



chapter three

Development approval

Introduction

There are two development approval systems operating in the Australian Capital Territory (ACT), one managed by the National Capital Authority (NCA), a Commonwealth agency, and the other by the ACT Planning and Land Authority (ACTPLA), a territory authority.

As a general rule development approval will be required from ACTPLA unless the land to be developed is within a designated area identified in the National Capital Plan (NCP). A 'designated area' is an area of land that has the special characteristics of the national capital and has been specified as such in the NCP (ss.4 and 10 of the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth) (Planning and Land Management Act)). These areas are listed below and are discussed in Chapter 2.

The Planning and Land Management Act classifies land as 'national land' or 'territory land'. National land is land intended to be used by the Commonwealth (s.27) and is managed by the NCA; territory land is all other ACT land (s.28). The ACT government has land management responsibility for territory land (s.29 of the Planning and Land Management Act and ss.3 and 36 of *Australian Capital Territory (Self Government) Act 1988*).

ACTPLA administers the *Planning and Development Act 2007* (ACT) (Planning Act), a territory enactment that provides for the making of the Territory Plan (TP) (see Chapter 2). This is also the principal legislation dealing with planning, development approvals and leasing matters for land under the planning responsibility of ACTPLA.

The Planning Act replaced the *Land (Planning and Environment) Act 1991*, and instituted a new system of three development assessment tracks, from the simplest, code track, through merit track, to the most complex impact track.

by
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Development applications to the NCA

Introduction

The NCA administers the Planning and Land Management Act which is the principal legislation dealing with planning and works approval for land managed by the NCA. Section references in this part of this chapter are to that Act unless stated otherwise. At the time of writing the Minister for Home Affairs was the Commonwealth minister with primary responsibility for this Act, referred to as the minister in this section of this chapter.

NCA approval is required prior to the carrying out of any 'works' (s.12) in a designated area. This includes the construction, alteration, extension or demolition of buildings or structures (unless it is purely internal work), landscaping, tree felling and excavation (s.4). Designated areas are shown in various sections of Part One of the NCP and include:

- the Central National Area, comprising the Parliamentary Zone, Lake Burley Griffin and its foreshores, major national institutions and defence establishments such as the Australian National University and the Australian Defence Force Academy
- the inner hills that form the setting for the Central National Area such as Mt Ainslie, Black Mountain and Red Hill
- the main avenues and approach routes, for example, State Circle, Kings Avenue, Commonwealth Avenue, Northbourne Avenue, Canberra Avenue and the Barton, Federal and Monaro Highways.

Given the nature of these areas, a certain percentage of development in them is carried out by government authorities. As a general rule the NCA is under no statutory obligation to advertise applications prior to determining them and there are no rights to make comments or objections under the Planning and Land Management Act, subject to several exceptions discussed below under 'Public notification/consultation'. However, as mentioned below, the NCA has adopted a consultation protocol which is available on the NCA website (see Contacts list at the back of this book) which sets out the consultation that the NCA will undertake on proposals. Most applications are listed on the website.

The NCA also approves developments in part of the residential area of Forrest/Deakin, offices in Barton, and some parts of the city where applications are from private companies or individuals. Some projects approved by the NCA in the past include Commonwealth Place, Reconciliation Place, Speakers Square and the new National Portrait Gallery, all of which are in the Parliamentary Zone.

The Minister for Home Affairs and the Minister for Finance and Deregulation have the ability to declare land to be national land where required for Commonwealth purposes (s.27).

Development in a designated area

An applicant should discuss the proposed works with the NCA before making a formal application for works approval. This discussion provides an opportunity to become familiar with the procedures that will need to be followed and the planning and development control provisions that may impact on the type of development that can be carried out on a particular site.

The NCA also requires preliminary sketch plans, showing the general nature of the proposed development, to be submitted for general agreement prior to lodging a formal application. Detailed design drawings may also be submitted for 'in principle' support before submitting a works approval application.

If the land to be developed is of heritage significance the applicant will also have to get approval from the Commonwealth Minister for the Environment, Heritage and the Arts where required under s.15B of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), and should seek advice from the ACT Heritage Council for places on the ACT Heritage Register (see Chapter 9).

Once the NCA has given its support in principle to the project the formal application for works approval is lodged. There is an application form, schedule of fees and information checklist available on the NCA website (see Contacts list at the back of this book).

The application for works approval needs to include an application form and the relevant fee which is based on the estimated cost of the work. The application will also need to be supported by detailed working drawings and supporting documents. Prior to lodging an application, applicants should check with the NCA what information is required for their specific proposal as larger or complex projects may require more detailed information, such as models, to be submitted in support of the application.

The information required by the NCA is quite detailed and includes:

- a locality plan
- a site analysis plan
- a detailed site plan
- design concept drawings/statements
- a schedule of proposed works
- architectural drawings, including floor plans, section, elevations and perspective drawings
- landscape plans
- a site establishment and construction management plan
- a design model (for any significant development).

Three sets of working drawings and supporting documents are required and one of these must be A3 size.

When the NCA is satisfied that all requirements of the NCP have been met the NCA may approve the application. The NCA has committed to finalise applications within 15 working days (see the NCA's Service Charter for Planning and Development Approvals, which is available on their website). The drawings and supporting documents are then stamped and signed. Two sets of the approved drawings are retained by the NCA and the other set, together with the material sample board, are returned to the applicant with a formal letter of advice granting works approval.

Public notification/consultation

Except in limited circumstances there is no statutory obligation on the NCA under the Planning and Land Management Act to give public notice of applications for works approval. Public notification and consultation is only necessary when required by the NCP. There are only three sets of circumstances in which public notification and consultation are required by the NCP.

- Residential development and/or development in the Deakin/Forrest residential area. For single dwellings, notification is to neighbours, while for other proposals notification and invitations for comment are more widely sought through a generally circulating newspaper (see paragraph 4 of Appendix M of the NCP).
- Dual occupancy applications in residential areas. There are only a few such areas under the control of the NCA. In these cases the NCA requires neighbours to be informed of the application and they will have an opportunity to comment on the design and siting aspects of the proposal (Appendix P of the NCP).
- Applications for telecommunications facilities where the NCA is of the opinion that they will have a high visual impact (see Chapter 12.4 of the NCP). Consultation is via notification in a generally circulating newspaper.

The NCA is otherwise under no statutory obligation to invite public comment on applications for works approval. It generally only does so where the performance standards specified in Appendix H of the NCP are met but the relevant quantitative standards are not.

The NCA has developed a Consultation Protocol which is available on its website which details the consultation which the NCA will undertake. This protocol is not legally binding.

A list of current works approvals is available for inspection on the NCA website (see Contacts list at the back of this book).

Review of approvals

The decision of the NCA in relation to an application for works approval is final. There is no right of merits review available to an applicant.

However, while there are no appeal rights relating to the merits of the NCA's decision, there may be a right to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to determine whether a decision of the NCA has been made correctly. However, this is likely to be a very limited review right in practice. It is only where a citizen's rights are affected that there may be an appeal. However as there is likely to be a very small amount of leased land within the designated areas this appeal right is unlikely to be exercised often.

Development on national land

As mentioned above, national land is land intended to be used by the Commonwealth (s.27). The Canberra Deep Space Communication Complex at Tidbinbilla is an example of national land. The Parliamentary Zone is also national land.

National land which is not a designated area is still subject to Special Requirements under the NCP. Proposals are assessed in relation to the provisions of both the TP and the NCP.

Under the NCP, development (including proposals to subdivide or lease) on national land must conform to a development control plan approved by the NCA (NCP provisions 4.5.1, 5.3.1, 8.4.2, 9.4.3).

Development in the Parliamentary Zone

Because of the cultural and historical significance of the land in the Parliamentary Zone, works proposed in this area require the approval of the NCA and both Houses of Federal Parliament. To get approval an applicant needs to follow the process outlined above in relation to applying for approval from the NCA for development in a designated area. The NCA then coordinates the parliamentary approval process.

Development applications to ACTPLA

Introduction

In the ACT the development of land which is not within a designated area under the NCP is managed by ACTPLA, which administers the *Planning and Development Act 2007* (ACT) (Planning Act). This Act established a new system of development approvals in Chapter 7, which involves a three tier system of assessment tracks: code, merit and impact. There is a quick guide to development applications on the ACTPLA website which explains the three tracks (see Contacts list at the back of this book). The applicant must decide which of these assessment tracks is the correct one for the development in question.

Some developments are exempt from the Act (ss.133-135), and some are prohibited (s.136). The Territory Plan (TP) (see Chapter 2) includes development tables for each land use zone in the ACT and these tables show whether a development is exempt, assessable or prohibited within that zone. If the development is assessable, the next step is to decide which assessment track is the correct track for that development, as the requirements for each are quite different. An applicant may approach ACTPLA with a development proposal and ACTPLA is obliged to give advice on this pre-application on which assessment track applies to the proposal (s.138 and see below).

Depending on the type of development, it may require approval or endorsement from various 'entities', such as ActewAGL or the Department of Territory and Municipal Services (TAMS) (see below).

All territory land in the ACT is held under a leasehold title system so it is essential to consider the provisions of the lease to decide whether or not the lease purpose clause permits a particular development proposal to go ahead (see Chapter 2 for a discussion of the leasehold system).

At the time of writing the ACT Minister for Planning was primarily responsible for the Planning Act and in this section of this chapter is referred to as the minister. The Chief Minister is responsible for Chapter 4 of the Act that establishes the Land Development Agency.

What is 'development'?

Under the Planning Act development is defined very broadly (s.7) to include:

- the erection, alteration or demolition of a building or structure

- the carrying out of earthworks or other construction work on or under the land
- the carrying out of work that would affect the landscape of the land
- using the land, or a building or structure on the land
- the subdivision or consolidation of the land
- the variation of a lease relating to the land (other than a variation that reduces the rent payable to a nominal rent)
- the display of signs or advertising material on the land (except in accordance with a permit or licence).

Provided that the development is not exempt from the Act, or prohibited under the Act, proposals for any of these developments will be assessable under either the code, merit or impact tracks and will have to be approved by ACTPLA.

Exempt developments

Certain small-scale or less complex development proposals are classified exempt and do not require development approval. Proposals are exempt either under the relevant development table of the TP, under s.134 of the Planning Act, or under Chapter 3 of the Planning and Development Regulation 2008 (Planning Regulation) (s.133). Provided they comply with certain criteria and requirements, exempt developments include, among other things, aerials and antennae, photovoltaic panels, single houses in new housing estates, decks, patios and terraces, demolition, fences, letterboxes and barbeques, satellite dishes, ponds, skylights and retaining walls (r. 20 and Schedule 1).

Proposals which are exempt under the Planning Act may be undertaken without a DA and development approval. However, they may still require a building approval under the *Building Act 2004* (ACT). For example, a single house in a new housing estate will be exempt from development approval, provided it meets certain design and siting requirements of relevant TP Codes, but will still require building approval regardless of meeting the first exemption.

Building approvals

To get building approval a developer can:

- employ a licensed certifier, also known as a building surveyor
- apply for building approval and pay relevant fees (the certifier will inform you)
- employ a licensed builder or be licensed as an owner-builder.

Building certifiers are responsible for:

- determining whether a house is exempt from requiring a development approval
- issuing building approvals for exempt houses after verifying that developments meet the development exemption criteria
- issuing approvals that include proposed site work such as driveways and damage to or removal of trees.

Certifiers are prohibited from issuing a building approval where a development application is required but is not in force (s.30 Building Act).

Prohibited developments

Under the Planning Act developments can be prohibited in one of two ways.

- A development may be prohibited under the relevant development table in the TP. For example, the High Density Residential Zone Table prohibits developments such as service stations, caravan parks, veterinary hospitals and car parks, while the Urban Open Space Zone prohibits developments such as child care centres, cemeteries and places of assembly or worship.
- If the proposal relates to development in a future urban area and the structure plan for the area does not state that the development is permitted then the development will be prohibited. Note that this provision does not apply to the ACT government or a government authority.

Examples of possible prohibited developments are a paint factory in a residential area and commercial office accommodation in a suburban area (s.112(3)).

If a development is prohibited a person cannot apply for approval of the development proposal (s.136(1)). If however, a development is authorised by ACTPLA and subsequently becomes prohibited then the development can continue. The rationale being that if a development is lawful when it begins then it continues to be lawful.

It is an offence to undertake prohibited development, with a maximum penalty of up to 2,000 penalty units (currently \$200,000) for an individual and 2,500 penalty units (currently \$250,000) for a corporation (s.200).

Assessable developments

Development applications

ACTPLA's website and shopfront provide information about how to lodge a development application (DA) (see Contacts list at the back of this book). It is the applicant's responsibility to identify the applicable assessment track and correctly complete the DA lodgment form prior to lodgment. However, you can ask ACTPLA for pre-application advice to help identify the correct assessment track (see below). There are different types of forms for different development proposals. ACTPLA requires all plans and supporting documents to be provided on CD and to be presented in accordance with set criteria including compliance with Australian Standards. Often people are assisted in the DA process by industry professionals such as architects, draftspersons and building certifiers.

Pre-application information and advice

Section 138 of the Planning Act requires ACTPLA to provide pre-application advice on a development proposal if requested by the proponent. The only proviso is that ACTPLA can decide not to consider the proposal if it believes it has not been provided with sufficient information to give adequate advice. Pre-application advice is valid for six months. Sought early in the design process pre-application advice can help resolve issues such as:

- which assessment track is likely to apply to the proposal

- whether the proposal is likely to be exempt or prohibited
- whether the proposal will require referral to another entity
- whether public notification will be required
- whether the proposal is consistent with existing lease conditions
- other information that may be required in the DA.

A proponent seeking pre-application advice must request the advice in writing. ACTPLA may charge a fee for the advice.

Entity endorsements and referrals

For all assessable developments there are a number of categories which require approvals and endorsements from other ACT organisations or entities. For instance, if the development involves demolition it may require approval from water, sewerage, gas or electricity utilities such as ActewAGL or TAMS. If the development site is larger than 0.3 ha (3,000 sqm) it may require a Sediment Control Plan, endorsed by the Environment Protection Authority, now within the Department of Environment, Climate Change, Energy and Water.

ACTPLA produces a guidance document entitled 'Entity Referral Requirements' which should be followed in conjunction with the DA forms and the requirements of the TP.

It is worth noting that if entity advice is provided in writing at the time the DA is lodged it must have been given less than six months before the lodgment date. Certain DAs must be referred to certain entities. Under the Planning Act entities are required to provide ACTPLA with a response within 15 working days from the date the application was referred. If advice is not received within this timeframe, the entity is taken to have supported the application. However, if ACTPLA is satisfied that the applicant has adequately consulted with the entity the application does not have to be formally referred.

Code track

A code track development application is assessed against the rules in the applicable Assessment Code of the TP. An applicant must ensure that an application for development approval in the code track is accompanied by information or documents addressing the relevant rules. It is the responsibility of the applicant to identify the applicable assessment track.

Possible code track proposals include a single dwelling not on new residential land, a large pergola, dual occupancy proposal, or a house extension.

The code track does not have any mandatory requirements for DAs to be referred to other entities (s.117(c)). However if a code track development application requires approval from an entity (for example ActewAGL or TAMs), the approval must be:

- obtained prior to the lodgment of the development application
- submitted as a supporting document.

There is no requirement to publicly notify a code track development application (s.117(a)). A DA in the code track which complies with all the relevant rules must be approved. The statutory time period for making a decision on a code track development application is

20 working days after the day the application is lodged (s.118). A development application is not considered lodged until full payment of fees is made. For DAs in the Code track ACTPLA charges an application fee which is either preset or commensurate with the cost of work. ACTPLA refers to a formula for calculating the cost of work. Applicants may also be charged fees for other services such as pre-application written advice, signage, lease variations, public notification and record searches.

Merit track

The aim of the merit track is to provide flexibility and a performance-based assessment that provides the opportunity for applicants to demonstrate that, even if their development deviates from prescriptive code requirements, approval is possible if the development can be shown to facilitate the best design outcome for a site and for neighbours. For instance, under the TP, a code may specify that the side boundaries of a residential development be no less than 1.5 m. The applicant, however, can apply to deviate from this rule and seek permission for the side boundaries to be approved at 1.2 m. In this case the applicant would lodge the DA in the merit track with documentation supporting the TP deviation. This optional compliance with the rules or criteria does not apply where the rule is mandatory.

Examples of developments which may be subject to merit track assessment include: indoor recreation facility in a commercial zone, apartment in a commercial zone or a multi-unit development in a residential zone.

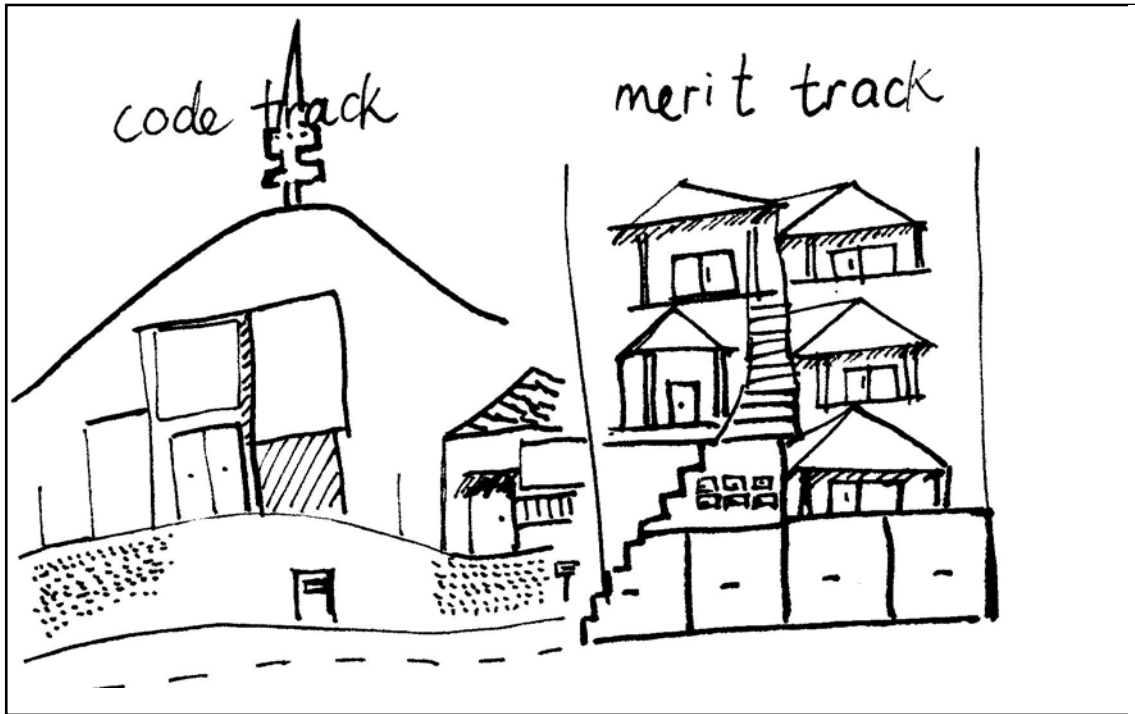
Approval process

Merit track DAs may be approved notwithstanding that they do not meet the prescriptive code requirements, provided that they do meet the relevant merit criteria of the relevant code(s), any other requirements of the TP and the requirements set out in s.119 of the Planning Act, including the relevant objectives for the relevant zone. However, under s.119 of the Planning Act development approval can only be given for land in a rural lease if the proposal is consistent with any land management agreement. Any proposed developments that will affect a registered tree or a declared site under the *Tree Protection Act 2005* can only be approved if it is consistent with the advice of the Conservator of Flora and Fauna.

Development approval must not be given for a proposal in the merit track if approval would be inconsistent with any advice given by an entity to which the application was referred, unless ACTPLA is satisfied of certain matters (s.119(2)) (see above for description of referral requirements). For example, ACTPLA could approve a development contrary to the advice of another entity if satisfied that any applicable guidelines and realistic alternatives to the development had been addressed and that the development is not inconsistent with the objects of the TP. The exception to this is where the development concerns a registered tree or a declared site. In these cases ACTPLA must not approve a development that is inconsistent with the advice of the Conservator for Flora and Fauna (s.119(3)).

ACTPLA will base its decision on whether or not to approve a development proposal in the merit track on:

- the relevant code of the TP
- the objectives for the zone



- the suitability of the land for development
- all representations
- entity advice
- a plan of management for any public land
- the probable impact of the development, including environmental impact (s.120).

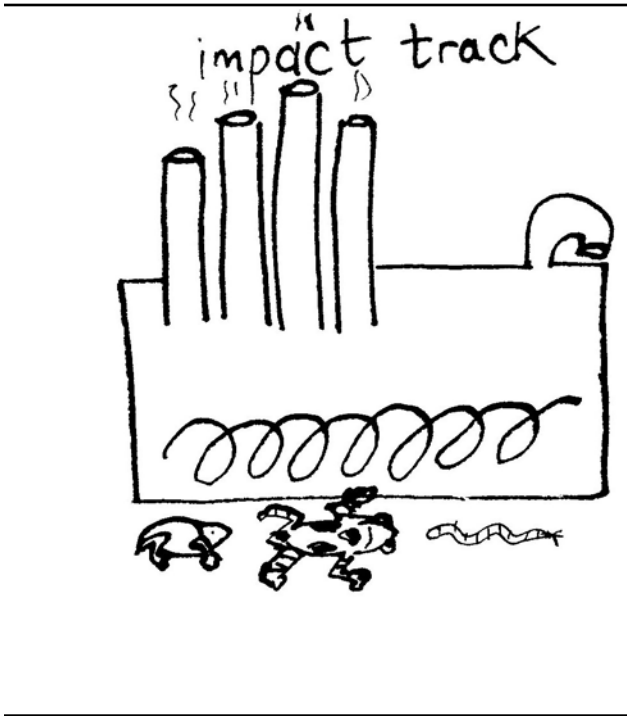
Public notification and comment

Merit track DAs must be publicly notified (s.121). There are two categories of public notification (see Division 7.3.4):

- minor—where written notice of the DA must be sent to adjoining neighbours
- major—where a sign stating the development proposed must be placed on the property, a notice placed in a newspaper and letters sent to adjoining neighbours.

Schedule 2 of the Planning Regulation prescribes the types of development for which minor or limited public notification is required. These developments include things like the building, alteration or demolition of a single dwelling, if the development would not result in more than one dwelling being on a block or the building, alteration or demolition of a building or structure defined as non-inhabitable under the Building Code.

Anyone may make a comment or objection to a DA (s.156). Comments or objections are sent to ACTPLA and must be received during the notification period. For minor developments representations must be received within 10 working days of notification. The time-frame for major notifications is 15 working days (s.157, r.28). ACTPLA may extend the time for



allowing representations. ACTPLA will not consider representations made outside these time-frames.

Assessment time-frames

ACTPLA may ask an applicant for further information at any time during the assessment process. ACTPLA must request this information in writing (s.141). The applicant is usually given 20 working days to provide the information (s.141(3)).

Provided all the relevant lodgement fees have been paid ACTPLA is required to make a decision on merit track DAs no more than 30 working days after lodgement (s.122). However if representations have been made this period is extended to 45 working days. This timeframe is also extended if ACTPLA has requested further information from the applicant or if the DA is amended (ss.166-169).

Impact track

DAs that are impact assessable undergo the broadest level of assessment. They are considered against the TP and, unless exempt by the minister, by an environmental impact statement (EIS).

Impact track assessment applies to infrastructure proposals and developments in sensitive areas, developments that have been declared impact assessable by the minister, and all other proposals not covered by the exempt, prohibited, code or merit tracks (ss.123 and 132). The types of developments which may be subject to impact track assessment include: constructing a major dam; constructing a major road; light rail line or other linear transport corridor; or clearing a significant area of native vegetation (Schedule 4).

A DA is considered impact assessable if it falls within one or more of the following five criteria:

- the relevant development table of the TP states that impact assessment applies
- Schedule 4 of the Planning Act lists it as a development requiring an EIS (see below)
- the proposal is impact assessable under s.124 of the Planning Act by declaration of the minister (see below)
- the development is a controlled action under the Commonwealth EPBC Act but is assessed under the ACT Planning Act and not the EPBC Act, in accordance with a bilateral agreement (see Chapter 4 for a further discussion on bilateral agreements)
- the proposal is impact assessable by declaration of the minister responsible for the *Public Health Act 1997* (s.125).

Schedule 4 contains two sections, both of which mandate the completion of an EIS. The first relates to the development itself, for instance a permanent public entertainment or sporting venue to hold more than 2000 people, a correctional centre or a large petroleum storage facility. The second relates to the areas or processes that the development may affect, for instance, a proposal that is likely to adversely impact on the conservation status of a vulnerable or protected species (see Chapter 4 for discussion of EIS).

The minister may make a declaration under s.124 if satisfied on reasonable grounds that there is a risk of significant adverse environmental impact on the site, or elsewhere, from the proposed development. An environmental impact is significant if it might adversely affect an environmental function, system, value or entity. The effect can be direct, cumulative or incremental. In deciding whether an adverse environmental effect is significant the minister must consider the kind, size, frequency, intensity, scope and length of time of the impact and the sensitivity, resilience and rarity of the environmental function, system, value or entity likely to be affected.

Approval process

Under s.129 of the Planning Act, ACTPLA will base its decision on whether or not to approve a development proposal in the impact track on:

- the relevant code of the TP
- the objectives for the zone
- the suitability of the land for development
- all representations
- entity advice
- a plan of management for any public land
- the probable impact of the development, including environmental impact
- the completed EIS for the proposal
- the conclusions of any inquiry about an EIS for the proposal (see below).

Part 8.3 of the Planning Act allows the minister to establish a panel to conduct an inquiry about any or all aspects of an EIS. Under the Planning Act, the Public Health Act minister may also direct the planning minister to conduct an inquiry in relation to the effects on public health of the proposal that is the subject of the EIS. Part 8.3 also sets out the time-frames and procedures the minister must follow in conducting an inquiry.

Under s.128 an impact track DA must not be approved unless an EIS has been completed, or the minister, under s.211, has exempted that application. Nor must the DA be approved unless the proposal is consistent with:

- the Statement of Strategic Directions in the TP (see below)
- any land management agreement for the land if it is in a rural lease
- the related advice of the Conservator of Flora and Fauna (conservator) if the proposal will affect a registered tree or declared site.

The Statement of Strategic Directions sets out the principles for giving effect to the main

object of the TP. The object of the TP is to ensure, in a manner not inconsistent with the NCP, the planning and development of the ACT provide the people of the territory with an attractive, safe and efficient environment in which to live, work and have their recreation. The principles set to achieve this object include economic, social and environmental sustainability and spatial and urban planning design principles.

Section 128 also provides that approval must not be given if that approval was inconsistent with any advice given by an entity, unless ACTPLA is satisfied any applicable guidelines and any realistic alternative to the proposed development have been considered and the decision is consistent with the objects of the TP. This exception does not apply to advice given by the conservator where the development involves a registered tree or declared site. In these cases development approval must not be given inconsistent to the conservator's advice.

Public comment, entity referrals and assessment time-frames

The procedures and timeframes for representations, entity referrals, requests for further information from ACTPLA, and for making a decision are the same for impact track applications as for developments in the merit track (ss.130 and 131). Public notification of impact track applications must always undergo the major notification process (s.152(b)).

Development approvals

Most development applications are determined by ACTPLA. ACTPLA can decide to approve a development as per the DA, or it may decide to approve the development subject to conditions. ACTPLA can also refuse a DA (s.162). The minister will determine those DAs that have been called in under Division 7.3.5 (see discussion below under ministerial call-in power).

Conditional approvals

Conditional approvals can only be given for developments assessable in the merit or impact tracks. A code track proposal must not be approved subject to a condition unless the condition has been prescribed by regulation (s.165(4)). Some examples of conditions that may be imposed on code track proposals under the Planning Regulation (r.29) include:

- that information relating to compliance with stated conditions be given to ACTPLA
- that the development be carried out within a stated period
- that stated action be taken to manage the impact of the development, whether on or off the development site
- that an approval under another Act be given.

In relation to merit and impact track assessable developments any decision about the imposition of conditions must be consistent with the TP. Section 165 of the Planning Act sets out the types of conditions to which a development approval may be subject. They include, among other things, a requirement that the development be carried out in stages and within stated periods, that stated things be done to prevent or minimise adverse environmental impacts, or that a development be carried out to a stated standard.

There are statutory time-frames by which ACTPLA, or the minister, must decide a DA. However if these times are exceeded and no decision has been made, under s.12 of the *ACT Civil and Administrative Tribunal Act 2008* (ACAT Act), ACTPLA is taken to have refused the DA.

Ministerial call-in power

The minister has the power to direct ACTPLA to refer to the minister a DA which has not yet been decided (s.158). The minister may decide to consider the DA if, in the minister's opinion, it either raises a major policy issue, may have a substantial effect on the achievement or development of the objects of the TP, or would provide substantial public benefit should the DA be approved or refused (s.159).

If the minister decides to consider the DA on any of these bases he or she must tell ACTPLA and the applicant of this intention (s.160(2)). The minister must also ensure that ACTPLA's comments accompany the application being considered. If the minister does make a decision on a DA he or she must present the following information to the Legislative Assembly no more than three sitting days after making the decision:

- a description of the development
- details of the land where the development is proposed to take place
- the applicant's name
- details of the minister's decision
- the grounds for the decision (s.161(2)).

Public register

It is a legislative requirement that ACTPLA keep a public register of all DAs, development approvals and compliance orders (ss.27 and 28). Documents on the register are available for public inspection. Through the register the public may inspect:

- each DA (unless withdrawn), but not including associated documents such as residential floor plans
- decisions ACTPLA has made about DAs
- controlled activity orders, including requirements, location and name of the person who is the subject of the order (see below)
- directions to carry out rectification work
- prohibition notices.

Controlled activities are defined by Schedule 2 of the Planning Act or by regulation. They include things like: failure to comply with a lease; developments that do not meet approval requirements; developing without approval; unapproved structures; and unauthorised use of unleased territory land. ACTPLA can issue a controlled activity order on its own initiative or as a result of a complaint. Contravening a controlled activity order is a criminal offence (s.361).

Applicants may apply to ACTPLA to have information excluded from the public register (s.411). However for such an application to succeed ACTPLA must be satisfied that

publication of the information would disclose a trade secret, or would or could reasonably be expected to endanger the life or physical safety of any person, or lead to damage to, or theft of, property. The Commonwealth Attorney-General or the minister responsible for the administration of justice may also certify restrictions on public access for reasons of national security and public safety (s.412).

Review of development approvals

There are two types of review that may be available in relation to a decision on a DA—merits review and judicial review. Merits review is where a court or tribunal looks at whether a decision should have been made and the court or tribunal has the power to remake the decision. Judicial review is a review as to whether the correct legal procedures were followed, that is, whether the decision was made according to the law. It does not look into whether the decision was right on the facts of the case. This chapter deals primarily with merits review.

The following information is for general reference only and if you are contemplating legal action, you should seek legal advice on the specific facts of your case.

Merits review

Whether or not an ACTPLA decision to approve or refuse a DA can be reviewed on its merits depends on which assessment track a development falls into. Generally there are two ways in which a development approval may be reviewed:

- it can be reconsidered by ACTPLA if the applicant makes an application for reconsideration—there are no rights for a third party to apply for reconsideration of a decision
- it can be reviewed by the ACT Civil and Administrative Tribunal (ACAT)—this review can be sought in certain instances by the applicant or a third party, such as a person who made a representation. (see Chapter 12 for information about ACAT which replaced the Administrative Appeals Tribunal).

Where the minister has called in a DA and approved or refused the application the note to s. 410 of the Act suggests that there are no rights to review the minister's decision (s.407 definition of 'reviewable decision', Schedule 1).

Code track developments

If a development is in the code track (that is, minor developments) there are limited rights of review. If ACTPLA refuses an application in the code track there is no opportunity to seek reconsideration of the decision or ACAT review (ss.117(d), 191(2)(a), 407 definition of 'reviewable decision', and Schedule 1). However, if ACTPLA approves a development in the code track subject to conditions the applicant can seek reconsideration of the decision (s.191(1)(a)) and appeal against the conditions imposed (s.407, definition of 'reviewable decision', Schedule 1, item 2 of the table).

An application for reconsideration must be made within 20 working days from the date the applicant is told about the original decision by ACTPLA (although this can be extended by

ACTPLA) and must set out the grounds for the reconsideration (ss.191(5) and (6)). A third party (such as an objector) cannot seek reconsideration of a decision.

ACTPLA must reconsider the application and make a new decision or confirm the original decision within 20 working days of receiving an application for reconsideration (s.193). This time can be extended on agreement.

ACTPLA can only reconsider the original decision to the extent that the development proposal approved in the original decision is subject to a rule and does not comply with the rule, or is not subject to a rule (s.193(3)).

The reconsideration must be carried out by a person within ACTPLA who was not the original decision-maker (s.193(7)). In reconsidering an application the decision-maker can confirm the original decision or make any decision that it could have made on the original application. If the reconsideration is not finalised within 20 working days, ACTPLA is taken to have confirmed the original decision (s.194).

As well as having a decision reconsidered, an applicant can seek ACAT review of a decision to approve a code track DA subject to conditions (s.407, Schedule 1, item 2). The applicant must generally seek ACAT review within 28 days of the decision being made (s.10(2) *ACT Civil and Administrative Tribunal Act 2008* (ACT) (ACAT Act)).

Merit track developments

If a development is in the merit track an application that has been approved subject to conditions or refused by ACTPLA can be reconsidered by ACTPLA if the applicant makes an application for reconsideration (s.191). The process and time-frames for seeking reconsideration are the same as those for a decision in the code track.

However for most merit track reconsiderations, before reconsidering the application ACTPLA must inform anyone who has made a representation on the original application that a request for reconsideration has been received, and must give them a reasonable opportunity (at least two weeks) to make a further submission (s.193(5)(b)). This is not required in a code track reconsideration as public representations are not made in relation to code track proposals. Full public notification of the new application is not required (s.193(5)(a)).

As well as reconsideration by ACTPLA, it is also possible in certain circumstances for an applicant or an objector to appeal to ACAT against an ACTPLA decision to refuse an application in the merit track, approve an application or approve it subject to conditions. An applicant may only appeal to the extent that a proposal is subject to a rule and it does not comply with the rule or is not subject to a rule (s.407 definition of 'reviewable decision', Schedule 1, item 3 of table).

Applicants must generally apply for ACAT review within 28 days of the decision being made (s.10(2) ACAT Act). Unlike third party appellant's appeals, the time for applying for an ACAT review may be extended by the tribunal under rules made under s.25(1)(e) of the ACAT Act.

A person who has made a representation about a proposal, for example, an objector, who may suffer material detriment from the approval of the development, may appeal to the

ACAT against ACTPLA's decision to approve a DA in the merit track (whether subject to a condition or not) (s.407 definition of 'reviewable decision', Schedule 1, item 4 of table).

A person suffers material detriment if the decision is likely to adversely affect their use or enjoyment of the land. For organisations, material detriment can be shown by looking at the objects or purposes of the organisation and considering if the decision related to a matter in these objects and purposes (s.419).

This third party right of review only applies to decisions on DAs which were required to go through the major notification process. The regulations also exempt numerous types of applications from appeals by objectors. For example, the regulations exempt development of land in the city centre, a town centre, and an industrial zone from third party appeals (r.350, Schedule 3, Part 3.2, item 4). They also exclude third party ACAT review of single dwelling developments (r.350, Schedule 3, Part 3.2, item 3).

Third party appellants must lodge appeals within four weeks of notification of the decision (s.409). Objectors must make sure any appeal is lodged within this time as the time cannot be extended under the ACAT Act (s.409(3) of the Planning Act).

Impact track developments

If the development is in the impact track, an application that has been refused by ACTPLA, or approved subject to a condition, can be reconsidered by ACTPLA if the applicant makes an application for reconsideration (s.191). The process and timing for reconsideration of a decision is the same as that in the code track, as discussed above.

It is also possible for an applicant to appeal to the ACAT against an ACTPLA decision to refuse an impact track development application or approve it subject to conditions (s.407 definition of 'reviewable decision', Schedule 1, item 5).

An objector who may suffer material detriment from the approval of an impact track development application may seek ACAT review of a decision to approve the application (whether subject to conditions or not), unless the application is exempted by regulation (s.407, definition of 'reviewable decision', Schedule 1, item 6). Currently the only impact track development proposals which are exempt from third party ACAT review are applications for the building, alteration or demolition of public facilities on unleased land, such as playground equipment, barbeques and seating (r.351, Schedule 3, Part 3.3, Item 1).

The process and timing for an ACAT review is the same as that in the merit track.

Other appeals

Apart from decisions on development applications there are a range of other decisions under the Planning Act that are subject to review. These are set out in s.407 and Schedule 1 and include decisions in relation to leases granted under the Planning Act, decisions relating to certificates of compliance, the determination of change-of-use charges and controlled activity orders.

Appeals are heard and determined by ACAT. The formal requirements for making an application for an ACAT review are contained in the ACAT Act.

Judicial Review

The *Administrative Decisions Judicial Review Act 1989* (ACT) provides a right of judicial review of many administrative decisions, including decisions relating to DAs. In deciding a judicial review case a court will decide whether or not a DA was decided in accordance with the law. It does not consider the merits of a decision, that is, whether it was a 'good' or 'bad' decision based on the particular facts.

It is worthwhile to note that judicial review proceedings are often very complex and costly.