

**Submission  
No 242**

## **HISTORICAL DEVELOPMENT CONSENTS IN NSW**

**Organisation:** Blacktown City Council

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Clayton Barr  
Committee Chair  
Legislative Assembly Committee on Environment and Planning  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

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Dear Mr Barr

### **Final submission to the Parliamentary Inquiry into historical development consents in NSW**

Thank you for inviting Blacktown City Council to make a submission to the NSW Legislative Assembly Committee on Environment and Planning into historical development consents (also known as 'zombie DAs') in NSW.

Council formally considered this matter at its meeting on 26 June 2024 and resolved to amend the earlier draft submission prepared by Council officers to include additional comments regarding the inclusion of some examples (diagrams and photographs) to support the legislation that can assist in demonstrating what constitutes commencement.

The status of historical development consents is an important topic for us as the growth in the City depends on all the development consents granted.

Our central position on historical development consents is that a development consent that has been lawfully commenced should be preserved and so remain valid in perpetuity.

There are many reasons why a lawfully commenced development consent cannot be completed. Some of these include the following:

- unforeseen events – like the COVID pandemic, the global financial crisis in 2008, and more commonly, deceased estates
- a shortage of building materials and skilled labour shortage currently being experienced, which affects building costs and therefore project feasibility and project timing
- building companies going into liquidation
- difficulty securing finance

- time taken to secure a service easement from adjoining owners through separate court proceedings.

Therefore, preserving lawfully commenced historical development consents is not unreasonable and an applicant or owner should not lose their development consent.

However, to ensure that commencement of an historical development consent has been done lawfully Council requests the Committee to undertake the following:

- a comprehensive review of all the current planning legislation relating to commencement of a development consent
- review the current definition and practices in relation to commencement as they apply to historical development consents
- the development of a physical commencement definition and practice that must apply to all development consents regardless of when they were granted
- ensure that the works done are in lawful compliance with the development consent granted
- ensure that historical development consents can still be made to comply with relevant current legislative obligations.

Each of these points are examined separately below:

**1. A comprehensive review of all the current planning legislation relating to the physical commencement of a development consent.**

- a. The current planning legislation specifically S4.53 of the Environmental Planning and Assessment Act 1979 states in subsection (4) as follows:

(4) *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.*

- b. This section is then qualified further by subsection (7) which states as follows:

(7) *The regulations may set out circumstances in which work is or is not taken to be physically commenced for the purposes of this section.*

- c. The reference made in (7) above to the Regulation is not clear and is in fact referring to S96 of the Environmental Planning and Assessment Regulation 2021 which states as follows:

(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.*

- d. These key sections of the planning legislation are used to determine if a historical development consent is physically commenced or not. However, this legislation is inadequate and incomplete as applicants and Council have to rely on Land and Environment Court case law to determine what constitutes physical commencement. This is time consuming and costly for both parties. It is therefore Council's hope that these provisions can be comprehensively reviewed by the Committee.

**2. The definition of physical commencement of a development consent is too vague and uncertain. The definition must clearly identify exactly what works can constitute the physical commencement of a development consent**

- a. Whilst the heading of S96 of the Environmental Planning and Assessment Regulations 2021 suggests certainty by its title:

*'When work is physically commenced'*

Unfortunately, the content of this section is far from certain and sets out only what can't be included as physical commencement not what can be included by an applicant as physical commencement works.

- b. So instead of providing a clear list of work that can constitute a genuine intention to carry out any approved historical development consent, the list in S96 of the planning regulations instead states the work that is not taken to have been physically commenced. This is as outlined below:

*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*

- c. Further this list only applies to those development consents issued on or after the 15 May 2020 so there is no list of any kind that applies to the development consents that were issued before the 15 May 2020.
- d. Council would prefer to see:
  - a list of all works that constitute physical commencement that can be applied to all development consents regardless of when the development consent was granted
  - accompanying photographs and diagrams that further clarifies what constitutes physical commencement.

**3. A final physical commencement definition that is the same for all historical development consents regardless of when they were granted**

- a. It is essential that the physical commencement test be the same for all development consents granted no matter when the development consent was granted

- b. In s96 (2) of the regulations it states that:

*This section does not apply to a development consent granted before 15 May 2020.*

Other than by virtue of the creation of this new list of works (that are not to be taken as having been physical commencement), it is not clear what the significance of this date is for historical development consents. This new threshold date fell in the midst of the COVID pandemic and it came out without any warning or reason being provided to Councils and the community.

- c. This creates uncertainty, for both Council and the applicant and results in Land and Environment Court cases to ascertain how to best interpret this piece of legislation. Also, this Clause only relates to development consents granted after 15 May 2020 which creates more confusion.

**4. The physical works carried out must be in lawful compliance with the development consent granted**

- a. Of concern also is that nowhere in the current definition of physical commencement in S96 does it say or require the work to be in lawful compliance with the development consent itself.
- b. In s4.53 of the Environmental Planning and Assessment Act 1979 it states as follows:

*4.53 Lapsing of consent*

- (4) *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.*

- c. For example, if an applicant is relying on the physical works such as tree removal or site works, both will require either the issue of a building construction certificate or a subdivision works certificate before any works can start on a site.
  - d. Yet the current definition of when work is physically commenced is silent on the need for all work to be lawful work. This could potentially result in an applicant doing work on the land without first lawfully complying with the development consent in a rush to get physical commencement on the site.
  - e. Therefore, we would like to see the legislation amended to state that any commencement of works must first be approved by a construction certificate or subdivision works certificate.
- 5. Ensure that historical development consents can still be made to comply with relevant current legislative obligations**
- a. The concern here is that whilst a normal development consent is valid for 5 years but an historical development consent that are physically commenced is valid in perpetuity, it is relying on old and often out of date legislation. The reactivation or reawakening, of a “commenced” historical development consent should where appropriate, be made to comply with current legislation and standards.
  - b. An example of where this already happening to a degree is in the application of the Building Code of Australia. So regardless of the age of the Development Consent the current version of the Building Code of Australia is applied to the Building Construction Certificate issued now.
  - c. Currently not all legislation caters for the reactivation of historical development consents. Other relevant legislation could be amended to apply to an historical development consent that is reactivated, for example the Biodiversity Conservation Act 2016.

If you would like to discuss our submission then please contact our Manager  
Development Assessment, Judith Portelli on 9839 6228.

Yours faithfully



Kerry Robinson OAM  
Chief Executive Officer