

Preparing for the LEC Process and Conduct of an Appeal

Presented by

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The DA Assessment

- DA lodgement and reports
 - Be careful not to say things that may come back to bite you in cross examination
- Amending the DA (cl 55)
- Time Frames
 - Deemed refusal ([cl 113](#) of EPA Regulation)
 - Appeal limitation periods ([s 8.10](#) of EPA Act)
 - But note [*Ipoh Pty Limited v Sydney City Council* \[2006\] NSWLEC 102](#)



Cl 55 Amendments

(1) A development application may be amended or varied by the applicant (but only with the agreement of the consent authority) at any time before the application is determined, by lodging the amendment or variation on the NSW planning portal.

- See – [Radray Constructions Pty Limited v Hornsby Shire Council \[2006\] NSWLEC 155](#)
- Cl 55 is “beneficial and facultative”. More liberal than s4.55 “substantially the same” test
- Must be made “with the agreement of the consent authority”
- Remember to be explicit in correspondence as to whether amended/further documentation is intended as cl 55 amendment.
- Note recent authority that cl 55 does not apply to s 4.55 applications
 - [AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces \[2021\] NSWCA 112](#)



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The SOFAC and the First Directions Hearing

- Format for the SOFAC
 - Particularise by reference to plans/documents
 - Don't include full extracts of controls verbatim
 - Avoid repetitiveness
- Practice Notes
 - [Development appeals](#) (s34)
 - [Residential Development Appeals](#) (s34AA)
- [s34AA](#) applies to DA for detached single dwellings and dual occupancies (including subdivision)

Preparing for Conciliation

- What to offer (at least 2 weeks in advance)
- How to prepare
- Be frank and realistic with the client
- Push for bottom line



Attending the Conciliation

- The process
 - [Conciliation Conference Policy](#)
- Observations at the site visit
 - [Site Inspections Policy](#)
 - Remember to take original plans, amended plans and survey plan
 - Do background research on any other buildings which you intend to refer to
- Potential outcomes
 - Agreement
 - Termination
 - Short adjournment to formalise “agreement in principle”



Notice of Motions Amending SOFACs

- Amending plans for hearing
 - File substantial amended plans at least 2 months before hearing as rule of thumb
 - Insist on detail from architect/consultants
- More documentation is better, if in doubt insist on amended reports
- Supplementary reports
 - Always track changes
- Amendments to SOFAC



Joint Conferencing/Joint Reports Amended Plans

- Policies
 - [Expert Witness Code of Conduct](#)
 - [Joint Conference Policy](#)
 - [Joint Report Policy](#)
- Further amended plans
 - Address plans before the Court
 - Prepare sketches which might resolve or reduce issues
 - Append to joint report
- Consistency between reports
 - General preference for expert reports to be staged and planners to go last
- Avoid repetitiveness and lengthy extracts

Hearing

Cross-Examination

- The Court process
- Cross Examination
 - Read, read and reread your reports in advance
 - Designed to be intimidating
 - Answer the question!



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Objectors/Joinder

8.15 Miscellaneous provisions relating to appeals under this Division

- (2) On an appeal under this Division, the Court may, at any time on the application of a person or of its own motion, order the joinder of a person as a party to the appeal if the Court is of the opinion—
- (a) that the person is able to raise an issue that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if the person were not joined as a party, or
 - (b) that—
 - (i) it is in the interests of justice, or
 - (ii) it is in the public interest,that the person be joined as a party to the appeal.

- Right of objector appeal for designated development applications (s 8.8)
- Again, avoid repetitiveness when representing objector
- Note: Double Bay Marina Order (less common since s8.15(2))



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Costs

- The presumption is that each party pays its own costs ([r 3.7 LEC Rules](#))
- However there are certain exceptions (i.e. unreasonableness)
- Where the applicant amends plans, and the amendments are more than minor, the applicant is to pay the respondent's costs thrown away (see [s8.15\(3\)](#) – not applicable to s34AA or s4.55)

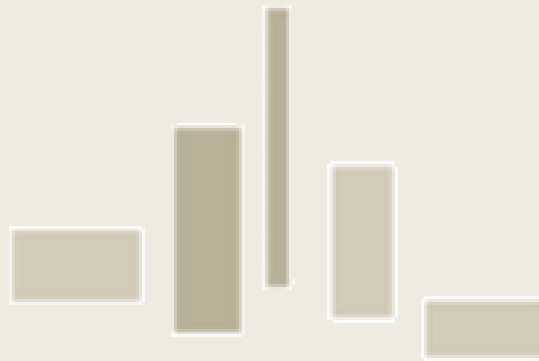


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Tips

1. Be mindful of appeal potential when preparing DA documentation
2. Be explicit when amending through DA process (cl 55)
3. Give frank advice from outset of appeal process
4. Push client for bottom line early
5. Avoid repetitiveness in expert reports and contentions
6. No such thing as too much detail for hearing
7. Beware amending plans through joint conferencing
8. Read, read and reread your reports before cross examination and remember to answer the question

QUESTIONS?



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