

DA APPEALS - FREQUENTLY ASKED QUESTIONS

The purpose of this document is to provide some general information that may assist Waverley residents in understanding the processes and conduct of DA appeals.

What is a DA Appeal?

A DA Appeal is the general term to describe when an applicant for a development application ("DA") is not satisfied with the determination of their application and lodges an 'appeal' to the Land & Environment Court of New South Wales ("Court"). The appeal can be against the refusal of a DA or the deemed refusal of a DA (the DA was not determined within a certain period) or a DA condition.

There are two 'parties' in the appeal – the applicant and the Council. Neighbours/objectors are not considered parties in an appeal, however, they can provide evidence regarding matters such as what impacts a proposed DA will have on their property.

What does Council do when an appeal is lodged?

Council staff will usually notify any person who objected to the DA of the appeal and, insofar as reasonably possible, keep them informed of relevant dates that relate to the conduct of the appeal that the person can attend subject to the Court's policies.

Council will engage legal representatives and relevant experts who will provide evidence in the appeal (eg planners, heritage architect, acoustic engineer, traffic engineer, arborist, geotechnical engineer).

The Council is required to prepare and tender a document called a *Statement of Facts and Contentions* which outlines the relevant information and history of the DA up to the lodgement of the appeal and the reasons (contentions) why the DA should be refused. These contentions may or may not include matters raised by objectors. Please note that Council cannot approach the Court to vary its timetable as part of the proceedings for late submissions. The parties have to abide by the directions of the Court.

What role can neighbours/objectors have in an appeal?

Objectors are not parties in the appeal so their role is limited to providing their own evidence to the Court. They can provide the Court and the parties with a written submission that outlines their concerns or issues and these matters will be taken into consideration.

In some circumstances, they can also provide an oral submission (subject to the current Covid procedures of the Court) – either at the site or in the Court or via a platform nominated by the Court (i.e. telephone dial-in or Microsoft teams). They can generally attend and listen to the public part of the section 34 conference (detailed below) and a full hearing if the matter proceeds to this stage.

They cannot attend the without prejudice meeting or any discussions between the parties as part of the section 34 process.

These are the rules of the Court and not matters that Council has any control over.

What are the stages in an appeal?

There are a number of stages or processes in an appeal. These will be outlined by the Court (usually the Registrar of the Court) to Council's legal representative soon after the appeal is lodged. The Council is obliged to follow any directions that are given by the Court. Generally, the Court will give directions that will try to facilitate the appeal being resolved without the need to have a formal hearing.

They might include:

- That the parties have a 'without prejudice' meeting to try to resolve or reduce the contentions.
- That the parties participate in a conciliation conference known as a section 34 conference.

If these fail to result in any agreement between the Council and the applicant, then Court will order that the matter proceed to a full hearing.

What is a without prejudice meeting?

This is a meeting that the Court may order to occur between the applicant and Council with the aim of resolving or reducing the contentions. This meeting is attended by the applicant (and their representatives) and Council planning staff.

The applicant will have reviewed Council's *Statement of Facts and Contentions* and might offer to make changes to the plans to overcome certain contentions. This meeting is conducted without any representative of the Court and any matter discussed in the without prejudice meeting cannot be used in the proceedings without the consent of the parties.

Objectors are not able to attend the without prejudice meeting.

What is a Section 34 Conference?

This process is a conciliation conference under section 34 of the Land & Environment Court Act and will generally be presided over by a Commissioner of the Court.

The purpose of the section 34 conference is to see if the parties can resolve the appeal matters or at least some of the issues relating to the development.

It generally will commence with an on-site inspection and objectors are able to attend this part (subject to the Courts Covid procedure rules) and give oral evidence of how the proposal will impact on them.

The second stage of the section 34 conference is not open to objectors to attend.

Covid rules: In response to the Covid pandemic, the Land and Environment Court has issued an updated *COVID-19 Pandemic Arrangements Policy* which commenced on 6 April 2021. This policy (and other useful practice and procedure information) can be accessed on the Land and Environment Court's website <https://www.lec.nsw.gov.au/>.

This policy currently restricts the number of persons who may provide oral evidence on-site inspections to a maximum of six persons objecting to a development proposal. This may mean that only those objectors most impacted can attend and give oral evidence. If there are

several objectors in a matter, a resident objector may nominate themselves as a point of contact for other resident objectors to contact them so that a List of Objectors can be formalised for the Court.

What are the possible outcomes of a section 34 conference?

1. The parties reach an agreement;
2. The parties reach an agreement on some of the issues;
3. The parties do not reach an agreement.

If an agreement is reached between the parties, the Court may then determine the application in accordance with that agreement. If this happens, anyone who has objected will be notified of this.

If no agreement is reached, then the matter will be set down for a full hearing at a later date and objectors will be notified of this date.

Can the applicant amend the plans?

As a general rule, the Court will allow the applicant to amend the plans if the changes are designed to resolve Council's contentions. Where the changes result in a different or greater impact, they may be renotified to neighbours and objectors and any further submissions will then be considered.

What happens if the appeal is referred to a full hearing?

If the parties are unable to reach agreement the section 34 conference will terminate and the matter will then proceed to a hearing before either a Commissioner or in some cases, a Judge.

Objectors will be notified of the date of the hearing and (subject to Covid rules) may attend and watch the proceedings. They are not generally allowed to give evidence again, although objectors may provide written submissions that will be considered by the Court.

At the hearing, the Court will be taken through relevant matters by the legal representatives and the experts will have their report tendered. They may also be cross examined by the parties legal representatives to test their expert evidence. The experts are not representatives of the parties or of the objectors – they are required to provide the Court with their own expert opinions.

When all of the evidence and legal submissions have concluded, the Commissioner or Judge will usually finish the hearing and reserve their judgement which will be provided at a later date (sometimes months) in writing. Objectors will be notified of the outcome.

Consent Orders?

Sometimes, Council's experts review amended plans the applicant provides the court and forms the preliminary view that all planning grounds and contentions have been satisfied and that they will no longer be in a position to support Council in its defence subject to the imposition of appropriate conditions of consent. Council will then consider the full circumstances of this matter,

including the amendment's proposed by the applicant, the submissions raised by neighbours and the advice

provided by Council's experts and will seek the finalisation of this matter by way of a hearing of application for consent orders. This means the Council and the Applicant will ask the Court to approve the amended development application subject to the imposition of conditions of consent. The Court will be required to determine whether the proposed development should be approved following its own merit assessment of the amended application.

Can the judgement be appealed?

Either party can appeal a judgement only on the basis of legal error and not on the merits of a decision.