Questions and Answers - Class 1 Residential Development Appeals

What appeals to the Court does the residential development appeal process apply to?

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).

If my development proposal fits within this category, must I follow the conciliation/hearing model or can I have a conventional Court hearing?

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.

Is there a formal document that sets out the Court's requirements for residential development appeals?

The Court has published a formal document that sets out the process and requirements for Class 1 Residential Development Appeals. This is called the Practice Note Class 1 Residential Development Appeals. The Practice Note not only sets out the process but also sets out the technical requirements for plans for development proposals; requirements for expert witnesses; and the standard directions that are likely to be made at the directions hearing, to set the timetable leading up to the final conciliation/hearing.

What forms do I need to complete to commence proceedings for a residential development appeal?

There is an application form – Class 1 Application (Form B (version 1)) – to commence a residential development appeal.

What other documents do I have to provide if I lodge an appeal?

The documents that you have to provide in support of your application to the Court concerning the refusal or deemed refusal (that is one where the council has not made a decision within the required time) of a residential development proposal are set out in paragraphs 10 and 11 of the Practice Note and Schedule A (requirements for plans) and Schedule D (information Sheet to be completed by applicant) of the Practice Note.

If you are appealing against the conditions or terms of a council's decision to grant consent or approval, you will need to provide with your application a Statement of Facts and Contentions (see paragraph 18 of the Practice Note and Schedule C of the Practice Note).

Are there any requirements for the plans of my residential development proposal?

You will need to include with your application to the Court plans of your residential development proposal that comply with the requirements that are set out in Schedule A to the Practice Note.

Is there a fee to appeal to the Court?

There is a filing fee that has to be paid to the Court to commence a residential development appeal. The amount of the filing fee depends on the value of the proposed development. The minimum filing fee for an application under s 34AA is $829.00 and the range of fees is contained on the Schedule of Court fees.

Where can I lodge my application to commence an appeal?

A residential development appeal can be commenced by lodging your application and supporting papers and paying the Court filing fee at the Court's Registry on Level 4, 225 Macquarie Street, Sydney. You may also post your application and supporting papers and payment of the filing fee to the Court at GPO Box 3565, Sydney, NSW 2001.

In addition, all Local Courts throughout New South Wales act as agents for the Land and Environment Court and applications can be lodged and the relevant filing fee paid at any Local Court registry. The Local Court registry staff will give a receipt for the payment of the filing fee and will forward the papers to the Land and Environment Court for processing.

How many copies of the application and supporting documents will I need to provide?

Ordinarily, you will need to provide to the Court three copies of your application and all the supporting documents.

What happens after I have lodged my application?

When your application papers are processed at the Court's registry, these will be recorded in the Court's record system and stamped as having been filed with the Court. The Land and Environment Court Registry will return two copies to you.

The time, place and date for a directions hearing will be set and will be written, by Court staff, on each of the three copies of the application. The directions hearing will usually be 21 days after the date of lodgment of the application (for applications in the Sydney metropolitan area) and, for applications outside the Sydney metropolitan area, on the next Monday after the expiry of three weeks of the date of lodgment of the application with the Court.

What are the returned copies for?

One of the returned copies is for you and the other has to be served on the local council that is the consent authority for the proposal. The third copy will be retained on the Court file (for the presiding Commissioner to read in preparation for the conciliation/hearing process). The copy for the council must be served within three days of you receiving the returned documents.

How do I serve the application and supporting documents on the relevant council?

The Court has prepared a guide for the service of documents for self represented litigants. The guide explains, using as little legalism as is possible, what is meant by service and how this is undertaken.

How will I know what are the issues in dispute in the appeal?

The issues in dispute on a residential development appeal are identified by the parties preparing a document called a Statement of Facts and Contentions.

If the council has actually refused your residential development application or is deemed to have refused it (because the council has not made a decision within the required time), the council will be required to prepare first a Statement of Facts and Contentions.

The council will be required to provide you and the Court with the Statement of Facts and Contentions before 4.00 pm on the second last working day before the date set for the directions hearing.

The Statement of Facts and Contentions, in addition to providing the basic factual information about your proposal (including information about what the council says are the applicable planning controls), includes a statement of the council's contentions explaining the council's reasons for saying your proposal should be refused, the conditions that may address council's concerns or the matters that require more information to be able to assess your proposal. The Practice Note sets out the requirements for the council's Statement of Facts and Contentions (see Schedule B to the Practice Note).

The contentions are required to set out the case upon which the council relies but not the evidence to support it. The contentions have to include sufficient particulars to enable you to understand the basis of the council's argument.

If you do not think that sufficient information is provided about the nature of the council's objections, you can ask the Registrar at the directions hearing to order the council to provide you with further and better particulars of the council's contentions.

If you disagree with the council's Statement of Facts and Contentions, you may prepare a Statement of Facts and Contentions in Reply. At the directions hearing, the Registrar will set a time by which you will need to file with the Court and serve on the council your Statement of Facts and Contentions in Reply.

If the council granted consent or approval to your residential development application, you may be dissatisfied with the council's decision in some respect, such as one or more of the conditions of consent or approval, and appeal to the Court. In this type of appeal, you will be required to prepare first a Statement of Facts and Contentions. The requirements for this Statement of Facts and Contentions are set out in Schedule C to the Practice Note. You will be required to provide the basic factual information about your proposal, including the consent or approval with which you are dissatisfied. In your contentions, you will be required to identify the conditions or other aspects of the consent or approval with which you are dissatisfied and the reasons for your dissatisfaction. You will also be required to provide any alternatives you propose to any of the conditions of consent or approval.

You will need to provide your completed Statement of Facts and Contentions to the Court when you file your application concerning your residential development appeal. Your Statement of Facts and Contentions must be served on the council at the same time you serve the appeal application on the council.

The council is permitted to file and serve a reply to your Statement of Facts and Contentions.
The Court has published a worked example of what a Statement of Facts and Contentions looks like.

How many hearings are there likely to be of my appeal?

Ordinarily, there will be two hearings in your appeal – a directions hearing and a final hearing. A Registrar of the Court will hold the directions hearing three weeks after your appeal is filed. At the directions hearing, the Registrar will fix a date for the final hearing and set a timetable for the exchange of information leading up to the final hearing. The final hearing will be usually be six weeks after the directions hearing (or about nine weeks after the appeal is filed with the Court).

The final hearing will be a combination of a conciliation and, if the matter is not resolved by conciliation, a hearing during which the presiding Commissioner will decide the matter.

The final hearing will continue on successive working days after the first day until it is concluded. Only in exceptional circumstances is it likely that the final hearing will be adjourned to a later date.

How and where are directions hearings conducted?

Directions hearings are conducted by one of the Registrars of the Court. Directions hearings for matters in the Sydney metropolitan area will be held in the Registrar's Court at 225 Macquarie Street, Sydney. The location of the Registrar's Court on the day is shown on the Court list posted on a notice board in the foyer of the building. You can also check the Court list on the Court's website in the afternoon of the day prior to the directions hearing. The Sydney Morning Herald may also (but does not always) publish the Court list on the morning of the date set for the directions hearing.

For applications concerning residential development on sites outside the Sydney metropolitan area, directions hearings will be held on Mondays (or on Tuesday if the Monday is a public holiday) each week. These non-metropolitan directions hearings will be conducted by telephone with the parties ringing in to the Court's specially equipped telephone conferencing courtroom.

What will happen at the directions hearing?

The presiding Registrar will fix the date(s) for the final conciliation/hearing and will set a timetable for the exchange of information between the parties and any involvement of expert witnesses. The Court expects that both parties would have discussed the appropriate timetable prior to the directions hearing.

This timetable will be set out in a formal document known as directions. The directions that will usually be made are set out in Schedule E to the Practice Note. Copies of the directions made by the Registrar will be provided to the parties (if they are in attendance at the Court) or, if the matter is being dealt with by a telephone hearing, will be sent by express post to the parties.

At the directions hearing, it would ordinarily be expected that any Notice of Motion to transfer a residential development appeal from the conciliation/hearing process to a more conventional court hearing process would be dealt with by the Registrar.

How do I prepare for a directions hearing?

The Practice Note assists parties to prepare for the directions hearing by describing what occurs at the directions hearing (see paragraphs 20 to 30 of the Practice Note) and the usual directions that are likely to be made (see Schedule E to the Practice Note).

The Practice Note also requires each party to complete an information sheet which is Schedule D to the Practice Note. The completed information sheet is to be handed to the Registrar at the directions hearing.

The information in the completed information sheets assists the Registrar to make the directions that are appropriate to the particular circumstances of the matter and the parties.

Can I ask someone to explain to me how the Court's procedure for residential development appeals will operate?

At the directions hearing, in addition to making directions for a timetable leading up to the date set for the conciliation/hearing process, the Registrar can also explain to you how the conciliation/hearing process usually operates.

What can I do if something happens and I can't meet the timetable set at the directions hearing?

One of the usual directions that is made at the directions hearing gives the parties what is known as liberty to restore (have the matter referred back to the Registrar) on two days notice (see paragraph 36 of the Practice Note).

If there is a material non-compliance with the timetable for the exchange of information or anything else required between the directions hearing and the final conciliation/hearing, the usual directions require that the opportunity to re-list the matter before the Registrar be exercised so that the Registrar can make further directions to ensure that the final conciliation/hearing can continue, if possible, on the date originally fixed.

Where will the conciliation/hearing be held?

Usually, all conciliation/hearings will commence at 9.30 am on the site of the proposed development. The Court has a site inspection policy which explains what happens at inspections and hearings on site.

What arrangements do I need to make on the site?

You will need to ensure that appropriate facilities are available on the site, including a table and chairs and bathroom facilities. As any hearing will be open to the public, the venue must be adequate to ensure that the hearing will be able to be observed and heard by all persons attending it.

If it will not be possible to comply with these requirements (for example, if the site is a vacant allotment), you will need to agree with the council's representative on an appropriate alternative location.

What will I need to do to get ready for the final hearing?

The final hearing will be in two parts. The first, the conciliation phase, will involve you and the council's representatives discussing what are the circumstances or minor changes to your development proposal that may meet the objections that the council has to it but also be acceptable to you. Thus, the first thing that you need to do to prepare for the conciliation phase is to consider, in your own mind, what minor changes to the design or conditions you would be prepared to accept that might meet the council's concerns. You also need to consider the council's without prejudice conditions of consent (discussed later) including any alterations or additions that the council might propose to the standard conditions of consent published on the Court's website.

If your appeal is against a refusal or deemed refusal of your proposal, the council will have had to outline to you, through the Statement of Facts and Contentions, what are the council's objections to your proposal.

You also need to be prepared for the presiding Commissioner holding a hearing of your appeal (if conciliation is not successful) immediately after the conciliation phase is terminated and making a decision about it.

Preparing for a hearing is different to preparing for conciliation. You need to consider what evidence you wish to present to the Commissioner and what submissions you wish to make about that evidence. You need to consider what witnesses you wish to call and what documents you wish to place in evidence that are relevant to your appeal. You need to consider what will be your response to the evidence the council is expected to give as part of its case. You will have been provided with a list of witnesses, including objectors to your proposal, who are to give evidence as part of the council's case.

Finally, for the hearing, you need to prepare your answers to the matters that the council has raised in the contentions part of its Statement of Facts and Contentions. You also need to consider the council's draft conditions of consent (including any alterations or additions that the council might propose to the standard conditions of consent published on the Court's website).

Finally, if your appeal is concerned only with conditions that the council has attached to a development approval, you will need to be prepared to explain what your concerns are about those conditions and what modifications you are seeking or the reasons why you are asking that the condition be removed. If your appeal is about conditions, you will have been provided, prior to the hearing, with a response from the council to your contentions relating to the conditions that you are challenging.

What will happen first at the final hearing?

The presiding Commissioner will discuss with the parties how long should initially be allocated for the conciliation phase. The Court expects that this will usually be somewhere between one and a half and two hours.

If the conciliation process is making real progress, can this time be extended?

The time for conciliation can be extended either by agreement between the parties or, if there is no agreement, when the presiding Commissioner considers that there is still a real prospect of conciliation resolving all or a significant number of the contested issues. Usually, the presiding Commissioner will discuss terminating the conciliation phase with the parties before doing so but the decision to proceed from conciliation to hearing is solely the responsibility of the Commissioner.

What happens if the matter is resolved by conciliation?

If the conciliation phase results in the parties reaching agreement about all the matters that are in dispute, the presiding Commissioner is obliged to give legal effect to the agreement provided that the Commissioner is satisfied that there is a proper lawful basis for doing so. The Commissioner makes no judgment about the merits of the outcome, that is the sole responsibility of the parties. The Commissioner's decision pursuant to s 34(3) of the *Land and Environment Court Act* 1979 to make orders giving effect to the agreement between the parties is the decision of the Court and disposes of the appeal.

However, if, during the course of a conciliation process, the presiding Commissioner considers that the negotiations may possibly lead to an agreement that is unlawful or could not lawfully be implemented, the presiding Commissioner will discuss these concerns with the parties as part of the conciliation process to see if those issues can be resolved.

Can I make amendments to my proposal during the conciliation phase if amendments will resolve the matters in dispute?

Although there will be scope for minor amendments to proposals (where these can be dealt with by conditions of consent and/or by minor revisions to plans which can be finalised with the council by a condition of consent), it is not expected that there will be major changes to plans arising out of the conciliation process.

The Court will not usually allow any significant period of time to an applicant to prepare substantial amendments to the plans for the proposed development as it is

expected that opportunities for amendment of the proposal at the pre-DA lodgment stage, through the council's development assessment process, and by the review provided by s 82A of the *Environmental Planning and Assessment Act* 1979, will have been utilised before any proceedings are commenced in the Court.

If the dispute cannot be resolved by conciliation, what happens next?

When the presiding Commissioner considers that conciliation will not resolve the dispute or substantially narrow the issues in dispute any further, the conciliation phase will be terminated.

A short break is likely to be taken (of the order of half an hour or so) but, at the conclusion of this break, the hearing phase will commence.

How will the hearing phase commence?

The hearing phase will usually commence by the presiding Commissioner returning to the parties all of the documents that may have been provided during the conciliation phase. This is done to ensure that the parties understand that they each need to make a decision as to what documents they propose form part of the evidence during the hearing phase.

The presiding Commissioner will then ask the parties whether they agree to all or any of what was discussed during the conciliation phase being taken into account during the hearing phase. If there is agreement that identifies what is to be taken into account, the presiding Commissioner can regard the agreed discussion in the conciliation phase as being part of the evidence in the hearing phase. However, if either party objects to anything that was said during the conciliation phase, that which is objected to will be disregarded and will not form part of the evidence in the hearing phase.

After the presiding Commissioner has sorted out with the parties what discussion, if any, is to be carried forward from the conciliation phase, the presiding Commissioner will then invite the council to commence its case at the hearing phase.

Although this is not the order that usually applies in civil proceedings, in merit appeals in the Land and Environment Court, such as this hearing phase, the council commences the proceedings (so that it can outline the matters the council says warrant refusal of the proposal) and to provide to the Court the relevant planning documents (such as the Local Environmental Plan and any relevant development control plans) which the presiding Commissioner needs to consider.

After the council has opened its case and tendered all the evidence upon which the council relies, including, usually, any joint expert reports (although they are not documents that form part of the council's case but are provided to assist the Court), you or your lawyer or agent will be asked to respond to the matters that the council says warrant refusal of your proposal. You will also be invited to tender any written expert reports and documentary evidence upon which you rely.

After these opening statements and tendering of written material, any oral evidence from witnesses will then be heard. This will include any oral evidence from objectors to your proposal and any oral evidence from expert witnesses.

Oral evidence from expert witnesses, in the same or related areas of expertise, is now given by what is called concurrent evidence. This is a process where all the witnesses give evidence at the same time in a less confrontational fashion than the traditional manner of giving evidence separately in each party's case.

Can I get access to all relevant council documents?

You may request the council to provide, and the council is required to provide, access to all documents relevant to your residential development application, other than any documents which might be protected by legal professional privilege, within seven days of your request (see paragraph 19 of the Practice Note).

If there is any difficulty in gaining access to relevant documents, it is possible to apply to the Court for an order for discovery (see Part 21 of the *Uniform Civil Procedure Rules* 2005). An application for discovery is made by Notice of Motion with a supporting affidavit.

Discovery is not usually ordered in residential development appeals as it is a time consuming and expensive process.

If another person or organisation, such as the Roads and Traffic Authority, has documents that are relevant to my application, can I request access to them?

It is possible to require another person or organisation to produce documents to the Court for your inspection if those documents are relevant to your proposed residential development. This is achieved by issuing and serving a document called a Subpoena to Produce on the person or organisation which has the custody of those documents. A Court fee is payable to issue a subpoena. Any subpoena has to be prepared using the form for a Subpoena to Produce. Subpoenas have what is known as a return date by which the person or organisation receiving the subpoena is required to provide the documents to the Court. The Court has published a document entitled a Subpoenas and Notices to Produce.

A specified period of notice is set at the time the Court issues the subpoena as well as a date by which it must be served on the person or organisation to whom it is directed. The Court has also published a Guide explaining, with as little legalism as possible, the requirements for service of documents.

Can I have experts give evidence in support of my proposal?

It is possible to use relevant expert evidence in the conciliation/hearing phases.

If experts in an area of expertise are to be engaged for both parties to the conciliation/hearing process, the Court usually will not permit individual expert reports but will require that the experts proceed directly to a joint conference to discuss and produce a short joint report about the matters where they agree; relevant matters where they disagree; and the reasons for this disagreement.

Any joint expert report will be made available to the parties and the Court prior to the date fixed for the conciliation/hearing process to take place.

Parties' single expert

It is also possible for a single expert to be appointed with the cost shared between the parties. This is more likely in highly technical areas such as noise assessment or engineering. The possibility of using a parties' single expert in any relevant discipline will be dealt with at the directions hearing.

If a parties' single expert is engaged, the Court will set, at the directions hearing, a timetable for the expert's report and its provision to the parties.

If my neighbours or other people have objected to my proposal, what role do they play in the conciliation/hearing?

Objectors to a residential development proposal usually do not have a legal right to participate in the conciliation phase of a conciliation/hearing process as they are not parties to the proceedings. However, in conciliation processes that the Court has

conducted in the past, councils have usually informally involved objectors as part of the council's participation (but the council is not obliged to do so). Any agreement that is reached between the parties during the conciliation phase does not involve the presiding Commissioner making any assessment of or determination about the matters that are raised by objectors to your proposal.

If the dispute proceeds to a hearing, the presiding Commissioner will consider the matters that are raised by objectors if they are relevant in determining the appeal.

What are the procedural rules that apply in the hearing phase?

It is appropriate to explain a number of things about the hearing phase.

First, although not being conducted in a courtroom, the hearing phase is nonetheless a hearing of the Court. As a consequence, documents that have been returned to the parties at the end of the conciliation phase need to be tendered if they are to form part of the evidence in the hearing phase.

Although witnesses will not be sworn in, the evidence that they give relevant to the issues in the appeal is treated as if it had been given under oath or affirmation in the witness box in a courtroom and those persons giving such evidence informally on site are under exactly the same obligations to tell the truth as if they were in the courtroom.

Although the presiding Commissioner is not obliged to apply the strict rules of evidence, the requirements for procedural fairness and natural justice are the same as if the matter was being heard in a courtroom. The statutory basis for the procedure in the hearing phase, as with all merit appeals in the Land and Environment Court, is found in sections 38 and 39 of the *Land and Environment Court Act* 1979.

Although it is unlikely that technical procedural rules will need to be considered during the hearing phase, the hearing phase is also governed by the *Civil Procedure Act* 2005 and by the *Uniform Civil Procedure Rules* 2005.

Do I have to conduct my appeal myself?

Each party has a right to conduct their appeal themselves, called self-representation. If you decide to represent yourself, the Court endeavours, through the provision of as much plain English information as is possible, to assist self represented litigants.

However, you are not required to represent yourself. You are entitled to be represented by a lawyer of your choice or by some other person who you authorise to act as your agent for the purposes of the conciliation/hearing process.

A person cannot give expert evidence and also act as your agent.

If you are represented by a lawyer or by an agent, the application commencing the appeal will need to state their names and give their contact details. If you engage a lawyer or agent after filing your appeal application, they will be required to file and serve a formal Notice of Appearance. This means your lawyer or agent will be obliged to lodge copies of the Notice of Appearance with the Court and obtain a stamped copy to serve on the council or, if the council is legally represented, on the council's lawyers.

Once a lawyer or agent has filed and served a Notice of Appearance on behalf of a party, all future documents concerning the proceedings are required to be served on the lawyer or agent rather than on the party themselves.

Is there a difference in the process if I am only appealing against conditions of consent?

If you are only appealing against conditions of consent that the council has imposed on a consent or approval for your residential development proposal, it may not be necessary for the conciliation/hearing to take place on site. This is a matter that will be sorted out by the Registrar at the directions hearing.

In addition, importantly, if the dispute is about conditions, you are responsible for the preparation of the Statement of Facts and Contentions as you are contending that the conditions should be changed or eliminated. The requirement for this is contained in paragraph 18 of the Practice Note.

How long is it likely to take before my appeal is decided?

The Court has set itself the target of disposing of 95% of all residential development appeals that are being dealt with through the conciliations/hearing process within three months of the date of filing of the appeal.

This means that the Court expects that, for almost all residential development appeals, the conciliation/hearing will be held and a decision given, including final orders of the Court disposing of the proceedings, within three months of the date of an appeal being filed with the Court.

From commencement, the parties need to prepare for the appeal in order to comply with this time period for disposing of residential development appeals

How is the Commissioner's decision given?

Because of the performance target of 95% of all matters being completed within three months of filing, it is likely that most matters, whether dealt with fully onsite or adjourned to a courtroom, will result in the presiding Commissioner giving an extemporaneous decision. This means that the Commissioner will, after a short break to consider what should be the decision, give an oral decision, including explaining the basis of and reasons for reaching that decision.

It is also likely that the extemporaneous decision will include the final orders of the Court disposing of the matter (although there may be exceptions to that if conditions of consent or minor amendments to plans need to be made where these are required by the Commissioner).

Any extemporaneous decision given by a Commissioner will be recorded, whether the decision is given on site or in a courtroom. The recorded decision will be transcribed and, after checking and permitted minor editing by the presiding Commissioner, a copy will be provided to the parties. It will also be published on the Internet in the Caselaw database.

In the minority of cases where a decision cannot be given immediately after the conclusion of the hearing, the presiding Commissioner will reserve the decision and a written judgment will be provided at a later date. Rarely will the period for a reserved decision be longer than a month or so and you will be notified when the decision will be given (at least 24 hours prior to it being handed down). Reserved decisions are delivered at the Court at 225 Macquarie Street, Sydney. Reserved decisions are also published on the Internet, in the Caselaw database, within a short time of the decision being handed down.

How can I obtain a copy of the orders of the Court finalising my appeal?

The decision that the Court makes in your appeal will tell you what are the final orders of the Court. These will be incorporated at the end of the written decision that you receive.

Usually, you will not receive a copy of the orders of the Court sealed with the official stamp of the Court and the signature of the Registrar. If a party requires a sealed

copy of the orders of the Court, the party needs to prepare three copies of the orders in the approved form (Form 43) and provide the copies to the Court for sealing. The party will need to pay the Court fee for providing a sealed copy of the orders paid. The fee for seeking a sealed copy of the orders of the Court is set out on the Schedule of Court fees.

Will I be given written reasons for the Commissioner's decision?

The Commissioner's decision will be provided in writing and this will set out the reasons for decision – see the answer to *How is the Commissioner's decision given?*

Can I appeal against the Commissioner's decision?

The only appeal that is available against a decision or order of a Commissioner given in a residential development appeal is on a question of law. The appeal is under section 56A of the *Land and Environment Court Act* 1979. Because of this limitation of appeals to questions of law, in general, there is no appeal against a decision of a Commissioner on the basis that the Commissioner made the wrong decision on the facts or the merits of the development proposal.

Appealing against a decision of a Commissioner is a process of some legal complexity and can involve costs orders if unsuccessful. It is suggested that you might wish to consult a lawyer before considering whether to appeal against a Commissioner's decision.

If the matter is adjourned how long will the adjournment be for and what will happen during the adjournment?

Ordinarily, if a final hearing cannot be concluded in the time fixed for the conciliation/hearing, it will continue on the next working day.

In the unusual circumstances where an adjournment for a longer period of time is necessary, the presiding Commissioner in consultation with the Registrar will fix a date for the continuation of the conciliation/hearing as soon as practicable afterward and will make further directions setting a timetable for any further exchange of information or plans during the period of the adjournment.

Will the Commissioner who does the conciliation phase also decide my appeal?

Section 34 AA(2)(b) of the *Land and Environment Court Act* 1979 provides that the Commissioner who conducts the conciliation phase must, if the conciliation is terminated without an agreement being reached, proceed to hear and decide the appeal. Ordinarily, this hearing will commence after a short break following the termination of the conciliation phase.

Can I object to the Commissioner who undertakes the conciliation phase going on to hear and decide my appeal?

The only basis upon which you can ask the Commissioner who presides over the conciliations phase to withdraw from hearing and determining your appeal, if agreement is not reached during the conciliation phase, is if you consider that the Commissioner is or could reasonably be seen to be biased.

If you consider that this is the case, you can apply to the Commissioner to disqualify him or herself. The Commissioner will hear and determine your application. You will need to give reasons for your application. If the Commissioner upholds your application and disqualifies him or herself from hearing the appeal, the Commissioner will adjourn the matter and refer the matter to the Registrar so that a new Commissioner can be appointed to hear and decide your appeal.

If I am successful in the appeal, can I have my costs paid by the council?

In merit appeals in the Land and Environment Court, including Class 1 residential development appeals using the conciliation/hearing process, costs are not usually awarded. The *Land and Environment Court Rules* 2007 provide that costs can only be awarded if the Court considers the making of a costs order is "fair and reasonable" in the circumstances. The Rules give examples of circumstances where the making of a costs order might be fair and reasonable. The relevant provisions of the Rules are contained in Part 3 rule 3.7.

Commissioners are not able to consider applications for costs and any such application needs to be made by Notice of Motion. A Judge or the Registrar will hear and determine any Notice of Motion for costs.

Is a record kept of what happens during the conciliation process?

The only records that are kept of what takes place during the conciliation phase are notes that may be taken by those participating, including the presiding Commissioner. There is no formal record kept of the discussion – although documents may be exchanged between the parties or shown to the Commissioner during the conciliation phase.

Any notes taken by the Commissioner during the conciliation phase are confidential and are not subsequently referred to by the Commissioner unless the parties agree to this occurring. Notes taken by the parties or the Commissioner are not used, if the conciliation fails, during the hearing and determination process that follows unless both the parties agree to this occurring.

What record is kept of the hearing if the Commissioner hears and decides my appeal?

If, after the conciliation phase concludes, the presiding Commissioner proceeds to hear and decide your appeal on site and give an extemporaneous decision at the conclusion of the on site hearing, the only formal record of what occurs is the recording of the Commissioner's extemporaneous decision. This recording will be transcribed and provided to the parties and published on the Caselaw database.

The parties and the Commissioner may take notes during the course of the hearing process but any notes that are taken by the Commissioner are not available to the parties.

If the hearing and determination phase takes place in a court, the proceedings including any extemporaneous decision given by the Commissioner in court will be recorded. The recording of the proceedings will not be transcribed unless one or other of the parties requests and pays for a transcript of the hearing.

Any extemporaneous decision given by a Commissioner at the end of a hearing in Court will be recorded and will be transcribed and published in the same way as a decision given onsite.

Can I ask for an adjournment during the conciliation or hearing phase?

If something unexpected suddenly arises during the course of the conciliation or hearing phases, you can ask the presiding Commissioner for a short adjournment to consider what has occurred. It is a matter for the presiding Commissioner whether an adjournment will be permitted and, if so for how long.

Will there be an adjournment at the end of the conciliation phase?

At the end of the conciliation phase, there will ordinarily be a short break to enable the parties to organise themselves for the hearing and determination process that will follow.

A longer adjournment will not ordinarily take place but you can make an application to the presiding Commissioner for a longer adjournment, including adjournments to a

different day, if you have reasons for wanting to do so. You will have to explain those reasons to the presiding Commissioner who will decide whether or not to grant any longer adjournment.

Ordinarily, if the conciliation phase is unsuccessful, the hearing and determination process will continue on the same day after the short adjournment between phases.

If my development proposal is approved, will conditions be attached to it and, if so, what will they be?

The council will be directed to provide draft conditions of consent. This direction will be made at the directions hearing. These draft conditions of consent are those that the council says should be imposed by the Court if the Court were to approve your development proposal. The council provides these draft conditions of consent without prejudice to its case that the Court should refuse your application. Providing these draft conditions does not mean that the council in any way supports your development proposal.

At the directions hearing, you will also be directed to provide your response to the council's draft conditions of consent.

Both parties will need to consider the standard conditions of consent for residential development which are published on the Court's website and identify any change the parties wish to make to the standard conditions, including any addition, amendment or deletion of conditions.

During the course of the conciliation phase, you will have the opportunity to consider whether, if the Court approves your proposal, you accept the council's proposed conditions or if you wish to propose any changes to them.

If the Court approves your proposal and you do not suggest any changes to the conditions, these conditions will form part of the development consent for your proposal.

If you do wish to suggest changes, you should be prepared to explain the changes that you are seeking to the presiding Commissioner. The presiding Commissioner will decide, if your proposal is to be approved, whether or not any changes should be made to the council's proposed conditions.