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|  | **Planning and Environment Division** |

**Planning and Environment Division Guidelines – Consent Orders**

**How to request a Consent Order in the Planning and Environment Division**

**Purpose**

The main purpose of these guidelines is to assist parties in a proceeding in the Tribunal’s Planning and Environment Division (PED) who agree to settle the proceeding ie on how they would like the Tribunal to finally dispose of the proceeding.

**Practice note PNVCAT01**

In paragraphs 32 to 40 of the Tribunal’s practice note PNVCAT01 (Common procedures), there is more information about consent order procedures.

**Final or procedural orders**

A consent order request may be for procedural orders or final orders in a proceeding.

These guidelines focus on final orders for the PEDs most common applications relating to applications concerning planning permit applications and enforcement order applications.

For more information about requesting procedural consent orders in PED applications, see the Tribunal’s practice note PNPE6 (Practice day).

**Withdrawal of an application**

If an applicant decides to withdraw an application, an applicant should request leave to withdraw the application and should not request a consent order, unless there is a need to make specific orders about costs or other relevant matters. For more information about withdrawing an application, see [Guide to Withdrawal of applications in the Planning and Environment Division](https://www.vcat.vic.gov.au/resources/guide-to-withdrawal-of-applications-in-the-planning-and-environment-list).

**The Tribunal’s powers**

The Tribunal may make the necessary orders to give effect to the settlement. Later in these guidelines, we refer to some of the circumstances in which the Tribunal may refuse to make the orders.

**How to make a request and who should make it**

If agreement is reached, any party to a proceeding may file a consent order request in that proceeding. In practice, most requests are made, in an application involving a planning permit application, by either the responsible authority or the party who is the permit applicant. The request must be made, in writing, to the Principal Registrar of the Tribunal.

The request should explain why the orders are sought and/or what they are intended to achieve. In particular, if a responsible authority’s or referral authority’s consent reverses its original decision (eg it consents to the grant of a permit when it originally decided to refuse or oppose the grant of a permit), the responsible authority or referral authority must include its reasons for reversing its original decision.

**Who must sign a consent order request?**

All the parties must sign a consent order request.

The parties should obtain an up to date party list from the Tribunal to ensure all parties have signed. Parties may not realise that a referral authority is a party.

A party’s representative may only sign for the party if the representative is nominated on a document previously filed with the Tribunal.

An objector who has filed and served a statement of grounds that states the objector does not intend to participate in the hearing of an application is not a party and the consent order request does not need to include that objector’s signature.

**Importance of exact terms and agreement**

The exact terms of the orders must be included and all parties must agree to those terms. If the consent orders refer to other documents (eg plans), there must be evidence that all the parties agree to those documents.

If the parties have agreed to the grant of a planning permit subject to conditions, the preferred form of the order is to include the conditions in an appendix. If one of the conditions refers to specified amended plans or to specified changes to amended plans, it must be clear that the parties have agreed to the amended plans. If a condition refers to specified amended plans, those plans must be included in the request.

**Costs**

The consent order finally disposing of a proceeding should not leave costs issues unresolved.

If the parties agree that the costs of one or more party must be paid by another party or parties, the consent order request must include orders relating to the payment of those costs. If the parties agree that parties are to bear their own costs, the consent order request must include orders that there is no order as to costs.

**Amended plans**

If an applicant applies to amend a permit application by substituting plans before a compulsory conference or hearing, the Tribunal’s practice note PNPE9 (Amendment of Plans and Applications) applies. This means that notice is given to those to whom notice of the permit application was originally given and those who objected to the responsible authority against the grant of a permit, as well as the parties.

A consent order request may include the grant of a planning permit based on amended plans. As well as the need for evidence that all parties have agreed to the amended plans, the consent order request must be accompanied by a statement of changes from the plans considered by the responsible authority when it made its decision. If the Tribunal considers additional notice must be given because of the nature and scope of the changes in the amended plans, the Tribunal may refuse to make the consent orders and may require the permit applicant to first apply to amend the plans in accordance with practice note PNPE9.

**When to make a request**

A request should be made as soon as practicable before the hearing or compulsory conference. It should be submitted **no later than 12 noon two business days** before the scheduled compulsory conference or hearing. In most cases, this will give the Tribunal enough time to decide whether to make the orders without a hearing or to decide to refuse to make the orders or to decide that the consent orders need to be discussed and clarified at the compulsory conference or hearing before they are determined.

Parties may reach agreement less than two business days before a compulsory conference or hearing. The request may still be submitted but there may be insufficient time for the Tribunal to consider the request and it more likely that the parties will need to attend the compulsory conference or hearing.

**Will a hearing be required?**

The orders may be made without a hearing. If the Tribunal decides to make the orders and the compulsory conference or final hearing is still some time away, the parties will receive the order in the usual way.

However, if the compulsory conference or final hearing is imminent, the Tribunal’s registry will contact the party requesting the orders as soon as a member has decided the orders should be made. That party may be required to notify the other parties that the compulsory conference or final hearing has been vacated.

However, if the Tribunal considers the terms of the consent orders are unclear or there is insufficient time to consider the request before the compulsory conference or hearing, the Tribunal’s registry may contact the parties to inform them their attendance at the compulsory conference or final hearing is required so that they can explain the request to the Tribunal and answer any questions the Tribunal member may have.

If the parties do not receive a response from the Tribunal to the consent order request before the compulsory conference or final hearing, the parties must attend the compulsory conference or final hearing.

**May the Tribunal make the requested orders with modifications?**

It is not uncommon for a consent order request to contain typographical, grammatical or spelling errors. Orders may otherwise be poorly expressed. The Tribunal has preferred forms of orders in particular circumstances. If a consent order request requires correction or amendment, the Tribunal may make those changes before making the orders. It may do so without first informing the parties. It will only do so if it is satisfied that the changes do not disturb the substance of the parties’ agreement.

If the Tribunal considers it necessary or desirable to consult the parties about changes to the orders that the Tribunal considers should be made, the Tribunal will seek the views of the parties about the changes before the consent order request is determined.

**Cancelling a compulsory conference or hearing**

Do not assume that the filing of a consent order request will result in the compulsory conference or hearing being cancelled or vacated. A compulsory conference or hearing is only cancelled or vacated by the Tribunal’s direction or order.

**Refusal of a consent order request**

An agreement between all the parties to consent orders does not guarantee the Tribunal will make those orders. Just as the Tribunal may make consent orders without a hearing, it may refuse to make consent orders with or without a hearing. The Tribunal will give reasons for a refusal. The Tribunal will aim to make that decision as soon as possible so that the parties have time to consider making a fresh consent order request that overcomes the reasons for refusal.

If the compulsory conference or hearing is imminent, the Tribunal may decide to use the compulsory conference or hearing to inform the parties of the Tribunal’s concerns with the making of the consent orders. If there are technical defects, the defects may be able to be resolved at the compulsory conference or hearing and the outcome may be the making of the consent orders but with amendments agreed with the parties.

Alternatively, the Tribunal may refer the consent order request to a practice day hearing for further consideration, particularly if there is time to do so before the compulsory conference or hearing.

**Why a consent order request might be refused**

A consent order request might be refused for a number of reasons. Some reasons may mean the parties could rectify the consent order request without difficulty. Some common examples of refusing a consent order request are as follows.

*Lack of clarity*

* A request may be refused if it is unclear what the parties have agreed. The terms may be vague or inconsistent. There may be obvious gaps and words missing. The Tribunal will not assume important words that may be missing. There may be contradictions or disparities between agreed conditions. If the parties agree to the grant of a permit based on amended plans, the references to the plans in the permit may not match the plans themselves eg in dates or revision numbers.

*Missing documents*

* A request may be refused if the parties have agreed to the grant of a permit based on amended plans but the plans have not been submitted with the consent order request. Similarly, a request may be refused if the parties have agreed to the making of an enforcement order that requires the land to be restored in accordance with plan or document but that plan or document has not been filed with the consent order request.

*Legal error*

* A request may be refused if the consent orders are infected with legal error.
* Example 1: The consent orders grant a planning permit for a use or development of land that is prohibited under the relevant planning scheme.
* Example 2: The consent orders make an enforcement order in respect of an erroneous contravention, such as failure to obtain permission to demolish a building when no permission was, in fact, required to demolish the building.
* Example 3: The consent orders include a permit condition that allows or requires additional works (eg removal of vegetation) if a permit is required for, and has been neither sought nor granted for, those works.
* Example 4: The grant of permit in a consent order fails to include a condition that the planning scheme states must be included or the permit includes a condition in conflict with a condition that the planning scheme states must be included.
* Example 5: A consent order in relation to a conditions review modifies conditions that are not subject of the conditions review.

This guideline is not the place to refer to the law relating to the validity of permit conditions but parties may need to consider that law in some instances before filing the consent order request.

*All the parties have not agreed*

* A request will be refused if all the parties have not agreed to the consent orders. If a party is a group of persons represented by a lead person, that person must agree to a consent order. In the case of two or more objector applications against the decision to grant a permit, all applicants must agree. If a referral authority is a party (for example, if it has filed a statement of grounds), that referral authority must agree to the consent order. If a party is two persons (eg spouses or partners), each spouse or partner must agree. The representative of a party (other than the responsible authority or a public authority) cannot agree if the party has not nominated the representative in a document filed with the Tribunal.

*Additional notice required*

* A request may be refused if the nature and effect of the consent order may affect other persons who are not parties to the proceeding and to whom notice should be given. Earlier in these guidelines there is reference to consent orders for the grant of a permit in relation to amended plans and to the possible need to give notice of the amended plans in accordance with practice note PNPE9. If the Tribunal requires the permit applicant to give notice of amended plans, notice must be given before the request is considered further.

*Changes to use or development that results in new requirements*

* A request may be refused if a permit agreed to be granted by the parties allows a modified use or development if the modifications raise questions about new requirements.
* Example 1: The responsible authority may have correctly decided that a cultural heritage management plan is not required for the activity in the application when it made its original decision. However, if the modified use or development in consent orders would require a cultural heritage management plan (eg the activity area location is moved from outside 200 metres from a relevant waterway to within 200 metres of the waterway), the consent order request must include an approved cultural heritage management plan or a certified preliminary Aboriginal heritage test.
* Example 2: If the modified use or development in a permit granted under consent orders would result in a breach of a registered restrictive covenant, the Tribunal could not grant the consent order.[[1]](#footnote-1)

**Consent orders for particular types of applications**

The following part of the guidelines relates to consent order requests for particular types of applications. These are the more common applications for which the Tribunal receives consent order requests for final orders.

1. **An application under s 77 or s 82 of the *Planning and Environment Act 1987* and the parties agree to the grant of a permit**

The precise wording of what the permit allows must be included. The wording must reflect the reasons why a permit is required under the relevant planning scheme.

The precise wording of all permit conditions or the variations to the permit as set out in the notice of decision must be included.

If the parties’ consent is based on specified amended plans, the name of the person who (or the organisation that) prepared the plans, the drawing numbers, the version numbers (if any) and dates should be included in the condition. A copy of those plans must be included with the consent order request. A statement of the changes in the amended plans from the plans considered when the responsible authority decided the application must be included.

See Sample Consent Orders 1 & 2

1. **An application under s 72, s 87 or s 87A of the *Planning and Environment Act 1987* and the parties agree to the grant of an amendment to a permit, or an application under s 80 of the *Planning and Environment Act 1987* and the parties agree to a modified permit**

The precise wording of any changes to what the permit allows must be included.

The precise wording of all amendments or modifications to permit conditions must be included.

If the parties’ consent is based on specified amended plans, the name of the person who (or the organisation that) prepared the plans, the drawing numbers, the version numbers (if any) and dates must be included in the condition. A copy of those plans must be included with the consent order request. A statement of the changes in the amended plans from the plans considered when the responsible authority decided the application (for a s 72 application) or submitted with the application (for a s 87 or s 87 application) must be included.

The precise changes that must be made to endorsed plans in any direction that such amended plans be endorsed must be included.

See Sample Consent Orders 3, 4 & 5

1. **An application under s 149 of the *Planning and Environment Act 1987* and the parties agree to the approval of a plan or other document under a condition of the permit or under a provision of a planning scheme**

A copy of the plan or document must be included.

If the parties’ consent is based on a plan or other document that includes changes to the plan or document in the application, a statement of the changes in the amended plans should be included.

See Sample Consent Order 6

1. **An application under s 114 of the *Planning and Environment Act 1987* and the parties agree to the making of an enforcement order**

The precise wording of the contravention must be included (e.g. “the demolition of a building without a permit contrary to clause 43.01 of the *ABC Planning Scheme*”).

The full and precise terms of the enforcement order must be included, including the full names of all persons against whom it is made and what those persons are required to do and by what date having regard to s 119 (a) of the *Planning and Environment Act 1987*.

See Sample Consent Order 7

1. **An application under s 81(1) of the *Planning and Environment Act 1987* and the parties agree to extend a permit**

If relevant, the extended date by which a use under the permit must start must be included.

If relevant, the extended date by which a development or a stage of it under the permit must start must be included.

If relevant, the extended date by which a development or a stage of it under the permit must be completed must be included.

If relevant, the extended date by which a plan under the *Subdivision Act 1988* must be certified must be included.

See Sample Consent Order 8

See Planning and Environment consent orders checklist and samples.

**CHECKLIST**

**Is there agreement?**

Do all the parties agree about the way in which it is proposed to settle the application?

Have all the parties agreed on the exact wording of the proposed consent order?

Have all the parties signed a document confirming their agreement to the exact wording of a proposed consent order?

Are the terms of the consent order and matters agreed to lawful and appropriate to the nature of the proceeding before the Tribunal and the relevant planning scheme and/or sections of the *Planning and Environment Act 1987*?

**What must be submitted to the Tribunal**

When the above matters are completed, one party may submit the request for a consent order to the Tribunal for consideration. The request must be in writing, preferably by email. Please ensure that you include the following:

* The Tribunal reference number.
* If relevant, the planning permit application number or permit number.
* Hard and electronic (Microsoft Word) copies of the consent order. If the consent order provides for the grant of a planning permit subject to conditions, the conditions should be formatted in accordance with the Tribunal’s requirements.
* If relevant, a copy of any amended plan(s) being referred to in the consent order, including a statement of changes they contain.
* Written evidence that all parties accept the exact terms of the consent order. Generally it will be sufficient if the name of each party is typed or printed on the document and each party or its representative as disclosed on the Tribunal’s file has signed the document adjacent to their name. Alternatively, a separate and identical copy of the consent orders signed by each party should be submitted by each party.
* Send your request for a consent order, permit conditions and any other applicable documents by email to VCAT at admin@vcat.vic.gov.au to assist the Tribunal to prepare an order if the terms are acceptable. In the email subject line please include the VCAT reference number and the words ‘Consent Order Request’.
1. *Planning and Environment Act 1987* s 61(4). [↑](#footnote-ref-1)