

Physical commencement of development consents – frequently asked conditions

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Key points

- The time for physically commencing a development consent starts after the deferred conditions of consent have been satisfied. It does not run from the time the deferred condition consent is issued.
- Motive for physical commencement is not relevant. Subject to the test otherwise being satisfied, it is sufficient that the intention of the works is to prevent the consent from lapsing.
- Once the consent has been physically commenced, there is no further risk of lapse if work does not continue for some time.

Introduction

Changes to the rules around physical commencement of development consents last year included a stimulus intended to extend the life of certain development consents by providing additional time for physical commencement. At the same time, changes were made to raise the threshold for what constitutes physical commencement, by ruling out certain forms of work as being sufficient to pass the test. See our June 2020 update on those changes [here](#).

The comprehensive case law on the question of what constitutes physical commencement continues to apply to consents granted before the threshold changes came in. Common issues that arise are addressed below.

What is the relationship between satisfaction of deferred commencement conditions and physical commencement?

A consent is not operative until deferred commencement conditions have been satisfied. A deferred commencement development consent lapses if the deferred commencement condition is not satisfied within the period specified in the deferred commencement condition – section 4.53(6).

Once the deferred commencement consent becomes operational by satisfaction of the condition, the consent then needs to be physically commenced to avoid any lapse under section 4.53(1) of the EP&A Act.

However, the time for physically commencing the consent so as to prevent lapse does not run until the consent

becomes operative, i.e. after the deferred commencement conditions have been satisfied. The time for physical commencement is that specified by the consent and imposed subject to section 4.53(1)-(3A).

Building, engineering or construction works carried out which are to be relied upon to physically commence the consent need to post-date the development consent becoming operative. This is the case even if the work intended to be relied upon doesn't require the express authority of the consent.

An example would be geotechnical work undertaken for the purposes of preparing detailed road design plans. Although there may be nothing unlawful about undertaking the geotechnical investigations before satisfaction of the deferred commencement condition, the investigations would need to occur after that time if intended to be relied upon for the purposes of physical commencement.

Is there a need for the developer to genuinely intend to get started with the development and plan to continue it to completion?

The short answer is no. While it is often said that the works relied upon for achieving physical commencement must not be a "sham" nor "notional" (with no particularly helpful explanation of what is meant by this), it is also the case that the motive behind the carrying out of the works is irrelevant.

The works must be genuinely required by the consent so that they do truly relate to the consent, however, the fact that the developer may carry out the works:

- Immediately before the date that the consent would otherwise lapse
- With the express purpose of achieving physical commencement of the consent to avoid its lapse
- As cheaply as possible
- With no intention to continue with the works
- Out of the normal sequence

will not necessarily disqualify the works from being sufficient to achieve physical commencement for the purposes of the Act.

This was addressed in *Besmaw Pty Ltd v Sutherland Shire Council* (2003) 127 LGERA 413 (at [109]-[112]) and remains the case despite clause 124AA to the EP&A Regulation which was inserted to exclude certain categories of work from being capable of being relied upon for physical commencement.

Is there any obligation to complete the development within a certain period of time once it has been physically commenced?

Again, the short answer is no (unless for example there is a specified end date in the consent, as occurs occasionally for time-limited uses).

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