Environmental Defenders Office
of Northern Queensland

EDO NQ
FACTSHEET

MINISTERIAL CALL IN POWERS

AN ALTERNATIVE WAY TO CHALLENGE DEVELOPMENT

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This factsheet is intended as a plain English guide to a particular area of law. Whilst all care has been taken in its preparation, it is not a substitute for legal advice as legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your particular circumstances you should contact the EDO or your solicitor.

AN ALTERNATIVE WAY TO CHALLENGE DEVELOPMENT

Development opponents are often unaware that they can request Queensland's Minister for Local Government and Planning to "call in" - *i.e*., decide - a development rather than the local council. By "calling in" a development, the Minister essentially takes the local council out of the equation and decides the merits of the development directly. Requesting a ministerial "call in" may be a cost-effective, viable alternative to litigating the matter in the Queensland Planning and Environment Court and is certainly a better alternative than meekly submitting to "the inevitable". As with most matters involving Queensland's local planning and development laws, there are a number of considerations for development opponents to effectively use this option.

Ministerial call in power generally

Ministerial call-ins of proposed development are dealt with in sections 424-433 of the *Sustainable Planning Act 2009* ("SPA") (formerly sections 3.6.4-3.6.9 of the *Integrated Planning Act 1997*). Under SPA, the Minister may call in a development application either *before* or *after* the local council has acted on the application. When the Minister calls in a development application *before* the local council has acted, the Minister can be said to "decide" the development; when the Minister calls in a development application *after* the council has acted on it, the Minister may be said to "override" the council's action.

Prerequisites to the Minister's exercise of call in powers.

There are several important items to note with respect to ministerial call-in powers under SPA ss 424-433. First, the Minister's decision whether to call in a development under SPA is *discretionary* (the Minister "may" call in rather than "shall"). Second, there are both substantive and procedural limits on the exercise of the Minister's call-in powers. Under SPA s 424, the Minister may call in a development "only if":

(a) The development involves a "State interest" [a substantive limit]; and

(b) The call-in occurs within designated time limits [procedural limits], which are the latest of:

(i) If the development is appealed to the Planning & Environment Court - 15 business days after the chief executive receives notice of an appeal about the application;

(ii) If there are submitters for the development [impact-assessable developments only] - 50 business days after the day the decision notice or negotiated decision notice is given to the applicant;

(iii) If there are no submitters for the development - 25 business days after the day the decision or negotiated decision notice is given to the applicant; and

(iv) If the development is "deemed approved" (per SPA s 331) - 25 business days after the day the decision notice was required to have been given to the applicant.

Is a "State interest" involved?

Putting aside whether a request for the exercise of ministerial call-in powers is timely, the key question is whether the development involves a "state interest". Generally speaking, if there is a State Planning Policy ("SPP") or regional plan involved by the proposed development, then a "State interest" will be involved for purposes of satisfying the first prong of SPA s 424 authorising the Minister to call in a development.

A "State interest" is defined in SPA Schedule 3 as:

> (a) an interest that the Minister considers affects an economic or environmental interest of the State or a part of the State, including sustainable development; or
>
> (b) an interest that the Minister considers affects the interest of ensuring there is an efficient, effective and accountable planning and development assessment system.

Section 40 of SPA provides that "a State planning policy is an instrument that . . . (b) advances the purpose of this Act by stating the State's policy about a matter of State interest".

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>
> (b) an interest that the Minister considers affects the interest of ensuring there is an efficient, effective and accountable planning and development assessment system.

There are a number of SPPs that may apply to a development application - SPP 1/92 (dealing with "good quality agricultural land"), SPP 2/02 (dealing with acid sulfate soils), or SPP 1/03 (which addresses potential for flood, bushfire or landslide impacts). Likewise, the regional plans for Far North Queensland and Southeast Queensland may be involved by a development application.

There are several ways to determine whether a development involves such a "State interest". Obviously the development application itself may reference relevant State planning policies. Or the council's planning officers may refer to such policies in their recommendation to council. Or a State referral agency may discuss a State planning policy in conjunction with its response to the development application. Development applications that are particularly appropriate for the exercise of the Minister's "call in" power are those that are approved, or recommended for approval, where the State referral agency recommends refusal of the development on State planning policy grounds.

Time for Minister's exercise of call-in power is short, so act fast

However, even where a development application appears well-suited to the Minister's exercise of his call in powers, development opponents must be wary of the short time frames within which those powers must be exercised. Section 425 of SPA requires the Minister to give written notice of any decision to call in a development, including the reasons for calling in the development, to: (1) the assessment manager (*i.e*., usually the council); (b) the applicant; (c) any concurrence agency; and (d) any submitter. More importantly, the Supreme Court of Queensland recently ruled that "natural justice" requires the Minister to give prior notice of "the intention to exercise the power" to any person whose "rights, interests or legitimate expectations" might be "destroy[ed], defeat[ed] or prejudice[d]" by that exercise. *See Landel v Hinchcliffe* [2009] QSC 408.

We have been advised that the Minister's office has adopted internal procedures requiring that such persons must be given at least 2 weeks' prior notice of - and the opportunity to make submissions regarding - the possible exercise of the Minister's call in power. If only 25 business days are allowed for the Minister's exercise of call in powers (*see* pp 2-3 above), then 2 weeks' notice leaves very little time for the Minister to act.

In order to avoid the running of the Minister's time-frame for calling in developments, we recommend that development opponents who request the Minister's exercise of call in powers under SPA s 424 should, simultaneously with their request, provide a copy of their request to all the parties to whom the Minister would be obligated to give notice of the call in (*i.e*., the assessment manager, the applicant, any concurrence agency, and any submitter). We also suggest that development opponents send a cover letter to such persons, suggesting that they may wish to lodge submissions regarding the request with the Minister before the deadline for exercise of call in powers. This may avoid any "natural justice" argument that could otherwise defeat the proper exercise of call in powers.

Another option would be to request the call in of a development application even before the council has acted on the application. Obviously, acting too quickly might not be wise if council is likely to reject the development. A call to your local councillor or EDO may help you determine what council's decision is likely to be and what action you may want to take.

Other aspects of Ministerial call ins

If the Minister calls in a development, the Minister may limit his or her decision to only the State interests involved. In that case, then the "deemed approved" provisions of SPA (s 331) do not apply, nor do the ordinary assessment and decision provisions set forth in SPA. If the Minister calls in a development before the council makes its decision, then the Minister may direct the council to assess the application and to refer the application to the Minister for decision - in that case, the council acts as the Minister's agent and recommends a decision but does not make the decision itself. In all events, the assessment manager (*i.e.*, council) is obligated to give the Minister all reasonable assistance in deciding the development application.

SPA also includes a provision for the exercise of call in powers by the regional planning Minister for a designated region (SPA s 430). However, to date no regional planning Minister has been designated.

Limited appeal rights

Only limited appeal rights apply to the exercise of Ministerial call in powers. Even if the Minister does not limit his or her decision to only the State interests involved (and thus the ordinary assessment and decision provisions of SPA apply), there is no appeal against the Minister's decision under SPA. However, if the assessment provisions of the legislation apply, then declaratory proceedings could be taken in the Queensland Supreme Court to challenge the Minister's decision. In all likelihood, even if SPA's assessment provisions do not apply (i.e., the Minister limits the decision to only the State interests involved), it is likely that declaratory proceedings could be brought in the Queensland Supreme Court to challenge the Minister's decision (which was the basis for Court's decision in *Landel v Hinchcliffe*, discussed above).

EDO NQ can advise you further regarding, and help you draft, an appropriate request for the Minister's exercise of call in powers under SPA s 424.

More Information From Your EDOs

If you have any further questions or concerns about any of these matters, then please contact us on the details below. While we have limited resources, often we can give you quick advice over the phone or direct you to someone who may help on a free or reduced rate basis.

Stay in contact with your local Environmental Defenders Office.

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