

# Non-Complying Development



## What is a non-complying development?

Types of non-complying development are listed in the Development Plan. Generally, such development has been judged inappropriate and inconsistent with the character desired for that area in the plan, and therefore won't be supported. An obvious example is the establishment of industry within a residential area.

## Am I allowed to make an application for non-complying development?

You may feel that your proposal has substantial merit even though it is listed in the Development Plan as non-complying. If so, you can make a formal application to the relevant authority (usually the City of Mitcham), which must then decide whether it wishes to allow assessment.

However, such applications are handled differently to normal applications and involve additional cost and time – and there is no guarantee of obtaining consent.

Under the Development Act, the relevant authority can refuse the proposal at the outset without even assessing the development. Therefore, the assessment process should not be taken lightly. Development Plan policy (the source of non-complying uses) is based on rigorous examination and acceptance of the desired future character of the area and how this character is to be achieved. The concept prohibiting certain uses to attain that character is vital to the plan and is not to be easily dismissed or set aside.

## Who makes the decision?

A number of authorities are involved. No single planning authority can act alone in issuing an approval for non-complying development. If Council is the authority (which it will be in most cases) and it is willing to approve a use then it must seek the agreement of the Development Assessment Commission for that consent to become effective. Likewise, if the Commission is the authority, it must seek agreement from Council and the Minister for that consent to become effective.

Without this agreement, the development cannot go ahead. In looking at giving its agreement, the Commission reviews and assesses the proposal from scratch – it doesn't merely 'rubber stamp' what Council has already done.

Although there are no limits imposed, the whole process may take 22 weeks to complete once Council (or the Commission) has decided it is willing to assess it.

## What do I have to do?

Firstly, you need to convince the relevant authority that your proposal has substantial merit and deserves to be assessed accordingly. You must include with your

application a brief statement setting out persuasive reasons why the development should be supported despite its non-complying nature. Without this statement, the application cannot go any further.

On the basis of the statement, Council can accept and process the application if it wishes. However, if it doesn't wish to proceed, you must accept its decision as there are no rights of appeal available for you to challenge it.

In the event that Council decides to assess your application, you will be asked to supply a detailed 'statement of effect' before anything else happens.

**You must be aware that a decision to assess your application does not imply an intent to approve the development.**

The statement of effect must describe and address the following:

- The nature of the development and the area in which it is located;
- The Development Plan provisions relevant to assessing the proposal;
- The extent to which the proposal complies with those provisions;
- An assessment of the expected social, economic and environmental effects of the proposal on the area in which it is located; and
- Any other information or material that may be relevant and helpful to Council in its assessment.

Obviously, the statement must reflect some understanding of the importance of the Development Act and Plan, as well as the context of the proposal and its setting. It must be much more than a letter simply stating why the development should go ahead. Although the statement of effect may be prepared by you, it is advisable to have a professional planning consultant assist you.

This statement is not needed in some prescribed, although limited, circumstances where the development is deemed to be minor only. However, you should normally expect to have to meet this requirement.

**What happens with my application?**

Once the above information has been received, Council may give public notification of the proposal as for a category 3 development, stating that the proposal is non-complying.

Other people have the chance to make a written representation to, and be heard by, Council. As the application, you will also have the right to respond, both in writing and personally.

The application may need to be referred formally to government agencies for their consideration and for them to provide a report (as required for any referred application if it is specified in the Regulations).

A decision will then be made by Council's Development Assessment Panel who will consider all relevant documentation and a report generated by Council Planning staff.

In some circumstances where the development is deemed to be minor, Planning staff can make a decision under delegation.

### **What are my appeal rights?**

As the applicant, you have no rights of appeal to the Environment, Resources and Development Court. As non-complying uses are very strongly discouraged, decisions maintaining the status quo of the Development Plan are protected from legal challenge.

However, if your proposal is approved, other people involved (third parties) can appeal if they dislike the approval or the conditions attached to it. As an approval is disrupting the status quo of the Development Plan, they are given the opportunity to challenge the merit of the decision in court.

You may have a right under Section 86(1)(f) of the Development Act 1993 to apply to a court to review the Council's decisions as to the **nature** of the development, whether the development is **seriously at variance**, the **status** of the development (complying, merit, or non-complying), and the **category** of the development (1, 2A, 2, 3, or no category), and any other decision that is relevant to Section 35 of the Development Act 1993. These rights of review are subject to quite short time limits.

The Council cannot advise you as to your rights nor court processes, and recommends that you promptly seek professional advice from a town planning consultant or lawyer experienced in such matters if you are interested in exercising any right of review.

**The above information is advisory and a guide only to give you a general understanding of the key points associated with the approval system. It is recommended that you seek professional advice or contact the City of Mitcham, Development Services on 8372 8888 or email [development@mitchamcouncil.sa.gov.au](mailto:development@mitchamcouncil.sa.gov.au) regarding any specific enquiries or for further assistance concerning the use and development of land. Being properly prepared can save you time and money in the long run.**