ENVIRONMENT AND PLANNING LAW ASSOCIATION CONFERENCE BYRON BAY 18.10.08

The keys to effective pre trial and hearing preparation and presentation of merit appeals - Section 34 Conciliation Conferences.

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Section 34 - framework

1 Conciliation is one of the dispute resolution processes offered by the Land and Environment Court as a way to achieve just, quick and cheap resolution of disputes as well as ownership of the outcome by the parties.

2 Conciliation is available under s34 of the *Land and Environment Court Act 1979* for Class 1-3 appeals. Section 34 provides a combined or hybrid system which involves first conciliation and then, if the parties agree, adjudication.

3 This paper will discuss s34 conciliation conferences conducted by the Court for class 1 appeals and the keys to successful preparation and presentation. It relies heavily on personal experience and on papers presented by Chief Justice Preston which are available on the Court's website and have been published as follows:

(a) "Conciliation in the Land and Environment Court of New South Wales: history, nature and benefits" (2007) 23 *Local Government Law Journal* 110

(b) "The Land and Environment Court of New South Wales: Moving towards a multi-door Courthouse – Part I" (2008) 19 *Alternative Dispute Resolution Journal* 72

(c) "The Land and Environment Court of New South Wales: Moving towards a multi-door Courthouse – Part II" (2008) 19 *Alternative Dispute Resolution Journal* 144

4 Conciliation is:

> a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator) identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement.

> The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the parties to reach an agreement.[1]

5 The definition of conciliation can involve the conciliator undertaking an advisory role, however, in a hybrid process, "where the transition from conciliation to adjudication is dependent upon the agreement of the parties, a degree of reticence in providing advice may be justifiable in order not to jeopardise the prospects of all parties agreeing to the conciliator becoming an adjudicator. The provision of advice by a conciliator favouring one party's position may be perceived by other parties as evidence of a pre-disposition towards that party and may accordingly lessen the prospects of the other parties' agreeing to the conciliator making an adjudication of the dispute."[2]

6 In the conciliation phase of a s34 conference, the Commissioner utilises their technical expertise to facilitate negotiation between the parties to move towards an agreement on the issues in dispute. [3]

7 Recent legislative amendments to s34 recognise the duty of each party to participate in good faith in the conciliation conference.[4] This is a key element to the parties being able to move towards an agreement and involves having sufficient instructions and delegations to engage in meaningful conciliation at the conference. It is important to understand that there are generally two parties to a class 1 appeal: the applicant and the council. While the concerns of residents are a relevant consideration they are not a party to the appeal. It is important that council has authority to

[1] National Alternative Dispute Resolution Advisory Council (NADRAC, *Dispute Resolution Terms* (2003) p5.
[2] Preston BJ, "Conciliation in the Land and Environment Court of New South Wales: history, nature and benefits" (2007) 13 *Local Government Law Journal* 110 at 123.
[3] *Land and Environment Court Act 1979* (NSW) s34(2).
[4] *Land and Environment Court Act 1979* (NSW) s34(1A).

enter into an agreement if its contentions are resolved, despite the concerns of residents not being satisfied.

8 If the parties reach agreement, the Commissioner must dispose of the proceedings in accordance with the agreement, provided that it is a decision that the Court could have made in the proper exercise of its functions.[5] "This does not require the Commissioner to determine whether the decision is one which the Commissioner "would have" made in the proper exercise of the Court's functions, rather that it is one that the Commissioner "could have" made in the proper exercise of the functions. It is a check on the legality of the agreement, not its planning or environmental acceptability". [6]

9 Alternatively, if the parties are not able to reach agreement, they can allow the Commissioner to adjudicate and dispose of the proceedings.[7] The Commissioner's role then changes from one of conciliation to one of adjudication. Only with the agreement of the parties can information adduced during the conciliation phase be admissible in the adjudication phase. [8] This has particular implications if a conference is adjourned, for example for amended plans, and upon resumption proceeds to adjudication. The opinions of residents heard on site and the site visit itself need to be expressly included, if they are to be considered in the hearing.

10 If the parties do not reach a decision through conciliation or do not agree to the Commissioner determining the appeal, the matter is referred back to callover to obtain a hearing date before another Commissioner. In this situation the conciliation Commissioner writes a report setting out the facts and the issues that remain in dispute between the parties. [9] If the matter is to be heard by another Commissioner there are again implications for

[5] *Land and Environment Court Act 1979* (NSW) s34(3).
[6] Preston BJ, "Conciliation in the Land and Environment Court of New South Wales: history, nature and benefits" (2007) 13 *Local Government Law Journal* 110 at 124.
[7] *Land and Environment Court Act 1979* (NSW) s34(4)(b).
[8] *Land and Environment Court Act 1979* (NSW) s34(12).

matters such as resident and expert evidence and the site visit that may need to be heard and revisited by the Commissioner at the hearing.

11 If the parties agree, the same Commissioner may preside over the subsequent hearing[10], but this is subject to allocation by the Chief Judge.

Section 34 - preparation and presentation

12 The Court's *Practice Note – Class 1 Development Appeals,* effective 14 May 2007 (the Practice Note) establishes the steps to be undertaken to prepare for an appeal. This requires parties, in preparation for the first directions hearing, to complete an information sheet[11] which asks:

> 3. Is there any reason for the proceedings not to be fixed for a preliminary conference under s34 of the *Land and Environment Court Act 1979, is so, provide reasons [point form only].*

13 There is a presumption that the matter will be referred to conciliation, unless the parties demonstrate a good reason to the contrary.[12] Normally, for short matters the proceedings will be fixed before the Duty Commissioner on the next available Friday. For other matters, the conference will be fixed within 14 days, subject to availability of the Court.[13]

14 It is important that matters are set down early to reduce costs, delays and intransigence of the parties, However, it is also important that conferences proceed with adequate information. To this end the Practice Note requires that before the first directions hearing, the parties are to complete the information sheet at Sch E, the applicant is to ensure that plans satisfy the requirements in Sch A,[14] and the council is to provide access to relevant

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[9] *Land and Environment Court Act 1979* (NSW) s34(4)(a).
[10] *Land and Environment Court Act 1979* (NSW) s34(13).
[11] *Land and Environment Court of New South Wales, Practice Note - Class 1 Development Appeals,* Sch E
[12] Preston BJ, "The Land and Environment Court of New South Wales: Moving towards a multi-door Courthouse - Part II" (2008) 19 *Alternative Dispute Resolution Journal* 144 at 149.
[13] *Land and Environment Court of New South Wales, Practice Note - Class 1 Development Appeals* at [14].
[14] *Land and Environment Court of New South Wales, Practice Note - Class 1 Development Appeals,* at [6].

information[15] and to file and serve a statement of facts and contentions in accordance with Sch B.[16]

15 *Practice Note - Class 1, 2 and 3 Miscellaneous Appeals* has similar requirements for the provision of information prior to the first directions hearing.

16 The Court has also issued an Explanatory Note which clarifies aspects of the process. Firstly, that it is not "preliminary". Secondly, that parties should be prepared and have sufficient instructions and authority to engage in meaningful conciliation. Thirdly, that parties should consider before the first directions hearing, whether, if they are not able to reach an agreement themselves, they can still agree to the Commissioner disposing of the proceedings by adjudication, either with or without a further hearing. The parties should have draft minutes of order prepared to enable the matter to proceed, if agreed, these would normally include draft conditions of approval.[17]

17 If the Commissioner is to adjudicate and determine the appeal it is important that adequate information to assess the contentions in dispute is provided. The degree of information will depend upon the complexity of the contention. Simple matters such as setback at the street frontage are easily discernable from observation on site. For other matters, such as issues relating to height or bulk, the information provided in support of the application and the council report and/or the presence of the applicant's and the council's planner to answer questions and provide facts may be adequate information to determine the issue. These matters can probably proceed to adjudication without a further hearing.

[15] *Land and Environment Court of New South Wales, Practice Note - Class 1 Development Appeals*, at [11].
[16] *Land and Environment Court of New South Wales, Practice Note - Class 1 Development Appeals*, at [8].
[17] Preston BJ, "The Land and Environment Court of New South Wales: Moving towards a multi-door Courthouse - Part II" (2008) 19 *Alternative Dispute Resolution Journal* 144 at 152.

18 More complex or technical issues, such as noise impacts will probably require expert evidence. If the matter proceeds to adjudication, this may need a further hearing at a later date.

19 In answering Question 3 of the information sheet at Sch E of the Practice Note, the parties need to carefully consider the nature of the appeal before the Court to ascertain whether s34 is the appropriate process to pursue to achieve the most efficient use of time and resources and to minimise costs.

20 The Court offers a range of dispute resolution processes including: conciliation, mediation, neutral evaluation, administration merits review and litigation as well as informal processes such as case management. It is important the "forum fits the fuss"[18]. In the majority of appeals, s34 can be an appropriate process, but its success is largely dependent upon the complexity of the issues, the adequacy of the information, parties preparedness and willingness to negotiate and whether there is a real prospect that the parties will move to reach an agreement, and if not, whether the Commissioner can then adjudicate the matter.

21 Even if there is no agreement or adjudication, the conciliation process of s34 can assist in clarifying and reducing the issues in dispute between the parties, which for complex matters that will proceed to a hearing, is undoubtedly of benefit. However, this must be weighed up against factors such as the time taken to listen to residents on site and the likelihood that if not resolved through s34 these residents may need to be further heard. For complex matters a consideration of whether case management can better assist in clarifying and simplifying contentions should be undertaken.

[18] See Preston BJ, "The Land and Environment Court of New South Wales: Moving towards a multi-door Courthouse - Part II" (2008) 19 *Alternative Dispute Resolution Journal* 144 and Preston BJ, "The Land and Environment Court of New South Wales: Moving towards a multi-door Courthouse - Part II" (2008) 19 *Alternative Dispute Resolution Journal* 144.
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22 Clearly, for it is more efficient and cost effective to resolve a matter at a single conference without the need for adjournments or to recommence before another Commissioner. It is therefore imperative that in preparing for a s34 conference the matters required by the Practice Notes and Explanatory Note are met. Of particular importance is providing plans that meet the requirements and a statement of facts and contentions that clearly and concisely outlines the real issues in dispute between the parties.

23 It is also important that the parties come to the conference having clearly considered how the contentions can be resolved. Contentions are generally resolved in the following two ways:

- firstly, the contention is withdrawn by the respondent as further information is provided which demonstrates that the contention was not well founded or has been satisfied. For example, the contention is that unreasonable overshadowing will occur and accurate shadow diagrams are subsequently provided which demonstrate the overshadowing will meet the council's controls.

- Secondly, the applicant proposes amendments to the plans to mitigate the impact raised in the contention. For example, the contention is that unreasonable overshadowing will occur and the applicant proposes to lower part of the building to reduce the overshadowing to an acceptable level.

24 In the event that neither party is prepared to move, then the matter cannot be conciliated and can only be resolved through adjudication. For example, where the council contends that there is unacceptable overshadowing, and the applicant does not agree either on the basis that it considers the overshadowing complies with the numerical controls or the

objectives of the controls or is reasonable given the circumstance of the case.

25 A further situation, where s34 conciliation is unlikely to be successful is when the issues are resolved between the parties but the residents remain concerned and council is not prepared to enter into an agreement or to allow the Commissioner to adjudicate. This circumstance is unacceptable and an inappropriate use of s34. Council, as a party to the proceedings, must be willing to enter into an agreement or adjudicate, having considered the residents concerns, if its issues are resolved.

26 Based on my experience with s34 conferences the key factors that assist the parties in resolving contentions and reaching agreement are:

i. accurate information to quantify the impact raised in the contention; and
ii. a consideration by each party as to how the contention can be resolved.

27 Examples of what is required for some of the most common contentions are:

Overshadowing
Overshadowing diagrams that demonstrate the increase in overshadowing and compliance with relevant controls. The parties should agree that the diagrams are accurate prior to the conference.

View loss
Information to assess the degree of view loss, either surveyed height poles on site or agreed photomontages (before and after).

28 In these examples the parties should consider prior to the conference

- what part of the proposal is causing the impact
- whether changes can be made to mitigate the impact
- whether these changes are reasonable given the implications for the development and the benefits to be gained eg. to achieve compliance with the control may require lowering of the building and

result in an unworkable floor to ceiling height which the applicant is not prepared to make. Whereas a lesser reduction may achieve solar access or view sharing benefits but still not comply with the numerical control.

Privacy

Privacy is usually raised by residents and can generally be dealt with on site by visiting the affected properties and the parties agreeing if screening is required. Information on separation distance, use of spaces, levels etc. are of assistance in determining the extent of impact. Again, it assists if the parties have considered whether there is an impact when assessed against the relevant controls and, if so, how this can be addressed eg planter boxes, screens, changes to windows etc. These measures can usually be imposed as a condition.

Streetscape

Streetscape issues such as whether a garage should be setback behind the front building line or whether a house conforms with the predominant setback in the street generally do not require additional information and can readily be understood on site. However, the implications of a further setback should be considered by the parties prior to the conference eg greater front setback may result in closer proximity to rear boundary, extent of cut and fill, reduction in building footprint, tree loss etc.

Height, bulk and scale

Agreed data on height, floor space ratio, setback etc. is of assistance. The contention can generally be easily understood on site for developments such as houses and dual occupancies. It is more difficult with larger developments and on sites with level changes. The implications of changes should be considered by the parties prior to the conference eg greater setback, reduction in height, articulation of facade, variety in materials etc.

29 Often agreement in s34 conferences will be reached through amended plans. While this is an acceptable process, care needs to be taken that it

does not result in numerous appearances and excessive time periods. It is important to focus on the development application that is the subject of the appeal and to remember that conciliation conferences are not a design workshop.

30 To limit the period of time between adjourning and resuming a s34 conference the following key guidelines are to be followed:

(i) A conciliation conference should be adjourned only once should occur on only two occasions only.

(ii) The period of time between the two occasions should be no more than 6 weeks.

(iii) At the resumption, the conciliation conference is to be resolved either by:

- an agreement under s34(3), or
- an agreement that the Commissioner hear and determine the appeal under s34(4)(b), or
- where there is no agreement, the Commissioner terminates the conference and makes a written report as to the issues under s34(4)(a) and lists the matter before the Registrar within a week.

31 The ideal situation is where the matter is resolved in one conference or, if adjourned, the parties' agreement, amended plans and conditions are filed within 6 weeks (or less) and the Orders are then made in Chambers. This clearly achieves the aim of s34 to provide an efficient and cost effective process in which the parties have control of the outcome.

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