Environmental Defenders Office

Appealing, Enforcing Development Approvals and Seeking Declarations

Disclaimer: *This factsheet is a guide only and is designed to give readers a plain English overview of the law. It does not replace the need for professional legal advice in individual cases. To request free initial legal advice on a public interest environmental or planning law issue, please visit our website.*

While every effort has been made to ensure the information is accurate, the EDO does not accept any responsibility for any loss or damage resulting from any error in this factsheet or use of this work.

This factsheet was last updated December 2017

What is this factsheet about?

This factsheet outlines the appeal, declaration and enforcement processes under the *Planning Act 2016* (Qld) (**Planning Act**) and *Planning and Environment Court Act 2016* (Qld) (**P&E Court Act**).

Key points

This factsheet provides information about each process, including:

- An explanation of each of these appeal and enforcement processes;
- Who is entitled to pursue each process;
- The circumstances required to seek each process;
- How proceedings are commenced and any time limits that may apply;
- Preparation for proceedings and the information required
- The likely costs involved;
- The possible outcomes

Appealing A Development Decision

Who can appeal?

An appeal can be brought in the Queensland Planning and Environment Court (**P&E Court**) against a local or state government decision by either:

- the applicant for the development (the "developer"); or
- any person who has made a written submission on particular types of development application (the "submitter").

When can a submitter bring an appeal?

Not all developments require government consent and you cannot appeal against all types of development. In order to bring an appeal, you must answer yes to all three questions below:

1. Is the development application for 'impact assessable' development?

   The Planning Act framework or the relevant local planning instruments will dictate the category of a development. You can only appeal against 'impact assessable' developments.

2. Did you lodge a valid written submission?

   You must have lodged a 'properly made submission'[1] with the local council within the public notification period for the development application.

3. Are you within the required time limit?

   If you lodged a valid submission, you have 20 business days from the date you receive the decision notice to start an appeal. An appeal is started by filing a Notice of Appeal in the P&E Court.[2]

   If the developer is appealing a decision, as a submitter you have 10 business days from the date you receive notice of the developer's appeal to apply to the P&E Court to be joined as a party using the Notice of Election form to become a 'co-respondent by election'.[3]

[1] See the definition in the *Planning Act 2016* (Qld) sch 2 (**Planning Act**).
[2] Planning Act ss 229(3)(g), 230(1).
[3] Planning Act 230(6).

What can a submitter appeal?

Any person who made a submission on an application for impact assessable development or variation request can appeal against:

- the decision to approve the application; and/or
- a condition of the development approval, or a failure to include a provision in the development approval.[4]

How do I prepare for an Appeal?

EDO has published the "The Community Litigants Handbook – Using the Planning Law to Protect the Environment". To assist with your preparation for starting or joining an appeal, it is strongly advised that you refer to this Handbook as this factsheet is a brief outline only.

What are the costs involved?

In the P&E Court there is a general rule that each party pays their own costs in planning matters.[5] This means that there is a low risk of receiving an adverse costs order requiring you to pay the other parties costs. However, the Court may still order a party to pay the costs of another party in certain circumstances, such as where a party is found to have brought proceedings simply to obstruct or delay a development, or where their grounds are found to be frivolous or vexatious, for example if grounds are found to lack any legal foundation.[6]

A costs order may include the costs of other parties' lawyers and any experts involved. The potential amount will vary from case to case, depending on factors like the complexity of a matter (e.g. number of parties, number of issues in dispute) and the relative merits of a party's argument.

Therefore, to minimise the risk of a cost order being made against you, it is important that you only proceed if your case has a reasonable chance of success. You should seek legal advice about those prospects, as your case needs to be supported by the relevant planning scheme and substantiated by evidence. As each party has an obligation to proceed in a timely manner throughout the proceedings,[7] it is also important to meet court-imposed timetables and due dates.

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[4] Planning Act sch 1, table 2, item 3.
[5] *Planning and Environment Court Act 2016* (Qld) s 59.
[6] *Planning and Environment Court Act 2016* (Qld) s 60 (**P&E Court Act**).
[7] P&E Court Act s 60(1)(i). See also s 10(2).

Seeking A Court Declaration

What is a declaration?

A declaration is a statement by a court about the law or about the rights of a party. Under the P&E Court Act, the P&E Court has a broad power to make declarations and associated orders on matters such as:[8]

- compliance with the Planning Act;
- interpretation of the Planning Act, planning instruments or guidelines; or
- the lawfulness of land use or development.

For example, the P&E Court may declare a development to be unlawful and then make an order stopping a person from continuing to carry on that development.

However, the P&E Court's power is discretionary; that means it is not required to make an order, even if an error or breach is found.[9]

Possible considerations the Court may deliberate when deciding whether the Court will make an order include:

- a person's interest in the subject-matter (i.e. is it a real interest which affects you directly and materially, or is it only an intellectual or emotional interest?);
- if there has been any delay in starting proceedings;
- if there is any practical utility in granting a declaration, or;
- if the breach of law is purely technical and causes no negative effect on the environment or the amenity of an area

Who can ask for a declaration?

Any person may bring proceedings in the P&E Court for a declaration under the P&E Court Act.[10]

What are the time limits for obtaining declarations?

There is no time limit for a community member to apply for a declaration; however, you should start proceedings as soon as possible after you become aware of the breach or error. A delay may be grounds for refusing an order, particularly when delay has negatively impacted any other party involved.

A developer may start proceedings for a declaration about whether a development application is properly made within 20 business days, and an assessment manager may start such a proceeding within 10 business days.[11] In addition, the developer or the

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[8] P&E Court Act s 11(1). See also Planning Act ss 239 and 240.
[9] *Bon Accord Pty Ltd v Brisbane City Council & Ors* [2008] QPEC 119 [173] (Rackemann DCJ).
[10] P&E Court Act s 11; Planning Act s 239.
[11] Planning Act s 240(3)(a)-(b).

responsible entity may start proceedings for a declaration about whether the proposed change to an approval is a minor change.[12]

How are declaratory proceedings commenced?

Declaratory proceedings are commenced by filing an originating application with the P&E Court Registrar and paying the relevant filing fee (refer to the Uniform Civil Procedure (Fees) Regulation 2009 sections 5AA and schedule 2A).

The application and any supporting evidence must be given to the persons who will be affected by the order(s) you seek. This will generally be the developer or the holder of a development approval, and/or the local council.

Written notice of the proceedings must also be given to the Director General of the Department of State Development, Manufacturing, Infrastructure and Planning.

Visit:	The Queensland Court's Forms page to download Form 02 – Originating Application

What are the costs involved?

The general rule that each party pays their own costs applies also to declarations.[13] However, also the Court still has the power to require that a party pays the costs of other parties for various reasons, such as delaying or obstructing a development or frivolous or vexatious grounds.[14]

Enforcing Development Offences

What is a development offence?

The Planning Act sets up certain development offences which include:[15]

- not complying with applicable codes when carrying out self-assessable development;
- carrying out development without a compliance permit;
- failing to comply with a compliance permit, including any conditions;
- carrying out assessable development without a development permit;[16]
- breaching a development approval, including any conditions;[17]

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[12] Planning Act s 241(2).
[13] P&E Court Act s 59.
[14] P&E Court Act s 60(1).
[15] Planning Act ch 5, pt 2.
[16] Planning Act s 163.
[17] Planning Act s 164.

- carrying out prohibited development;[18] and
- using premises if the use is not a lawful use.[19]

What are the consequences of committing an offence?

A person who commits an offence may be:

- subject to enforcement action by the government (which have a range of enforcement options available, such as show cause or enforcement notices);
- prosecuted by government or any person in the Magistrates Court; or
- subject to enforcement action by any person in the P&E Court.

What can you do if you think a development is in breach of the law?

1. Contact the government

If you think a development is in breach, you should report it to your local government and ask them to investigate the incidence and take action as necessary.

Queensland Government departments also have a role in enforcing some aspects of particular development approvals, so you should contact the relevant department with your concerns. For example, we recommend you contact the Department of State Development, Manufacturing, Infrastructure and Planning for any planning related matters, as well as the Department of Environment and Science if there are environmental impacts from an activity.

2. Rights to take court action if government doesn't act

If If the offence continues and you cannot persuade the local government and/or relevant state government department to take any enforcement action, for most types of matters any person can bring an offence proceeding in the Magistrates Court,[20] or start enforcement proceedings in the P&E Court.[21]

Please note that proceedings in the Magistrates Court must show a higher burden of proof, you must prove 'beyond a reasonable doubt' that an offence was committed.[22] Therefore, more evidence or more thorough evidence may be required. Moreover, a losing party in a proceeding in the Magistrates Court may be required to pay the

[18] Planning Act s 162.
[19] Planning Act s 165.
[20] Planning Act s 174. Please note that only the government can bring an action in relation to enforcement notices (s 168), applications in respect to a show cause or an enforcement notice (s 172) and false and misleading information (s 226).
[21] Planning Act s 176. Please note s 176 states that an enforcement order may be made by a Magistrate's Court. The *Planning Act 2016* (Qld) s 180(1) states that enforcement order proceedings may be started in the P&E Court and may be made by any person.
[22] *Magistrates Court Act 1921* (Qld) s 19.

winning party's legal fees.[23] This is very different to the P&E Court in which there is a general rule that each party bears their own legal fees and therefore much lower risks of an adverse costs rules.

For this reason we recommend that an interested community member seeking to take enforcement action applies for enforcement orders in the P&E Court, rather than using the power to apply to the Magistrates Court for an offence proceeding.

What are the possible outcomes in enforcement proceedings in Court?

As a member of the public choosing to start legal action in either the Magistrates Court or the P&E Court, it will depend on what you want to achieve and the circumstances of the situation. However, starting such legal action should only really be a course of last resort.

Prosecution of an offence in the Magistrates Court is usually undertaken by state or local governments; it penalises the offender for the unlawful conduct. The Planning Act also allows the Magistrates Court to make orders in place of, or in addition to, any penalty.[24] For example, a Magistrates Court may make an enforcement order for the defendant to take a stated action within a stated period.[25] Any orders might include a requirement to stop work, demolish or remove development and/or apply for development permit.

In most situations, the P&E Court will be the best venue for public interest litigants as it can make both interim (temporary) and final (permanent) enforcement orders. These may require the offending party to:

- stop any activity that is an offence;
- not start any activity that will be an offence;
- do anything necessary to stop committing an offence;
- return anything to a condition as close as possible to the condition it was in immediately before the development offence was committed; or
- do anything to comply with the Planning Act.

How are enforcement proceedings commenced?

Prosecution proceedings in the Magistrates Court are commenced by way of a complaint and summons under the *Justices Act 1886* (Qld). Any such action must be commenced

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[23] *Uniform Civil Procedure Rules* r 681. Please also note the *Magistrates Court Act 1921* (Qld) s 42ZC which states that the court may order a party to pay the costs of the other party if the claim is frivolous or vexatious, is an abuse of a process of the court or there was an unreasonable act or omission of the paying party connected with the conduct of the proceeding which caused the other party to incur costs.

[24] See for example, the Planning Act) ss 177 and 178 in relation to the powers of the Magistrate's Court. See the P&E Court Act s 14 in relation to the orders that the P&E Court can make.

[25] Planning Act s 176(1).

within one year of the offence being committed, or within one year after the offence comes to the knowledge of the person making the complaint.[26]

Enforcement proceedings in the P&E Court under the P&E Court Act are commenced by filing an originating application with the P&E Court Registrar,[27] and paying the relevant filing fee (see the Uniform Civil Procedure (Fees) Regulation 2009). The application and any supporting evidence must be served on the persons against whom the subsequent order(s) will be sought. The time limits stated above are also likely to apply for starting proceedings.

N.B.	It is strongly recommended that you do not commence legal proceedings without getting independent legal advice or assistance from the EDO.
Visit:	The Queensland Court's Forms page to download Form 02 – Originating Application

Public Access to Planning and Development Information

Where can I obtain information?

You can apply to your local government and the Department of State Development, Manufacturing, Infrastructure and Planning to inspect and purchase documents.[28] Some local governments also have online databases where development application documents can be accessed.

Most local governments provide development information via their website on a platform called 'Development.i'.

Visit:	Brisbane City Council's Development.i page to see all development application material and property information for developments/properties in Brisbane City

What kind of information can I obtain?

Documents that must be made 'available for inspection and purchase' include:

- details of development applications;
- current planning scheme and amendments; and
- decision notices and the conditions of the relevant development approval.

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[26] Planning Act s 173A(1)(a)-(b).

[27] See Form 02 on the Queensland Court's website.

[28] Planning Act s 10(2)(a) in relation to purchasing and inspecting copies of the State planning instrument. See also Planning Act s 313 in relation to keeping documents generally. The Chief Executive must also keep certain documents available for inspection and purchase according to the Planning Regulation 2017 (Qld) sch 22, pt 4, s 11.

Local government planning schemes and policies are commonly available on council websites.

You can also apply to the local government to have a planning and development certificate issued.[29] Each certificate contains increasingly detailed information about the planning requirements that apply to the site.

The three types of planning and development certificates are:

1. Limited Planning and Development Certificates;[30]
2. Standard Planning and Development Certificates;[31] and
3. Full Planning and Development Certificates.[32]

The local government or state government determines costs for public access to these certificates and, depending on which certificate you request, the government must provide it within 5, 10 or 30 business days.

Visit: The QLD Government's Information Access Application page if you are unable to obtain the information you are seeking. You may consider making an application under the *Right to Information Act 2002* (QLD) and *Information Privacy Act 2009* (QLD).

Where can I find more information?

- Visit the EDO website to read related factsheets, submissions and publications on this topic
- Visit the Development.i portal
- Visit the Planning and Environment Court Registry website

[29] Planning Act s 265.
[30] *Planning Regulation 2017* (Qld) sch 23, s 1.
[31] *Planning Regulation 2017* (Qld) sch 23, s 2.
[32] *Planning Regulation 2017* (Qld) sch 23, s 3.