

**Submission
No 83**

HISTORICAL DEVELOPMENT CONSENTS IN NSW

Organisation: Byron Shire Council

Date Received: 11 June 2024

E2024/66667
Your ref:
Contact: Shannon Burt



11 June 2024

Environment Planning
environmentplanning@parliament.nsw.gov.au

Dear Committee,

Inquiry into the impact of historical development consents on the NSW

Thank you for the opportunity to provide a late submission to the Legislative Assembly Committee Inquiry into the impact of historical development consents on the NSW planning system, development industry and property ownership. For the purposes of Inquiry this is a Byron Shire Council staff submission.

Historical development consents have recently been termed rightly or wrongly 'zombie developments' and are developments that were granted development consent many years ago, have achieved physical commencement such that the consent is prevented from lapsing and is in force, but have not been substantially carried out or completed.

Aside from this Inquiry, and apart from the recent changes to the lapsing provisions of the Environmental Planning and Assessment Act in 2021, there have been no recent state policy or legislative proposals put forward to address the issue.

Much has been covered in the media of late about 'zombie development consents' up and down the NSW coast. Byron Shire has not been immune from such coverage. Historical development consents present different problems to different communities depending on the age, type, and location. However, universally, concerns from community and Council about these historical development consents have emerged, mainly to do with whether they meet current planning and environmental legislation. From the community's perspective the current approach is failing to meet community needs or expectations from the development approval process.

The current legal framework for development consents and what is required to prevent lapsing has changed over time.

Where the legislation has been lacking, case law has informed the approach for Byron Shire Council to apply the various tests of 'substantial commencement' for approvals pre 1980 then 'physical commencement' for approvals post 1980 until now. Generally speaking, where asked by a landowner/developer to agree to a historical development consent being commenced, the statutory tests have been problematic and, in some instances, contested by Byron Shire Council resulting in Court proceedings for a determination. This has cost both time and money for Council, community as ratepayer and landowner/developer. In each instance the Court has relied upon the legislation and made judgments in support of the historical development consents, notwithstanding their age, type or adequacy under current legislation.



With the passage of time and where that physical work is limited for example to a part survey of a boundary, tree removal, connection of power and or other infrastructure and could be construed as serving other purposes for the land owner, the legislation is ambiguous and not easily interpreted.

As noted above, the Environmental Planning and Assessment Regulation 2021 was amended to provide that survey work, vegetation removal and other specified minor preparatory works will not be sufficient to constitute 'physical commencement' and prevent a development consent from lapsing. While a welcome change to the legislation, it should be noted that the changes are not retrospective and have no impact on historical development consents.

Further, the current legislative tools available to Council to time limit, condition, include performance based KPIs, stage, monitor and or modification of development consents also do not apply or have any effect on historical development consents. However, these tools can and are being used by Council to ensure that development consents granted now will not result in inappropriate development being carried out into the future.

As can be seen, the substantive issue with historical development consents is the definition of substantial or physical commencement, the time at which this is deemed to have occurred and what the conditions imposed on that consent require, and is this adequate under the current planning and environmental legislation.

Key areas of concern for Council and community include: Threatened ecological communities as listed under the Biodiversity Conservation Act 2016 (NSW) or Environment Protection and Biodiversity Conservation Act 1999 (Commonwealth); Known habitat of threatened species, as listed under the Biodiversity Conservation Act 2016 (NSW) or Environment Protection and Biodiversity Conservation Act 1999 (Commonwealth); Land identified as bushfire prone, where the requirements of 'Planning for Bush Fire Protection' (2019) and AS3959-2018 cannot be met; Land at high risk from sea level rise and/or flooding, including where modern flood related development controls would otherwise apply as outlined in 'Considering flooding in land use planning guidelines' (2021), as well as the coastal zone as defined in the Coastal Management Act 2016 (NSW); and Areas of Outstanding Biodiversity Value (AOBVs) as defined under the Biodiversity Conservation Act 2016 (NSW).

SUGGESTED RESPONSES

1. State Government through the Planning Portal require all landowners/developers to identify in a new category 'historical development' being development that has achieved physical commencement but has not been substantially carried out or completed (a date to be determined like 7 years or more) so it can be registered, quantified, and publicly identified.
2. Legislation be implemented to ensure that all future development consents apply a staging approach where appropriate, and time limit for their completion e.g., time limit or sunset condition so they cannot remain active in perpetuity without additional checks and balances.
3. Legislation to provide an avenue for the reassessment of historical development consents where it can be demonstrated via a test or trigger that it would have a substantially greater impact than was identified at the time of initial assessment, or where the circumstances in which their approval was granted have changed substantially.
4. Financial and legislative protections be provided to Councils that seek to challenge historical development consents.

5. Creation of a review procedure through the Regional Planning Panels to enable Council and land owners to present to the Panel for a decision on whether a consent has lapsed or not instead of having to refer and rely upon the Courts to make such decisions.

Thank you for the opportunity to take part in this Inquiry.

Your key contact point for further questions and correspondence is Shannon Burt, Director Sustainable Environment and Economy, available via [REDACTED] and [REDACTED]

Your sincerely



Shannon Burt
Director Sustainable Environment and Economy