

AMENDED PRACTICE DIRECTION NUMBER 4 OF 2023

PLANNING AND ENVIRONMENT COURT

DETERMINATION OF ORIGINATING APPLICATIONS SEEKING DECLARATIONS ABOUT DEVELOPMENT APPROVALS AND DEVELOPMENT APPLICATIONS

Purpose

1. The purpose of this Practice Direction is to set out case management procedures for the just and expeditious resolution of disputed issues in declaratory proceedings about development approvals and development applications.

Application

2. The practice direction applies after 18 March 2024 to proceedings in the Brisbane registry of the Court:
 - (a) about the validity of a development approval;
 - (b) about compliance with the requirements of the *Planning Act 2016* or development assessment rules with respect to the receipt, processing or assessment of a development application;
 - (c) where relief is, or may reasonably be expected to be, sought by any party to the proceeding under s 37 of the *Planning and Environment Court Act 2016* by reason of paragraphs 2(a) or 2(b); and
 - (d) about a matter which does not fall within (a) to (c) above, but the Listing Judge is satisfied should be managed, and listed, as if this Practice Direction applies.

Definitions

3. For the purposes of this Practice Direction, the following terms are defined:

“*Applicant*” means the applicant for declaratory relief and consequential orders, including orders under s 37 of the *Planning and Environment Court Act 2016*;

“*decision maker*” means the assessment manager, or any delegate of the assessment manager, for the development approval or development application the subject of the proceeding to which this Practice Direction applies;

“*First return date*” means the first mention of a proceeding before the Court to which this Practice Direction applies, and is a date no later than six weeks after the proceedings were filed;

“*hearing schedule*” means a plan that contains the estimated duration of openings; the estimated duration of each witness’s evidence; the sequence in which the witnesses are proposed to be called; the estimated duration of oral submissions and the estimated duration of the hearing;

“**Listing Judge**” means a Judge of the Court who manages the Brisbane P&E List from time to time;

“**proceeding**” means the whole, or part, of a proceeding to which this Practice Direction applies;

“**Respondent**” means any respondent to an Originating Application for declaratory relief or consequential orders, including orders under s 37 of the *Planning and Environment Court Act 2016*;

“**Ready for hearing**” means a proceeding to which this Practice Direction applies where, to the extent relevant:

- (a) compliance has been achieved with the requirements of the Rules, orders, directions and this Practice Direction; and
- (b) alternative dispute resolution has been exhausted; and
- (c) the Applicant has filed and served an Affidavit:
 - (i) deposing to the matters in paragraphs (a) and (b) above;
 - (ii) exhibiting a draft hearing schedule reflecting the time estimates of the advocate who will appear at the hearing (including any self-represented litigant, agent, solicitor advocate or Counsel);
 - (iii) exhibiting draft Annexures 1 to 6,¹ where relevant, as required by Practice Direction No. 7 of 2023;
 - (iv) identifying preferred hearing dates for all parties; and
 - (v) identifying hearing dates to be avoided for all parties and the reason for doing so;

“**Rules**” is a reference to the Planning and Environment Court Rules as made from time to time.

Commencing proceedings

4. Prior to filing an Originating Application to which this Practice Direction applies, the Applicant is to obtain a First return date from the Planning and Environment Court list manager.²

First return date

5. The purpose of the First return date is to deal with notice of the proceeding and orders, or directions, to facilitate the just and expeditious resolution of the proceeding.

¹ For the purposes of complying with this aspect of the definition, only the following parts of the Annexures need to be completed at the draft stage, namely: Annexure 1 – Columns 1, 2, 4, 5, 9, 10 & 13; Annexure 2 – Columns 1, 2, 4, 5, 9 & 10; Annexure 3 – Columns 1, 2, 3, 4, 6, 7, 11, 12 & 14; Annexure 4 – Columns 1, 2, 4, 5, 6, 7, 11, 12 & 15; Annexure 5 – Columns 1, 2, 4, 5, 6, 10 & 11; Annexure 6 – Columns 1, 2, 3, 4, 6, 7, 8, 12, 13 and 15. Where a reference in the Annexure calls for an exhibit number, at the draft stage, a description of the document should be provided instead.

² P&E List Manager: Tel: 3738 7976; Email: DC-PEListManager@justice.qld.gov.au.

6. At the First return date, the Applicant is to demonstrate compliance with respect to notice of the proceeding by way of affidavit material. In the event an extension of time for giving notice of the proceeding is required, the affidavit material is to demonstrate why an extension should be granted in the circumstances.

Orders or directions for the First return date

7. Upon the Court being satisfied with respect to notice, or granting an extension of time, the Judge may make orders or directions about the future conduct of the proceeding at the First return date.
8. There is no standard suite of orders or directions for each case. Each party is to conscientiously consider what orders or directions are appropriate for the proceeding. Prior to proposing or committing to any directions or orders, each party must be satisfied that they are appropriate, and compliance would be practical and realistically achievable.
9. Having regard to the nature of the proceedings to which this Practice Direction applies, and experience, the just and expeditious resolution of the real issues in dispute at a minimum of expense will usually follow a particular sequence. The sequence broadly involves:
 - (a) the decision maker preparing and serving a bundle of documents containing:
 - (i) extracts of the relevant versions of the planning instrument or other relevant planning controls prescribed as assessment benchmarks for the development application the subject of the proceeding;
 - (ii) a certificate of the Chief executive officer prepared under s 251 of the *Local Government Act 2009* or s 232 of the *City of Brisbane Act 2010* identifying the version of the planning scheme, and relevant planning scheme designations or zoning (including local or neighbourhood plan designations and overlays), applicable at the relevant time;
 - (iii) the material the decision maker had regard to for the purposes of assessing and deciding the development application the subject of the proceeding; and
 - (iv) where relevant, the notice about the decision the subject of the proceeding published under s 63(4) of the *Planning Act 2016*;
 - (b) the Applicant filing and serving the affidavit material and written submissions to be relied upon;
 - (c) the Respondent/s filing and serving the affidavit material and written submissions to be relied upon; and
 - (d) the Applicant filing and serving any affidavit material and written submissions in reply.
10. When preparing and proposing a draft order for the First return date, parties should consider providing for the following steps to occur in the proceeding:
 - (a) the decision maker filing and serving a list that identifies the documents that will comprise the bundle of documents for the purposes of paragraph 9(a);
 - (b) the parties to the proceeding, other than the decision maker, giving notice of any objection or omission to the list filed and served in accordance with paragraph 9(a);

- (c) the decision maker serving a paginated bundle of the documents and any certificate of the Chief Executive officer under s 251 of the *Local Government Act 2009* or s 232 of the *City of Brisbane Act 2010*;
- (d) the Applicant filing and serving the material it relies on, including written submissions prepared in accordance with Practice Direction No. 7 of 2023;
- (e) the Respondent/s giving notice, in writing, of any objection to the Applicant's affidavit material and written submissions;
- (f) the Respondent/s filing and serving a notice that identifies if relief is sought under s 37 of the *Planning and Environment Court Act 2016* and, if so, the supporting reasons;
- (g) the Respondent/s filing and serving a notice that identifies any discretionary reasons to be relied on (individually or collectively) to oppose the relief sought in the proceeding;
- (h) the Respondent/s filing and serving the material relied on, including written submissions prepared in accordance with Practice Direction No. 7 of 2023;
- (i) listing the proceeding for a subsequent review to make orders or directions that:
 - (i) define the issues in dispute;
 - (ii) provide for a hearing about objections, if required;
 - (iii) require the preparation of an agreed hearing schedule;
 - (iv) provide for alternative dispute resolution, if not already the subject of an order or direction; and
 - (v) facilitate the listing of the proceeding for hearing.

11. Prior to proposing or committing to any directions or orders, each party must be satisfied they are appropriate, and that compliance would be practical and realistically achievable. In considering whether compliance is realistically achievable with proposed directions or orders, it is expected the parties will take into account that:

- (a) the Affidavit material filed and served by, or on behalf of, any party should not duplicate a document in a bundle of documents prepared and served by the decision maker;
- (b) written submissions filed and served by, or on behalf of, any party to the proceeding must comply with Practice Direction No. 7 of 2023; and
- (c) written submissions filed and served by, or on behalf of, any party to the proceeding should explain why evidence that, *prima facie*, goes to the merits of a decision rather than process or legal error is admissible.

12. With respect to paragraph 11(c) above, experience shows that, in many cases of the kind to which this Practice Direction applies, there is a significant body of inadmissible evidence filed going to the merits of a decision rather than process or legal error. This comes at significant cost to the parties, the Court and the public. At an early stage of the proceeding, all parties should conscientiously consider the resolution of objections to affidavit material to ensure only the real issues in dispute are advanced for determination in the proceeding.

Subsequent reviews

13. At any review after the First return date, the parties must inform the Court:
- (a) whether there has been compliance with the requirements of the Rules, orders or directions and this Practice Direction and, if not, the nature and effect of all non-compliances; and
 - (b) of any matter bearing on whether further orders or directions should be made.

Provision of draft orders before First return date or subsequent reviews

14. The parties must comply with r 21 of the Rules dealing with the provision of draft orders and directions.
15. Compliance with r 21 of the Rules assists the Court to discharge its obligations under s 10(1) of the *Planning and Environment Court Act 2016*.
16. The times prescribed for compliance with r 21 of the Rules should be treated as the minimum required to ensure the First return date, or subsequent review (as applicable), can proceed expeditiously. The early provision of draft orders or directions permits parties to a proceeding to obtain proper instructions and give conscientious consideration to whether the orders or directions proposed are appropriate and realistic.
17. To facilitate the early provision of draft orders or directions, the party with the onus, or the party who has made an application for orders or directions, is encouraged to give the other parties a proposed draft no later than four business days before the First return date or any subsequent review.
18. Upon receipt of the draft order, the other parties are encouraged to notify whether it is accepted. This should occur no later than two business days before the First return date or any subsequent review. Where different orders are proposed, the notification is to be accompanied by a draft order.

Listing a proceeding for hearing

19. A proceeding will be listed for hearing in accordance with Practice Direction No. 6 of 2023.
20. A proceeding will not be listed for hearing unless:
- (a) it is Ready for hearing; or
 - (b) the Listing Judge is satisfied there are exceptional circumstances in relation to the proceeding for the purposes of r 22(b) of the Rules.
21. To be Ready for hearing, the Applicant is required to file and serve an affidavit that complies with paragraph (c) of the definition of Ready for hearing in this Practice Direction. The definition requires the identification of preferred hearing dates and dates that are to be avoided. It is the responsibility of the party preparing the affidavit to ascertain the relevant dates from all parties to the proceeding. If a party to the proceeding, without reasonable justification, does not provide information about preferred hearing dates or dates to be avoided to the party preparing the affidavit within three business days of receiving a request for such information, that party is taken to accept the contents of

the affidavit in so far as it identifies relevant dates to be avoided or preferred.³ Compliance with the requirement to serve an affidavit assists the Court to discharge its obligations under s 10(1) of the *Planning and Environment Court Act 2016*.

22. Nothing in this Practice Direction precludes any party making an application, supported by affidavit material, for a proceeding to be listed for hearing.

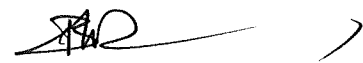
Review by hearing Judge

23. After a proceeding has been listed for hearing or referred to the hearing Judge to allocate specific hearing dates, the proceeding will be reviewed. The purpose of the review is for the hearing Judge to make such further orders or directions considered appropriate to facilitate the efficient and expeditious conduct of the hearing.

24. It is expected that Counsel briefed for the hearing will appear at a review before the hearing Judge.

25. The parties should expect orders to be made about any of the following matters at a review before the hearing Judge:

- (a) the timing for the delivery of written submissions, including any alternative arrangement to that required by paragraph 6 of Practice Direction No. 7 of 2023;
- (b) the delivery of a draft of Annexures 1 to 6 as required by Practice Direction No. 7 of 2023, where relevant, to the hearing Judge (via the Judge's Associate);
- (c) the delivery of working copies of the bundle of documents, written submissions, and copies of affidavits to the hearing Judge (via the Judge's Associate);
- (d) the delivery of an updated and agreed hearing schedule to the hearing Judge (via the Judge's Associate);
- (e) arrangements with respect to the matter proceeding by way of eTrial (or equivalent document management system);
- (f) the filing and serving of an agreed list of issues for determination; and
- (g) the filing and serving of a schedule of agreed facts.



Chief Judge B G Devereaux SC

25 March 2024

³ It is expected that parties will make early enquiries of their witnesses and Counsel and will inform their experts and Counsel of the need to notify them of any change to the situation previously notified.