Environmental Defenders Office

Development Controls

Disclaimer: This factsheet is a guide only and is designed to give readers a plain English overview of the law. It does not replace the need for professional legal advice in individual cases. To request free initial legal advice please visit our website.

While every effort has been made to ensure the information is accurate, the EDO does not accept any responsibility for any loss or damage resulting from any error in this factsheet or use of this work.

This factsheet was last updated on 30 June 2019

Introduction

In Tasmania, approval for new developments has been integrated, streamlined and simplified. In many cases, only one combined approval is required for both planning and environmental approval.

The approval process is governed largely by two key Acts:

- *Land Use Planning and Approvals Act 1993* (**LUPAA**) – regulates planning & environmental controls
- *Environmental Management and Pollution Control Act 1994* (**EMPCA**) – regulates impacts of developments considered to be of higher environmental risk (called 'Level 2 activities').

The approval process integrates provisions within both of these two Acts (plus some others) to ensure that a proposed development addresses a variety of land use and environmental considerations before it can be approved.

Read: EDO Factsheet on **Environmental Controls** for more information on how various planning processes consider environmental impacts, safeguards, and controls.

When do I need planning approval?

You will generally need to seek planning approval if you want to do any of the following:

- change the use of land
- undertake a new development on land
- expand an existing development

‘Development of land’ includes the carrying out of building, engineering or other operations on land. It includes making any material change in the intended use of the land or buildings or works upon it. It also includes demolition, land clearing and subdivision.

Even if you already have a planning permit, you will probably require a new approval for any proposal that involves:

- an intensification of the use of the land
- changing the use of existing buildings (eg converting a residence into a visitor accommodation use)
- changing the way you conduct your activities (e.g changing the operating hours of your business)
- an increase in the output of pollutants, including noise

Some activities may be exempt from planning approval requirements– it is a good idea to check with the local council before doing any work.

N.B. Permits to build dams or weirs, forestry activities and mining operations go through different approval processes.

How do I apply for planning approval?

Local councils (sometimes called ‘planning authorities’) are central to Tasmania’s planning system for information about councils). Unless your proposed activity is exempt, you will need a planning permit before you proceed with a development.

Your application may also need to comply with the requirements of various other government agencies (e.g traffic arrangements need to comply with Department of State Growth requirements, sewerage arrangements must meet the requirements of TasWater, and approval from Crown Lands may be required if any part of your development (including access) occurs on reserved land.

What information must a development application contain?

If you are applying or a planning permit, your application should answer all the relevant questions in the form provided by the planning authority, and include plans and reports showing enough detail so that the planning authority (and any person viewing your application) can understand the potential impacts of your proposed development and how you plan to manage those impacts.

If the Planning Scheme sets out particular information that is required to be included with an application, the application may not be valid unless all the required information is provided. The planning authority (and, if the proposal is referred – see below – the referral

agency) can also request further information if they believe that your application doesn't address all the relevant impacts. If you receive a "Request for Further Information", the timeframe for making a decision on your application will be paused until you respond to the request. If you think the request is unreasonable you can apply to the Resource Management and Planning Appeal Tribunal (**RMPAT**) for a ruling on whether the information is really required.

Read: EDO Factsheet on **The Planning System** for more information on enforcement of the Planning System.

Read: EDO Factsheet on **Appealing to RMPAT** for more information on general information about the appeals process.

Classifying the Use Type

A proposed development will fall into one of these categories, determined by the Planning Scheme:

- Prohibited Use – application must be rejected
- Discretionary Use – the application can be accepted or rejected (see below)
- Permitted Use – application must be approved (with or without conditions)
- Exempt Use – the application does not need to be approved by the planning authority (for example, boundary fences lower than 2.1m, small garden sheds, pruning vegetation or maintaining an easement around transmission lines).

Even if the application is classified as a Permitted or Discretionary activity/use, it must comply with development standards. These might cover issues such as building heights, the number of car parking spaces or the minimum size of a piece of land. If the development standards are not met the proposal can be refused even if it would otherwise have been classed as a 'permitted use'.

What happens if your proposed development is for a 'prohibited use'?

A planning authority must refuse an application for a prohibited use.

If you believe that the use should not be prohibited on the land (for example, that the land should be included in a Local Business Zone, rather than an Inner Residential Zone, and therefore a shop should be allowed), you can apply to the planning authority to assess a combined amendment to the Planning Scheme and planning permit to allow the development. If the planning authority supports your proposal to amend the planning scheme, your application will be referred to the Tasmanian Planning Commission for assessment.

What happens if your proposed development is for a 'permitted use'?

Some Planning Schemes further divide the 'permitted use' category into Permitted (No Permit Required) and Permitted (Permit Required). Where no permit is required, the use is often referred to as being 'as of right'. You do not need to apply to the Council in relation to an 'as of right' development, though you must ensure that it complies with all relevant planning scheme standards. Depending on the development, you may also still need building or plumbing approval (see below).

If the use is Permitted (Permit Required), you must apply to the council for a planning permit. The planning authority must approve your application. However, where appropriate, the council can add conditions to the permit, including environmental requirements such as landscaping and pollution control, restriction of operating hours, or use of building materials to reduce bird strike.

N.B. Applications for permitted uses are not publicly advertised. Only the applicant has a right to appeal against any conditions that are attached to the permit.

What happens if the proposed development is for a 'discretionary use'?

A proposed use or development will be 'discretionary' if it is listed as a 'discretionary' use under the Planning Scheme OR if it is a 'permitted use' but does not comply with one or more of the applicable standards (for example, if a proposed building will be higher than the permitted height, or will be located closer to the neighbouring property than the standard setback distance).

You will need to apply for a planning permit for any discretionary use. A planning authority has discretion to refuse or approve the application, after considering all of the potential issues associated with the proposal. Before it refuses or approves the development application, the planning authority must follow certain procedures to ensure the community has a chance to have a say.

1. Councils must advertise the proposed development

The public must be notified of a proposed discretionary development by:

- Advertising in the public notices section of a local newspaper
- Displaying the application at the local council offices
- Sending a notice of the application to all adjoining neighbouring properties and property owners
- Placing a public notice on the site of the proposed development, as near as possible to all public boundaries of the land.

2. Referral agencies

Some applications with specific impacts on issues managed under other legislation must be passed on to "referral agencies" for comment prior to the planning authority

making its decision. For example, where a development is for an environmentally significant activity ('Level 2 activity'), the application must be referred to the Board of the Environment Protection Authority (**EPA**); where a development is proposed on a listed heritage place, the application must be referred to the Tasmanian Heritage Council for consideration.

Planning authorities must act consistently with any advice received from referral agencies, and cannot approve a proposal where a referral agency has recommended that it be refused.

In some circumstances, Level 1 activities that may cause environmental harm can also be referred to the EPA and assessed as if they were Level 2 activities. The Director of the EPA may also 'call in' an activity for environmental impact assessment even where the activity does not require a permit.

Visit: EPA Tasmania page on the Assessment Process to learn more about the assessment process for Level 2 activities

3. Representations

Any person or group who has concerns about a proposed development can make a representation (sometimes called a 'submission') to the council explaining these concerns.

The public must be given at least 14 days to make a representation (excluding public holidays – this period may be longer if a referral agency is involved. The planning authority may allow additional time in some circumstances, such as where the proposal is particularly complex or where details of the proposal are amended during the advertising period.

The development application and all supporting documents are available at council offices for anyone to inspect. Many Councils provide this information on their websites, but they are not required to do this. Councils are also not required to provide copies or to allow people to make copies of a development application.

State government agencies are also able to make comments about a proposed development during this period. For example, DPIPWE officers may express concern about potential impacts on threatened species or the Department of State Growth can comment on road access arrangements. However, the Council is not specifically required to consult with relevant agencies before making its decision (other than referral agencies.

The RMPAT has previously held that representations can only be accepted by email if the public notice clearly provides an email address and invites representations to be made by email. Be careful to check the notice. Even if Council accepts your email, it

may not be a “valid” representation giving you a right of appeal unless the notice specifically allowed for email representations.

The planning authority must take into account any representations it receives during the advertising period (including from government agencies) when making its decision. Any person, group or agency that made a representation then has the right to appeal against the planning authority’s decision in relation to the development.

Read: EDO Factsheet on **Appealing to RMPAT** for more information on general information about the appeals process

What about approvals for buildings?

Even if you obtain planning approval, separate building and plumbing plans will need to be approved by the Council. This is to ensure that safety, health and other requirements are taken into account before anyone occupies the building.

Regulations governing buildings apply throughout Tasmania and include prescribed standards for certain materials and building methods. No structural alterations can be carried out unless you have obtained a building permit for the work. Approval is also required to build car parks, retaining walls over 1 metre high and some fences and sheds.

If work is done without approval, penalties may be imposed and orders may be issued preventing any further work being carried out or requiring demolition of unauthorised works.

Visit: National Construction Code website to learn more about technical design and construction provisions for buildings

Visit: Consumer, Building and Occupational Services page on Technical Regulation to learn more about the prescribed standards for certain materials and building methods in Tasmania

Changes to Water and Sewerage Controls

From 1 March 2013, sewerage and water infrastructure throughout Tasmania has been the responsibility of the Tasmanian Water and Sewerage Corporation (**TasWater**). Each local council is a joint shareholder of TasWater, however fees for services are paid to the corporation and any complaints are made directly to the corporation (see Development by TasWater below).

Two pieces of legislation govern TasWater's operations:

- *Water and Sewerage Industry Act 2008* – provides the framework for infrastructure development and assessment of applications that will affect the system.
- *Water and Sewerage Corporations Act 2012* – sets out how TasWater will operate, including governance arrangements.

Development by TasWater

Under the *Water and Sewerage Industry (General) Regulations 2009*, many activities carried out by TasWater do not require a planning permit. These include:

- Installation, maintenance or removal of pump stations, fluoridation or chlorination stations;
- Laying, removing and maintaining underground pipelines;
- Clearing vegetation where the work is necessary to protect water or sewerage infrastructure or water quality; and
- Subdivision for the purpose of creating lots for uses associated with water and sewerage infrastructure.

TasWater also has wide powers to enter land to carry out works associated with water and sewerage infrastructure, or to acquire land for those purposes.

Other Developments

Subject to some exemptions, TasWater is a referral agency for the following developments, and planning authorities must refer all relevant development applications to TasWater for consideration:

- Developments that will increase demand for water (for example, a golf course);
- increase the burden on sewerage or trade waste infrastructure (for example, residential subdivision);
- damage or interfere with TasWater infrastructure; or
- adversely affect TasWater's operations (see s.56O of the *Water and Sewerage Industry Act 2008*).

For a list of developments which do not need to be referred to the water corporation, see r.12 of the *Water and Sewerage Industry (General) Regulations 2009*.

TasWater may make a submission to the planning authority regarding the application within 14 days (or longer in some circumstances) either recommending approval (with or without conditions) or refusal of the application.

If TasWater has recommended approval of a development application, it is still open for the planning authority to refuse the application on other planning grounds. However, if

the planning authority grants a permit for the use or development, it must include any conditions specified by TasWater.

If TasWater has recommended refusal of the application, the planning authority cannot issue a permit for the application (although the applicant can appeal against the refusal decision).

TasWater must also grant a 'water and sewerage compliance certificate' before a certificate of completion is issued for any certifiable building work. A developer can appeal against a decision not to grant the compliance certificate.

Environmental Impacts

In addition to land use and infrastructure considerations, planning assessments must also take into account environmental impacts and how to minimise and manage those impacts. In Tasmanian environmental legislation, there are three 'levels' of activities (operations or developments) used: Levels 1, 2 and 3.

Read: EDO Factsheet on **Environmental Controls** for more information about how these impacts are assessed.

What happens next?

How long does it take for approval to be granted?

For a 'Level 1' activity, the council must generally make a decision within 42 days of receiving the application.

For an activity assessed by the EPA Board, it must make a decision in relation to the proposed development within the following periods after the representations are received in response to the public comment period or from the date of public consultation closure if no permit application is involved:

- For 2A activities, 35 days
- For 2B activities, 56 days
- For 2C activities, 91 days

The EPA Board will then notify Council of the completion of the assessment and its decision. Council then makes the final decision about whether to issue a permit or not. These time limits can be extended if further information is required from the applicant or if the applicant agrees to an extension of time.

Notification of decisions

Once a council makes its decision, notice is sent to:

- the applicant
- any person who made a representation / submission

How can I get a copy of a planning permit?

Planning permits are available for inspection at local council offices. Depending on the council, you may be required to make a Right to Information request to obtain a copy of the permit, other councils require an application to view the permit.

If the council has amended a permit by an Environment Protection Notice, this is also available for public inspection at the Council office. Environment Protection Notices issued by EPA Tasmania can be viewed at their offices.

Significant Development Projects

When a significant development is being proposed, the state government can sometimes step in and require a different development approval process. There are three different classes of significant developments:

1. Project of Regional Significance
2. Project of State Significance
3. ‘Major Infrastructure Development’

Projects of Regional Significance

A project proponent or a planning authority can apply to the Minister for Planning for a declaration that a project is a project of regional significance (PoRS). The application is to include a ‘statement of intent’ outlining key aspects of the project, including the anticipated timeline, likely environmental, social and economic impacts and details of studies to be carried out in relation to the impacts.

The Minister may also decide to declare a project to be a PoRS without an application from the proponent or planning authority.

A project will be eligible to be a project of regional significance if the project:

- is of regional planning significance (e.g. would make a significant economic or social contribution to the region, or affect the provision of regional infrastructure), or;
- requires high-level assessment (where the planning authority does not have the capability or resources to adequately assess the proposal), or;
- would have a significant environmental impact.

An order declaring a project to be a PoRS can include in the description of the project any use or development which is necessary for the project, even if the use or development is undertaken by a third party.

How are PoRS assessed?

Where a project is declared to be a PoRS, it will be assessed by a Development Assessment Panel rather than a planning authority. The Panel will comprise 3-5 people, including:

- a member of the Tasmanian Planning Commission;
- a person nominated by the planning authorities within the region who has experience in land use planning, urban and regional development, commerce, industry or building and infrastructure, and;
- a person with qualifications or experience relevant to the assessment of the PoRS.

The Panel develops assessment guidelines for the PoRS in consultation with the Commission, affected planning authorities and relevant government agencies. The guidelines must have 68 regard to planning schemes, regional land use strategies and planning orders in force for the development site.

The Minister will also refer a PoRS to the Director, EPA. The Director must advise whether the EPA will conduct an environmental assessment of the proposal (see Environmental Controls above) and, if so, provide guidance to the Panel regarding issues to be included in the assessment guidelines for the PoRS.

The proponent must submit a project impact statement addressing the assessment guidelines to the Panel and the EPA (if they are to undertake an assessment). The assessment guidelines and project impact statement are then made available for public comment for a period of at least 28 days. Any person may make a representation in relation to the PoRS, and will be invited to attend a hearing before the Panel.

How is a PoRS approved?

The Panel will generally make a determination in relation to the PoRS within 4 months of receiving the project impact statement. The Panel may refuse the **proposal** or grant a special permit for the proposal (with or without conditions). However, the Panel may not grant a special permit for the PoRS if the EPA has recommended that the PoRS be refused.

The Panel may approve a PoRS even if the use or development would not be permitted under the relevant planning scheme. If a special permit is issued the Commission must amend any applicable planning instruments to remove any inconsistencies with the PoRS.

If a special permit is issued subject to conditions, the Panel must give the proponent, relevant planning authority, the EPA and the regional water corporation an opportunity to comment on the proposed conditions before a final determination is made.

Can I challenge a decision in relation to a PoRS?

Unlike normal planning applications, decisions in relation to PoRS are not subject to appeal.

N.B. As at 30 June 2019, no projects of regional significance have been declared. The Tasmanian Government intends to introduce new laws by the end of 2019 for a new category of development, "Major Projects". Major projects will be assessed by the Tasmanian Planning Commission, and are likely to replace Projects of Regional Significance.

Projects of State Significance

Under the *State Policies and Projects Act 1993*, the Premier can declare a project to be a Project of State Significance if it satisfies at least two of the following criteria:

- significant capital investment;
- significant contribution to the State's economic development;
- significant consequential economic impacts;
- significant potential contribution to Australia's balance of payments;
- significant impact on the environment;
- complex technical processes and engineering designs;
- significant infrastructure requirements.

An order declaring a project to be a Project of State Significance (***PoSS***) must be approved by both Houses of Parliament. Such projects are classified as 'Level 3' developments, and are subjected to the approval process outlined below.

Examples of projects of state significance include:

- Lauderdale Quay
- Basslink
- Oceanport
- Taiwan Pulp and Paper Corporation

N.B. An order declaring a project to be a Project of State Significance can include in the description of the project any "use or development which is necessary or

convenient for the implementation of the project", even if the use or development is undertaken by a third party.

How are PoSS assessed?

The *State Policies and Projects Act 1993* sets out the assessment and approval process that must be undertaken. The fundamental difference between Projects of State Significance and other development applications is that the assessment process is conducted by the Tasmanian Planning Commission and the final decision is made by the Government, instead of the planning authority.

PoSS are subject to Integrated Assessments and the public are given an opportunity to make submissions and appear at public hearings in relation to the proposed development.

Following the hearing, the Commission makes a recommendation to the Premier about the proposed development, including any conditions that should be imposed if the development is approved. The Premier will then make a recommendation to the Governor regarding approval or refusal of the Project. The Premier is not bound to follow the recommendations of the Commission, but any decision that is contrary to those recommendations must be approved by both Houses of Parliament.
Unlike normal planning applications, decisions in relation to Projects of State Significance are not subject to appeal. Therefore, it is important to get involved in the assessment process to make sure that your concerns are considered.

If a Project of State Significance is approved, the Tasmanian Planning Commission (**TPC**) must amend *any relevant planning scheme* to remove any inconsistency with the project. The normal procedure for amending a planning scheme does not apply to this process.

Assessment Guidelines

The Commission will develop Scope Guidelines ('terms of reference') for an Integrated Impact Statement, setting out the issues that must be addressed in the assessment documents. Draft Scope Guidelines are generally released for public comment (but this is not required by law). If you think that the Guidelines do not cover a particular issue that may be relevant to the development (e.g. greenhouse gas emissions), you should make a submission to the Commission requesting that the terms of reference be amended.

Who conducts the Integrated Assessment?

The developer (or its consultants) must prepare a comprehensive IIS document in accordance with the Scope Guidelines. The IIS generally includes an Environmental Impact Statement (**EIS**) and a Social, Economic and Cultural Impact Statement (**SECIS**). These documents must be available for public comment.

The Commission then conducts the Integrated Assessment in accordance with any directions given to it by parliament. This generally involves public hearings, at which the proponent and any person who made a representation are invited to present evidence.

How are PoSS approved?

In assessing a PoSS, the Tasmanian Planning Commission:

- seeks expert advice from EPA Tasmania and other agencies
- conducts an Integrated Assessment (which may include a public hearing(s))
- after assessing all the material, provides advice to the Premier about in a publicly available report

The Premier then makes a decision regarding the proposed project and can recommend to the Governor that the project be refused or allowed. However, if the decision is not in accordance with the TPC recommendations report, the decision must be approved by both Houses of Parliament before the project is allowed to proceed.

The final orders made in relation to the Project will specify the agencies responsible for enforcing the conditions. Once approved, the activity is subject to normal environmental and planning regulation.

Read: EDO Factsheet on **Environmental Controls** for more information about assessing proposals under environmental and planning regulations.

Major Infrastructure Developments

When a 'linear' project, such as a major gas pipeline, would require development approval from several councils, the Minister may recommend (after consultation with affected councils) that the project be declared a Major Infrastructure Project.

These developments are declared under the Major Infrastructure Development Approvals Act 1999 (**MIDA**). Once declared as a Major Infrastructure Project, the proposal will be assessed by a specially constituted body. In all other ways, the proposal will be subject to normal planning approvals, including appeals.

Who assesses major infrastructure developments?

The project is normally assessed by a Combined Planning Authority set up for the particular project. This Authority comprises people nominated by the local councils that are impacted by the project. For example, the "Waddamana to Risdon Vale Electricity Transmission Line Combined Planning Authority" comprised representatives from Central Highlands, Southern Midlands, Brighton and Clarence Councils.

Alternatively, the project can be assessed by the Tasmanian Planning Commission.

Once the development is approved, the relevant local councils again become responsible for regulating the proposal under normal environmental and planning laws.

Read: EDO Factsheet on **Environmental Controls** for more information about assessing proposals under the environmental and planning laws.

How are major infrastructure developments assessed?

Once declared as a Major Infrastructure Development, the project is deemed to be ‘discretionary’ (ie it can be permitted or refused). Section 12 of the MIDA Act requires that draft planning criteria for the project must go on public display for at least 14 days. Having regard to public comments, the combined planning authority will then finalise the planning criteria against which the project will be assessed.

Section 14 of the MIDA Act requires the developer to lodge a plan which defines the proposed corridor. The application for a development permit cannot be for an area wider than the notified corridor. The project can proceed anywhere within the approved corridor, including on private land (subject to compensation).

Can I appeal against a major infrastructure development?

Yes, if you made a representation about the proposal, you can appeal to the Resource Management and Planning Appeal Tribunal (**RMPAT**) against a decision to approve it.

Read: EDO Factsheet on **Appealing to RMPAT** for more information on general information about the appeals process.

Other Permits and Licences

Some developments will need additional permits from other agencies, depending on their circumstances. Some examples of activities that require special permits include:

- operating a business in a national park
- taking water from a watercourse
- commercially harvesting timber on private land
- fish farming
- activities on Crown land.

What if Commonwealth approval is required?

If a proposed project is likely to have a significant impact on a matter of national environmental significance, the project may require Commonwealth government approval as well as approval under Tasmanian legislation.

There is a bilateral agreement between the Tasmanian and Commonwealth governments that allows assessments carried out under Tasmanian planning and environmental laws to be considered for the purposes of an assessment under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Approval is still granted by the Commonwealth government but may not involve a separate assessment.

If you believe a proposed development may impact on a matter of national environmental significance, contact the Department of Agriculture, Water and the Environment and ask them to consider requesting that the proposal be referred for assessment.

Visit: The Department of Agriculture, Water and the Environment EPBC Notices Portal to view the current project referrals under assessment and open for public comment.

Can decisions be challenged?

Decisions relating to discretionary Level 1 or Level 2 activities can be appealed by

- the applicant, or;
- any person who made a valid representation during the public comment period

There is no right of appeal against a decision to approve / refuse a Level 3 activity.

N.B. An appeal must be lodged within 14 days of the date of the letter giving notice of the decision that you want to appeal against.

Read: EDO Factsheet on **Appealing to RMPAT** for more information on general information about the appeals process