



Report to General Manager

Attachments:
1. Appeals Lodged 2019

SUBJECT: 2019 Appeals Statistical Review

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EXECUTIVE SUMMARY:

The management of planning appeals can be at considerable cost to Council. This report examines the reasons behind the commencement of appeals and the relevance of the 40-day “deemed refusal” period when considered in light of realistic processing times for complex Development Applications.

It is intended that an updated report will be provided to the Legal and Planning Committee at the conclusion of the 2020 calendar year, with a view to making a submission to the Department of Planning, Industry and Environment. The submission will request, if considered appropriate, that the current deemed refusal period of 40 days be reviewed.

FINANCIAL IMPLICATIONS:

Council’s current total legal budget is \$1.5 million for the 2019/20 financial year. Much of this expenditure occurs in the defence of planning-based appeals and represents expenditure for the professional services of external legal services and technical consultants. Wherever possible, expert evidence is given by Council planners and this cost is not included in the expenditure mentioned above.

Council’s total legal expenditure on planning matters for the 2018/19 financial year was \$1,672,000.

RECOMMENDATION:

1. THAT the 2019 Appeals Statistical Review be received.

LINK TO COMMUNITY STRATEGIC PLAN

The relationship with the Community Strategic Plan is as follows:

Direction: 5. Our Civic Leadership

Outcome: 5.2 Council is well governed and customer focused

BACKGROUND

The management of planning appeals can be at considerable cost to Council. Many of these appeals commence as “deemed refusal” appeals. These are ones which are commenced following the expiry of 40 days since the lodgement date of the application. Alternatively appeals can be commenced following the determination of an application.

This report examines the reasons behind the commencement of appeals generally and particularly the relevance of the 40-day period when considered in light of actual and realistic processing times for complex Development Applications.

It is intended that an updated report will be provided to Legal and Planning Committee at the conclusion of the 2020 calendar year, with a view to making submission to the Department of Planning, Industry and Environment requesting, if appropriate, that the current deemed refusal period of 40 days be reviewed.

CONSULTATION REQUIREMENTS

Community engagement is not required.

SUSTAINABILITY STATEMENT

The sustainability implications are of a minor nature and did not warrant a detailed assessment.

DETAIL

Current Management of Planning Appeals

It is considered relevant that a brief description be given of how appeals are managed by Council following their lodgement with the Land and Environment Court. The following is to be regarded as an overview, noting that the progress of every appeal is unique and dependent on the circumstance of the case.

Current Processes - In-house Lawyer's Role

The Council Solicitor:

- Provides legal services across the organisation;
- Appoints briefs and oversees external legal service providers;
- Provides formal and informal advice in regard to appeal and compliance matters; and
- Advises on day to day legal issues and interpretation whether planning or governance related, affecting the whole of Council operations.

North Sydney Council also calls on the services of a panel of law firms for general legal matters including planning appeals. These law firms are selected on the basis of type matter, previous involvements and conflicts of interest. On occasion, barristers are also briefed directly by Council's in-house Solicitor.

Current Processes - Council Planners' Role

- Draft statements of basic facts and contentions;
- Provide ongoing input into the conduct of appeals;
- Depending on the circumstances, give expert evidence to the Court;
- Consult with in-house and external service providers; and
- Provide input into joint expert statements.

Depending on circumstances the Council Planner's role may be outsourced to consultants and other appropriate experts which may include amongst others; traffic, acoustic, urban design and engineering.

North Sydney Local Planning Panel and Elected Councillors' Role

Following the implementation of Local Planning Panels in March 2018, a Councillor's role in the conduct of Planning appeals in relation to applications that were or would have been determined by the elected Council is very limited. The conduct of such appeals now rests with the Local Planning Panel. Whilst this may seem like a significant and undesirable change, in practice, Councillors had little to do with day to day management of planning appeals, with updates on their progress being provided on a quarterly basis much as they are today.

The North Sydney Local Planning Panel, having regard to the practicalities of it directing individual planning appeals in an ongoing sense, has delegated that role to certain Council Senior staff including the General Manager, Director City Strategy, Council's Solicitor and Manager Development Services.

Appeals lodged in response to applications determined under delegation are also directed by the aforementioned senior staff. Legal expenditure remains within the direct control of officers employed by Council.

Reasons Why Applicants Appeal

Applicants appeal for the following reasons:

- a matter remains underdetermined (deemed refusal);
- there is a strong indication given by Council's planner that the application will not be supported;
- they are unhappy with the determination given; and
- the value of development in North Sydney often justifies the costs of running an appeal.

Why Council Defends Appeals

Council defends planning appeals for a number of reasons:

- Council needs to defend its Planning Controls, which have been developed in full consultation with its community. This is the core driving force behind appeal policy;
- To maintain North Sydney as a vibrant CBD within a leafy urban environment; and
- Expenditure is justified on these grounds, even though there is not the monetary return a developer may enjoy through the successful conduct of an appeal.

Appeal Expenditure

Council's current total legal budget is \$1.5 million for the 2019/20 financial year. Much of this expenditure will occur in the defence of planning-based appeals and represents expenditure for the professional services of external legal services and technical consultants. Wherever possible, expert evidence is given by Council planners and this cost is not included in the expenditure mentioned above.

It should be noted that the majority of planning-based matters are conducted within Class 1 of the Court's jurisdiction and costs are not generally awarded, save for costs thrown away by the parties to an appeal. An example of this is when plans and expert reports are substituted during the appeal process for those which are demonstrated to be inadequate or misleading.

Statistical Analysis of Appeals Lodged in 2019

The attached spreadsheet summarises those appeals lodged in the 2019 calendar year.

Included in this spreadsheet are the following details:

- application number;
 - address, lodgement date;
 - deemed refusal date, that is the earliest date an appeal could have been lodged;
 - issues letter date (if sent);
 - date of determination (if not appeal as a deemed refusal);
 - date of appeal lodgement;
 - appeal type whether deemed refusal or against determination and days since lodgement; and
 - outcome, if the appeal has been determined by the court.
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The following observations are made:

- 26 Appeals were lodged in the 2019 calendar year representing 4% of the primary development application stream comprising 611 applications;
- Of those 26 appeals, 12 or 46% were lodged with the court following the determination of the application;
- 14 appeals commenced as deemed refusals of which 11 or 78% were lodged following the initial assessment of the application and the receipt by the applicant of an issues letter from Council's planners;
- The average age of a deemed refusal appeal was 99 days;
- Increasing the deemed refusal period to a more realistic period of 80 days would reduce the number by 5 appeals or around 35%; and
- Increasing the deemed refusal period to 100 days would potentially reduce the number of deemed refusals by 8 appeals or 58%.

Processing Times and Deemed Refusal

An appeal must be commenced within six months of the application being deemed refused. This is generally around 220 days since lodgement (40 days + six months) for local DAs. Stop the Clock times (when Council is waiting on additional information from the applicant) are not included in these time frames.

During the 2019 calendar year the average age of a deemed refused application was 99 days. The average time for Council to process a DA in 2019 was 73 days. The shortest time before lodgement of a deemed refusal was 49 days for two appeals for related sites at 55 and 67 Chandos Street, which had also been subject to earlier planning proposals.

The longest period before lodgement was 169 days for a site at 5 Montpellier Street, where a letter outlining all issues had been sent 52 days into the process. Ongoing negotiation between Council and the applicant failed to resolve the matter.

The theoretical minimum processing time for an advertised DA is around 45 days allowing for notification, assessment, report writing and determination by panel or under delegation. This figure was arrived at by an external management consultant who reviewed the development application process several years ago.

Factors affecting processing times include:

- the issues demonstrated by the application;
 - requests by submitters for extension to advertising periods requests;
 - waiting on amended plans and/or details to ensure a favorable determination;
 - delays in the return of referrals from external authorities; and
 - other work priorities which can be dictated by external agencies such as the Court and staffing resources which are a constant despite the ebb and flow of application lodgement during the year.
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Deemed Refusals and the Application Stream

Deemed refusal appeals represent around 2% of the application stream with the other 2% of appeals being lodged post determination.

As part of Council's standard procedure, a letter outlining all issues is sent to the applicant of any troubled application, requesting that they address points of concern that stand in the way of a successful outcome. Some limited negotiation occurs but it must be remembered that the DA process is one of assessment, not one of ongoing negotiation.

Should the Deemed Refusal Period be Extended?

The current deemed refusal period of 40 days might be considered too short and has not been amended since the Environmental Planning and Assessment Act was first gazetted in 1979. This Act reflected what was stipulated by Part 12 of the Local Government Act 1919. Assessment processes and the need for consultation and planning controls have not been simplified in that time. It is questionable whether the 40-day period has any relevance today, particularly when considered in relation to the complex nature of development in an inner city area such as North Sydney. It is perhaps worthy to note that once in the Court system an appeal can take around 12 months to resolve.

Councils total legal expenditure on planning matters for the 2018/19 financial year was \$1,672,000. As observed earlier in this report, if the refusal period was extended to 80 days, five deemed refusal appeals could not have been made, potentially saving Council up to \$400,000 in legal and consultant fees. These savings would also be achieved by the applicant but in this case, one needs to be mindful of holding and other costs related to speculative development may easily offset any potential saving.

Conclusion

This report examines the relationship between appeals and processing times. A simple conclusion based on one year's worth of statistics suggests that the current deemed refusal time of 40 days is unreasonable.

It is intended that an updated report will be provided to the Legal and Planning Committee at the conclusion of the 2020 calendar year, with a view to making submission to the Department of Planning, Industry and Environment. The submission will request, if considered appropriate, that the current deemed refusal period of 40 days should be reviewed.

2019 Development Application Appeals.

DA number/Property.	Lodged	DRD	IL	DD	AL	AT	CDD	Outcome
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Finalised Appeals.

443/18	63 Carter Street	19/12/2018	30/01/2019	N/A	N/A	26/03/2019	DR 161d	13/01/2019	Consent Orders
40/18	141 Carabella	21/02/2018	4/04/2018	19/04/2018	3/10/2018	7/04/2019	R 233d	19/12/2019	Consent Orders
193/18	287 Military Road	27/06/2018	8/08/2018	3/07/2019	11/10/2018	4/01/2019	R 196d	10/09/2019	Upheld
74/18	24 Milner Crescent	20/03/2018	1/05/2018	21/03/2019	5/12/2018	7/01/2019	R 270d	17/09/2019	Consent Orders
334/18	6 the Boulevard	5/10/2018	16/11/2018	13/12/2019	N/A	12/02/2019	DR 130d	20/11/2019	Refused
259/18	4 Illiliwa Street	17/08/2018	28/09/2018	28/08/2019	5/12/2018	6/04/2019	R 79d	11/06/2019	Discontinued.
316/15/5	12a Milson Road	23/10/2018	4/12/2018	N/A	3/02/2019	24/04/2019	R 88d	31/07/2019	Consent orders.
336/18	5 Montpellier Street	5/11/2018	17/12/2018	5/12/2019	4/07/2019	17/06/2019	DR 169d	10/02/2020	Refused
395/18	1 Henry Lawson Drive	23/11/2018	4/01/2019	15/12/2019	N/A	21/05/2019	DR 152d	10/02/2020	Refused
428/19	22 Cario Street	12/12/2018	14/01/2019	31/05/2019	17/06/2019	27/06/2019	R 187	14/11/2019	Consent Orders
160/16/3	21 Shellcove Road	5/10/2018	14/11/2018	11/01/2019	1/03/2019	17/05/2019	R 147	13/09/2019	Discontinued
284/18	43 Pitt Street	6/09/2018	18/10/2018	11/01/2019	1/03/2019	7/05/2019	R 127	6/09/2019	Consent Orders
162/18	8 Queens Avenue	31/05/2018	10/07/2018	4/07/2018	25/07/2018	25/01/2019	R 54	13/09/2019	Consent Orders

Ongoing Appeals

32/19	55-63 Chandos Street	15/02/2019	29/03/2019	9/04/2019	N/A	24/04/2019	DR 49d	In train
30/19	67-69 Chandos Street	15/02/2019	29/03/2019	9/04/2019	N/A	24/04/2019	DR 49d	In train
65/19	22-26 Spruson Street	12/03/2019	23/04/2019	29/03/2019	N/A	24/07/2019	DR 83d	In train
103/19	3 Parker Street	23/04/2019	4/05/2019	5/08/2019	N/A	21/08/2019	DR 88d	In train
55/2019	5 Bayview Street	1/03/2019	12/04/2019	29/05/2019	N/A	3/09/2019	DR 118d	In train
320/15/2	17 Milson Road	26/02/2019	9/04/2019	N/A	13/05/2019	6/09/2019	R 82d	In train
169/19	101-103 Miller Street	13/06/2019	25/07/2019	N/A	N/A	17/09/2019	DR 90d	In train
37/2019	66 Shellcove Road	18/02/2019	1/04/2019	N/A	3/04/2019	30/09/2019	R 44d	In train
249/19	13 Shellcove Road	19/08/2019	20/09/2019	8/10/2019	N/A	21/10/2019	DR 63d	In train
224/19	40 Brightmore Street	1/08/2019	19/08/2019	19/08/2019	N/A	12/09/2019	DR 69d	In train
238/19	21 Christie Street	12/08/2019	23/09/2019	8/08/2019	N/A	18/10/2019	DR 65d	In train
175/19	24 Cranbrook Avenue	18/06/2019	30/07/2019	N/A	4/09/2019	30/10/2019	R 78d	In train
225/19	27 Edward Street	1/08/2019	30/09/2019	N/A	N/A	11/11/2019	DR 102d	In train

Code:

DRD	Deemed Refusal Date	CDD	Court Determination Date
DD	Determination Date	AT	Appeal type-days since lodgement
IL	Issues letter -earliest date	DR	Deemed refusal
AL	Appeal Lodged	R	Refused