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HISTORICAL DEVELOPMENT CONSENTS IN NSW

Organisation: Country Mayors of NSW

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SUBMISSION

HISTORICAL DEVELOPMENT CONSENTS IN NSW

Presented By
Country Mayors Association of NSW

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Contents

TERMS OF REFERENCE

That the Committee on Environment and Planning inquire into and report on historical development consents in New South Wales, including:

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

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

(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.

(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.

(e) Any other matters.

The Country Mayors Association of New South Wales, the Development Approval Status Quo and the Zombie DA issue

The Country Mayors Association of NSW (CMA) represents 89 Local Councils throughout non-metropolitan NSW. The Association exists because of city-country inequities in Local Government. The disparities between regional and Sydney Councils includes limited resources, such as skilled planning staff with local experience, to monitor historical Development Applications. In some cases, planning personnel have been shared between Councils, such is the planner skills shortage. Hence, the challenges that historical Development Approvals create can often be unexpected (and all the challenging for CMA members), which is impactful, as member Councils are forced to be reactionary but are limited in their authority to act under current legislation.

Zombie or historic development consents refer to Development Applications approved years or often decades ago under previous planning legislation, that have been 'resurrected', after some level of commencement. This issue has increased dramatically for CMA members in recent years, costing time and money for both Councils and developers. Given its' representation of regional NSW Councils, the CMA is ideally positioned to advise the Inquiry that zombie DA or historical development consent issues are widespread.

The CMA understands that currently, development consents lapse after five years. Consent can be prevented from lapsing if building, engineering, or construction work relating to the consent is "physically commenced" within that five-year period. Legislative defining of commencement has changed since the introduction of the legislation in 1979. Initial requirements entailed minimal preparatory work such as survey work or removal of vegetation, while current requirements confirm such minor work is insufficient. In either case, physical commencement of a consent undertaken in the initial five-year period, 'secures' the consent, meaning the consent remains in force ready to be acted upon at any time. This is where further a benchmarking framework is required, with discretionary authority remaining with consent authorities.

The Planning NSW website states that:

Local environmental plans (LEPs) are the main planning tool for shaping the future of communities and ensuring local development is done appropriately.

LEPs provide a framework that guides planning decisions for local government areas through zoning and development controls. Zoning determines how land can be used (for example, for housing, industry, or recreation) and development controls set guidelines such as the maximum building height allowed.

Changes to LEPs keep local planning controls up to date. The process of making and amending LEPs aims to make sure these changes are in keeping with broader strategies and deliver good planning outcomes.

Member Councils' are required to review Local Environment Plans and determine if updates are required every five years. Environmental considerations alone have changed significantly in many CMA Members' LEPs, just going back as far as 2010. The maximum building height allowed might not have been a restriction in place at the time a development was approved but if it goes ahead today, it could be in conflict with the urban and/or natural environment around the site. This has been the case and of particular concern for the CMA's coastal members, where high value properties with ocean views have had the aesthetics of their neighbourhood marred and outlooks obstructed.

In 2018, Local Strategic Planning Statements were added by the NSW Government, as a further requirement of NSW Councils. These are also expected to be updated at least every five years, with no more than seven years to elapse.

Council's Statements are to set out their planning priorities to meet the community's needs and deliver key State and regional planning objectives.

The council's LSPS set out:

- the 20-year vision for land use in the local area
- the shared community values to be maintained and enhanced
- how future growth and change will be managed
- the special characteristics which contribute to local Identity

Development Applications (DA) are approved according to the requirements and zoning in place at the time of application. If LEP generations have passed since then, it is problematic when the development in question is no longer in line with the local environment, let alone current regulations, such as safety or fire codes. The value of time spent on LSPS is questionable when large-scale developments approved decades ago are impacting CMA members.

Equitable, dignified accessibility expectations have also evolved considerably from what was required of commercial buildings decades ago. Member Councils have reported that historic commercial buildings in local towns do not have disabled access and often provide access through a back door, which can be of questionable suitability or dignity.

Of the CMA's 89 members councils, most have been increasingly impacted by the issue of historical development consents or Zombie DA's, with primarily the smaller, rural Councils being relatively untouched by growing pains. Member Councils contending with the issue report that the current planning framework is failing to meet community needs or expectations from the development approval process. This is largely due to legislative improvements not being retrospective.

CMA Members have resorted to case law when legislation has inadequately defined development commencement. A Council cannot act as expected to without its position being backed by an irrefutable case, legislative or legal. CMA Members are struggling with

numerous externally inflicted financial sustainability barriers and the expense of legal advice to secure pertinent precedencies for individual cases would be unappealing at best for most. Court battles are worst case scenarios, in terms of costs, staff time and community angst. In making this submission, the CMA hopes likelihood of costly legal expenses will be reduced by strengthened legislation.
In general, CMA members acknowledge the planning legislation improvements that have occurred in NSW. Legislative tools can and are being used by Councils to ensure that development consents granted now will not lead inappropriate developments being carried out into the future.

More legislation has been introduced into the NSW Planning sector in the past 20 years than ever, aside from major drafting of planning process requirements. An example of this is the Coast Management Act 2016 but biodiversity preservation and disaster mitigation Acts are more widespread in relevance across the CMA membership. Contemporary considerations have led to these Acts, which provide much needed developmental parameters. Therefore, it is unfortunate and of considerable concern to the CMA that the predictable rise in Zombie DA's as an issue has been somewhat due to developers seeking to save money and time by skirting around the precautionary Acts of recent years, showing little regard for community, environmental or future safety of the development.

One mid-north coast CMA member is currently contending with at least three historical development consents that are causing substantial issues for the Council and its' community. One of these has cost in excess of $250,000 in legal costs, not to mention considerable amounts of staff time. The matter in question was a development consent for a tourist resort complex (approved in 1993) that involved complete native vegetation clearing from the site.

In March 2021, the current landholder and developer approached Council regarding the current validity of the Consent. The timeframe to date had far exceeded the five-year lapse date provided by the Consent. However, it was put to Council that bore-hole drilling undertaken by Caltex in 1994 was physical work that would constitute commencement.

With strong community support, the Council was forced to contest the matter in the NSW Land and Environment Court. The Council was unsuccessful. A further appeal was not practical, due to the cost and the fact that an injunction preventing the clearing of the site while an appeal was prepared was not achieved.

This is a Council that has found its' financial sustainability so threatened by escalating cost pressures that it applied to IPART for a Special Rate Variation of 42% over three years and was granted 24% over two years in May 2024. It is a clear example of the Zombie DA issue costing CMA Members who cannot afford such sizable extraneous expenses.

A coastal historical development site, where native vegetation was cleared, against the wishes of Council and community

One inland regional CMA member reported that they are "quite often faced with having to deal with zombie/historical DAs and the issues faced include":

- *servicing constraints*
- *outdated conditions due to legislative changes*
- *new property owners of the DA land lack prior knowledge of issues*
- *new neighbouring property owners unaware of the DA and it being activated*
- *outdated headworks and developer contribution charges*
- *property owners not acting in accordance with the development consent conditions e.g. haulage contribution payments and lack of submission of annual environmental reports*
- *original concept approval too cost prohibitive to developers leading to requests of Council to be flexible in its current minimum standards and guidelines*

This Council stated that they generally work to address issues associated with zombie/historical DAs via a modification which quite often involves time-consuming meetings, taking staff away from current applications. This illustrates how Councils' DA processing times are a misrepresentative depiction of performance.

Complicated Zombies

The CMA advises that the issue of historical approved development applications is more complex than a simple zombie problem. There are partial zombies, where developments were approved with multiple stages, with some stages complete and occupied or utilised, while other stages have never been commenced and may or may not be in the near future, regardless of planning requirement changes since initial approval.

A CMA Member has noted the impact of the introduction of the State Environmental Planning Policy (Rural Lands) in 2008 (now repealed) which saw concessional allotment subdivisions being extinguished. This reportedly resulted in an influx of concessional lot subdivisions (small lots interspersed with larger rural lots) immediately prior to the gazettal of the SEPP. Many of those consents went on to achieve commencement but remain incomplete.

Amendments to Section 96 of the Environmental Planning and Assessment Regulation 2021 better defined activities that cannot be deemed physical commencement (of a development), noting those provisions do not apply to development consents granted before 15 May 2020.

Members have found that legislation is ambiguous and not easily interpreted, particularly in relation to prima facie cases where commencement of development is demonstrated by the likes of a survey of a boundary, fencing, tree removal, connection of power and or other infrastructure. These cases are still atypical of historical or Zombie DA's because the amendments to Section 96 were not retrospective.

Current legislation gives the appearance that NSW Councils can amend or revoke a development approval. The reality is that the legislation exposes Councils to compensation claims and CMA members cannot afford that exposure, making such action prohibitive.

Action needed now to negate future zombie DA's

Land banking is a common real estate investment strategy that involves buying and holding onto parcels of undeveloped land for future sale or development. The main idea behind this is to purchase land in areas predicted to experience high growth over time, allowing the land's value to increase. (The Mortgage Agency, 7 Mar 2024)

The CMA is concerned that land banking and similar stalling strategies to capitalise on market/value growth could create a larger generation of zombie DA's. The housing shortage is exacerbating the market pressures that make land banking attractive and it is also the reason why the trend is of such concern and frustration to CMA members.

Another factor than may stall developments and could potentially lead to future Zombie DA's is the disparity between State and Federal Biodiversity legislation. Where there is insufficient alignment, confusion and delays will result, with costly legal proceedings also a serious consequence.

One DA for multiple stages in a development has been proven to be inappropriate at best. Staged developments are often among the zombie DA's challenging CMA Members and recent legislative changes have not sufficiently addressed them. Members have reported numerous cases of major staged developments currently or recently causing considerable issues. Some of these cases saw stage one commenced and completed decades ago, yet work on stage two (in some cases) has only been initiated since 2020, with more stages to come.
A consent authority could not foresee 30 years ago (for example) the approaches and legislation that exists today. Hence, the development consent should only be considered valid for the works or stage of the development that was carried out at the time or within a certain time period.

Recommendations

The expiry of DA consent should require re-assessment in the context of the current LSPS's and LEP's, as well as the current built and natural environments. Member Councils would expect this to involve an assessment by their planning staff, followed by deliberation and a vote by Council.

The term Zombie DA's is appropriate because when brought to life in current circumstances, they are no longer fitting. A sunset clause on DA's should have existed a long time ago. The extent of changes in fire and safety, accessibility, environmental and sustainability expectations has made that evident.

Recent legislative strengthening should be made retrospective and commencement within the required five-year period should not allow unlimited time for progress or completion. To reduce the prospect of future issues, the CMA recommends further defining development progress expectations/requirements beyond commencement.

The CMA further recommends:

1. That the NSW Government introduces a process for the contemporary assessment of historic development consents when reactivated, including mechanisms to adjust and/or revoke historic consents. This should include consideration of legal protections for Councils and potential compensatory funding for applicants (they are often innocent victims of a changing legislative landscape). CMA members support development as core to economic growth.
2. That additional strengthening of the Act and associated Regulation include an unambiguous definition of 'commencement' as it relates to residential, commercial and subdivision (and other) developments.
3. That, where a development does not fall within the parameters set by the Planning NSW 'commencement' definition, the relevant Local Council have the authority to make an evidence-based determination.
4. That Planning NSW, with legal advice, caution developers who avoided meeting current requirements by using an historical development approval of the potential liability exposures they may face. This should be publicised to warn others off the practice.
5. That the NSW Government establish a property acquisition fund to enable consent authorities to revoke historical consents on properties with high exposure to flood, bushfire and coastal hazards and/or within area of high biodiversity values may provide some scope for high risk/ high value sites to be acquired from existing landowners to be returned to the Crown or Parks

estate. However, this would need careful consideration regarding when and how this would be utilised to ensure it applies to areas with high biodiversity values or risk, rather than situations where neighbouring properties/communities are seeking to retain a more natural setting for their own, previously developed properties. A recommendation the CMA shares with one its' members.

6. That the NSW Government reviews the current extent of land / property banking, the implications and legislative causalities.
7. That the NSW Government consider legislative or prohibitive financial negatives for investors to limit the property banking trend, particularly when approved developments (including subdivisions) and stalled.
8. That the NSW Government considers legislation from Local Government and a developer's perspective, collaborates with Federal counterparts in relation to biodiversity legislation and ensures the framework for development considerations is consistent, efficient and practical.
9. That a cost-effective process for reviewing and withdrawing development consent be integrated with the Regional Planning Panels.
10. That legislation supports consent authorities (to reduce legal costs) and is developed in collaboration with CMA Members' planning personnel, who are contending with the issues on the ground.
11. That the process be further reinforced by proportionate punitive consequences for developers who do not heed consent authority requirements. When an extractive industry, such as a quarry or mine is fined thousands of dollars for breaching environmental regulations, the sum is far from proportionate or a deterrent but there is some social license damage.
12. That where substantive stages exist in a development and they are to occur at different times (parameters to be set out legislation), development consent should be required for each stage, with Addendum DA's to be submitted to the consent authority/Council when the developer is ready to proceed with the next stage.
13. In order to contend with historic / zombie DA issues, Planning NSW must work with Local Councils, with a foundational understanding of their challenges. Historically approved developments cannot be effectively monitored when a Council does not have the resources to do so. Hence, the onus must be on developers to update Councils when belated action / progress is occurring. Planning personnel are under pressure to complete current development applications in a timely fashion. Zombie DA's are an additional burden on already over-taxed staff. Planning NSW is encouraged to add development reporting requirements and support Councils with monitoring and funding.

14. That the NSW Government prepare a community education program to improve public awareness of development consent processes, considerations, and the limitations on adjusting or revoking historic consents. Many so-called zombie developments create considerable community discord and frustrations with Local Councils is often out of ignorance of the limitations of Councils, in light of legislation at the time of consent; the CMA seeks NSW Government support in reducing that ignorance.

15. That the NSW Government establish and promotes a public register, providing greater transparency about approval mechanisms, timing, past decisions, and historic planning controls.