

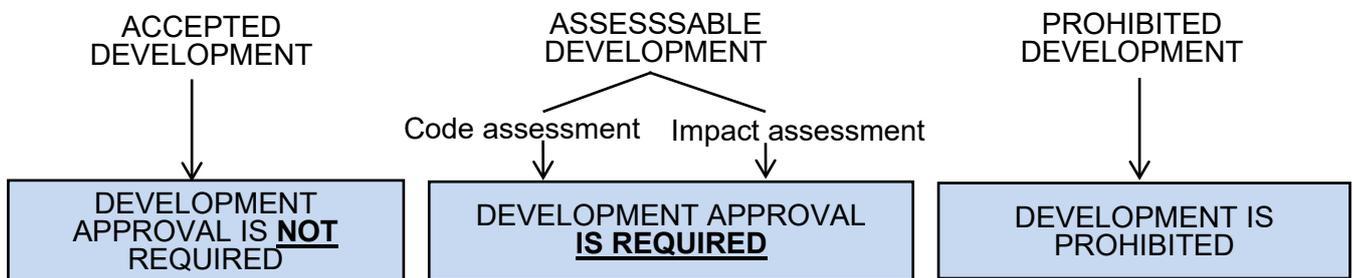
Flowchart for the development assessment (DA) system under the *Planning Act 2016* (Qld)

STEP 1 – PRELIMINARY QUESTIONS

1. Does the proposal involve “development”? (see the definition of “development” in Sch 2 (Dictionary) of the *Planning Act 2016* (Qld) (PA) – 5 types:

- building work
- plumbing or drainage work
- operational work
- reconfiguring a lot (RAL); and
- material change of use (MCU).

2. What category of development is it? (see the PA, ss 43-46, *Planning Regulation 2017*, Sch 6, 7, 9, 10, 12, 13, 18, 19, 20 & 21 for State-level accepted, assessable and prohibited development, **plus** the relevant local government planning scheme for local-level categories of development)*

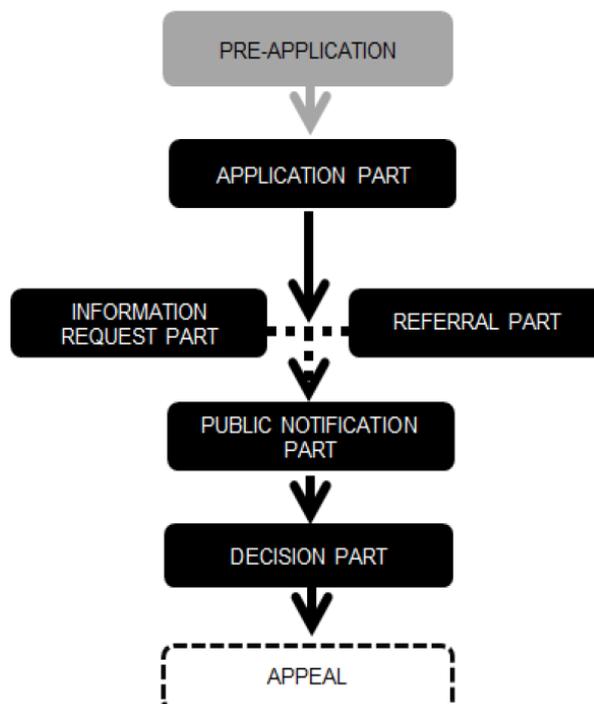


3. Which levels of government (or private certifier) are involved in the assessment process?

- Who is the **assessment manager** listed in Sch 8 of the *Planning Regulation 2017* (Qld)?
- Is there any **referral agency** listed in Sch 10 or elsewhere in the *Planning Regulation 2017* (Qld)?

STEP 2 – DETERMINE THE PARTS OF THE DEVELOPMENT ASSESSMENT SYSTEM THAT APPLY

(See Ch 3 of the *Planning Act 2016* (Qld), plus the *Development Assessment Rules* made under s 68**)



* There are three, relatively rare, exceptions to these categorizing instruments: (a) where an exemption certificate applies (e.g. for minor development), in which case further approval is not required (PA, s 46); (b) where a local government has a temporary local planning instrument (TLPI) in force; or (c) a variation approval applies for a specific parcel of land. Note also that existing lawful uses, buildings & works do not require approval and are protected from changes to planning instruments under s 260 of the PA.

** Available at <https://planning.dsdmip.qld.gov.au/planning/better-development/da-rules>

Understanding the concept of “use” in town planning and the *Planning Act 2016* (Qld)

The concept of a “use” of land is not defined in the *Planning Act 2016* (Qld)¹ but is central to the operation of the Act through concepts such as the protection of “existing lawful uses” and the major category of development, “material change of use”. It has an important technical meaning in a town planning context that has been explained in past court decisions.²

In *Newcastle City Council v Royal Newcastle Hospital* (1957) 96 CLR 493 at 515, Taylor J said in the context of determining whether a hospital used a large area of undeveloped bushland on its property:

The uses to which property of any description may be put are manifold and what will constitute “use” will depend to a great extent upon the purpose for which it has been acquired or created. Land, it may be said, is no exception and ... the “use” of land will vary with the purpose for which it has been acquired and to which it has been devoted.

In *Shire of Perth v O’Keefe* (1964) 110 CLR 529, Kitto J explained the meaning of “use” in a town planning context further. That case concerned whether an existing lawful use of land was properly described as “pottery making” or “light industry” under a by-law regulating land use in Perth. In holding that “pottery making” was the appropriate terminology to describe the purpose of the use occurring on the land for the purposes of the by-law, Kitto J stated (at 535):

The application of the by-law in a particular case has therefore not to be approached through a meticulous examination of the details of processes or activities, or through a precise cataloguing of individual items of goods dealt in, but by asking what, according to ordinary terminology, is the appropriate designation of the purpose being served by the use of the premises at the material date ... The general considerations that have been mentioned will suffice for most cases. If premises were being used as professional offices at the commencement of the by-laws, no greater degree of particularity in defining the purpose is likely to appeal to practical minds as appropriate in the application of town planning legislation than is involved in saying that the purpose is that of professional offices: the particular profession of the occupant would not ordinarily be adverted to by a person speaking in a town-planning context.

In summary, a “use” of land is the purpose for which the land is used as understood in ordinary terminology and a town planning context. What constitutes a “use” of land is a matter of commonsense as expressed in the words used by ordinary members of the community to describe the activity occurring on the land (e.g. a “restaurant” is a use of land and it unnecessary to describe the use as “a McDonald’s Restaurant”).

However, Schedules 3 and 24 of the *Planning Regulation 2017* (Qld) define relevant uses for local government planning schemes and all planning schemes have a dictionary or definitions section defining various uses of land which should be applied when considering the application of the scheme. These definitions are generally based on the general principles of “use” established by the courts so it is important to be aware of the general principles when applying the definitions.

One issue that has been extensively litigated is the “use” of vacant land. A number of principles have been established by these cases.³ Land can be used for a purpose even though no physical activity occurs on the land, as in the case of open space provided as a buffer and for clean air around a hospital. “Use” is not limited to actual physical use but includes passive use. Whether apparently vacant or unused land is in fact being used will depend on the extent of its integration with land in actual physical use and the nature of the business being conducted. The holding of unused land for future business use, whether because no business has yet been commenced or because the existing business has not yet increased sufficiently to justify expansion onto an extended site, is not “use”.

To be an existing lawful use of land at a particular date, the use must actually be occurring at that date. Mere acquisition of land with the intention of using it for a particular purpose in the future would not make the possession of the land an existing use of it.⁴ Land can have more than one use at any particular time.

¹ Beyond, unhelpfully, noting that “**use**, for premises, includes an ancillary use of the premises” in Sch 2 (Dictionary).

² See *Perivall Pty Ltd v Rockhampton Regional Council & Ors* [2018] QPEC 46 at [72]-[180].

³ See *Newcastle City Council v Royal Newcastle Hospital* (1956) 96 CLR 493; (1959) 100 CLR 1; *Parramatta City Council v Brickworks Ltd* (1972) 128 CLR 1; *Eaton & Sons Pty Ltd v Warringah Shire Council* (1972) 129 CLR 270.

⁴ *Parramatta City Council v Brickworks Ltd* (1972) 128 CLR 1. Three useful examples of the type of factual examination undertaken by the courts to determine what constitutes the use of land at a particular date are *Rosenblum v Brisbane City Council* (1957) 98 CLR 35 at 45-46 (involving whether use of premises as a restaurant was abandoned at a particular date), and *Nymboida Shire Council v Skar Industries Pty Ltd* (1998) 99 LGERA 178 at 190-191; [1998] NSWLEC 166 (scale of use of a quarry at a particular date); and *Perivall Pty Ltd v Rockhampton Regional Council & Ors* [2018] QPEC 46 at [72]-[180] (whether an extractive industry was an existing lawful use).