IDAS IMPLEMENTATION NOTES

Note 4

Owner's consent

Section 3.2.1(3) of the *Integrated Planning Act 1997* (IPA) makes it mandatory for certain development applications to be supported by the written consent of the owner of the land to the making of the application.

Prior to 4 October 2004, all applications were required to be supported by the consent of the owner of the land.

From 4 October 2004, owner's consent is only required if the application is for –

(i) a material change of use of premises or reconfiguring a lot; or
(ii) work on land below high-water and outside a canal as defined under the *Coastal Protection and Management Act 1995*; or
(iii) work on rail corridor land as defined under the *Transport Infrastructure Act 1994*.

1.0 Providing owner's consent

Applicants must complete IDAS Application Form 1, Part A Questions 10 and 11 in relation to owner's consent and resource entitlement. If relevant, owner's consent or evidence of resource entitlement must be provided to the assessment manager for the application to be properly made. A template for the provision of the consent as an attachment is available on the IPA website www.ipa.qld.gov.au .

2.0 Who is the "owner" for the purposes of IPA?

The term "owner" of land, is defined in Schedule 10 of IPA to mean -

> *"The person for the time being entitled to receive the rent for the land or would be entitled to receive the rent for it if it is let to a tenant at a rent"*

Schedule 10 of IPA further defines "land" to include -

> *"(a) Any estate in, on, over or under land…."*

Therefore in most instances, the registered property owner is the owner of the land for the purposes of IPA and must provide owner's consent to the making of the application, if required.

3.0 Multiple owners of one site

If there are multiple owners of a single lot, the consent of each owner of the lot is required.

4.0 When the application is over multiple lots

If the application is over a number of lots, the owner/s of all lots the subject of the application must consent to the making of the application.

5.0 When the owner is a company

If the owner of the land is a company, the company must sign as the owner. Section 127 of the *Corporations Act* (Cth) *2001* details how a company may execute a document. Company owners should provide consent as an attachment to the IDAS Application Form 1 Part A – a template for the provision of the consent is available on the IPA website www.ipa.qld.gov.au .

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6.0 When the development site includes an easement

An easement is an interest in land that creates certain rights and obligations. These rights and obligations fall into two categories -

- the land that has the easement registered on it is called the **burdened lot** or **servient tenement**. The easement may restrict how the owner of the land can use the land. For example, not to construct any structures over the land the subject of the easement. It can also allow another party to use the land consistent with the terms of the easement.
- the land advantaged by the easement is called the **benefited lot** or **dominant tenement**. It provides another party with benefits and rights to use the easement. This easement has the effect of giving rights over the use of the land to a party other than the registered proprietor.

The benefit of an easement runs with the benefited lot and the burden of the easement runs with the burdened lot. All future owners of the burdened lot are bound by the easement, unless it is surrendered or extinguished.

1. **In relation to the burdened lot** *(i.e. servient tenement)*

   If the land comprising a proposed development application includes an easement because the proposal relies on the easement for a critical element, the consent of the owner of the burdened lot (i.e. the servient tenement) to the making of the application is not required, provided that the proposed development is not inconsistent with the terms of the easement.

2. **In relation to the benefited lot** *(i.e. dominant tenement)*

   The owner of the benefited lot (i.e. the dominant tenement) is not entitled to receive rent for the land the subject of the easement as they hold no proprietary interest in the land. Hence, given the definition of "owner", there is no requirement under IPA for the dominant tenement to give their consent to the making of the application.

In the circumstance where the easement is not required to be included in the land comprising the application but the proposal **affects** rights or obligations under the terms of the easement, it is a matter for the owner of the burdened lot to negotiate any changes in the easement arrangement with the owner of the benefited lot. It is most likely that, under the terms of the easement document, the owner of the burdened lot may be required to seek consent from the owner of the benefited lot if the application under IPA seeks to change the easement arrangements. However, such consent required under the terms of an easement document is **not** necessary for the purposes of the development application process.

7.0 Other types of easements

The following easements are usually easements "in gross". In these instances there is a servient tenement but no dominant tenement. The body in whose favour the easement is created has no proprietary interest in the land and hence does not have to give consent as owner under IPA to the making of the development application -

- for drainage or water reticulation;
- for water supply; and
- for electricity transmission.

8.0 When the development site involves a State resource

To the extent a development site involves a State resource that is prescribed under a regulation, an applicant is required to provide evidence of resource entitlement, instead of owner's consent. Schedule 10 of the *Integrated Planning Regulation 1998* (IP Reg) prescribes the type of evidence that is required for each prescribed State resource. There may be a small number of circumstances under which both owner's consent and evidence of resource entitlement will be required. For further information contact the local government or the Department of Natural Resources and Water.

9.0 Other ownership arrangements

If the land is -

- leased - the lessors of the land must give owner's consent; and
- dedicated parkland - the owner or the trustee (within the terms of the trust or reserve) must give owner's consent.

10.0 Power of Attorney

Note: The terms of the Power of Attorney must be sufficiently broad enough to allow the Attorney to make or consent to the application on behalf of the principal.

If Power of Attorney has been granted authorising another person to sign on the owner's behalf, a certified copy of the Power of Attorney is required to accompany the consent. Each page of the Power of Attorney must be certified to the effect that the copy is a true and complete copy of the corresponding page of the original and the last page must be certified to the effect that the copy is a true and complete copy of the original.

11.0 Who is responsible for ensuring owner's consent?

IPA states that an application is a properly made application if it is -

- made to the assessment manager;
- made on the approved form - including a requirement for the written consent of the owner of the land to the making of the application; and
- accompanied by the applicable fee.

The assessment manager may refuse to receive an application that is not "properly made" *[Schedule 10 of IPA]*. However, IPA clarifies that if the assessment manager receives and after consideration accepts an application that is not a "properly made application", the application is taken to be a properly made application, unless the application does not contain the written consent of the owner of any land to which the application applies.

However, it is not the responsibility of the assessment manager to check the accuracy and authenticity of ownership details. Nor is it the obligation of a private certifier. The responsibility of ensuring that the information contained in an application, including the owner's consent, is true and accurate, lies with the applicant.

12.0 Confirmation of details in the acknowledgment notice

The Department of Infrastructure and Planning also suggests that the assessment manager reiterate to the applicant in the acknowledgement notice (if required) that the assessment manager relies on the truth and accuracy of the information provided in the application form and accompanying information when assessing and deciding the application.

If no acknowledgment notice is required, the assessment manager may choose to issue a statement to the applicant advising them that the assessment manager relies on the truth and accuracy of the information provided in the application form when assessing and deciding the application.

13.0 Documentation provided by the private certifier to the assessment manager

Under section 5.3.5(6) of IPA, if a private certifier approves an application, they must give to the assessment manager a copy of documents including the application form, supporting material, the decision notice etc. The assessment manger cannot refuse to accept these documents from a private certifier on the grounds that they consider the owner's consent to be incorrect.

Commonly asked questions

1. ***If a development proposal requires vehicular/pedestrian access for the development to be gained via an easement on adjoining land, is the consent of the owner of land over which the easement is registered required? If so, who is the owner for the purpose of giving consent to making of the application?***

   In this instance, the development application would rely on the easement itself or the purpose of the easement, such that the land containing the easement needs to be included in the land comprising the development application. The "Pioneer" case[1] and others since have established that in these circumstances the land used for giving access must be included in the application, otherwise the application would be "piecemeal" and hence invalid. Therefore, the registered proprietor of the land over which the easement is registered (i.e. the servient tenement) is an "owner" of land within the meaning of the definition under IPA.

   However, section 3.2.1(12) of the IPA provides that if the proposed development is not inconsistent with the terms of the easement, the consent of the servient tenement is not required. So applicants will need to consider the wording of easement documents in light of their proposal to ascertain whether or not the consent of the servient tenement is required.

Note: The giving of consent to a development application does not have the effect of amending the terms of the easement registered on the land. Any amendments to the terms of the easement would require specific amendments to the easement document.

[1] *Pioneer Concrete (QLD) Pty Ltd v Brisbane City Council* (1980) 145 CLR 485

2. ***If the land the subject of the development application contains a drainage easement, electricity easement etc (i.e. an easement in gross for which there is a servient tenement but no dominant tenement), is the consent of any party benefiting from the easement required to lodge a development application?***

   No - in relation to freehold land. Only the proprietor of the burdened lot (i.e. servient tenement) will be required to provide consent. If the proposed development is inconsistent with the utility easement, it is up to the owner of the burdened land to negotiate with the party that has the benefit of the easement under the terms of the easement document.

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