

**PRACTICE DIRECTION NUMBER 3 OF 2023**  
**PLANNING AND ENVIRONMENT COURT**

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**DETERMINATION OF MERITS APPEALS**

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**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 particular types of merits appeals.

**Application**

2. Subject to paragraph 3, this Practice Direction applies after 18 March 2024 to proceedings in the Brisbane registry of the Court about:
  - (a) development applications (Schedule 1, Table 1, item 1 of the *Planning Act 2016*);
  - (b) change applications, other than an excluded application (Schedule 1, Table 1, item 2 of the *Planning Act 2016*);
  - (c) extension applications (Schedule 1, Table 1, item 3 of the *Planning Act 2016*);
  - (d) conversion applications (Schedule 1, Table 1, item 5 of the *Planning Act 2016*);
  - (e) eligible submitter and eligible advice agency appeals (Schedule 1, Table 2, items 2 and 3 of the *Planning Act 2016*);
  - (f) local laws (Schedule 1, Table 2, item 6 of the *Planning Act 2016*);
  - (g) a decision the subject of s 161 of the *Queensland Heritage Act 1992*; and
  - (h) a matter which does not fall within (a) to (g) above,<sup>1</sup> but the Listing Judge is satisfied should be managed, and listed, as if this Practice Direction applies.
3. This Practice Direction applies to proceedings about infrastructure charges notices and conditions after there has been compliance with the requirements of paragraph 4 or an order of the Court under paragraph 5 of Practice Direction No. 2 of 2023. For a proceeding of this kind, the First return date for the purposes of this Practice Direction will be the first review after compliance is achieved with paragraph 4 of Practice Direction No. 2 of 2023 or the ADR Registrar has listed the proceeding for review.

**Definitions**

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

“**decision maker**” means an assessment manager, or responsible entity or local government, as required by the particular circumstances of the appeal;

“**First return date**” means the first mention of a proceeding before the Court to which this Practice Direction applies;

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<sup>1</sup> Such as an appeal under the *Environmental Protection Act 1994* in relation to a decision about an ERA as defined in the Act.

“**hearing schedule**” means a plan that contains the estimated duration of a site inspection and openings; the estimated duration of each witness’s evidence; the sequence in which parties propose to call the witnesses; 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;

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

- (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) any application for a minor change as defined in the *Planning Act 2016* has been heard and is the subject of an order of the Court; and
- (d) the party seeking approval has given notice to the other parties to the appeal about conditions that are accepted and will be relied upon to address a reason/s for refusal; and
- (e) the party seeking an approval (or otherwise the Appellant) has filed and served an Affidavit:
  - (i) deposing to the matters in paragraphs (a) to (d) above;
  - (ii) confirming instructions have been given, or obtained, to the effect that no application (or no further application) will be made for a minor change as defined in the *Planning Act 2016*;<sup>2</sup>
  - (iii) 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);
  - (iv) exhibiting draft Annexures 1 to 6,<sup>3</sup> where relevant, as required by Practice Direction No. 7 of 2023;
  - (v) identifying the preferred hearing dates for all parties; and
  - (vi) identifying hearing dates to be avoided for all parties and the reasons for doing so;

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<sup>2</sup> The purpose of this requirement is to ensure that when hearing dates are allocated, there is certainty for all parties about the final form of development for which approval is sought. This is not intended to preclude an application made during a hearing for a minor change to the development to reflect the substance of oral evidence.

<sup>3</sup> 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 & 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.

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

“**subsequent review**” means any review before the Court after the First return date.

### **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.
6. At the First return date, the Appellant is to demonstrate compliance with respect to notice of the proceeding by way of affidavit material. In the event an extension of time is required for giving notice of the proceeding, the affidavit material is to demonstrate why an extension should be granted in the circumstances.
7. An application for orders or directions about the future conduct of an appeal to which this Practice Direction applies must be filed and served as soon as practicable. It must have a return date that is no later than three months<sup>4</sup> after the proceeding was filed. The application must be made by the party who bears the onus in the appeal. The return date for any such application is the First return date. The application for the First return date should be filed and served on the decision maker with sufficient time to permit compliance with paragraphs 9, 10, 15, 20 and 21. It is preferable that the application is filed and served no later than 10 business days prior to the return date listed in the application. Nothing in this Practice Direction precludes a party other than party who bears the onus from making an application for orders or directions about the future conduct of an appeal.
8. Compliance with r 20 of the Rules and paragraph 7 assists the Court to discharge its obligations under s 10(1) of the *Planning and Environment Court Act 2016*.
9. Unless final orders are to be sought with the consent of all parties, at the hearing on the First return date, it is expected the decision maker will read an affidavit, or certificate prepared pursuant to s 251 of the *Local Government Act 2009* or s 232 of the *City of Brisbane Act 2010*, that exhibits a copy of the decision notice the subject of the appeal and proves, where relevant:<sup>5</sup>
  - (a) the date the development application the subject of the appeal was received;
  - (b) the date the development application the subject of the appeal was treated as properly made for the purposes of s 51(5) of the *Planning Act 2016*;
  - (c) whether the development application was treated as requiring:
    - (i) code assessment; or
    - (ii) impact assessment; or
    - (iii) both code and impact assessment and, if both, those parts that were treated as requiring code assessment and those parts that were treated as requiring impact assessment;

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<sup>4</sup> See r 20(3) of the Rules.

<sup>5</sup> One purpose of the affidavit or certificate is to assist the Court to decide at the First return date which one of the three case management streams a proceeding will be allocated to under Practice Direction No 6 of 2023.

- (d) the version number or description of assessment benchmarks against which the development application the subject of the appeal must be assessed (s 45(7) of the *Planning Act 2016*);
- (e) the designations and zoning (including local or neighbourhood planning designations and overlays) applying to the land the subject of the appeal by operation of the assessment benchmarks identified for paragraph 9(d);
- (f) the version number or description of provisions to which weight may be given (s 45(8) of the *Planning Act 2016*); and
- (g) the designations and zoning (including local or neighbourhood planning designations and overlays) applying to the land the subject of the appeal by operation of the provisions identified for paragraph 9(f).

10. The affidavit or certificate read by the decision maker must include a list of the designations or zoning applicable to the relevant land for the purpose of paragraphs 9(e) and 9(g) above. It must also include an extract of the maps from the relevant document.

### **Orders or directions proposed at the First return date**

- 11. The Judge may make orders or directions about the future conduct of the proceeding at the First return date. This will occur where the Judge is satisfied the material read demonstrates compliance with paragraphs 6, 9 and 10.
- 12. There is no standard suite of orders or directions for each proceeding. 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 they are appropriate, and that compliance would be practical and realistically achievable.
- 13. 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 involves:
  - (a) in appropriate cases, the parties participating in an early without prejudice conference, case management conference or mediation;
  - (b) the identification of issues in dispute;
  - (c) the nomination of expert witnesses, if any, to be called by each party to the proceeding;
  - (d) the preparation and production of joint expert reports;
  - (e) participation in a form of alternative dispute resolution informed by, among other things, the substance of joint expert reports;
  - (f) the identification of any changes to an application proposed in response to, among other things, a joint report or alternative dispute resolution process;
  - (g) the identification of any conditions of approval that are said to address a nominated reason/s for refusal;
  - (h) the amendment of issues in dispute to reflect the outcome of a joint report or notice given of a change or condition of the kind envisaged by paragraphs 13(f) and 13(g);
  - (i) preparation and exchange of any separate report for the purpose of the Rules;

- (j) preparation and exchange of a draft hearing schedule;<sup>6</sup>
  - (k) preparation and exchange of an index for a draft appeal book, including any planning scheme extracts;<sup>7</sup>
  - (l) listing the proceeding for a subsequent review to make orders or directions that:
    - (i) define the issues in dispute by reference to any amended documents; or
    - (ii) facilitate the listing of the proceeding for hearing.
14. With respect to orders about the identification of issues, a decision maker who has refused an application and published reasons for that decision should not assume an order or direction will be made permitting the preparation of a consolidated list of reasons for refusal. While a decision maker is not confined to the reasons as published in a decision notice, experience shows that orders or directions permitting reasons for refusal to be recast can result in:
- (a) unnecessary expense to the parties;
  - (b) the identification of issues that are not real issues in dispute; and
  - (c) delay to the efficient conduct of the proceeding.
15. Consequently, a decision maker who seeks to abandon, vary or augment reasons for refusal identified in a decision notice (or equivalent) is to prepare a draft consolidated list of reasons for refusal. This list will be considered by all parties, and the Court, at the First return date or at a subsequent review. This is to ensure the duties imposed on the Court and the parties by s 10 of the *Planning and Environment Court Act 2016* can be discharged. Proceedings will not, without good reason, be adjourned to allow a decision maker to recast reasons for refusal in the form of a consolidated list.<sup>8</sup> It is expected the period between the commencement of the proceeding and the First return date will be utilised by the decision maker to, among other things, recast the reasons for its decision (if it intends to do so) with knowledge of the grounds of appeal articulated in the Notice of Appeal.

### **Subsequent reviews**

16. 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**

17. The parties must comply with r 21 of the Rules dealing with the provision of draft orders and directions.

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<sup>6</sup> This does not preclude the parties from attempting to reach agreement about such matters should they consider that discussions to that end would avoid undue delay and expense.

<sup>7</sup> This does not preclude the parties from attempting to reach agreement about such matters should they consider that discussions to that end would avoid undue delay and expense.

<sup>8</sup> If a decision maker seeks an adjournment for this purpose, it is expected that the request will be accompanied by affidavit material addressing the basis for the request.

18. 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*.
19. 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.
20. 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 order no later than four business days before the First return date or any subsequent review.
21. 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**

22. A proceeding will be listed for hearing in accordance with Practice Direction No. 6 of 2023.
23. 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.
24. To be Ready for hearing, the party seeking an approval is required to file and serve an affidavit that complies with paragraph (e) 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 seeking approval 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.<sup>9</sup> 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*.
25. 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**

26. 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 the Judge considers appropriate in the circumstances to facilitate the efficient and expeditious conduct of the hearing.

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<sup>9</sup> 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.

27. It is expected that Counsel briefed for the trial will appear at a review/s before the hearing Judge.
28. The parties should expect orders to be made about any of the following matters at a review before the hearing Judge:
- (a) 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 and copies of reports 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 appeal proceeding by way of eTrial (or equivalent document management system);
  - (f) arrangements with respect to a site inspection, if required;
  - (g) the filing and serving of an agreed list of issues for determination;
  - (h) the filing and serving of a schedule of agreed facts; and
  - (i) the identification of any opinion expressed in a joint report, or part thereof, which no longer reflects an expert's opinion considering, among other things, changes made to an application or notification of conditions that are said to address reasons for refusal.



**Brian Devereaux**  
**Chief Judge**  
7 December 2023