Submission No 222

HISTORICAL DEVELOPMENT CONSENTS IN NSW

Name: Dr Amelia Thorpe

Position: Associate Professor, Faculty of Law and Justice UNSW

Date Received: 18 June 2024

17 June 2024

Legislative Assembly Committee on Environment and Planning
Parliament of New South Wales

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

Re: Inquiry into historical development consents in NSW

I am an Associate Professor in the Faculty of Law and Justice at UNSW Sydney. I specialise in planning, property and environmental law. I have qualifications in Architecture and City Policy as well as Law, and professional experience in planning and in public interest environmental law.

I am pleased to comment on the inquiry into historical development consents in NSW.

In summary, I make two main points:

1. The ability for development consents to last indefinitely, regardless of changes in planning controls, works against trust in the planning system.
2. Commencing construction should not be enough for consents to endure beyond five years. This is unnecessary, and out of step with other jurisdictions internationally. Accordingly:
    a. For the duration of consent to be extended, substantial works must have commenced well before 5 years and must be actively and substantially ongoing.
    b. Extensions should be exceptional rather than routine.
    c. Extensions should be time limited rather than indefinite.
    d. As well as amendments applicable to future developments, the EPA Act should be amended to provide for local and state planning authorities to require reassessment where planning controls and/or the local context has changed since the development application was determined.

These are outlined in more detail below.

1. The ability for development consents to last indefinitely, regardless of changes in planning controls, works against trust in the planning system.

Development consents which are not time-limited work against sustainable development and contribute to property speculation. At a time of climate and housing crises, change is urgently required.

"Zombie" development consents have generated significant community concern in recent years. Also known as legacy or dormant developments, these are development proposals for which consent were granted years ago and remains effective. Neighbours and others are

often unaware of the existence of dormant consents, and can be (unpleasantly) surprised when a developer decides to start construction. While the planning controls, scientific understanding and environmental assessment requirements may have changed significantly in the interim, there is no obligation on consent holders to update their plans to comply with contemporary controls. Information on the number and location of these dormant consents is not readily available.

Dormant development consents are possible because section 4.53(4) of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) provides an exception to the general provision that a consent lapses 5 years after the date at which it comes into effect. That exception applies "if building, engineering or construction work relating to the building, subdivision or work is physically commenced". Physical commencement is not defined in the EPA Act, and courts have found this test satisfied even when works have been relatively minor (such as preliminary geotechnical investigations and removing shrubs.[1] Since 2020, the EPA Regulation has excluded some minor works (now s 96 of the EPA Reg 2021). These exclusions do not raise the bar significantly and, more importantly for concerned communities, they do not apply to development applications determined prior to this date.

Growing pressures on biodiversity in NSW, and growing scientific understanding and public awareness of those pressures, mean that communities want to see bushland retained. "Zombie developments" can be a significant impediment to such retention. Recent moves to build developments approved decades ago at Manyana forest and Inyadda Coastal areas have been especially controversial, given the extensive damage to surrounding bushland caused by bushfires in 2020.

Communities are concerned about "zombie develpments" also for their impact on land speculation and the current housing crisis. Studies in the UK point to unimplemented residential planning permissions as an indicator of speculation by housebuilders on the uplift generated by planning permission, and a contributor to financialisation and supply shortages.[2]

Flexibility is a key strength of planning law. Planning law provides an important complement to the rigidity of property law. Property centres on fixed rules, bounded rights and individual interests. As the numerus clausus doctrine makes clear, 'the system of rights in rem is a strictly circumscribed one, with a tight regulatory regime governing the range and form of available rights over land'.[3] This approach can be sustained, I have argued, because planning law provides a system through which flexibility, democratic decision-making and public interests can be incorporated in the governance of land.[4] Planning law provides a mechanism to mitigate tensions between owners and others (both other owners and other non-owners), a mechanism to recognise the unavoidable relationships between different places and the people who own and interact with them. The democratic mechanisms created through the EPA Act facilitate adjustments in light of shifting scientific understandings and social values, and enable the weighing of local concerns against wider objectives. For community confidence and trust in the planning system, it is imperative that these mechanisms be maintained.

---

[1] *Cando Management and Maintenance Pty Ltd v Cumberland Council* [2019] NSWCA 26; 237 LGERA 128.

[2] Quintin Bradley, 'The Financialisation of Housing Land Supply in England' (2021) 58(2) *Urban Studies* 389.

[3] Brendan Edgeworth, 'The Numerus Clausus Principle in Contemporary Australian Property Law' (2006) 32(2) *Monash University Law Review* 386, 388.

[4] Amelia Thorpe, 'Property and Planning' in *The Routledge Handbook of Property, Law and Society* (Routledge, 2022) 389 <https://www.taylorfrancis.com/books/9781003139614/chapters/10.4324/9781003139614-37>.

2. Commencing construction is not enough for consents to endure beyond five years. This is out of step with other jurisdictions internationally.

There may be circumstances in which it is appropriate for a development consent to last for more than five years. However, the current system goes well beyond what is needed. There is no need for the extension of validity to be indefinite. There is also no need for the extension of validity to occur when only minor works have been undertaken over five years.

In the United States, there is variation between states as to when development rights "vest".[5] In a "late vesting" state, developers need to obtain the permit and then expend substantial sums on the project in order to vest their rights to continue under that permit / those rules. Minor works are not enough to vest development rights. Preparing a site, for example, is usually not enough to avoid the risk of having to conform if zoning provisions change. There is also variation between states as to how long development rights last, and how long they can be extended. Figure one shows the duration provided in a range of states.

State	Original Vesting Period	Possible Extension
Arizona	Non-phased: Three years Phased: Five years	Two years[144]
California	"[A]s provided by ordinance, but not less than one year or more than two years beyond the recording of the final map."[145]	One year[146]
Colorado	Three years	"[P]eriod exceeding three years"[147]
New Jersey	Three years	One to two years; or "longer than three years" if the development is 50 acres or more[148]
North Carolina	Two years	"[E]xceeding two years but not exceeding five years"[149]
Pennsylvania	Five years	"[T]erm or terms of three years from the date of final plat approval for each section"[150]
South Carolina	Two years	"[A]t least five annual extensions"[151]

Figure 1. Time periods for vested rights in the United States.[6]

Dormant projects are addressed in some state legislation. For example, in Massachusetts, the General Law regulating zoning provides:

> "A zoning ordinance or by-law shall provide that construction or operations under a building or special permit shall conform to any subsequent amendment of the ordinance or by-law unless the use or construction is commenced within a period of not more than 12 months after the issuance of the permit and in cases involving construction, unless such construction is continued through to completion as continuously and expeditiously as is reasonable."[7]

[5] J Spencer Hall, 'State Vested Rights Statutes: Developing Certainty and Equity and Protecting the Public Interest' (2008) 40(3) *Urban Lawyer* 451.

[6] Ibid 468.

[7] https://malegislature.gov/Laws/GeneralLaws/PartI/TitleVII/Chapter40A/Section6

In New Hampshire, Title LXIV regulating Planning and Zoning provides that approved plans and subdivisions need not comply with changes for 5 years, with the exception of

> "regulations and ordinances which expressly protect public health standards, such as water quality and sewage treatment requirements, for a period of 5 years after the date of approval". The five year exception applies only if "active and substantial development" commenced within 24 months of approval.[8]

These provisions provide a better balance between community expectations and the possibility of unforeseen circumstances delaying developments. Similar provisions should be introduced into the EPA Act as a priority. Commencing construction should not be enough for consents to endure beyond five years. **Substantial works must commence well before the lapsing period (e.g. within 24 months) and these must be actively and substantially ongoing.**

Extensions should be treated as exceptional rather than routine. Instead of consents extending automatically after physical commencement, this should change (in line with many US jurisdictions) so that an application must be made to extend the duration of consent. This application should require clear and strong justification of the need for extension.

Extensions should be time limited rather than indefinite. Extensions should be granted for short periods (e.g. 12 months). Provision could be made for a limited number of additional extensions, for which applications would again need to be made and strong grounds for extension demonstrated.

Legislative revision is necessary also to deal with already existing dormant developments. Section 96 of the EPA Reg 2021 could be amended to provide a clearer definition of physical commencement, bringing this into line with definitions in many US states. To restore community trust in the planning system, dormant developments must be assessed against current planning requirements. This is especially important where the social and environmental context has changed significantly, as at Manyana. **The EPA Act should be amended to include provision for councils and the department to require reassessment where planning controls and/or the local context has changed since the development application was determined.**

I would welcome the opportunity to discuss any of these recommendations in more detail, and can be contacted at a.thorpe@unsw.edu.au.

[redacted]

Yours faithfully,

Dr Amelia Thorpe
Associate Professor
Faculty of Law and Justice

[8] https://www.gencourt.state.nh.us/rsa/html/LXIV/674/674-39.htm