ENVIRONMENTAL DEFENDERS OFFICE (QLD) INC.

Appealing and Enforcing Development Approvals

Factsheet 10

This factsheet considers when you can appeal against a development approval or seek to enforce development conditions.

Factsheets in this series:

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For more detailed information and example court documents see our publication:
The Community Litigant's Handbook – Using the Planning Law to Protect the Environment

SUMMARY

The Integrated Planning Act 1997 (IPA) allows decisions on development approvals to be appealed before the Planning and Environment Court ("appeals"). This right is generally only available to those who have made submissions on development applications. However any person can seek declarations or take action on development offences before the Planning and Environment Court ("declarations")

Appeals:

What can a submitter appeal?
Any person who lodged a valid written submission regarding an application for impact assessable development can appeal against:

- the giving of development approval, including any conditions, lack of conditions or other provisions of the approval; and
- the length of a currency period for the approval.

What can an applicant appeal?
Applicants can appeal the refusal in whole or part of an application, any conditions or requested variations to an approval and the length of time approvals remain valid.

How long do you have to appeal?
Submitters have **20 business days** from the date they receive a copy of the decision notice within which to commence an appeal.

An appeal is commenced by filing a notice of appeal. A notice of appeal must state the grounds of the appeal – ie, the reasons why the development should be approved or refused.

The general rule in the Planning & Environemnt Court is that each party must bear its own costs. However, there are some exceptions to this general rule, for example, if the appeal is frivolous or vexatious. See the *Community Litigants Handbook* for more information regarding costs risks.

Declarations:

Any person can bring proceedings at any time in the Court for a declaration about an activity under the *Integrated Planning Act 1997* or the lawfulness of a land use or development or the interpretation of the *Integrated Planning Act 1997* or planning instruments.

The *Integrated Planning Act 1997* sets up certain development offences. Any person can:

- prosecute an offence in the Magistrates Court; and
- seek an enforcement order from the Planning & Environment Court.

There are some differences between the Planning and Environment Court and Magistrates Courts in the orders that can be made and the awarding of costs. The Planning and Environment Court can issue interim orders, while the Magistrates Court has the power to order compensation.

Appealing and Enforcing Development Approvals

FULL TEXT

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.

Appealing a development approval

The circumstances for appealing development approvals and the processes involved in development approvals are discussed in more detail in our publication "The Community Litigants Handbook – Using the Planning Law to Protect the Environment". If you are considering commencing or joining an appeal, we recommend that you obtain a copy of the Handbook. The information below is a brief outline.

The decision to grant or refuse certain types of development approvals can be challenged in the Planning and Environment Court (see *factsheet* 9 for a description of the court). An appeal can be brought by either the applicant for the development (the "developer") or any person who has made a valid written submission about an impact assessable development (the "submitter").

An appeal to the court about a development approval or refusal is known as a **merits** or **planning appeal**). In a merits appeal the court sits in the position of the assessment manager (usually the local council) and considers whether to approve or refuse the development application. It is up to the applicant for the development to prove to the court that the development application should be approved (s4.1.50 *Integrated Planning Act 1997*).

Not all developments require council consent and you can not appeal against all types of development. In order to bring a merits appeal, you must answer yes to all of the three questions:

1. **Is the development application for impact assessable development?**
   Planning instruments dictate whether a development is code or impact assessable. You can only appeal against impact assessable developments.

2. **Did you lodge a valid written submission?**
   In order to bring an appeal, you must have lodged a valid written submission with the assessment manager within the notification period for the development.

3. **Are you within the required time limit?**
   Submitters have **20 business days** from the date they receive the decision notice, within which to commence an appeal. If the developer is appealing a council refusal, submitters have **10 business days** from the date they receive notice of the developer's appeal within which to apply to the court to be joined as a co-respondent.

See the *Community Litigants Handbook – Using the Planning Law to Protect the Environment* for information about:

- When you can bring an appeal;
- What you must consider before commencing or joining an appeal;
- How to start an appeal;
- How to prepare, file and serve court documents including the Notice of Appeal and Election to Co-Respond;
- The costs and risks of litigation;
- The steps involved in a planning appeal;
- The first directions hearing;
- How to prepare for and appear in court.

Seeking a declaration on an *Integrated Planning Act* 1997 related matter from the Planning & Environment Court

Faults in the decision making process on any matter covered under the *Integrated Planning Act 1997* can be appealed by seeking a declaration from the Planning and Environment Court. Under s4.1.21 of IPA any person may bring proceedings at any time in the Court for a declaration about:

- a matter done, to be done or that should have been done under IPA;
- the interpretation of the IPA and planning instruments; or

- the lawfulness of land use or development.

The Court has discretion to grant or refuse to make a declaration. The factors the Court may consider include:

- what is the applicant's interest in the subject-matter, i.e. is it a real interest which affects the applicant directly and materially or is it a merely intellectual or emotional interest which does not greatly affect the applicant;
- whether there has been any delay in bringing proceedings;
- whether or not there is any practical utility in granting a declaration; or
- whether any breach of the law complained of is purely technical and causes no adverse effect on the environment or the amenity of an area.

What are the time limits for obtaining declarations?
There is no time limit for applying for a declaration, however, proceedings should be commenced as soon as possible after the matter complained of occurs or becomes known. Delay may be a ground for refusing a declaration, particularly when delay has caused substantial prejudice to the other party in the proceedings.

Enforcing decisions under the Integrated Planning Act 1997

Under IPA it is an offence to:

- start assessable development without a development permit (s4.3.1);
- not comply with applicable codes when carrying out self-assessable development (s4.3.2);
- contravene a development approval or a condition of an approval (s4.3.3);
- contravene a code applying to the use of premises (s4.3.4);
- use premises if the use is not a lawful use (s4.3.5); or
- not comply with the regulatory provisions of the SEQ Regional Plan.

A person who commits an offence may be:

- prosecuted by any person in the Magistrates Court;
- given an enforcement notice by an assessing authority; or
- challenged in the Planning and Environment Court.

The Court may make an enforcement order which requires the offending party to:

- stop any activity that is an offence;
- not start any activity that will be an offence;
- do anything necessary to stop committing an offence;
- return anything to a condition as close as practicable to the condition it was in immediately before a development offence was committed; or

- do anything to comply with the Act (s4.3.26 IPA).

If the assessing authority (usually the relevant local government) cannot be persuaded to take any of these enforcement actions, any person can bring a prosecution in the Magistrates Court or enforcement proceedings in the Planning and Environment Court, except where the offence is about the *Standard Building Regulation* (ss4.3.18(3) and 4.3.22(2) IPA). In addition, any person may bring proceedings for a declaration that a land use or development is unlawful.

Which type of proceeding is appropriate depends on the circumstances. There are some differences in the orders which a Magistrates Court may make (s4.3.20 IPA) and the enforcement orders which the Planning and Environment Court may make (s4.3.26 IPA). Interim orders (temporary orders pending a full hearing) may be made by the Planning and Environment Court (s4.3.24 IPA) but not by a Magistrates Court. In cases where an order needs to be made urgently, interim orders should be sought from the Planning and Environment Court.

Generally, the Planning and Environment Court will require the applicant to undertake to pay any damages suffered by the respondent if the applicant succeeds in obtaining an interim order but fails to obtain an enforcement order at the final hearing (s4.3.24(2) IPA). On the other hand, a Magistrates Court has power to order a person convicted of a development offence to compensate another person for loss of income or damage to property caused by the commission of the offence (s4.4.5 IPA).

If you want to find out if an offence has occurred you should first notify the local government of what is happening and ask for your complaint to be investigated. You can obtain from the local government various documents which you may need to establish whether an offence has been committed. The documents which the local government must keep available for inspection and purchase (ss5.7.1 to 5.7.13 IPA) include:

- details of development applications (available for inspection only);
- current planning scheme and amendments; and
- decision notices and the conditions of development approval.

In addition you may apply to the local government for a planning and development certificate which will provide details of approvals and their conditions.

Further information and references

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Web: www.edo.org.au/edoqld

Environmental Defenders Office of Northern Queensland Inc
Ph: (07) 4031 4766
Fax: (07) 4041 4535
Email: edonq@edo.org.au
Web: www.edo.org.au/edonq

Planning and Environment Court Registry
Ph: (07) 3247 5407
Fax: (07) 3247 4394
Court website: www.courts.qld.gov.au

Department of Local Government and Planning
Ph: (07) 3234 1870
Fax: (07) 3247 4172
Email: enquiries@dlgpsr.qld.gov.au
Web: http://www.lgp.qld.gov.au/
Web: http://www.ipa.qld.gov.au

Environmental Protection Agency
Ph: (07) 3227 8185
Fax: (07) 3227 8749
Email: csc@epa.qld.gov.ay
Web: www.epa.qld.gov.au

The Community Litigants Handbook – available from the EDO

Relevant laws

Integrated Planning Act 1997
Planning and Environment Court Rules 1999
Uniform Civil Procedure Rules 1999