



## FACTSHEET

# How Can Vegetation protection be enforced through planning decisions in the Cairns area?

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# How Can Vegetation protection be enforced through planning decisions in the Cairns area?

*This Factsheet is for general information purposes and is not legal advice. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your particular circumstances you should contact the EDO or your solicitor.*

Many residents of Cairns have been concerned by the practice of wholesale clearing of significant remnant vegetation for new subdivisions.

This factsheet is designed to provide some further information about how development approvals are made and the powers of the Cairns City Council to appropriately manage new subdivisions. It also outlines the role of other laws that protect the clearing of vegetation.

## What Plans apply at present?

The current Planning Scheme, CairnsPlan, was adopted by the Council on the 27 January 2005 and commenced on the 1 March 2005.

CairnsPlan replaces the previous transitional plans - the Planning Scheme for the Balance of the City of Cairns, the Planning Scheme for Part of the City of Cairns and part of the Mareeba and Douglas Planning Schemes that apply to Cairns.

This means that all development applications made up to and including 28 February 2005 will be assessed under the previous Scheme, regardless of the fact that the actual decision date will be after the commencement of CairnsPlan. Development approvals issued under the previous scheme prior to the commencement of CairnsPlan continue and the conditions of those approvals still apply.

## How does Cairns Plan affect old applications?

The 'Coty Principle' applies when the Council is assessing any proposed development under the old Planning Scheme, when the new Planning Scheme is in force. This principle means that the Council is entitled to consider the planning intent of the new CairnsPlan. If there is conflict between the development application and the new Scheme, the Council is entitled to give substantial weight to the CairnsPlan. The 'Coty Principle' suggests that where a new Planning Scheme is in force, the Council should not be making decisions that undermine the new Scheme by applying

the old scheme. For example, under the CairnsPlan, remnant areas of vegetation may be mapped as an area containing Key, Moderate or Low Conservation Values. This may impose particular constraints or requirements on development in these areas. Such considerations may therefore be relevant to current assessment of a development application under the previous Planning Scheme.

## **What development approvals are required for Subdivisions?**

There are two ways in which development approvals are made for new subdivisions:

- (i) through the process of Impact Assessment
- (ii) through the Code Assessment process.

### **Impact assessment:**

If the area in which the subdivision is proposed is zoned for rural, commercial or other uses under the Planning Scheme, the development application will involve rezoning the land for urban development. The proposed development therefore involves a 'material change of use' of the land, and will be impact assessable.

The process for gaining development approval through impact assessment involves a broad assessment of the potential effects of the proposal. After the development application is lodged with the Council it will progress through three further stages, each with set time frames. The stages are as follows:

#### **Information and Referral Stage**

The application is reviewed, and the Council or relevant State Government agencies may request further information and particulars about the proposal.

Applications under IPA are now a one stop shop where you put in one application and it is assessed by both the Council against the Planning Scheme and by other relevant State agencies against their respective legislation, and almost all approvals are granted through the one process. Depending on the type of application, State agencies may be referral agencies and have the power to advise on the application, or be concurrent agencies who can recommend conditions which should be imposed, or that an application be refused.

State agencies response to the application are provided to the Council. You are able to inspect these documents on the Council file.

### Notification Stage

The development application is publicly advertised and comments of the proposal are invited from the community.

The applicant must publish a notice in a local newspaper, place a notice on the land and give notice to owners of all adjoining land and the time when submissions are to be lodged in response.

During this period, any person may make a submission to the Council about the application. Any properly made submission must be accepted.

### Decision Stage

The Council then makes a decision on whether the application is to be approved and advises the applicant and any submitters of their decision.

The Council has regard to the material obtained through the previous stages, the planning scheme, any State Planning Policies and Council laws and policies. They may decide to approve the development, approve with conditions, or refuse the development application.

Once notified of the decision, submitters have 20 business days to appeal the decision.

## **How is the protection of vegetation relevant to the impact assessment process for subdivisions?**

During the impact assessment process, the relevant State government agencies assess the application against the applicable laws for which they are responsible as discussed above. The Council must assess a development application against the relevant planning scheme. The Council's decision about the application must not conflict with the planning scheme, except in restricted circumstances. Specifically, when deciding development applications, the Council is not allowed to compromise the achievement of a planning scheme's Desired Environmental Outcomes (DEOs).

The DEOs reflect the principle of ecological sustainability, and provide the foundation of the planning scheme by expressing its purpose and the overall outcomes it seeks to achieve.

CairnsPlan contains 17 DEOs. The protection of vegetation may be identified as relevant in several of CairnsPlan's DEOs as follows:

2.2.1 Biodiversity and nature conservation values of the marine, terrestrial and freshwater ecosystems within the City are conserved and enhanced. The effects of development on these ecosystems and on their values are minimized.

- This DEO recognises that many of Cairns' vegetation communities occur as small remnant patches that have been isolated by clearing for urban development, and the impacts associated with fragmentation and isolation affect the viability of these communities and the plants and animals that depend on them.

2.2.2- Water quality, in-stream and riparian values and nature based recreation values of natural and modified waterways and wetlands and their catchments within the City are conserved and enhanced. The effects of development on these waterways, wetlands and catchments and on their values are minimized.

2.2.3- The values of the Coastal systems of the City for coastal stability, ecological processes and nature based recreation are conserved and enhanced. The effects of development on the coastal systems and their values are minimized.

2.2.5- The scenic landscape of the City is valued and enjoyed by residents and visitors, and the essential elements of this landscape, the forested hills and foothills, beaches and headlands, streams and rivers, wetlands, open spaces and rural land are conserved and enhanced. The effects of development on these elements are minimized.

- Includes reference to variety of visually striking vegetation communities (littoral rainforest, mangroves and coastal heath).
- Also refers to the coastal landscape important for distinguishing and separating urban areas and agricultural areas from the natural environment, thereby contributing to the amenity of coastal settlements.

2.4.3 -Villages, towns and suburbs have a distinctive and recognizable character and sense of place, which promotes a strong social fabric and strong sense of community and encourage community interaction and participation.

- It is stated that new developments should respect and be compatible with the identity and character of a locality, and these should be recognized and respected.
- Vegetation is included as an aspect of the environment of a locality which forms its identity and character.

The Council should take these matters into account and also impose reasonable conditions to comply with these objectives, such as restricting clearing to that necessary for infrastructure and building footprints but retaining vegetation otherwise, and requiring suitable buffers for replanting of mature species endemic to the area.

### **Code Assessment:**

If the development application for the proposed subdivision applies to land already zoned for urban development, this will usually be regarded as reconfiguration of a lot and Code Assessable. For example, if an area is zoned residential one, and there are no proposals for medium density residential or tourist use, the development will be code assessable.

The process of Code Assessment involves assessment of the development application against relevant Codes contained in the Planning Scheme.

After a development application has been lodged, it may require assessment by referral agencies as part of the information and referral stage. However, public notification is not required for Code Assessable development and there are no appeals rights. Appeals can only be by way of declarations and these are limited in scope to say arguments that there was not strict compliance with the relevant Codes (see *Westfield Management Pty Ltd v Brisbane City Council* [2003] QPELR 520).

The development application will be assessed by any applicable referral agencies and the Council, and approved if it complies with the 'acceptable solutions' stated in the Codes.

### **How is the protection of vegetation incorporated in the Code Assessment process for subdivisions?**

#### **Relevant Codes:**

### Landscaping Code:

A Landscaping Code applies to development involving the reconfiguration of a lot. An element of this Code is maintaining the character and visual amenity of the City. This requires landscaping on a site to incorporate the retention of existing vegetation in all parts of the site, except those parts approved for the building envelopes and for access and parking.

### Filling or Excavation Code:

Filling or excavation must not result in a reduction of the water quality of receiving waters. Filing or excavation is located no closer than 20 metres from any watercourse or wetland identified in the Vegetation/Conservation/Waterways Significance Overlay maps.

The Codes make it clear that the protection of vegetation is a required consideration and Council has power to impose reasonable conditions to ensure this occurs.

## **Other protection contained in the CairnsPlan for vegetation**

### Vegetation Conservation Values Overlay

The CairnsPlan contains an overlay map which represents remaining vegetation communities and ranks these according to their significance, or 'Conservation Values'.

This is based on attributes including the presence of endangered, rare and vulnerable plant species, the regional significance of vegetation type, the size and/or connectivity of any remnant vegetation, or the presence of riparian or wetland areas. The overlay map applies to remaining natural areas which are outside the Wet Tropics World Heritage Area, National Parks and other land management systems, many occurring as small remnant patches that have been isolated by clearing for urban development and agriculture.

If an area of vegetation is classified as Key, Moderate, Low or Very Low Conservation Values Land, this will impact on any development proposed, in terms of the constraints or requirements imposed. Much stronger protections may apply for the vegetation, and the level of assessment for proposed development may change. Sometimes Code assessable developments will become impact assessable also because of the overlays. As a minimum, detailed site investigation and consideration of the conservation values identified will have to occur.

The CairnsPlan also establishes Significant Waterways as an overlay. This recognises the need for management of the riparian buffer zone of waterways to maintain and improve their ecosystem functions, such as water quality, biodiversity and habitat maintenance.

Vegetation which may be included within categorisation of Significant Waterways overlay.

- If riparian area of vegetation located within 200 metres of area of Key Conservation Value, or conservation reserve
- Riparian area outside above but there is a well developed riparian buffer generally greater than 25 metres in width
- Riparian buffer less than 25 metres in width

#### Biodiversity Code

This Code applies to areas discussed above that are being reconfigured that have vegetation contained in the Key Conservation Values, Moderate Conservation Values, Low Conservation Values or Very Low Conservation Values, or areas with watercourse of significance on these Maps.

Developments must not affect vegetation conservation values. Riparian corridors are also to be maintained with various buffer distances. In these areas the design must also take into account the constraints on the site, specifically verifying significant vegetation on the site, important habitat areas and linkages and areas of connectivity, maintaining the ecological values and biodiversity values. Clearing should not be allowed in areas of Key or Moderate Conservation Values, and there should be suitable buffers. It also provides for rehabilitation of degraded sections of riparian corridors. Development of a site adjoining a watercourse must not adversely affect the integrity of the watercourse or the riparian corridor.

### **So what do I do if I am concerned about clearing of vegetation?**

#### **1. Check the Planning Scheme**

- Is the vegetation mapped in the Vegetation Conservation Overlay, as an area containing Key, Moderate, Low or Very Low Conservation Values?
- Is the vegetation mapped near a water course?
- What zone is the land mapped in the Planning Scheme?

- Has the development approval been granted, or do you still have rights to make a submission about the approval?

## 2. Approach the developer

- Discuss the proposal, suggest ways of making it more sustainable and negotiate

## 3. Raise your concerns with the Local Council

- In particular, raise any conflicts with the Planning Scheme

## 4. Publicise your concerns

## 5. Take legal action-

- Seek legal advice, speak to the EDO-NQ
- Impact assessment- merits appeal within 20 days
- Code assessable- Declaration if it doesn't comply with the Code-within reasonable time.

## Other relevant laws:

### Vegetation Management Act 1999

Do require permit to clear?

Don't under IPA -Schedule 8 if

- Clearing for single residential lot
- Not remnant vegetation
- Urban area and remnant of concern or not of concern

### Local Law No. 24- Cairns City Council

Restricts removal or damage to protected vegetation. Section 22 however allows for damage reasonable necessary for carrying out works expressly or implicitly authorized or required pursuant to a development approval.

### Water Act 2000

The protections for vegetation in this Act only apply to what is in a watercourse and permits are required to clear in this area. The definition of a watercourse includes its bed and banks. The Act require permits for filing watercourses.

## Nature Conservation Act 1994

This Act contains a procedure for identifying critical habitat through Conservation Plans, and a register is kept of critical habitat by the EPA. If a threatening process is likely to have a significant detrimental effect on critical habitat, it can be the subject of an Interim Conservation Order. Critical habitat can also be declared a nature refuge or a protected area.

USEFUL CONTACTS	
<b>EDO-NQ</b>	<b>EDO (Qld)</b>
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### Where to find more information:

#### Relevant Laws:

State legislation referred to above can be found on the following websites:

[www.austlii.edu.au](http://www.austlii.edu.au)

[www.legislation.qld.gov.au/legislation.htm](http://www.legislation.qld.gov.au/legislation.htm)

Local laws made by the relevant Councils are found:

[www.lgp.qld.gov.au/ID=134](http://www.lgp.qld.gov.au/ID=134)

#### Planning Schemes:

Copies of the Planning Schemes for Local Councils are available at Council's chambers and for purchase on disk.

Some are also available electronically on the Council's websites. See:

[www.cityofcairns.qld.gov.au](http://www.cityofcairns.qld.gov.au)