

IDAS IMPLEMENTATION NOTES

Note 13

Development permits and preliminary approvals

Under the *Integrated Planning Act 1997* (the IPA) there are a variety of approvals that may be sought/given in relation to a development application. They are-

- development permit;
- preliminary approval -
 - (i) generally; and
 - (ii) varying the effect of the planning scheme for future development on the land.

The reason there is a variety of approval types is to ensure the Integrated Development Assessment System (IDAS) operates with the flexibility needed to deal with the wide range of potential application scenarios that will be encountered.

1.0 Development permit [s3.1.5(3) of the IPA]

A development permit is required for all assessable development. Self-assessable development is not required to have a development permit although self-assessable development must comply with codes/standards applying to the development¹.

If a development proposal involves multiple aspects of assessable development (e.g. material change of use, operational work and building work) a development permit must be obtained for each of these aspects of development. The necessary development permits may be obtained through a single development application or multiple applications (e.g. one application for each aspect of assessable development).

A development permit authorises the assessable development to occur and must be obtained **prior** to the development commencing. Importantly, a development permit cannot conflict with a previous preliminary approval for the proposal that is still current.

2.0 Preliminary approval [s3.1.5(1) & (2) and s3.1.6 of the IPA]

Section 3.1.5 of the IPA establishes the concept of preliminary approval (generally). Section 3.1.6 of the IPA establishes the concept of preliminary approval (varying the effect of the planning scheme on the land).

Preliminary approvals (generally) are optional only (i.e. it is not essential prior to seeking a development permit) and do **not** authorise the development to commence. However, once issued (and if current) the preliminary approval is a binding approval and is therefore often a useful step in the development process, in particular in the staging of large and complex approvals.

A preliminary approval (varying the effect of the planning scheme on the land), as the name suggests, varies the effect of the planning scheme for subsequent development on the land the subject of the approval and substitutes different provisions on that land for the life of the approval or until the development approval is completed. This is a power in addition to the powers of a preliminary approval under s3.1.5 of the IPA. So, in addition to approving the development, this type of preliminary approval either -

- establishes the level of assessment for further development on the site. Utilising this provision, the level of assessment that would otherwise be required (eg. impact assessment) for the subsequent development may be altered (eg. to code assessment). Alternatively the

To contact us:

PO Box 15031 City East
QLD 4002
(07) 3237 1279
www.ipa.qld.gov.au

¹ For more details on assessable, self-assessable and exempt development refer to IDAS Implementation Note 1, Part 5.0.

development may become exempt or self-assessable, in which case a development permit would no longer be required; and/or

- identifies the codes against which the subsequent development would be assessed.

It should be noted that the IDAS process applies equally to both types of preliminary approvals. That is, the IDAS timeframes, the level of assessment, the referral triggers and public notification apply whether or not the preliminary approval is a general approval or an approval over-riding the planning scheme.

It should also be noted that like a development permit, a preliminary approval can condition development.

Circumstances in which a preliminary approval may be issued

An **applicant may specifically seek** a preliminary approval for a development concept, for one or more aspects of development, for the purpose of staging the design and approval process or staging the construction of a development project.

In addition, **the assessment manager may**, due to lack of available information or detail about a proposal, issue a preliminary approval (generally) -

- even when the applicant sought a development permit [*s3.5.15(2)(f) of the IPA*]; or
- when a concurrence agency directs the assessment manager to issue a preliminary approval instead of a development permit [*s3.3.18(1)(c) of the IPA*].

What can a preliminary approval do?

A preliminary approval -

- gives the applicant an approval and therefore provides certainty;
- may include conditions [*s3.1.5(1)(b) of the IPA*]; and
- establishes the parameters for the subsequent development applications.

3.0 Preliminary approval (varying the effect of the planning scheme on the land)

- **s3.1.6 only applies at the applicant's initiation**

A variation to the operation of a planning scheme as a consequence of a development approval may only be in response to an application dealt with under s3.1.6. A local government may **not** vary the effect of their planning scheme without an application seeking the variation. The applicant will therefore need to complete Attachment 2 to the IDAS Development Application Form 1.

- **an applicant seeking a preliminary approval varying the effect of a planning scheme on the land must apply at the same time for the change to the scheme to be made**

An application to vary the effect of a planning scheme under s3.1.6 can only be made as part of an application for a preliminary approval, that is, in order to facilitate a particular form of proposed development that may not otherwise be achieved under the planning scheme. An application to vary the effect of the planning scheme cannot be made independently of such a development proposal, and is consequently in no way similar to a rezoning application under the repealed *Local Government (Planning and Environment) Act 1990*. Rezoning applications under the repealed Act were not necessarily associated with a particular development proposal, and resulted in a permanent change to the planning scheme.

- **public notification applies to a preliminary approval (varying the effect of the planning scheme)**

All applications for preliminary approval involving variations to the planning scheme require public notification. The only exception is where a preliminary approval is 'layered', and the variation of the planning scheme being sought is consistent with an earlier preliminary approval in relation to the proposal [*s3.4.2(3) of the IPA*]. The public notification period for s3.1.6 applications is 30 business days starting on the day after the last notification action is carried out, rather than 15 business days [*s6.7.1A of the IPA*].

- **s3.1.6 may apply to an aspect of development related to the material change of use**

A preliminary approval for material change of use (MCU) may vary the effect of the planning scheme for **any** aspect of development related to the material change of use. For example, a preliminary approval for MCU for a “master planned community” may vary assessment requirements or include codes dealing with building work associated with the MCU (e.g. the building height, bulk or density), or associated reconfiguration (e.g. through lot size or other lot characteristics).

- **s3.1.6 may apply to an aspect of development other than MCU**

A s3.1.6 preliminary approval for development other than MCU may vary the operation of the planning instrument **only for that aspect** of development (e.g. a preliminary approval for building work may substitute a new code for the work based on an innovative approach that nevertheless still achieves the objectives of the planning scheme).

- **assessment and decision rules for a preliminary approval (varying the effect of the planning scheme)**

Section 3.5.5A and 3.5.14A of the IPA establish criteria for assessing and deciding the part of an application that seeks to vary the operation of a planning scheme on land. These criteria provide guidance about matters to be considered in assessing and deciding the suitability of the proposed variations to the effect of the planning scheme, as opposed to criteria for assessing and deciding the development itself, which are contained in section 3.5.4, 3.5.5, 3.5.13 and 3.5.14.

- **s3.1.6 preliminary approval must be noted on the planning scheme**

As the preliminary approval has the effect of varying the planning scheme for the particular development approved, the approval must be noted on the planning scheme and be available for public scrutiny. The noting does not require amendment of the planning scheme under schedule 1 of the IPA, however the local government must give the chief executive of the Department of Local Government, Planning, Sport and Recreation written notice of the notation.

Matters to consider regarding preliminary approval (varying the effect of the planning scheme)

The criteria for assessing the proposed variations to the effect of the planning scheme are set out in s3.5.5A of the IPA and include:

- the common material;
- the result of the assessment of the development under section 3.5.4 or 3.5.5;
- the effect of the variations on any future submitter rights, with particular regard to the amount and detail of supporting information for the current application;
- the consistency of the variations with the planning scheme;
- relevant State planning policies and the SEQ regional plan if applicable; and
- matters prescribed under a regulation.

These criteria are concerned, not with the merits of the proposed development (i.e. its height, bulk, the side boundary clearances etc), but rather primarily with the effect of the proposed variations on the structure and integrity of the planning scheme, and their likely effect on the future rights of submission and appeal available to the community. They imply that proposed variations should not be approved if they are substantially inconsistent with the policy of the planning scheme (which should be articulated in the applicable land use codes) or if the information available with the application is insufficient to form a clear view about the character and form of the development.

There is no implied right to the granting of a preliminary approval to which s3.1.6 applies. In fact by its nature, a s3.1.6 preliminary approval application is proposing development that is inconsistent with the established policy of the planning scheme. Accordingly, **an application must justify why it is appropriate to depart from this policy in approving the proposal.**

In this regard, the IPA assessment and decision rules are structured so as to clearly require that assessment of the proposed variations to the planning scheme is carried out **after, and having regard to the normal assessment and decision rules that apply for assessing the development itself.** In other words, the proposed development must be assessed in the same way as any development - against the planning scheme as it currently is - not as it would be if the proposed variations were approved. The assessment of a development proposal under s3.1.6 does not in any

way change the rules for assessing the development against the planning scheme, nor the weight to be given to the planning scheme in the assessment.

If the proposed development conflicts with the planning scheme, the application should be refused, regardless of the variations sought to the planning scheme, **unless sufficient planning grounds can be established to justify an approval.**

These provisions are **not** designed to circumvent an inconsistency between proposed development and the planning scheme.

4.0 When is a s3.1.6 approval appropriate or inappropriate?

The following examples are provided to demonstrate when an approval under s3.1.6 of the IPA is not required and when it may be appropriate to seek such an approval.

Instances where it may be appropriate to seek a preliminary approval to which section 3.1.6 applies so as to vary the effect of the planning scheme for subsequent development.

	Development proposed	Suggested application type	Comments	Zoning consideration
1	<p>300 unit retirement village on vacant land, zoned for residential purposes and requiring impact assessment.</p> <p>The applicant wants to construct the development in 3 stages and avoid notification of each additional stage.</p> <p>The development will otherwise comply with the requirements of the planning scheme.</p> <p>The applicant has prepared detailed plans for Stage 1 and conceptual design plans for Stages 2 and 3.</p>	<ol style="list-style-type: none"> 1. Stage 1 – development permit (DP) for material change of use (MCU) 2. Stages 2 & 3 – s3.1.6 preliminary approval (PA) for MCU seeking to vary the effect of the planning scheme by making the subsequent MCU applications for Stages 2 and 3 code assessable. 	<p>As the application requires impact assessment the whole of the application must be publicly notified.</p> <p>When assessing this application, the assessment manager should first consider the suitability of the development by assessing the proposed land use against the land use code for residential development.</p> <p>If the development is consistent with the intended outcomes for the area, the development is likely to be approved.</p>	<p>As the PA has the affect of varying the planning scheme for the particular development approved, the approval must be noted on the planning scheme [s3.5.27 of the IPA].</p> <p>In this instance the zoning of the land would not need to be altered as a result of the approval.</p>
2	<p>Range of land uses including low density residential, medium density residential, retail and offices on a 20 hectare “greenfield” site zoned for rural purposes.</p> <p>The applicant has prepared conceptual plans identifying the areas for each of the proposed land uses. Detailed design plans for the uses will be prepared and lodged as part of the subsequent applications for DP.</p>	<p>S3.1.6 preliminary approval (PA) for material change of use (MCU) seeking to vary the effect of the planning scheme in relation to the levels of assessment for each proposed land use as well as the codes against which the subsequent applications for DP will be assessed.</p>	<p>The initial application is impact assessable with the whole of the application publicly notified.</p> <p>When assessing this application, the assessment manager should first consider the suitability of the development by assessing the proposal in light of the intended uses for the area.</p> <p>Using this land for the range of land uses proposed would be a clear change in policy direction for the Council and needs to be justified on planning grounds.</p>	<p>If the Council determines it is appropriate to change its policy direction for the area, the planning scheme should be amended by including the land in an appropriate zone, through schedule 1, 10(i)(b)(iv) of the IPA.</p> <p>The approval must also be noted on the planning scheme [s3.5.27 of the IPA].</p>
3	<p>Proposed low-density residential houses on an infill site (2,500m²) historically used for a church (and zoned likewise).</p> <p>Under the current provisions of the planning scheme, the subdivision of the land is code assessable but the subsequent houses in the church zone are impact assessable and stated as being inappropriate in the zone.</p>	<ol style="list-style-type: none"> 1. development permit (DP)–reconfiguring a lot; and 2. S3.1.6 preliminary approval (PA) for material change of use (MCU) varying the effect of the planning scheme so that the houses are self-assessable development and identified self-assessable codes apply to the development. 	<p>The initial application is impact assessable with the whole of the application publicly notified.</p> <p>This approach for seeking development approval enables the developer of the subdivision to sell individual allotments and the subsequent purchasers to make application to build a house directly to the building certifier.</p> <p>Using the church land for residential purposes would be a clear change in policy and needs to be justified on planning grounds.</p>	<p>If the Council determines it is appropriate to change its policy direction for the area, the planning scheme should be amended by including the land in an appropriate zone, through schedule 1, 10(i)(b)(iv) of the IPA.</p> <p>The approval must also be noted on the planning scheme [s3.5.27 of the IPA].</p>

Instances when a preliminary approval (PA) under s3.1.6 of the IPA would not be appropriate

As established above, a preliminary approval to which s3.1.6 applies should **not** be viewed as equivalent to a 'rezoning' nor is a 3.1.6 preliminary approval necessary to consider/approve development inconsistent with a code. Under section 3.5.13 of the IPA, development which conflicts with a code can be approved if there are sufficient grounds to justify the decision having regard to the purpose of the code and subject to the decision not compromising the achievement of the desired environmental outcomes for the planning scheme.

The following table contains examples of situations where the applicant has inappropriately sought a preliminary approval under s3.1.6 of the IPA and provides advice regarding a more appropriate application type.

	Development proposed	Suggested application type	Assessment and decision considerations
1	6 storey, multi-unit, residential development in a medium density residential area/zone with a 4 storey maximum height limit	Development permit (DP) for material change of use (MCU)	<p>The assessment manager would consider the inconsistent features of the proposal with regard to the policies of the current planning scheme.</p> <p>Having regard to the purpose of the code and subject to the decision not compromising the achievement of the desired environmental outcomes for the planning scheme, the assessment manager must decide whether or not to approve the application.</p> <p>If approved, the inconsistency with the current planning scheme requirements would be noted on the relevant planning scheme (see s3.5.27). Also, as for any development approval it would be a material consideration in any subsequent impact assessment for the premises or adjoining premises (see s3.5.5(2)(d)).</p>
2	<p>Rural residential development (i.e. 10 –25 hectare lots) in a rural zone.</p> <p>The rural zone has a minimum lot size of 100 hectares.</p> <p>Under the current provisions of the planning scheme, a house on a rural lot is self-assessable development against the house code.</p>	<ol style="list-style-type: none"> 1. Development permit (DP) for material change of use (MCU) from rural to rural residential 2. Development permit (DP) for reconfiguring a lot 	<p>As with Scenario 1 above, the assessment manager would consider the inconsistent features of the proposal with regard to the policies of the current planning scheme.</p> <ul style="list-style-type: none"> • the MCU may be inappropriate for the locality and subject to impact assessment • the reconfiguration is code assessable unless it is made impact assessable by the planning scheme due to the inconsistency with the minimum lot size for rural subdivision; • the application is likely to require assessment against the use code and the subdivision code; • the first consideration is whether or not there are sufficient grounds to justify rural residential use of land in the rural zone; • if it is determined that the development is appropriate on the land, the secondary consideration is whether or not the zoning of the land should be amended through the schedule 1 amendment process to reflect the proposed rural residential development on the land.
3	Low-density residential development on land zoned for rural purposes. Under the transitional planning scheme, the land is clearly indicated in the Strategic Plan for low-density residential development.	Development permit (DP) for reconfiguring a lot	If approved, the Council should act under s6.1.34 of the IPA and consequentially amend their planning scheme to reflect the approval.

Commonly asked questions

Preliminary approvals (generally)

1. *Can the preliminary approval lapse?*

Yes, the relevant periods stated in IPA apply to both development permits and preliminary approvals. [s 3.5.21 of the IPA] [Refer to Implementation Note 21 When an approval takes effect/ relevant periods].

2. *Can the applicant make representations about being given a preliminary approval, prior to lodging an appeal?*

Yes - the opportunity for the applicant to make representations to the assessment manager about the approval relates to both a development permit and preliminary approval. The applicant may make representations on any matter stated in the decision notice, other than a refusal or a matter about which a concurrence agency told the assessment manager to include [s 3.5.17 of the IPA].

3. *Can the applicant appeal the decision by the assessment manager to give a preliminary approval when the applicant sought a development permit?*

Yes - the applicant may appeal the assessment manager's decision under section 4.1.27 of the IPA. In particular, the applicant may appeal the decision to give a preliminary approval when a development permit was applied for.

4. *If the application for the preliminary approval requires impact assessment and is therefore publicly notified, does the subsequent application for the development permit also require public notification?*

Yes – the public notification process is followed again if any subsequent application for a development permit involves impact assessable development.

Preliminary approvals (varying the effect of the planning scheme)

5. *Can a local government refuse to accept an application seeking preliminary approval to which s3.1.6 of the IPA applies?*

Not if the application is properly made.

6. *Can a local government issue a preliminary approval to which s3.1.6 of the IPA applies even if the application has not applied for it?*

No.

7. *Can an applicant seek a preliminary approval varying the effect of the superseded planning scheme?*

No. There is no purpose to such an application and the same planning considerations that would be given to vary the effect of the current scheme would equally apply to vary the effect of the superseded planning scheme.

8. *As the application for the preliminary approval requires public notification, does the subsequent application for the development permit also require public notification?*

Yes, if the subsequent development is impact assessable. However, if the preliminary approval overrides the planning scheme to the extent that it makes the subsequent development code assessable, rather than impact assessable, no public notification is required. Furthermore, if the preliminary approval overriding the planning scheme made the subsequent development self-assessable or exempt development, no further development application would be required under the planning scheme.

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