**I want to go to the Land & Environment Court!**

I have heard clients say this before and think no-one should want to go to Court, although the Land & Environment Court (**"L&E Court"**) is probably a more pleasant court to be in than others.

By the time applicants under a DA seek legal advice, they are usually unwilling to wait anymore or try again with their local consent authority (usually their local council). These applicants are not happy with:

- a refusal; or,
- a consent with unfair conditions; or,
- with what seems like continued "moving the goalposts" in trying to obtain a consent to their development application (**"DA"**).

Before L&E Court action is recommended, applicants should aim to have the best DA possible in terms of meeting their needs and addressing real concerns of their council. A useful paper summarising the types of things to consider before getting to the point where the L&E Court may be their best option is located here *"Council hasn't approved my DA - What should I do!"*.

To work out whether lodging an application in the L&E Court is their best option, applicants need to know what that involves - and should ask their legal adviser:

- how much will going to the L&E Court cost?
  [unlike most other court proceedings, Class 1 appeals (which apply to DAs) are usually on the basis that each party pays their own costs irrespective of the outcome - but there are exceptions!]
- how long will it take?
  [According to the L&E Court website, 97% of Class 1 appeals were finalised within 12 months, and 78% were finalised within 6 months, of commencement. The median time for all Class 1 appeals was 108 days.]
- are there any alternatives? and
- what are my prospects?

The 2011-2012 Local Development Performance Monitoring Reports from NSW Planning & Infrastructure summarised that:

- 47% of Class 1 appeals involving a DA were approved by the L&E Court. That 47% could be split further to distinguish between successful Class 1 appeals without amended plans (28%) and successful appeals with amended plans (19%);

- 37% of Class 1 appeals were withdrawn or dismissed and therefore unsuccessful;

- 17% of the Class 1 appeals involved DAs which were resolved through consent orders, that is, through agreement of the parties. This can mean different outcomes, some involving a successful outcome, possibly outside the L&E Court system, and some, an unsuccessful outcome or changed circumstances for the applicant. It seems probable that some of these

cases would involve some sort of successful outcome though, but as that 17% is not analysed further it is not possible to read too much into this figure.

[For more statistics and other Local Development Performance Monitoring Reports including how your local council compares, click here: http://www.planning.nsw.gov.au/en-au/developmentproposals/performancemonitoring.aspx]

The statistics for a successful outcome therefore look fairly positive for applicants as a group, but, it is important to bear in mind that the lawyers acting for prospective applicants in the L&E Court would have already dissuaded some of their clients from court action if they believed the prospects of success were not good.

Each DA and Class 1 appeal is different as are the circumstances surrounding each matter. There are many factors that influence whether a Class 1 appeal is likely to be successful, such as:

- the level of compliance with planning instruments and policies;
- the surrounding built environment;
- whether sufficient information has been provided; and,
- the nature of objections received.

Back to the statistics though - of the Class 1 appeals that are successful, a significant proportion, around 40%, involved some amendments to the proposed development at some point in the Class 1 appeal process. One possible reason is that sometimes it takes commencing Class 1 action to get the parties to really focus on the DA and avenues available to an approval. It is important, at least from the applicant's point of view, to carry out a thorough review before commencing proceedings as explained in this paper [link to *"Council hasn't approved my DA - What should I do!"*]

There are strict time limits on when a Class 1 appeal can be lodged, so, if you like your prospects, the next question is:

When can I lodge?

Applicants can lodge a Class 1 appeal within **6 months** after the date that:

For DAs

- the applicant received notice of the determination of their DA or their DA is deemed to be determined;

DAs are "deemed" to be determined

- 40 days from the day the DA is lodged for an "ordinary" DA;
- 60 days for integrated development, designated development or where concurrence is required;
- 90 days for State significant development.

or, For modification/section 96 applications

- the applicant received notice of the determination of their modification/section 96 application or their modification/section 96 application is "deemed" to be determined.

Modification/section 96 applications are deemed to be determined:

- 40 days from the day the modification/section 96 application is lodged

[For appeals concerning DAs ss 82(1), 97(1) of the Environmental Planning & Assessment Act 1979 (**"EP&A Act"**) & cl 113 of the Environmental Planning & Assessment Regulation 2000 (**"EP&A Regulation"**) & for appeals concerning modification/section 96 applications: ss 96(6), s97AA of the EP&A Act & cl 122A of the EP&A Regulation]

Eakin McCaffery Cox Lawyers can help by advising you through the DA process and available options as well as acting as your legal representatives in commencing and running a Class 1 appeal in the L&E Court on a cost effective basis.

Please contact **Eakin McCaffery Cox Lawyers on (02) 9265 3000** for advice and action on planning, Council and the Land & Environment Court matters.

This paper is a summary providing general information and should not be construed as specific legal advice. Each development application is different and is made in different circumstances which require subjective assessment before legal advice may be provided.