

**Submission
No 243**

HISTORICAL DEVELOPMENT CONSENTS IN NSW

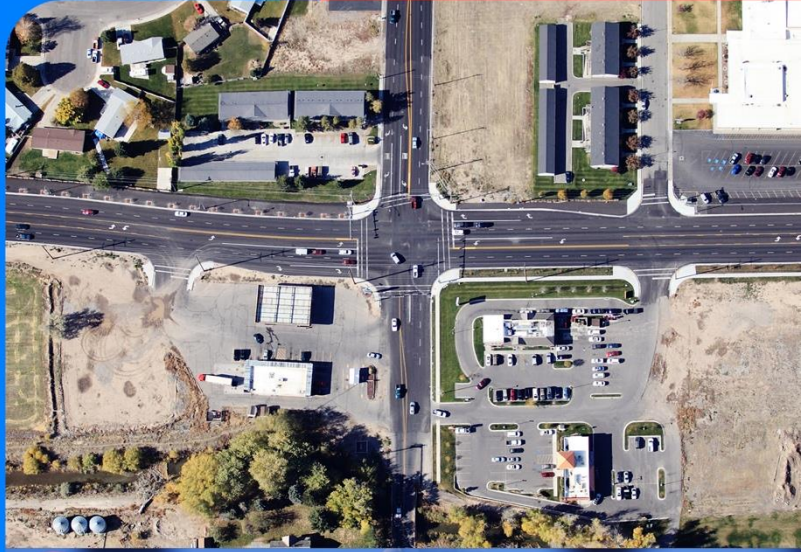
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SUBMISSION

Inquiry into historical development consents

June 2024





Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

OVERVIEW OF THE LOCAL GOVERNMENT SECTOR



Local government in NSW employs **55,000 people**



Local government in NSW is responsible for about **90% of the state's roads and bridges**



Local government in NSW looks after more than **\$177 billion** of community assets



NSW councils manage an estimated **4 million tonnes of waste** each year



Local government in NSW spends more than **\$2.2 billion** each year on caring for the environment



NSW councils own and manage more than **600 museums, galleries, theatres and art centres**



NSW has more than **350 council-run libraries** that attract tens of millions of visits each year



NSW has more than **400 public swimming and ocean pools**

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Opening

Local Government NSW (LGNSW) welcomes the opportunity to provide comments to the Parliamentary Committee on Environment and Planning to assist its inquiry into historical development consents in NSW.

This submission seeks to highlight the pressing need to future-proof the way development consents are handled so that the issues being encountered today are not perpetuated in years and decades to come. Councils do not want to see the current 'glut of stalled housing approvals'¹ becoming the next generation of 'zombie developments'. We need to avoid repeating the mistakes of yesteryear by fixing the current system today, so it is clearer and more robust.

At the outset, it is relevant to note the distinction between development consents that have already been approved (i.e. existing, sometimes historical longstanding consents) and those development consents that are yet to be approved – future consents. This is important because proposing retrospective legislative action to address issues with *existing* consents presents many challenges, whereas it is more feasible and clearly necessary to look at reforms which can address the current situation to avoid more of the same occurring with future development consents.

This submission is informed by the policy positions of LGNSW and consultation with councils.

This submission was endorsed by the LGNSW Board in July 2024.

¹[Sydney housing crisis: construction of thousands of new homes stalled \(smh.com.au\)](https://www.smh.com.au/national/sydney-housing-crisis-construction-of-thousands-of-new-homes-stalled-20240701)

Summary of Recommendations

Recommendation 1: That the Committee, when contemplating options to address historical development consents, recognises and considers the distinction between existing historical consents and future consents.

Recommendation 2: That the Committee recommend the NSW Government implements new measures applicable to all future development consents that would require them to proceed to completion in a timely manner. This would involve amending planning laws to introduce stronger controls based on the principle of clear commencement timeframes (maximum five-year period) during which the physical construction works must be substantially completed. Where works are not substantially completed, the consent should lapse.

Recommendation 3: That the Committee recommend the NSW Government investigate regulatory or other measures to discourage land banking by incentivising landowners to unlock the significant housing potential that already exists.

Terms of Reference

The Legislative Assembly Committee on Environment and Planning of the NSW Parliament has established the Terms of Reference to inquire into and report on historical development consents² 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.

² [Historical development consents in NSW](#)

LGNSW Position

LGNSW Policy Platform

As set out in the LGNSW Policy Platform³, councils have sought reforms to the planning system to address the issue of 'zombie developments' whereby the delayed implementation of decades old development consents results in development proceeding that is out of step with contemporary planning and environment standards.

This policy is based on resolutions of the 2019⁴ and 2022⁵ LGNSW Annual Conferences to:

- Seek regulatory reform of the NSW planning system to address the delayed implementation of development consents, which currently permit development some 28 or more years after the consent was secured, without obligation to review against contemporary planning and environmental standards or the views of the present community. **(2019 Resolution #29 - Delayed implementation of development consents)**
- Request amendments to the NSW Planning laws to adopt a currency period of development consent approval (maximum 5 years); during which time physical construction works must be substantially completed. Where works are not substantially completed, the consent lapses and the proponent is required to re-lodge the development application to be assessed on its merits. **(2022 - Resolution X36 - Development Consent to Lapse Where Work Has Not Been Completed)**

In their background information supporting these reform proposals, the councils noted they are seeing:

- community concerns about "*extensive clearing associated with a Flora and Fauna Park...on the basis of a development consent issued in 1989 and secured with physical commencement in 1992*" with no development of the site occurring since that time.⁶
- "*a surge in the land clearing associated with development consents approved in late 1980s and 1990s. Several bushland land properties are being cleared for housing subdivisions. This has resulted in increased sightings of koalas in urban yards, and the likelihood of development within potential coastal vulnerability areas, new mapped areas significant vegetation communities, areas of Aboriginal heritage significance.*"⁷

³ The [LGNSW Policy Platform](#) reflects the collective positions of local government across NSW on issues of importance and guides LGNSW in its advocacy on behalf of the local government sector.

⁴ [2019-LGNSW-Annual-Conference-resolutions.pdf](#), p 8

⁵ [2022_Annual_Conference_Business_Paper.pdf](#), 147

⁶ [2019-LGNSW-Annual-Conference-Business-Paper.pdf](#), p 46

⁷ [2022_Annual_Conference_Business_Paper.pdf](#), p 147

General comments

The term 'zombie development' has been commonly used by communities and environmental groups when referring to developments which have been approved many years ago but have not been substantially carried out or completed. Typically, they have an historical or longstanding approval which could date back decades. Once an approved development has been *physically commenced* the consent is considered to have been 'secured'. Once secured, a development consent can remain valid in perpetuity.

The resurrection of a development under a development consent that may have been granted decades ago can be unexpected for local councils and communities, can conflict with contemporary expectations around safety, environmental and character protection, and risks eroding community trust in the planning system.

These developments present many challenges for councils, having to dedicate precious and scarce resources navigating the legal framework of development consents (including court appearances) and balancing this with community expectations, changing environmental and safety standards and the rights of property owners.

Faced with this ongoing and growing challenge, councils have made representations to successive State Government ministers and agencies, backed up by resolutions at LGNSW Annual Conferences, calling for reform in this area. The establishment of this parliamentary inquiry is a welcome step and presents an opportunity for all stakeholders to contribute constructive suggestions for change.

Response to Terms of Reference

a) **Current legal framework for development consents, including physical commencement test**

Term of Reference:

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

In the legal framework for development consents, two key provisions relevant to the issue of historic development consents are:

- **The requirement for physical commencement** - Currently, under section 4.53 of the NSW *Environment and Planning Assessment Act 1979* (EP&A Act) development consent will generally lapse after 5 years.

However, the consent can be prevented from lapsing if *'building, engineering or construction work'* relating to the consent is *'physically commenced'* within that five-year period.

This does not mean that the development covered by the consent must be completed within five years to stop the consent from lapsing. Provided physical works (within the meaning of the EP&A Act) have been legally commenced before the lapse date, the consent remains valid and the development can be implemented at any stage in the future.

- **Powers to revoke a development consent** – The EP&A Act contains a power to revoke or modify a development consent in return for compensation. Section 4.57 allows a council or the Planning Secretary to revoke or modify a development consent, but only when a new State or local planning instrument is proposed. This means that in the absence of a proposed planning instrument, the power to revoke or modify a consent cannot be used. Compensation associated with such action is payable under section 4.57(7). The decision to revoke a consent may be appealed to the Land and Environment Court (LEC).

b) Impacts of the uncertain status of lawfully commenced development consents

Term of Reference:

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

The issues and implications of these historical development consents have been well illustrated – playing out in media stories and court cases, and drawing in councils, community and environmental groups, and development proponents, along with lawyers and the LEC. The current legal framework for historical development consents presents challenges for all involved and does little to serve anyone's interests. Some of the issues are outlined below.

- **Implications for future consents** – Unless new measures are implemented to manage future consents, the current framework – which allows development consents to remain valid in perpetuity based on minimal site works being undertaken – will result in a new generation of problematic historical consents further down the track.
- **Resourcing and cost implications for councils** – Identifying historical consents is complex and takes time, requiring consideration of a range of factors⁸. Councils have also been required to enter legal proceedings which is not only time-

⁸ For example: Evolving physical commencement requirements or 'tests'; case law and legal considerations; the logistics of locating and reviewing (potentially volumes) of paper-based and digital records; instances where landowners/developers have undertaken preparatory works without confirming such work with council.

consuming but costly. The entire process of managing these historical consents entails council resources being expended to establish facts, obtain legal advice, prepare for court proceedings and manage interaction with their community. Where council resources are already stretched, this could significantly impact resourcing of core development assessment activity, a particularly important consideration noting the current drive to improve approval timeframes for housing proposals.

- **Lack of visibility for councils and communities** – Due to the amount of time that has passed, new community members moving in since the development was approved, and a lack of public information about the consent, councils and communities may be unaware of a historical development consent in their neighbourhood until a developer seeks to recommence that consent. It is currently not possible for a member of the community to easily and quickly understand what development consents remain in force and potentially affect their local area. This may leave the community unclear about the future of a development site and can lead to anger, frustration and mistrust in the planning system, all of which falls to councils to manage.
- **Historical consents do not consider or meet contemporary planning or environmental requirements** – Historical consents often contain outdated requirements relating to standards such as environmental protection, bushfire construction and accessibility. In addition to the environmental and safety implications, this can present compliance challenges for councils, if for example a development was to proceed in accordance with past standards that differ from today's requirements. Planning and zoning changes through amendments to local environmental plans (LEPs) over the life of a development consent may also result in land use permissibility issues. Contemporary environmental standards also include consideration of threatened species under Commonwealth legislation⁹.
- **Natural disaster risk to personal and property safety** – Significant bushfire and flood events in recent years have highlighted the importance of correct siting and mitigation measures to prevent risks to people and property. Similar to environmental concerns, the recognition of disaster risk has strengthened over time, leaving historical development consents to proceed, having never considered these impacts properly. This conflicts with recent efforts to promote disaster resilience and reduce natural disaster exposure.
- **Commencement and completion timeframes** – Councils have observed that over time the original intent of the EP&A Act in relation to timeframes for commencement and lapsing of development consent has been watered down, and the bar for physical commencement is now set too low. Increasing the bar for physical commencement or reducing the period for commencement may help to lower the risk of historical developments arising in the future.
- **Uncertainties around powers to revoke consents** – The existing powers to revoke or modify consents have limitations and incur a compensation provision

⁹ *Biodiversity Conservation Act 2016 and Environment Protection and Biodiversity Conservation Act 1999 Act*

which needs further clarification and for which no funding exists within councils. For councils considering this action, the provisions to appeal leave little clarity regarding the final costs a council might face should they take this approach. Not surprisingly, for these reasons it is not a power that is often used.

c) Barriers, benefits and costs of taking action on historical development concerns

Term of Reference:

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.

The barriers to addressing historical development consents and preventing new historical development consents may be summarised primarily as a lack of legal mechanisms, a lack of funding (such as would be needed for compensation if a consent was revoked), and a lack of clarity and certainty for all involved.

Each case of an historical consent currently in the public domain, while labelled a 'zombie development' by communities, has its own unique set of circumstances and reflects the deep complexity of the planning system and the difficulties brought about by changes that have occurred over time. Councils do not have the information or resources to track all development consents from approval through to physical commencement and then to completion. Insufficient information about the number of historical consents that already exist means that the scope and extent of the problem cannot be easily quantified. This brings greater challenge to evaluating options to address the problem.

Further, the possibility of imposing any new requirements retrospectively will require careful consideration, given the challenges and implications around the risk of legal action, complex case law, and property owners' investment decisions (necessitating compensation which is currently unfunded within councils).

While the barriers and challenges with historical consents may appear insurmountable, this inquiry presents a very achievable and significant opportunity to take action to prevent these problems occurring in relation to *future* development consents. For example, increasing the bar for physical commencement may assist in lowering the risk of historical developments arising in the future.

An important secondary benefit is the potential to unlock more housing in appropriate locations, if steps could be taken to identify and action more recent development approvals that currently remain dormant. (Refer to land banking discussion later in this submission.)

d) Options to address concerns regarding historical development consents

Term of Reference:

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.

When contemplating options to address historical development consents, it is necessary to draw the distinction between *existing* consents and *future* consents. For existing consents, a further distinction can be made between longstanding consents – many that date back to last century and which do not meet contemporary standards – and more recent approvals where development has not proceeded for one reason or another. As discussed earlier, the imposition of retrospective requirements on existing longstanding consents will be challenging for a range of reasons.

Future consents on the other hand, are not yet in the planning system, so reforming the current laws to apply to these is more feasible. It is also clearly necessary if we are to avoid more of the same occurring with future development consents.

To help lower the risk of historical developments arising in the future, councils would like the NSW Government to implement new measures that would incentivise and require future development consents to proceed to completion in a timely manner.

This requires amendments to planning legislation to introduce stronger controls around commencement requirements. These amendments should be based on the principle of clear commencement timeframes (maximum five-year period) during which the physical construction works must be substantially completed. Where works are not substantially completed, the consent should lapse, requiring the proponent to re-lodge the development application to be assessed on its merits.

From an operational perspective, councils have given thought to various options and identified in their submissions some areas where reform could be contemplated. These include:

- Clarifying the ‘physical commencement’ test – councils consider the bar is currently set too low.
- Shortening the period in which approved development must commence and giving councils powers to set completion dates for developments.
- Introducing provisions that would require historical consents to be reviewed and updated against critical matters at key junctures in the life of an approval.
- Improving transparency around historical development consents so that local communities know what is approved in their local area.
- Strengthening the ability of local authorities to ‘buy back’ consents that are not in the public interest – currently, the powers to revoke a development consent are limited and councils have limited funds to support any actions to revoke consents.

LGNSW encourages the Committee to look at the practical suggestions offered by councils, based on their direct experience and detailed knowledge of individual cases.

Recommendation 1: That the Committee, when contemplating options to address historical development consents, recognises and considers the distinction between existing historical consents and future consents.

Recommendation 2: That the Committee recommend the NSW Government implements new measures applicable to all future development consents that would require them to proceed to completion in a timely manner. This would involve amending planning laws to introduce stronger controls based on the principle of clear commencement timeframes (maximum five-year period) during which the physical construction works must be substantially completed. Where works are not substantially completed, the consent should lapse.

e) Any other matters

Term of Reference:

e) Any other matters

Addressing land banking

Development consents generally have a five-year commencement period under section 4.53 of the EP&A Act, but there is no onus on a developer under the EP&A Act to complete a development once that development has been physically commenced.

As LGNSW has noted in other submissions¹⁰ councils regularly cite examples where approvals that have been in place for some time are not proceeding due to decisions of private landowners. These could have the benefit of unlocking many hundreds of additional dwellings rather than leaving these undeveloped and pressing into new areas which require further challenging planning and environmental constraints to be addressed. However, there is a general lack of regulation to require the completion of development and to prevent land banking decisions by some property owners. Measures are needed to incentivise landowners to unlock the significant housing potential that already exists.

Recommendation 3: That Committee recommend the NSW Government investigate regulatory or other measures to discourage land banking by incentivising landowners to unlock the significant housing potential that already exists.

¹⁰ [LGNSW Submission to Inquiry into Planning System and the Impacts of Climate Change](#)

Conclusion

LGNSW has welcomed the inquiry into historical development consents as an opportunity to understand the many challenges for councils in navigating these consents and to put forward practical and constructive recommendations to government to address these issues.

Key points in this submission are based on the LGNSW Policy Platform and motions from councils to the LGNSW Annual Conference, as well as council feedback based on their direct experience and knowledge of specific cases. To summarise:

- For existing historical consents – Greater clarity is needed about what constitutes ‘physical commencement’.
- Future-proofing – Closing the gap between existing consents and the rate of development completions is important. Councils want to see changes implemented that will help avoid ‘zombie developments’ in the future.

This submission reiterates LGNSW’s advocacy for reforms to the planning system to address the issue of the delayed implementation of decades old development consents resulting in development proceeding that is out of step with contemporary planning and environment standards.