

Module 6: The development approval process

Obtaining the development approval or permit is one of the most important milestones that you will achieve in the property development process. Without a DA nothing will happen. You will not be able to get your funding, buy the land or build your development. Obtaining your DA is also how you achieve *notional equity*, which we will talk about in greater detail in the Funding Module.

It is absolutely critical therefore that you approach your DA submission with care and a great deal of knowledge about the council and state government instruments that will be used to assess your application. You will require the assistance of professional consultants to undertake a DA for the type of developments we're focusing on, and these are predominantly medium and high density residential and mixed-use developments.

Additionally, it is critical that you take into consideration community interests. I have seen many development companies go broke because they have gone head to head with the local residents and council in an effort to force through development applications that are often arrogant, or at the very least insensitive to the neighbourhood character and the interests of the residents.

Select an architect who is not only familiar with the type of development you are trying to achieve, but also with your location and the local council. If your architect has a good professional relationship with the council staff, it will be much easier for him or her to negotiate a favourable outcome on your behalf.

Similarly, when selecting your town planner (and the architect will help you with recommendations here), make sure the planner is absolutely knowledgeable about the council, its staff and the locality in general. Often the planner will have previously assessed DAs at the local council, and this will prove to be invaluable when they draft their Statement of Environmental Effects (SEE) in support of your application.

I recommend you visit the council where you are lodging your DA and ask to have a look at some past DAs that are similar to yours and have been approved, or refused for that matter. Review particularly the planner's SEE or impact statement. It will provide you with a wealth of information about what you can expect when you lodge, including previous objections from neighbours.

Unfortunately, the DA process in Australia is still rather cumbersome. However, the good news is that over the past several years the state governments have made an effort to revamp planning legislation and introduce reforms relating to plan preparation, assessment and determination of development proposals. These have included in NSW, for example:

- A completely revamped legislative framework
- Expansion of powers of approval to the Minister
- Creation of the Planning Assessment Commission (PAC)
- Joint Regional Planning Panels (JRPP).

There has also been a trend towards the expansion of what constitutes exempt and complying development. You can find specific information about these on your local council's website.

Generally speaking, councils are seen as overly bureaucratic, inefficient, indecisive and sometimes inconsistent in their decision making. However, current reforms initiated by state governments promise some major improvements and efficiencies in councils' processes for dealing with DAs. In NSW these include, for example, the amalgamation of smaller councils into fewer, more efficient ones.

Having said that, 'blaming' councils or the state government is certainly not what I advocate. Remember, full responsibility and accountability rests with the developer. We have to work with the council to achieve the best outcomes. I recommend adopting an 'issues-based' approach in dealing with the council. That is, remain calm and unemotional at all times, no matter how hairy your application process gets. Identify the issues and prioritise from the most to the least important in relation to the viability of the project. Identify those issues that you are prepared to compromise on as opposed to those that are absolutely critical to the success and profitability of the project, and work with the assessor to resolve differences. Yes, be ready to compromise in order to keep moving forward. Always keep your eyes on the bigger picture.

Here's a snapshot of the development assessment process:

- Concept development
- Pre-lodgement meeting
- Lodgement of the application
- Referrals/notification
- Assessment
- Determination
- Obtaining a Construction Certificate (if DA is approved)
- Construction phase.

Concept development

This is where your due diligence becomes critical. Some pitfalls to avoid are:

- Not assessing the constraints and opportunities of the site before detailing the plans (refer to Module 2 site analysis)
- Not reading or understanding the planning controls and/or planning instruments properly
- Not stress testing your ideas with the consent authority
- Not listening to the feedback from the consent authority
- Pushing the envelope too far.

Pre-lodgement

The pre-lodgement consultation process is very important and can significantly help reduce costs and time taken for a determination. Check with your local council on their pre-lodgement policy, as they tend to vary from council to council. Generally speaking, for a small fee (hundreds as opposed to thousands of dollars) you can book in for a meeting.

This, in my opinion, is an invaluable part of the process and can reveal a great deal about council staff, their appetite for your development and issues you may not be aware of that will affect your submission. I recently went through two pre-lodgement meetings for one of my residential developments (130 apartments), and as a result secured development approval in five months. This included a JRPP (Joint Regional Planning Panel) process, as the state government was the consent authority. I can tell you that gaining approval in just five months in Sydney for this size and complexity of development is an excellent outcome.

Lodgement of the development application

Make sure you fully understand the DA process and the path the application will take within the council and other authorities who will have a say on whether your submission will get approval.

Here are some helpful ideas on how to get it right first time:

Ensure that the application form is completed correctly. Submit all the information requested, and if necessary the correct number of copies of plans. This may not apply if you are able to make an electronic lodgement. You will reduce delays if you lodge a well-prepared and complete application.

If you had a **pre-lodgement meeting**, you would have received written feedback from the council. Make sure all matters raised at pre-lodgement are addressed in the application.

Make sure your town planner provides a thorough **Statement of Environmental Effects**. This is your ‘business case’ for getting approval: it has to be technically sound and to address issues on merit as necessary. The SEE is defined (by the council) as:

...a written statement which demonstrates that the applicant has considered the impact of the proposed development on both the natural and built environments before and after construction and the proposed method/s to mitigate any adverse impact/s...

Its function is to assist in the assessment of an application.

SEEs are often accompanied by specific information and independent reports from other consultants, depending on the issues being addressed. Common examples include:

- Photomontages
- Examples of public art
- Acoustic report
- Traffic report
- Environmental report.

Referrals

The council has a statutory obligation under the EP&A Act to refer DA applications to other statutory authorities for their consideration if the proposed scheme will affect their jurisdiction. They may also seek expert assessment on specific issues as required. Common referrals include:

- Heritage
- Fire department
- Roads and maritime services
- Airport authority.

This means you may have to provide specialist documentation with your application.

Notification

Similarly, the council has a statutory obligation to notify the immediate neighbours and the public that a development application is being considered. This is generally done by way of advertising in the local paper, on the council’s website and by letter directly to the neighbours.



PROPERTY DEVELOPMENT WORKSHOPS

Assessment

The council is legally obligated to assess the application with reference to the applicable provisions, and there are many. Here are some of the relevant instruments:

- Environmental Planning and Assessment Act (EP&A Act)
- State Environmental Planning Policies (SEPP)
- Regional Environmental Planning Policies (REPP)
- Environmental Planning Instruments (e.g. IDOs, PSOs, LEPs)
- Development Control Plans and Council Policies (DCPs).

It is important to remember that councils are scrutinised not only on their decisions, but on their processes in coming to those decisions – that is, they have to follow due process.

This is particularly relevant in dealing with objections from adjoining neighbours, which is where you have to help the council to help you. Take into consideration the neighbours' issues and address them accordingly. This will help the council deal with potential objections if and when they receive them.

Determination

The council's options for determination are set out under the EP&A Act:

Approval

Your approval will come with conditions of consent. You must ensure that you read your approval completely as it often contains actions required on your part. There are also critical dates that need to be adhered to, including the expiry date of the DA if no action is taken. This is often only two years, although there is a short grace period during which you can reinstate. Nevertheless, I have come across situations where the applicant has inadvertently allowed their DA to lapse and has had to reapply for a completely new DA. Worse still, sometimes the planning densities have changed for the worse, which means the applicant suffers a great lost opportunity. Remember, once the DA has lapsed, the council does not have the power to reinstate.

Refusal

If your application is refused, you do have some avenues for appeal and/or review under the EP&A Act. The Notice of Refusal from the council will set out your rights for appeal. Generally speaking, you can have the decision reviewed by independent staff within the council, which is the quickest and cheapest option. Alternatively, you can lodge an appeal at the Land and Environment Court as it is commonly known (although it has changed its name to NCAT in NSW and VCAT in Victoria).



PROPERTY DEVELOPMENT WORKSHOPS

Deferred Commencement

If you receive an approval with Deferred Commencement as one of the conditions of consent, it means that certain actions have to be completed and evidenced to the council before you can activate your DA. Those actions will be clearly stated in your conditions of consent.

More than 90% of all applications are determined under delegated authority (that is, by council staff rather than going to a meeting for councillors to decide). It is therefore worthwhile to determine from your council the criteria for getting approval under delegated authority, as it is quicker and less complex than to have your application referred to councillors and perhaps encounter some political risks.

Construction Certificate (Building) Approval

Construction Certificate Approval is required before construction can commence. Be aware of conditions imposed in the development consent.

Additional information and actions will be required, and fees, including developer contributions, will need to be paid before the Construction Certificate can be issued.

Summary

The planning process is challenging. Understanding the process well and approaching it in an issues-based way will assist you greatly. Here's a quick summary of the pitfalls to avoid and the main points we have covered.

Pitfalls include:

- Poor research
- Poor preparation and PR work prior to lodgement
- Lack of communication with the consent authority (ask the right questions)
- Failure to understand the importance of threshold issues (height, FSR, setbacks, car parking, views, contamination, etc.)
- Incomplete or poor information
- Poor understanding of the political process
- Failure to anticipate potential problems.

Successful applicants:

- Understand the process
- Do their homework
- Resource and prepare their proposal well
- Communicate effectively and *at appropriate times* in the process
- Problem solve effectively
- Demonstrate reasonableness at all times
- Understand the threshold issues
- Concede where necessary
- Keep the final goal in sight.

Other matters:

- Likely impact of the development (on both natural and built environments)
- Suitability of the site for the development
- Any submissions (objections) received
- The public interest.

How and where to find assistance

- Council's website
- Austlii
- Department of Planning website
- Local Environmental Plans (LEPs), Development
- Control Plans (DCPs)
- Building Code of Australia (BCA), Australian Standards (AS) and relevant guidelines.