



**Land and Environment
Court**
of New South Wales

PRACTICE NOTE

CLASS 1 DEVELOPMENT APPEALS

Commencement

1. This practice note commences on 14 May 2007.

Application of Practice Note

2. This practice note applies to appeals under ss 97 and 98, and applications under ss 96, 96AA and 96A of the *Environmental Planning and Assessment Act* 1979 in Class 1 of the Court's jurisdiction ("development appeals"). This practice note is to be known as *Practice Note – Class 1 Development Appeals*.

Purpose of Practice Note

3. The purpose of this practice note is to set out case management procedures for the just, quick and cheap resolution of development appeals.

Responsibility of parties, legal practitioners and agents

4. It is the responsibility of each party, their legal practitioners and agents (as applicable) to consider the orders and directions appropriate to be made in the particular case to facilitate the just, quick and cheap resolution of the real issues in the proceedings. If any party reasonably considers that compliance with this practice note will not be possible, or will not be conducive to the just, quick and cheap resolution of the proceedings, the party should apply to be relieved from compliance on the basis that an alternative proposed regime will be more conducive to such resolution. In that event, the party is to notify other parties of the proposed alternative regime as soon as practicable and is to make available to the Court short minutes reflecting that alternative regime.

Parties are to ensure that all directions which they seek with respect to development appeals will assist in enabling such appeals to be dealt with at the hearing with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and as the proper consideration of the matters before the Court permits (see s 38 of the *Land and Environment Court Act 1979*).

Before the first directions hearing

5. Development appeal applications will usually be given a return date 28 days after the date on which they are filed. The first directions hearing will usually be before the Registrar. Development appeal applications are to be served within 7 days of filing.

Note: Parties may request from the Registry an earlier return date provided that they are able to serve the development appeal application as filed at least 21 days before the return date. Parties may otherwise file and serve a notice of motion for expedition of the proceedings if appropriate. Applications to extend the period for the return of the proceedings before the Registrar may be granted if the applicant demonstrates that service cannot be achieved within the time required. The Registrar may also extend the period if circumstances, such as public holidays, make it appropriate that a longer period be allowed for parties to take the action required by this practice note before or by the return of the proceedings.

6. Any plans of any development accompanying the development appeal application are to satisfy the requirements in **Schedule A**. If leave is granted by the Court to amend the plans, any amended plans are also to meet those requirements.
7. If the plans the subject of the determination of a consent authority in respect of which a development appeal application is to be made do not satisfy the requirements in Schedule A, the applicant, before lodging the development appeal application, may amend the plans without seeking leave of the Court, but only to the extent necessary to cause the plans to satisfy the requirements in Schedule A. Any other amendment is to be by leave of the Court.
8. The respondent consent authority is to file and serve a statement of facts and contentions in accordance with **Schedule B** before 4.00pm on the third last

working day before the first return of the proceedings unless the proceedings involve:

- (a) under ss 96, 96AA or 97 of the *Environmental Planning and Assessment Act* 1979, an appeal in respect of the imposition of conditions by an applicant for consent, or
 - (b) under s 98 of the *Environmental Planning and Assessment Act* 1979, an appeal by an objector to the application.
9. If the proceedings involve an appeal in respect of the imposition of conditions or an appeal by an objector, then the applicant for consent or objector is to file and serve a statement of facts and contentions in accordance with **Schedule C** before 4.00pm on the third last working day before the first return of the proceedings.
 10. If any party seeks to raise an issue of fact or law that it contends precludes the grant of consent or approval to the application, then the party raising that issue is to identify it in its statement of facts and contentions.
 11. On request, a respondent who is a public authority or public official is to provide the other party with access to the documents relevant to the development application or modification application and its decision (if any), within 14 days of the request.

At the first directions hearing

12. At the first direction hearing, the parties should expect that the usual directions set out in **Schedule D** will be made and should have either agreed or competing proposed short minutes to hand to the Court. In preparing these short minutes, parties may delete, amend or abridge any part of the usual directions to facilitate the just, quick and cheap resolution of the proceedings. Parties may also propose alternative directions if they have a reasonable basis for considering that alternative directions will better facilitate the just, quick and cheap resolution of the proceedings. If alternative directions are proposed, the party seeking those directions is to notify the other party before the first

directions hearing and ensure that proposed short minutes are available to be handed to the Court.

13. 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*. If proceedings are fixed for a preliminary conference, then the parties may request that the usual directions in Pt A of **Schedule D** be made, with the balance of the usual directions to be made at a second directions hearing.
14. 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 as follows:
 - (a) for short matters, before the Duty Commissioner on the next available Friday; or
 - (b) for other matters, within 14 days, subject to the availability of the Court.
15. To enable the balance of the usual directions to be made, the parties are to hand to the Court at the first directions hearing a completed information sheet in the form of **Schedule E**.

Note: This may be deferred until the second directions hearing if the matter is to be fixed for a preliminary conference.

16. Any party seeking to have an issue dealt with in advance of the merits of the development appeal must apply to do so by notice of motion and short affidavit in support setting out the reasons that make a separate hearing necessary. If possible, the notice of motion is to be returnable at the first directions hearing. In the ordinary course, all issues should be heard together unless an issue genuinely capable of separate determination is likely to be determinative of the appeal. If an order is made for a separate hearing:
 - (a) short matters (less than 2 hours) may be listed on the first available Friday before the Duty Judge or Duty Commissioner for issues of law or fact respectively; and

(b) other matters will be listed for hearing in the ordinary course, and the usual directions in **Schedule D** (Pt H) will apply.

Note: A Judge and Commissioner may be appointed to hear a matter to facilitate the objective of having all issues heard together.

17. In the ordinary course, proceedings will not be adjourned at the first directions hearing because a development appeal is against a deemed refusal of the application by a consent authority unless:

(a) the parties agree and satisfy the Court that there is a reasonable likelihood that the development appeal will be resolved on a date able to be identified, being a date not more than 4 weeks away; or

(b) the party seeking the adjournment otherwise satisfies the Court that not to adjourn the proceedings would result in an undue waste of resources.

18. Unless good reason is demonstrated, the parties are to be sufficiently prepared at the first directions hearing to assist the Court in making and to accept a timetable up to and including the hearing date. Legal practitioners and other representatives of the parties are to ensure they advise the parties of their obligation to be ready to agree to a timetable up to and including the hearing date and are to obtain full and timely instructions to ensure the parties comply with this obligation.

Note: The agreement of both parties to attend a preliminary conference usually will be accepted as a good reason to defer the making of a timetable up to and including the hearing until the second directions hearing.

19. Estimates of hearing length should be realistic having regard to the statements of facts and contentions.

20. Generally, development appeals should commence at 9.30am on site unless, in the particular circumstances of the case, it would be inappropriate to do so.

Short matters

21. Parties may request short matters (less than 2 hours) to be fixed for hearing before a Duty Commissioner or Duty Judge on a Friday.

22. If the request is by consent, the parties may file the request with the Registry before the first return date. Parties will be notified if the hearing can be listed on a Friday before the first return date, in which event the first return date will be amended to be the hearing date.

Expedition

23. Any party may seek expedition of a development application appeal by notice of motion, with a short affidavit in support setting out the reasons in support of expedition.

Breach of the Court's directions

24. If there is any significant breach of the Court's directions, including a breach sufficient to cause slippage in a timetable, the parties must promptly, by e-Court communication or fax to the Registrar, notify the Registrar of the breach. The Registrar may require the parties to attend before the Court if it is considered that the reasons for the breach are not adequately explained in that e-Court communication or facsimile or if the breach might materially affect the timetable. Parties are reminded that where the conduct of either party unnecessarily or unreasonably increases the number of appearances in Court, that party may be at risk of the making of a costs order against them.

Variation of timetables

25. If proposed directions vary an existing timetable, they must include the vacation of any date for a directions hearings or mention or for the hearing of motions that can no longer be maintained.

Liberty to restore

26. Parties have liberty to approach the Court without a notice of motion on three working days' notice or earlier if urgency requires. A party seeking to make urgent application should, if possible, make prior arrangement with, or give

appropriate notice to, any other party, and should send an e-Court communication or fax to the Registrar.

Amendments to applications and to statements of facts and contentions

27. Subject to paragraph 7, an applicant for consent may not rely on an amended development appeal application including amended plans unless it first obtains the leave of the Court. Applicants for consent should ensure that their development appeal application is suitable for assessment at the hearing before commencing the development appeal, including ensuring plans satisfy the requirements in Schedule A. Multiple requests for leave to amend applications (including plans) cause unnecessary delay and cost for all parties and should be avoided.
28. If an applicant for consent wishes to amend its development appeal application, including by amended plans, the applicant is to consolidate all such amendments (to avoid multiple requests to amend) and apply for leave as soon as reasonably possible and usually no later than 10 days after the facts or circumstances which prompted the application for leave came to the attention of the applicant. Examples of such facts or circumstances are the receipt of a report of a parties' single expert or a joint report of parties' experts recommending modification of the proposed development, which recommendation the applicant wishes to adopt in whole or part.
29. Other than amendments sought during the hearing of the appeal, leave to rely on an amended development appeal application including amended plans is to be sought by notice of motion, accompanied by a short affidavit in support that:
 - (a) provides particulars sufficient to indicate the precise nature of the amendments proposed;
 - (b) identifies any amended plans by date and plan revision number;
 - (c) identifies the facts or circumstances which prompted the application for leave and when they came to the attention of the applicant;

- (d) identifies the respects in which the amendments lessen the environmental impact of the development and/or otherwise lead to an improved community outcome;
- (e) identifies why granting leave to amend the application would promote the just, quick and cheap resolution of the proceedings;
- (f) discloses if any additional documents (eg a BASIX certificate for the amended development) are required to support the amended application and, if so whether those documents have been, or are to be, obtained;
- (g) discloses the applicant's position on any additional costs that the consent authority may incur as a consequence of the amendment; and
- (h) identifies the potential impacts on the hearing dates and the applicant's position on the adjustments to the timetable that would enable the hearing dates to be maintained if possible.

If practicable, the affidavit should not exceed 3 pages in length (excluding annexures).

30. If leave to rely on an amended development appeal application is granted, the parties should expect that the Court will make the further usual directions in **Schedule F** and should hand either agreed or competing proposed short minutes to the Court, unless there is a reasonable basis for considering that alternative directions will better facilitate the just, quick and cheap resolution of the proceedings. If alternative directions are proposed, the party seeking those directions is to notify the other party before the hearing of the application for leave and ensure that proposed short minutes are available to the Court.
31. Parties require leave of the Court to amend their statement of facts and contentions. Leave to do so consequential on an amended development appeal application may be assumed where leave to amend an application has been granted and will be subject to directions made at that time. In all other cases, leave is to be sought by notice of motion accompanied by a short affidavit in support explaining the reasons for leave being sought.

Applications to vacate hearings and for adjournments

32. Development appeals will not be adjourned generally. In particular, applicants for consent should generally be ready to proceed with their development appeal when it is commenced.
33. Development appeals usually will not be adjourned because of failure to comply with this practice note or Court directions or because of lack of preparedness for any attendance before the Court. If failure to comply or lack of preparedness nevertheless does cause the adjournment of the proceedings, the defaulting parties or legal practitioners may be ordered to pay costs.
34. Applications to vacate hearing dates are to be by notice of motion, with an affidavit in support explaining the circumstances of the application and the reasons the hearing date should be vacated.

Application for final orders by consent of parties

35. When there is agreement prior to the commencement of a hearing of development appeals involving a deemed refusal of the application by the consent authority, the Court will usually expect the consent authority to give effect to the agreement by itself granting consent or approval.
36. Any application for consent final orders in development appeals will be listed before the Court for determination. The parties will be required to present such evidence as is necessary to allow the Court to determine whether it is lawful and appropriate to grant the consent or approval having regard to the whole of the relevant circumstances, including the proposed conditions. The consent authority will be required to demonstrate that relevant statutory provisions have been complied with and that any objection by any person has been properly taken into account. Additionally, the consent authority will be required to demonstrate that it has given reasonable notice to all persons who objected to the proposal of the following:
 - (i) the content of the proposed orders (including the proposed conditions of consent);

- (ii) the date of the hearing by the Court to consider making the proposed consent orders; and
 - (iii) the opportunity for any such person to be heard,
- or that, in the circumstances of the case, notification is not necessary.

Application for an easement under s 40 of the *Land and Environment Court Act 1979*

- 37. An application for an order under s 40 of *the Land and Environment Court Act 1979* can only be made “if the Court has determined to grant development consent on an appeal under s 97 of the *Environmental Planning and Assessment Act 1979*”.
- 38. It is inappropriate for parties to seek an order under s 40 of *the Land and Environment Court Act 1979* at the hearing of an appeal pursuant to s 97 of the *Environmental Planning and Assessment Act 1979*.
- 39. An application for an order under s 40 of *the Land and Environment Court Act 1979* is to be made in Class 3 of the Court’s jurisdiction and is subject to *Practice Note – Classes 1, 2 and 3 Miscellaneous Appeals*.

Legal practitioners and agents of parties to be prepared

- 40. Each party not appearing in person shall be represented before the Court by a legal practitioner or duly authorised agent familiar with the subject matter of the proceedings and with instructions sufficient to enable all appropriate orders and directions to be made.
- 41. Legal practitioners and agents for each party should communicate prior to any attendance before the Court with a view to reaching agreement on directions to propose to the Court and on preparation of short minutes recording the directions.

Expert evidence

42. Parties are encouraged to consider whether expert evidence is genuinely necessary to resolve the issues in dispute in development appeals. Unnecessary expert evidence substantially increases the time and cost of appeals. Parties are encouraged to consider whether the proceedings can appropriately be fixed for hearing before a Commissioner or Commissioners with special knowledge and experience in relation to the issues in dispute.
43. Where expert evidence is necessary to be called in relation to an issue, the Court encourages parties to use a parties' single expert. The use of a parties' single expert in an appropriate case can reduce costs and ensure the Court has the benefit of evidence from a person who is not engaged by only one party. In determining whether a parties' single expert might be appropriate in a particular case, consideration should be given to:
- (a) the importance and complexity of the subject matter in dispute in the proceedings;
 - (b) the likely cost of obtaining expert evidence from a parties' single expert compared to the alternative of obtaining expert evidence from individual experts engaged by each of the parties;
 - (c) the proportionality of the cost in (b) to the importance and complexity of the subject matter in (a);
 - (d) whether the use of a parties' single expert in relation to an issue is reasonably likely either to narrow the scope of the issue or resolve the issue;
 - (e) the nature of the issue, including:
 - (i) whether the issue is capable of being answered in an objectively verifiable manner;
 - (ii) whether the issue involves the application of accepted criteria (such as Australian Standards) to ascertainable facts;

- (iii) whether the issue is likely to involve a genuine division of expert opinion on methodology, or schools of thought in the discipline; and
- (iv) whether the issue relates to the adequacy or sufficiency of information provided in the development appeal application;
- (f) whether the evidence of the parties' single expert involves the provision of aids to assist in the assessment of a development appeal application (such as shadow diagrams, view lines or photo montages).
- (g) whether the parties' single expert would be required independently to obtain further information or to undertake monitoring, surveys or other means of obtaining data before being able to provide expert evidence;
- (h) whether the parties are prepared at the time to proceed to hearing on the basis of a parties' single expert report about the issue and no other expert evidence about that issue;
- (i) whether the integrity of expert evidence on the issue is likely to be enhanced by evidence being provided by a parties' single expert instead of by individual experts engaged by the parties; and
- (j) whether the Court is likely to be better assisted by expert evidence on the issue being provided by a parties' single expert instead of by individual experts engaged by the parties.

44. The Court will not usually accept the appointment of a parties' single expert if that expert is unable to provide a report within 5 weeks of receiving the brief or is unable to attend a hearing within a further 28 days thereafter.

45. The usual directions in **Schedule D** provide for a parties' single expert to file and serve one expert report only. Without leave of the Court, a parties' single expert is not to provide parties with preliminary reports or opinions.

Note: Under Pt 31.41 of the Uniform Civil Procedure Rules a party may seek clarification of the report of a parties' single expert on one occasion only.

46. The parties' are not to provide a parties' single expert with any expert report brought into existence for the purpose of the proceedings addressing any

matter the subject of instructions to the parties' single expert, without leave of the Court.

47. Where a parties' single expert has been appointed to give evidence in relation to any issue, the parties may not rely on any other expert evidence about that issue without leave. Any application for leave is to be made as soon as reasonably possible and usually no later than five days after receiving the report of the parties' single expert.
48. Leave is to be sought by notice of motion, with an affidavit in support explaining:
 - (a) the name, qualifications and expertise of the expert proposed to be called;
 - (b) the matters proposed to be addressed by the expert;
 - (c) the date on which the expert was first retained and the date or dates of any expert report the expert has already prepared;
 - (d) the reasons for the need to call an additional expert to give that evidence, rather than having the parties' single expert address the matters further or in cross examination;
 - (e) how calling the additional expert at all, or at the particular stage in the preparation of the proceedings, promotes the just, quick and cheap resolution of the proceedings; and
 - (f) the party's position in relation to any additional costs that might be caused by the calling of the expert.

If practicable, the affidavit should not exceed three pages in length (excluding annexures).

49. It is not the role of any expert to opine whether a development appeal should be upheld or dismissed. That is the role of the consent authority and, on appeal, the Court exercising the functions of the consent authority. Expert opinions in reports and joint reports are to deal with the contentions raised by the parties. Any other matter relevant to the expert's expertise, which the expert feels obliged to draw to the attention of the parties and the Court, may also be noted.

50. An expert (including a parties' single expert) and the expert's report are to comply with the requirements of Division 2 of Pt 31 of the Uniform Civil Procedure Rules and the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules.
51. An expert witness should identify any pre-existing relationship between the expert witness, or their firm or company, and a party to the litigation.
52. It is the responsibility of the parties to agree the remuneration to be paid to a parties' single expert. This includes making provision with respect to the amount of the expert's fees and the frequency with which the expert renders accounts. The Court will fix the remuneration of a parties' single expert only where the parties are unable to agree that remuneration.

Note: See Pt 31.45 of the Uniform Civil Procedure Rules.

53. Experts' reports are not to repeat matters in Part A Facts of the statements of facts and contentions. Wherever possible, an expert should state that Part A Facts has been adopted as correct. If this cannot be stated, the expert should identify the matters which are disputed and state his or her position in relation to those matters.
54. If experts are directed by the Court to confer, experts are to ensure that their joint conference is a genuine dialogue between experts in a common effort to reach agreement with the other expert witness about the relevant facts and issues. Any joint report is to be a product of this genuine dialogue and is not to be a mere summary or compilation of the pre-existing positions of the experts.
55. Legal representatives are not to attend joint conferences of experts or be involved in the preparation of joint reports without the leave of the Court.
56. Where expert evidence from more than one expert in the same discipline is to be given in Court, the experts will give such evidence concurrently (subject to any order by the hearing Judge or Commissioner to the contrary).
57. If a party requires any expert for cross-examination, notice is to be given at least seven days before the hearing.

58. The Court expects legal practitioners and experts to work together to implement this practice note in a practical and sensible way which ensures that it achieves its intended purpose.

Costs and compliance

59. If a breach of the Court's directions or of this practice note causes costs to be thrown away, a party or legal practitioner responsible for the breach may be ordered to pay those costs.

60. The cost of unnecessary photocopying and assembly of documents is unacceptable. Legal practitioners for the parties are to consider carefully the documents necessary to be tendered. Unnecessary documents may attract adverse costs orders.

61. Any failure by one party to comply with the Court's directions will not be considered an adequate excuse for any failure to comply by the other party. Both parties are responsible for ensuring that they comply with directions.

***The Honourable Justice Brian J Preston
Chief Judge***

30 April 2007

Schedule A

Requirements for Plans

1. General

- Plans should be drawn to an appropriate scale shown on the drawings.
- Plans should be drawn with clarity.
- Plans should indicate a north point.
- All plans shall be consistent with each other.

2. Survey plans are to indicate:

- Existing buildings, structures and features of the site;
- Topography (spot levels, contours) including that of adjoining property where relevant;
- Natural drainage of the site;
- Any easements or rights of way;
- Significant existing vegetation, indicating its location on the site, type and spread;
- Location, height and use of any adjoining buildings or structures such as swimming pools; and
- Features of streets immediately adjoining or within the property, including poles, kerbs, crossings and pits.

3. Site plans are to identify the location of the following:

- Proposed and existing buildings;
- Existing significant trees, indicating whether they will be retained or removed;
- Paved areas;
- Landscaped areas;
- Driveway entry and/or exit;
- Garbage storage areas;
- On-site detention tanks;
- Letter boxes;
- Private open spaces; and

- Where privacy is an issue in the proceedings, the location of windows of the adjoining property and the subject proposal.

4. Floor plans are to indicate:

- Room names, area and dimensions;
- The location of windows and doors;
- The levels of floors, terraces and the like to Australian Height Datum (AHD);
- Wall construction; and
- Spot levels of natural ground to AHD.

5. Elevations are to indicate:

- Elevations of all sides of the building or structure;
- Outline of existing buildings;
- Materials and finishes to be used in construction;
- Location of adjoining buildings showing address, height, setbacks and other relevant features;
- Proposed window size, sill height and location; and
- Height of eaves, ridge and floor levels to AHD.

6. Sections are to indicate:

- Appropriate number and location;
- Section line and location on plan;
- Room names;
- Adequate representation of ground level;
- Areas of cut and/or fill; and
- Height of levels to AHD.

7. Landscape plans are to:

- Be consistent with other plans tendered to the court with respect to the height, size and location of buildings;
- Indicate the location, species, height and spread of significant existing trees, indicating whether they will be retained or removed;

- Indicate the location of any additional planting to be carried out including species names, spread, height and other features; and
- Indicate the location of significant retaining walls or other structures.
- Indicate finished relative levels of all major surfaces.

8. Overshadowing plans are to:

- Be based on true north;
- Indicate the location and nature of existing and/or proposed fencing, with the shadows projected;
- Indicate horizontal and vertical impact, including any impact from any substantial wall;
- Provide a table of compliance and non-compliance with known criteria (such as a development control plan, a State environmental planning policy or Australian Model Code for Residential Development (AMCORD)); and
- Make appropriate allowance for the topography.

Schedule B

Requirements for statement of facts and contentions by respondent consent authority

1. The statement is to be as brief as reasonably possible.
2. The statement is to be divided into two parts – Part A Facts and Part B Contentions.
3. An authorised officer of the respondent consent authority is to sign and date the statement.
4. In Part A Facts, the respondent consent authority is to identify:
 - (a) **The proposal:** a brief description of the proposed development or modification of a development including any building, subdivision and/or land use and, where relevant, matters such as density, floor space ratio, setbacks and heights.
 - (b) **The site:** a description of the site including its dimensions, topography, vegetation and existing buildings.
 - (c) **The locality:** a description of the locality including the type and scale of existing surrounding development.
 - (d) **The statutory controls:** details of the applicable statutory instruments (State environmental planning policies, regional environmental plans, local environmental plans and development control plans) and the relevant provisions.
 - (e) **Actions of the respondent consent authority:** date of application, application number, details of any advertising process and its results, details of any consultation and its results, the decision of the respondent and the reasons for refusal.

Part A Facts is not to include matters of opinion.

5. In Part B Contentions the respondent consent authority is to identify each fact, matter and circumstance that the respondent contends require or should cause

the Court, in exercising the functions of the consent authority, to refuse the application or to impose certain conditions.

6. In Part B Contentions, the respondent consent authority is to:
 - (a) focus on issues genuinely in dispute;
 - (b) have a reasonable basis for its contentions;
 - (c) present its contentions clearly, succinctly and without repetition;
 - (d) where it contends that the application must be refused, identify the factual and/or legal basis for that contention. Any such contention is to be made at the beginning of Part B Contentions and is to be clearly identified as a contention that the application must be refused;
 - (e) where the respondent consent authority contends there is insufficient information to assess the application, list the information it contends is required;
 - (f) where it contends that a proposal does not comply with provisions, including development standards, of an environmental planning instrument or provisions of a development control plan, identify the standard or provision that is breached and quantify the extent of the non-compliance (if necessary, in a diagrammatic form), grouping together provisions dealing with the same aspect (for example, height or density);
 - (g) identify the nature and extent of each environmental impact relied upon to support any contention and, if practicable, quantify that impact; and
 - (h) identify any contentions that may be resolved by conditions of consent.

Schedule C

Requirements for statement of facts and contentions by applicant for consent or by objector

1. The statement is to be as brief as reasonably possible.
2. The statement is to be divided into two parts – Part A Facts and Part B Contentions.
3. The applicant for consent or the objector or its authorised officer is to sign and date the statement.
4. In Part A Facts, the applicant for consent or objector is to identify:
 - (a) the relevant development consent, including (if possible) the development application number and the date of determination;
 - (b) if an applicant for consent, the conditions appealed against;
 - (c) if an objector, the date(s) of their letter(s) of objection to the development application.

Part A Facts is not to include matters of opinion.

5. In Part B Contentions an applicant for consent or objector is to identify each fact, matter and circumstance that the applicant or objector contends require or should cause the Court, in exercising the functions of the consent authority, to grant or refuse the application or to impose certain conditions.
6. An applicant for consent or objector is to:
 - (a) focus its contentions on issues genuinely in dispute;
 - (b) have a reasonable basis for the contentions; and
 - (c) present its contentions clearly and succinctly.
7. An applicant for consent is to identify:
 - (a) each condition that the applicant contends should be deleted;
 - (b) each condition that the applicant contends should be amended and, for each such condition, the amendment sought and the reason for seeking the amendment;

8. In Part B Contentions, an objector is to:
- (a) focus on issues genuinely in dispute;
 - (b) have a reasonable basis for the contentions;
 - (c) present contentions clearly, succinctly and without repetition;
 - (d) where the objector contends that the application must be refused, identify the factual and/or legal basis for that contention. Any such contention is to be made at the beginning of Part B Contentions and is to be clearly identified as a contention that the application must be refused;
 - (e) where the objector contends there is insufficient information to assess the application, list the information the objector contends is required;
 - (f) where the objector contends that a proposal does not comply with provisions, including development standards, of an environmental planning instrument or provisions of a development control plan, identify the standard or provision that is breached, quantify the extent of the non-compliance (if necessary, in a diagrammatic form), grouping together provisions dealing with the same aspect (for example, height or density);
 - (g) identify the nature and extent of each environmental impact relied upon to support any contention and, if practicable, quantify that impact; and
 - (h) identify any contentions that may be resolved by conditions of consent.

Schedule D

Usual directions at the first directions hearing for development appeal applications

Note: Strike through/amend as required.

A. **If the parties agree or the Court requires the proceedings to be fixed for a preliminary conference under s 34 of the *Land and Environment Court Act 1979*:**

1. The appeal is listed for a preliminary conference under s 34 of the *Land and Environment Court Act 1979* on #.
2. The [respondent/applicant for consent or objector] is to file and serve its statements of facts and contentions in accordance with Schedule [B/C] of *Practice Note – Class 1 Development Appeals* by # [insert date having regard to date of preliminary conference].

Note: This direction may be unnecessary for short matters.

3. The [applicant for consent or objector/respondent] is to file and serve its statements of facts and contentions in reply in accordance with Schedule [B or C] of *Practice Note – Class 1 Development Appeals* by # [insert date having regard to date of preliminary conference]. This statement is not to repeat any facts not in dispute.

Note: This direction may be unnecessary for short matters.

4. The proceedings are listed for a second directions hearing on # [+ 14 days after the preliminary conference].
5. (a) Each party is to notify the other party and the Court in writing of the name of the experts upon which they propose to rely and the issues to be addressed by each expert or the name of any expert they propose to nominate as a parties' single expert by # [seven days after the preliminary conference].

(b) If the parties agree or the Court requires a parties' single expert, the parties are to agree the identity and remuneration of the parties' single expert by # [no later than 11 days after the preliminary conference].

- (c) Failing agreement, the parties are to seek orders from the Court at the second directions hearing that the parties engage a named parties' single expert and to fix the remuneration of the parties' single expert. For that purpose, each party is to file and serve the names, CVs and fee estimates of three appropriately qualified experts at least three days before the second directions hearing.

Note: If the proceedings are resolved at the preliminary conference, these directions will not need to be followed.

6. If the proceedings are resolved after the preliminary conference, the parties are to notify the Court at least 48 hours before the date of the second directions hearing. If the proceedings have been resolved, the second directions hearing may be vacated.

B. If the parties do not agree or the Court does not requires the proceedings to be fixed for a preliminary conference under s 34 of the *Land and Environment Court Act 1979*:

1. The [respondent/applicant for consent or objector] is to file and serve its statements of facts and contentions in accordance with Schedule [B or C] of *Practice Note – Class 1 Development Appeals* by # [insert date having regard to date of preliminary conference].

Note: This direction may be unnecessary for short matters.

2. The [applicant for consent or objector/respondent] is to file and serve its statements of facts and contentions in reply in accordance with Schedule [B or C] of *Practice Note – Class 1 Development Appeals* by # [insert date having regard to date of preliminary conference]. This statement is not to repeat any facts not in dispute.

Note: This direction may be unnecessary for short matters.

Note: The usual directions in the following paragraphs are intended to operate on an issue-by-issue basis. It is the responsibility of the parties to consider the most appropriate combination of directions for the particular case having regard to the real issues requiring resolution.

The directions in Part G below should usually be made.

C. If the parties agree on or the Court requires the appointment of a parties' single expert to address **any** issue:

1. The Court notes the agreement between the parties to engage # [insert name] as a parties' single expert and that the parties have agreed the remuneration to be paid to that expert as being [insert details of remuneration].

Or, failing agreement about the identity and/or remuneration of the parties' single expert:

1A. (i) The parties are to agree on a parties' single expert and their remuneration and are to notify the Court of the expert's name and that the expert's remuneration has been agreed by # [+ 7 days of the first/second directions hearing].

(ii) Failing agreement, the parties are to file and serve the names, CVs and fee estimates of three appropriately qualified experts by # [+ 10 days of the first/second directions hearing]. The Court will make orders (iii) and (iv) below in Chambers and notify the parties accordingly.

(iii) The Court orders the parties to engage # [insert name] as a parties' single expert.

(iv) The Court fixes the remuneration of the parties' single expert at # [insert details of remuneration].

2. A parties' single expert is not to incur fees or disbursements additional to the remuneration agreed by the parties or fixed by the Court without written agreement of both parties or, absent such agreement, the leave of the Court.

3. The parties are to brief the parties' single expert with agreed instructions and an agreed bundle of documents by # [within 7 days of the first/second directions hearing].

4. The parties' single expert is to file and serve their expert report by # [within 6 weeks of the first/second directions hearing]. Without leave of the Court, the parties' single expert is not to provide the parties with a preliminary expert report or preliminary opinion.

5. The parties' single expert is to comply with the requirements of Division 2 of Pt 31 of the Uniform Civil Procedure Rules and the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules, including the requirements for experts' reports.
6. If the Court has ordered that a parties' single expert address any issue, no expert report addressing the same issue other than the report of the parties' single expert may be relied upon at the hearing, without leave.

D. If the contentions are that there is insufficient information to assess the application, or any other circumstance makes it appropriate for one party to file and serve its evidence before the other, the following directions may be considered appropriate:

1. The [applicants'/respondents'] experts are to file and serve their individual expert reports by # [within + 28 days of the first/second directions hearing].
2. The [respondents'/applicants'] experts are to file and serve their individual expert reports by # [within + 6 weeks of the of the first/second directions hearing].
3. The experts, grouped in areas of expertise, are to confer in accordance with the requirements of Division 2 of Pt 31 of the Uniform Civil Procedure Rules and the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules and are to file and serve their joint report, which is to include any evidence in reply, by # [within + 8 weeks of the first/second directions hearing].

E. If the contentions do not involve inadequate information or any other circumstance does not make it appropriate for one party to file and serve its evidence before the other, the following directions may be considered appropriate:

1. The applicants' and respondents' experts are to file and serve their individual expert reports by # [within + 28 days of the first/second directions hearing].

2. The experts, grouped in areas of expertise, are to confer in accordance with the requirements of Division 2 of Pt 31 of the Uniform Civil Procedure Rules and the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules and are to file and serve their joint report, which is to include any evidence in reply, by # [within + 6 weeks of the first/second directions hearing].

F. If the parties agree or the Court requires that **any** experts may proceed directly to joint conferences and joint reports, without having prepared an individual expert report:

1. The parties are not to instruct experts on # [insert areas of expertise] to prepare individual expert reports.
2. The experts, grouped in areas of expertise, are to confer in accordance with the requirements of Division 2 of Pt 31 of the Uniform Civil Procedure Rules and the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules and are to file and serve their joint report by # [within + 28 days of the first/second directions hearing].
3. No expert reports, other than the joint reports, may be relied upon at the hearing, without leave.

G. For all matters:

1. The proceedings are fixed for hearing on # [in all cases as soon as reasonably possible and usually within + 12 weeks from the return date].
2. The hearing is to be [an on site hearing] or [a Court hearing] and is to commence [on site at 9.30am] or [in Court at 10.00am]. If the parties consider the site may be difficult to find, they are to file an agreed map showing the proposed location for the commencement of any hearing on site at 9.30am two working days before the hearing.

Note: If a matter is fixed for an on site hearing or is otherwise to involve substantial time or taking of evidence on site, the parties should ensure that appropriate facilities are available for that purpose, including a table and chairs and bathroom facilities, and that the hearing will be

open to the public and will be able to be observed and heard by all persons attending the hearing.

3. Parties are to serve a copy of these directions, the statements of facts and contentions, Division 2 of Pt 31 of the Uniform Civil Procedure Rules and the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules on all experts upon whose evidence they propose to rely.
4. The parties' are not to provide a parties' single expert with any expert report brought into existence for the purpose of the proceedings addressing any matter the subject of instructions to the parties' single expert, without leave of the Court.
5. Experts are directed to give written notice to the Court and the party instructing them if for any reason they anticipate that they cannot comply with these directions. In that case, or if the experts have failed to comply with these directions, the parties will promptly list the matter before the Court for directions and give written notice to the other parties. Default without leave of the Court can result in the imposition of sanctions.
6. Experts are to ensure that a joint conference is a genuine dialogue between experts in a common effort to reach agreement with the other expert witness about the relevant facts and issues. Any joint report is to be a product of this genuine dialogue and is not to be a mere summary or compilation of the pre-existing positions of the experts.
7. A joint report is to identify the experts involved in its preparation, the date of their joint conferences, the matters they agreed about, the matters they disagreed about and reasons for agreement and disagreement. A joint report should avoid repetition and be organised to facilitate a clear understanding of the final position of the experts about the matters in issue and the reasoning process they used to reach those positions. Each expert is to sign and date the joint report.
8. Legal representatives are not to attend joint conferences of experts or be involved in the preparation of joint reports without the leave of the Court.

9. A party calling a witness may not, without the leave of the Court, lead evidence from the witness the substance of which is not included in a document served in accordance with the Court's directions.
10. If any witness is required for cross-examination, notice is to be given at least seven days before the hearing.
11. A party who proposes to object to any part of an affidavit, statement or report is to file and serve notice of its objections, including the grounds in support, at least seven days before the hearing.
12. The respondent consent authority is to file and serve a bundle of documents by # [14 days before the hearing]. The bundle is to contain copies of relevant environmental planning instruments, relevant extracts from development control plans and policies, and documents evidencing the lodgement, processing and determination of the application by the consent authority, including all submissions from objectors, and the decision of the consent authority but is not to otherwise include copies of any documents annexed to the development appeal. Unnecessary copying and duplication of documents is to be avoided. The bundle is to be subdivided into relevant divisions, paginated and have a table of contents.
13. The respondent consent authority is to file and serve a notice of objectors who wish to give evidence in the hearing, of whom the consent authority is aware, by # [7 days before the hearing]. The notice is to identify the objector, their address, where they wish to give evidence (on site or in Court) and whether they made a written submission about the application (in which event, the notice is to provide the page number of that submission in the key bundle). If there is no submission, the respondent consent authority should, if possible, file and serve a short statement identifying the topics about which the objector wishes to give evidence.
14. The respondent consent authority is to file and serve draft conditions of consent (in both hard copy and electronic form) by # [14 days before the hearing].
15. The applicant for consent is to file and serve its draft conditions in response (in both hard copy and electronic form) by # [7 days before the hearing].

- 16 Parties are to notify promptly the Court if there is any material slippage in the timetable.
- 17 The parties have liberty to restore on three working days' notice.
- 18 At the hearing the evidence of experts is to be given by way of concurrent evidence, unless the hearing judge or commissioner directs otherwise.

H. If issues of fact or law precluding the grant of consent are raised:

If necessary [Strike through/amend as required]:

1. The parties are to file and serve any affidavits, reports or statements on which they wish to rely by # [within + 14 days of the first directions hearing].
2. The parties are to file and serve any affidavits, reports or statements in reply by # [within + 28 days of the first directions hearing].

Note: Directions 1 and 2 may be unnecessary depending on the nature of the issue raised.
3. The parties are to file an agreed bundle of documents by # [within + 5 weeks of the first directions hearing].
4. The party raising the issue is to file and serve an outline of submissions by # [two working days before the hearing].
5. The other party is to file and serve an outline of submissions by # [one working day before the hearing].
6. The issue is listed for hearing separately from any other issues in the proceedings on #.
7. Parties are to notify promptly the Court if there is any material slippage in the timetable.
8. The parties have liberty to restore on three working days' notice.

Or for small matters, where there is no requirement for affidavits, reports or statements, bundles of documents or outlines of submissions:

1. The issue is listed for hearing separately from any other issues in the proceedings before the [Duty Judge/Duty Commissioner] on # (usually a Friday).

Date: # [insert date]

Schedule E

Class 1 Development Appeals - Information Sheet

Parties:

Applicant:

Respondent(s):

Proceedings no:

Part A: to be completed by applicants for consent or approval (as applicable)

1. (a) Do the plans comply with Schedule A as relevant to the application?
(b) If not, in what respects do the plans not comply?

Part B: to be completed by all parties (as applicable)

2. Is there any issue that the parties seek to be dealt with in advance of the merits of the appeal? If so, see paragraph 16 of *Practice Note – Class 1 Development Appeals*.

3. Is there any reason for the proceedings not to be fixed for a preliminary conference under s 34 of the *Land and Environment Court Act 1979*? If so, provide reasons [point form only].

4.	Is any expert evidence required? If so, nominate issues on which expert evidence is required and the areas of expertise.
Applicant:	
Respondent:	
5.	<p>(a) Is any issue in the appeal appropriate for evidence by a parties' single expert agreed by the parties and if so, identify the issue.</p> <p>(b) If parties' single experts are not appropriate, the reasons in support [point form only].</p>
Applicant:	
Respondent:	
6.	If parties' single experts are agreed, set out below their name, charge rates, estimate of total fees and disbursements and available dates to prepare a report and appear at a hearing.
Name:	
Charge rates	
Estimate of total fees and disbursements	

<p>Dates by which reports can be prepared:</p>	
<p>Available dates to appear at a hearing</p>	
<p>7.</p>	<p>Is sufficient information available or is it otherwise appropriate for any experts proposed to be called by parties to proceed directly to a joint conference and joint report, without preparing other reports? If so, identify the experts and areas of expertise. If not, provide the reasons in support [point form only].</p>
<p>8.</p>	<p>Are there any experts who should prepare an individual report before proceeding to a joint conference and joint report and, if so, identify the expert, the area of expertise and provide reasons supporting the report being necessary or appropriate [point form only]?</p>
<p>9.</p>	<p>Should a Commissioner or Commissioners with special knowledge and experience in particular disciplines hear the development appeal? If so, specify the relevant disciplines.</p>
<p>10.</p>	<p>If the appeal concerns land outside of the Sydney metropolitan region, should the development appeal be heard in the local area? If not, provide the reasons for not doing so [point form only].</p>

11.	Is the appeal appropriate to be heard as an on site hearing under s 34A of the <i>Environmental Planning and Assessment Act 1979</i> ? If so, will adequate facilities be available? Will the hearing be able to be observed and heard by the public?
12.	Is there any reason that the hearing should not commence at 9.30am on site?
13.	Estimate of the length of hearing.
Applicant:	
Respondent:	
14.	Identify number and, if possible, names of lay witnesses.
Applicant:	
Respondent:	
15.	Identify hearing dates sought:
Applicant:	
Respondent:	

Schedule F

Usual directions where an applicant for consent seeks leave to rely on an amended application

Note: Strike through/amend as required.

1. The parties have leave to amend their statement of facts and contentions by [+ 14 days from the filing of the notice of motion or such longer period if the Court accepts that further notification/exhibition is required].

If leave is granted before evidence of any experts is filed:

- 2A. Such of the directions in Sch D as are appropriate should be made running from the date of leave being granted.

Or, if leave is granted after evidence of any experts has been filed and if the parties agree that it is appropriate or the Registrar orders:

- 2B. (i) Any parties' single expert is to file and serve a brief addendum to their expert report identifying any changes to their opinions by reason of the amendment by [+28 days from the grant of leave]; and
(ii) Other experts are not to prepare further reports, but are to proceed to a joint conference and are to file and serve an addendum to their joint report by [+28 days from the grant of leave].
3. The hearing date of # is confirmed.

Date: # [insert date]