

HISTORICAL DEVELOPMENT CONSENTS IN NSW

Organisation: The Law Society of New South Wales
Date Received: 14 June 2024



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EPDC:BMslh140624

14 June 2024

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

By email: environmentplanning@parliament.nsw.gov.au

Dear Chair,

Inquiry into historical development consents in NSW

The Law Society appreciates the opportunity to respond to the terms of reference for this Inquiry. Our Environmental Planning and Development Committee contributed to this submission.

Overview

The Law Society is concerned that the current legal framework permits:

- a) the preservation of development consents beyond the prescribed lapsing period of five years, which can lead to excessive delays in the appropriate development of land, and
- b) the reactivation of historical development consents, in some cases where they have been dormant for decades, which may allow development that is inconsistent with contemporary laws, and incompatible with community expectations.

We acknowledge that development consents are valuable property rights and that regulatory certainty for landowners is necessary to support investment in the development sector and the delivery of housing and infrastructure. The challenge for policy makers is the balancing of these interests, while ensuring that the planning regime guides appropriate land development responses, particularly in the context of climate change.

It is timely that the Inquiry considers the law permitting indefinite delay in completion of development consents and the potential impact on the community, particularly in light of the State Government's current focus on driving housing supply.¹

¹ In accordance with its commitment to the National Housing Accord. Department of Planning, Housing and Infrastructure, *A Shared Responsibility: The plan to begin addressing the housing crisis in NSW*, 7 December 2023, <https://www.nsw.gov.au/media-releases/addressing-housing-crisis-nsw>.

Terms of reference

We provide our comments on the terms of reference below.

(a) The current legal framework for development consents, including the physical commencement test.

Under section 4.53(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (EPAA), a development consent will generally lapse five years from the date from which it operates.

Section 4.53(4) of the EPAA saves the lapsing of a consent where work has physically commenced on the land:

- (4) Development consent for -
- (a) the erection of a building, or
 - (b) the subdivision of land, or
 - (c) the carrying out of a work,

does not lapse if building, engineering or construction work relating to the building, subdivision or work is *physically commenced* on the land to which the consent applies before the date on which the consent would otherwise lapse under this section. (emphasis added)

This provision has traditionally been given a broad interpretation by the courts to mean that mere preparatory works are sufficient to constitute physical commencement, including:

- survey work (such as the digging of holes and placement of marks/pegs)²
- clearing of shrubs/ site clearing³
- geotechnical work, including excavation of soil for testing.⁴

A stricter test for physical commencement was introduced on 15 May 2020 under the *Environmental Planning and Assessment Amendment (Lapsing of Consent) Regulation 2020* (NSW), now section 96 of the *Environmental Planning and Assessment Regulation 2021* (NSW) (EPAR). Section 96 specifically excludes some types of insubstantial works previously permitted by the Court to constitute commencement:

- (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.

² *Hunter Development Brokerage Pty Ltd v Cessnock City Council; Tovedale Pty Ltd v Shoalhaven City Council* 63 NSWLR 124; [2005] NSWCA 169.

³ *Cando Management and Maintenance Pty Ltd v Cumberland Council* [2019] NSWCA 26; 237 LGERA 128; *PAG Services Pty Ltd v Byron Shire Council* [2023] NSWLEC 40.

⁴ n 2.

Section 96 of the EPAR was part of a suite of amendments, including temporary extensions to certain development consent lapsing periods, in response to the impact of COVID-19 on the construction industry. The purpose of the amendments was to provide more certainty in relation to development commencement and completion. The amendments were intended to offset delays that had occurred in the industry due to lockdowns and supply chain interruptions, while also ensuring that the avoidance of an automatic lapsing period should only be permitted where works of a substantial nature were commenced, therefore demonstrating a sufficient intent to complete the development.⁵

Some commentators have expressed the view that this change in the law has “the potential to hamper activation of development consents in NSW in the near to mid-term because of a more onerous (and potentially more expensive) task for proponents to enliven their development consents” and that this will result in “a likely increase in lapsed development consents”.⁶ Alternatively, it may be argued that this test constitutes a sensible tempering of an overly permissive test, and appropriately encourages timely completion of approved developments.

However, as section 96 does not have retrospective effect, the five-year lapsing provision under section 4.53(1), and its predecessors, remains in place for proponents of development consents granted before 15 May 2020, with a less stringent test of whether work has commenced. Moreover, once that low threshold test is met, the consent is preserved in perpetuity.

For example, in *2 Phillip Rise Pty Ltd v Kempsey Shire Council* [2023] NSWLEC 28, the Court accepted that borehole drilling and testing of the extracted material for the presence of acid sulfate soil was capable of constituting physical commencement of the work under the development consent, and that a construction certificate should be issued by the Council to the developer. This case concerned a development consent for the construction of a 180-villa resort granted by Kempsey Shire Council 30 years prior, and in respect of which the substantive development proposal had not proceeded.

It is interesting to note, presumably in response to the intense community scrutiny of this matter,⁷ that the developer subsequently surrendered the historical consent and lodged a new development application, which was assessed against current planning laws and potential environmental impacts, and became active from 23 February 2024.⁸ This application was approved subject to an extensive suite of 72 conditions of consent which the Council stated

⁵ Department of Planning, Industry and Environment (NSW), *COVID-19 response - Temporary measures in place to support the state's economy and jobs will be made permanent*, 2020 <https://www.planning.nsw.gov.au/policy-and-legislation/covid-19-response>.

⁶ A Whealy and J Oldknow, “The (Low) bar has been raised – NSW overhauls the law on ‘physical commencement’ and the implications for your development consent”, May 2020, <https://www.millsoakley.com.au/thinking/the-low-bar-has-been-raised-nsw-overhauls-the-law-on-physical-commencement-and-the-implications-for-your-development-consent/>

⁷ See South West Rocks Inc, Submission No 200 on behalf of 2,000 community members to *Inquiry into the Planning System and the Impacts of Climate Change on the Environment and Communities*, 16 November 2023, 2.

<https://www.parliament.nsw.gov.au/lcdocs/submissions/82921/0200%20South%20West%20Rocks%20Inc.pdf>; K Gribbin, “South West Rocks Community Stage Vigils In Protest Of Rise Projects Development Decision”, *News of the Area*, 17 April 2023, <https://www.newsofthearea.com.au/south-west-rocks-community-stage-vigils-in-protest-of-rise-projects-development-decision>.

⁸ Kempsey Shire Council media release, “South West Rocks ‘zombie’ DA buried as Rise Projects start work”, 23 February 2024, <https://www.kempsey.nsw.gov.au/Your-Council/Council-news-public-notice/Council-news-updates/20240223-Rise-Development-to-begin-construction-in-March>.

would “help protect the environment in and around the site, with several conditions needing to be met before a construction certificate will be issued”.⁹

(b) Impacts to the planning system, development industry and property ownership as a result of the uncertain status of lawfully commenced development consents.

In our view, there is no uncertainty as to the status of lawfully commenced development consents. Once physically commenced, there is no time limit for completion. This is the case whether a development consent was physically commenced by way of minor preparatory works under the pre-15 May 2020 test, or by way of the more substantial works test, as is now required under section 96 of the EPAR.

The planning system

The Law Society is concerned that public confidence in the planning system may be undermined where undue delays in development completions are permitted. Community opposition to proceeding with development projects that were approved many years ago without fresh scrutiny against contemporary planning controls and standards is easily understandable. This is particularly the case in environmentally sensitive areas that may contain threatened species habitats, are vulnerable to extreme weather events, or prone to natural disasters.¹⁰ We note in the *Independent Review of the Biodiversity Conservation Act 2016: Final Report*, the Review Panel, led by Dr Ken Henry AC, found the adverse impacts of development on habitat and biodiversity were significant, and suggested reforms to prevent historical development consents from proceeding without biodiversity assessment or offsetting.¹¹

Delay in completion of development is also an obvious concern where it hinders the potential for the delivery of appropriate housing. While barriers external to the planning system, including financial market conditions and workforce shortages are factors, we also note reports of “zombie projects” contributing to low completion rates.¹²

Development industry/ property owners

Unlike other approvals, a development consent runs with the land and is not granted in a personal capacity.¹³ As such, a development consent is a valuable property right, and an investment made by a landowner in obtaining a consent may then be reflected in the price paid by a subsequent landowner, who is entitled to rely upon the consent. Arguably, a planning

⁹ Kempsey Shire Council media release, “Consent granted for Rise development”, 15 August 2023, <https://www.kempsey.nsw.gov.au/Your-Council/Council-news-public-notice/Council-news-updates/Consent-granted-for-Rise-development>.

¹⁰ For example, see discussion on historical development consents granted in the following locations/years: Tuross Heads (1983), South West Rocks (1993), Hallidays Point (2004), Brunswick Heads (2013), in Nature Conservation Council, Submission No 136 to *Inquiry into the Planning System and the Impacts of Climate Change on the Environment and Communities*, 3 November 2023, 32, <https://www.parliament.nsw.gov.au/lcdocs/submissions/82732/0136%20Nature%20Conservation%20Council.pdf>; In relation to historical consents on flood prone land in the Tweed local government area, see A Shan, “Stopping legacy developments on floodplains no easy task for councils”, *Echo*, 17 May 2023, <https://www.echo.net.au/2023/05/stopping-legacy-developments-on-floodplains-no-easy-task-for-councils/>.

¹¹ Department of Planning and Environment (NSW), *Independent Review of the Biodiversity Conservation Act 2016: Final Report*, August 2023, 57, <https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf>.

¹² In M Wade, “The ‘zombie’ housing projects linked to Sydney’s housing crisis”, *The Sydney Morning Herald*, 28 May 2024, <https://www.smh.com.au/politics/nsw/the-zombie-housing-projects-linked-to-sydney-s-housing-crisis-20240528-p5jh7y.html>

¹³ See, for example, *Dravin Pty Ltd v Blacktown City Council* [2017] NSWLEC 38.

system that permits the holder of a development consent to indefinitely delay completion facilitates land banking.

We note advocates for reforms to address land banking view this practice as a market failure that has locked-up housing supply.¹⁴ Others have described land banking as “stymying the healthy movement essential for a dynamic marketplace” and “depriv[ing] the local economy of significant financial inflows”.¹⁵ Recent moves in Australia to implement taxation strategies designed to target land banking demonstrate the high public interest in timely development of land.¹⁶ In our view, stronger regulation of development commencement and completion under planning law will also discourage inefficient uses of land.

While land banking may adversely impact the broader community, the Law Society also acknowledges the importance of certainty in the planning system for the development industry to support investment in the property market. Where reforms are introduced to address problems posed by historical development consents that might unreasonably interfere with the consent holder’s private property rights, we suggest consideration be given to invoking statutory rights to specified heads of compensation. This is discussed under (d) further below.

(c) Any barriers to addressing historical development consents using current legal provisions, and the benefits and costs to taxpayers of taking action on historical development concerns.

Barriers under current legal provisions

Identification

As a threshold issue, we are not aware of any central, public facing repository of relevant data on historical development consents granted prior to 2018, making it difficult to ascertain the total number and locations of affected sites in NSW.¹⁷ In order to determine that number it would be necessary to source earlier development consent information directly from the consent authorities, that is, from each of the 128 local councils in NSW and the Planning Minister.

Limitations with respect to available controls

Our members representing councils have reported that unrealistic expectations are often placed on local government, where it is the approval authority, to exercise powers that are seen to address the issue of development consents assessed under superseded laws. For instance, we note that, in 2019, the then Department of Planning, Industry and Environment responded to concerns from a council about dealing with dormant historical consents to the effect that local government is empowered to issue a Development Control Order to complete the works within a specified time.¹⁸ In 2023, its successor, the then Department of Planning

¹⁴ National Housing Supply and Affordability Council (Cth), *State of the Housing System*, 2024, 152, <https://nhsac.gov.au/sites/nhsac.gov.au/files/2024-05/state-of-the-housing-system-2024.pdf>.

¹⁵ R Wakelin, “Land banking: why this property investment is a really bad idea”, *The Australian Financial Review*, 31 October 2023, <https://www.afr.com/wealth/personal-finance/why-this-property-investment-is-a-really-bad-idea-20231026-p5ef7j>.

¹⁶ For example, taxation legislation was passed in Victoria in late 2023 that “expands the vacant residential land tax to also apply to unimproved residential land that has been undeveloped for more than five years in established areas of Melbourne to discourage land banking and encourage new housing developments”, D Pearson, Assistant Treasurer in Parliament of Victoria media release, “Tax increase on vacant property passes parliament”, 6 December 2023, <https://www.parliament.vic.gov.au/news/economy/land-tax/>.

¹⁷ The NSW Planning Portal became the repository of all development consents granted in NSW after 1 March 2018, Sched 2 [4], *Environmental Planning and Assessment Amendment Act 2017* (NSW).

¹⁸ See letter from the then Department of Planning, Industry and Environment to the Blue Mountains City Council dated 19 July 2019, <https://www.bluemountains.org.au/documents/campaigns/croc-park/dept-of-planning-response-re-zombie-das-24jul19.pdf>.

and Environment, stated, in response to a media question regarding controversial historical consents that are proposed to be activated on flood and fire prone land, that councils have existing powers to revoke or modify the original consents.¹⁹

However, these responses ignore the serious financial and legal risks for councils in exercising these powers. Understandably, councils may be reluctant to absorb the legal costs associated with potential challenges to council decisions. In addition, aggrieved parties may be entitled to claim compensation for expenses incurred from the date of the granting of the original consent to the date of the revocation/modification notice.²⁰

Benefits and costs to taxpayers of taking action on historical consents

Costs

As previously mentioned, legal and compensation costs may be incurred by the consent authority in taking action on historical development consents under existing discretionary powers.²¹ See further discussion on compensation under (d) below.

Benefits

In our view, trust and confidence in the planning system could be improved where the capacity for developments to be completed under outdated laws is removed, thus promoting a fit for purpose planning system by encouraging appropriate design, assessment and completion of development proposals in accordance with modern law.

We consider better community outcomes will flow from law reform targeting historical development consents, including, as previously discussed, mitigation of legal, environmental and public safety risks and the promotion of better housing and economic outcomes.

(d) Possible policy and legal options to address concerns regarding historical development consents, particularly the non-completion of consents that cannot lapse, and options for further regulatory support, including from other jurisdictions.

We suggest that any options for policy and legal reform to address concerns regarding historical development consents should focus on the following priorities:

- Maximising the assessment of development proposals based on current planning laws.
- Minimising delays in the development of land subject to development consents, and promoting certainty and transparency in relation to lapsing periods.
- Promoting the efficient and appropriate development of land, including, where relevant, the potential increase in housing supply.

²⁰ Gianni Francis, "North Coast joins alliance against 'zombie developments'", *The Daily Telegraph*, 26 August 2023, https://www.dailytelegraph.com.au/subscribe/news/1/?sourceCode=DTWEB_WRE170_a_GGL&dest=https%3A%2F%2Fwww.dailytelegraph.com.au%2Fnews%2Fregional%2Fnorth-coast-joins-coastal-residents-united-alliance-against-zombie-developments%2Fnews-story%2F5c6bfd030a07d1583d1354c75e46c22b&mementype=anonymous&mode=premium&v21=HIGH-Segment-2-SCORE.

²¹ s 4.57(7), EPAA.

²² Revocation and modification of development consent powers are exercisable by the Planning Secretary or a council and compensation is recoverable from the NSW Government or council, respectively: ss 4.57(1) and 4.57(7), EPAA.

Relevant considerations in developing a legal framework to implement these priorities could include:

- A notification regime, including a public awareness campaign, to alert any potential historical consent holders that a fresh lapsing period is to commence from a nominated date. The notice could invite consent holders interested in progressing their development to contact their consent authority to inform the consent authority that they wish to proceed on the basis outlined in the notice, or provide a mechanism seeking a variation.

The notice could stipulate that the consent holder has a one-off opportunity to apply to have the original development proposal reassessed under current planning laws, or accept the development consent lapsing, in accordance with the notice.

- A new regime for determining the development consent period for such historical consents, and for new consents, could consider the size, scope and complexity of the development in determining the development completion period, under carefully calibrated and prescribed criteria, developed after industry and community consultation.
- A mechanism for determining where a specific development consent should lapse or not, taking into account work already undertaken. The mechanism will need to consider how to deal with projects that have been substantially or partially completed during the consent period, and what factors may be relevant in determining whether to provide a right to apply for an extension of the development completion period in such cases. As noted above, such factors should include the size, scope and complexity of the development.
- Alignment of any proposed new framework with other relevant planning controls.

Compensation

As is the case currently under section 4.57(7) of the EPAA, we would propose an entitlement to claim compensation if revocation or modification of the consent is required following development assessment or reassessment as outlined above. However, we suggest refining this regime to provide more certainty to the process for determining the amount.²²

We also suggest that where implementation of reforms will require significant resourcing, and noting the barriers described above, that those funds would be most appropriately provided at the state rather than the local government level.

Any questions in relation to this letter should be directed to Sonja Hewison, Policy Lawyer on [REDACTED] or [REDACTED]

Yours sincerely,



Brett McGrath
President

²² For example, we note the compensation regime under Part 3 of the *Agricultural Tenancies Act 1990* (NSW) sets out a well-established framework for assessing compensation with reference to improvements to or deterioration of land arising from a change in circumstances over time, impacting the value of land.