

Article Information

Authors: Margot King, Samantha Gou

Service: Planning & Environment, Projects & Construction, Property & Development, Property Development

Sector: Infrastructure, Real Estate

Changes to timeframes for lapsing of Development Consents and 'physical commencement' of works

Recent changes to planning legislation and regulation in response to COVID-19 have extended lapsing periods for existing development consents. However, for new development consents, developers must show a clear intent to physically commence the project - relatively minor works are no longer sufficient to demonstrate that the works have 'physically commenced'.

Development consents operational before 25 March extended from 5 to 7 years

Amendments to the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (EPA) in response to COVID-19 commenced on 14 May 2020. In light of the current uncertainty, the NSW Government recognised that developers may require more time to commence works. Previously, all development consents lapsed after five years from after the development consent operated, unless works had 'physically commenced'.

Now, a development consent lapses after:

- five years, for a development consent commencing operation after 25 March 2020; and
- two years after the development consent 'would have otherwise lapsed' if the development consent commenced operation, and had not lapsed at, 25 March 2020.

Development consents that lapsed after 25 March 2020 but before the commencement of the new provisions (14 May 2020) are taken not to have lapsed and also have the benefit of the extended two year period ([s4.53\(3A\)](#)).

The same periods apply for deferred commencement development consents according to the date the development consent was *granted*.

Changes to 'physical commencement' test

A development consent does not lapse if 'building, engineering or construction work' is 'physically commenced' before the date on which the development consent would otherwise lapse ([s4.53\(4\)](#)).

The 'physical commencement' test has been extensively litigated. Courts have held that there is no distinction between 'core' and 'non-core works' and preparatory works such as survey works, acoustic testing and pegging constitute 'engineering work' can satisfy the physical commencement test (see for example [Hunter Development Brokerage Pty Ltd v Cessnock City Council](#); [Tovedale Pty Ltd v Shoalhaven City Council](#) [2005] NSWCA 169, [Richard & Ors v Shoalhaven City Council](#) [2002] NSWLEC 11 and [Macquarie International Health Clinic Pty Ltd v Sydney Local Health District](#); [Sydney Local Health District v Macquarie Health Corporation Ltd](#); [Macquarie International Health Clinic Pty Ltd v City of Sydney Council \(No 9\)](#) [2016] NSWSC 155).

The [Environmental Planning and Assessment Amendment \(Lapsing of Consent\) Regulation 2020 \(NSW\)](#) commenced on 15 May 2020 to change this position. This amending regulation introduced a new [r124AA](#) into the [Environmental Planning and Assessment Regulation 2000 \(NSW\)](#). Work is not taken to have been 'physically commenced' merely by doing any one or more of the following:

- creating a bore hole for soil testing;
- removing water or soil for testing;
- carrying out survey work, including the placing of pegs or other survey equipment;
- acoustic testing;
- removing vegetation as an ancillary activity; or
- marking the ground to indicate how land is to be developed.

This new test does not apply to a development consent granted before 15 May 2020.

The longer timeframe to physically commence works for existing development consents is welcome news for developers. However for development consents issued after 15 May 2020, developers will need to be mindful of the stricter test for physically commencing works.