

**Submission
No 190**

HISTORICAL DEVELOPMENT CONSENTS IN NSW

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Submission to the NSW Parliamentary Enquiry into Historical Development Consents

**Committee on Environment and Planning
NSW Legislative Assembly - June 2024**

I appreciate the opportunity to provide a submission to the Parliamentary Enquiry into historical development consents in New South Wales (NSW). This submission addresses the terms of reference set out by the Committee, focusing on the current legal framework, impacts on the planning system, barriers to addressing historical consents, and potential policy solutions. Additionally, I'd like to highlight the specific case of the proposed 'Wallum' development at 15 Torakina Road, Brunswick Heads, NSW (DA 10.2021.575.1) and call for an immediate moratorium on all such consents.

Call for Immediate Moratorium on Zombie DAs

In reference to Historically Approved Consents, colloquially known as "Zombie DAs," I am calling on the NSW Parliament to urgently and immediately enact a Moratorium on all such Consents throughout New South Wales. Enacting a Moratorium is within your powers as conferred by the State Environmental Planning Policy for an Historical Approval Review of Development (HARD SEPP). It seems that New South Wales is now the only Australian State or Territory to allow Historically Approved Consents ongoing validity.

I understand the NSW Legislative Assembly Committee has already instituted an Inquiry into Historically Approved Consents. This is an important step and is to be commended. Critical habitat and endangered species are under a direct threat from these developments, where we see NSW planning law falling behind community expectations in terms of protecting our diminishing natural spaces and ensuring that much-needed housing development is carried out in appropriate locations. For instance, In the case of the proposed Wallum development, it's a critical wetland with numerous endangered species present. It would require 'infill' of huge amounts of trucked in fill to bring the level up to an acceptable height to avoid flooding. This is a situation to be avoided at all costs considering the NSW government's current stance on floodplain development.

(a) The Current Legal Framework for Development Consents, Including the Physical Commencement Test

The legal framework for development consents in NSW is primarily governed by the Environmental Planning and Assessment Act 1979 (EP&A Act). A critical component of this framework is the "physical commencement test," which requires certain physical work to have been undertaken on the site to prevent the development consent from lapsing.

However, this test often fails to account for modern standards and requirements. Developments that were granted consent many years ago can be "physically commenced" with minimal work, allowing them to avoid lapsing even if they do not meet contemporary environmental, social, or cultural standards.

(b) Impacts to the Planning System, Development Industry, and Property Ownership

The uncertain status of lawfully commenced development consents has several significant impacts:

1. **Planning System:** It undermines the integrity of the planning system by allowing outdated consents to proceed, potentially conflicting with current planning strategies and community expectations.
2. **Development Industry:** It creates uncertainty within the development industry, as the status of various projects can change based on legal interpretations of "commencement".
3. **Property Ownership:** Property owners may face uncertainty regarding the potential for nearby historical developments to proceed under outdated consents, affecting property values and community cohesion.

(c) Barriers to Addressing Historical Development Consents Using Current Legal Provisions

Several barriers hinder the effective addressing of historical development consents:

1. **Legal Ambiguities:** The physical commencement test is often subject to varying interpretations, creating legal ambiguity.
2. **Resource Limitations:** Local councils and planning authorities may lack the resources to rigorously enforce contemporary standards on historical consents.
3. **Political and Economic Pressures:** There can be significant political and economic pressures to allow historical consents to proceed, particularly in regions with development-driven economic strategies.

(d) Possible Policy and Legal Options

To address concerns regarding historical development consents, the following policy and legal options should be considered:

1. **Reassessment Framework:** Implement a statutory framework requiring the reassessment of historical consents against current environmental, social, and cultural standards.
2. **Sunset Clauses:** Introduce sunset clauses for historical consents that mandate their reassessment or automatic lapse after a certain period.
3. **Increased Regulatory Support:** Provide local councils and planning authorities with additional resources and legislative support to enforce contemporary standards.
4. **Moratorium on Zombie DAs:** Enact a temporary moratorium on all historical development consents (Zombie DAs) until a comprehensive review is completed.

(e) Proposed 'Wallum' Development at 15 Torakina Rd, Brunswick Heads

In my own locality, I am very concerned about the Wallum development at Brunswick Heads. Only a tiny remnant of coastal Wallum heathland remains in the Byron Shire. This unique place features ancient scribbly gums, wildflowers, and rare orchids, along with threatened ecological communities, bird, animal, and frog species. There are over 24 threatened species at Wallum. This place is of deep cultural importance. The community realises that in 2024 we should not be wiping out extremely rare habitats and culturally significant land for housing developments.

The community will not stand for destroying frog habitat and replacing it with artificial ponds. Nor will it stand for removing trees that pre-date colonisation with an offset that replaces tree hollows with nesting boxes. Not in 2024.

The community recognizes that there is a housing crisis, but this development does not address this issue appropriately. This development is not about the housing crisis at all. It is about generating wealth for a few at a huge and irrevocable cost to the environment. Building unaffordable housing on flood-labile land is not a solution for our community, which has already experienced devastating floods. It is important to consider that wetlands mitigate flood impacts, and we must keep them intact. I believe the government wants to do the right thing for our communities, ensuring no more fill or development on floodplains and no more buck passing. Please act.

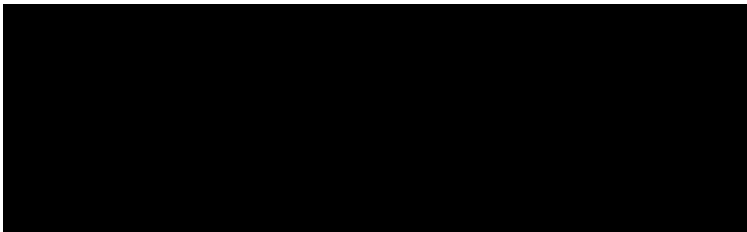
The Brunswick Heads Wallum development was approved by the Northern Regional Planning Panel (NRPP), as the consent authority, not Byron Shire Council.

Conclusion

I call on the NSW Government to use Ministerial powers to declare a Moratorium on all Zombie DAs, particularly Wallum, which is under immediate threat.

Historical development consents present a complex challenge for the NSW planning system. Addressing this issue requires a multifaceted approach, including legal reforms, enhanced regulatory support, and interim measures such as a moratorium on Zombie DAs. We urge the Committee to consider these recommendations seriously and take decisive action to protect our communities and environment.

Thank you for the opportunity to contribute to this important enquiry.



David Carnovale