



Environmental
Defenders Office

Planning and Development Law in the ACT

Melanie Montalban, Managing Lawyer ACT

Frances Bradshaw, Senior Solicitor

12 October 2021



Note: The law described in this presentation is current as at 12 October 2021. This presentation was designed to give the audience plain English information on planning laws in the ACT. This presentation contains legal information and not legal advice, and does not replace the need for professional legal advice in individual cases.



Presentation outline

- 1) Introduction to the EDO
- 2) Key Planning Legislation in the ACT
- 3) Overview of the Approval Process
- 4) Community Participation
- 5) Third-Party Review Rights and Processes
- 6) Case Study: Ainslie Football Club development
- 7) Reform and Future Directions for ACT's Planning Law

1. About the EDO

We are an environmental law practice that protects the Australia Pacific region by delivering legal solutions for peoples, nature and our climate

- We deliver innovative legal solutions for peoples and planet
- We empower communities and fight for nature through law
- We educate people about the law and their rights
- We advocate for better laws that deliver transformative change
- We litigate to uphold rights and enforce the law





The Work of the EDO

❖ **Practice areas**

- Public interest environmental law (administrative, environment, planning and development, heritage, climate change, biodiversity, freshwater, human rights, torts, criminal and corporations law)

❖ **Core activities**

- Legal advice and representation
- Policy and law reform
- Public engagement and education

❖ **Legal programs**

- Healthy Environment and Justice
- Systemic Change (Safe Climate, Biodiversity and Freshwater)

❖ **Intake**

- [Get Advice - Environmental Defenders Office \(www.edo.org.au/get-advice\)](http://www.edo.org.au/get-advice)



Healthy Environment and Justice Program

❖ **Goal**

- To empower vulnerable communities to fight for environmental justice

❖ **What is environmental justice?**

At its core it recognises:

- the *disproportionate* placing
- of *environmental risk or burdens*
- on *vulnerable people* or, primarily people of colour & Indigenous communities
- through *direct or systemic discrimination*

2. Key Planning Legislation

- *Planning and Development Act 2007*, regulations and Territory Plan (ACT land)*
- *ACT (Planning and Land Management) Act 1988* (Cth land)
- *Nature Conservation Act 2014*
- *Environment Protection Act 1997*
- *Tree Protection Act 2005*
- *Heritage Act 2004*
- *Climate Change and Greenhouse Gas Reduction Act 2010*
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth)**





Planning and Development Act 2007 (ACT)

Objects of Act (s 6)

The object of this Act is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT -

(a) consistent with the social, environmental and economic aspirations of the people of the ACT; and

(b) in accordance with sound financial principles.

"Development" includes (s 7)

- Building, altering or demolishing a building a structure
- Carrying out earthworks or other construction work
- Using the land, or a building or a structure on the land
- Subdividing or consolidating the land
- Varying a lease



3.The Planning & Development Process

Permissible development and the three
development tracks



Commonwealth and Territory Land

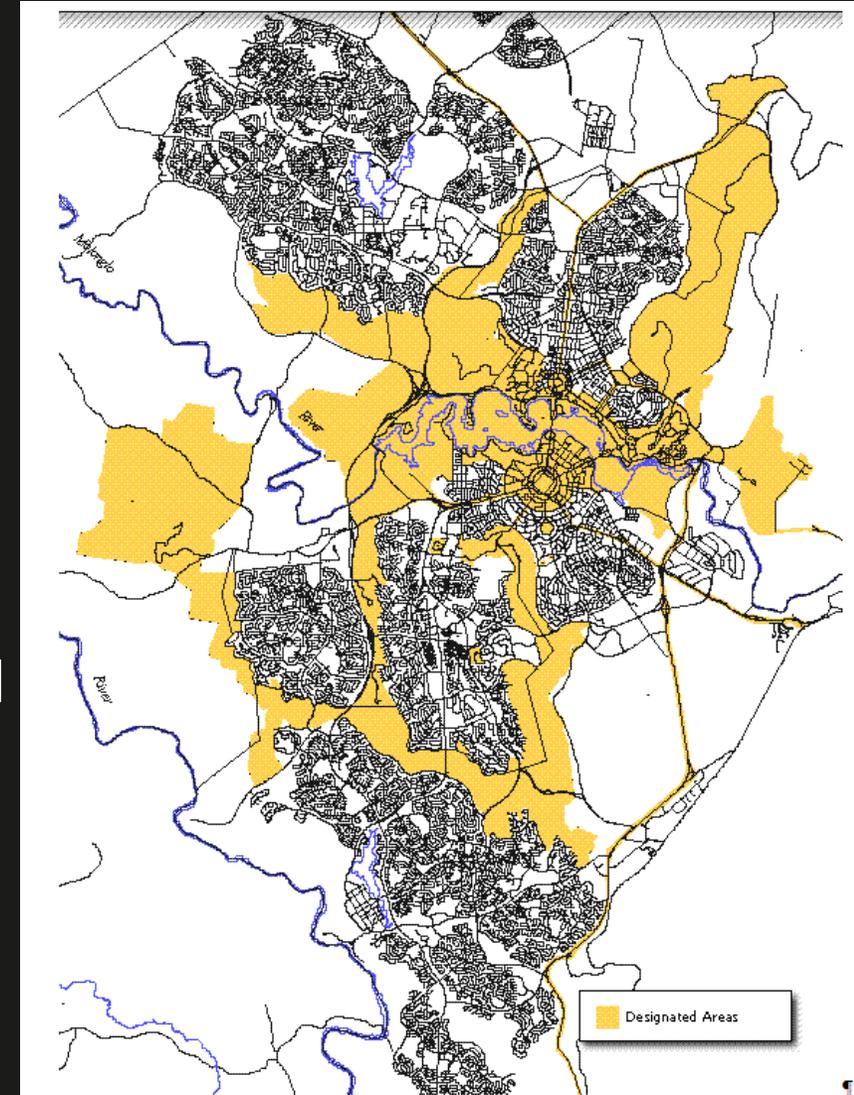
Commonwealth (National) Land

- *ACT(PLM) Act 1998 (Cth)*
- Declared National Land
- Designated Areas under National Capital Plan which have 'special characteristics of the National Capital'
- National Capital Authority

Territory Land

- *PD Act 2007 (ACT)*
- All other land
- Territory Plan
- ACT Planning & Land Authority (ACTPLA) now Environment, Planning and Sustainable Development Directorate (EPSDD)

Potential for overlap of the National Land and Designated Area categories. Territory Land may also be a Designated Area and subject to the powers of the NCA.



Permissible Developments – The Assessment Tracks

- **Code Track (low impact development)** – there are no requirements for public notification or rights of review
- **Merit Track (moderate scale/impact)** – applies to most developments; there are public notification and consultation requirements, and merits review may be available to third parties
- **Impact Track (significant impact)** – the strictest assessment requirements; major public notification and consultation requirements; completion of an Environmental Impact Statement; right of review is available to third parties



Merit track

Sect 119:

- (1) Must not approve development proposal in the merit track unless it is consistent with:
 - the relevant code; and
 - any land management agreement for the land; and
 - if the proposed development will affect a registered tree or declared site, the advice of the Conservator of Flora and Fauna
- (2) Must not approve if approval would be inconsistent with any advice given by an entity to which the application was referred to the Conservator of Flora and Fauna or the custodian of the land under s 148 (see r 26(2) P&D Regulations)

Consideration for merit track decisions (s 120)

The Planning Authority must consider:

- a) the objectives for the affected zone
- b) the suitability of the land where the development is proposed
- c) environmental significance opinion (if in force – see s 138AA)
- d) representations received by the Authority in relation to the application
- e) any advice provided by the Design Review Panel and the proponent's response
- f) any advice provided by an entity under s 149 (e.g. Conservator of Flora and Fauna)
- g) the public land management plan for the land (if public land)
- h) the probable impact of the proposed development, including environmental impacts.

Planning Authority approves, refuses or conditionally approves the DA: s 162



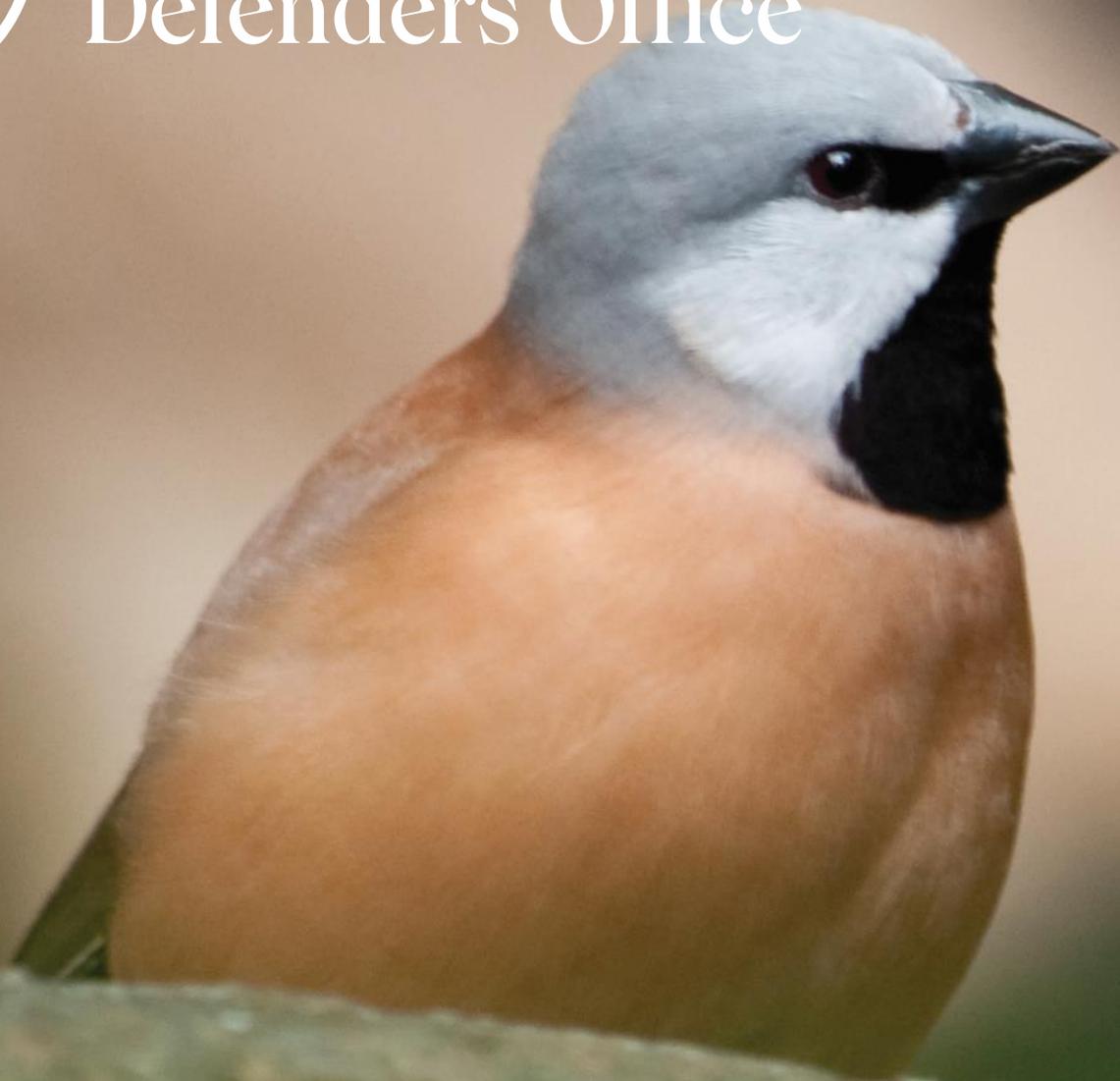
Prohibited Developments/Variation of the Territory Plan

Variation of the Territory Plan (Part 5.3):

- Planning Authority prepares draft plan variation (s 60)
- Consultation notice inviting comments (s 61)
- Public notification on draft plan variation (30 working days) (s 63)
- Provide to draft to Minister (s 69) and issue public availability notice (s 70)
- Minister refers to committee (5 working days) (s 73)
- Committee may prepare a report with a recommendation (20 working days) (s 73)
- Minister approves draft plan variation (s 76)
- Minister presents variation to Legislative Assembly (5 sitting days) (s 79)
- Minister fixes commencement date (5 sitting days) (s 83)
- Territory Plan is varied on commencement date



Environmental
Defenders Office



4. Community Participation

Community involvement in the
Development process

- Public notification requirements
- Representations

Territory Land – when can the community get involved?

Before a decision is made, the public can submit written comments on:

- development proposals during the public notification process (Division 7.3.4.) (usually **10-15 working days** – see s 152, P&D Act; s 28, P&D Regulations)
- proposed changes to the Territory Plan (s 63) (**30 working days** – s 63)
- draft Environmental Impact Statement (s 219) (**20 working days** – s 217)

After a decision is made:

- Review of decisions by ACAT (merits review)
- Review of decisions by the Supreme Court (judicial review)

How are community views taken into account?

- **Considering development applications:** must consider community views (ss 120(d) and 129(d))
- **Draft variation of Territory Plan:** submissions received must be considered and a report on consultation prepared (s 69(2))
- **Considering draft EIS:** must take representations into account & demonstrate how (s 222(2)(a)(ii) and (iii))



Notification of decisions

- Public must be notified of:
 - decision to approve or refuse development application (s 170(1) and 171(1));
 - decision to approve variation of Territory Plan (s 76(7))
- Decisions to approve or refuse development will be accompanied by reasons (s 170(3) and 171(3))
- For draft Plan variation approval decisions, a statement of reasons can be requested under the ADJR Act; must be provided within 28 days (s 13, *ADJR Act*)

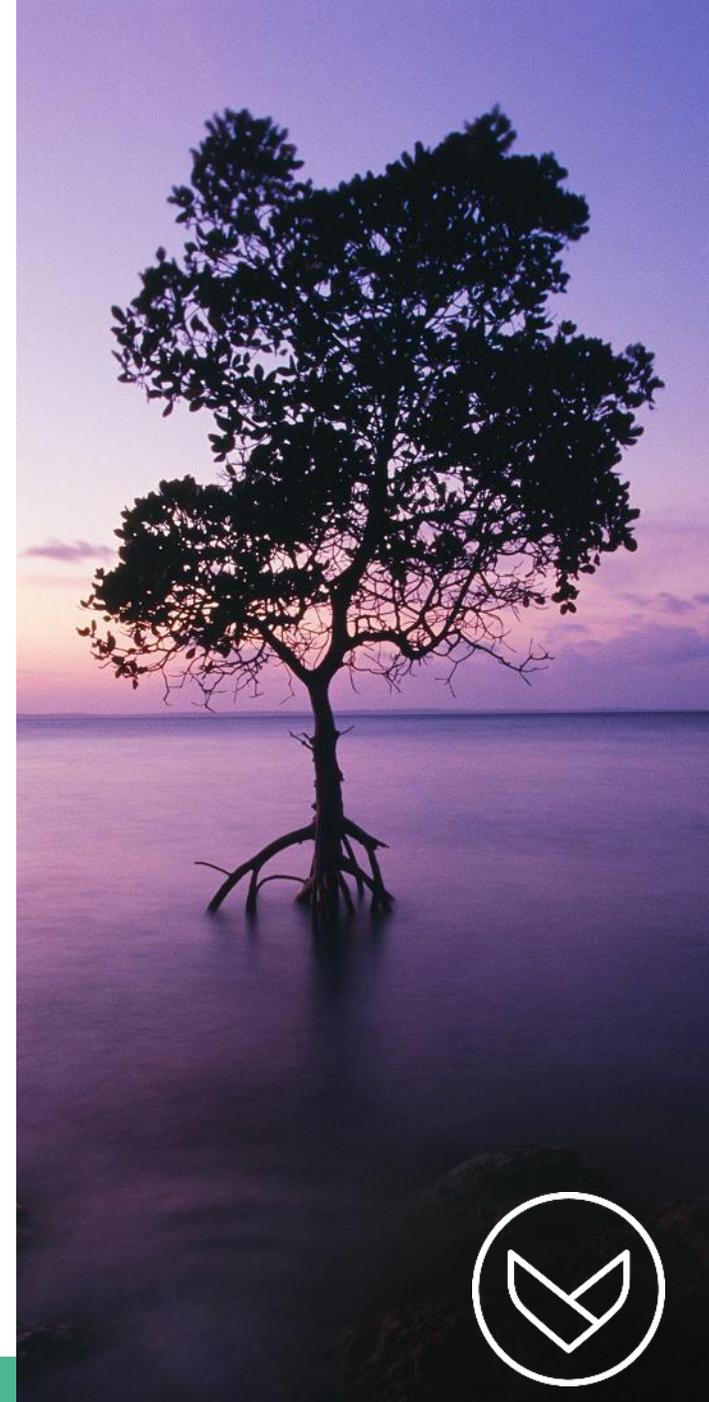
A lush green forest with a river flowing through it. The scene is filled with dense foliage, including various trees and bushes, with sunlight filtering through the canopy. The river is calm and reflects the surrounding greenery.

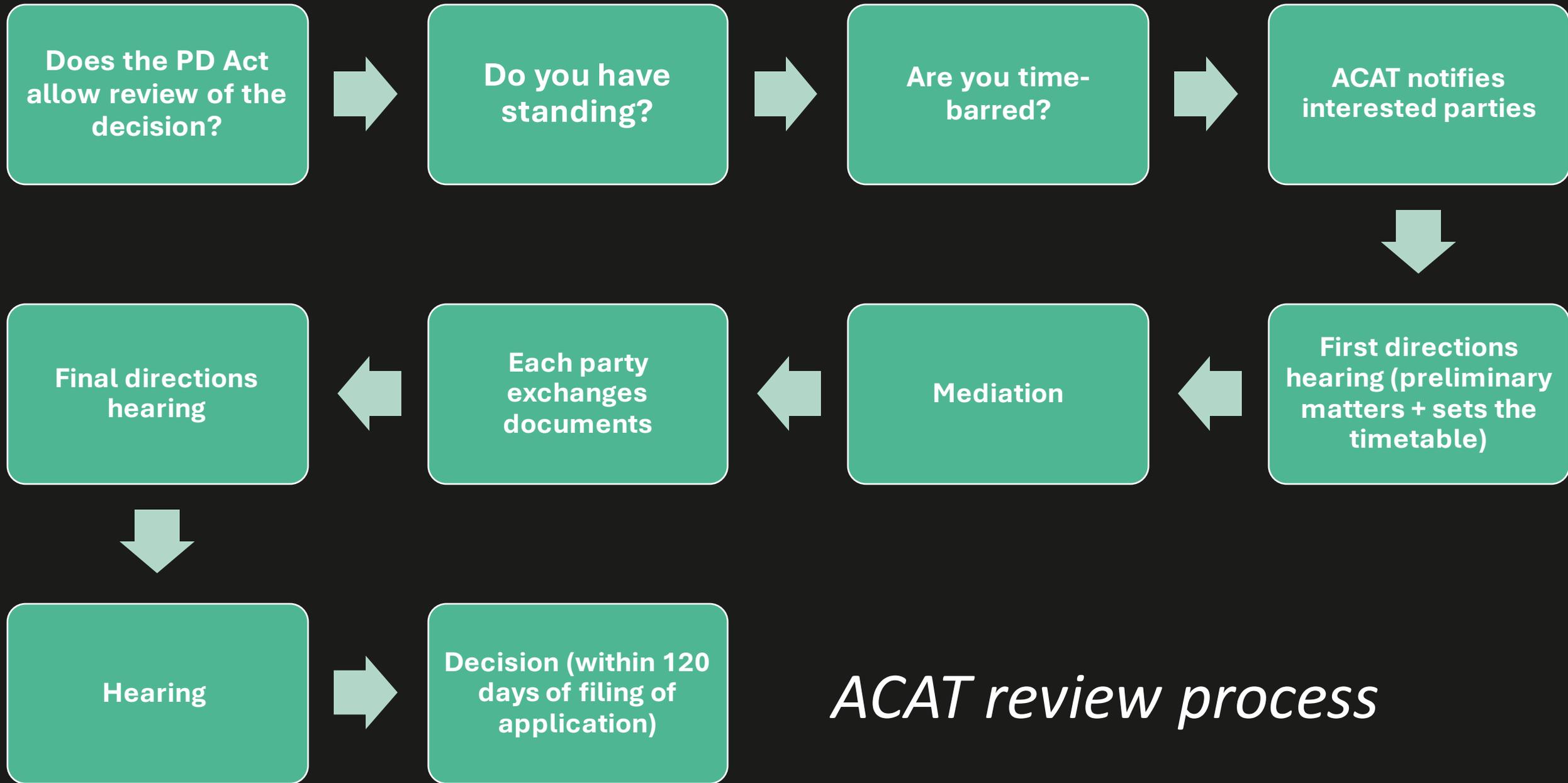
5. Third-Party Review of Decisions

- ACAT & Supreme Court processes
- Standing
- Merits and judicial review
- Costs

Review process: ACAT

- **Merits review:** powers of original decision-maker
- **Third-party reviewable decisions:** decisions to approve development applications in merit track or impact track (*Schedule 1, PD Act*)
- **Standing of third parties:** made a representation under s 156 *PD Act* + 'material detriment'
 - **For people:** the decision has, or is likely to have, an adverse impact on the use or enjoyment of the land (s 419(1)(a))
 - **For groups:** decision must relate to a matter included in 'objects and purposes' of group (s 419(1)(b))
- **Deadline:** within 20 working days of decision (s 409)





ACAT review process



Review process: Supreme Court of the ACT

- **Judicial review in the Supreme Court:** legality of the decision
- **Standing: 'Eligible person'** (s 4A ADJR Act)
 - Individual, corporation, or unincorporated organisation or association
 - Interests adversely affected
- **Reviewable decisions:**
 - Decision to which the ADJR Act applies (Schedule 1, ADJR Act)
 - Certain decisions under P&D Act not eligible for judicial review
- **One or more ground of review:** see s 5, 6 & 7
- **Process:**
 - File originating application in Supreme Court (r 3556, *Court Procedures Rules 2006*)
 - Deadline: 28 days after receiving written notice of decision (s 10, P&D Act)
 - Procedural steps and timetable set by the Court at first directions hearing

Costs

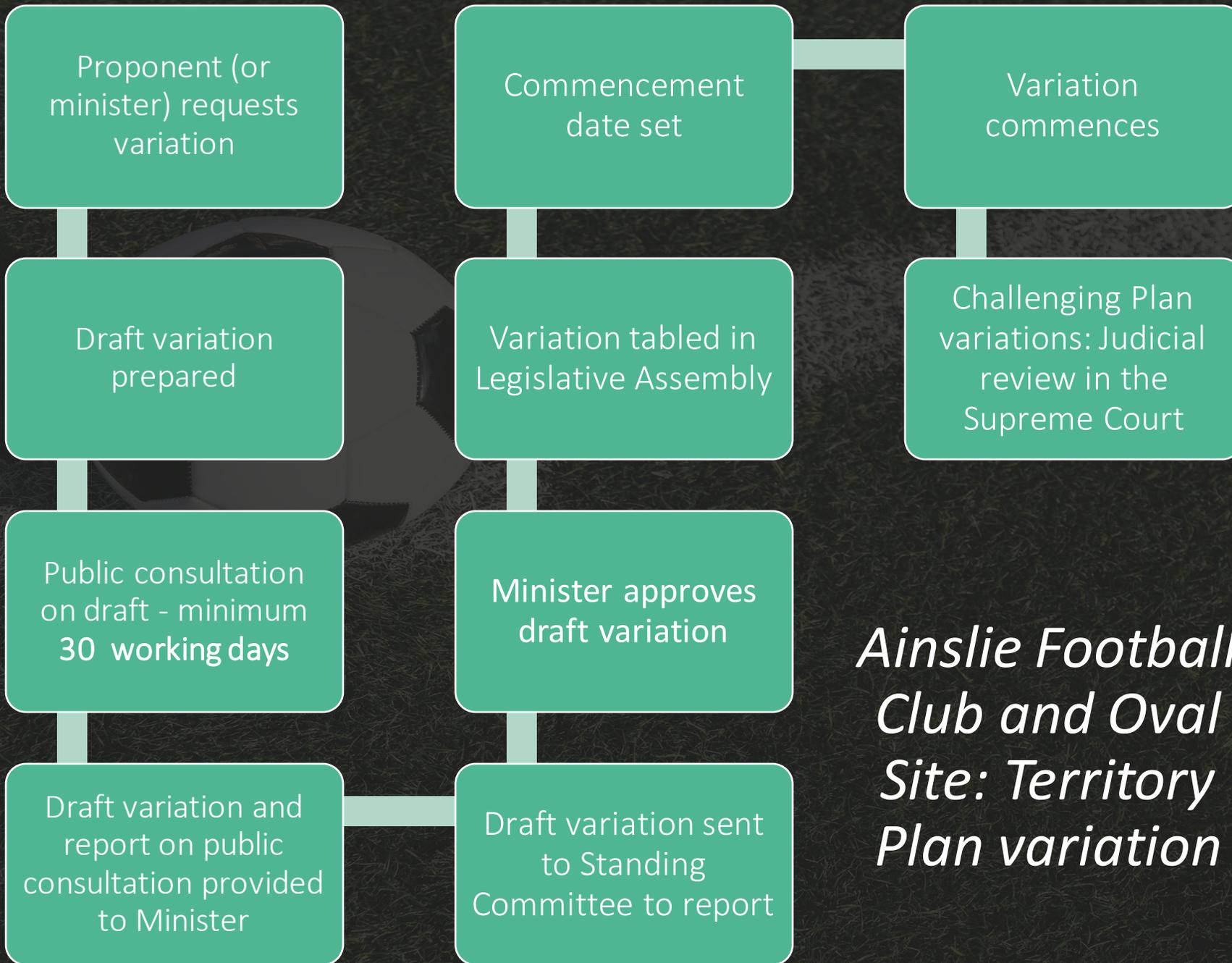
- Registrars of ACAT and the Supreme Court can remit, refund, defer, waive or exempt a person paying fees (s 15, *Court Procedures Act 2004*)
- **ACAT:** each party pays own costs
 - However, where application dismissed, party may be ordered to pay costs of other party
- **Supreme Court:** generally more costly
 - Costs orders
 - Security for costs (injunctions)
 - Orders for compensation



6. Case Study

Ainslie Football Club and Oval Site - Territory Plan variation





Ainslie Football Club and Oval Site: Territory Plan variation





7. What next for ACT Planning & Development?

- **YourSay:** ACT Planning System Review and Reform Project:

"To deliver a planning system that is clear, easy to use and that facilitates the realisation of long-term aspirations for the growth and development of Canberra while maintaining its valued character"

- Outcomes-focussed
- Legislation Working Group
- Draft Bill expected to be released for public consultation by end of 2021





Questions?



Stay in touch



edo.org.au



facebook.com/environmentaldefendersoffice/



twitter.com/EDOLawyers



linkedin.com/environmentaldefendersoffice



info@edo.org.au

Donate

EDO relies on community support. Make your tax-deductible donation at <https://www.edo.org.au/donate>



Thank you.

