

IDAS IMPLEMENTATION NOTES

Note 20

Appeal and declaratory powers under the IPA

Determinative decisions about development applications under the Integrated Development Assessment System (IDAS) may be appealed to the Planning and Environment Court (the Court) under chapter 4, part 1, division 8 of the *Integrated Planning Act* (IPA).

The declaratory powers of the Court under chapter 4, part 1, division 7 of the IPA are available to applicants in respect of non-determinative decisions made in the course of assessing a development application.

1.0 Who can lodge an appeal

An appeal to the Court about the decision on a development application can be lodged by -

- the applicant;
- a submitter¹; and
- an advice agency submitter²

2.0 Appeals by applicants [s4.1.27 of the IPA]

The IPA lists the matters about which an applicant for a development application may appeal to the Court. These are appeals about determinative decisions and are with respect to any of the following matters -

- (i) the refusal, or refusal in part, of the development application;
- (ii) a matter stated in the development approval, including any condition applying to the development, and the identification of a “code” in a preliminary approval which overrides the planning scheme under section 3.1.6 of the IPA;
- (iii) the decision to give a preliminary approval when a development permit was applied for;
- (iv) the length of a relevant period for the approval; and
- (v) a deemed refusal³.

In situations(i) to (iv) above, an applicant appeal must be started within **20 business days** after the day the decision notice or the negotiated decision notice is given to the applicant.

In situation (v) above, the appeal may be started at any time after the last day a decision should have been made about the application.

3.0 Appeals by submitters [s4.1.28 of the IPA]

Submitters only have appeal rights against the impact assessable part of a development approval with respect to the giving of a development approval; and any provision of the approval including (but not limited to) any condition of, or lack of condition for the approval or the length of a relevant period for the approval.

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¹ A submitter is a person who made a properly made submission about the application [schedule 10 of the IPA]

² An advice agency submitter is an advice agency who told the assessment manager to treat their response as a properly made submission [s4.1.29(1) of the IPA].

³ A “deemed refusal” relates to an application which has not been decided by the assessment manager and which has passed the last day on which a decision on the matter should have been made in accordance with the specified timeframes in IDAS. For a deemed refusal to come about, the applicant must **take** the indecision by the Assessment Manager to be a “deemed refusal”. Accordingly, some action is required by the applicant, as a deemed refusal does not happen automatically.

Note: Appeals under this section of the IPA are likely to arise some considerable time after the application is decided.

However, a submitter may not appeal if the submitter withdraws the submission before the application is decided or has given the assessment manager a notice under s3.5.19(1)(ii) of the IPA advising that they will not be appealing the decision.

A submitter appeal must be started within **20 business days** (the “submitter’s appeal period”) after the day the decision notice or the negotiated decision notice is given to the submitter.

4.0 Appeals by advice agency submitters [s4.1.29 of the IPA]

An advice agency for a development application requiring impact assessment may, within the limits of its jurisdiction, appeal to the Court if they previously informed the assessment manager to treat their response as a properly made submission.

An advice agency appeal must be started within **20 business days** (the “submitter’s appeal period”) after the day the decision notice or the negotiated decision notice is given to the advice agency as a submitter.

5.0 Appealing against a change to an existing approval [s4.1.30 & 31 of the IPA]

A person to whom any of the following notices have been given may appeal to the Court against the decision in the notice within 20 business days after the day the notice is given -

- a decision on a request for an extension of the relevant period for an approval⁴;
- a decision on a request to make a minor change to an approval;
- a decision on a request to change or cancel a condition of a development approval;
- a decision to change conditions of a rezoning under the *Local Government (Planning and Environment) Act 1990* (P&E Act); and
- a deemed refusal of one of the above requests.

6.0 How appeals to the Court are started [s4.1.39 of the IPA]

An appeal is started by lodging a written notice of appeal with the registrar of the Court that states the grounds of the appeal and the facts upon which it is based.

The person lodging the appeal must also comply with the rules of court, however the Court may hear an appeal even if the rules have not been complied with.

Form number PEC-02 (Notice of Appeal) is available from the [Queensland Courts](#) website.

7.0 Giving notice of an appeal to other parties (for appeals relating to development applications) [s4.1.41 of the IPA]

Where an appeal is in relation to a development application, the IPA requires the appellant⁵ to provide written notice of the appeal to certain parties. This notice must be provided within –

- **10 business days** after the appeal is started, or
- if the appellant is a submitter or advice agency submitter – **2 business days** after the appeal is started.

The parties to be notified of an appeal vary depending upon the nature of the application and whether the appeal is an applicant or submitter appeal.

An appellant must give the notice of appeal to -

- if the appellant is an applicant - the assessment manager, any concurrence agency, any principal submitter, any advice agency submitter and the Chief Executive(CE) of DLGPSR ;
- if the appellant is a submitter or an advice agency submitter - the assessment manager, the applicant, any concurrence agency and the CE;
- if the appellant is a person who received a notice extending the relevant period or making a minor change to an approval - the assessment manager, any concurrence agency for the original development application and the CE; and

⁴ This does not apply if the approval resulted from a development application (superseded planning scheme) that was assessed as if it were an application made under a superseded planning scheme.

⁵ The appellant is the person who appeals to the Court or tribunal under chapter 4 of the IPA.

- if the appellant is a person who received a notice changing or canceling conditions of a development approval or rezoning under the P&E Act - the entity who gave the notice and the CE.

The notice of appeal must state -

- the grounds of the appeal; and
- if the person given the notice is not the respondent or a co-respondent - the rights of the person to become a co-respondent to the appeal⁶.

8.0 Respondent and co-respondent (for appeals relating to development applications) [s4.1.43 of the IPA]

Where an appeal is in relation to a development application, the respondent to an appeal, made by either the applicant or submitter, is **always** the assessment manager. By making the assessment manager the initial point of contact, it is intended to reduce procedural problems in identifying the proper party to nominate as respondent. This will also allow the assessment manager to always be aware that an appeal has been made.

However, the co-respondent for an appeal will vary depending on who lodged the appeal and the parties involved in the application. Therefore –

- if an appeal is lodged by a submitter - the assessment manager is the respondent⁷, and the applicant is a co-respondent for the appeal;
- if an appeal is lodged by an applicant - the assessment manager is the respondent, and a submitter may elect to become a co-respondent for the appeal;
- if the appeal is about a concurrence agency response - the concurrence agency is a co-respondent for the appeal;
- if the appeal involves a State interest - the Minister is entitled to be represented in the appeal.

The IPA also allows for an assessment manager to apply to the Court to withdraw as the respondent if the matter only involves issues relating to the concurrence agency [s4.1.43(6) of the IPA].

9.0 How an entity may elect to be a co-respondent [s4.1.45 of the IPA]

Within **10 business days** after the day the notice of the appeal is given, any person who receives such a notice may lodge a notice of election in the Court, under the rules of the Court, electing to be a co-respondent.

10.0 Lodging an appeal stops certain actions [s4.1.47 of the IPA]

Once an appeal is lodged, development must not start until after the appeal is decided or withdrawn.

However, it is recognised that this could be unnecessarily restrictive in some cases, such as an appeal about a specific permit condition that does not involve submitters or other co-respondents. Therefore the IPA provides for the Court to allow the development (or part of the development) to proceed before the appeal is decided but only if the Court considers the outcome of the appeal would not be affected.

The capacity to allow development or an aspect of development to proceed recognises that a development approval under IDAS may cover a range of development, some of which is not at issue in the appeal. It also recognises that IDAS encourages the inclusion in development approvals of management conditions that may previously have been established through other statutory mechanisms such as licences.

For example, if an appeal about a proposed shopping centre development concerned aspects of operational work associated access or parking, the Court may allow building work for the shopping centre to proceed if it does not affect the outcome of the appeal about the operational works. Also, if an appeal concerned a condition about the ongoing management or use of a premises after development had been completed (such as hours of operation), the Court may decide that the

⁶ This is not applicable when the appellant is a person who received a notice giving a decision on a request to change or cancel a condition of a development approval.

⁷ If the appeal is about a concurrence agency response, the concurrence agency is a co-respondent for the appeal. However, if the appeal is **only** about a concurrence agency response, the assessment manager may apply to the Court to withdraw from the appeal.

development could proceed because the building of the structure itself is unrelated to the substantive issues of the appeal before the Court.

11.0 Who must prove the case in an appeal? [s4.1.50 of the IPA]

The IPA establishes who must prove the case in an appeal. In most instances the appellant has the responsibility for establishing that the appeal should be upheld. However, in an appeal by a submitter or an advice agency submitter, the applicant must establish that the appeal should be dismissed.

12.0 Appeal by way of hearing anew [s4.1.52 of the IPA]

A appeal is to be heard by the Court “de novo”, or anew, that is the Court considers the application afresh, and when making a decision, the Court “stands in the shoes” of the administering authority.

If the appellant is the applicant or a submitter for a development application, the Court must decide the matter based on the laws and policies in effect at the time that the application was made, although the Court may give consideration to laws and policies made subsequently if appropriate. This is not intended to prevent the Court from applying the ‘Coty’ principle whereby the Court may also give weight to laws and policies not yet in effect when an appeal is heard.

The Court must also not consider a development proposal which is different from the one originally considered by the assessment manager, unless the change is a minor change⁸.

13.0 Appeal decision

The Court may confirm the original decision of the administering authority or set aside the original decision and make a new decision in its stead. In the event that the Court acts to change the original decision or make a new decision, then that decision is taken to be that of the administering authority.

14.0 Appealing to the Court of Appeal

The decision of the Court may be appealed to the Court of Appeal but only on the following grounds –

- where there has been an error or mistake in law;
- where the Court had no jurisdiction to make the decision; or
- where the Court exceeded its jurisdiction in making the decision.

The party appealing the matter to the court must first seek leave from the Court of Appeal or Judge of Appeal.

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⁸ Minor change is a term defined in schedule 10 of the IPA