Recent Developments in the NSW Land and Environment Court
Conciliation in Merit Review Appeals

City of Sydney Law Society
CLE Seminar 20 October 2016

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Introduction

Settlement by conciliation in the merit review jurisdiction of the NSW Land and Environment Court has been an option available to litigants since the Court was created in 1980. However the success of conciliation as an alternative to adjudication has varied markedly over the years. The number of disputes settled by conciliation has never been as high as it is now in 2016. In the first 9 months of the 2016 calendar year, 63.6% of all merit review applications were resolved by conciliation.

This paper outlines the history and characteristics of conciliation in the Land and Environment Court and considers the reasons why conciliation has become so successful in the Court.

Tracking the Success of Conciliation in the Land and Environment Court

Between the years 1980 and 2005 the number of merit review disputes resolved by conciliation varied between 0.3% (1994) and 20.9% (1983) of all merit review disputes determined annually by the Court.\(^1\) As the table below shows, since 2006 there has been a dramatic increase in the number of merit appeals settled by conciliation, while over the same period the total number of disposals has declined.\(^2\)

<table>
<thead>
<tr>
<th>Year</th>
<th>disposal total</th>
<th>disposal by concili</th>
<th>% settled by concili (^3)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>1212</td>
<td>175</td>
<td>11.6</td>
</tr>
<tr>
<td>2007</td>
<td>1319</td>
<td>277</td>
<td>21</td>
</tr>
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\(^2\) Figures for 2006 to 2014 taken from Land and Environment Court Annual Reports for those years; the 2015 Annual Report is yet to be published

\(^3\) As a percentage of all merit review matters
Research undertaken for the purposes of this paper\(^4\) indicates that in the first 9 months of the 2016 calendar year the Land and Environment Court determined 382 class 1 matters, which represented 67% of all decisions in the Court. Of those 382 matters, 243 (or 63.6%) were *resolved* by conciliation. Of those matters that were *not resolved* by conciliation (139 matters), a total of 89 appeals were *upheld* after a contested hearing. This represents 64% of all matters not resolved at conciliation, and 23.2% of all merit review matters determined.

If resolution by conciliation is defined as a successful outcome for an applicant (the decision recorded by the Court is appeal upheld), then these figures indicate that prospects of success of an appeal in a merit review appeal in the Land and Environment Court, provided an applicant is prepared to make concessions either at conciliation or by leave of the Court after termination of conciliation, is 86.8%.

It is difficult to determine with any precision the reasons for the rise in success of conciliation in the Land and Environment Court. It probably has something to do with the nature of the disputes in the Court, the administration of the process by the Court and a shift in the culture of litigants. Further insight into the secret of the success might be gleaned from the history and characteristics of conciliation in the Land and Environment Court. These issues are explored and discussed below.

**Conciliation in the Land and Environment Court**

Conciliation in the Land and Environment Court is governed by sections 34 and 34AA of the *Land and Environment Court Act 1979* ("LEC Act") and is administered by the Court by way of practice notes, a policy and standard directions. Section 34 was part of the LEC Act when it commenced in 1980. At that time it applied to some but not all merit review proceedings. Now section 34 of the LEC Act applies to all merit review proceedings, otherwise known as class 1, 2 and 3 applications.\(^5\) Merit review applications typically involve appeals against the refusal of development applications and account for the majority of disputes processed by the Land and Environment Court.\(^6\)

Amendments were made to the LEC Act, including section 34 in 2003\(^7\) and 2006\(^8\). The 2003 amendments were made in response to recommendations made by the Working Party established by the NSW Government in 2000 in response to public criticisms of the Court. These amendments required minor matters to be dealt with only by way of an on-site hearing, rather than a conciliation conference under section 34. The 2006 amendments reversed the 2003 amendments and required all merit review matters, including minor matters and class 3 matters, be to allocated to a conciliation conference dealt with under section 34.

\(^4\) Analysis of recent judgements in the Land and Environment Court - austl.ie.edu.au  
\(^5\) Class 3 proceedings were added to s34 by the *Crimes and Courts Legislative Amendment Act 2006* which commence on 29/11/2006  
\(^6\) Class 1 – 3 applications comprised 84% of all matters determined by the Court in the 2014 calendar year (LEC Annual Review 2014)  
\(^7\) *Land and Environment Court Amendment Act 2002.*  
\(^8\) *Crimes and Courts Legislative Amendment Act 2006*
A further important refinement to section 34 of the LEC Act was made in 2008\(^9\) by the insertion of section 34(1A) as it now appears in the Act. That section requires parties to participate in a conciliation conference in good faith. The purpose of the amendment was to ensure conciliation under the LEC Act was consistent with the good faith requirements relating to mediations in part 4, section 27 of the Civil Procedure Act 2005 and “to enhance the prospects of a successful outcome at conciliation conferences”.\(^10\)

Section 34AA of the LEC Act applies to all merit review appeals involving development for the purposes of detached single dwellings and dual occupancies (including subdivisions), or alterations or additions to such dwellings or dual occupancies.\(^11\) The section may, with leave of the Court, also apply to other types of merit review appeals. Section 34AA commenced on 7 February 2011.\(^12\) Its purpose is “to make it easier and cheaper for home owners to have local council decisions on development applications and modification applications [for small-scale development] reviewed by the Land and Environment Court …”.\(^13\)

Section 34AA expressly incorporates section 34, and is designed to provide a more streamlined appeal process for the types of development specified in the section. It does this by requiring the commissioner who presides over the conciliation conference to immediately proceed to adjudicate the dispute if there is no agreement at the conciliation phase. In the author’s experience the section 34AA process is not necessarily cheaper than the section 34 process because unlike the section 34 process, parties must go to the expense of preparing their case for hearing, including the preparation of expert evidence, prior to the conciliation/adjudication.

Conciliation under the above provisions is characterised by the coercive power of the Court to order conciliation, the requirement on parties to participate in good faith and the inadmissibility of anything done or said at a conference in any subsequent hearing. These characteristics are explained below.

**Participation by Coercion**

Section 34(1)(a)(i) of the LEC Act provides that the Court “may” arrange a conciliation conference between the parties or their representatives, with or without their consent. The Court’s Practice Note: Class 1 Development Appeals (April 2007) is less discretionary. It provides that at the first directions hearing in a class 1 appeal:\(^14\)

“*The parties are to inform the Court if there is any reason for the proceedings not to be fixed for a preliminary conference under s 34 of the Land and Environment Court Act 1979.*”

Further,

“If the parties do not satisfy the Court that there is a good reason the proceedings should not be fixed for a preliminary conference under s 34 of the Land and Environment Court Act 1979, then, in the ordinary course, the proceedings will be fixed for a preliminary conference .... “

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10. Minister’s Second Reading Speech, Hansard 12/08/2008
11. LEC Act section 34AA(1)(a)(i)
12. Planning Appeals Legislation Amendment Act 2010
14. PN Paragraphs 13 and 14
The power of the Court under section 34(1)(a)(i) has been described by the Court as “coercive”.\(^\text{15}\) The Practice Note has been described as creating a “presumption in favour of referring matters to a conciliation conference.”\(^\text{16}\) The power in section 34(1)(a)(i) is usually exercised by the Registrar at the first directions hearing. The usual direction is allocation of a date for a conciliation conference. Generally the only reason that might dissuade the Registrar from making the usual direction is the existence of a threshold issue in the dispute, such as characterisation of a development for the purposes of permissibility. Otherwise, if the contentions in a dispute relate to matters of design, then the Court will see utility in directing the parties to conciliate.

It is no longer an excuse for a party to avoid a conciliation conference to say that its representatives do not have authority to enter into a legally binding agreement. In *Golden Max Pty Ltd v Hurstville City Council* [2015] NSWLEC 16 the Court dealt with an application to review the Registrar’s decision not to order the parties to attend conciliation, a decision made at the request of Hurstville Council. The Council was successful in resisted the usual direction because it informed the Court that the officers required to attend the conference would not be delegated the power by the elected Council to settle the dispute. This apparently was a blanket position of the Council at the time in respect of all merit review proceeding before the Court.

The Registrar’s decision to not order a conciliation conference was reviewed, and overturned, by Justice Biscoe of the Land and Environment Court. In reaching his decision, His Honour noted that section 34 of the LEC Act “was enacted against the background of a culture, that s 34 was intended to defeat, by local councils that they would not authorise representatives at conciliation conferences to enter into agreements.” His Honour said that the absence of authority to enter into a legally binding agreement did not preclude council officers participating at conciliation in good faith. Rather “it is alternatively sufficient if a party’s representative at a section 34 conference has authority to enter into a legally non-binding agreement as to the terms of a decision in the proceedings that the representative thinks may be acceptable to that party.” The legally non-binding agreement could then be submitted to the council for ratification.

Biscoe J held that the absence of authority to settle (and various other reasons) advanced by the Council was not sufficient reason to not order a conciliation conference. His Honour ordered the parties to approach the Registrar for the listing of the matter for a conciliation conference. Unfortunately this interlocutory move by Golden Max was ultimately unsuccessful. The matter did not settle at the conciliation conference, the appeal proceeded to a contested hearing where the commissioner dismissed the appeal.\(^\text{17}\)

**Good Faith**

Section 34(1A) of the LEC Act imposes a legal obligation on each party attending a conciliation conference to participate in the conference in good faith. Good faith requires more than mere attendance at the conference. Good faith requires a party attending a conciliation conference to:\(^\text{18}\)

- be prepared to conciliate;

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\(^{15}\) *Golden Max Pty Ltd v Hurstville City Council* [2015] NSWLEC 16 at [9]


\(^{17}\) *Golden Max Pty Limited v Hurstville City Council* [2015] NSWLEC 1234

\(^{18}\) See note 13 (Preston August 2007) referring to *Aiton Australia v Transfield Pty Ltd* (1999) 153 FLR 236; [1999] NSWSC 996 at [156].
have an open mind in the sense of a willingness to consider such options for the resolution of the dispute as may be propounded by the other party or by the conciliator; and

be willing to give consideration to putting forward options for the resolution of the dispute.

The scope of the good faith obligation has been tested on a number of occasions in relation to claims for costs of attendance at a conciliation conference.

In ROI Properties Pty Ltd v City of Sydney [2010] NSWLEC 22 the applicant sought costs of preparing for and attending a conciliation conference. The claim was based on an allegation that the Council did not properly participate in the conciliation in good faith because it did not require its experts to attend the conference in order to confer with the applicant’s experts. The applicant was represented at the conference by 4 experts and the opportunity for these experts to confer with their opponents at the conference was lost by the Council’s failure to call its experts. Instead the Council was represented at the conference only by its solicitor. The Council’s experts and Council officer were available by telephone. The Council’s solicitor had authority to participate in the conference and to conciliate on those matters which the Council considered were capable of resolution.

The Court observed that it was difficult to establish a failure to participate in good faith in light of the restriction in section 34(11)(a) of the LEC Act that evidence of anything said or of any admission made in the conciliation conference was not admissible in the costs order hearing, without the consent of the parties (which was not the case in the appeal). Without that evidence, the Court said, the determination of costs occurs in a partial vacuum (at [12]).

The Court observed that the absence of a party’s experts at a conciliation conference could, depending on the circumstances of the case, result in a costs order against that party. The present case was not one of those circumstances. The salutary lesson, the Court said, is that there needs to be specific discussion by both parties about the attendance in person of experts at a conciliation conference in sufficient time for appropriate arrangements to be made.

The Court refused to determine the motion and instead stood it over until after the substantive class 1 application was decided. The substantive class 1 application was refused by the Court and it appears that the motion was no longer pressed after the refusal.

Since the decision in ROI Properties, the Court has adopted a Conciliation Conference Policy. That policy requires, among other things, that “Unless excused, the parties are to ensure that any expert who has prepared evidence for the proceedings is available to attend the site inspection, conciliation conference and any subsequent hearing.”

In another case involving a notice of motion for the costs of a conciliation conference (Brindley v Parramatta City Council [2015] NSWLEC 1160) an applicant for consent claimed his costs on the basis that the Council failed to delegate its authority to the person attending the conference to resolve the matter. This necessitated multiple adjournments of the conference before the conference was ultimately terminated. The appeal was subsequently upheld by the Court after a contested hearing. The Court held that the adjournment of the conciliation conference was not an indication that the respondent Council was not participating in good faith. Such adjournments are “entirely appropriate”, citing Golden Max (see footnote 15).

The Court noted in Brindley that the applicant sought and was granted leave to rely on amended plans as a result of discussions at the conciliation conference, and that the appeal was ultimately upheld. This, the Court said, demonstrated utility in the conciliation process.
There is yet to be a reported decision in the Land and Environment Court where the Court has found circumstances that amount to bad faith in the conduct of a conciliation conference. The decisions in *Golden Max* and *Brindley* show that the Court sees utility in the conciliation process even in circumstances where a council has not delegated its authority to its officers to settle a matter, and even where a participant has instructions to resolve some but not all issues in dispute.

The decisions in *Golden Max* and *Brindley* also suggest that the obligation to participate in good faith does not extend to a decision by a local council at a council meeting to not enter into a legally binding conciliation agreement in accordance with a legally non-binding agreement made at a conciliation conference by council officers. That was precisely what occurred in *Brindley*, where the Council resolved at a meeting to request the Commissioner terminate the conciliation conference. The reasons for the Council’s decision were not revealed in the judgement, probably because the decision was probably made in a closed session of the Council. The Court nonetheless declined to find the Council did not act in good faith.

**Inadmissibility of anything done or said, or document produced**

Confidentiality is an important element in the conciliation process. Confidentiality is effected by section 34(11)(a) and (b) of the LEC Act. Subsection 11(a) provides that “evidence of anything said or of any admission made in a conciliation conference is not admissible in any proceedings before any court, tribunal or body.” Subsection 11(b) applies the same constraint in 11(a) to “a document prepared for the purposes of, or in the course of, or as a result of, a conciliation conference, or any copy of such a document”. Such a document might include an architectural plan or sketch of an amended proposal advanced by an applicant, or a drawing advanced by a council that indicates an amendment that the Council would be willing to accept.

The only exceptions to the constraints on admissibility in section 34(11) are in respect of a signed agreement (s34(10)) and waiver of confidentiality by consent of both parties (s34(12)).

Confidentiality in the conciliation process is important. As the Court observed in *Brindley*, it allows parties to reach a negotiated outcome with full and frank discussion in relation to the issues. Parties have an opportunity to reach a negotiated outcome and in attempting to do so, either party or both parties might offer, or accept a concession from which they may wish to resile should the matter proceed to a contested hearing. If evidence of anything said or done or document produced at a conciliation conference was admissible at a later date against the wishes of a party, a party might be dissuaded from participating in the process to the extent that they otherwise would.

**Reasons for the Success of Conciliation**

The upturn in success of conciliation in the Land and Environment Court started in 2007 and, except for 2014, has steadily risen since then. The upturn appears to have coincided with amendments to the LEC Act in 2006 and 2008, and the Court’s Practice Note: Class 1 Development Appeals (April 2007). The 2006 amendments expanded conciliation to all merit review appeals. The 2008 amendments inserted the good faith requirement in section 34(1A) of the LEC Act.

The 2006 and 2008 amendments by themselves did not effect significant change. In the case of the 2006 amendments, the change merely reinstated the original form of section 34, and in the case of the 2008 amendments, the change merely codified an obligation that already applied in spirit. The most significant influence on the change has been the administration
of section 34 and 34AA by the Court, and a shift in the culture of parties to litigation. The latter is due in large part, in the author’s view, to the expertise of commissioners and the legal profession that regularly practise in the Court.

The presumption in the Court’s 2007 Practice Note in favour of conciliation forces parties to conciliate. Only the most intractable of disputes are let off the conciliation hook. The majority of disputes in the merits review jurisdiction involve the impact of a development or the suitability of a building or use for a site. The nature of these disputes is such that there will almost always be room to move, in the sense that a design can be changed so as to lessen an impact and a planning control can be varied or be satisfied if the circumstances warrant. The Commissioners of the Court contribute to the high level of settlement by conciliation through their skills at exploring redesign options and facilitating discussion between the parties.

The Court does not take an all or nothing approach to conciliation. The Court sees utility in conciliation even if some but not all issues are resolved. Even if some issues are resolved by design changes the hearing time will potentially be reduced and there will be a better outcome if the conciliation is terminated and the appeal is upheld.

The nature of disputes involving the development of land can also be a constraint to conciliation. The planning process in NSW can be influenced by politics, particularly when a local council is the consent authority. Often the decisions that lead to merit appeals are made by elected representatives at a council meeting. Not infrequently these decisions are made against the recommendation of council officers. These circumstances underpin the reluctance on the part of elected representatives to delegate the authority of council to exercise the council's powers and functions in respect of the litigation. This is the type of behaviour that Justice Biscoe described in Golden Max as a culture.

Now that the concept of a non-legally binding agreement is accepted, the conciliation process can accommodate the nuances of local government politics. An elected council has an opportunity to receive a report from its officers following a conciliation conference and discover what might be possible by a negotiated agreement. The elected representatives can then make a properly informed decision, in the confines of a closed meeting of council, to either accept or reject the proposed agreement. The success of conciliation must mean that the culture among local councils is changing and that applicants are more willing to make changes to their plans that address contentions.

The success of conciliation must also be due in part to the legal profession who practise in the Land and Environment Court. A decision to accept or reject a conciliated agreement is not an easy one for a litigant to make. It requires consideration of the best and worst alternatives to a negotiated agreement, costs, ongoing relationship considerations and potentially other factors. The high levels of conciliated agreements suggests that litigants accept settlement by conciliation over adjudication. It can be inferred that most litigants would only agree to settle after full and frank advice from their legal advisor.

Conclusion

Alternative dispute resolution in the merits review jurisdiction in the NSW Land and Environment Court has undergone a significant change in the last 9 years, more significant than at any period in the Court’s 36 year history. Since 2007 the number of matters commenced in the Court’s merit review jurisdiction resolved by conciliation has increased six-fold.

If you are an applicant for development consent with a right of appeal to the Land and Environment Court, and you are prepared to make amendments to the design of your
proposal, now is a good time to exercise that right. Applicants are more likely than not to be successful, either by a conciliated agreement or at a contested hearing in an appeal to the Court.

The rise in the success of conciliation in the Land and Environment Court is due partly to administration of the conciliation process by the Court, partly to the nature of merit review disputes and partly to a shift in culture among litigants.

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