A guide for parties participating in a P&E Court chaired without prejudice conference

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For ease a "chaired without prejudice conference" will be simply referred to as a "conference" in this document. Parties may also hear the process being occasionally referred to as a mediation.

The basics

1. A conference provides a private forum, in which the parties can gain a better understanding of their respective positions, and to work together to explore options for resolution and avoid the time, cost, stress and uncertainty associated with a trial.

2. Whilst it is the preferred outcome, the conference process is not necessarily restricted to getting an agreement which resolves the appeal. Other positive outcomes are:

    a) Identification and better understanding of the issues in dispute.
    b) A reduction of the issues in dispute.
    c) Agreeing to provide further or better information to progress discussions.

3. As part of any court order, the P&E Court will usually require the parties to participate in at least two conferences. One prior to the appointment of experts, and one following the release of the Joint Expert Reports. There is no restriction in parties meeting early in the appeal process, prior to a court order. The earlier a conference takes place the better as it can avoid parties becoming entrenched in their position and lower the overall cost of the dispute.

4. The conference is a confidential discussion. Nothing that is discussed in the conference can be disclosed to any other person who is not a party to the appeal. Nor can anything said during the conference be discussed in court or be used as an admission in court, without the consent of all parties. This allows parties to have a frank discussion about the issues and make concessions in an effort to resolve the appeal, with the knowledge those discussions cannot be disclosed in later proceedings if the conference does not settle.

5. Conferences are flexible. The process is not bound by the rules of evidence. The reasons for approval or refusal expressed in court documents are a guide to the disputed issues, but the discussions at the conference is not limited to the matters raised by those documents.

6. Except in unusual circumstances, the parties must send a representative with the authority to reach a binding agreement at the conference. Where the decision about the development has been made by the full Council (councillors and mayor), they must send an officer with the authority to be able to recommend to the Council that they support an agreement.

7. Most conferences in the P&E Court are conducted by the ADR registrar (**the Registrar**) who is an officer of the court. It is a free service provided by the court.

8. The Registrar acts as a mediator, not as a decision maker. The role of the Registrar is to regulate the discussion making sure that all voices are heard and the discussions progress harmoniously.

9. The Registrar is impartial and does not support one side over the other. Even though they may help with procedural queries or offer suggestions for discussion purposes, they are not on your side during the conference.

10. The Registrar does not give legal advice or suggest how a party should conduct their case. The Registrar may test each parties' understanding of the strengths and weaknesses of their case, as well as discuss the potential for loss, expense, time, distraction and uncertain court outcomes.

11. Agreeing to participate in a conference does not stop court proceedings, unless the parties agree to delay the proceedings. It is the prospect of the trial that encourages everybody at the conference to consider the risks of a failure to settle the matter.

Why participate in a chaired without prejudice conference?

1. A mediated resolution saves all parties time, cost, stress and the potential of an adverse court decision.

2. Parties can gain a thorough understanding of the other parties' points of view, and have an enhanced opportunity to be heard and understood themselves during the process, which is not available by correspondence alone.

3. A conference allows misconceptions about the development, the planning rules, or a party's issues to be eliminated.

4. The conference provides a forum where more alternative methods of dealing with issues can be revealed, than would have been identified by a party alone.

5. As the parties have an opportunity to negotiate their own settlement in a conference, they have control over the outcome of the dispute. Any decision made in the conference is a decision made, and therefore owned, by all of the parties. Judges do not mediate a solution, they impose decisions based on the evidence and law presented to them.

6. Agreements reached at a conference are not limited to the outcomes that the court can impose, or conditions that might be imposed on the development approval. Agreements can address personal, commercial or other important interests that may not be possible with a court determined the outcome. Impacts of development can be mitigated off-site, rather than on the development site itself.

How a chaired without prejudice conference is conducted

1. The Registrar may have discussions with the lawyers and litigants in person ahead of the conference to ensure that various formalities and other issues are addressed so that time is not lost at the conference.

2. The Registrar will normally open the conference with a joint session, attended by all parties, their lawyers and in some cases the technical advisors or experts.

3. When the conference involves parties who have not participated in a conference before, the Registrar may open with an overview of the conference process and their expectations of the parties. If it is a resumed conference or the parties are regular participants in conferences, the Registrar may only remind the parties of the key principles.

4. Each party will then have an opportunity to make an opening statement to express their view of the situation and concerns.

5. Normally the party with the interest in development proposal, being the developer, gives the first opening statement. They will give an overview of the project and the characteristics of the locality. They may also summarise what they understand to be the concerns of the other parties.

6. If the development was refused by the Council or a State Government Agency, they will then be asked to give their opening statement, followed by any submitters (Co-respondents by Election) such as local residents.

7. If the development was approved, and there are submitters opposing the approval (Appellants), they will be asked to give their opening statement, followed by the Council and any State Government Agency.

8. Because the Registrar is not a decision maker, the purpose of the opening statement is merely to inform them of the issues and the 'framework' of the dispute. It is not necessary to present a statement of the applicable law, or to try to persuade the Registrar of a particular position.

9. The parties will then have the opportunity to clarify any statements or issues raised by the other parties during their opening statements.

10. Following the opening statements any party may make an initial offer to resolve the appeal for the consideration of the other parties.

11. After opening statements, the Registrar will decide how the discussion will move forward. The following are just examples of what may happen:

    a) The parties may separate for a short period to consider the concerns raised by the other parties, and any initial settlement offers.

    b) The Registrar may meet privately with each party to discuss the situation. This allows each party to be frank with the Registrar and allows them to have a realistic look at their case in private and consider alternatives, without fear that any discussions will be communicated to other parties. During these discussions the Registrar may test the strengths and weaknesses of the party's position and tell them about solutions they have seen work in other situations.

    c) The parties may remain separated while the Registrar shuttles between the parties to convey settlement offers and counter proposals.

d) If all the nominated experts in the same technical discipline are present, they may be asked to meet and discuss the issues and identify potential solutions, which can then be presented to all the parties for their consideration.

e) Sometimes the developer will meet with Council first to see if they can reach a resolution, before they meet with the submitters. There is no restriction on any parties having a discussion without another party being present. Those discussions are confidential unless agreed otherwise.

f) The parties may separate and reconvene a number of times during the conference.

g) If there are submitters opposing an approval, it is often valuable for them to meet with the Council and learn firsthand why the decision was made, how the planning scheme operates and how the Council took their submissions into account.

h) Sometimes, Council is a passive participant in the process and the discussions will be held between the submitters and applicant for the development.

12. If the parties do reach an agreement, that agreement can be documented, signed by all parties and placed in a sealed envelope on the court file. Like the conference itself, the agreement is confidential and must not be shared with anyone who is not party to the appeal, unless the parties specifically agree the document can be shared with others. There is no agreement unless it is in writing and signed by all parties.

13. The parties are bound by the provisions of the written agreement and should make sure they understand the document and be happy with the wording prior to signing the document. A number of drafts may be produced before the final version is settled upon.

14. The document on the court file is confidential and may not be accessed by court officers or a judge, unless a court order is made granting access. If a party does not comply with the provisions of the written agreement, another party may seek an order of the court enforcing the provisions of the agreement.

Common mistakes in chaired without prejudice conferences

1. Not being prepared before attending the conference. Before you go to the conference, consider:

   a) What are your prospects of winning in Court?
   b) What do you want to get out of the discussion?
   c) What materials, information or people do you need to achieve this?
   d) What are the strengths and weaknesses of your case?
   e) What is the worst outcome for you?
   f) What is the consequence of not resolving the dispute?
   g) What costs have you incurred to date and likely future costs of the dispute?
   h) If you cannot achieve your preferred outcome, what is an outcome you could live with?
   i) Is there anything that is not negotiable?
   j) If you are part of a group, do you have the authority to agree to a settlement on behalf of others? Is the group in agreement about the questions above?

2. It is a mistake to take and hold a particular position and go into a conference with an 'us' and 'them' attitude. Parties can achieve more if they are willing to listen and work together. A good discussion requires the parties to:

    a) Think laterally.
    b) Have their position reality tested, even in relation to 'non-negotiables'.
    c) Listen to the options and not automatically reject them.

3. Being too focussed on what you want to say, and not listening or missing what is said by others. It is important to listen actively to other parties during the conference as:

    a) Good ideas come from surprising places.
    b) Sometimes, all people want is for people to listen and respect their point of view.
    c) People may give subtle clues to what they really want in their conversation. If you are only half listening, or listening only to prepare a response, you may miss these clues.

4. Preparing for a conference as if preparing for trial. Trials are adversarial, conferences are not. Discussions about technical legal points, or different interpretations of legislation or a planning scheme, will not promote discussions that may resolve disputes. The Registrar may allow some discussion about legal issues where they feel it is appropriate, but it will be limited.

5. Conducting yourself in a conference as though you are in trial. Whilst it may be necessary to question the reasons behind another party's position to gain a better understanding, it is not an excuse to interrogate the other party in an attempt to expose weaknesses. The Registrar will restrict questioning if they consider it goes beyond gaining a better understanding.

6. Not trusting the experts and not accepting the advice of your own experts. The role of the expert is to assist you and the court with independent and professional advice, that role extends to assisting the Registrar and parties during the conference.

7. Relying on the lawyers too much. A strict legal position often hinders a practical, problem solving approach. Remember you are the client and give the instructions.

8. Taking too long to get to the point. Negotiations are best done when the parties are fresh, not at the end of a long session when all sides will simply feel that they are being 'worn down'. It is not a sign of weakness in being the first to put an offer on the table. It is a positive indication of your willingness to negotiate and seek a sensible outcome.

Tips for self-represented parties

1. If you have never participated in a conference before and are uncertain about what is involved, contact the Registrar and ask if you can arrive slightly earlier than the nominated start time so you can have a discussion about the conference process.

2. Understandably residents may feel aggrieved by the potential impact a development may have on their lifestyle and neighbourhood. It is appropriate to express your concerns in the conference. People may have strong feelings, but try not make it personal. For the developer and Council the old saying is true, it is not personal, it is just business. Personal attacks are

counterproductive, they may make the other side less receptive to your concerns and your suggested solutions.

3. As highlighted earlier in this guide a conference is confidential and anything said in the conference cannot be shared with any person who is not party to the appeal. In practical terms that means, if they have not joined the appeal, you may not tell your friends; family; neighbours; people who submitted against the development but did not join; or the media about what was discussed during the conference. Nor may you share information on social media where it may be accessed by the public. It is the confidentiality of the conference process that facilitates parties exploring options to resolve the appeal. If that confidentiality is broken the other side will be less willing to negotiate, or may even suspend negotiations.

4. If you are part of a large group, it is best to nominate one or two people to speak for the group at the conference so the discussion runs more efficiently. Even so the Registrar may ask everybody to express their concerns. If the entire group is invited to speak, try not to repeat in detail the same concerns somebody else has raised; confirm that you agree with those concerns and then highlight any points of difference you may have. For instance, the entire group may have an issue with traffic safety, so you would advise you have the same concern; but because the development is beside your property you may explain your additional concern about privacy.

5. It is not always practical to have all members of a large group attend the conference due to other commitments. If a person cannot attend the conference, they must send someone else or nominate another member of the group to represent them at the conference. That person must have the written authority to resolve the appeal on behalf of the person/s they represent. If you are sending a representative you must make sure they are fully informed about your position and what are your negotiables. You must be prepared to allow that person to sign an agreement which will be binding on you. If you are not prepared to send another person with that level of authority, you must attend the conference yourself.

6. Whilst submitters may have a common position at the start of a conference, as the discussion progresses it is not uncommon for a group to develop a difference of opinion about how a matter should be resolved. You should be prepared for the possibility of fractures within your group. The developer may focus their attention on addressing the issues of people they believe are more impacted (or more receptive) than others in the group.

7. Conferences are about reaching a compromise position that the parties can live with. Be prepared with alternative positions (back-up plans), as it is unlikely your preferred option will be achieved without adjustments.

8. The P&E legal community is small in comparison to other jurisdictions. Consequently the lawyers and experts who specialise in the field deal with each other on a regular basis. They may address each other, and sometimes the Registrar, with less formality than you anticipated. This should not be mistaken for a lack of respect, bias or an inability to represent you effectively. The regular practitioners realise that being overly formal in a conference can be a barrier to discussion.