LOCAL GOVERNMENT ASSOCIATION OF NEW SOUTH WALES

RECENT CHANGES AND REFORMS AT THE LAND AND ENVIRONMENT COURT

27 JULY 2004

JUSTICE PETER McCLELLAN
CHIEF JUDGE OF THE LAND & ENVIRONMENT COURT

As you all understand, the system of local government which has evolved in New South Wales requires a council to undertake a number of complex and at times conflicting roles. This is particularly true in relation to planning. Decisions with respect to the provisions and maintenance of public facilities, roads, sporting fields, libraries, parks, swimming pools and many other matters require the identification of priorities by a council and the allocation of the available funds in accordance with those priorities. Beyond the fact that there will never be enough money, the council's role in the process is relatively straightforward.

Planning is quite different. The role of a council in planning is complex, both at the policy or macro level, where local environmental plans and development control plans are made, and at the operational or micro level, where in relation to a particular development project, state and regional plans and policy objectives may have to be reconciled with the perceived needs of the local community, often confined to the residents of one street or indeed only a few of the residents of that street. It is not uncommon to find that a decision with respect to the permissible uses or height or density of development in a particular area, which seemed quite sensible at the policy stage, comes to be seen by some people as quite alien when the architect prepares a design for a project on a particular block of land which conforms to those parameters. It is also not uncommon to find that the perceived impacts of a particular project will lead to a response that the zoning should be changed or a new development control plan made in order to defeat the application which is commonly described as being “contrary to the public interest.” I venture to suggest that most, if not all of you, will be subject to the pressure of lobbying, petitions and streams of correspondence in relation to a particular development application during your term of office.

We live in a dynamic community where population growth and the rapidly changing age and economic profiles of identifiable groups require real community responses. Both at a federal and state level, significant work in both monitoring existing trends and predicting future outcomes has been, and continues to be, undertaken. Once identified, those trends require effective responses at all levels of the planning process.

Your role as councillors requires you to reconcile disparate community values and aspirations in an environment where the decisions you make will have significant and lasting impacts upon the community. Decision making in planning is not some academic or theoretical exercise. If a project is approved, the chances are that you will get to see the real thing accompanied by either a sense of pleasure, tinged with relief, or sometimes, humility, tinged with embarrassment.

Since the earliest days of local government, council decisions in relation to applications for

permission to erect buildings or subdivide land have been the subject of review. The right of appeal has generally been to a court - initially the District Court, at times to an expert tribunal. Today, an appeal lies to the Land and Environment Court, which is comprised of lawyers and expert planners, engineers and architects.

As you know, the Land and Environment Court has received its share of criticism in recent years. Some of its decisions have been stridently criticised and some of its practices and procedures have been questioned. The criticism led to a review of the Court by a former Chief Judge of the Court, the Honourable Mr Jerrold Cripps QC. That review has led to some changes. However, in recent months further and more significant changes have been made. They include:

- a change in the hearing process for class one appeals which now commence on site and where objectors' and other evidence is taken in an informal manner;
- the pre-trial case management of many appeals, which identifies and limits the issues to be litigated and the evidence to be presented at a hearing;
- the taking of concurrent evidence from experts, who are sworn in together and whose evidence is taken in discussion with each other, the representatives of the parties and the Court;
- the appointment of court experts to provide evidence in many cases. This involves the Court identifying issues suitable for a court expert, whereupon the parties are invited to agree upon the person to be appointed. The parties may cross-examine the court expert and, with the leave of the Court, call an additional expert to give evidence on the issue;
- the confining of cross-examination to matters which will be of real assistance to the Court;
- changing the basis for orders for costs in merit appeals so that they can be made if the Court is satisfied that it is fair and reasonable to make such an order.

Although the changes are relatively recent, it is possible to identify some trends which are now emerging. The reports I have indicate that in many cases the hearing time of relatively complicated appeals has been reduced by one third to one half of the previously accepted time for such a hearing. Concurrent evidence is estimated to have saved six days in one complicated appeal and four days in another. Savings of this order are consistent with my expectation and, as practitioners become more familiar with the new processes, the time savings will increase.

I have spoken previously about the problems which courts have found with expert evidence in recent years. Because of the problems which come before it, the Land and Environment Court must consider many questions in areas of increasing complexity. In some cases, numerous questions involving areas of special learning may have to be resolved. The Court must be confident that the evidence which it relies upon to resolve these matters is not affected either consciously, or more likely subconsciously, by the knowledge that the "client" has a significant "investment" in the outcome. This is only possible if a court expert, briefed by both parties and funded jointly by them, is available.

I have been asked tonight to remind you of the obligations of the parties in relation to court experts and the procedure which the court follows. That discussion commences by reminding you that the Practice Directions of the Court have been amended to require that on the first return date of a matter, the Council will have filed a statement of the issues in the appeal and a statement of basic facts. This requirement has been imposed so that the Registrar may discuss the nature and extent of the expert evidence which may be required to effectively resolve the case before the parties have spent monies on experts which they have themselves retained. I know that in contrast to the position even ten years ago, many councils do not call evidence from their own

staff in appeals but rely upon expert consultants.

By the time of the first call over the advocates for the parties, or if there are no advocates the parties themselves, are required to have discussed whether the Court should appoint an expert to give evidence on any issue or issues in the proceedings. At the first call over, unless the Court is satisfied that a court expert should not be appointed, this will occur. The onus lies on the parties to persuade the Court that a court expert is not appropriate. If the decision is made that a court expert will be appointed, the parties must agree on who that person should be or agree on a list of three from which the Court can appoint one person. To date the parties have always agreed on the person who should be appointed and the Court has not been required to make a choice.

The advantages of this approach to expert evidence are many. Because the costs are shared, the parties being jointly and severally liable, in many cases the costs of expert evidence to both parties are significantly reduced, probably halved. The integrity of the expert evidence is obviously enhanced.

However, I suspect the greatest advantage of a court expert in merit appeals is that the parties have an opportunity to discuss with an expert who has no brief for either side and who both sides have confidence in, the merits and problems of the particular proposal. This may lead to a recognition by the Council that the project is satisfactory or with modest amendments or the imposition of suitable conditions can be made to be appropriate. It may also lead to the applicant recognising problems and either modifying the application or withdrawing it altogether. Both situations have already arisen.

In other cases, and this has also occurred, one party may be unhappy with the court expert's view of a matter. In this event that party may, with leave, call another expert. In such a case, both the court expert and the applicant's expert will give evidence concurrently. In effect they have a discussion with the Court which enables the issue to be resolved.

It is still early days for court appointed experts. At the time of preparing this speech about 140 had been appointed but only twenty-two cases had been determined. Fourteen of those cases settled without the need for a hearing and with obvious cost savings to the public and private purse.

I have previously indicated that in the early stages, a court expert will usually be appointed only when cost savings to the parties are likely or where the issue is of such complexity or significance that the additional cost is justified by the contribution to the integrity of the decision which is ultimately made. However, my expectation is that when a court expert is appointed, many more cases than previously will settle and those which do not may occupy less time. I remain confident that this will be the case. The consequence will be that although preparation of the case may be more costly, there will be such significant overall savings that the appointment of a court expert will be justified in most cases. The court will monitor the position and, when I am satisfied that it is justified, the basis for appointment of an expert will be changed.

There is one further matter with respect to experts which I would like to mention today. Many of the cases which the Court is required to decide relate to relatively modest development, often the erection of a new dwelling or the extension of an existing one. Such cases commonly involve an assessment of the impact of the proposal on the streetscape, its visual compatibility with its neighbours, shadow impacts and overlooking matters. Each of the commissioners of the Court is

very experienced in assessing such applications and, as you would expect, do so by gaining an understanding of the plans, an appreciation of the site and its neighbours, and come to a decision after the alleged problems have been explained. Many of these cases do not require experts at a cost of thousands of dollars to assist the council's position or for that matter the applicant's argument. Nevertheless, it is commonplace in such cases to find councils and applicants retaining multiple experts, including town planners, architects, urban designers and sometimes heritage experts. A great deal of public and private money is wasted as a result.

I urge you, as part of your input to the efficient management of your council, to have a good look at how litigation on the council's behalf is being managed and the money which is being spent on consultants. I have no doubt that many cases could be managed for councils by tendering the council officer's report which raises the issues and then a competent advocate explaining the issues on site to the commissioner or judge who hears the matter. This will avoid the present situation where multiple experts are often engaged because little thought is given to the real issues and how they can be adequately presented to the court.

Apart from changes which have been made to the merit appeal process, the Court has also introduced case management procedures to all class 4 matters where declarations or injunctions are sought. All of these matters are now returnable before a judge and a rigorous examination of the claim and any defence is made at an early date. At the time of preparing this speech, the consequence has been that the pretrial settlement rate has doubled from in the order of 35% to over 70%. I hope and expect this trend will continue.

One type of proceedings which has generally proved complex and costly to the parties is the assessment of appropriate compensation when land is resumed. Many of the cases have similar issues, including the underlying zoning and the subdivision or development potential of the land which may raise complex sub issues. Only when those issues have been resolved can the valuers undertake the task, often quite conventional, of assessing the value of the land.

Apart from the use of concurrent evidence procedures for experts, which brings significant time reductions, the Court has increasingly adopted a procedure whereby separate preliminary questions are identified and the evidence in relation to them is received at an early stage of the trial. In most cases the judge is able to answer the questions giving ex tempore reasons which enable the valuers to either agree the ultimate sum or after receiving limited evidence, help the Court to identify the appropriate award. The savings both in hearing time and time for a decision are proving to be significant.

There is one aspect of the Court's process about which I remain concerned. Before the recent changes, and indeed for about three years, the Court had generally required the experts in a case to meet before the hearing in an endeavour to achieve common ground on some or all issues. A number of variations of the process have been tried, but so far as I can tell none of them are working well. Experts rarely agree and time and costs are wasted. Even when they do agree they may be told by the advocate in some cases to withdraw their agreement.

In time, the increased use of court experts will solve the problem. However, in the meantime I have commenced a process of wide consultation with practitioners and experts to see whether a better system of pretrial conferencing can be implemented. If it cannot, I may decide that in many cases the system will be abandoned and differences resolved by concurrent evidence at the hearing.

One final matter I should acknowledge is the difficulties which I know some councils face in securing sufficient competent town planners to process development applications. I am not entirely clear as to why there are problems, although I have some ideas, and do know that there is a vacancy rate of at least 20% for qualified planners throughout Australia.

The practical consequence is that many councils are unable to process development applications within the statutory time, some experiencing delays of up to twelve months before a relatively modest application can be considered. In many cases this means that a "neglect and delay" appeal is lodged with the Court, often because it is quicker and, because "time means money", cheaper, to have an appeal determined than to wait for the council to decide the matter.

I am aware that within councils where there are resource problems, "neglect and delay" appeals can cause serious problems especially when the Court is requiring efficient disposition of the matter. Although there are presently no special rules for these appeals, because of the difficulty of discriminating between applications where the council does not have adequate resources and those where the council is simply procrastinating, the Registrar is mindful of the problems and does on an individual basis look sympathetically upon the appropriate pretrial directions when genuine resource issues exist. Nevertheless, I welcome suggestions as to any more effective mechanism for dealing with these problems.

When I was sworn in as Chief Judge, I indicated that although there are some in the community who believe that the role of the Court should be limited to declaring and enforcing the law and that there is no place for appeals for merit decisions made by council or others, this has not been the approach taken by the parliament. I went on to indicate that there are many reasons why a merit review process is appropriate. I said:

> "The continuing legitimacy (of the merits review process) rests on consistency of decision-making in accordance with identified principles. Merit appeals provide the opportunity for the court to address contemporary environmental problems and responses and through the reasons for decision articulate principles which can guide and inform decision-making at all levels of the process."

The Court has now begun to publish the decisions of Commissioners upon the internet. Anyone who has access to the net is able to understand the outcome of a particular matter and identify the reasoning processes of the Commissioner who decided it. As a reflection of the greater significance which the community will attach to Commissioners' decisions, the Commissioners are intent upon including in their reasons for decision a discussion of both general and particular planning principles.

With time, I anticipate that the publication of Commissioners' decisions which embody these principles will enable councils and other decision-makers, as well as architects, planners and developers, to understand the principles which will be applied by the Court in the ordinary course. They should also enable local government to have a better understanding of the approach of the Court and I have no doubt this will assist in the application by those bodies of appropriate principles to the decisions which they must make. The number of appeals is likely to be reduced and the capacity of the planning profession and those who advise councils and developers to predict the approach which the Court will take will be enhanced. The quality of decision-making will be enhanced at every stage of the process.

One further issue which I need to mention this evening is that of amended plans. I know it causes some concern to some councillors. As you are aware once an appeal has been lodged with the Court the Court is required by the Act to determine the matter. For this purpose the Court is given all of the powers of the Council. Being vested with that jurisdiction it is not an option for the Court to decline to exercise the jurisdiction. As you know councils can and, very often do, receive and must deal with amended plans. So too must the Court exercising the powers of the Council.

In my many years as a practitioner it became plain to me that the appeal process, with the intense scrutiny it brings to any development project will almost inevitably identify aspects in which the project could be improved. To preclude amendments where improvements are suggested, even if the application is in any event suitable for approval but perhaps not as good as it could be, would obviously be wrong. Equally to deny an opportunity for an amendment which makes an unacceptable project suitable for approval would create a potential for a significant wastage of public and private resources. If denied the opportunity for an amendment many developers would simply continue the appeal, perhaps knowing it is likely to be refused, but hoping for an indication from the evidence of the parameters for a suitable development.

Whether or not the hearing continues if the appeal fails the applicant must prepare and lodge a fresh development application. The process of assessment of the amended application may take months, in some council areas it may take up to a year, with consequential costs both to individuals and inevitably the community which, in relation to a project of any size, may be quite considerable.

It is arguable that the process of review of council decisions which the Parliament has given to the Court must function to ensure that the interests of all parties, the council, the applicant and objectors are appropriately considered. This will be facilitated in many cases by allowing amended plans, provided necessary safeguards to ensure a fair hearing are put in place.

The safeguards which the court imposes have been stated on many occasions and I repeat them.
1. Amended plans will generally be received, but if they cannot be reasonably assessed by the council witnesses or advocate prior to or during the hearing an adjournment will be considered and, if appropriate will be granted.
2. An adjournment will be granted where the nature of the amendments require the amended plans to be renotified or readvertised.
3. If the process of assessing the amendments imposes unreasonable costs burdens on the council or there are costs thrown away by the process of amendment or adjournment the Court will, if an application is made, consider making an order for costs in favour of the council.

I have described the merit review process as one which seeks the best outcome for the community. In this context a culture of "winners and losers" is not appropriate. Although I can understand that for many people the best outcome of a merit review will be a win or a loss, we must not lose sight of the fact that public and private funds are being invested in order to achieve a community outcome. In particular councils, and those who act for them, must see merit review as such a process. Principled decision-making brings confidence in the whole system. It must be the foundation for the decisions of consent authorities and for merit review by the Court.