Environmental Defenders Office

Procedure in the Environment, Resources and Development Court in SA

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This factsheet provides 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. This factsheet will be useful for people who have lawyers assisting them, as well as those people who are representing themselves.

What is the Environment, Resources and Development Court?

The Environment, Resources and Development Court (**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 ERD 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 to simplify its procedures, save expenses (for the parties) and reduce formality.

Main function of the ERD Court

The ERD Court is largely utilised by individuals seeking 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.

How can I commence proceedings in the ERD?

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 on the lower floor of:

Sir Samuel Way Building
241-259 Victoria Square
Adelaide SA 5000

Court staff can assist you with the paperwork and procedures.

Visit: The Courts Administration Authority of South Australia page on Environment, Resources and Development (ERD) Court Rules & Forms to view and download forms.

Next steps

Once you have completed the necessary forms, paid the filing fee and "served" copies of relevant documents on other parties (I.e. 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 preliminary conference or hearing, normally about four weeks after lodgement.

At the preliminary conference the matter will be placed into one of three tracks:

- pending
- conference, or;
- hearing track.

Pending track

The pending track is to allow negotiations to occur between the parties and to allow time for amendments to be made and amended plans to be considered by a Development Assessment Panel. Matters assigned to the pending track will be listed for another preliminary conference at a time suitable to the Court and the parties where possible.

Conference track

A matter assigned to the conference track will be listed for a conciliation conference. The conference track allows parties to have time to talk freely about the issues in confidence and in an informal way and to find a resolution themselves, assisted by a member of the Court. Conferences are held in private, with only the other parties and their representatives or solicitors present.

The conference will be convened by the Court and usually will be chaired by a Commissioner. The Commissioner will 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.

If it is clear to the Court that there would be no useful purpose in convening a conference in a matter the Court may dispense with the conference and place the matter in the hearing track.

Hearing track

Prior to a formal court hearing, the matter will be referred to a listings conference. When you attend this conference, you should consider the range of dates and times that will suit you and your witnesses to attend the Court.

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 referred to a directions hearing and a hearing date will be allocated.

You may also encounter certain other pre-hearing procedures.

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.

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 the requested documents.

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 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.

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