COURT PANEL - THE KEYS TO THE EFFECTIVE PRE TRIAL AND HEARING PREPARATION AND PRESENTATION OF MERIT APPEALS

THE PRE TRIAL PROCESS

PRESENTATION TO THE ENVIRONMENT AND PLANNING LAW CONFERENCE – BYRON BAY – 18 OCTOBER 2008

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Introduction

This paper concentrates on the pre trial process in Class 1, 2 and 3 appeals heard by commissioners, and specifically:

- Pre hearing directions,
- Case management,
- Statement of Facts and Contentions, and
- The appropriate level of evidence.

Pre hearing directions

Development appeal applications will usually be given a return date 28 days after the date on which it is filed. The first directions hearing will usually be before the Registrar where the parties should expect that the Usual Directions are to be made. The parties should have either agreed or have competing proposed short minutes to hand to the Court. At this time the parties are to hand to the Court a completed Information Sheet in the form prescribed in Schedule E of the *Practice Note – Class 1 Development Appeals* (the Practice Note) of 14 May 2007. This requires the parties, amongst other matters, to nominate the expert evidence required, the areas of expertise and the real issues in the appeal. The appropriate level of expert evidence is raised at this time. The question of whether any expert reports are required at all is also raised at the first directions hearing.

The early identification of issues and a considered response to the details required in the Information Sheet guides the future progress of the appeal. The proper identification of issues allows the parties to determine the critical matters, such as the level and extent of evidence and the time and type of hearing that is appropriate for the appeal. The quick, just and cheap disposal of matters cannot be achieved unless the genuine basis for the dispute has been clearly and precisely settled between the parties.

Case Management

The *Civil Procedure Act* 2005 relevantly states:

> ***56 Overriding purpose***
> *(1)The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.*
>
> ***57 Objects of case management***
> *(1)For the purpose of furthering the overriding purpose referred to in section 56 (1), proceedings in any court are to be managed having regard to the following objects:*
> *(a) the just determination of the proceedings,*
> *(b) the efficient disposal of the business of the court,*
> *(c) the efficient use of available judicial and administrative resources,*
> *(d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.*
> *(2)This Act and any rules of court are to be so construed and applied, and the practice and procedure of the courts are to be so regulated, as best to ensure the attainment of the objects referred to in subsection (1).*

The Court uses case management regularly but not for all matters. The Registrar may direct parties to case management during the pre trial process if the Registrar is of the opinion that it will *facilitate the just, quick and cheap resolution of the real issues in the proceedings.* The parties may also, by agreement, request that the matter be the subject of a case management, presumably for the same reasons. A single commissioner generally hears a case management. The parties may request that the commissioner who conducted the case management hear the appeal or conversely, request that another commissioner hear the appeal when the matter is referred back to the Registrar for hearing dates.

The role of the commissioner in a case management is to facilitate discussion between the parties on the issues with the goal to reach agreement (at best) or allow the parties to have a better understanding of the issues (at worst). Generally, the outcome is somewhere between with some issues deleted, some issues dealt with through conditions and some issues remaining but provided with greater particulars.

In my experience, case management can be a valuable part of the pre trial process, particularly where:

- additional time allocated by the Court is likely to result in a reduction in the number of issues,
- there are a large number of issues,
- the issue(s) may be complex,
- insufficient time is available at the Call over to fully understand and discuss the issues,
- there are reasons why the parties have not been able to enter into meaningful discussions over the issues.

Statement of Facts and Contentions

A Statement of Facts and Contentions is to be filed and served (except in an appeal in respect of the imposition of conditions or an appeal by an objector) by the council by 4.00 p.m. on the third last working day before the first return date of the proceedings (the Practice Note, par 4). Schedule B of the Practice Note specifies the form and content and consists of Part A and Part B. Part A identifies the facts to be provided and Part B the contentions. The statement is to be as brief as reasonably possible.

The applicant (or objector/respondent) may file and serve a Statement of Facts and Contentions in reply. Leave of the Court is required to amend the Statement of Facts and Contentions (the Practice Note, par 31) except where it is consequential on an amended development appeal application (that also requires leave to be granted).

Part A states that the following details are to be provided:

- the proposal,
- the site,
- the locality,
- the statutory controls, and
- action by the respondent consent authority.

Importantly, Part A states that no matters of opinion are to be included.

Part A is generally uncontroversial and is usually prepared in a manner that satisfies the requirements of the Practice Note with the exception that large sections of planning documents such as local environmental plans and development control plans are sometimes unnecessarily cut and pasted into this part of the document. Often these extracts around do not relate to the issues in dispute.

Part B states that the respondent is *to identify each fact, matter and circumstance that the respondent contends require or should cause the Court…. to refuse the application or to impose certain conditions.* Part B is to:

- focus on the issues genuinely in dispute,
- have a reasonable basis for its contentions,
- present its contentions clearly, succinctly and without repetition,
- identify the factual/legal basis for a contention that an application must be refused,
- list the information required, if there is insufficient information,
- identify the relevant planning control, if there are breaches of planning instruments, and the extent of non-compliance (grouping together provisions dealing with the same aspect), if necessary in diagrammatical form,
- identify the nature and extent of each environment impact, and if possible quantify, and
- identify contentions that may be resolved by conditions of consent.

The content of Part B varies considerably notwithstanding the specific requirements of the Practice Note. In my observation, there are a number of different approaches that are used in the preparation of Part B. These are:

The "Scatter Gun Approach" – this approach works on the basis that if enough issues are raised, some are likely to the relevant. This approach invariably includes issues that "may" be issues rather than issues genuinely in dispute. While I acknowledge that an appeal may be lodged well before the council has undertaken any proper assessment of a development application, the onus still rests with the council to identify those matters that are genuinely in dispute. It is not reasonable to identify an issue without a reasonable basis for its inclusion. While this approach may be a way of satisfying the Registrar at the first directions hearing, it is largely unhelpful as it simply transfers the need to properly identify the real issues to a later time. This has the flow on effect of requiring a party to address issues that may not necessarily be real issues with a consequent increase in the cost of the appeal.

The "Reverse Roseth Approach"- this approach has similarities with the "Scatter Gun Approach" but includes issues that are mostly real but of such small or trivial significance that even cumulatively they would not warrant the amendment or refusal of the application. This approach adopts the mantra of "give me your 40 best issues"! Again, it is largely unhelpful as it simply transfers the need to properly identify the real issues to a later time.

The "War and Peace Approach" - this approach adopts the premise that there is a strong positive correlation between the size and quality of the statement. Statements that adopt this approach are often in excess of 40 pages in length and contain complete extracts of local environmental plans and development control plans (most of which are not relevant to the issues), excessive commentaries on each issues that are more appropriately dealt with by way of evidence, lengthy irrelevant references to past planning studies and a complete lack of diagrams or other means of simply explaining the issue in dispute. Statements that adopt the "War and Peace Approach" can require multiple case managements to actually work out what are the issues.

The "I Know But I'm Not Telling You Approach" - this approach is based on a lack of communication. In the absence of any meaningful discussion between the parties, the Statement of Facts and Contentions contains real issues, but issues that can readily be addressed with some discussion between the parties. In most cases that adopt this approach, if there had been even a minimum level of communication between the parties, a number of the issues could be satisfactorily addressed by way of amendments to the plans or conditions of consent. A consistent example of this approach is the relocation of an access driveway to avoid the removal of an existing street tree generally following an arborist's or landscape report supporting the retention of the tree.

The "I Want To See Everything Approach" – this approach is based on the need to have every aspect of the proposed development available at the hearing and places little value on conditions of consent or relatively simple amendments to the plans that can be made with little trouble. Examples include a concept drainage design not being an acceptable response to an issue over the disposal of stormwater even if it is simply a question of how it is to be designed rather than can it be designed. Similar problems occur with geotechnical, contamination and structural issues.

The "Crystal Ball Approach" – this approach is based on the assumed perceptive abilities of those parties required to understand issues that are provided with few particulars. An issue that states "*Non-compliance with zone objective (b) of the Residential 2(a) zone"* is of little benefit to anyone unless there are particulars provided to indicate how a proposed development is inconsistent.

The" Issue When It Isn't Really An Issue Approach"- this approach generally manifests itself in the last of the issues - The Public Interest or Matters Raised By Objectors. While it is clearly acceptable for objectors to identify issues beyond those identified by the council, it is unreasonable to raise those issues to the same level as the council issues. For example, a council may not identify noise an issue however objectors may legitimately raise noise as an issue and state why they see it as a problem. While it is appropriate that submissions are made that noise was seen as a problem for local residents it is unreasonable to make submissions that it was a

reason for the refusal of the application. Such a submission prejudices the other party who cannot respond in any meaningful way to such a technical issue and where there are potentially multiple ways of dealing with noise disturbances. If noise was such an issue of significance that it should have been identified by the council and appropriate evidence provided.

Evidence

The extent and type of evidence is required to be provided in the Information Sheet at the first directions hearing. The options include:

- no expert evidence,
- single expert reports,
- a joint report from the competing experts after conferencing identifying the areas of agreement, disagreement and opportunities for the resolution of an issue, if possible, and
- individual reports from competing experts and a joint report, and
- lay evidence.

No expert evidence

An appeal with no expert evidence (or for particular issues) can be a sensible and cost effective approach for both parties. Where issues involve matters such as building line encroachments, streetscape, character, overlooking and view loss; the experience and expertise of commissioners should be used particularly when it is likely that the findings will be based on the observations of the commissioner on the site view, rather than the evidence of expert witnesses. The only proviso is that the relevant controls should be available to the commissioner at the time of the site view and that guides, such as height poles, are available.

Single experts

Single experts (previously known as Court appointed experts) have been used in the Land and Environment Court since the appointment of Justice Peter McClellan as the Chief Judge of the Court in August 2003. The term "single expert" is a term used in the *Uniform Civil Procedures Rules 2005* (the Rules) and only recently adopted by the Court in the Practice Note. Single experts can be used in subjective fields such

as; town planning, urban design, heritage and architecture and also objective fields such as; traffic, hydrology and contamination. In most instances the parties select the expert by mutual agreement and where there is a dispute the parties are required to provide a list of three nominees to allow the Court to make the selection. Leave was generally granted to allow the parties to call their own expert evidence after the single expert had prepared their report. Not surprisingly, it was generally limited to the party most aggrieved by the findings of the single expert.

In recent times there has been a significant reduction in the use of single experts compared to previous years particularly in the more subjective fields.

Individual reports

The need for individual expert reports is becoming less compelling over time. If the role of the Court is to arbitrate on the principal contested issues then joint reports are more responsive to this requirement. There is a clear benefit to the Court in narrowing and clearly stating the points of disagreement between the experts and a short statement why they have formed their opinions rather than each expert producing a large report that may not necessarily address the issues in dispute.

Joint conferencing and joint reports

Joint conferencing is simply a meeting between experts in a similar discipline with the view of producing a report that clearly outlines the areas of agreement and disagreement. A joint report may form the basis for the evidence in an appeal rather than individual expert reports (Div 2, Pt 31 of the Rules) although the opportunity still exists for reliance on individual expert reports in an appeal if a case can be made out for this approach. For example, in more complicated cases, a joint report can provide a useful and helpful summary of the issues in dispute and the evidence relied on by each party without the need to trawl through voluminous documents to find the basis for the issue and the respective evidence. In these instances, a joint report can supplement individual reports. Joint reports can also be very helpful in concurrent evidence, which is increasingly used by the Court.

There are considerable benefits in the use of joint conferencing and joint reports, these include:

- reduced costs to the parties,
- helps distil the issues in dispute,
- provides the opportunity for the experts to meet, generally without the involvement of a legal representatives,
- provides a clearer and more succinct representation of the issues and the evidence,
- provides the opportunity to explore alternative solutions, particularly where objective-based solutions are available such as access requirements for the *Building Code of Australia* or bushfire protection measures under *Planning for Bushfire Protection 2006*.

Even though there are clear benefits in joint conferencing and joint reports, the end result does not always justify the time taken to produce the joint report. This can occur when:

- experts attend the joint conference with a fixed mindset and with no intention of fully considering the opportunity for discussion and potential compromise,
- the joint report is simply a compilation of individual expert reports.

The paper prepared by Senior Commissioner Roseth on this topic is particularly helpful in preparing effective joint reports (*How to make joint reports helpful, Talk given by Dr John Roseth, Senior Commissioner of the Land and Environment Court of NSW to the NEERG Seminar on Compiling Joint Expert Reports* on 24 October 2007, available on the Court web site).

Lay evidence

A fundamental component of almost all appeals under Class 1, 2 and 3 is local resident or community submissions. The Usual Directions (at Pt F, par 2) provides that the hearing is to commence at 9:30 a.m. on-site. While the Usual Directions provide the option for persons making a written submission to give their evidence on site or in court, in almost all instances local resident evidence is given on site. This has the advantage of allowing the Judge or Commissioner to view properties of those persons who may have objected to a proposed development and allow the residents of that property to fully explain their concerns from the viewpoint of their

property or from particularly sensitive locations on their properties. Loss of view is more fully considered in this way. In practical terms, their evidence is likely to be repeated if given in court after the site view. The on-site hearing of resident evidence is also more convenient for residents who may have work or other commitments and importantly provides a less intimidating environment for people who may have had little experience in a court. There is also little doubt that it reduces the overall time for a hearing.

A potential problem is the number of residents who may wish to give evidence on site. There have been recent examples where the first two days of a hearing were taken up with resident evidence given on-site. This is the exception rather than the rule. The Usual Directions (at Pt G, par 13) require the council to file and serve a notice of objectors who wish to give evidence at the hearing. This does not place any limit on the number of objectors, however the Rules (at Pt 6 r 6.32) allow the Court to make any orders it thinks fit for the future conduct of proceedings. When considered in the context of *ensuring for the orderly and expeditious discharge of the business of the Court* (s 40(1) of the Court Act), conducting the hearings with *as little formality and technicality, and with as much expedition* as permits (s 38(1) of the Court Act) and for the *just, quick and cheap resolution of development appeals* (the Practice Note, par 1) limits can clearly be placed on the amount of lay evidence. Most recently, the Chief Judge directed that the amount of lay evidence in a five day appeal be limited to four lay witnesses from either party, notwithstanding over 300 submissions were provided that occupied eight lever arch files. Despite the strong initial protestations from both parties compliance was achieved without any measurable impact on the strength of either parties' case.

The Ten Steps to Effective Pre Trial Preparation

1. Provide the issues clearly, succinctly and without repetition and identify the factual/legal basis for an issue.
2. Ensure that every endeavour is made to comply with the Usual Directions and avoid slippages in the agreed timetable.
3. Make use of case management, particularly when there are problems with communication between the parties.

4. Consider whether any expert evidence is required for the appeal or specific issues.
5. Provide expert evidence that is proportional to the number and complexity of issues.
6. Use joint reports in preference to individual reports unless there are compelling reasons not to do so.
7. Conditions of consent and minor amendment to plans should be used, where possible, to address issues in dispute.
8. Make use of diagrams rather than lengthy commentaries to explain an issue.
9. Any additional information in response to an issue should be provided at the earliest possible time.
10. The Court room should not be the only forum for discussion between the parties.

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