HONES LAWYERS
Experts in Property & Planning Law

Our Ref: JBH:TW:22095

20 April 2022

Goolawah Co-operative Limited
200 Illa Langi Road
CRESCENT HEAD NSW 2440

**By Email: secretary.goolawah@gmail.com**

**Attention: Mr Wayne Skinner**

Dear Mr Skinner,

## Goolawah Co-operative Limited v Kempsey Shire Council
## Land and Environment Court (Class 1) Proceedings No. 2022/111192
## Ppty: 200 Illa Langhi Road, Crescent Head

We refer to our instructions in relation to your above development appeal.

We find that many of our clients wish to know the procedure and workings of the Land & Environment Court once they embark upon the appeal process. We therefore provide you with the following information in that regard.

## Court timetables and directions

The following is a timeline on procedural matters that need to be addressed once an appeal is filed in the Court:

(a) The appeal must be served upon the respondent Consent Authority within 7 days of it being filed;

(b) The appeal will be listed for a first directions hearing at a date normally 28 days after the date that the appeal is filed;

(c) The Consent Authority's solicitors will file and serve a Statement of Facts and Contentions upon us 3 working days before the directions hearing;

(d) The directions hearing will be attended by the Consent Authority's solicitors and by us to establish the timetable for the remaining steps below;

(e) We will file and serve a Statement of Facts and Contentions in reply on the Consent Authority's solicitors, if required, 14 days before the preliminary conciliation conference (or second directions hearing if there is to be no preliminary conference);

(f) We will arrange to inspect the Consent Authority's file relating to the DA at the earliest opportunity;

(g) A preliminary conference is sometimes arranged between the parties and their legal representatives (and in certain circumstances, any consulting experts) within 14 days of the first directions hearing;

(h) A second directions hearing may be listed at least 14 days after the preliminary conference for the parties to advise each other and the Court on the appointment of their respective expert/s and to re-determine the remaining steps in the timetable;

(i) Ordinarily, a conciliation conference will be listed within 12 weeks of the first directions hearing, with the duration of the conciliation usually being 1 day;

(j) It is sometimes useful for your experts to prepare position papers for the conciliation conference. These are usually exchanged a week or so prior to the conciliation;

(k) Further directions hearing 1 week later if the matter does not resolve at the conciliation conference. A hearing date will usually be set at this time (usually within 4 – 6 weeks of this directions hearing);

(l) Joint Expert Reports (or Parties Single Expert Reports) are to be prepared following conference between the experts, grouped in their areas of expertise, and are filed and served on both parties within 6 weeks of the second directions hearing.

(m) The Consent Authority's solicitors will file and serve on us a bundle of documents relating to the DA file and relevant planning laws and development controls, as well as a draft set of conditions that will form part of the consent to the DA in the event that your appeal is upheld, 14 days prior to the hearing; and

(n) The Consent Authority's solicitors will file and serve on us a notice of objectors who wish to give evidence at the hearing 7 days prior to the hearing; and

(o) We will file any amendments to the draft conditions 7 days prior to the hearing.

## Directions Hearing

Normally at the directions hearing we appear with the Consent Authority's solicitors, and directions are given as to the further conduct of the matter in accordance with directions (e) through (l) outlined above.

These directions generally include the timetable for arranging a preliminary conciliation conference between the parties, and the filing of the joint expert report. This report sets out the expert's areas of agreement and areas of disagreement. Where there is disagreement between the experts, they must specify the basis for their disagreement.

The Court may also make directions in relation to the appointment of a joint expert. This is dealt with further below under "Parties Single Expert".

The Court's range for hearing dates is generally about 12 weeks from the date of the directions hearing, but can be longer depending on the availability of experts or Counsel.

## Inspecting the Consent Authority's DA file

In order to determine the specifics of the Consent Authority's decision making process regarding the DA, we will apply to inspect the Consent Authority's file or will serve the Consent Authority's solicitor with a Notice to Produce.

Either of these options will enable us to look through internal referrals made by the responsible planning officer to the Consent Authority's internal experts, and to see the internal correspondence and reports that can better help us prepare our case to convince the Court to uphold your appeal and grant you the DA.

## Briefing expert consultants and Counsel (barrister)

Depending on the nature of the Consent Authority's reasons for opposing the approval of your DA, which will be set out in the Consent Authority's Statement of Facts and Contentions, you will need to engage the services of a consultant expert or experts. Such experts may include:

(a) Town Planner;

(b) Landscape Architect;

(c) Arborist;

(d) Traffic Engineer;

(e) Hydraulics Engineer;

(f) Architects and urban designers; and

(g) Ecologists.

These experts will be provided with a copy of the Consent Authority's Statement of Facts and Contentions, and will proceed to prepare an expert report either individually or jointly with their counterpart for the Consent Authority. For more information on the preparation of expert reports, see the following two sections.

For matters involving a range of experts providing evidence on a number of contentions, or for proceedings involving a novel or complex point of law, it is common practice for our firm to engage a barrister (or to 'brief Counsel').

Counsel will assist our firm in settling the submissions to be made to the Commissioner at the hearing, running the proceedings and guiding the conciliation, and cross examining the experts on their reports at the hearing (see below).

In cases where Counsel is required to be briefed, we will forward you a fee disclosure for their services which is an independent amount to that incurred for expert/s or for our firm.

## Parties single expert (PSE)

In rare circumstances, the Court may appoint a single expert for both parties (known as the Parties Single Expert, or PSE).

The PSE is engaged by both parties who are both liable (in one half shares) for his or her fees. The purpose of the appointment of a PSE is to try and save the parties costs (i.e. to

use only one expert rather than have the parties engage an expert each) as well as to bring a certain amount of impartiality to the expert process.

The Court will normally set a timetable for the PSE to be briefed by the parties and to provide a report to both the parties and the Court.

## Joint Expert Conference (where no PSE)

In most cases, it is the Court's approach to order a joint expert report as indicated above. These reports are created following a conference between the experts, and are held to achieve the following objectives:

(a) to promote the just, quick and cost-effective disposal of proceedings;

(b) to identify the real issues in dispute;

(c) to eliminate issues not genuinely in dispute;

(d) to commit experts to their position on issues, thereby enhancing certainty as to how the expert evidence will come out at the hearing;

(e) to provide clearer and more succinct presentation of the evidence of the experts on matters not agreed; and

(f) to avoid or reduce the need for experts to attend court to give evidence.

We would, in the normal course, coordinate the scheduling of this conference with the Consent Authority's lawyers. We point out that we are unable to confer with your expert once the joint expert conferencing process has commenced except in very limited circumstances.

## Amended plans

In certain circumstances, once we receive the joint expert report, it is appropriate to reassess the application and consider whether or not some (or all) of the Consent Authority's concerns can be addressed or ameliorated by amendments to the plans.

Plans can be amended prior to a hearing, however, amendments must be such that the application still retains the essential characteristics of the application that was originally lodged for approval.

If the amendments to the plans result in essentially a different application (or more properly an application with different characteristics) the Court has no power to approve the amended plans and the Consent Authority could ask that you withdraw the appeal and lodge a fresh application altogether (or that you simply rely upon the original plans).

Under the guidance of the previous Chief Judge of the Court, The Honourable Justice McClellan, there has been a move back to encouraging parties to settle matters with amendments to plans if able. How far one can modify plans depends on a number of factors including (but not limited to):

- Your needs or wishes;
- The amendments resulting in a proposal that has the same character as that originally lodged with the Consent Authority; and

- Our ability to sell modifications to the Consent Authority's lawyers with a view to resolving contentious matters and producing a satisfactory proposal.

Where new plans are proposed when a matter is under appeal, a Notice of Motion and Affidavit in support needs to be filed with the Court.

It is not a certainty that the Court will automatically grant its consent for you to rely on the amended plans. It should be noted that there are wide number of issues to be considered in determining whether fresh plans can or cannot (or even should or should not) be submitted after proceedings are commenced.

## Costs where amended plans filed

Costs (to the Consent Authority) are now payable where amendments to plans are made (other than "minor amendments"). Relevantly, s.8.15(3) of the *Environmental Planning & Assessment Act 1979* provides:

> *If the Court on an appeal by an applicant under this Division allows the applicant to file an amended application for development consent (other than to make a minor amendment), the Court must make an order for the payment by the applicant of those costs of the consent authority that have been thrown away as a result of the amendment of the application for development consent. This subsection does not apply to proceedings to which section 34AA of the Land and Environment Court Act 1979 applies.*

What this means is, if you make an amendment to the application (other than a minor amendment) then you will need to pay the Consent Authority's costs thrown away up to the date that the amendment was made.

In those circumstances, if you are going to make an amendment to your application after the commencement of an appeal, then that amendment should be made as soon as possible so as to ensure that any costs payable to the Consent Authority in relation to the appeal and preceding the amendment are as minimal as possible. In other words, if you wait until the latter part of an appeal, then arguably you would be required to pay the Consent Authority's costs of the appeal up to that later time as there would be more costs 'thrown away'.

It is therefore prudent, if you are going to make an amendment, to make the amendment earlier rather than later.

## Costs – Generally

The Land & Environment Court is empowered to award costs if it considers that it is fair and reasonable to do so. The normal rule, however, is that each party is responsible (liable) for their own costs associated with the appeal.

For either party to succeed on an application for costs they must establish that it is fair and reasonable for such an award to be made. An award of costs is most unusual in Class 1 appeals; however, this is not to say that it does not happen.

Circumstances in which the Court has awarded costs in the past include:

- Raising superfluous issues and running hopeless cases;
- Amending plans; and
- Decisions by elected Consent Authorities to refuse applications that are lacking in merit and/or against the recommendations of their planning officers.

At this stage, we do not consider that costs will be awarded, however if this changes we will advise you accordingly.

We note that although all Class 1 Development Appeals such as yours are usually listed for at least a two-day hearing, the number of contentions to be addressed can sometimes mean that proceedings can be concluded in a single day. If your matter requires counsel to be briefed, but is concluded on the first day of the hearing, we can raise the possibility of Counsel's second day's attendance charge being waived.

You may be required to make a deposit into our firm's trust account of the full amount of Counsel's fee estimate, if the fee estimate requires this to be done. Please note that your expert/s fees are separate to Counsel's fees, and separate from our legal fees.

## Conciliation Conference

In most cases, the Court will arrange a conciliation conference between you and the Consent Authority's representatives, regardless of whether you consent to such a conference. These conferences are often called Section 34 conferences to reflect the section of the *Land and Environment Court Act* that grants the Court the power to undertake these conferences.

These conferences are held on a Without Prejudice basis, meaning that anything discussed or any concessions granted by either party cannot be relied upon if no agreement can be reached and the matter proceeds to a contested hearing. The Commissioner presiding over the proceedings adopts a conciliatory role, and is responsible for facilitating discussion between the parties without making any binding decisions.

The Consent Authority's Statement of Facts and Contentions will have been provided to you prior to this conference. This will enable the scope and depth of the grounds for refusal by the Consent Authority to be discussed with the relevant Consent Authority officer, and possible solutions and grounds for agreement explored.

If the circumstances of the case dictate an adjournment, such as there being meaningful progress made on a large number of issues, the Commissioner presiding over the conference can grant an adjournment to allow the parties to prepare additional information to progress towards reaching an agreement. The Court will generally not grant too many adjournments, in order to remain within the desired timeframe of 3 months from the commencement of the proceedings to the resolution of the matter.

Many Class 1 Development Appeals can be resolved at or shortly after the Section 34 conference (around 75%), and we strongly encourage the participation in these conferences of all relevant experts (and Counsel, if required).

If an agreement cannot be reached at the Section 34 conference, the conference will be terminated and matter return before the Court for further directions, including allocation of a hearing date. Depending on availability of the Court, your experts and parties legal representatives the hearing date could be a number of months after the directions hearing.

## The Hearing

Class 1 Development Appeals such as yours are usually listed for a 2 day hearing, depending on the size of the development and the scope and complexity of any contentions remaining after the conference/s between the parties.

The hearing commences on the site the subject of the DA in the morning. We will arrange with you to meet early in company of our expert/s and Counsel for a brief conference to discuss the proceedings and any final matters.

If the parties agree, the same Commissioner of the Court who facilitated the Section 34 conference may preside over the hearing. This can save time and money as the initial site view is not required and the matter will simply start in Court.

If a different Commissioner hears your matter he or she will need to undertake a site view and hear from any objectors to your DA. The Commissioner will usually be taken by the Consent Authority's solicitor through the objectors' properties to consider the impacts that your DA are alleged to cause.

Following this inspection, the hearing is briefly adjourned to allow the parties, experts and Commissioner to return to the Land and Environment Court (or local Court house for matters outside of Sydney). This usually happens by lunchtime on the first day.

Upon returning to the Court, the hearing is resumed in the standard format, with Counsel for both parties cross examining the experts in the witness box on the content of their contribution to the Joint Expert Report.

In straightforward matters, the Commissioner may deliver a judgment at the end of the hearing in Court, be it at the end of the first day or on the final day as required. For less straightforward matters, the Commissioner may 'reserve' his or her judgment for 2 - 4 weeks for all issues to be addressed and a comprehensive decision written down. Some decisions may, however, take several months to be determined, especially for more complex matters.

If the Court upholds your appeal and grants you consent, we will apply for a sealed copy of the Court's orders, which functions in the same manner as a Notice of Determination from the Consent Authority granting consent to your DA. You will then be able to progress your development in the standard fashion. Please note, however, that the Court does not issue "stamped approved plans".

We hope that you have found this information useful. If you have any queries regarding this letter, or your matter in general, please do not hesitate to contact Jason Hones of our office.

Yours faithfully
**HONES LAWYERS**

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