

## Co-responding to a Planning and Environment Court Appeal

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*This Factsheet is for general information purposes and is not legal advice. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your particular circumstances you should contact the EDO or your solicitor.*

### 1. Factsheet Overview

This document sets out general information about electing to become a Co-respondent to a developer's Planning and Environment appeal.

Where Council has refused a development application and the developer is appealing that decision to the Court you will be entitled to participate in the appeal if you lodged a properly made submission to Council during the public notification period.

This document contains general information only and is not intended to be a substitute for legal advice from a solicitor aware of all the facts of your case.

### 2. Summary

- As a co-respondent by election you are limited to raising issues that relate to the impact assessable parts of the developer's application.
- If you decide to become a Co-respondent to the appeal (in other words, join in), you must complete an Election to Co-Respond (PEC Form 6) and file this with the Planning and Environment Court within **ten days** after you receive a copy of the developer's Notice of Appeal. You will then need to post a copy (serve) of your election to Co-respond to your local Council, the developer, and any other party whose name appears on the Notice of Appeal.
- Check your mailbox daily for documents relating to the case.
- The normal course of the action would involve the developer/appellant listing the appeal for application for directions before the Planning and Environment Court. This will, ordinarily, take place within 3 months after the appeal has been started. At this hearing, the Court will make directions, including for disclosure of relevant documents and the exchange of expert reports, to make the matter ready for hearing. Once these steps are completed, the court will then list the matter for dates of hearing.
- You need to obtain expert evidence to support your claims. However, if the Council defends the appeal vigorously, obtains experts and already addresses the concerns that you hold, you may only need to play a very small role and would not need to retain your own experts. There is always

the risk that Council might change its position, so you need to be prepared to continue contesting the appeal.

- As a Co-respondent, you are able to simply tag along with Council, noting whether they are doing enough to defend the appeal, and stepping in when you feel they are not. You may wish to check if any of the other submitters are intending to elect to become Co-respondents to the appeal. As submitters, they too are entitled to become Co-respondents, and you may come to an arrangement whereby only some submitters elect to become parties to the appeal and the other submitters simply provide informal support.

### **3. Electing to Co-respond to a planning appeal**

You have **10 business days** in which to elect to become a Co-respondent to the appeal, starting from the date on which you receive a copy of the Notice of Appeal. This means that if you want to become a party to the appeal (giving you a right to be present, participate in, and make submissions to the court about the appeal), you must file a form within this time stating that you wish to be a Co-respondent. The relevant form is PEC Form 6 “Notice of Election”.

A copy of that form is included in **Appendix 1**. You will need to fill in the sections (in type, not handwriting) where indicated before you file it with the Court. You should file the Notice of Election form in person in the court registry of the Planning and Environment Court specified on the top left corner of the Notice of Appeal.

The filing fee is \$75.50.

You may make an application to the registrar for an order to exempt you from paying the required fee. The registrar will make this decision considering your financial position and whether it is in the interests of justice to do so.

### **4. Service of Notice of Election**

You must “serve” your Notice of Election form on all the other parties to the appeal, so they are aware of your intended participation. This means giving a copy to the developer, the Assessment Manager for the development (your local Council), and any other party whose name appears on the Notice of Appeal.

Whilst you are able to serve your Notice of Election form on the other parties by post, we recommend you use registered post. You should keep a note of the time and day on which you posted the Notices, and also keep any receipts from the registered post which prove delivery. Whilst you have “a reasonable time” to post off copies of your Notice of Election form, to be safe you should post them on the same day as you file the Notice with the Court.

### **5. Check your mail for court documents and correspondence**

Your address for service will be your residential address (unless you specify another address, such as that of your solicitors, or your place of business. A

PO Box is not acceptable). The general rule is that all documents can be served by ordinary post after the appeal is commenced. You should be careful to ensure that your mail is checked at least every day for documents served by the other parties. You should also ensure that the receptacle for the receipt of mail is secure and cannot be entered by another person without your authority. This is because there is a presumption of effective service upon posting a document.

## **6. Further steps**

Once the appeal has been commenced, the onus is on the developer to take reasonable steps to pursue the appeal.

Normally the next step in the action would be to list the matter for directions by the court (called a “**directions hearing**”). The general practice is that the appeal would be listed for mention at 9:15am on either a Wednesday, Thursday or Friday morning. The court's practice at the directions hearing is to set a timetable for the matter to be prepared for trial. The new Practice Direction of the Planning and Environment Court requires the developer to instigate a directions hearing *within 3 months* of the commencement of the action.

The matters subject to direction will normally include:

- Notification of issues in dispute. This usually involves a requirement that the respondent and / or co-respondents tell the other parties the reasons why they say the development should be refused. You can rely on the Council's reasons for refusal (which are set out in the decision notice, which you would have received). But, if there are additional reasons why you believe the development is not suitable, you must tell the other parties.
- Disclosure of relevant documents by each party,
- the preparation and exchange of expert reports,
- the need for without prejudice settlement negotiations or some form of alternative dispute resolution process (ADR) like Mediation.

It is very useful to have someone familiar with the court processes to represent you at the directions hearing, as the directions hearing is where the timetable for all future actions to be taken by the parties is set. It is extremely important to have a timetable that allows you enough time to perform the actions required of you, or your chances of success are lessened.

## **7. Further Review Dates**

At the directions hearing the Court will allocate future “review” dates to ensure the appeal timetable is being complied with.

## **8. Callover**

At this point the appeal is set down for hearing before a Judge. The number of Court days required will depend on the issues in dispute and the number of expert witnesses who will need to be called. A day may also be set aside for the parties to take the Judge to the site for an inspection. The site inspection

is not part of the evidence, but is a way for the Judge to become familiar with the land, and the surrounding areas.

## **9. Hearing**

When before the Court, the decision whether or not to approve the development is looked at afresh. That is, the Court will consider all the information and submissions that Council originally considered, and make its own decision about whether the development should be approved, refused, or approved with conditions. The Court's decision takes the place of Council's original decision.

## **10. Obtaining expert evidence**

If you are concerned that Council will not vigorously defend the developer's appeal against the decision to refuse the development, you may wish to elect to become a Co-respondent and engage your own experts (who will prepare a report which will be submitted to the other parties and to the Court) who can give evidence about the issues in the case (for example, issues might include appropriate disposal of wastewater in a sensitive water catchment; damage to rare flora and fauna, or the flood prone nature of the site).

You may care to start making some preliminary enquiries about the existence of friendly experts in your area. Beware Council may change its position in the middle of the appeal. If this would be a disaster for you, then it is best to have your own experts.

## **11. Likely costs as a Co-respondent**

The Court rules do not require that you are represented by a barrister (also called "Counsel"), thus you are able to appear on your own behalf and make your arguments to the Court (or say very little if Council is adequately addressing the issues of concern to you). Usually appellants are able to undertake most tasks in preparing the case, but need to make a significant commitment if the case is to be successful. You may wish to retain a barrister if you feel that the Council are unlikely to vigorously defend the appeal, forcing you to take more responsibility in that regard.

Depending upon whether you retain experts or a barrister, the cost of being a party to the appeal as a Co-respondent may be quite small. Your costs might include:

- Filing fees (see **Appendix 2**)
- Fees for retaining any experts (optional, but highly recommended – especially a town planner);
- Fees for engaging a barrister ('Counsel') to speak for you in Court (optional);
- Miscellaneous costs, including things like the cost of travel to and from Court for hearings, and photocopying or printing fees for making copies of your documents which need to be sent to other parties.

The major expenses you are likely to face in pursuing this matter are for experts and barristers fees. It may be that any experts will be prepared to give of their time on a voluntary basis or are willing to charge reduced fees for their services. On a normal commercial basis, we would expect an expert to charge around \$5000 for a report and a similar amount for giving evidence.

We would expect that a barrister would charge approximately \$1500 per day for preparation, conferences and conducting the hearing. A sympathetic barrister may be prepared to discount their fees and provide a capped fee for working on the case. Of course, you are able to represent yourself in court in this matter. Many community groups have been successful in court when they have been self-represented. The issue of representation can be reviewed if it does not appear that the matter will be successfully resolved by negotiation.

## **12. What if you lose?**

Other lawyers may use the threat of costs to intimidate you. This is, unfortunately, a common tactic. Basically, if you have genuine concerns about the development and have complied with the procedural steps, it is very unlikely that a Court will make a costs order against you. It is, however, always wise to seek legal advice if an application for costs is made against you.

If you consider pulling out of the appeal because of the ongoing intimidation of other lawyers you should contact the P&E Registrar, or the Queensland Law Society.

The general rule in the Planning and Environment Court is that each party to the action bears their own costs, regardless of which party 'wins' the case. However, the Court has a discretion to order a party to pay another party's legal costs if it considers that:

- Part of the proceeding has been frivolous or vexatious (ie groundless, and instituted to wrongfully delay or obstruct);
- A party has not been given reasonable notice of intention to apply for an adjournment of the proceeding;
- A party has incurred costs because the party is required to apply for an adjournment because of the conduct of another party;
- A party has incurred costs because another party has defaulted in the court's procedural requirements;
- A party has incurred costs because another party has introduced (or tried to introduce) new material;
- If the Court considers that the Council or a referral agency should have taken an active part in the proceeding and it did not do so;
- If a party does not properly discharge its responsibilities in the proceedings.

## Appendix 1

In the Planning and Environment Court  
Held at:

No

Between:

Appellant

And:

Respondent

And:           ***Name of party***

Co-respondent by  
election

### NOTICE OF ELECTION

Filed on    /    /20    .

Filed by:  
Service address:  
Phone:  
Fax:  
Email:

*Name of party* , of *address*, elects to co-respond to this *notice of appeal/originating application*

.....  
*Co-respondent*

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NOTICE OF ELECTION  
Filed on behalf of  
Form PEC-6

Name  
Address  
Phone no.  
Fax no.  
Email

Sustainable Planning Act 2009

Version 1

April 2010

## Appendix 2

Below are the fees for appeals relating to development applications lodged under SPA and under IPA. Check the Queensland Court website or contact the registry to confirm the fees are current. Bring cash or contact the registry to ask if they accept cards or personal cheques.

### For development applications lodged under SPA:

#### *Sustainable Planning Regulation 2009*

Filing notice of appeal—

(a) if there is only 1 party initiating the appeal and the party is an individual, or if there is more than 1 party initiating the appeal and they are all individuals	\$497.00
(b) otherwise	\$984.00

Filing an originating application—Planning and Environment Court Rules 2008 (the rules), rule 5—

(a) if there is only 1 applicant and the applicant is an individual, or if there is more than 1 applicant and all applicants are individuals	\$497.00
(b) otherwise	\$984.00

Issuing a certificate on final judgment, order, finding or decision

\$52.50

Filing a document (the first document), other than any subsequent document relating to the first document, for which no other fee is provided

\$75.50

Issuing a copy of a record of the court, a document or exhibit filed in the registry or reasons for judgment—

(a) first copy—each page	\$2.00
(b) maximum fee for first copy	\$56.00
(c) additional copy—each page	\$0.50
(d) maximum fee for additional copy	\$22.00
Opening or keeping open the registry after	\$409.00

hours

Searching the record in an appeal or other proceeding—for each name or file \$19.50

Attending a view

(a) for each hour or part of an hour \$87.00

(b) but not more than, for each day \$435.00

Making an appointment for assessment of a costs statement \$87.00

Assessing a costs statement—for each \$100 or part of \$100 allowed \$10.50