

MANAGING THE DA PROCESS FROM GO TO WHOA

Thursday 24 March 2011 9.00 am – 4.30 pm The Mint

Opening Address

Senior Commissioner Tim Moore

LAND AND ENVIRONMENT COURT OF NSW

Introduction

My paper is designed to deal with what happens when an applicant for development consent realises that the light at the end of the tunnel is not the granting of approval for their dream project but is, in fact, the headlight of the 3801 Express coming at them full bore! At the time of that realisation, either because of the effluxion of time or receipt of an adverse notice of determination, that proponents turn to the Court as a matter of last resort.

I note, parenthetically, that this paper is being delivered some two days prior to what various media pundits prognosticate will be a train wreck of a different type – a matter about which it is not appropriate for me to comment or speculate, but where, if there were to be a change of government, there might well be changes of some significance to the planning system over the next 12 or 18 month period.

For a number of years, now, Justice Brian Preston, the Chief Judge of the Court, has discussed the concept of the Court being a multi-door Courthouse with each of the available doors opening to a differing form of dispute resolution. In the past, ADR has been regarded as standing for *alternative dispute resolution*. In the Court, we consider it preferable and more accurate to refer to *appropriate dispute resolution* – because there is not a single alternative but a wide range of options. Those options are being added to, on a regular basis, by both the Court itself taking advantage of existing legislative opportunities that had not previously been extensively explored or by the legislature amending relevant legislation to create new paths for dispute resolution.

The purpose of this paper is to outline to you what lies behind each of the doors of the multi-door Courthouse and to set out, briefly, what is involved and some critical points of difference between the various processes available.

The appropriate dispute resolution options available through the Court are as follows:

- (1) the conventional arbitration model;
- (2) intensive case management;
- (3) neutral evaluation;
- (4) mediation;

- (5) conciliation with arbitration by the conciliator at the option of the parties; and
- (6) conciliation moving to mandatory, immediate arbitration if conciliation fails (for defined residential development appeals).

1. Conventional arbitration

When I was first appointed to the Court, at the end of 2002, conventional arbitration was, effectively, the universal tool for dispute resolution used in merit appeals in the Court. It was what I have described, in seminar papers and in judgements, as being confined the red and green light approach – either “yes” or “no” to the proposal before the Court.

The appointment of Justice Peter McClellan as the Court’s Chief Judge, in August 2003, saw the insertion of what I describe as the “amber light in the set of traffic lights”. The amber light approach involves the following:

Amber light approach

27 I have approached my consideration of the issues in these proceedings by adopting the “amber light approach” now taken in merit proceedings in the Court.

28 This approach has me first ask myself this initial question – “On the merits, is the application capable of being approved as applied for?” If this question is answered in the affirmative, I must then proceed to approve the proposal.

29 If I were to conclude that it is not capable of being approved as applied for, I do not automatically refuse the proposal. In the alternative to refusal, I then proceed to address a second question – “Is the proposal capable of being given development consent within the scope of the present application but with amendments or changes that are defined by me with sufficient precision as to be incorporated in either plans or in conditions of consent?”

30 If this second question is answered in the affirmative, I should then proceed to specify the amendments or changes; require their incorporation in the proposal; and approve the proposal as so modified.

31 However, if this second question is answered in the negative, I am obliged to proceed to reject the proposal and dismiss the appeal.¹

This amber light approach involves the Court seeking to pursue what Justice McClellan described as the best community outcome. That best community outcome is one where, for the community, the approved development is one that is acceptable in its location and planning control contexts whilst, on the other hand, the person seeking approval for the project is not sent to the back of the queue to start again – a process that could take a considerable time and cost depending on the processing delay with the relevant consent authority.

The amber light approach self-evidently involves the greater use of amendments being imposed by the Court. However, it also led to applicants

¹ *Riordans Consulting Surveyors Pty Limited v Lismore City Council* [2010] NSWLEC 1333

more frequently seeking leave to amend during the course of the Court's processes. This, in turn, led to the enactment, in its original form of s 97B of the *Environmental Planning and Assessment Act 1979* (the Planning Act) which mandated, during its period of operation (merit appeal proceedings commenced between 1 September 2009 to 27 February 2011), that if the amendments to the development application permitted by the Court were not minor², the Court was obliged, without any discretion, to make an order for costs.

If there was agreement between the applicant and the relevant council as to the amount of costs, then the Court had neither the obligation nor any opportunity to go behind the agreed amount but merely make an order reflecting the agreement. Fortunately, as for the very major part such amendments were ones that ameliorated the impacts of the contested proposal, many councils took the view that achieving the amendment was sufficient and many orders were made for the payment of \$1.00 within 28 days to satisfy the mandatory requirements of s 97B.

However, if there was no agreement, the mandatory form could have great costs implications for an applicant – I am aware of one instance where the costs pursuant to a s 97B(2) order were well over \$100,000.00. If there was no agreement, and an order needed to be made because the amendments were not minor, that order was mandated to be:

for the payment by the applicant of those costs of the consent authority that were incurred in respect of the assessment of, and proceedings relating to, the original development application the subject of the appeal.

In at least one instance³, a council insisted that, if amendments were to be made to the application [where those amendments were significantly ameliorative of view impacts on the neighbouring properties], the council would insist on its full costs being met pursuant to a s 97B order with those costs being estimated at \$43,000. As a result, the applicant withdrew the application to amend indicating that they would consider the option of constructing a complying development dwelling with the minimum side setbacks permitted under that regime. Such an outcome, if it has been pursued, about which I am unaware, would have had an even greater impact on the views of the neighbours then would have been the case of the original application refused by the council or, more significantly, the highly ameliorative amendments proposed by the applicant in response to an interim merit determination.

For appeals commenced on and from 28 February 2011, s 97B has been amended to require to costs order to provide:

² For what might be minor see, for example, the decision of Pepper J in *Futurespace Pty Ltd v Ku-ring-gai Council* [2009] NSWLEC 153; (2009) 169 LGERA 45

³ *Cachia v Manly Council (No 2)* [2009] NSWLEC 1107

for the payment by the applicant of those costs of the consent authority that are thrown away as a result of amending the development application.

Although softer than the original position, the disincentive to offer ameliorative amendments may still be large if the respondent council does not take a pragmatic view of the benefit to be obtained by such amendments. I should indicate that I will continue to encourage councils to take a pragmatic attitude to amendments that are purely ameliorative and propose that the council should consider a costs order that is, in effect, a token one rather than seeking a fully effective order in the terms to which they would otherwise be entitled.

2. Intensive case management

This process is usually only invoked for complex matters that are inevitably going to go to a full hearing. The case management process is designed to ensure that, where there is a wide range of areas of expert evidence to be given that a proper timetable is established for both Statements of Evidence and for joint conferencing (including consideration of whether or not multidisciplinary joint conferencing might be necessary).

It is also important where some areas of expert evidence are contingent on what takes place in other areas of expert evidence that the case management process works through and establishes the appropriate sequencing of the evidence.

As the matters that are likely to be subject to this sort of case management are ones that can be expected to have multiple hearing days, the case management process will also discuss and settle an order of evidence for the hearing itself.

This process, which may involve up to 3 or 4 case management sessions depending on the complexity of the matter, may be undertaken by the Commissioner who will preside at the final hearing. Although not inevitable that this will be the case, because of other listing commitments, the benefits of having the Commissioner who has developed considerable familiarity with the issues (and the broad nature of the evidence and the anticipated timetabling for the hearing) are self-evident.

3. Neutral evaluation

Neutral evaluation is a process where the parties agree to a Commissioner undertaking an assessment of the contested proposal, with a site inspection, and indicating whether, if that Commissioner were to hear and determine the matter, what the Commissioner thought the likely outcome would be.

Neutral evaluation is not, however, a dress rehearsal for a full contested hearing. In my experience, the matter is either dealt with simply on the basis of

the contentions put by the consent authority (without any evidence apart from any council officer's report that may have been provided for the purposes of a council determination) or, if there is some expert evidence already filed in the proceedings, simply based on those papers rather than the participation of any expert.

The site inspection usually involves a representative of each side and no participating experts or oral evidence. Minimalist or no submissions, apart from a walk round to understand the nature of the proposal, occur.

Although there were a reasonable number of neutral evaluations undertaken under the immediate past Chief Judge, this tool has fallen into disuse with the advent of significantly greater utilisation of the s 34 conciliation conference process and has thus, effectively, disappeared.

I suspect that the advent of proceedings under the now-operative amendments to the Land and Environment Court Act 1979 (the Court Act) that inserted s 34AA conciliation/mandatory immediate determination proceedings for residential development appeals would will not facilitate any revival of neutral evaluation as an appropriate dispute resolution tool.

In some respects, this lack of fashionability – almost to the point of extinction – is disappointing. I say that because there are some quite simple proceedings that I have dealt with over the years that might well benefit from the use of this form of dispute resolution. Neutral evaluation of disputes concerning, possibly, cases such as proposals for carports in the front setback in more densely settled parts of the metropolitan area (where issues of precedent and streetscape dominate) might well see such matters disposed of in a *just, quick and cheap* fashion⁴, achieve the same likely outcome as a full-blown hearing. Such a hearing, involving advocates and expert planners, as is not infrequently the position with such cases, would cost the parties tens of thousands of dollars more to achieve the same likely outcome.

Mediation, conciliation with discretionary determination, conciliation and immediate mandatory determination

Before dealing in detail with each of these forms of dispute resolution, I observe that I gave a paper, published on the Court's website toward the end of 2010 that set out quite distinct differences between conciliation and discretionary arbitration, on one hand, and mediation on the other. I do not propose to traverse the fine detail of that paper in the course of this presentation. It is, however, appropriate to discuss each of these three dispute resolution options in a little more detail with a particular focus in my consideration of the final of the on the new conciliation/mandatory immediate determination model recently handed as a new doorway to our Courthouse by the coming into effect of s 34A of the *Land and Environment Court Act 1979*.

⁴ That being our objective set by s 56 of the *Civil Procedure Act 2005*

4. Mediation

Eight of the nine full-time Commissioners and one of the Acting Commissioners are nationally accredited mediators. The last of my full-time Commissioner colleagues to undertake this training, Commissioner Morris, has, in the past, been a qualified mediator but has needed to undertake additional training for national accreditation. She has recently completed this and we expect that she will receive this accreditation in the near future.

Commissioners are able to be appointed as mediators, not by delegation of a matter by the Chief Judge⁵ but pursuant to s 26 of the Civil Procedure Act. A minor procedural difference to note (although in reality it is of little practical distinction) is that assignment of cases by the Chief Judge pursuant to the Court Act is a function that can only be carried out by him but appointment as a mediator is an appointment that can be made by any Judge of the Court or by the Registrar.

If carrying out a mediation, we are not confined to those matters that fall solely with those elements of the Classes⁶ of the Court's jurisdiction able to be exercised by Commissioners as set by the Court Act and Rules.

For development applications, there is a number of important areas where there is the potential for a Commissioner to be used, taking off our Commissioners hat and becoming mediators, is where a development application dispute is contingent on the acquiring of an easement pursuant to s 40 of the Court Act or the ability to use neighbouring land for purposes such as underpinning (which requires authorisation pursuant to the *Access to Neighbouring Land Act 2000*) where neither of these jurisdictions is able to be exercised by a Commissioner.

I have conducted mediations in matters that have involved applications in each of these areas of the Court's jurisdiction and in both matters, one under each of these Acts, there has been a successful outcome to the mediation – resulting in consent orders being made by the Duty Judge and the saving to the parties of multiple tens of thousands of dollars in legal and expert witness costs.

However, the mediation process is of a distinctly different character from either of the two conciliation processes that are discussed later. The fundamental difference is that the role of the mediator is to encourage the parties to undertake a dialogue between themselves in an endeavour to resolve the issues in dispute. This must take place without any merit intervention or opinion expression by the mediator. The role of the mediator is to prompt that dialogue in a structured mediation process in an entirely non-judgemental and non-interventionist fashion. The skills required to mediate are, in my experience, quite different from those required for conciliator.

⁵ Pursuant to s 36 of the Court Act

⁶ Classes 1 to 3 and (for legally qualified Commissioners, Class 8

Conciliation as a process

Over recent years, the present Chief Judge has re-emphasised conciliation as a dispute resolution tool for the Court.

The conciliation part of the process is common to both streams of conciliation processes – those under s 34 and those under s34AA. Conciliation involves a Commissioner actively endeavouring to assist the parties reach a resolution to the issues that are in dispute.

As earlier noted, when the Chief Judge allocates cases, he matches as appropriate the skills of the various Commissioners with the matters that are to be dealt with during any sitting week. A subset of this, obviously, is the allocation of matters for conciliation.

When conducting the conciliation process, I almost all ways commence by inviting the council to respond to the question “*Is the proposal capable of approval with modification?*” If the answer to that question is “yes”, I then ask “*What changes do you say needs to be made to the proposal to render it an acceptable?*” I have found that this is the most constructive approach because, if the consent authority has decided that there is nothing capable of approval able to arise from the development proposal, there is not much point exploring options for improvement.

5. Conciliation pursuant to s 34

The s 34 model is one that has been available on the statute for very many years. It was previously regarded as a process whereby the parties, before the Registrar, could agree to be bound by the outcome of the conciliation process prior to the conciliation phase commencing. The s 34 conciliation model is not confined to residential development appeals and will continue to be used extensively for other development (eg industrial/commercial matters) or merit appeal matters in other Classes of the Court’s jurisdictions (eg statutory valuation appeals).

This agreement to a “binding s 34 conference” – a practice that no longer continues but is still referred to by some advocates – is wrong at law, in my opinion. It is perfectly clear that the question of giving consent to the conciliating Commissioner proceeding to hear and determine the matter does not arise until after the conciliation has been terminated pursuant to s 34(3).

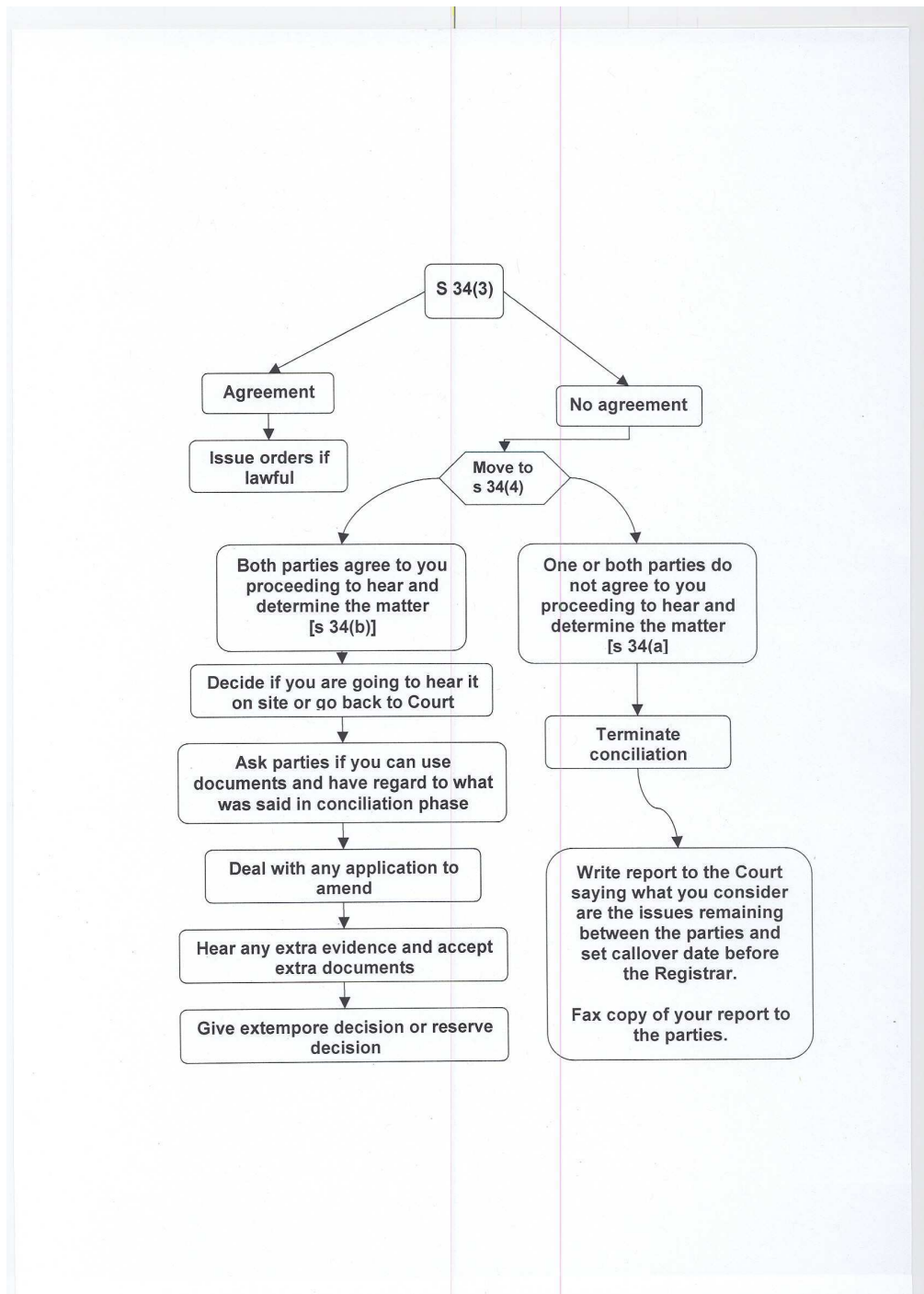
It is also relevant to note that the determination that conciliation has failed and the conciliation process should be terminated is one that lies entirely with the presiding Commissioner and not with the parties. It has been my experience, in a number of instances, where the parties have indicated that they considered termination was warranted but where I remained of the view that there were options that had not yet been fully explored by the parties, I refused to terminate the conciliation phase. Whilst my declining to terminate the conciliation phase under these circumstances has not been universally followed by agreement

after further conciliation efforts, it has so resulted in a significant number of cases.

As s 34 conciliation is a modestly complex process. The relevant sub-sections of s 34 setting out the structure of the conciliation and optional determination process, is set out below:

- (3) If, either at or after a conciliation conference, agreement is reached between the parties or their representatives as to the terms of a decision in the proceedings that would be acceptable to the parties (being a decision that the Court could have made in the proper exercise of its functions), the Commissioner:
 - (a) must dispose of the proceedings in accordance with the decision, and
 - (b) must set out in writing the terms of the decision.
- (4) If no such agreement is reached, the Commissioner must terminate the conciliation conference and:
 - (a) unless the parties consent under paragraph (b), must make a written report to the Court:
 - (i) stating that no such agreement has been reached and that the conciliation conference has been terminated, and
 - (ii) setting out what in the Commissioner's view are the issues in dispute between the parties, or
 - (b) if the parties consent to the Commissioner disposing of the proceedings, must dispose of the proceedings:
 - (i) following a hearing, whether held forthwith or later, or
 - (ii) with the consent of the parties, on the basis of what has occurred at the conciliation conference.
- (5) The Commissioner, when giving his or her decision under subsection (4) (b), is to give reasons for the decision:
 - (a) in writing, or
 - (b) orally and recorded by means that can be reproduced.
- (6) If satisfied that there is a good reason to do so, the Commissioner may adjourn the conciliation conference to a time and place fixed in consultation with the Registrar.

As part of the induction manual for new Commissioners, I have prepared a flowchart on how the present processes under s 34A operate. A copy of that flowchart is reproduced below:



When the conciliation phase is terminated, the parties are then asked if they consent to the conciliating Commissioner proceeding to determine the matter with or without a further hearing. If either party objects to the conciliating Commissioner continuing, that is an absolute right of veto. If either or both parties exercise that right, the Commissioner who has conducted the conciliation is required to write a report to the Court (which is placed on the Court file and provided the parties) setting out what the conciliating

Commissioner considers are the issues remaining in dispute between the parties.

Although in the vast majority of cases the issues will be self evident and will be agreed to by the parties, there are rare instances where the issues that are in dispute, in the Commissioner's assessment, do not reflect in their entirety what the parties consider those issues to be. That will be reflected in the report if it is necessary to do so.

The report is a comparatively brief document and is usually no longer than a single page. A copy of the template used by me as a basis of such a report appears below in reduced size:

Matter No:

Applicant **Council**
Respondent

Report pursuant to s 34(4)(a) of the *Land and Environment Court Act* 1979

On, I conducted a preliminary conference, between the parties, at the conclusion of which no agreement was reached and the conference was terminated. The parties have not consented to me hearing and determining the matter.

The applicant was represented by

The respondent was represented by

In my opinion, the issues remaining between the parties are:

1.;
2.; and
3.

A copy of this report has been faxed to the parties.

.....
Commissioner of the Court

(date)

If the parties agree to the conciliating Commissioner proceeding to hear and determine the matter, the process for doing so will be discussed with the parties – including the question of whether the further hearing should take place forthwith or whether directions should be made for the preparation and exchange of evidentiary material.

The parties also then need to consider what of the material and discussions, if any, that took place in the conciliation phase are to be carried forward into the determination phase. The only material that can be carried forward is material that is agreed to by both parties as conciliation is, as it were, under the seal of the confessional – unless the parties agree to the contrary⁷.

I have found it useful to hand back copies of documents that were provided to me during the conciliation phase, when the parties have agreed to me proceeding to determine the matter – as doing so provides a psychological break between the phases of the process and provides an opportunity for the advocates to make considered forensic decisions about whether or not such documents should subsequently be tendered.

In many instances, all or virtually all of the information and documents from the conciliation phase are carried forward and not infrequently the matter proceeds to immediate hearing and determination (quite often on-site).

6. Conciliation pursuant to s 34AA

The new mandatory conciliation/arbitration model has arisen as part of the reconsideration of the amendments to the Planning Act that originally proposed the creation of a system of planning arbitrators. As a consequence of that reconsideration, the government introduced legislation to insert s 34AA in the Court Act and repeal the proposed system of planning arbitrators.

This new section is confined to applying to a limited range of residential development appeals. The section applies to:

development for the purposes of detached single dwellings and dual occupancies (including subdivisions), or alterations or additions to such dwellings or dual occupancies

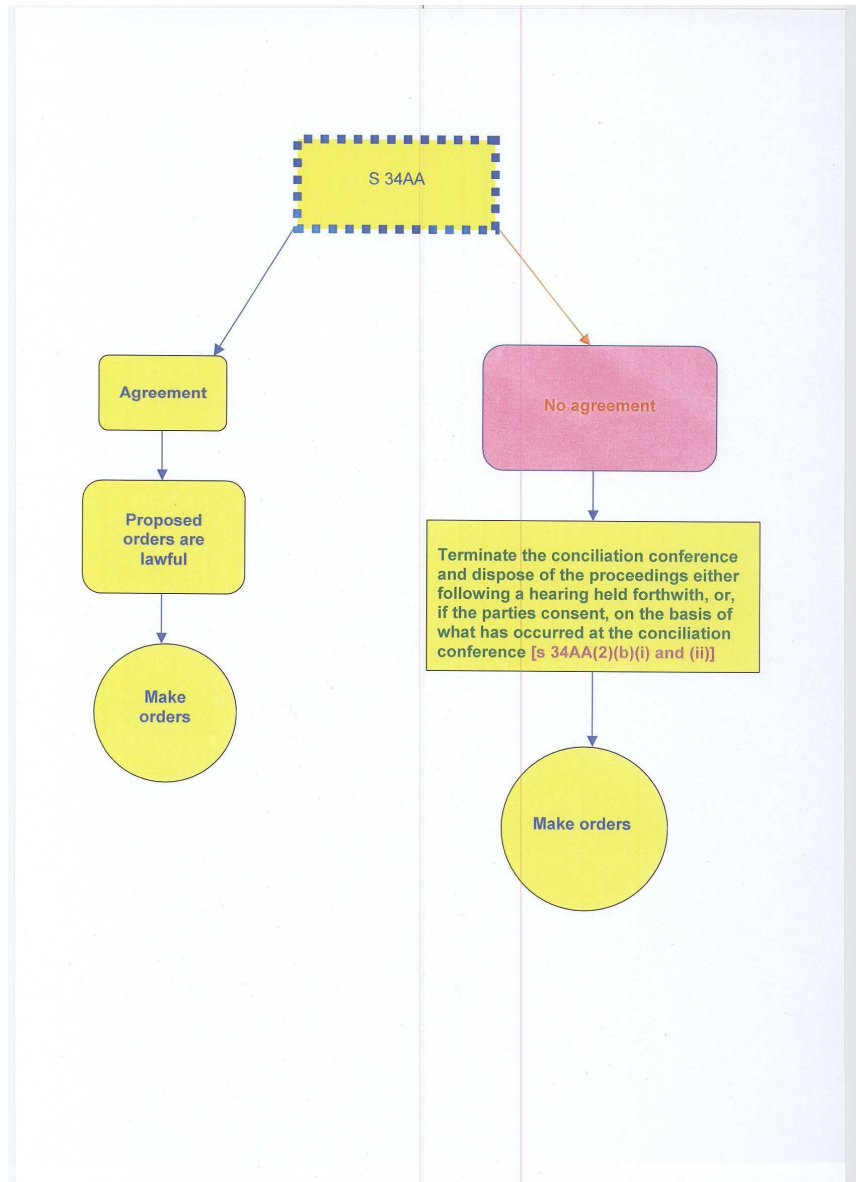
About 25% of merit appeals to the Court concern these types of development proposal.

The significant difference between the s 34 and s 34AA is that, if the conciliation phase fails, the conciliating Commissioner is then to proceed to hear and determine the matter. There is no right of veto by either party to this occurring. In addition, there is the requirement that the hearing will proceed forthwith

⁷ s 34(11)

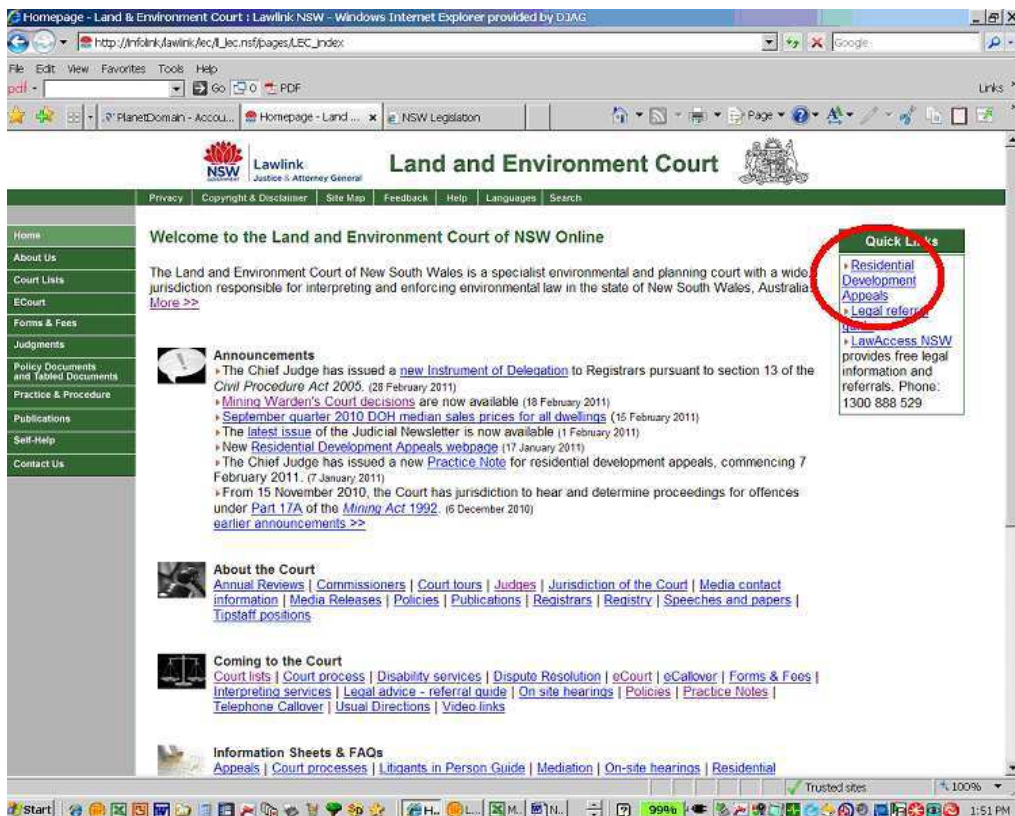
although the provisions about carrying forward of material from the conciliation phase to the determination phase remains.

The flow chart for s 34AA proceedings is much simpler:

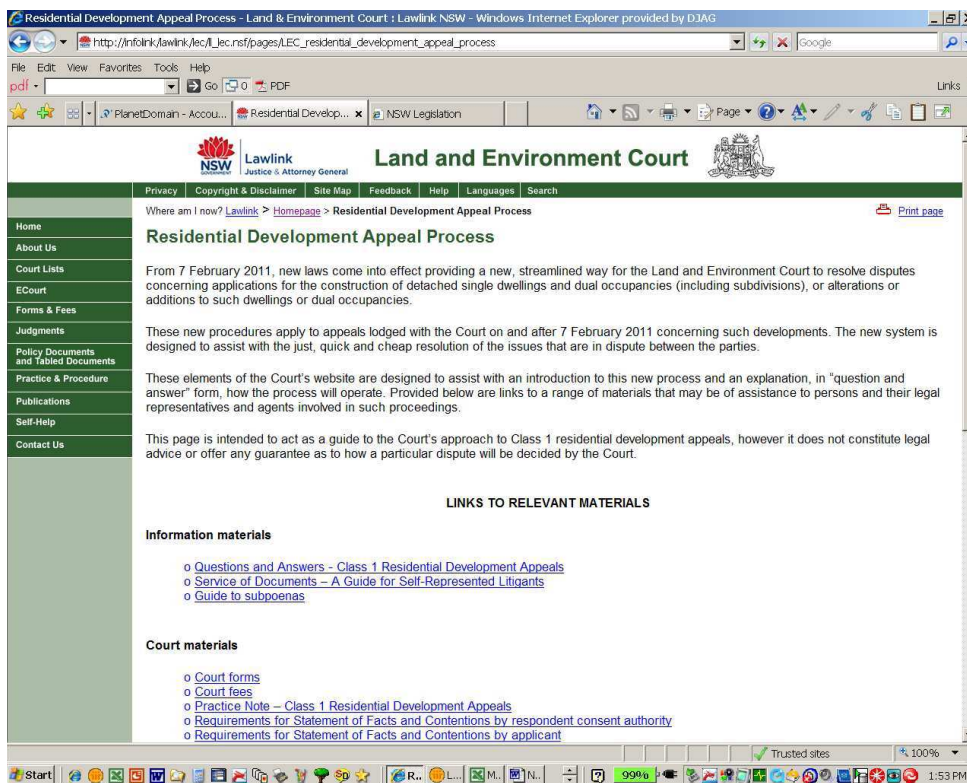


The question now arises as to what will be the practical impact of the introduction of this new form of appropriate dispute resolution to dealing with these residential development matters. The Court has, to facilitate the involvement of and in order to endeavour to contain expense for the parties, published an extensive plain English, step-by-step, guide to how these proceedings will operate.

We have created a new part of the Court's website for residential development appeals and this is accessed by a quick link in the top right-hand corner of the opening page of the Court's website.



Accessing this material takes you to a page dedicated to such residential appeals:



This provides access to the new Practice Note for these residential appeals and a wide range of other reference documents.

Importantly, it contains the extensive plain English question and answer material that steps through the whole s 34AA process:

The screenshot shows a web browser window displaying the Land and Environment Court website. The page title is "Questions and Answers - Class 1 Residential Development Appeals". The breadcrumb trail indicates the user is in "Home > Lawlink > Home page > Residential Development Appeal Process > Questions and Answers - Class 1 Residential Development Appeals".

The main heading is "Questions and Answers - Class 1 Residential Development Appeals". Below this, a section titled "What appeals to the Court does the residential development appeal process apply to?" contains the following text:

The streamlined conciliation/hearing process will apply to all appeals relating to particular types of residential development being "development for the purposes of detached single dwellings and dual occupancies (including subdivisions), or alterations or additions to such dwellings or dual occupancies" (see s 34AA of the *Land and Environment Court Act 1979*). However, it only applies to appeals of this nature that are commenced in the Court on or after 7 February 2011.

The legal basis for these appeals is s 97 of the *Environmental Planning and Assessment Act 1979*. These appeals usually concern council's refusal of a development application or application for modification of a development consent; deemed refusal of such applications (that is where the council has not made a decision within the required time - see s 82(1) of the *Environmental Planning and Assessment Act 1979* and s 113 of the *Environmental Planning and Assessment Regulation 2000*) or, where the council has approved a development or modification, the conditions or terms of consent or approval with which the applicant is dissatisfied.

The streamlined conciliation/hearing process can also be used in other development appeals if the Court considers it appropriate and will also apply to development of a kind prescribed by the regulations (no other development types have yet been prescribed by the regulations).

A section titled "If my development proposal fits within this category, must I follow the conciliation/hearing model or can I have a conventional Court hearing?" contains the following text:

The Parliament has created a presumption in favour of using this conciliation/hearing process for residential development involving dwelling houses and dual occupancies. This has been done in order to simplify such appeals and in an endeavour to reduce the cost of resolving such disputes. However, it is possible for the Court, if proper reasons are shown why it is appropriate, to order that a residential development matter be dealt with at a conventional court hearing.

If a matter has been commenced and has been allocated to the residential development conciliation/hearing process, an application can be made, by *Notice of Motion* and supported by an affidavit explaining the reasons for the application, to have the matter dealt with at a conventional court hearing. Ordinarily, any application of this nature should be made soon after the proceedings are commenced so that the application can be heard and determined on the date set for the directions hearing for the matter.

S 34AA operates with applicability to all residential development appeals that are within the scope of the statutory definition quoted earlier and that have been filed with the Court on or after 7 February 2011. The presumption with respect to such residential development appeals is that they will be dealt with through the s 34AA process.

For the time being, I am monitoring each such matter that is filed to ensure that there are no matters are allocated to this stream that should properly be set aside for a conventional dispute resolution process because of the potential complexity of the issues involved. An obvious example for such diversion would be a proposal to erect a residence or a dual occupancy on a former service station site [where it is likely that potentially complex issues concerning contamination and remediation might need to be addressed].

Matters that are to be dealt with under s 34AA are also to be dealt with in a quite compressed procedural timeframe. The Court has accepted a performance target of 95% of these matters being heard and finalised – that is a decision given on the merits if conciliation fails – within 3 months from the date of filing.

Residential development appeal applications will usually be given a return date 21 days after the date on which they are filed. The Registrar now runs a separate residential development appeals list for the first (and likely only procedural attendance) return date; the timetable for the exchange of evidence is compressed and there is the expectation that the respondent will have a Statement of Facts and Contentions prior to the return date before the Registrar.

It is also reasonable to expect that, if the appeal arises out of an actual determination by the council rather than a deemed refusal, the parties will have been commencing evidentiary preparation based on the matters contained in the council's notice of determination prior to the first return date before the Registrar.

Part of the listing process for setting these matters down for a s 34AA conciliation hearing date is consideration as to whether or not the matter should be given a listing for two days or for a single day as the matters, once commenced are to proceed to finality. In most instances, the matter will be listed for two days and this is being done to ensure that the matter can be dealt with if it needs to carry over as it is intended that the matters, once commenced, will precede finalisation without adjournment.

Finally, it should be noted that this process is not amenable to major amendments requiring revised plans needing further consideration – it is a process for a “straight-through” dealing with comparatively uncomplicated residential development appeals – such appeals comprising about 25% of our merit appeal filings.

Conclusion

The Department of Planning’s explanatory note on the introduction of s 34AA said:

Since 2007, the court has successfully increased the use of alternative dispute resolution mechanisms and in particular, conciliation. There has been a 158 per cent increase in the use of conciliation conferences and a subsequent significant improvement in clearance rates.

We expect that the use of s 34AA processes will likely increase the success of the *appropriate dispute resolution* options of our multi-door courthouse.