

Community Fact Sheet



Understanding the Development Application Appeal Process

Last Updated: October 2022

Purpose

This fact sheet has been developed by Council to explain the appeal process, how the Land and Environment Court ('Court') makes decisions, and the role and involvement of Council, Councillors, objectors, applicants and others.

What is an appeal?

- If a person who applies to Council for approval to carry out development ('applicant') is not happy with the decision made, the person can have the Court reconsider whether the development can proceed.
- An applicant can also have the Court consider whether to approve the development if Council or the Local Planning Panel has not made a decision on the development within a certain period of time (generally 40 days).
- The Court can make its own decision on the development.
- Generally, unless there is some legal error, the Court's decision is final.

How does the Court make its decision?

- The Court hears expert evidence on matters such as town planning, heritage and engineering and will hear from some residents or stakeholders.
- The Court holds a compulsory conference between Council and the applicant called a 'section 34 conference' (discussed further in this fact sheet) at which the Council and applicant may reach an agreement regarding the development and whether it can proceed. That agreement can become the Court's decision.
- If the parties don't reach agreement at the section 34 conference, there will be a 'hearing' and the Court will make a decision after the hearing.

How can you be involved in an appeal?

- If you lodged an objection to the development, you will be receiving this information and will also be contacted by Council's solicitors
- Your written objection will be provided to the Court.

- You may be able to attend and have your views heard at the start of the section 34 conference and, if there is a hearing, again at the start of the hearing. This generally occurs on site, although it may be through audio-visual link due to COVID-19 restrictions.
- The Court has policies which limit the number of people it will generally permit to speak to a maximum of 6. The same policies give preference to residents directly affected by the development, such as those living adjacent to or directly opposite the development site. This is not a decision of Council. Council's solicitors will discuss this with you and guide who should speak, in order to comply with the Court's policies if there are more than 6 objectors.

What is Council's involvement in the appeal process?

- Council will prepare a document called a Statement of Facts and Contentions ('SOFAC') setting out why the Court should not permit the development to proceed.
- Council officers may be experts who give evidence on the impacts of the development on matters such as amenity, heritage, streetscape, traffic and noise in the appeal. Council may also retain independent consultants as experts.
- An expert **must** express their honest expert opinion to the Court. The views of Council or residents cannot override the expert's honest expert opinion and Council cannot direct an expert, even if that person is a Council employee, as to what to say. Experts are bound by the Code of Conduct from Schedule 7 of the Uniform Civil Procedure Rule 2005. In this regard, the Code of Conduct stipulates an expert is not an advocate for a party and has a paramount duty to assist the Court impartially.
- Other Council officers will have a role in instructing Council's solicitors. This role is performed by specific Council officers, and those officers cannot be told what to do by Councillors.
- If the original decision was made by Council's Local Planning Panel or the Regional Panel, Council officers can be subject to the direction of the Panel.

The section 34 conference

- The section 34 conference discussion only involves Council and the applicant.
- You can have your say at the start of the section 34 conference. The *Land & Environment Court Act 1979* and the Court's policies only permit the parties (generally only the applicant and the Council) to participate in the conference.
- Council is required to participate in the section 34 conference in good faith to try to resolve issues, or reach agreement with the applicant. Council does not have a choice about this, as it is a requirement of the *Land & Environment Court Act 1979*.
- It is common for applicants to amend their developments before, during or after the section 34 conference which might resolve some issues, or could lead to Council agreeing that the development is acceptable.
- Council staff have delegations which allow them to reach agreements in a section 34 conference. Councillors have no say in whether such agreements are reached.
- You cannot be told what happens during the conference phase, as the Court's policies provide that the conference is confidential, but you will be told that the matter has been resolved at the section 34 conference or that it will instead proceed to a hearing.
- A section 34 conference can be held over a number of weeks, and if so, you will not be able to be told anything about what is occurring during that time until the matter is finalised.

The hearing

- The hearing takes place publicly and you can attend and observe.
- There could be further amendments to the development made during the hearing which may resolve some or all of Council's concerns.
- Again, if an expert thinks that an amendment resolves their concern as an expert, they must tell the Court.
- Council is required to provide draft conditions which would be imposed if the Court allows the development to proceed. This is required by the Court and is not a sign of Council's concession for the development.

Further comments on your role

- You are not a party to the appeal, and have no right to address the Court or be represented in Court other than where Council's solicitors agree to you speaking at the start of the section 34 conference and hearing as noted.
- Council's solicitors are not your solicitors, and do not represent you, but they will assist you in understanding the process and how to provide evidence to the court and to speak. They cannot give you legal advice. It is a matter for you whether you seek your own independent legal advice, including regarding whether you can take a more active role in the appeal.
- You will be informed of the ultimate decision made (including at a section 34 conference) without undue delay. A case outcome report will also be published on Council's website as soon as practical (subject to protecting information identified as privileged).

Role of Councillors

Councillors have limited ability to assist residents in respect of an appeal.

This is because:

- They have no role in the determination of development applications.
- They cannot direct Council staff regarding any evidence they give in appeals; and
- They cannot direct any Council staff or Council's solicitors regarding the way in which an appeal is run or whether an agreement is reached.