

## **HISTORICAL DEVELOPMENT CONSENTS IN NSW**

**Organisation:** Property Council of Australia

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Legislative Assembly  
Committee on Environment and Planning

Via email ([environmentplanning@parliament.nsw.gov.au](mailto:environmentplanning@parliament.nsw.gov.au))

## **Re: Historical development consents in NSW**

The Property Council would like to thank the Legislative Assembly Committee on Environment and Planning for the opportunity to make this written submission on their inquiry into the impact of historical development consents on the NSW planning system, development industry and property ownership.

As Australia's peak representative of the property and construction industry, the Property Council is well-placed to provide feedback on the effect of historical development consents and how amendments to the policy and legal framework on this matter should be considered.

The Property Council's members are the nation's major investors, owners, managers, and developers of properties of all asset classes. The property industry employs more Australians than any other sector, and shapes the future of our cities, with a deep long-term interest in seeing our cities prosper as productive, sustainable, and safe places.

'Historical' development consents are merely development consents which have been activated but not completed, reflecting the situation of thousands of development consents. While the Property Council supports ongoing review and improvements through bodies such as the Legislative Assembly Committee on Environment and Planning, this inquiry must not be undertaken in a vacuum and needs to consider the current environment of a once-in-a-generation housing, cost-of-living, and construction crisis.

Introducing new roadblocks and stifling development already approved and in the 'pipeline' during the Housing Accord period, where the government is calling on the property sector to deliver more homes than ever before, in conditions that are significantly challenging the viability of development, would be unreasonable and directly conflict with the commitment of the NSW Government to deliver 377,000 new homes over the next five years. At the same time, the Property Council recognises the need to expediate both planning approvals and housing completions during the accord period.

This submission addresses the two requests of the inquiry, being feedback on the effect of historical development consents on the NSW planning system, development industry and property ownership, and policy and legal solutions to address these effects.

## Defining historical development consents

'Historical' or 'zombie' consents are development consents which have been physically commenced but have not been completed. The phrase 'historical' or 'zombie' consents is broad, and does not reflect the particulars of many different sites, projects, and situations, such as large-scale multi-stage developments which take years to complete, or significant land subdivisions which may be realised over time to reflect market demands and infrastructure servicing.

The generalisation of 'historical' development consents therefore places at risk the acknowledgment of the complexity of the development process and construction delivery. For infill residential developments, a minimum construction phase for an ordinary infill development is circa 24 months and can be longer, constituting nearly half of the ordinary 5-year lapsing period of a consent. As such, depending on the timing of activation, it is not unreasonable or uncommon for development completions to occur some time after development consent is granted, and then to take some time to deliver.

In this context, it is difficult to classify when a development consent becomes 'historical'. For instance, would a consent be deemed historic immediately after 5 years, 6 years, 10 years, or more.

**A single, one-size-fits-all approach for defining historical development consents is inappropriate and is unlikely to capture the complexity of the development process.** A 'catch-all' limitation on the duration for activated development consents will result in large-scale and multi-stage projects being stalled and/or requiring further planning approvals, halting construction and the delivery of homes. This will result in further fragmented planning processes, greater pressure on the planning system, and less homes delivered during the Housing Accord.

## The long-established principle of protecting industry investment in the planning process

There has been a long-established framework for post-consent actions, including the lapsing of consents. Initially, the test of a 'substantial commencement' was mandated under the *Local Government Act 1919*. This test was an acknowledgement that a development consent should **not** lapse if commenced given the significant investment of time, costs and resources by the development industry, community and consent authorities in the determination of a development consent.

In 1999, this test was amended to 'physical commencement', and the framework was translated into the *Environmental Planning and Assessment Act 1979* and *Environmental Planning and Assessment Regulation 2021*.

Intentionally, the Act provides that a development consent for erection of a building, subdivision, or the carrying out of works, **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 ...*

This amendment had a clear objective to relax the test for commencing a development, and ensure that the significant investment of industry and local councils and government in the planning process was not wasted.

It was only four years ago during the COVID response period that greater clarity was provided to the Regulation, making clear when work is not taken to have been physically commenced.

At the time, the (former) Department of Planning, Industry and Environment provided:

*Amendments to the Environmental Planning and Assessment Regulation 2000 will provide greater certainty to landowners, developers and the community about development that has been ‘physically commenced’.*

As such, it is clear that there has been a fundamental principle in place for decades to protect hard-fought development consents, recognising the investment of the development industry, councils, and communities in planning processes which result in these approvals. The clear relaxation of the prerequisites to commencing a development made in 1999 is a further acknowledgment of the need to allow for flexibility and latitude in the protection of this investment – this needs to be retained.

In this context, **the Property Council is not supportive of any further amendment which places at risk the certainty and confidence industry has in the protection of development consents which meet the established test of being ‘physically commenced’.**

### **The effect of historical development consents on the NSW planning system, development industry and property ownership**

The inquiry requests submissions provide feedback on the effect of historical development consents on the NSW planning system, development industry and property ownership. In short, historical development consents do not have any significant bearing on the existing planning system, only having the effect of increasing the number of approvals in place which may be delivered over time.

For instance, the recently released 5-year housing completion targets prescribed for councils by the Department of Planning, Housing and Industry take into account ‘planned’ homes, which includes housing currently under construction. These ‘planned’ homes may be inflated by development consents activated, but potentially not being delivered in the next 5-years due to various reasons, such as the transaction of sites, a lack of available builders/contractors/labour, the challenge of rising construction costs, and financing constraints, etc.

Nonetheless, these approvals for new homes are important in the pipeline as they represent a significant investment in projects and planning processes. The ability to deliver these approvals, whether it be within or beyond the 5-year housing target period, is critical to ensuring a continuous supply of housing which is ‘shovel-ready’, particularly in the context of NSW’s lengthy and costly planning system.

Separately, it is acknowledged that there may be other effects of historic development consents, such as community awareness of approved developments, and compliance with updated codes and standards. We agree that these effects are important and need consideration, but addressing them requires a balanced view and consideration of development challenges and barriers over time.

### Policy and legal solutions

Any policy or legal solution proposed to manage historic development consents must look to the future, and not have the unintended (or intended) effect of causing more approved developments to lapse. This would only have the result of even less housing being delivered, counterintuitive to the ambitions of government during this time of crisis and during the Housing Accord period.

Importantly, as evidenced by the 'oversubscription' of projects to the Commonwealth Government's Housing Australia Future Fund (HAFF), anecdotally there are a substantial number of projects seeking HAFF funding that rely upon 'historical' development consents, with the attractiveness of these projects being 'shovel-ready' with no planning risk (given development consents are already in place). If amendments were introduced to impact the continuation of these development consents, these projects would cease to exist and place a further barrier on the delivery of much needed affordable housing.

The Property Council recommend that if government is seeking to introduce greater certainty on completion of commenced developments and adherence to updated codes and standards, any amendments should *only* be placed on development consents moving forward. For instance, the governments flagship Transport Oriented Development (TOD) Program will require development approvals to be time-limited for 2 years in Tier 1 precincts to support construction to occur more quickly to deliver housing within the Accord period.

A similar approach may be adopted for other residential development consents, and post-commencement obligations, during the Housing Accord period, but this solution needs to be balanced with the context of escalating construction costs and feasibility barriers.

In the context of the critical shortage of industrial land and low vacancy rates, we do not support any changes which would impact development consents related to industrial lands or industrial development.

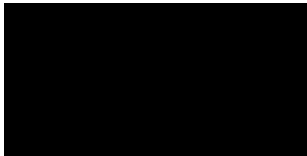
Government should also be deliberate to not introduce further planning approval or modification processes that introduce more red tape into the most complex planning system in Australia. While other states, such as Victoria, have end dates for consents and the ability for extensions, such a process only adds cost, complexity and further resources for both government and the development industry.

**Importantly, we do not support any long-term or fundamental change to the existing planning policies which have a clear framework for the lapsing and commencement of development consents.**

As the property industry is called on to shoulder the heaviest load of housing delivery in recent history, despite the context of significant headwinds, now is not the time to place further burden or roadblocks on the industry. The flexible framework in place for the activation of development consents for decades is a necessary and positive feature of the current planning system, and must be retained to continue providing opportunity for industry to navigate the complex and evolving development and construction process.

If you have any questions on our submission or wish to discuss the matter further please contact me on [REDACTED] or [REDACTED]

Yours sincerely,



**Katie Stevenson**  
NSW Executive Director  
Property Council of Australia