves through the development industry and causing in many cases once viable projects to be unviable in the short term.

With the exception of safety issues, there is a fundamental need to ensure that a development approval and the conditions imposed through the Construction Certificate are secure and respected.

Recommendation 1: the committee iterate the fundamental importance of private property rights and interests to the economic and legal underpinnings of the Australian economy

Recommendation 2: the committee notes the negative consequences of removing or weakening approvals secured through the *Environment Planning and Assessment Act 1979.*

Recommendation 3: the committee recommend that the current provisions around activating development consents are appropriate and achieve the right balance considering the risk and variable circumstances affecting commercial, industrial and residential development

Unintended impacts of changes to the current regulatory framework

Given the current challenges when it comes to housing supply, the complexities of the property development industry and the interaction of an array of economic, financial, social and demographic factors on its operation, Governments must adopt a cautious approach to making changes to the regulatory environment.

Urban Taskforce strongly maintains that the 5-year timeframe for physical commencement is appropriate, particularly for the large complex developments undertaken by our members. Equally, the conditions that need to be met to meet physical commencement are appropriate.

The experience of Urban Taskforce members is that development projects often do not commence until several years after obtaining consents, dictated by varying market conditions.

Any government action that increases the difficulty of initiating development consents, shortens the activation period, or allows for the unilateral revocation of undeveloped consents would be counterproductive.

Forcing developers to restart the lengthy approval process would likely result in fewer housing projects, detrimentally affecting the availability of new housing in NSW.

Recognizing the complexities, costs and difficulties associated with project initiation and development cycles, is essential for fostering rather than stifling growth in housing supply.

Any changes here could prove disastrous for the provision of housing and job creating developments and the existing provisions must remain in place.

Recommendation 4: the committee notes that the 5-year physical commencement requirements are appropriate and should not be reduced, and the conditions required to demonstrate physical commencement are equally appropriate and should not be made more onerous

Scoping the issue – how serious is it?

Urban Taskforce is unaware of significant problems attached to some very old historic consents affecting the development of housing. The development industry is very time sensitive, and the need to convert approvals into product is a constant pressure. Holding costs, particularly in markets like Sydney, are extremely high and the pressures to develop are such that the current policy settings provide a sufficient level of balance between progress towards development and the need to ensure that the development as approved is feasible to proceed with.

While the review is examining a range of developments authorised under NSW Planning legislation, there needs to be utmost caution in a one size fits approach across a variety of sectors. Given the growing housing supply crisis, the cost pressures on development and the high holding costs, particularly in markets like Sydney, there does not appear to any case to change existing legislation and regulation government the development of residential, commercial or industrial property in NSW.

Recommendation 5: the Committee recommend the NSW Government work with Local Government to determine the size and magnitude of historic development consents and map where these consents exist and the industry to which they pertain

Changes to EP&A Regulation in 2020 – a work in progress

The Committee should note that changes to the EP&A Regulation in 2020 under the former Coalition Government have already raised the bar in terms of demonstrating physical commencement under the Act. Section 96 of Division 5 states:

96 When work is physically commenced—the Act, s 4.53(7)

(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.

(2) This section does not apply to a development consent granted before 15 May 2020.

Perhaps missed in the fog of COVID lockdown, the impact of these changes is yet to be fully known and assessed. The 5-year period for possible lapsing of consents under these amended regulations will only occur after **15 May 2025.**

A prudent response would be to get further longitudinal assessment of the impact of these amendments made in 2021 before considering any further changes. Data on the impact of this section should be gathered until at least May 2030.

Recommendation 6: the Committee note the amendments Clause 96 of the *EP&A Regulation 2021* and await further assessment on the impact of these recent changes.

There are existing provisions available to revoke or modify consent

The Act already provides the ability for a consent authority to revoke or modify a development consent if the development is considered no longer appropriate, having regard to the provisions of any proposed SEPP or LEP. This provision has been in the Act since 1 July 1998, largely unchanged in that time (noting that the right of appeal was moved to part 8 upon renumbering of the Act).

4.57 Revocation or modification of development consent
(cf previous s 96A)

(1) If at any time it appears to—
(a) the Planning Secretary, having regard to the provisions of any proposed State environmental planning policy, or

(b) a council (being the consent authority in relation to the development application referred to in this subsection), having regard to the provisions of any proposed local environmental plan,

that any development for which consent under this Division is in force in relation to a development application should not be carried out or completed, or should not be carried out or completed except with modifications, the Planning Secretary or council may, by instrument in writing, revoke or modify that consent.

(2) This section applies to complying development for which a complying development certificate has been issued in the same way as it applies to development for which development consent has been granted and so applies to enable a council to revoke or modify a complying development certificate whether the certificate was issued by the council or by a registered certifier.

(3) Before revoking or modifying the consent, the Planning Secretary or council must—
(a) by notice in writing inform, in accordance with the regulations—
(i) each person who in the Planning Secretary's or council's opinion will be adversely affected by the revocation or modification of the consent, and

(ii) such persons as may be prescribed by the regulations,

of the intention to revoke or modify the consent, and

(b) afford each such person the opportunity of appearing before the Planning Secretary or council, or a person appointed by the Planning Secretary or council, to show cause why the revocation or modification should not be effected.

(4) The revocation or modification of a development consent takes effect, subject to this section, from the date on which the instrument referred to in subsection (1) is served on the owner of the land to which the consent applies.

(5), (6) (Repealed)

(7) If a development consent is revoked or modified under this section, a person aggrieved by the revocation or modification is entitled to recover from—

(a) the Government of New South Wales—if the Planning Secretary is responsible for the issue of the instrument of revocation or modification, or

(b) the council—if the council is responsible for the issue of that instrument,

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.

(8) The Planning Secretary or council must, on or as soon as practicable after the date on which the instrument referred to in subsection (1) is served on the owner of the land referred to in subsection (4), cause a copy of the instrument to be sent to each person who is, in the Planning Secretary's or council's opinion, likely to be disadvantaged by the revocation or modification of the consent.

(9) This section does not apply to or in respect of a consent granted by the Court or by the Minister.

Recommendation 7: the committee notes that there are existing provisions under section 4.57 of the *Environmental Planning and Assessment Act 1979* granting powers to the Secretary for Planning or local government authority to revoke or amend a development consent

NSW Government should not change requirements post development approval

One of the biggest roadblocks for developments is the requirement to apply current standards to previous approvals. This includes environmental, transport, and bushfire. This is particularly burdensome when a developer needs separate approval from the relevant government departments.

Applying today's standards may mean that the development may not be able to attain current standards, or will result in an unfeasible development in achieving compliance.

It would assist the supply of housing and job creating developments for a principal to generally apply that in relation to historic developments that need post consent certificates and/or approvals, that they be required to comply with the standards that existed at the time of consent. While the principal would need to be carefully considered, it would give such projects a greater opportunity to progress.

Urban Taskforce members have also raised specific concerns with changes to Biodiversity Assessments that can be updated even if there is an existing approval. While Governments cannot directly control external factors such as interest rates and broader financial conditions that can impact developments post approval,

they can ensure the regulatory environment is stable and not subject to changes that could impact the feasibility of developments already approved.

Recommendation 8: that the committee recommend the Government ensure that if Biodiversity Assessments have been undertaken as part of a development approval, these assessments should remain in place and not require updating post approval.

Councils should not seek to place new conditions on developments post approval

Urban Taskforce members are coming across many cases where councils seek to introduce new conditions and requirements at the construction certificate/ subdivision works certificate stage. These go beyond the development consent or seek to amend the development consent. The councils are effectively trying to vary the consent through later requirements. This should be discouraged.

Recent examples include a council seeking to change requirements in a vegetation management plan at the subdivision works certification stage, and another council seeking to change stormwater design after development consent was issued.

Recommendation 9: the committee recommend the Government ensure that approval authorities like Councils cannot introduce new conditions and requirements on any development at the construction certificate or subdivision works certification stage.

NSW Government should be proactive in resolving barriers to development

Rather than contemplating any changes to the existing definitions of 'physical commencement', the Government should be proactively examining reasons why property developments are not proceeding or are delayed in their path from development approval to completion.

The Department of Planning, Housing and Infrastructure (DPHI) should establish a small unit as part of their research function to engage with the private sector and seek to document reasons that obstruct the progressing of DA's. This would better inform the Government as to the blockages in the planning system, and outline areas upon which the Government should focus in clearing or resolving these obstacles.

Recommendation 10: the committee recommend that the DPHI establish a small unit to work with proponents experiencing difficulties in progressing development consents and assess ways of resolving barriers to development

Conclusion

Risk is an ever-present factor for the residential, commercial and industrial development sector in NSW. A serious of exogenous shocks stemming from the COVID 19 pandemic has only increased the risks around the delivery of property. This has been added to a planning system in NSW which is widely viewed as the most complex and slow planning systems in Australia, and one of the most challenging in the developed world.

Governments must seek to reduce any risk associated with the delivery of housing and job generating development.

Development consents are costly, take time and are difficult to attain. In the midst of a housing supply crisis, Government should not be seeking to thwart or rescind opportunities where there is potential to develop a site.

While there may be a small number of isolated examples of physically commenced historic development consents on sites that have otherwise remained dormant for decades, these cases are very rare, and are not likely to occur into the future, given the recent changes to physical commencement that apply to consents granted after 15 May 2020. It would be reckless to address these few isolated cases through a heavy-handed response to change the existing requirements applying to development consents generally, which would only increase the risk associated with the delivery of housing and jobs in NSW.

Changes made to the *Environmental Planning &Assessment Act 1979* in 2021 are yet to have their impacts measured and assessed. A prudent Government would assess these impacts before contemplating any further changes.

The Committee should note, in addition, that there are sufficient provisions in the *Environmental Planning & Assessment Act 1979* and the *EP&A Regulations* to deal with lapsing of development consents. There is no need for any additional requirements to restrict historical approvals.

Should any Committee member wish to discuss matters relating to this submission, please contact Head of Policy, Planning and Research, Mr Stephen Fenn on [redacted] or via email [redacted]

Yours sincerely

[redacted]

Tom Forrest
Chief Executive Officer

Summary of Recommendations:

Recommendation 1: the committee iterate the fundamental importance of private property rights and interests to the economic and legal underpinnings of the Australian economy

Recommendation 2: the committee notes the negative consequences of removing or weakening approvals secured through the *Environment Planning and Assessment Act 1979*

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