

# Chapter 3

## Development approval

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# Development approval

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## 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.

Generally, 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) in which case the NCA must give approval. 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 (s 10 of the *Australian Capital Territory (Planning and Land Management) Act 1988 (Cth) (Planning and Land Management Act)*). Development within these areas is discussed below (see Chapter 2 of this Handbook for more information about the Commonwealth's planning responsibility and the NCP).

The *Planning and Land Management Act* classifies land as 'national land' or 'territory land'. National land is declared by the relevant minister and is land that is, or is intended to be, used by or on behalf of the Commonwealth (s 27). National land is managed by the NCA via the NCP. Territory land refers to all other ACT land (s 28), and is managed by ACTPLA via the Territory Plan (TP). The ACT government obtains land management responsibility for territory land from the *Planning and Land Management Act* (s 29) and the *Australian Capital Territory (Self Government) Act 1988 (Cth)* (s 37 and Schedule 4).

ACTPLA administers the *Planning and Development Act 2007 (ACT)* (the *Planning Act*), a territory enactment that provides for the preparation and administration of the TP (s 12) and the establishment of ACTPLA (s 10). This is also the principal legislation dealing with planning, development approvals and leasing matters for the territory land under the planning responsibility of ACTPLA.

The *Planning Act* replaced the *Land (Planning and Environment) Act 1991*, and instituted a three track development assessment system, differentiated by the nature of the development proposal. The simplest assessment track is the code track, the most commonly used is the merit track and the broadest assessment is applied in the impact track for larger, more complex proposals.

# Development applications to the NCA

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## ***Introduction***

The NCA is established under section 5 of the *Planning and Land Management Act* and is responsible for administering and reviewing the NCP (s 6), the objective of which is to ensure that Canberra and the Australian Capital Territory are planned and developed in accordance with their national significance (s 9). On behalf of the Australian Government, the NCA manages 'national land' as opposed the 'territory land', designated as land intended to be used by the Commonwealth and for the special purposes of Canberra as the national capital. The NCA also 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. Currently, the Assistant Minister for Infrastructure and Regional Development is 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' in a designated area (s 12). Works include 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 Majura, Mt Ainslie, Black Mountain and Red Hill
- the main avenues and approach routes to Canberra, for example, State Circle, Kings Avenue, Commonwealth Avenue, Northbourne Avenue, Canberra Avenue and the Barton, Federal and Monaro Highways.

The NCA also approves developments for offices in Barton, and the residential area of Forrest/Deakin due to their proximity to Parliament House. 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.

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 the community has no right to make comments or objections under the *Planning and Land Management Act*. This rule is subject to several exceptions discussed below

under 'Public notification/consultation'. The NCA has also adopted a consultation protocol - '*Commitment to Community Engagement*' which is available on the NCA website (see Contacts list at the back of this book) and sets out the NCA's community consultation process for development proposals. The protocol contains a commitment to engage with the community as part of NCA decision making, and recognition that inclusion and engagement - particularly at the early and formative stages of projects and proposals - are vital to building and maintaining community trust. Most applications for a works approval are listed on the NCA website.

## ***Development in a designated area***

The NCA is required to give works approval prior to any works being undertaken in a designated area. An applicant should discuss the proposed works with the NCA before completing and lodging an application for works approval. Discussions focus on the requirements of the NCP which might affect the proposal, and will help identify any major issues that require resolution prior to approval. It is also 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 designs showing the development intention for its consideration and comment before proceeding with any development application. Detailed design drawings may also be submitted for 'in principle' support before submitting a Works Approval application.

A development likely to have a significant impact on a National Heritage place must obtain approval from the Commonwealth Minister for the Environment as required under section 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 if the development is likely to have an impact on ACT heritage within a designated area (see Chapter 9 of this Handbook for more information on ACT heritage law). The applicant may be required to provide evidence of an environmental clearance or approval from the Department of the Environment before the NCA will give its approval to development proposals on:

- Commonwealth land
- Designated areas
- Sites that may have endangered and protected species of flora and fauna, or some other environmental value (including heritage) or
- Development that has a significant impact on the heritage values of a 'place' entered in the Commonwealth or National Heritage list.

Once the NCA has given its in principle support to the project the formal application for works approval can be lodged. There is an application form, schedule of fees and information checklist available on the NCA website.

The application for works approval needs to include an application form and the relevant fee calculated by reference to the estimated cost of the work. The application also needs 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 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
- civil & excavation plans
- a Planning Report
- a Public Consultation Report (in accordance with the NCA's Consultation Protocol)
- a Traffic Assessment Report
- a site establishment and construction management plan
- a design model (for any major development and/or proposed in a prominent location).

The NCA will consider the formal application and, once it is satisfied that all relevant matters have been resolved and the proposal is in accordance with the NCP, will issue a formal works approval. The NCA has committed to finalise applications within 15 working days (see the NCA's [Planning and Development Service Charter](#) on its website). Major projects and those which require consultation or clearance from external agencies may take longer.

### ***External agency clearances***

Consultations with ACT government agencies may also be required covering issues such as vehicular access, traffic safety, waste management, storm water drainage, leasing and lease compliance, tree preservation and verge landscaping and management.

## ***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. Specific circumstances in which public notification and consultation are required by the NCP include:

- Residential development and/or development in the Deakin/Forrest residential area between State Circle and National Circuit. For single dwellings, neighbours must be notified, 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). The NCA will take into account comments received before assessing and approving the application
- 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 comments from neighbours will assist the NCA in determining whether performance criteria has been met and establishing conditions of approval (Appendix P of the NCP)
- Applications for telecommunications facilities where the NCA is of the opinion that they will have a high visual impact (Chapter 12.4 of the NCP). Consultation is via notification in a generally circulating newspaper, and will invite interested parties to submit written comments with the NCA
- Residential and commercial development proposed for Campbell Section 5 requires public notification and consultation (Appendix T8 of the NCP)
- If the NCA determines that a development in Section 6 or Blocks 12 and 13 Section 9 Barton constitutes a major works, then as per the detailed conditions, the application for works approval is subject to public notification and consultation.

The NCA is otherwise under no statutory obligation to invite public comment on applications for works approval.

## ***Community Consultation Protocol***

The NCA has developed a Consultation Protocol called '[Commitment to Community Engagement](#)' which is available on its website and details the consultation the NCA will undertake. This protocol is not legally binding.

The purpose of the protocol is to formalise arrangements for when and how the NCA conducts consultation. The protocol aims to provide guidance for the community and stakeholders and to ensure consistency in the application of consultation as required by the Act and the NCP and sets out minimum requirements only. Additional community engagement activities may be adopted for complex issues, and when they would demonstrably improve the effectiveness of community engagement and the potential outcome for the community.

NCA policy is to apply the protocol in all situations and to keep exemptions to a minimum. The NCA states it will consider the potential for limited consultation in preference to exemption from any form of consultation. In situations where consultation is limited or exempt, the NCA will state the grounds on which this decision has been made. Examples include cases where consultation might compromise national security or undermine the Commonwealth's fulfilment of international treaty obligations.

The consultation protocol states that the NCA website will provide a public notification process for all works approval applications, irrespective of their proposed capital expenditure. Full public consultation for works approvals will be required where the NCA's perceived risk rating is 'significant' or 'high', and also for any development where consultation is a mandatory requirement under the NCP. When a works approval application is lodged and consultation is required, the applicant is required to consult with the community and stakeholders. The NCA may stipulate specific requirements for consultation and, for higher perceived risk proposals, may undertake the consultation process itself.

The protocol for works approval applications and their respective consultation processes are set out in detail in the policy, which is available on the [NCA's website](#). Organisations that are interested in various aspects of the NCA are invited to register their details with the NCA so they can advise directly about projects and proposals which may be within the organisation's area of interest. The NCA has also developed an online forum for public participation, found under '[Public Consultation](#)' on the website, which allows interested persons to comment on draft plans and also outlines other opportunities for public participation. The list of current works approvals can be inspected on the [NCA website](#) (see also Contacts list at the back of this book).

### ***Review of approvals***

There is no provision for planning appeals relating to the merits or otherwise of development proposals approved or disallowed by the NCA. In this respect the decision of the NCA in relation to an application for works approval is final.

While there are no appeal rights relating to the merits of the NCA's decision, there may be the opportunity for recourse under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to determine whether a decision of the NCA has been made in accordance with the law. In practice, this is likely to be a very limited right of review as it is only where a citizen's rights are affected that there may be an appeal and only a small amount of leased land exists within the designated areas.

## ***Development on national land – other than a designated area***

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

At the time of writing, selected areas which are not a designated area may still be national land and subject to 'special requirements' under the NCP (s 10(2)(d)). Proposals for this land 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). Where both planning regimes apply, the TP has no effect to the extent that it is inconsistent with the NCP, but the TP shall be taken to be consistent with the NCP to the extent that it is capable of operating concurrently with the NCP (s 11).

## ***Development in the Parliamentary Zone***

The Parliamentary Zone is a key-hole shaped area of land bounded by State Circle, Commonwealth and Kings Avenues and Lake Burley Griffin. 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**

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## ***Introduction***

In the ACT the development of land which is not within a designated area under the NCP is managed by ACTPLA. ACTPLA also administers the *Planning and Development Act 2007* (ACT) ('Planning Act'). Chapter 7 of this Act provides the legislative framework for development approvals in the ACT and 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 the Contacts list at the back of this book). By checking the relevant development table and code, it is the applicant who must decide which of these assessment tracks is appropriate for the development in question. The [ACTMAPI](#) shows an area's land use policy or zoning which also provides information on what development is allowed. A [step by step guide](#) to using ACTMAPI is also available. The relevant development table for a zone lists the minimum assessment track in which a development can be considered. Development tables can be accessed from the Territory Plan available on the [ACT legislation register](#).

Some developments are exempt from the Act (ss 133-135), and some are prohibited (s 136). The Territory Plan (TP) (see also Chapter 2 in this Handbook for more detail about the TP) 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 determine which assessment track is the correct track for that development, as the requirements for each are quite different. An applicant may pre-apply to ACTPLA with a development proposal and ACTPLA is obliged, after considering the proposal, to give advice on which assessment track applies, or if it is likely to be exempt or prohibited (s 138 and see below).

Depending on the type of development, ACTPLA may require approval or endorsement from various entities, such as ActewAGL, the Department of Territory and Municipal Services (TAMS) or the Conservator of Flora and Fauna if likely to have a significant adverse environmental impact on a protected matter (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 the lease purpose clause permits a particular development proposal to go ahead (see Chapter 2 in this Handbook for more information about the leasehold system in the ACT).

It is an offence to undertake development without development approval (s 199).

The ACT Minister for Planning is primarily responsible for *the Planning Act* and in this section of this chapter is referred to as the minister.

## ***What is 'development'?***

Under the *Planning Act* development is defined very broadly 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) (s 7).

If 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 the impact tracks and will need to be approved by ACTPLA.

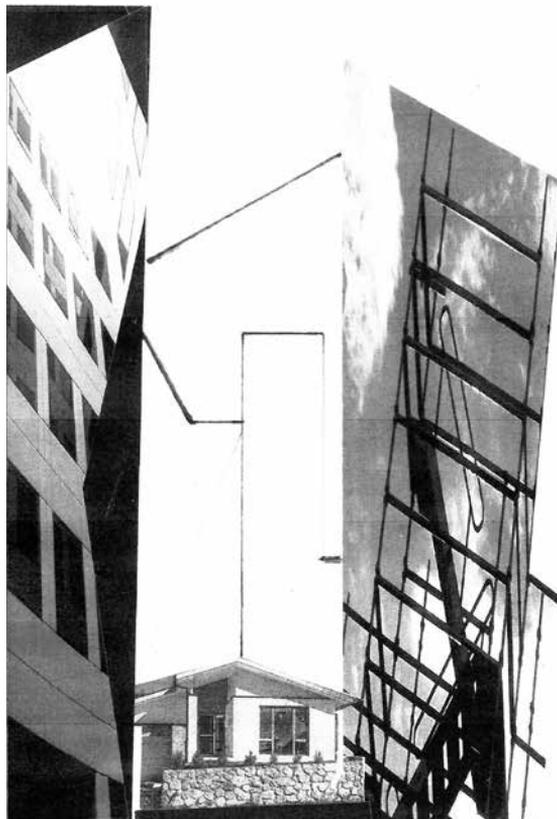
## ***Exempt developments***

Provided they comply with certain criteria and requirements, certain small-scale or less complex development proposals are classified as exempt and do not require development approval. Proposals are exempt either under the relevant development table of the TP, under section 134 of the *Planning Act*, or under Chapter 3 of the *Planning and Development Regulation 2008 (ACT)* ('*Planning Regulation*') (s 133). An exempt development does not include a proposed development assessable in the impact track nor does it include a development that is inconsistent with a conditional provision concerning a separate development approval on the same land (s 133(2)).

The requirements for exemptions vary according to the type of project. A list of the types of developments that are exempt from development approval and the relevant criteria and requirements can be found in Schedule 1 of the *Planning Regulation*. Examples of exempt developments include aerials and antennae, photovoltaic panels, single houses in new housing estates, decks, patios and terraces, demolition, fences, letterboxes, clothes lines, barbeques, satellite dishes, ponds, skylights and retaining walls (r 20 and Schedule 1). See also the [ACTPLA website](#) for more information on what is an exempt development.

ACTPLA must tell a proponent of a development proposal if the development is likely to be exempt (s 138 (4)(a)) and a person may apply for an exemption assessment to work out whether a development is an exempt development (s 138B).

While the development may be exempt from needing development approval, it may need approval from TAMS. For example, the development must not breach the *Heritage Act 2004 (ACT)* or the *Tree Protection Act 2005 (ACT)*. Where an authorised use of the land or an existing building is exempt and there is a development proposal in relation to the land, the exemption ceases if the other development is not exempt from the need to obtain approval. For example, the use of land ceases to be exempt if a large building is constructed on the land and the construction the large building requires development approval (s 116A).



Proposals that are exempt under the *Planning Act* may be undertaken without a development application or 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***

Building approval is required for most developments to ensure the building complies with building laws, including the [Building Code of Australia](#) and must be sought before construction begins. Since 2012 the lodgement of building approvals and related forms are only accepted via the [eDevelopment portal](#).

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 (a certifier will address this)
- employ a licensed builder or be licensed as an owner-builder.

The appointment of a building certifier is regulated under the *Building Act*. Building certifiers act independently and are appointed by the landowner. Some certifiers will act as a works assessor and advise whether a house is exempt from requiring a development approval. They are responsible for:

- assessing building plans to determine whether the proposal can be constructed in accordance with the approved plans and the applicable legislation and codes inspecting the building work during the construction phase to ensure the building work complies with the approved plans and associated legislation and standards, including the National Construction Code, Building Code of Australia. There are a number of stages of building work where an inspection is required and these should be discussed with the certifier
- issuing of a certificate of completion when satisfied the building work complies, or substantially complies, with the building approval and associated technical requirements, and lodgement of documentation with the Construction Occupations Registrar
- issuing approvals that include proposed site work such as driveways and damage to or removal of trees.

A certifier must not issue a building approval if carrying out the site work would result in the contravention of any law in force in the ACT or if contrary to any advice obtained by an entity on referral (s 30, 30A *Building Act*).

Most people engage the services of a builder prior to engaging a building certifier. For more information on building in the ACT, see the [Consumer guide to building process](#).

## ***Prohibited developments***

Under the *Planning Act* (s 136) 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 childcare centres, cemeteries, overnight camping and mining.
- 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 or 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 (s 201). 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***

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### ***Development applications***

ACTPLA's website and shopfront provides a [quick guide](#) with information about development applications (DAs) as well as [how to lodge a DA](#). Since 2012 the lodgement of development applications and associated processes are accepted via the [eDevelopment \(eDA\) portal](#) only and not over the counter, via post or email. Applicants must register for an eDA and can access certain online services including the uploading of plans and documentation, lodgement of additional information and amendments and viewing the status of their application at any time. Online demonstrations on how to lodge a DA online are provided as well as training on the eDA portal. (The Customer Service team can also be called on 6207 1923).

It is the applicant's responsibility to identify the applicable assessment track and correctly complete the DA lodgement form prior to lodgement. However, a request can be made to ACTPLA for pre-application advice to help identify the correct assessment track (see below). There are different types of forms for different development proposals. To identify requirements, reference can be made to the [documentation requirements page](#) on the ACTPLA website.

ACTPLA requires all plans and supporting documents to be presented in accordance with set criteria, including compliance with Australian Standards as updated from time to time and where specified some plans and documentation must be provided in printed form. Often people are assisted in the DA process by industry professionals such as architects, draftspersons and building certifiers.

Once a DA is lodged, a lodgement check is carried out to ensure the minimum requirements have been met. If the DA submission is complete, a fee advice is sent requesting payment of the relevant fees. If not complete, a request is sent to the applicant to submit the additional information. On payment of the fees, the DA is formally lodged. Assessment then commences, necessary public notifications are issued and referrals made to relevant entities (see below).

ACTPLA charges an application fee for DAs based on the anticipated cost of the work, which is calculated in accordance with the Building Cost Guide. Applicants may also be charged fees for other services such as pre-application written advice, failure notices issued during the completeness check process, a building levy, hydraulic fees, plan registrations, survey data and certificates. All fees are listed in a Fees and Charges Booklet available on the ACTPLA website.

### ***Pre-application information and advice***

Pre-application information may take the form of a meeting or formal advice. Pre-application meetings allow people to seek advice on development proposals before they submit a development application and are a good opportunity to raise or identify issues that may arise when an application is assessed. Pre-application meetings are a free service. A written pre-application advice on a development proposal may also be obtained when requested by a proponent in writing (s 138). This advice expires six months after the day it is given and there is a fee for this service.

When 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
- any other information that may be required in the DA.

ACTPLA need not consider the proposal if it believes it has not been provided with sufficient information to give adequate advice and it is not bound by its advice for a variety of reasons including if the environmental circumstances surrounding the development proposal change, the development proposal under assessment is different from the proposal for which the advice was given or if there are changes to the TP before the assessment takes place (*Planning Act* s 138(6)).

## **Entity endorsements and referrals**

For all assessable developments there are a number of categories that require approvals and endorsements from other ACT organisations or entities. ACTPLA must refer a development application in the merit and impact tracks to an entity if it is prescribed by regulation (the *Planning Act* s 148; see also *Planning Regulation* s 26 for a list of the prescribed entities). A referral entity may be a government department, statutory body or utility that provides advice to assist with assessing development applications. For example, if the development involves demolition it may require approval from water, sewerage, gas or electricity utilities such as ActewAGL or TAMS. For example, if the development site is larger than 0.3 ha (3,000 sqm) it may require a Sediment Control Plan to be endorsed by the Environment Protection Authority (now within the Environment and Planning Directorate).

Whether liaison with referral entities is required before or after the DA is lodged depends on what assessment track the DA must take. If entity advice is provided in writing at the time the DA is lodged the advice must have been given less than six months before the lodgement date. Under the *Planning Act*, entities are required to provide ACTPLA with a response within 15 working days from the date the application was referred (s 149). If advice is not received within this timeframe, the entity is taken to have supported the application (s 150). If ACTPLA is satisfied that the applicant has already adequately consulted with the entity and the entity agrees to the proposal in writing, then the application must not be referred (s 148(2)).

ACTPLA must refer the development application to the Conservator of Flora and Fauna (the conservator) if it believes a proposed development is likely to have a significant adverse environmental impact on a protected matter. The conservator's advice must contain an assessment of whether the proposed development is likely to have a significant adverse environmental impact on a protected matter and, if so, advise about suitable offsets for the proposed development (*Nature Conservation Act* 2014 s 318). ACTPLA may not give development approval if the development proposal is inconsistent with the conservator's advice or if the proposed development is likely to have a significant adverse environmental impact on a protected matter (s 147A). 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. Certain matters must be considered when determining whether an adverse environmental effect is significant including: 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 (s 124A) (see the merit track section below for the definition of 'protected matter').

## **Light rail exceptions**

In 2014 the planning of light rail was introduced to connect the suburbs of Canberra to the city centre. The statutory planning of this infrastructure expressly overrides some of the usual requirements outlined in the *Planning Act*. The Act allows light rail planning to bypass certain referrals and advices of entities in situations where

the proposal does not involve a protected matter. The light rail exceptions were introduced to ensure the light rail development progresses without delay. In particular, the *Planning Act* allows light rail proposals to bypass the otherwise specified requirements if they would risk significant delay to the completion of the light rail, risk a significant increase in cost or otherwise impede the progress of the development. (See below for more information on the approval process for light rail proposals in the merit and impact assessment tracks).

## **Assessment tracks**

It is the responsibility of the applicant to identify the applicable assessment track.

### **Code track**

A code track assessment applies to simpler developments that meet all the relevant rules in the TP. With the increase in development types that can now be considered exempt (see above), there are few developments that are currently considered in this track. If applicable, an applicant must ensure that an application for development approval in the code track is accompanied by information or documents addressing the relevant rules.

Possible code track proposals include: a large pergola, a below ground swimming pool, a 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 lodgement of the development application, and
- submitted as a supporting document.

There is no requirement to publicly notify a code track development application (s 117(a)) and there is no opportunity for third parties to lodge representations or objections to the proposal (s 156).

A DA in the code track, which complies with all the relevant rules, must be approved no later than 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. A schedule of fees and charges is available from ACTPLA and is available on its website.

### **Merit track**

Most developments fall into this track, including applications to vary a lease. Multi-unit and commercial developments are usually considered under the merit track, as are single houses when they do not meet all the relevant rules of the TP.

The aim of the merit track is to provide flexibility and a performance-based assessment that provides the opportunity for applicants to demonstrate that approval

is possible even if their development deviates from prescriptive code requirements. The expected outcome is the facilitation of the best design outcome for a site and for neighbours. For example, 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 merit track proposals include: development in a residential zone, a childcare centre in residential area, a gymnasium in commercial area or an apartment in commercial area.

### ***Approval process***

Merit track DAs may be approved notwithstanding that they do not meet the prescriptive code requirements, provided that they meet the relevant merit criteria of the relevant code(s), the requirements of the TP or the NCP and the requirements set out in section 119 of the *Planning Act*, including the relevant objectives for the relevant zone. However, development approval in the merit track 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 (s 119(1)).

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 (s 119(2)). However, the decision maker can approve a development contrary to the advice of another entity if it is 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. This does not apply where the development concerns a registered tree or a declared site, in which case the decision maker must not approve a development that is inconsistent with the advice of the conservator (s 119(3)).

There is, however, an exception to this rule if the development is related to a light rail development proposal and if the proposal does not affect a protected matter. A 'protected matter' is defined under section 111A of the *Planning Act* as a matter protected by the Commonwealth or a protected matter as declared by the minister. The *Planning and Development (Protected Matters) Declarations 2015 (No. 1)* contains a schedule of species declared as a protected matter for the purposes of the *Planning Act*.

If the development is related to light rail, no protected matter is involved and ACTPLA (or the minister) is satisfied that an entity's advice will risk significant delay, increase the cost or be a significant impediment to the development, then that entity's advice may be disregarded (section 119A). Section 119A(2) expressly excludes the above

described exception for registered trees, thus allowing the conservator's advice to also be disregarded.

It is important to note that a proposal will be considered *related to light rail* if the development to which the proposal relates may facilitate the construction, ongoing operation and maintenance, repairs, refurbishment, relocation or replacement of a light rail track or infrastructure within 1km from an existing light rail track or a proposed light rail track (s 137A(1)(a)) or if a light rail declaration is made (s 137A(1)(b)).

ACTPLA (or the minister) 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
- an environmental significance opinion if applicable (see below)
- all representations
- entity advice (subject to the above light rail exceptions)
- 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 by ACTPLA (s 121). There are two categories of public notification (Division 7.3.4):

- minor—where written notice of the DA must be sent to adjoining neighbours (s 153)
- major—where a sign stating the development proposed must be displayed on the property to be developed and a notice of the application published in a newspaper (s 155).

Schedule 2 of the *Planning Regulation* prescribes the types of development for which minor or limited public notification is required. These include developments such as 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 written comment or objection about a DA that has been publicly notified, that is, for all merit and impact track proposals and some amended development applications (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 (s 157, r 28(a)(ii)). The time-frame for major notifications is 15 working days (s 157, r 28(b)(ii)). A representation about a development application may relate to how the development proposed in the application meets, or does not meet, any finding or recommendation of the EIS for the development, but must not relate to the adequacy of the EIS for the development (see s 219 of the *Planning Act* and Chapter 4 in this Handbook for further details regarding EIS).

Representations form part of the public register and are made available to the applicant, unless an exemption has been granted. Anyone who has made a representation during the public notification period is notified in writing of the decision as well as any rights of review of the decision.

ACTPLA may by notice extend the time for allowing representations. ACTPLA will not consider representations made outside the set 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)). If ACTPLA decides to amend a development application then the amended application must be publicly notified if the initial application was also so required.

Once all the relevant lodgement fees have been paid ACTPLA is required to make a decision on merit track DAs within 30 working days (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 and, unless exempt by the minister, must include a completed environmental impact statement (EIS) in relation to the proposal (see Chapter 4 in this Handbook for more information on EIS). They are also considered against the TP and statements of strategic directions.

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 (see the *Planning Act* 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 section 124 of the *Planning Act* by declaration of the minister (see below)
- the development is a controlled action under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*'), but is assessed under the ACT *Planning Act* in accordance with a bilateral agreement between the ACT and Commonwealth governments (see Chapter 4 in this Handbook for information 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 construction of a transport corridor including a major road, a permanent venue for the conduct of motor racing events 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 have a significant adverse environmental impact on an endangered species or ecological community (see Chapter 4 in this Handbook for more information on environmental impact assessment).

The minister may make a declaration that a proposal is impact assessable under section 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. A *significant adverse environmental impact* is defined in section 124A (see above).

Unless one of the above listed criteria applies and for certain impact track proposals itemised in Schedule 4 of the *Planning Act*, a proponent may apply for an environmental significance opinion from a relevant agency that the proposal is not likely to have a significant adverse environmental impact. The production of the opinion by the agency will take the proposal out of the impact track (obviating the requirement for an EIS) and it will be assessed in the merit track (s 138AA). For example, if a proposal is likely to have a significant adverse environmental impact on a critically endangered species or other protected matter, the conservator may be asked to provide an environmental significance opinion indicating that the proposal is not likely to have a significant adverse environmental impact.

### ***Approval process***

Under section 129 of the *Planning Act*, ACTPLA (or the minister) 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 (subject to light rail exceptions – see below)
- a plan of management for any public land
- the probable impact of the development, including the environmental impact
- the completed EIS for the proposal
- the conclusions of any inquiry about an EIS for the proposal (see below and see Chapter 4 in this Handbook for more information on EIA and EIS)
- the offsets policy. An offset, for a development that is likely to have a significant adverse environmental impact on a protected matter, means environmental compensation for the likely impact (s 111C). The offsets policy is a notifiable instrument prepared by the minister in consultation with ACTPLA and the conservator describing what is considered suitable for an offset and how environmental compensation may be made to offset the impact of developments that have a significant adverse environmental impact on protected matters (s 111E) (see the merit track section above for what is a ‘protected matter’). What is a *significant adverse environmental impact* is described in section 124A (detailed above). An offset must be consistent with the offsets policy (s 111S) and ACTPLA must take reasonable steps to implement the offsets policy (s 111M).

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 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 timeframes and procedures the minister must follow in conducting an inquiry.

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

- the National Capital Plan
- the Territory Plan including the Statement of Strategic Directions (see below)
- any land management agreement for the land if it is in a rural lease
- the related advice of the conservator if the proposal will affect a registered tree or declared site
- the conditional requirements of an EIS exemption if such an instrument is in force
- advice of the Commonwealth Environment Minister if the proposed development is likely to have a significant adverse environmental impact on a Commonwealth protected matter by the Commonwealth or
- the advice of the conservator if the proposed development is likely to have a significant adverse environmental impact on a protected matter (s 147A). However, the conservator’s advice on a protected matter may be overridden

if the minister is to decide the development application (using the minister's call-in power, see the relevant section below) and the minister is satisfied that the approval is consistent with the offsets policy and that the approval would provide a substantial public benefit.

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.

Similar to the merit track assessment above (s 119), section 128 also provides that approval must not be given if inconsistent with any advice given by an entity, unless the decision maker is satisfied any applicable guidelines, all reasonable development options and design solutions, 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 by ACTPLA if it is inconsistent with the conservator's advice (s 128(3) (4)).

Similar to the merit track, the *Planning Act* provides for a light rail exception. Where the development proposal is related to light rail and does not involve a protected matter, ACTPLA (or the minister) may grant approval regardless of any inconsistent entity advice where it is satisfied that the entity's advice will risk significant delay, will increase the cost or be a significant impediment to the development to which the proposal relates (section 128A). Section 128A(2) expressly excludes the requirement that a light rail proposal be consistent with the advice of the conservator in relation to registered trees or declared sites. However, unlike its merit track equivalent, this section does not specifically exclude section 128(4) which otherwise provides protection for registered trees or declared sites. This part of the legislation creates an ambiguity as to the issuing of a DA where the proposal is in the impact track, relates to light rail and is inconsistent with the conservator's advice relating to a registered tree or declared site.

See above in merit track section for an explanation of a 'protected matter' (s 111A) and 'related to light rail' (s 137A).

### ***Public comment, entity referrals and assessment time frames***

Public notification of impact track applications must always undergo the major notification process (s 152(1)(b)). Otherwise, the procedures and timeframes for representations, entity referrals, requests for further information from ACTPLA, and for making a decision in the impact track are the same for development applications in the merit track discussed above (ss 130 and 131).

## ***Pre-DA community consultation***

Community consultation is also required for all larger scale development proposals before the development application is lodged. In short, if a development proposal meets one of the triggers listed below then a pre-DA community consultation must be completed and lodged before the DA will be accepted by ACTPLA:

- a building for residential use with 3 or more storeys and 15 or more dwellings
- a building with a gross floor area of more than 5000m<sup>2</sup>
- a building or structure more than 25m above finished ground level
- a variation of a lease to remove its concessional status (s 138AE).

The [pre-DA lodgement community consultation form](#) is available on the ACTPLA website and provides details about the consultation, however it is up to the proponent to determine the type of community consultation that they will complete.

Certain development proposals are exempt from pre-DA community consultation. If the area is outlined in bold in one of the maps depicted in Schedule 1B of the [Planning Regulation](#) (accessed via the ACT legislation register) then it will be exempt. For example, at the time of writing, a development proposal for development in areas including Gungahlin, Molonglo, Kenny, Throsby and Jacka. The operation of this exemption must be reviewed by ACTPLA at least once every 5 years.

## ***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. If a development application has been referred to an entity then the notice of the decision about the DA must include information about any comment by the entity and whether ACTPLA followed the entity's advice. ACTPLA can also refuse a DA (s 162). The minister will determine those DAs that have been 'called in' under the ministerial call-in power as allowed at Division 7.3.5 (see below for more information).

## ***Conditional approvals***

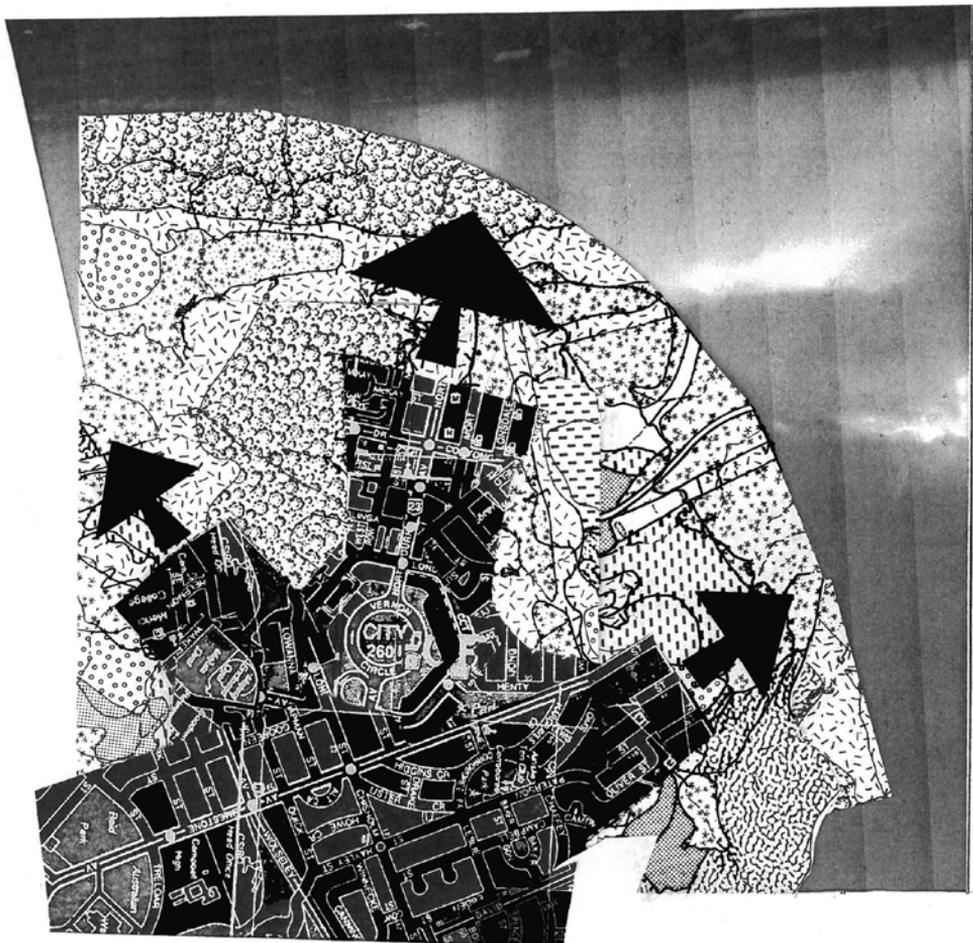
Conditional approvals can only be given for developments assessable in the merit or impact tracks. A code track proposal must not be approved subject to a condition unless the condition has been prescribed by regulation (s 165(4)). Some examples of conditions that may be imposed on code track proposals 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 a stated action be taken to manage the impact of the development, whether on or off the development site, for example, the protection of trees

- that a bond be entered into securing performance against the conditions of the approval.

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, if a conditional environmental significance opinion (ESO) has been given then a condition that the development complies with the conditional ESO; that stated things be done to prevent or minimise adverse environmental impacts; that a development be carried out to a stated standard or that it complies with an offset condition (see below for more information). It is an offence to develop other than in accordance with the conditions (s 202).

There are statutory time-frames during which ACTPLA, or the minister, must decide a DA. At the time of writing, the time for deciding a development proposal in the code track is 20 working days (s 118), in the merit track, 30 working days if no



representation is made or 45 working days if a representation is made (s 122) or if the development proposal in the impact track, 30 or 45 working days with or without a representation (s 131).

ACTPLA or the minister may still approve the application despite the ending of the time for deciding the application. However, if the prescribed time periods are exceeded and no decision has been made then the authority is taken to have decided to refuse the application (s 163).

### ***Offset conditions***

Where a development approval identifies a protected matter that is likely to suffer a significant adverse environmental impact, section 165B requires an 'offset' to compensate for the impact. An offset condition may also include a requirement for an offset management plan. The plan must be prepared by the proponent and must include certain information including how the effectiveness of the plan is to be monitored and reviewed. An offset management plan must be agreed to in writing by the conservator and approved by the minister.

### ***Ministerial call-in power***

The minister has the power to direct ACTPLA to refer a DA to the minister if the DA has not been decided (div. 7.3.5). This power does not extend to an application for a development proposal in the code track. When a referral direction is made, ACTPLA cannot take any further action in relation to the application other than procedural steps (unless otherwise directed) such as referring the application to an entity if required, for example, the conservator (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).

However, before the minister is allowed to form an opinion to consider a DA, he or she must be satisfied that the level of community consultation carried out by the proponent of the development proposal was sufficient (s 158A). In doing this the minister must consider matters such as the nature of the proposal, whether pre-DA community consultation was undertaken (see s 138AE above), the information from referred entities if any, whether and what public notification was made and the representations received, if any. The minister must also consider the level of community awareness about the proposal and whether it has had an opportunity to have discussion and debate about the development proposal. For example, the minister must consider any information about the outcome of community consultation carried out by the proponent. If the minister is not satisfied that sufficient community consultation has been undertaken then he or she must refer the application back to ACTPLA for further action or direct ACTPLA to extend the public notification period

during which the community can make representations and/or to obtain further information in relation to the development application.

If the minister decides to consider the DA he or she must notify ACTPLA and the applicant of this intention (s 160(2)). The minister must also ensure that ACTPLA's comments accompany the application being considered.

When the minister decides a development application, the development approval may be inconsistent with the conservator's advice pursuant to a section 147A referral (development applications involving protected matter to be referred to conservator) if the minister is satisfied that the approval is consistent with the offsets policy and would provide a substantial public benefit (s 128(2)).

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
- a summary of the community consultation, if any (s 161(2)).

### ***Public register***

It is a legislative requirement that ACTPLA keep a public register recording the details of all development applications, approvals, the offsets register and other documents listed in the *Planning Act* (ss 27 and 28). All documents on the public register must be made available for public inspection during business hours and ACTPLA must allow people inspecting the public register and associated documents to make copies. Through the register the public may inspect documents including:

- details of each DA (unless withdrawn) including amendments and section 156 representations, but not including associated documents such as residential floor plans
- certain decisions ACTPLA has made about approvals including reconsiderations and amendments
- The offsets register (s 111V). For each offset the register must include information such as the development approval, the details of the offset, the offset management plan if required and anything else considered relevant by ACTPLA
- Lease variation charges

- controlled activity orders, including requirements, location and name of the person who is the subject of the order (see below), but not the name of the applicant for a controlled activity order
- directions to carry out rectification work
- prohibition notices including the location and name of the person who is the subject of the notice.

The public register does not contain ‘associated documents’ for development applications, development approvals or leases, however they are otherwise made available for public inspection. For example, the advice of the conservator if development is likely to have a significant adverse environmental impact on a protected matter, information or documents addressing the relevant rules and criteria of the relevant assessment track or an EIS if applicable (s 30).

Controlled activities are defined by Schedule 2 of the *Planning Act* or by regulation. They include activities such as failure to implement an offset management plan; undertaking 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 (s 340). Contravening a controlled activity order is a criminal offence and can be prosecuted without having to prove a fault element, in other words, it is enough for the prosecution to prove the physical element of the offence only to secure a conviction (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, 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**

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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 by a court 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. Because of the nature of most ACT planning appeals, this chapter deals primarily with merits review.

The following information is for general reference only. If you are contemplating any legal action then it is necessary to seek legal advice on the specific facts of your case.

## ***Merits review***

Whether or not a decision to approve or refuse a DA can be reviewed on its merits depends on which assessment track applied to the development. 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. For example, the applicant may seek a right of review in relation to a code track proposal if the development application is approved subject to a condition (s 117). There are no rights for a third party to apply to ACTPLA for reconsideration of a decision
- it can be reviewed by the ACT Civil and Administrative Tribunal (ACAT).

An applicant and, in some cases, a third party who made a representation may have a right to apply to ACAT for a review of a decision (see Chapter 12 in this Handbook for more information about applying to ACAT). What is a 'reviewable decision' made under the *Planning Act* is itemised in Schedule 1 Column 2 located towards the end of the Act.

A decision of the minister to approve or refuse an application pursuant to the call-in power described above is not a reviewable decision before ACAT (see s 407, def 'decision maker' and 'reviewable decision'; sch 1). Nor is there a right of ACAT review for a decision of ACTPLA to refuse a development application because the minister has decided under section 261 that it is not in the public interest to consider the application (s 407).

## ***Code track developments***

### ***Rights of the applicant***

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

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)-(6)).

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 by 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 could have been 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 by ACTPLA, an applicant can seek a review before ACAT of a decision to approve a code track DA subject to conditions (s 407; sch 1 item 2). The applicant must generally seek ACAT review within 28 days of the decision being made by ACTPLA (*ACT Civil and Administrative Tribunal Act 2008 (ACT)* (the 'ACAT Act') s 10(2)).

### ***Rights of a third party***

A third party (such as an objector) cannot apply to ACTPLA for a reconsideration of a decision nor does a third party have a right to review a code track development in ACAT (s 40; definition of 'reviewable decision'; sch 1 item 2 of the table). Schedule 1 of the *Planning Act* does not list third parties as an entity eligible to seek an ACAT review for a code track proposal. Further, when reconsidering an application, ACTPLA need not publicly notify the reconsideration because notification and public representations are not required in relation to code track proposals.

## ***Merit track developments***

### ***Rights of the applicant***

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 as discussed in the section above.

For most merit track reconsiderations, before reconsidering the application, ACTPLA need not publicly notify the reconsideration application (s 193(5)(a)). However, they must inform anyone who has made a representation on the original application that a request for reconsideration has been received, and they must give them a reasonable opportunity (at least two weeks) to make a further submission (s 193(5)(b)).

As well as reconsideration by ACTPLA, it is also possible in certain circumstances for an applicant to appeal to ACAT against an ACTPLA decision to refuse an application in the merit track or approve an application subject to conditions. An applicant may only appeal the decision 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'; sch 1 item 3). An applicant may also seek review of a reconsideration decision if ACTPLA decides to impose a condition or confirm the original decision pursuant to section 193 (s 407 definition of 'reviewable decision'; sch 1 items 11, 13).

Applicants must generally apply for an ACAT review within 28 days of the decision being made (*ACAT Act* s 10(2)). The time for applying for an ACAT review may also be extended by the tribunal under rules made under section 25(1)(e) of the *ACAT Act*.

### ***Rights of a third party***

A third party cannot apply to ACTPLA for a reconsideration of a decision regarding a DA in the merit track.

A person who has made an objection or representation about a proposal and who may suffer material detriment from the approval of the development, may appeal to ACAT against ACTPLA's decision to approve a DA in the merit track (whether subject to a condition or not) (s 162, s 407 definition of 'reviewable decision'; sch 1 item 4). Such a person may also appeal to ACAT against a reconsideration decision where ACTPLA makes a decision in substitution for the original decision (s 193 (1)(b)(i), s 407 definition of 'reviewable decision'; sch 1 item 12).

A person suffers 'material detriment' if the decision is likely to adversely affect their use or enjoyment of the land. For organisations, 'material detriment' is satisfied if an entity has objects or purposes and the decision relates to a matter included in the entity's objects or purposes (s 419(1)).

This third party right of review of a decision to approve a DA applies only to applications that require public notice to adjoining premises (s 153) and major public notification (s 155) (s 152; sch 1 item 4). The *Planning Regulation* also exempts numerous merit track decisions from third-party ACAT review. Merit track development proposals currently exempt from third-party ACAT review are development proposals relating to light rail (other than a development involving a protected matter); a development on land in the city centre; or a town centre (e.g. Belconnen or Woden); or an industrial

zone; or the Kingston Foreshore; or a review of single dwelling developments (s 350; sch 3 pt 3.2 items 17, 4, 3).

Third party appellants must lodge appeals within four weeks (20 working days) of receiving 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***

### ***Rights of the applicant***

If the development is in the impact track, an application that has been refused by ACTPLA or has been 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 discussed above.

It is also possible for an applicant to appeal to the ACAT against an ACTPLA decision (or a reconsideration decision) to refuse an impact track development application or approve it subject to conditions (s 407 definition of 'reviewable decision'; sch 1 items 5, 11, 13). Applicants must generally apply for ACAT review within 28 days of the decision being made (*ACAT Act* s 10(2)). The time for applying for an ACAT review may also be extended by the tribunal pursuant to s 25(1)(e) of the *ACAT Act*.

### ***Rights of a third party***

A third party cannot apply to ACTPLA for a reconsideration of a decision regarding a DA in the impact track.

A person who has made an objection or representation about a proposal and who may suffer material detriment from the approval of the development, may appeal to ACAT against ACTPLA's decision to approve a DA in the impact track (whether subject to a condition or not) (s 162, s 407, definition of 'reviewable decision'; sch 1 item 6). Such a person may also appeal against a reconsideration decision which substitutes the original decision (s 193(1)(b)(i), s 407 definition of 'reviewable decision'; sch 1 item 12).

A person suffers 'material detriment' if the decision is likely to adversely affect their use or enjoyment of the land. For organisations, 'material detriment' is satisfied if an entity has objects or purposes and the decision relates to a matter included in the entity's objects or purposes (s 419(1)).

The process and timing for an ACAT review is the same as that in the merit track, discussed above, that is, four weeks (20 working days) from the 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*).

The *Planning Regulation* exempts certain impact track decisions from a third-party ACAT review. Impact track development proposals currently exempt from third party ACAT review are development proposals relating to light rail (other than a development involving a protected matter); developments in relation to the Symonston mental health facility and the building; or alteration or demolition of public facilities on unleased land, such as playground equipment, barbeques and seating (s 351; sch 3 pt 3.3 items 1-3).

## **Other appeals to ACAT**

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 section 407 and Schedule 1 of the Act 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* (see Chapter 12 in this Handbook for more information about applying to ACAT).

## **Judicial Review**

The *Administrative Decisions Judicial Review Act 1989* (ACT) ('*ADJR Act*') provides a right of judicial review in relation to many administrative decisions, including decisions relating to DAs. In a judicial review, 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 worth noting that judicial review proceedings are often very complex and costly, and legal advice should always be obtained before proceeding with such an application (see Chapter 12 in this Handbook for more information on taking a matter before a court).

The *Planning Act* regulates legal challenges to the validity of a ministerial decision about a development application. The right to challenge the validity of ministerial decisions on development applications (s 162) is time limited and can only be brought no later than 28 days after the date of the decision (s 410) (see Chapter 12 in this Handbook for more information about judicial review).

## **Matters exempt from judicial review**

Schedule 1 of the *ADJR Act* lists all the decisions which are excluded from judicial review. In relation to the *Planning Act* this includes decisions to make a light rail declaration or decisions about a development approval, an EIS or a lease/licence relating to a light rail development proposal, other than a development proposal involving a protected matter ('Decisions to which this Act does not apply'; sch 1 item 15 col 3).

If the light rail decision relates to a protected matter it may be judicially reviewed and there is a time limit of 60 days within which a person may commence proceedings in relation to a light rail declaration (s 137C of the *Planning Act*) or a light rail decision made in relation to a development approval, an EIS or Leases and Licences (s 137D).