

## THE LEC IN 2011: REVIEWING CASES & NEW PROCEDURES

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### Framing contentions: Council view

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#### Introduction

I have had the benefit of reading Commissioner Brown's excellent paper on Framing Contentions – The Court View and will try not to repeat the material and comments set out there.

I have been requested to comment on the question of framing contentions from a council point of view.

#### A bit of history

When I first started practising in the Land and Environment Court there was no requirement to file a Statement of Issues (which was the precursor to the Statement of Contentions).

This led to a number of unfortunate cases (for applicants) where councils had refused development applications for a number of reasons and applicants attended hearings only to find that it was contended for the first time that the proposals were prohibited or affected by other fundamental problems which could not then be resolved. I should also add that at this time there was no requirement for written statements of evidence.

I recall one council lawyer commenting when the requirement for a Statement of Issues was introduced, "Good heavens, that is going to pin us down".

#### What is the purpose of the Statement of Contentions?

The first purpose of the Statement of Contentions is to inform applicants of the case to be met.

The second purpose is to inform the Commissioner what the case is about.

I understand the purpose for the change in terminology from Statement of Issues to Statement of Contentions was to "pin down" councils so that there would be stated only those matters contended as reasons for refusal, not issues that would just "hang there".

#### Applicants' pet hates with the Statement of Contentions

Prior to preparation of this paper I spoke to a number of lawyers in my firm and other firms who do applicant work to ascertain their "pet hates" in relation to Statements of Contentions they receive from other lawyers.

The list of top pet hates was as follows:

- 1 Repetition/saying the same thing in a number of different places.
- 2 Failure to adequately particularise.
- 3 Providing so much detail that the real case is hidden.
- 4 Contentions designed to obfuscate rather than enlighten.
- 5 No structure/logical order.
- 6 “Kitchen sink” non issues.
- 7 “Issues raised by objectors”.
- 8 “The public interest”.

Some of these pet hates have been listed in a slightly different form in Commissioner Brown’s paper.

#### **Preparation of contentions – council officers/council lawyers pet hates**

I spoke to a number of council officers and council lawyers resulting in the following list of their “pet hates” in preparing the Statement of Contentions:

- 1 Insufficient time to complete (especially in relation to deemed refusals and refusals contrary to staff recommendations).
- 2 Insufficient resources/competing demands on time (if I do this Statement of Facts and Contentions will I miss the deadline for a council meeting for an important DA?).
- 3 Inadequacy of DA documentation (for example, have you ever seen a Statement of Environmental Effects that actually states what the environmental effects are?).
- 4 Lack of communication/dialogue with the applicant (for every story that “the council officer won’t talk to me”, there is another where the applicant was given pre-DA advice, lodged the DA contrary to that advice, was sent a letter to withdraw it explaining why it should be withdrawn, and nevertheless lodged the appeal).
- 5 Perception that appellants are “queue jumpers”.

#### **Problems faced by councils and their lawyers in the preparation of the Statement of Contentions**

- **Deemed refusals**

I am not sure what the exact statistics are but a good proportion of appeals which cross my desk are deemed refusals.

Each council seems to have a different approach to deemed refusal appeals. Some council officers simply “down tools”. Other council officers place the applications on the top of the pile (leading to a

perception that people lodging appeals are “queue jumpers”). Some councils refer the matters to an independent consultant where applicants may then find they have a number of new issues to deal with that otherwise would not have arisen.

In any event, deemed refusals create particular problems for council lawyers as the application has not been fully assessed at the time of lodgement of the appeal.

- **Refusals contrary to staff recommendation**

These appeals are also problematic. There are often allegations by applicants and their lawyers that the council lawyers “embroidered” the contentions in these cases.

A problem is that in these circumstances most councils wish to refer the matters to independent experts, and possibly multiple experts if there are involved other issues such as noise, traffic, trees etc. The time constraints of doing this and producing a meaningful Statement of Contentions by the date of the first directions hearing (28 days in the case of general appeals and 21 days in the case of the new residential appeals) are difficult, if not impossible to overcome.

Every council lawyer has an anecdote of a class 1 development appeal that he/she won on a point in the contentions which was alleged to be “embroidered” where the development application was recommended for approval by the council officer.

The question of whether a contention has a “reasonable basis” is one on which minds might differ given the often subjective nature of planning decisions.

- **Refusals in accordance with staff recommendation**

These can also be difficult. For example, a council officer has just gone on leave, is now on a “special project” or simply gives priority to another deadline.

- **The kitchen sink**

A main reason for “kitchen sink” contentions (which are later withdrawn) is that it is easier to remove contentions than to subsequently include them. See my comment above about the “reasonable basis” question.

### **A concrete example**

Many of the complaints about Statements of Contentions being lengthy and containing too much detail are in fact nostalgic yearnings for the way things used to be before LEPs and DCPs became so voluminous.

Take the case of a metropolitan council I will call “council X”. Many years ago, its LEP ran to the equivalent of 15 A4 pages and there was no Development Control Plan. At that time, there were only a handful of State Environmental Planning Policies.

Now, that council’s LEP is more than 80 A4 pages and its Development Control Plan for Residential Development is more than 100 pages.

There is, in addition, a multiplicity of State Environmental Planning Policies. Indeed, there are so many State Environmental Planning Policies that the Department of Planning ceased numbering them.

To do justice to a Statement of Contentions and keep the document brief in such circumstances is a challenge for council officers and lawyers.

To illustrate this point, I consider the hypothetical example of a proposed residential flat building which looks very similar to Blues Point Tower on the foreshores of Sydney Harbour in a council area other than North Sydney.

The Statement of Contentions could simply state “Overdevelopment” or “It is too big” and/or “It is out of context with its surrounding area”.

However, to properly comply with the Practice Direction and to satisfy the objects of Statements of Contentions, which are to inform the other side of the case it has to meet and inform the Commissioner what the case is, it is necessary to give some detail and deal with the relevant planning controls.

There will be council planning controls, namely an LEP and DCP. There will also be State planning controls. In this example there are at least the following:

- SEPP 1
- SEPP 65 and the accompanying Design Guidelines
- SREP (Sydney Harbour Catchment) 2005 and the accompanying DCP.

It is easy to understand that even before we deal with non-planning issues (such as parking, trees, landscaping, contamination and stormwater drainage), keeping the Statement of Contentions brief is a challenge.

### **The end of “issues raised by objectors”?**

Paragraph 14 to Schedule B to the new Residential Practice Note states in relation to the Statement of Contentions:

*“It is not acceptable to identify as a ground for refusal “matters raised by the objectors”. The respondent consent authority is to identify which, if any, of the matters raised by the objectors the respondent itself contends, on a reasonable basis, justifies the refusal of the application.”*

I assume that this requirement will in due course be replicated in Schedule B to the mainstream Practice Note.

This should make it clear to everybody that “Issues raised by objectors” should never be seen again in a Statement of Contentions.

If a council contends that a matter raised by an objector is a ground for refusal, it should already have its own heading (e.g. “the proposal causes overshadowing to the private open space of 20 Smith Street”).

It is submitted that the correct approach to comply with paragraph 14 to Schedule B is to list “issues raised by objectors” with some specificity in the Statement of Facts. For example, in the worked example which is Attachment 3 to Commissioner Brown’s paper, after the heading “Actions of the respondent consent authority” there is a note that six submissions were received objecting to the application. The nature of the submissions is not specified. It would be prudent for those involved in the preparation of the council Statement of Facts and Contentions to specify the bases of the respective objections particularly where there are objections which are not to be raised as contentions in the Statement of Contentions.

The fact that a resident objection is not raised in the contentions does not mean the Court cannot take it into account in the final determination of the matter, as the Court, standing in the shoes of council as consent authority, is required to take such submissions into account under section 79C(1)(d) of the Environmental Planning and Assessment Act 1979.

The submissions would normally be included in the Council Bundle of Documents for consideration by the Commissioner.

### **Who should prepare the Statement of Contentions?**

Some councils leave it to the council lawyers to prepare the document. Some have it prepared by the council officer with carriage of the matter. Some refer it to a different council officer who has the job of managing appeals including preparation of Statements of Contentions and some councils contract it out to a planning consultant.

Whatever method is adopted, it is important for everyone involved to understand the time constraints and do their best to meet them.

### **A way forward**

Commissioner Brown’s paper helpfully appends Schedule B (which sets out the requirements for the Statement of Facts and Contentions) to the “mainstream” Practice Note for class 1 development appeals and for the new residential stream.

Also appended is a worked example of a Statement of Facts and Contentions.

These documents should be studied closely by everyone involved in the preparation of the contentions be they council officers, consultants acting for councils or council lawyers.

I set out below my ten ways to better contentions:

- 1 Think about the purpose of the Statement of Contentions and imagine that you would be receiving it – “do unto others as you would have done unto you”.
- 2 On the assumption that in due course the requirements for the contentions in the residential stream will be adopted for the mainstream, the format for the residential stream should be adopted regardless of the nature of the appeal, i.e. the first part should be “contentions that warrant the refusal of the application”; the second part should be “contentions that may be resolved by conditions of consent”; and the third part should be “insufficient information”.

- 3 Each heading should be in bold and should be a topic rather than merely a statement of non-compliance with a planning control. Each item should be properly particularised including details of the relevant applicable controls.
- 4 Have a precedent or “pro-forma” from other appeals. I find with residential development appeals there are three themes that come up regularly (however described):
  - 1 What it looks like [normally identified as “streetscape”, “townscape”, “bulk and scale” and the like];
  - 2 Amenity impacts on neighbours; and
  - 3 Whether the amenity of the occupants of the proposed development will be acceptable.

Each of these themes may have sub-themes (e.g. (2) could be “views”, “overshadowing”, “privacy” etc) and should be particularised by reference to the relevant planning controls and impacts.
- 5 Group related contentions as a single contention wherever possible.
- 6 Give it the time it deserves.
- 7 Rather than having the assessing officer prepare the Statement of Contentions, have it prepared by a different council officer who has preparation of such documents as part of his/her core duties.
- 8 If there is a lack of resources at council, contract the preparation (or settling) of the Statement of Contentions to a consultant. This has the additional benefit of bringing a fresh mind to the matter.
- 9 The council lawyer should check and settle the document to ensure it complies with Schedule B to the Practice Direction.
- 10 If the document cannot be completed in a meaningful way before the first directions hearing (for example, it is a deemed refusal or a refusal contrary to the staff recommendation and the advice of a consultant planner/architect/heritage advisor etc has not yet been received), seek an adjournment rather than file a document which is inadequate and will have to be amended at a later stage, or alternatively, serve a draft.