

Procedure in the Environment Resources & Development Court

environmental law
5
fact sheet

The aim of this guide is provide a brief outline of the workings of the Environment, Resources and Development Court to help people understand how cases they are involved with will be dealt with. The guide will be useful for people who have lawyers assisting them, as well as those people who are representing themselves.

What is the ERD Court?

The Environment, Resources and Development (ERD) Court is a specialist court created to deal with issues that arise under environment and planning legislation. The Court tends to deal mainly with development issues, but it also deals with native title, heritage, environment protection and other related issues.

The Court is made up of Judges and Commissioners. Judges are legally trained whilst Commissioners are experts in fields such as local government, environment protection, urban planning and heritage. Matters can be dealt with by just one Commissioner, or a Judge, or by the full bench (usually a Judge and two Commissioners). Normally, a full bench hears matters which raise a number of complex issues and legal points.

The Court is designed so as to simplify its procedures, to save expense to the parties and to reduce formality.

How can you use the ERD Court?

The most likely use that individuals will make of the ERD Court is to appeal against a decision of a planning authority. For example, a person may want to appeal against a local council's decision to approve what the person sees as an inappropriate or environmentally-damaging development. In addition, there are a range of other applications that an individual might make under several other environmental Acts or Regulations.

As with all Courts, there is a degree of paperwork that is needed before an appeal or other application can be made. Generally, this involves filling out forms and the payment of a filing fee. The Adelaide Registry of the Court is located in the Sir Samuel Way Building, Victoria Square and Court staff can assist you with the paperwork and procedures. There are a number of country locations of the Registry.

Procedure in the Environment Resources & Development Court

Attending a conference

Once you have completed the necessary forms, paid the filing fee and “served” copies of relevant documents on other parties (ie. given them copies), the Registry of the Court will then send you a notice informing you of the next step in the process, which is usually a conference.

Attendance at conferences is compulsory. As is the case with all other hearings in the ERD Court, you may appear personally, by representative, or by your solicitor.

A Judge or Commissioner of the Court will chair the conference proceedings, and will attempt to draw the issues out from each of the parties to ascertain whether a compromise can be reached.

When you enter the conference you should have a clear idea of what it is you are unhappy about, and what it is you want done and whether there is room for compromise.

If the conference provides no solution to the problem, the next step is the actual Court hearing of the appeal or application. At the end of the conference, the Judge or Commissioner may ask how long the parties expect the trial to take, and will then suggest a date for the hearing to commence. Where a full bench hearing is required, the matter will be placed in a “callover” list and a hearing date will be allocated in two to three weeks time.

Conferences are held in private, with only the other parties and their representatives or solicitors present.

Pre-trial procedures

Before your matter goes to the Court, there are various procedures that may or may not arise.

Callover Hearing

This is mainly an administrative procedure for the Court so that it can determine when is the most convenient time for the matter to be set down for hearing. When you attend the callover, you should consider the range of dates and times that will suit you and your witnesses to attend the Court.

For Mention Only Hearings (FMO's)

This is like a check-up hearing. The parties attend to report to the Court on the stage they are at in preparing their cases, and any compromises or agreements that have been reached. If no agreement or order is sought however, then the matter will be set down for an actual hearing, or set down for the next callover hearing.

“Further and better particulars”

The Court has power to require any party to produce to the Court, before the trial begins, any “further and better particulars” of that party’s case. In other words the Court (usually at the request of the other side) may ask for more detail, or more facts or documents that the party will be relying upon in the trial.

“Discovery”

The Court may also make an order for “discovery of documents”. This usually happens where a party is reluctant to produce certain documents to the other party or to the Court. The Court (again usually at the request of the other side) can insist that the documents be produced. This provides an opportunity for all the parties to examine and make copies of those documents.

Procedure in the Environment Resources & Development Court

Statement of Agreed Facts

It is in the interests of both the Court and the parties to keep the length of the hearing to a minimum. Sometimes there will be a number of issues and facts about which the parties are in agreement. A "statement of agreed facts" can be prepared and filed with the court before the hearing. It means the parties will not have to produce any evidence to the Court of these matters.

Pre-hearing checklist

Copy Documents

Before the trial begins, you must provide to the Court copies of all documents for each of the Judges and Commissioners sitting at the hearing, and an extra copy to be shown to the witnesses. You must also give copies to the other parties involved.

It is the responsibility of the person bringing the case to provide these documents. The copy documents should include all applications, maps, plans, letters, reports, written submissions, specifications and all other documents and relevant material that was used or related to the making of the decision appealed against.

Experts' Statements

Where you have called an expert witness, such as a town planner, or an engineer to give evidence at the hearing, and they have produced a written statement, you should provide a copy of this statement to the court and to the other parties involved. The Court rules state that it is an expectation that experts' reports will be in writing.

Preparing for a "View"

The court normally requires a "view" (or physical inspection) of the land that is the subject of the dispute at some stage during the trial. To prepare for this, you should be familiar with the land and the surrounding locality and be aware of the things that you want the Court to see on that "view".

The Hearing

Opening

At the commencement of the hearing, the person bringing the case (called the "appellant" or "applicant") normally outlines their arguments and takes the Court through the copy documents, highlighting the most important ones.

View

The Court generally undertakes a physical inspection of the land in the presence of all the parties. On the "view" it will not hear evidence but will make observations of the things brought to its attention. You may need to remember to subsequently call someone as a witness to explain particular things observed by the Court on the "view".

Evidence

Evidence before the Court can be either written or oral. Written evidence in the form of documents, plans etc. is tendered to the Court which marks it as an "exhibit". Oral evidence is given by witnesses called by each of the parties. The Court will insist that any evidence, written or oral, be directly relevant to the issues before the Court for determination.

Who goes first?

The normal rule is that the appellant or applicant goes first by presenting their case and calling any

Procedure in the Environment Resources & Development Court

witnesses they need to assist them with that presentation. The respondent then presents its case. However, when hearing an appeal by a third party (see fact sheet no. 4) the developer will be required to explain to the Court the nature of the development at the beginning of the appeal. At the conclusion of the case, both parties “sum-up” their cases by presenting final submissions or addresses to the Court. If any legal points are made, they will normally be emphasised at this stage. The Court usually “reserves its decision” which means the decision will be delivered at some time in the future (normally a couple of weeks after the hearing).

Examination of witnesses

Witnesses are called, “sworn in” and then questioned by the party who called them. The other party is then entitled to “cross-examine” that witness. The Court will often also ask questions of witnesses.

Subpoena

Sometimes there may be a witness who is reluctant to attend Court, or (in the case of Government employees) requires a “subpoena” from the Court. If you need a witness to attend, you must make an application to the Court which will then issue a summons to that person to attend. You may also have to pay any costs associated with that person attending Court.

Costs

Generally speaking, the ERD Court is a “no-cost jurisdiction”. This means that the parties bear their own costs of litigation, whether they win or lose. However, where the Court feels that a particular action has been frivolous, vexatious, or instituted for the purposes of delay or obstruction, it has power to award costs against the “guilty” party. Special costs rules may apply to cases involving the “civil enforcement” of legislation.

In some cases, costs can be awarded against an unsuccessful applicant or an applicant may be required to provide “security” to the Court for costs in the event the applicant is unsuccessful. In other cases, a party may have to pay “damages” in addition to costs if they lose. Whilst this is unlikely in “public interest” cases, it is a very important area on which proper legal advice should be sought.



The Environmental Defenders Office (SA) inc, (EDO) is a non-profit community legal centre offering free advice to individuals and groups on all matters of environmental law. The EDO operates an advisory service from its offices on 1st floor, 118 Halifax Street Adelaide on Thursday evenings between 6pm and 8pm.

Appointments are necessary and must be made by ringing 8232 7599.

Postal address: EDO, GPO Box 170 Adelaide SA 5001

This guide is not a substitute for proper legal advice. Important legal details have been omitted to provide a brief overview of this area of law. Contact the EDO or your solicitor for more detailed legal advice about your specific problem.

The research for and printing of this fact sheet has been funded by the South Australian Department for Environment, Heritage and Aboriginal Affairs.

Printed on recycled paper.

Fact sheet design and layout: John Hyland, Plan Pink Design...ph 8362 8881.