



Land and Environment Court

of New South Wales

CONCILIATION CONFERENCE POLICY

Commencement

1. This policy commences on 27 March 2017. It replaces the Conciliation Conference Policy dated 1 November 2013.

Purpose

2. The purpose of the policy is to guide the conduct of conciliation conferences in certain matters in Classes 1 and 2 of the Court's jurisdiction.

Application

3. The policy applies to:
 - Conciliation conferences (including site inspections and any subsequent hearings) under s 34 of the *Land and Environment Court Act 1979* (the Court Act) and
 - Conciliation conferences (including site inspections and any subsequent hearings) for residential developments dealt with under s 34AA of the Court Act.

Commencement Arrangements

4. A conciliation conference within the scope of this policy will normally commence with a site inspection starting at 9.30am. If the location of the site requires longer than normal travel times to be reached or there is agreement between the Court and the parties that a time other than 9.30am is appropriate, then another commencement time may be set.

Nature of the site inspection process

5. Although a site inspection as part of a conciliation conference is carried out in a less formal manner than proceedings in court, it is nevertheless carried out as part of the court's statutory functions. As a consequence, usual forms of address and conduct to a court member in court should be followed.

The introductory role of the parties

6. At the site inspection, the legal representative or agent of each party is to introduce themselves to the Commissioner conducting the conciliation conference, the other party and other persons attending the site inspection.

The introductory role of the Court

7. The Commissioner will make an introductory statement to the parties and other attendees explaining:
 - who constitutes the Court to conduct the conciliation conference;
 - the reason for the site inspection;
 - the nature of the conciliation process involved (whether under s 34 or s 34AA of the Court Act);
 - the manner in which the conciliation conference, including the site inspection, will be conducted (including the limits and forms of participation by residents or other observers); and
 - the future conduct of the matter after the site inspection.
8. For s 34 conciliation conferences, the Commissioner will explain the options that are available for determining the matter if conciliation is unsuccessful (including that the parties consent to the Commissioner disposing of the matter with or without a hearing or that there might a further hearing before another Commissioner where there will be an opportunity for non-expert evidence to be given on site). For s 34AA conciliation conferences, the Commissioner will explain that, if conciliation is unsuccessful, that Commissioner will be determining the matter.
9. The areas to be visited and the order in which the areas are to be visited on the site inspection should be discussed with the parties prior to the start of the site inspection.

Resident and other lay submissions

10. The council and the applicant are to prepare a list of local residents and other non-expert participants who they wish to ask to make submissions on-site. This list is to be filed in the Court and served on the other party seven days prior to the hearing. The list should include any reference to relevant written submissions each person made to the council and contained in any documents to be discussed during the conciliation phase or proposed to be tendered as part of the proceedings if the matter proceeds to determination. If no submission has been made to the council, a brief summary of the submission that is expected to be given is to be provided, preferably prior to the site inspection.
11. A person making a submission is to provide their full name and address when speaking on-site. To provide for the "just, quick and cheap" disposal of the proceedings, the number of persons speaking on-site should be limited. In most circumstances, a maximum of six persons should be asked to make a submission on-site. It is sufficient for only one person per household to make a submission to the Court. Preference should be given to those residents directly affected by a proposed development, such as those living adjoining or directly opposite the site of the development. If there are contentions that extend beyond the immediate area of the site, such as impacts on the character of the area or wider traffic implications, then a representative person raising this contention should make a submission on-site.
12. The council is to ensure that:
 - People who made submissions to the council are advised of the time of the site inspection so they have the opportunity to ask the council if they can make a submission on-site for consideration by the parties during the conciliation phase.
 - People who made submissions to the council are also advised that, at the conclusion of any submissions made on site, the parties will be undertaking confidential conciliation discussions facilitated by the Commissioner and that participation in those discussions is limited to the parties (including their legal representatives and experts).
 - People who made submissions to the council have a full understanding of the proposal (including recent amendments) so that any concerns expressed on-site are relevant.
 - Proposed submitters understand their obligation to the Court is to provide their submission in a truthful and helpful manner as it may subsequently become evidence.
 - Proposed submitters understand that while their submission is to be given on-site, if their submission becomes evidence, it will have the same effect as if it was given in a courtroom.

- Where written submissions have been prepared, on-site oral submissions should address only the main points of concern. The full text of the submissions can be made available during the conciliation phase and subsequently tendered by the council as part of any determination phase of the proceedings.
 - Where a written submission has been prepared and submitted to the council by a person on behalf of the owner of a property, such as an architect or town planner, that person may address the Court on the contents of the written submission. Such submissions are not expert evidence in the proceedings.
 - Where one specific issue has been addressed in detail by one submitter, it is not necessary for each subsequent submitter to address in full the same issue. It is sufficient if the subsequent submitters acknowledge that they hold similar views to any previous submitter who has spoken on that issue.
 - When people are making their submissions, there should be no interruptions or interjections so that those attending the site inspection can fully understand the matters raised by the submitter.
 - The lay submitters understand that their opportunity to speak is limited to their formal presentation and it is not appropriate that further comments be made during the site inspection unless requested by the Commissioner, agreed by the parties or as part of an explanation of their submission, for example, from their property if their submission was made elsewhere.
 - The submitters understand that they may be questioned on their submission.
 - The council has the contact details of any submitter who has expressed interest in attending any hearing that may be held if the conciliation conference is terminated, so that the council can contact those persons advising them of the time and venue of the hearing.
13. An applicant who proposes to ask local residents or other non-expert participants to speak on site is to ensure that it and those persons also comply with the requirements of paragraph 10.
14. Where submitters speak on-site (or at an alternative location if required), notes are to be taken by each party or their legal representatives or agents and an agreed summary can be tendered to the Court in the event the matter proceeds to hearing and the parties consent to the Court determining the matter on the basis of the submissions made on site at the conciliation conference.

Expert evidence

15. Unless excused, the parties are to ensure that any expert who has prepared evidence for the proceedings is available to attend the site inspection, conciliation conference and any subsequent hearing.

Documentary material

16. A party wishing to make documents available at the site inspection is to have copies available for the Court and the other party. The Court will not necessarily bring all documents filed in the Registry of the Court to the site inspection except where a party has given three working days' notice to the Court that the document is required at the site inspection.
17. If a document prepared for the purposes of the conciliation conference is to be provided to the conciliating Commissioner prior to the commencement of the conciliation conference or during any adjournment of it, it should be lodged at the registry or by post in a sealed envelope with the file number and date of the conciliation conference, marked for attention of the Commissioner presiding at the conciliation conference.
18. If an applicant for development consent intends to provide amended plans or additional information to the respondent for their consideration at the conciliation, those amended plans or the additional information should be provided 14 days before the conciliation conference or by such other time as the Court directs.
19. The respondent should provide to the applicant 7 days before the conciliation conference or by such other time as the Court directs, any response to the amended plans or additional information, as well as any draft without prejudice conditions that the respondent seeks to have imposed on a development consent or other approval, or modification of a consent or other approval, that might be agreed to be issued at the conciliation conference.

Access to relevant properties

20. The parties are to make every endeavour to make access available to all relevant properties to allow the Court to understand the issues in the proceedings. The applicant is to ensure that the site of the appeal is available for inspection. Where there are lay submitters and where the council believes the proposed development will affect a submitter's property, then the council should make every endeavour to provide access to the property. The Court will limit inspections to those properties that are likely to experience a direct impact from the proposed development.
21. In some circumstances, internal access to properties may be restricted in number and confined to the relevant experts on the contentions relevant to

the particular property and the parties and their legal representatives or agents.

22. The Court has no power to allow persons to enter onto private property if the owner of that property objects to any person entering their property. Where access is to be denied to a private property, the parties are to advise the Commissioner prior to the commencement of the site inspection.

Assessment of impacts

23. The parties are to provide the necessary aids for the Court to fully assess the impact of a proposed development. This may involve the following:
- the erection of a temporary frame to identify the outline of a proposed building to assess view impacts;
 - the pegging out of a proposed building to assess the impact on adjoining properties;
 - a height pole where issues of height are raised; and
 - survey details for existing, nearby and other prominent features to allow an assessment of the relationship and height of a proposed development with adjoining features.
24. There should be no dispute at the site inspection over the accuracy of such aids. In the event of a dispute, it may be necessary for a Registered Surveyor to certify the accuracy of any aids prior to the site inspection. Any aids used to assess the impact of a proposed development should be in place in sufficient time to allow the experts to consider the impacts prior to the commencement of the site inspection.

Site location

25. In rural or remote locations, the Court is to be provided with adequate information to locate the site. Maps are preferred and should be provided three working days prior to the hearing. If the site has more than one frontage or is large, the location for the start of the site inspection should be identified. Where a site is not readily accessible, arrangements are to be made to meet in a convenient and identifiable location before travelling to the site.

Special requirements

26. The Court is to be advised, three working days before the site inspection, if there are special site requirements, such as walking boots, protective clothing, hard hat etc.

Safe site requirements

27. The applicant is to ensure that the site is suitable for inspection and the Acts and Regulations administered by Workcover New South Wales are complied with.

On-site facilities

28. Where the conciliation conference and any subsequent hearing is to be conducted on-site or where the site inspection is likely to take considerable time, the Court and parties should have access to a reasonable range of facilities, such as:

- toilet;
- shelter;
- sufficient area to provide enough tables and chairs to allow the parties and the Court to conduct the hearing or discuss the contentions including an area for persons not party to the appeal who may attend the hearing following termination of a conciliation conference if the matter proceeds to a hearing forthwith;
- tables which are sufficiently large to provide adequate workspace having regard to the documentation likely to be provided, including sufficient area for plans to be laid out; and
- water, tea or coffee.

Alternative location

29. A conciliation conference and any subsequent hearing may be held at an alternative location to the site of the proposed development where the Court considers that:

- it would be unfair to the interests of one or more of the parties to hold the conciliation conference and any subsequent hearing at the site of the proposed development;
- the lack of facilities at the site of the proposed development makes it impractical to hold the on-site conference there;
- the particular weather conditions on the day of the on-site conference make it impractical to hold the on-site conference there; or
- if there is any likelihood that extraneous noise from sources such as traffic, aircraft or construction activities may make hearing difficult during the site inspection (particularly if hearing what is being said is likely to be difficult for resident and other lay submitters during the initial submissions period or during any post conciliation hearing).

30. In these circumstances, the parties are to confer and agree on, or in the absence of an agreement, the Court may direct a suitable convenient alternative location where the conciliation conference and any subsequent hearing are to take place immediately following the site inspection.

Giving effect to a conciliation agreement

31. If the parties reach agreement during the conciliation phase as to the terms of a decision in the proceedings that would be acceptable to the parties, the Commissioner is to dispose of the proceedings in accordance with the decision (provided only that the Commissioner is satisfied that the decision is one that the Court could have made in the proper exercise of its functions).
32. If the agreement requires preparation of documents such as amended plans and revised conditions of consent to reflect the terms of the decision agreed, the Commissioner will set a timetable for the preparation of the documents. The conciliation conference will be adjourned to a date and time to accommodate the timetable and orders would ordinarily be made in chambers to give effect to the agreement if the timetable was observed (and the resumed conference cancelled as a result).

Adjournment of conciliation conferences

33. A conciliation conference is to be adjourned to a time and date fixed in consultation with the Registrar only if the Commissioner is satisfied that there is a good reason to do so (s 34(6)). Adjournments will usually only be granted in circumstances where the parties have reached an agreement in principle and where a short adjournment is required for documents (including plans and conditions) to be prepared to finalise the agreement.
34. Adjournments are not usually appropriate where either of the parties request time to consider their position or obtain advice.
35. If an adjournment is given, the conciliation may be listed after 4pm on a future date not more than 3 weeks after the conciliation conference. The Commissioner may conduct the adjourned conciliation by telephone or by requiring the parties to attend in person. If the time or date of the listing changes due to other duties of the Commissioner, the parties will be notified in writing by email.

Return of material at the conclusion of the conciliation phase

36. If the conciliation phase does not result in an agreement between the parties and the conciliating Commissioner terminates the conciliation conference, the Commissioner will return all documents provided to the conciliating Commissioner to the relevant party.

The determinative phase

37. If the conciliation phase does not result in an agreement between the parties, the conciliating Commissioner may with the consent of the parties (for s 34 conciliation conferences) and must (for s 34AA conciliation conferences) proceed to determine the matter. If the parties consent, the Commissioner may determine the matter on the basis of what occurred in the conciliation conference. Otherwise, the Commissioner is to determine the matter following a hearing held forthwith after the termination of the conciliation conference. The normal hearing processes for either an on-site hearing or in court hearing will apply as appropriate.

Giving and publishing the decision

38. If the Commissioner determines the matter, the Commissioner will either deliver orally the decision at the conclusion of the hearing (an ex tempore decision) or reserve the decision to be delivered at a later time to be advised.
39. In the case of residential developments dealt with under s 34AA of the Court Act, the Commissioner is expected to give an ex tempore decision but has the right to reserve the decision if the circumstances warrant this course in the Commissioner's opinion.
40. Any orally delivered decision will be recorded and transcribed and a copy provided to the parties. All decisions will be published on Caselaw.

***The Honourable Justice Brian J Preston
Chief Judge***

22 March 2017