Environmental Defenders Office

ZOMBIE DEVELOPMENTS

Disclaimer: This factsheet is a guide only and is designed to give readers a plain English overview of the law. It does not replace the need for professional legal advice in individual cases. To request free initial legal advice on a public interest environmental or planning law issue, please visit our website.

While every effort has been made to ensure the information is accurate, the EDO does not accept any responsibility for any loss or damage resulting from any error in this factsheet or use of this work.

This factsheet was last updated on 29 May 2024

What is this factsheet about?

This factsheet provides information on 'zombie' developments in NSW. It will be useful for anyone who is concerned about these sorts of development applications and seeks information on the assessment and approval framework and opportunities there may be to challenge development decisions.

Outline:

The factsheet covers the following:

Visit: The NSW Parliament is holding an inquiry into historical development consents in NSW. Submissions to the inquiry can be made via the portal accessed via this link.

The closing date for submissions is **3 June 2024.**

Read: EDO Submission Guide

What is a 'Zombie' Development?

There is no legal definition of a 'zombie' development, which may also be referred to as a legacy or historical development. It is a term used to describe a development, frequently for residential subdivision and housing, that was given development consent years ago, was not constructed, but which is not considered to have lapsed, and could therefore still be acted on many years after it was assessed and approved. The number and location of these "dormant" development consents is presently unknown.

Increasing demand for housing and rising property values has seen a number of these dormant projects re-enlivened, particularly in regional coastal areas. Local communities are concerned about these projects as they may not have been assessed in accordance with, or subject to conditions or other requirements, under current planning and environmental controls, and the environmental circumstances of the site and its significance may have changed significantly.

NB. If you are concerned that there may be a 'zombie' development consent over a particular parcel of land, you could ask the relevant Council to provide details of any development applications that have been lodged at that address. Development consents generally runs with the land, so even if the property has been sold the development consent may still apply.

Obtaining a copy of the development consent:

Development applications and any associated documents received in relation to a proposed development made after 1 July 2010 must be made publicly available as they are classified as open access information.[1] This means that the documents must be made

[1] Clause 3(1) of Schedule 1 *Government Information (Public Access) Regulation 2018.* Note this does not apply to detailed plans and specifications for a residential building or commercial information.

available for inspection at the council office and a copy provided free of charge.[2] This also applies to records of decisions on development applications made on or after 1 July 2010.[3]

If the relevant council will not provide public access to development applications for decisions made prior to 1 July 2010 we suggest you make a formal access application under the *Government Information (Public Access) Act (2019)* NSW (**GIPA Application**). For information on how to make a GIPA Application see our factsheet on Access to Information in NSW.

Has the development consent lapsed?

A key question to determine whether a development consent could give rise to a zombie development is whether the consent has lapsed. If you are concerned about a particular development consent it is important to first check whether the consent has lapsed.

A development consent generally lapses 5 years after the date from which it operates.[4] However, if *building, engineering or construction work is physically commenced* on the site to which the consent applies prior to the date on which the consent would otherwise lapse, then the consent does not lapse.[5]

What is physical commencement?

The type of work which would satisfy the requirement for physical commencement is not set out in the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). However, the *Environmental Planning and Assessment Regulation Act 2021* NSW (**EP&A Regulation 2021**) now states that certain types of minor work will **not** be taken to mean the development has been physically commenced.[6] This includes such things as creating a bore hole or removing soil for testing[7], carrying out survey work[8] or removing vegetation as an ancillary activity[9]. However, it is important to note that this provision only applies to development consents granted after 15 May 2020. For development consents granted before 15 May 2020, it is necessary to consider case law to understand the type of works which the courts have accepted as physical commencement on site.

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[2] Clause 5 of *Government Information (Public Access) Regulation 2018.*
[3] Clause 3(1)(b) of Schedule 1 *Government Information (Public Access) Regulation 2018.*
[4] Section 4.53(1)(a) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) states that a development consent will lapse 5 years after the date from which it operates if the consent commences operation after or during the prescribed period. If consent was granted before the prescribed period, and has not lapsed, at the commencement of the prescribed period, it will lapse two years after the date on which it would otherwise have lapsed. The *prescribed period* commenced on 25.3.2020 and ended on 25.3.2022.
[5] Section 4.53(4) of EP&A Act.
[6] Clause 96 EP& A Regulation (2021.
[7] Clause 96(1)(a) & (b).
[8] Clause 96(1)(c).
[9] Clause 96(1)(e).

It is important to note that the Courts have held that physical commencement is a question of fact that will turn on the circumstances of each development.[10] Examples of the type of work that the court has accepted as physical commencement include:

- Survey work[11]
- Soil testing[12]
- Clearing of vegetation[13]

There are some generally applicable principles arising from the case law. For example, physical commencement does not include any work that is not undertaken in accordance with the consent conditions.[14] Further, when considering whether work has been physically commenced on a site, the court has said that there must be a real nexus between the work carried out and the approved development.[15]

NB. Where you believe a development consent may have lapsed, we recommend you write to the relevant Council and ask that they confirm in writing what works have been carried out on site, when these works were carried out and how these works satisfy the requirements for physical commencement as set out in the EP&A Act, EP&A Regulation 2021 and/or the case law. We recommend you seek legal advice if you are not satisfied with the response you receive from Council or have ongoing concerns.

Have the conditions of the development consent been met?

The EP&A Act allows the consent authority (usually the relevant local council) to impose conditions on the development which must be complied with before the commencement of works. You should check whether the conditions of the zombie development can in fact still be complied with.

Case Study: Inability to obtain a Property Vegetation Plan:

In the matter of *Pluim Commercial Contractors Pty Ltd trading as Pluim Group v Central Coast Council*[16] (**Pluim**) the applicant had received development consent for the

[10] *Hunter Development Brokerage Pty Limited v Cessnock City Council* [2005] NSWCA 169
[11] *Hunter Development Brokerage Pty Limited v Cessnock City Council* [2005] NSWCA 169
[12] *2 Phillip Rise Pty Ltd v Kempsey Shire Council (No 2)* [2023] NSWLEC 28
[13] *Cando Management and Maintenance Pty Ltd v Cumberland Council* [2019] NSWCA 26
[14] *Cando Management and Maintenance Pty Ltd v Cumberland Council* [2019] NSWCA 26
[15] *Hunter Development Brokerage Pty Ltd v Cessnock City Council; Tovedale Pty Ltd v Shoalhaven City Council* [2005] NSWCA 169 at [86]
[16] [2019] NSWLEC 1077

development in June 2014. Condition 5 of the consent required that the applicant submit an approved Property Vegetation Plan (**PVP**) from the Local Land Services in accordance with the now repealed *Native Vegetation Act 2003* (NSW).

As this condition could no longer be complied with, the applicant sought the Court's approval to modify the consent under s 4.55(1A) of the EPA Act by deleting condition 5 and replacing it with two new conditions. These conditions required the applicant to submit a Biodiversity Development Assessment Report in accordance with the *Biodiversity Conservation Act 2016* (NSW).

N.B.	Check that the conditions of the development consent can still be met. If you believe the conditions of consent cannot be met, we suggest you write to Council and set out your concerns and request they provide a written response.

Concept Plan Approvals

In some cases, a zombie development may relate to a development application lodged in accordance with a Concept Plan which was approved under Part 3A of the EP&A Act. Whilst Part 3A was repealed in 2011, transitional provisions are still in force under the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (NSW). These transitional provisions provide that Part 3A of the EP&A Act continues to apply to any "transitional Part 3A project"[17] which includes a project that is the subject of an approved concept plan (whether approved before or after the repeal of Part 3A).[18]

However, where there is a concept plan approved under Part 3A, subsequent development applications are not approved under Part 3A.[19] Where a determination has not been made in relation to the project the subject of a Part 3A concept plan approval, or any stage of the project as is usually the case with zombie developments, the project will be assessed under Part 4 of the EP&A Act.[20]

Any development is taken to be development that may be carried out with development consent under Part 4 of the EP&A Act, even if such development would no longer be permissible under an Environmental Planning Instrument (**EPI**), such as the Local

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[17] Clause 3(1) of Schedule 2 *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (NSW).
[18] Clause 2 of Schedule 2 *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (NSW).
[19] Clause 3A of Schedule 2 *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (NSW).
[20] Clauses 3A(1)(a) and 3B(3) of Schedule 2 *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (NSW).

Environment Plan.[21] Any provisions of an EPI or a Development Control Plan do not have effect to the extent they are inconsistent with the terms of the approval of the concept plan.[22] However, a State environmental planning policy or other instrument made under or for the purposes of Part 3A, as in force on the repeal of that Part and as amended after that repeal, continues to apply to and in respect of a transitional Part 3A project, which includes a concept plan approved under Part 3A .[23]

A development application must not be approved unless the consent authority is satisfied that it is generally consistent with the approved concept plan.[24]

N.B.	Review the development application and check that it is generally consistent with the approved concept plan. Seek legal or expert planning advice if you have any concerns.

Environmental Assessment and Clause 34A Certificates

Zombie developments, assessed and approved under repealed legislation, including Part 3A of the EPA Act and the *Threatened Species Conservation Act (1995)* (**TSC Act)**, may not be required to comply with current planning and environmental controls.

Environmental assessment under Part 3A was more discretionary than that required under current legislation. The Director General of Planning could determine what form of environmental assessment would be required and what issues the assessment would cover.[25]

Under the *Biodiversity Conservation (Savings and Transitional) Regulation (2017)* (**BC Savings and Transitional Reg)** a proponent could seek a Clause 34A certificate which recognizes past biodiversity impact assessment and offsetting arrangements secured as part of a concept plan approval or a relevant planning arrangement.[26]

Clause 34A(5) of the BC Savings and Transitional Reg provides that all or any pending or future development applications that are part of a specified concept plan approval or

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[21] Clause 3B of Schedule 2 *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (NSW).
[22] Clause 3B(2)(f) of Schedule 2 *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (NSW). However, subclause 3B (2)(f) does not apply to the provisions of *State and Environmental Planning Policy (Transport and Infrastructure) 2021*, Chapter 6 (see clause 3B(2)(5A)).
[23]Clauses 2(1)(b) and 3(2)(a) of Schedule 2, *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (NSW).
[24] Clause 3B(2)(d) of Schedule 2 *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (NSW).
[25] Section 75F of EP&A Act as in force prior to the repeal of Part 3A in 2011.
[26] Clause 34A BC Savings and Transitional Reg. 2017

relevant planning arrangement (which may include a DA) may be certified under this clause.

Where a Clause 34A Certificate is in place, biodiversity impacts of the development application are assessed under the former provisions of the EP&A Act as well as now repealed legislation such as the TSC Act. Part 7 of the *Biodiversity Conservation Act (2016)* (**BC Act**) does **not** apply[27].

It is important to note however that Clause 31 of the BC Savings and Transitional Reg states:

> *For the purposes of the application of the former planning provisions in accordance with this Part, any change under the new Act to the listing of threatened species and ecological communities is taken to be a corresponding change to the listings under the Threatened Species Conservation Act 1995 referred to in former planning provisions.*

This means that any change in the status of the listing of a species or ecological community, such as a new or up-listing, under the BC Act will result in a corresponding change under the TSC Act. For example, the koala was listed as an endangered species under the BC Act in 2022, which was a change in the status since it was listed as vulnerable under the TSC Act. As a result of the change in status under the BC Act, any assessment undertaken under the TSC Act also requires that the koala be considered endangered.

This may trigger additional assessment requirements under Section 5A of the EP&A Act[28] such as a Species Impact Statement.[29]

N.B.	Check the listing of any species or ecological communities impacted by the development to see if they have been listed as threatened under the BC Act or if they have been up-listed since the concept plan approval.
Visit:	You can find information on species that are listed as critically endangered, endangered and vulnerable under the BC Act here: https://www.environment.nsw.gov.au/topics/animals-and-plants/threatened-species/programs-legislation-and-framework/species-listing

[27] Clause 34A(2) BC Savings and Transitional Reg.
[28] Section 5A of the EP&A Act was repealed in 2017 however may still apply to development applications or approved concept plans lodged before this date or where a section 34A certificate is in place.
[29] See Part 6, Division 2 of the repealed TSC Act.

Referral under the EPBC Act

A zombie development is still subject to the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). If a project is likely to have a significant impact on a Matter of National Environmental Significance (**MNES**) it must be referred to the Commonwealth Department of Climate Change, Environment, Energy & Water (**DCCEEW**) for assessment under the EPBC Act.[30] It is an offence to carry out a controlled action without approval under the EPBC Act.

Read: EDO Factsheet on the EPBC Act, Referrals and Opportunities to comment

Visit: DCCEEW Protected Matters Search Tool for information on MNES in your area

While third parties are not able to directly refer the development to the Federal Minister for consideration, you can write to the State Minister requesting they refer the project[31] and / or the Federal Minister for the Environment[32] and ask that they call the development in for assessment.

Your written request should clearly identify how the development is likely to have a significant impact on one or more of the MNES, as outlined in the significant impact guidelines. It is helpful to have scientific evidence supporting the assessment that it will, or is likely to, have a significant impact.

If a project was previously referred and determined to not be a controlled action requiring approval, section 78A of the EPBC Act allows for a person to request the Federal Minister for the Environment to reconsider the decision under s 75(1) of the EPBC Act as to whether the Project was a controlled action, on the basis that:

- There is substantial new information about the impacts the Project has, will have, or is likely to have on a MNES; or
- There is a substantial change in circumstances that was not foreseen at the time of the first decision and relates to the impacts the Project has, will have, or is likely to have on a MNES.

[30] Section 68 EPBC Act.
[31] Section 69(1) EPBC Act.
[32] Section 70(1) of the EPBC.

Whilst there is no statutory time limit to lodge a request for reconsideration it is important to note that the decision cannot be revoked after the action is taken.[33] Accordingly, any request should be made as soon as possible where there is new substantial information or a substantial change in circumstances that would alter the impact of the development on a MNES.

Challenging development decisions

There are very few legal avenues available to challenge the approval of zombie development applications. There are generally no merit review rights available to an objector where the development relates to residential subdivision.

It may be possible to seek a judicial review of the approval of a development application or other decision such as the issuing of a construction certificate if it can be demonstrated that there has been some error of law, for example that the conditions of consent have not been met or the development application was not consistent with the approved concept plan. Any application for a review of the decision must be filed within 3 months of the determination being made.[34] It is important to note that judicial review is difficult, expensive and may not ultimately stop the project from going ahead.

Read: EDO factsheet on the Land and Environment Court for further information on Judicial Review

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If you have any concerns or suggestions regarding this factsheet, please fill out the Legal Resources evaluation form by clicking here or scanning the QR code below:

[33] Section 78(3)(b), EPBC Act.
[34] Section 4.59 of the EP&A Act