Submission No 84

HISTORICAL DEVELOPMENT CONSENTS IN NSW

Organisation: Environment and Planning Law Association (NSW) Inc

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BY WEB SUBMISSION

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NSW Legislative Assembly
Committee on Environment and Planning

Attention: The Chair, Mr Clayton Barr MP

Dear Mr Barr and the Committee,

Submission to the inquiry into historical development consents in NSW

The Environmental Planning Law Association (**EPLA**) welcomes the opportunity to make a submission in response to the terms of reference issued for the inquiry into historical development consents in NSW. These are development consents granted in the past for development that has been physically commenced (and, therefore, the consents have not lapsed under s 4.53 of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**)), but are not completed until many years thereafter, sometimes when planning and environmental standards and community expectations have changed. They are colloquially referred to as 'zombie consents'.

EPLA has more than 400 members comprising planning, environmental and legal professionals. As a result, many members of EPLA, in various capacities, have daily interaction with the operation of the EP&A Act. This makes EPLA well placed to provide feedback in relation to the practical issues that arise in relation to historical consents from both a consent authority and development industry perspective.

This submission addresses each of the published terms of reference in turn.

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

Section 4.53(4) of the EP&A Act provides:

> *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.

The extent of activity that can lead to a consent being "*physically commenced*" has been defined in s 96 of the *Environmental Planning and Assessment Regulation 2021* (**Regulation**):

> *(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.*
>
> (Emphasis added.)

Section 96 of the Regulation was a continuation of the cl 124AA of the *Environmental Planning and Assessment Regulation 2000*, which was originally introduced to overcome the effect of a series of Court decisions that had led to very minor works being sufficient to physically commence a development consent and, therefore, stop it from lapsing under the EP&A Act. It is plain that section 96 of the Regulation does not affect any development consents granted before 15 May 2020. Accordingly, any development consents that had otherwise been physically commenced prior to 15 May 2020 only need meet the relatively low bar for physical commencement established by caselaw.

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

The legal consequence of s 4.53 of the EP&A Act is that a development consent will, in theory, last forever once "physically commenced". There are sensible reasons for this approach. It provides certainty to developers in a constantly changing regulatory landscape. That certainty allows financial decisions to be made in fixed circumstances. It also allows for the eternal regulation of the development the subject of the consent (even if against older standards) and allows historical development consents to be modified. As a general proposition, a modification to a development consent may result in up to date standards and requirements being imposed on an existing development consent[1], however, this will depend on the nature of the modification sought.

More intense or potentially environmentally detrimental industries that are regulated under the *Protection of the Environment Operations Act 1997* are subject to more fluid environmental standards via the environmental protection licences system.

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[1] *Scrap Realty Pty Ltd v Botany Bay City Council* (2008) 166 LGERA 342

The concern over zombie consents arises when a development consent is physically commenced but not completed until (sometimes many) years later. Therefore, the development sits unrealised and then begins within a changed regulatory landscape.

The consequences of the existence of these zombie consents for the planning system is that they can undermine strategic planning decisions. For example, there is difficulty for authorities in planning for the transition of suburbs when the extent of potential development is unknown. There is no mechanism available for consent authorities to know whether a development consent has been physically commenced such that it may later be developed. It is only when a historical development consent is further acted upon that a consent authority is triggered to enquire about the original physical commencement of the consent.

There is also uncertainty for developers when there is no mechanism to confirm the commencement of a development consent. Essentially, developers must hope for the best that they have done enough to physically commence a development consent if they seek to act on a consent after the initial five-year period of operation of a consent.

(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.

These two matters will be addressed together.

There are two mechanisms that could be inserted into the current legal framework that would provide greater certainty and transparency regarding historical development consents. They are:

(i) providing a mechanism (for example, the issuing of a certificate) by which confirmation is provided regarding the commencement of a development consent; and

(ii) providing that, once commenced, a development must be completed within a specified period of time.

The benefit of the first mechanism would be to take the guess work out of whether a consent has been physically commenced. This will give developers certainty and an opportunity for any issues regarding physical commencement to be resolved before the lapsing period under s 4.53 of the EP&A Act expires.

The introduction of such a step would require local councils to undertake an additional task when requested, which may be an issue for resourcing. There is also the possibility that private certifiers could provide the confirmation of commencement. Either way, if there was something that could be relied upon by developers to secure the operation of a development consent, this would remove an existing layer of risk regarding the life of a consent. Further, the mechanism for confirmation of physical commencement would provide a record to planning authorities regarding those historical consents that remain extant.

To address the prospect of development consents, once physically commenced, sitting unrealised only to be acted upon years in the future, a time limit could be imposed for completion of the works under a consent to be measured from the date of physical commencement. This would have the benefit of a developer choosing to extend the life of a development consent (it having been commenced within the prescribed 5 year period under s 4.53) but then would bring a consent to an end if the development is not completed within a further time period, say, another 5 years.

Such a mechanism may balance the desire for developers to bank a development consent for longer than the 5-year lapsing period (for example, to allow market conditions to improve) while also giving confidence to planning authorities that their strategic planning for an area will not be undermined by the resurrection of an old consent.

(e) Any other matters.

There is an existing development control orders (DCO) power in the EP&A Act Schedule 5 Part 1 General Orders, Order 13

It appears that this may be a little used power which if exercised could provide flexibility and a complete remedy to Zombie consents.

The orders regime under the EP&A Act includes the giving of procedural fairness and relevant appeal rights where the holder of the consent is aggrieved by the issuing of an order to complete the development.

The current form of order 13 extracted from Schedule 5 is as follows:

To do what	When	To Whom
Complete Works Order To complete authorised works under a planning approval within a specified time	The authorised works have commenced, but have not been completed, before the planning approval would (but for the commencement of the works) have lapsed.	The owner of the relevant land

Understanding that there may be a desire to modernise the consent to then current Building Code of Australia or National Construction Code compliance, a power might be inserted into the Act or by Regulation to entitle the body giving the order (the Council) to require compliance with current BCA/NCC standards.

It should be noted that compliance with the BCA/NCC is a prescribed condition of Consent under s4.17 (11). That the BCA/NCC standards may have altered in the time between the grant of the consent and the issuing of the DCO can be a factor in the issuing of a Notice of Intention to Issue the Order, representations by the owner and subsequent consideration by Council. If there remains dissatisfaction, then a right of appeal is available to the owner should they choose.

It would be necessary to resource Councils to enable them to pursue the process.

This approach has the benefit of utilising the existing orders regime which is likely to give less concern to the development industry than to introduce a raft of new provisions and a new constraint of time limitation on consents.

It is uncertain how the market (particularly developers and financiers) will respond to the concept of time limitation.

Upgrading existing provisions and resourcing implementation can deal with both the completion of projects and modernising projects to current standards.

If the Inquiry would be assisted by discussion with representatives of EPLA regarding the content of this submission, that may be arranged.

Yours faithfully

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Paul Crennan
President