Our ref: R90/0490 Out-3657
11 September 2001

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Local Government and Shires Associations of NSW

Minority Report

September 2001

Response to the Report of the Land and Environment Court Working Party

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Introduction

The Local Government and Shires Associations of NSW are the peak organisations for Local Government, representing all 172 councils in NSW.

The review into the role of the Land and Environment Court in reviewing the decisions of councils on development applications commenced in April 2000. I represented the Local Government and Shires Associations of NSW (LGSA) on the Attorney General's Land and Environment Court Working Party, which was chaired by Jerrold Cripps QC. In July 2000, the Associations made a submission to the review that contained more than 20 recommendations. This submission is attached as an appendix to this report.

This Minority Report has been prepared because while agreeing with much of the content, I do not agree with some of the key recommendations of the Working Party's report and am generally disappointed with the outcomes of the review process for Local Government in NSW, which I saw as a great opportunity for serious reform of the system. Importantly, this Minority Report forms part of the report of the Land and Environment Court Working Party, which will be presented to the NSW Government.

It is important to note that this report does not provide comment on all recommendation made by the Working Party. The purpose of this report is to outline the key recommendations of the Working Party that are not supported by the Associations, the key recommendations that are supported and to identify issues that the Associations regard as important and have not been addressed by the Working Party.

Please note that reference in this report to the words "Working Party" is taken to mean the Attorney General's Land and Environment Court Working Party.

Policy Positions

This Minority Report is based on the following broad policy positions:

- Local Government should retain autonomy in the making of local planning decisions and accordingly be the primary consent authority.

- Appeals to the Land and Environment Court should be restricted to appeals on questions of law and judicial review on process, not merits review. Councils, in consultation with their communities, should be the sole determinants of merit.

- Local Government should have a lead role in planning for local communities with other spheres of government because councils are:

    - best placed to inform the planning process of the needs and expectations of local communities
    - democratically accountable to local communities and
    - advocates for their communities to other spheres of government.

- The Associations encourage the development of increased opportunities for dispute resolution, for use when appropriate through the employment of alternative dispute resolution techniques.

General Comments

The former Attorney General, the Hon J Shaw QC MLC, following strong representation from the Associations and the community, announced a review into the role of the Land in Environment Court in reviewing the decisions of councils on development applications in April 2000. The review of the Court was welcomed not only by the Associations and Local Government, but also by the development industry, legal practitioners and the wider community. Given that both the *Environmental Planning and Assessment Act 1979* and the *Land and Environment Court Act 1979* have been in operation for more than 20 years, a review of the operation and functions of the Court was timely.

While I commend the Working Party for its recommendations in relation to a number of issues, in particular the use of panels in major matters (where appropriate), the streamlined process for minor matters and the modification of Court imposed conditions of development consent, I am genuinely very disappointed with the outcomes of the review. It would seem that the Working Party has interpreted the Terms of Reference narrowly which in turn, has led to issues that have arisen in the course of the review not being addressed. This is disappointing because the review represented a prime opportunity to review the operation and functions of the Land and Environment Court, an opportunity that has now passed us by, perhaps for another 20 years.

The key recommendations of the Working Party that I do not support are:

- The Court will retain the jurisdiction to determine development applications on the merits (Recommendation 14).
- The Court will retain the ability to apply SEPP 1, just as the original consent authority may do so (Recommendation 33).
- The Court will retain the ability to depart from the provisions of a development control plan or other council policy (Recommendation 34).
- Development applications which are amended during the course of an appeal will not be referred back to council for consideration (Recommendations 13, 29).
- That commissioners will continue to decide planning appeals, including both minor and major matters (Recommendation 19).
- That appropriate training of State agencies is required to address problems, in particular delays, currently being experienced in relation to applications for integrated development (Recommendation 5).
- That a representative of Local Government will not be appointed to the Court, as it is stated that the Court is already well equipped in relation to experience in the administration of local government and town planning (Recommendation 16).
- Site visits in relation to the hearing of major matters will not be compulsory and will be at the discretion of the Court (Recommendation 28).

These issues will be discussed in further detail in the body of this report.

I would also like to make my position clear on the matter of severing conditions of consent, particularly section 94 conditions, for the purposes of an appeal, without the consent becoming *de novo*. While I acknowledge the Working Party has not made a specific recommendation in relation to this issue, I remain vehemently opposed to the idea. These conditions of development consent are integral to the consent and developers should not be able to appeal to the Court on section 94 conditions alone while the remainder of the consent continues to operate. The severing of section 94 conditions undermines contribution plans and ignores the fact that section 94 contributions are an integral part of the broader planning and development assessment process.

I also find the report to be overly defensive of the Land and Environment Court. Criticisms made to the Court during the course of the review have been deflected towards the planning system and councils. In particular, the reference to criticisms as *"Common misconceptions and the need for education"* infers by its very nature, that concerns are not legitimate. I believe that the criticisms of the Court are supported by the public and that the report has failed to adequately address these concerns. The continued defence of the Court will only lead to greater criticism upon the release of the Working Party's report.

Generally speaking, the recommendations made by the Working Party for the reform of the current appeals system are procedural and do not substantially alter the way that decisions of councils in relation to development applications are reviewed by the Court. The current problems with the system, namely that proceedings are adversarial, take too long and cost too much, will be perpetuated.

PART 1 - KEY RECOMMENDATIONS NOT SUPPORTED BY THE ASSOCIATIONS

1. Judicial review not merits review (Recommendation 14)

The majority of the members of the Working Party consider that the Court's jurisdiction to determine development applications on the merits should be retained.

Comment

I am extremely disappointed that merit planning appeals are not being removed from the power of the Court and are not being replaced by a form of judicial review. As I have stated time and time again to the Working Party, I remain of the view that the Court should only be allowed to conduct a judicial review of a council's decision and not substitute a decision of its own without having gone through the full processes. Councils, in association with their citizens, should be the sole determinants of merit in relation to development applications, as they are democratically accountable to local communities for the decisions they make.

The *Land and Environment Court Act 1979* bestows upon the Court the power to make a decision on a development application in the same manner as a council makes that decision. In other words, the Court has all the functions and discretion that the council had when it made its original decision. When the Court conducts a merit review of a development application, it is a *de novo* merit appeal. In other words, it is a fresh hearing of the application and one that allows the Court to substitute its own decision for that of the council. I would strongly argue that if the Court is going to continue hearing *de novo* merit appeals, then it should be required to carry out the same processes as a council does in determining an application. These processes include site visits, public notification, public meetings, referrals, assessment reports and transparent decision making. I believe that the present system of merit appeals are not really *de novo* at all as the Court does not go through the same processes as a council does when making a decision on a development application even though it has the powers to do so.

I believe that the current system of merit appeals in the Land and Environment Court is undemocratic. This is not 'perception', rather it is a reality. The people of NSW elect councils to represent their views and to act in their best interests – the people do not elect Judges and Commissioners. While I acknowledge that the system is far from perfect, at least there is some form of accountability built in. It is totally inappropriate that an unelected body, being the Court, can overturn a decision made by an elected body, being the council. Furthermore, I am disappointed that the views of the Associations were not included in the Working Party's report, given they are the peak bodies representing Local Government in NSW.

In relation to the issue of "deemed refusals", I believe there should not be an automatic right of appeal given that there are no merit or legal issues in dispute. Rather, an applicant who wants to appeal to the Court after the 40 days should be made to show cause and demonstrate neglect and delay of their application to an independent panel, in a non-adversarial process without legal representation. The panel would then decide if the applicant could proceed to the Court in their appeal. This ensures that the primary consent authority is retained with the local council and that the Court's time is not unnecessarily wasted in hearing appeals from developers who wish to bypass the council's decision making processes and planning policies.

In relation to the costs of an appeal, there is an assertion in the report that submissions have deflated or inflated the costs and time of an appeal depending on whether the author of the submission supported merit appeals or wished to have them abolished. This is nothing more than a ludicrous and totally inappropriate statement. We all recognise that appeals to the Court cost far too much and take

too long. In the course of the review, the Associations provided examples of costs incurred by a selection of councils to the Working Party, which indicated that a two (2) day hearing could cost upwards of $20,000. If a judicial review by its nature is concerned with examining adherence to due process and legislative requirements and not the merits of the decision, then I fail to see how an appeal of this nature could incur higher legal costs. In any case, one could argue that a judicial review model would result in fewer appeals reaching the Court and overall savings in cost and time.

To conclude on this very important issue to Local Government, I am of the firm view that only matters of law should appear before the Court. Merit judgements should only be made before council. Councils should be the sole determinants of merit and the Court's role should be confined to examining the council's adherence to due process and legislative requirements, not the merits of the decision.

2 . State Environmental Planning Policy No. 1 – Development Standards (Recommendation 33)

The majority of the members of the Working Party consider that the Court should retain the ability to apply SEPP 1, just as the original consent authority may do so.

Comment

The Associations' submission to the review (attached as an appendix to this report) recommended that the Court return to a conservative application of *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1) consistent with the original intent of the SEPP. It was further recommended that there should be no right of appeal to the Court on a development application that relied on SEPP 1. Whilst I acknowledge that the Department of Urban Affairs and Planning (DUAP) is currently undertaking a review of SEPP 1, I am disappointed that the Working Party has made no recommendations in relation to the overuse of this Policy by the Court. The practical interpretation of SEPP 1 by the Court has been both confusing and resulted in conflicting outcomes and there has been much debate as to what constitutes a development standard as opposed to a prohibition. Increasingly, Judges and Commissioners have taken to questioning whether a council's development standard is appropriate, as opposed to exploring why a development should not comply with that standard in the first place. It is quite clear to me that it is not the role of the Court to rewrite a council's planning policies and in doing so, sanction a planning outcome which is opposed to these policies that have been created by democratically elected representatives in association with their citizens.

3 . Court's departure from council planning policies (Recommendation 34)

The Working Party has recommended the Court should retain the ability to depart from the provisions of a DCP or other council policy, just as the council may do so.

Comment

There has been strong opposition from councils including the City of Sydney, and the wider community, to the Court overturning the planning policies of democratically elected councils. Local Government has a lead role in planning for local communities with other spheres of government because councils are best placed to inform the planning process of the needs and expectations of local communities and are accountable to local communities. Planning policies, namely development control plans (DCPs), are prepared with extensive community consultation and when a decision of the Court disregards the standards contained within these plans, the Court marginalises the views of the community and totally disregard their aspirations for the neighbourhood. Changes must be made

to the Court's practice so that it has regard to councils' planning policies (including draft policies) in the hearing of an appeal.
The report suggests that if standards are so important they should not be in DCPs and that the appropriate course of action under the present planning system is to include them in local environmental plans (LEPs), where they must be complied with and can only be varied through the application of SEPP 1. This contradicts advice that has been given by DUAP to councils in recent years and one of the recommendations in the review of SEPP 1. The Department has over some time, encouraged councils to place many of their standards in DCPs rather than LEPs in order to provide flexibility in the assessment of development applications. While I am supportive of a level of flexibility in the application of development standards, I believe that it should be at the discretion of the council to determine the approach to this issue, having regard to the local conditions.

4 . Amended development applications (Recommendation 13, 29)

The Working Party has made a number of recommendations in relation to amended development applications as follows:

Recommendation 13

In deciding planning appeals, the council should not be prevented from raising issues that were not included in the reasons for decision and the developer should not be confined to the material presented to the Council. It is in the public interest that all relevant matters, whether or not raised previously with the council, are taken into account in the determination of development applications.

Recommendation 29

The majority of the members of the Working Party do not support the proposal that amendments of a development application made in the course of an appeal should automatically trigger a referral back to the local council for reconsideration.

Recommendation 10 which relates to section 82A of the Environmental Planning and Assessment Act 1979 would, if adopted, allow the council to review the application at any time before the appeal is decided.

Rule 16(1b) of Part 13 of the Land and Environment Court Rules 1996 should be amended by omitting item (b1) and replacing its with the following:

> *"except with the consent of the respondent, or by leave of the Court, the applicant shall not be entitled to rely at the hearing upon any amended plans of the development proposal unless and until the respondent has had a reasonable opportunity to consider the amended plans;"*

Comment

I strongly believe that it is the council's role as the consent authority and not the Court's to reconsider a development application that has been amended. Council's determination of an application is made in relation to plans submitted at a point in time. Any amendments made may change the substance and merits of an application. When the Court decides on amended applications, the community feels they have been marginalised and the onus is then on the council to explain the Court's determination, which has excluded the community and prevented the local democratic process from operating. In this respect, it is imperative that the integrity of the local democratic process is maintained.

Time and time again, councils have incurred significant costs in defending unnecessary appeals as a direct result of the current practice by developers who submit amended plans just before, or at the commencement of an appeal. These plans often address the features of the development that gave rise to council's refusal of the application in the first place. It is clear to me that the instigation of an

unnecessary appeal process could have been averted many times over and the matter settled out of Court by various means.
The argument in the report that the Court has no power to determine an application that has not been before the council, is being used to support the Court's assertion that the submission of amended plans during proceedings is not widespread practice. The Working Party has failed to acknowledge this problem, preferring to view it as a "perceived problem" that may have occurred "on occasion". This is completely untrue. Applicants frequently amend a development proposal after council determines it and then lodge an amended proposal with the Court. During the course of this review, the Associations received many examples from councils where this had occurred. Whilst I acknowledge that the planning legislation allows the Court to entertain "minor" amendments to a development application, the nature and quantity of amendments usually go beyond what could be considered "minor."

The Working Party considers that the remedy available to councils is to refer the matter to a Judge of the Court for a declaration that what is proposed is unlawful and beyond jurisdiction. This appears to be an acknowledgment in itself that the practice is occurring. Why should it be up to the councils to bring a Commissioner into line where he or she is acting beyond power? This suggests to me that the system is fundamentally flawed. The report goes even further to suggest that if a Commissioner grants consent to a development application which has not been before the council, the council could appeal to the Judge for an order that the consent is invalid. This is totally unacceptable in that the onus is placed on councils to incur further legal costs and delays in order to obtain a lawful decision from the Court in the first place.

The Working Party has also recommended that the *Land and Environment Court Rules 1996* be amended to provide that an applicant shall not rely on amended plans at an appeal unless and until the council has been given reasonable opportunity to consider the amended plans. While I hold the view that the Rule amendment, together with amendments to section 82A of the *Environmental Planning and Assessment Act 1979* go some of the way toward addressing this issue, I remain of the view that the Rules should be strengthened to allow amended plans to be returned to the council for reconsideration in all cases. The importance of reforming this aspect of the Court's operation was also supported in the submissions of many councils, including the City of Sydney.

I would also like to comment on another recommendation that is related to this issue, being the consideration by the Court of issues that were not addressed in the development application as originally submitted to the council. While I acknowledge that this may be necessary from time to time in the course of a hearing, I would not like to see this become the regular practice of the Court. Indeed, this would appear to be contrary to the *Pre Hearing Practice Direction 1999,* which requires the statement of issues to meet certain requirements in order that both parties know the issues that are before the Court. Bringing additional issues into play in the course of an appeal contributes to costs and delays and is contrary to the efficient conduct of proceedings.

5. Role of commissioners (Recommendation 19)

The Working Party has recommended that commissioners should continue to decide planning appeals, including both minor and major matters.

Comment

I am of the firm view that the constitution of the Court should include both Judges and Commissioners in the hearing of planning appeals, and not solely Commissioners. Appeals to the Court are becoming increasingly complex and cover a range of issues requiring specific expertise and knowledge on the part of those hearing the appeal. While Commissioners are appointed pursuant to section 12 of the *Land and Environment Court Act 1979* based on their technical skills and

experience, there will be circumstances when the legal experience and qualifications of a Judge is more appropriate. In this regard, the opportunity should be available for councils to request planning appeals be heard by a Judge.

6. Integrated development (Recommendation 5)

The Working Party has recommended there is a need for appropriate training of approval body staff in the processes associated with the assessment of applications for integrated development. Lack of knowledge appears to be contributing to delays.

Comment

This recommendation is intended to address the problems in relation to the timing of approval bodies for integrated development applications. However, in the Associations' submission to this review, it was recommended that the Working Party consider the benefits to the development assessment system if DUAP, in the case of integrated development, act in the role of coordinating the State agency responses to integrated development proposals. Councils should then have 40 working days on receipt of the information to fully assess the application. I am subsequently very disappointed that the Working Party has dismissed this proposal and one that could see the Department being backed by the authority of the Premier's Office, in lieu of a recommendation for training of State agencies.

Many councils expressed the view during the course of the review that the current process in respect of integrated development is inadequate and timeframes blow out significantly while awaiting information from State agencies. This is unacceptable. While I concede that training of agency staff will go part of the way to addressing these problems, clearly something more has to be done. The suggestion has been made in the report that a more effective way for councils to encourage timely responses would be to join such bodies as a respondent in an appeal and therefore, potentially making the agencies liable to an adverse costs order. While this would go some of the way to address this issue, approval bodies should be made more accountable for their conduct. The Working Party has given no reasons in the Report why it is not practical for DUAP to implement the Associations' recommendation. I believe that the Working Party should provide these reasons, and, if DUAP is not the appropriate body, then an alternative must be found.

7. Part time Local Government Commissioners (Recommendation 16)

The majority of the members of the Working Party consider that a representative of local government should not be appointed to the Court to act in an advisory capacity. The majority of the members of the Working Party consider that the Court is already well equipped in relation to experience in the administration of local government and town planning.

The following recommendations of the Working Party are also relevant to this issue:

Recommendation 15

- *Section 12 of the Land and Environment Court Act 1979 should be amended to provide that special knowledge of and experience in heritage matters or urban design can qualify a person for appointment as a commissioner.*

Recommendation 18

- *The Court should have the power to appoint part time commissioners. However, part time commissioners should not act as expert witnesses or advocates before the Court during their period of part time tenure.*

Comment

I am extremely disappointed that the majority of the Working Party did not support the option of part time commissioners with expertise in Local Government, given that it supports commissioners with experience in heritage matters or urban design and the appointment of part time commissioners. I believe the Court would have gained great benefit from having commissioners from a broader range of disciplines in the hearing of appeals.

As indicated earlier in this report, I do not support the continuance of merit planning appeals in the Court. However, if the review did not see fit to remove this form of "appeal" from the Court system, then I considered that the option of part time Local Government commissioners would have been an outcome to meet these ends to a degree.

Local Government commissioners would lead to greater transparency and provide for specialists with an understanding of local politics. They would also go a long way to help convince councils that the Court is not a developer's Court or functioning under the pretence of being a "Court" rather then carrying out largely an administrative function.

The Associations have suggested previously that this representative should not be an elected representative from a council area in which a development is proposed, but rather a representative at large that would provide general input from a local government perspective. In contrast, the Council of the City of Sydney have proposed that the representative should be drawn from the respondent council. Contrary to the views of the majority of the members of the Working Party, I am of the view generally that Local Government commissioners would ensure any merit decision made by the Court considers Local Government processes and concerns, and therefore lead to a more credible result.

8. Site visits for major matters (Recommendation 28)

The Working Party has recommended that if a site visit is to be taken in relation to a major matter, it should ordinarily be taken after the parties have made their submissions in chief and before any orders are made or requests for leave to cross examine witnesses are considered.

Comment

In the Associations' submission to this review, it was recommended that Judges and Commissioners be required to conduct site visits before a hearing commences. I remain strongly of the view that the Court would gain great benefit if Judges and Commissioners visited the site that is the subject of an appeal and that this will facilitate quicker proceedings and a better understanding of the evidence presented.

There have been many debates amongst members of the Working Party in relation to this issue, particularly focussed on when a site visit should be undertaken during the course of a hearing. While site visits in relation to "minor matters" will more or less be assured as they will be held on site, visits will still be at the discretion of the Court for "major matters". This is of great concern as these types of development are more likely to raise complex issues and have higher levels of public interest. I cannot understand the Court's reluctance to conduct site visits as a matter of course during the hearing of an appeal.

PART 2 - KEY RECOMMENDATIONS SUPPORTED BY THE ASSOCIATIONS

1. Use of panels in major matters (Recommendations 17, 27)

The Working Party has made a number of recommendations in relation to major matters as follows:

Recommendation 17
Where appropriate, and subject to the availability of resources, major matters should be decided by panels comprised of commissioners with relevant expertise.

Recommendation 27
"Major matters" identified as those which are not minor matters, should be dealt with by formal hearings unless the parties reach a settlement by way of alternative dispute resolution facilitated by the Court (that is, preliminary conferences and mediation).

Comment

As an ever increasing number of appeals being considered by the Court are complex and cover a range of different issues requiring specific expertise and knowledge on the part of those hearing the appeal, I am pleased that the Working Party generally agreed with the views of the Associations on this issue. Notwithstanding, there is a need for Local Government representation on these panels. This would allow a greater degree of transparency and would be positive in a political sense. Where a panel is used during a hearing, both Judges and Commissioners should be represented so as to give any decision credibility. The Judges and Commissioners should also have experience in non-metropolitan planning issues.

However, I am concerned that the use of panels in major matters will be *"where appropriate, and subject to the availability of resources"* and consequently, remain at the discretion of the Court. I would have thought that the recommendations of the Working Party for a streamlined process in relation to minor matters would free up some of the resources of the Court so it could then focus on the major development proposals with high levels of public interest. At the end of the day, it appears to me that there will be no substantial change in the way the Court deals with major matters and the process of formal hearings that are so familiar will prevail. Recommendation No. 27 above, confirms this view.

The submission made by the City of Sydney to the review advocates legislative change to enable the creation of a Local Appeals Panel (LAP) by each consent authority. It is proposed that appeals from decisions on minor development (being development less than $10 million in value) would be made to this panel on the same grounds of review as the Court. While I support the concept of a LAP as it has the potential to reduce the workload of the Court and the costs associated with these appeals, I do not agree they should be made mandatory for councils. Further to this, the majority of councils in NSW would agree with me in saying that a development with a value of $10 million can hardly be regarded as minor development. Notwithstanding, this concept for the City of Sydney should be explored.

2. Streamlined process for minor matters (Recommendations 25, 26)

The Working Party has made a number of recommendations in relation to a streamlined process for minor matters as follows:

Recommendation 25

Where proposed development the subject of an appeal would have little or no impact beyond neighbouring properties and there is no wider public interest involved, the appeal should be identified and dealt with as a "minor matter". In determining whether an appeal is a minor matter, the estimated value of the development should be used as a guide. As a starting point, where the estimated value of the proposed development is less than half of the median house price in the local government area, the appeal should be regarded as a minor matter. Where a party submits that the appeal is not a minor matter, a Judge should determine the question.

Recommendation 26

Conferences under section 34 of the Land and Environment Court Act 1979 should be compulsory for minor matters. The commissioner presiding over such a conference should have the power to make a binding decision.

The conference should be held on the site of the proposed development unless the presiding commissioner considers that another venue would be more appropriate. Conferences should be conducted with a minimum of formality. Generally, there would be no transcript of proceedings and no cross-examination. However, it would be open to a commissioner to require the parties' experts to confer and report on specific issues.

Appeals from compulsory conferences should be limited to questions of law.

Comment

I generally support a streamlined process for minor matters as it has the potential to reduce cost and expedite the time taken to determine these development proposals and generally be an informal process. The process will have the effect of freeing up some of the Court's resources and in doing so, allow the Court to focus on major matters where there is a high level of public interest in the outcome.

I agree with the Working Party's view that minor matters can be considered as those with a private, as opposed to a public, interest in the outcome, for example, development that only impacts on immediate neighbours. However, I am concerned about the way in which a development proposal will be determined as a minor matter. While I am of the view that the estimated value of development can be an indicator of the scale of a proposal, it is not by any means an indicator of complexity, and should not be solely relied upon. Nor can the figure address controversial development proposals, such as those involving an extension to the hours of operation of a hotel or a change of use of premises, which may not have high development costs but where there is a high level of public interest.

The proposal for compulsory conferences in respect of minor matters builds upon the current section 34 preliminary conferences available to parties under the *Land and Environment Court Act 1979*. The use of mandatory conferences raises the issue of delegations of council representatives. Participation in conferences facilitated by the Court will require that authorised representatives have the powers to negotiate and settle matters to effectively participate, otherwise they will fail. Recommendation 32 of the Working Party's report encourages councils to make appropriate delegations to council staff (refer point 7, below).

3. Delegation to council staff (Recommendation 7)

The Working Party has recommended that councils should consider delegating the power to determine applications for development:

- *Which complies with all the applicable controls and policies; and*
- *Where no objections have been received, or any objections can be overcome by the imposition of appropriate conditions of consent.*

In order to use delegation effectively, councils will need to ensure that clear and up-to-date policies are in place and staff receive appropriate guidance.

Comment

I strongly support this recommendation. It should be acknowledged however, that many councils have already adopted delegations to this effect in the determination of development applications. The level of delegation a council wishes confer upon its staff is for the respective council to determine, following consultation with and taking account of the expectations of its citizens.

4. Pre-lodgement processes (Recommendations 1, 2, 3)

The Working Party has made a number of recommendations in relation to pre-lodgement processes as follows:

Recommendation 1
Councils should be encouraged to provide additional information to prospective applicants. Information should be provided in plain English and, so far as practicable, in relevant community languages.

Recommendation 2
Where appropriate, councils should encourage pre-lodgement discussions between prospective applicants and their neighbours and other local residents, and between prospective applicants and representatives of the council. However, participation in such discussions should not be mandatory.

Where a council facilitates pre-lodgement discussions it should make sure that the process and any associated requirements are communicated accurately.

Councils should ensure that pre-lodgement discussions facilitated by them, or in which their representatives participate, are transparent.

Recommendation 3
Wider use should be made of alternative dispute resolution at all stages of the development assessment process, including the pre-lodgement stage.

Councils should consider making use of mediation and conflict management services offered by government funded organisations such as the Community Justice Centres and the Australian Commercial Disputes Centre, or similar services offered by reputable private organisations.

Comment

I generally support these recommendations. I note that the Associations initially recommended that the Working Party give consideration to the preparation of guidelines to detail the information to be submitted with a development application and a compulsory pre lodgement process. However, since

the commencement of the review, the *Environmental Planning and Assessment Regulation 2000* came into force and now goes into some detail as to what information should accompany an application. Notwithstanding, the manner in which additional information is communicated to prospective applicants is for the council to determine, having regard to the local circumstances.

However, I am concerned as to how pre-lodgement processes facilitated by councils can remain transparent in all the circumstances. The approach taken by councils to pre-lodgement discussions varies and in many councils, discussions consist of an informal meeting between the applicant and council staff to discuss a development proposal. Often the details of a proposal have not been fine-tuned by an applicant and will be subject to change, having regard to the issues and concerns raised by the council. Notwithstanding, I acknowledge there are movements toward formalising this process, with some councils already providing formal pre-lodgement services to prospective applicants and charging fees accordingly.

5. Education and Training (Recommendations 6, 11)

The Working Party has made a number of recommendations in relation to education and training as follows:

Recommendation 6

- *Local councillors should continue to be offered training in relation to the planning system and how to discharge their responsibilities within it. More training opportunities should be provided. This could be arranged by the Department of Urban Affairs and Planning and the Local Government and Shires Associations.*

Recommendation 11

- *Judges and commissioners presently receive ongoing training in matters including the principles of ecologically sustainable development and total catchment management. Such training should continue.*

Comment

I generally support these recommendations. Despite assertions from the Court to the Working Party that ongoing training of Judges and Commissioners takes place, often their performance would question whether this training is adequate, as decisions do not reflect this knowledge. Not only should this training continue, the Court must review it as a matter of priority and identify areas where training may be improved. Councils have expressed serious concerns that some Judges and Commissioners do not readily understand the concepts of ecologically sustainable development (ESD) and total catchment management (TCM).

In relation to further training of Councillors, the Associations, through LGSA Learning, coordinates a Councillor Professional Development Program. This consists of programs designed to meet the individual learning needs of councillors. While modules are conducted in the planning system, it appears to me that there are opportunities to build on the level of training.

In my view, there is also another area where there is a need for education and training and that is in relation to the "stop the clock" provisions of the *Environmental Planning and Assessment Regulation 2000*. While the Associations initially recommended that the current assessment time for development applications be amended to provide for 40 working days, I now agree that these provisions go a long way to addressing this concern. These provisions, if utilised correctly, allow councils to "stop the clock" when making requests for additional information within the first 25 days of receiving a development application and then restart it once again when this information is received. I would agree that these provisions appear to have been underutilised by councils and

clearly, there is a role for DUAP and the Associations to play in any future education and training program in relation to this issue.

6. Modification of development consents (Recommendation 8)

The Working Party has recommended that Section 96 of the Environmental Planning and Assessment Act 1979, and the Environmental Planning and Assessment Regulation 2000, should be amended to give councils the power to modify development consents granted by the Court.

When an application for the modification of a Court-granted consent is submitted, the council (in addition to fulfilling any other notification or advertising requirements) should be required to notify in writing any person who objected to the original development application. Such persons should then be given a reasonable amount of time to lodge an objection to the proposed modification.

When it determines whether to modify the consent, the council should be required to send a notice of determination to any person who objected to the modification and, if it determined to modify the consent, those persons should be able to appeal to the Court against the determination within 28 days of receipt of the notice. Such appeals should only proceed with leave of the Court.

Comment

I commend the Working Party for this recommendation as it has the potential to reduce the legal costs and delays to councils and the Court's workload. The safeguards proposed are not onerous and in fact, many councils have already adopted this approach in determining applications to modify development consents granted by the council. The importance of reforming this aspect of the Court's operation was also supported in the submission made by the City of Sydney.

7. Alternative Dispute Resolution (Recommendations 3, 9, 32)

The Working Party has made a number of recommendations in relation to alternative dispute resolution (ADR) as follows:

Recommendation 3
Wider use should be made of alternative dispute resolution at all stages of the development assessment process, including the pre-lodgement stage.

Councils should consider making use of mediation and conflict management services offered by government-funded organisations such as the Community Justice Centres and the Australian Commercial Disputes Centre, or similar services offered by reputable private organisations

Recommendation 9
Councils should make greater use of alternative dispute resolution in dealing with development applications, but its adoption should not be mandatory.

Councils should consider establishing Independent Hearing and Assessment Panels, modelled on those of Fairfield and Liverpool City Councils, to provide a forum in which objectors and applicants may be heard in person, independently assess development applications and make recommendations as to how they should be determined.

Councils should also consider establishing Facilitation Committee Programs, similar to that of Gosford City Council, to provide facilitation services to objectors and applicants.

Recommendation 32
Councils are encouraged to make appropriate delegations, including the power to negotiate and settle matters, so as to enable their representatives to participate effectively in alternative dispute resolution facilitated by the Court (that is, preliminary conferences and mediation).

Comment

I generally support these recommendation and agree with the sentiment of the Working Party that is, *"the success of most forms of ADR depends to a large extent upon the cooperation of the parties and for this reason, the Working Party does not consider that the adoption of ADR by councils should be compulsory".* I remain vehemently opposed to any notion of compulsory mediation, as it has been ill advisedly introduced into the Supreme Court. Compulsory mediation is a contradiction in terms whilst voluntary mediation should be encouraged.

Generally speaking, I agree there is scope for the greater use of ADR by Local Government in dealing with development applications, which has been demonstrated by the establishment of Independent Hearing and Assessment Panels by Liverpool and Fairfield councils and the Facilitation Committee program operated by Gosford Council. It is the policy of the Associations to encourage the development of increased opportunities for dispute resolution in Local Government, for use when appropriate through the employment of ADR techniques. However, the need for and the form of ADR mechanisms are for the council to determine as the nature and extent of development varies enormously across the State.

8. Section 82A of the Environmental Planning and Assessment Act (Recommendation 10)

The Working Party has recommended that section 82A of the Environmental Planning & Assessment Act 1979 should be amended to allow councils to review their decisions in relation to development applications at any time until the expiration of the period within which an applicant may appeal or the application is determined by the Court (whichever occurs later).

Comment

I commend the Working Party for this recommendation as currently a council has only 28 days to review a decision to refuse a development application. This amendment will negate the need for consent orders and potentially reduce the number of appeals to the Court and the associated financial and resource costs for councils.

9. Stamping of plans (Recommendation 31)

The Working Party has recommended that the Court should stamp plans which are the subject of a development consent granted by it with the date of the determination and an indication that the stamped plans accurately reflect the Court's determination before being sent back to the council.

Comment

I commend the Working Party for this recommendation as the Associations received numerous representations from councils regarding this issue. The importance of reforming this aspect of the Court's operation was also supported in the submission made by the City of Sydney.

PART 3 - RECOMMENDATIONS FROM ASSOCIATIONS SUBMISSION NOT ADDRESSED BY THE WORKING PARTY'S REPORT

A number of recommendations from the Associations' submission to the review of the Land and Environment Court have either not been addressed by the Working Party or, where they have been addressed, recommendations have not followed. These recommendations are listed below and outlined in further detail in the submission, attached as an appendix to this Minority Report.

- The issue of right of appeal to the Court where a council refuses a development application because it is inconsistent with the provisions of a LEP or DCP, relies on a SEPP 1 objection or is a "deemed refusal."
- Judges and Commissioners should have experience in non-metropolitan planning and development issues.
- That the Court promotes the option of having appeals determined based on written submissions.
- That both the Working Party and Reference Group examine interstate and international examples of alternative systems to a Court based appeals process.
- That Judges and Commissioners should be prevented from expressing personal opinion, suggestions, design amendments or alterations during a hearing, other than in relation to conditions of development consent.
- The Court must be required to consider the cumulative impact of a proposed development on a community and the cumulative impact of its own decisions.
- That Commissioners and Judges be required to demonstrate that each of the matters for consideration as per section 79C of the *Environmental Planning and Assessment Act 1979* have been specifically assessed in reaching their determination.
- That the time standard for the disposal of matters should be amended so that all class 1, 2 and 3 applications are disposed of in four months of filing and all class 4, 5 and 6 applications are disposed of within 6 months of filing.
- That the time standard for the handing down of reserved judgements be amended so that all judgements are handed down with 40 working days of the hearing.
- That the Pre-Hearing Practice Direction should be amended to provide the respondent with 40 working days to file their Statement of Issues.
- The Court realistically considers the implications of Terms of Settlements on all parties.
- Orders for prohibited or illegal uses should be attached to the premises/land so that any future operator will inherit the Order served.
- Councils should have the power to issue on the spot fines for breaches of Court Orders though the Self Enforcing Infringement Notice System.

Comment

I am very disappointed that the above recommendations were not addressed as part of the review process or, where they were addressed, the Working Party made no recommendations. The criticisms that have been directed to the Court in the review process are legitimate and supported by the views of the public. The fact that these concerns have not been addressed, combined with the continued defence of the Court, will merely lead to greater criticism upon the release of the report. Many councils have advocated these concerns to the Associations and no doubt, directly to the Working Party through individual submissions.

Conclusion

The Associations welcomed the announcement of a review into the role of the Land and Environment Court in reviewing the decisions of councils on development applications. I was particularly pleased to represent Local Government in NSW on the Attorney's General's Working Party. A review of the role and operation of the Court was timely, given the *Environmental Planning and Assessment Act 1979* and the *Land and Environment Court Act 1979* have been in operation for more than 20 years.

It is with regret, however, that I submit this Minority Report in response to the report of the Land and Environment Court Working Party but I do so because I am very disappointed with the outcomes of the review process for Local Government, local communities and our citizens. I have found the report to be defensive of the Court with criticisms being deflected towards councils and the planning system generally.

The recommendations that have been made by the Working Party are essentially procedural in nature and do not substantially alter the way that decisions of councils are reviewed by the Court. Given that the Court's power to determine development applications on the merits is being retained, the current problems with the system, namely those proceedings are adversarial, take too long and cost too much, will be perpetuated. I believe this to be in direct contradiction to the original intent of the legislation that gave the Court powers to review the decisions of councils in relation to development applications in the first place. The "Court" in no way deals effectively with the matters *de novo* in the methodical and transparent manner as a council does. Quite frankly, without proper and substantial reforms, this so-called "Court" should be abandoned and its pretence exposed.

A great opportunity exists for genuine reform if only the entrenched conservatism of the Court is excised and the pecuniary interests of the legal fraternity are replaced by citizen-orientated processes.

APPENDIX

Local Government and Shires Associations of NSW

Submission to the Review of the Land and Environment Court (July 2000)

Local Government and Shires Associations of NSW

The Review into the State's Planning Laws and the Role of the Land and Environment Court in Reviewing Development Applications.

July 2000

Introduction

The Local Government & Shires Associations of NSW are the peak organisation for Local Government, representing all 174 councils in NSW.

The Associations welcome the invitation to comment and acknowledge and support the general need to review the legislative basis, which provides for the Land and Environment Court to review decisions relating to development applications. Specifically, the provisions of the Environmental Planning and Assessment Act 1979 and the Land and Environment Court Act 1979 are relevant.

In regards to the Terms of Reference for the review, it may be necessary to examine different issues, which arise throughout the review which are not expressly mentioned in the Terms of Reference. An example is that it will be necessary to consider changes to the Environmental Planning and Assessment Act 1979 and the Land and Environment Court Act 1979 to improve the operation of the Court and to examine the operation of interstate and international review systems.

The Associations' comments are based on the following broad policy positions:

- Local Government should retain autonomy in the making of local planning decisions and accordingly be the primary consent authority.

- Appeals to the Land and Environment Court should be restricted to appeals on questions of law.

- Local Government should have a lead role in planning for local communities with other spheres of government because councils are:

–best placed to inform the planning process of the needs and expectations of local communities
–democratically accountable to local communities and
–the advocates for their communities to other spheres of government.

- The Associations encourage the development of increased opportunities for dispute resolution, for use when appropriate through the employment of alternative dispute resolution techniques.

The following comments are based on the Associations' policies, feedback and submissions, which have been provided to the Associations by member councils. Attached to this submission is a summary of the Associations' recommendations.

Key issues raised by councils

1. Matters of law only to appear before the Court

The Associations are of the firm view that only matters of law should appear before the Court as value judgements should be made politically before council. Councils should be the sole determinants of merit and the Court's role should be confined to examining the council's adherence to due process and legislative requirements, not the merits of the decision.

Further, the Associations believe that matters of law should be heard before the Court only by a Judge, who has the appropriate legal experience and qualifications. Commissioners do not have significant legal experience, rather they are appointed as per section 12 of the Land and Environment Court Act 1979 based on their technical skills.

It is ironic that the only appeals allowable from the Land and Environment Court are those on points of law, yet the majority of cases heard in the Court are in fact merit appeals.

Recommendations:

- **Only appeals on a point of law should permitted to the Land and Environment Court.**
- **Appeals on a point of law must be heard before a Judge.**

2. Constitution of the Court

It is felt that in the case of determining complex appeals before the Court, a multi-member panel with appropriate knowledge and expertise should be engaged.

An increasing number of appeals being considered by the Court are complex and cover a range of different issues requiring specific expertise and knowledge on the part of those hearing the appeal.

A change to the Court's procedures would mean that a panel of three with professional expertise relevant to the matters listed in the Statement of Issues would be able to hear evidence. This panel would be in a position to fully understand and comprehend the evidence presented as a result of their own professional expertise, rather than weighing up which party's experts presented the most convincing argument.

The constitution of the Court should include Commissioners and Judges with experience in non-metropolitan planning issues. Representations have been received which suggest that there is a perception that the Court is unfamiliar with the contexts of non-metropolitan councils.

Recommendations:

- **In complex appeals before the Court, a multi-member panel consisting of both Judges and Commissioners should be engaged to hear the appeal.**
- **Judges and Commissioners should have experience in non-metropolitan planning and development issues.**

3. Inconsistency between development applications and LEPs and DCPs

When a development application is refused by council because it is inconsistent with the provisions of a development control plan (DCP) or a local environmental plan (LEP), there should be no right of appeal to the Land and Environment Court. Significant resources are consumed during the preparation of such plans, not only by the council but also by Department of Urban Affairs and Planning (DUAP) in approving LEPs. Such plans are prepared with extensive community consultation and when a decision of the Court disregards the provisions contained within DCPs and LEPs, the Court marginalises the views of the community and totally disregarding their aspirations for their neighbourhood.

Significant concern has been expressed regarding the Land and Environment Court's predisposition to overturning locally derived planning controls and community standards. The Court should clearly not have the power to override a local community's standards when this would be contrary to the local area's aspirations as reflected in those standards. The departure from local standards undermines the planning system and encourages the development industry to have scant regard to community values as expressed in council's policies. Many councils for example, commented on the Court's decisions regarding telecommunications towers as being very far removed from what the communities wishes were.

The Environmental Planning and Assessment Act 1979 (EP&A Act) requires councils to widely consult with the community in the stages of plan preparation and development application assessment so as to acknowledge the local community's desires. When such plans and decisions of councils based on those plans are overruled by the Court, the Court is operating in a fashion which directly contradicts the aims, objectives and legislative requirements of the EP&A Act.

Recommendation:

- **There should be no right of appeal to the Land and Environment Court by a developer when a development application is refused by council because it is inconsistent with the provisions of a DCP or LEP.**

4. Amending plans

The Associations strongly believe that it is the council's role as the original consent authority, not the Court's to reconsider a development application which has been amended. Council's determination of an application is made in relation to plans submitted at a point in time. Any amendments made may change the substance of, and merits in respect to, an application. When the Court decides on amended applications, the community feels they have been marginalised and the onus is then on the council to explain the Court's determination, which has excluded the community and prevented the local democratic process from operating. In this respect, it is imperative that the integrity of the local democratic process is maintained.

Councils have incurred significant costs in defending unnecessary appeals as a result of the current practice by developers who submit amending plans just before or at the hearing of appeal, often addressing the features of the development which gave rise to councils refusal of the initial application. The instigation of an unnecessary appeal process could have been averted and the matter then settled out of Court by various means.

Contrary to the Court's assertion that the submission of amended plans is not a widespread practice, the Associations have received many examples from councils where this has consistently happened. Further, the Court maintains that is confined to entertaining only minor amendments which do not substantially or significantly change the development proposed by the development application. There has been some conjecture in regards to what constitutes a minor amendment. Member councils have provided the Associations with examples where two extra floors have been added and other significant amendments have been made, which clearly move beyond the scope of what could be considered 'minor amendments'.

The Associations were pleased with the initiative of the Court in preparing the draft Practice Direction and Rule Amendment concerning amending plans but are disappointed that the Court did not strengthen the Draft Practice Direction and Rule Amendment to bring about a change in practice whereby amending plans are returned to council for reconsideration in the light of the amending plans. The Associations are of the fundamental view that the local council should retain the role of the primary consent authority throughout the local consent process.

As it stands, Part 13 Rule 16 affords the Court discretion to allow amending plans to be relied upon even if the respondent council does not consent to the applicant relying upon the amending plans. The Associations strongly believe that unless the respondent council consents to the amending plans being relied upon, any amending plans should be returned to the council for full reconsideration of the application in light of the amendments made.

The Associations acknowledge that the Rule Amendment goes some of the way to providing redress to councils, who have incurred significant costs in defending unnecessary appeals as a result of the current practice by developers who submit amending plans just before or at the hearing of appeal.

Recommendation:

- **If an applicant seeks to rely on amending plans in a hearing, the application should be returned to council for full reconsideration of the application in light of the amendments made.**

5. Complexities and costs associated with such an adversarial system

The Associations have received numerous representations from councils, criticising the processes of class 1, 2 and 3 appeals as being far too adversarial and complex. Due to the adversarial nature of the system, parties feel compelled to expend significant resources on legal representation. The irony is of course that the Land and Environment Court was meant to be a non-legalistic venue for the review of development applications. Many cases do not involve a question of law. The instant that an appeal is lodged, a phalanx of lawyers and expert consultants are unleashed, at considerable expense, to generate and consider more information than was available to either party when the application was first considered by council.

Costs incurred by both parties associated with appeals and the hearing time taken on some cases would appear to go beyond what is reasonable and what is necessary in order for the Court to determine the matter.

Considerable time is spent in the preparation of evidence and attendance at the Court as a result of the emphasis on legal procedures. Councils have no choice but to spend significant resources, particularly when Commissioners have said that competent expert evidence is the most important

element in mounting a successful case. It has been suggested that these processes could be handled in a less formal manner.

The Associations acknowledge that currently, an appeal can be determined without a hearing or requiring appearances but this option is rarely used, possibly as it is not widely understood that this option is available. The Court should be encouraged to publicise this option as a means of reducing the complexity and streamlining the processing of appeals through the Court.

Recommendations:

- **That the Working Party and Reference Group examine the processes in Class 1,2 and 3 and consider changes to practice to allow these processes to be handled in a less formal manner.**
- **That the Court promote the option of having appeals determined based on written submissions.**

6. Exploration of alternatives to a Court based appeals system

The Terms of Reference suggest that the Land and Environment Court system will continue to provide an appeals mechanism. There is no indication that alternative systems will be examined for their potential to deliver a better service to all stakeholders than a court system.

Many councils have expressed concern regarding the Working Group's ability to be independent in fully examining alternative systems to court based appeal systems, given the presence and vested interests of the many legal professionals represented on the Working Party.

It is felt that it would be most constructive for the Working Party to undertake a comparative assessment of the legislative basis of the NSW system against many other non court based systems such as Victoria, Tasmania and New Zealand. Further, the concept of independent panels for review, similar to the systems in operation at Fairfield City and Liverpool City Councils should be fully canvassed.

Recommendation:

- **That both the Working Party and Reference Group examine interstate and international examples of alternative systems to a Court based appeals process.**

7. Incidence of review of development applications and appropriateness of timeframe for assessment and Deemed Refusals

Any genuine effort which attempts to reduce the incidence of reviewing development applications must consider an appropriate timeframe for the assessment of development applications. The Associations strongly assert that the incidence of deemed refusals is directly related to the appropriateness of the timeframe (40 days) afforded to councils to assess and determine a development application. When examining whether 40 days is appropriate, it must be noted that weekends, advertising periods (usually 21 days) and requests for extra information from applicants diminish the 40 day period.

The current 40 day period for assessment often means that councils are treated as a stop en route to the Court. The current time period is not genuine in providing sufficient time for the proper assessment of applications. A legislative amendment to allow councils 40 working days for assessing development applications would enable sufficient time for a full assessment and would significantly reduce the number of deemed refusal applications to the Court.

Similarly in the Court, where judgements are not extempore, a significant period of time is taken before reserved judgements are made. If councils were afforded a period of up to three months, as provided for Judges and Commissioners by the time standard for handing down reserved judgements, the frequency of deemed refusal applications would be considerably reduced.

It is felt that it in the case of deemed refusals there should be no automatic right of appeal given that there are no merit or legal issues at stake. Rather, the applicant, if wishing to make an appeal to the Court after the 40 working day assessment period, must show cause and demonstrate neglect and delay of their application to a panel, in a non-adversarial process without legal representation. The panel would then decide if the applicant could proceed in their appeal. This process ensures that the primary consent authority is retained with the local council and that the Court's time is not unnecessarily wasted in hearing cases from developers who merely wish to bypass the council and its environmental planning instruments.

Recommendations:

- **That the current assessment time of development applicants be amended to provide for 40 working days.**
- **That in the case of deemed refusals there should be no automatic right of appeal.**
- **That a non-adversarial process be established, consisting of an independent panel for when an applicant wishes to appeal after the deemed refusal period has expired. The applicant must demonstrate sufficient grounds for an appeal to that panel, who would then decide if the applicant can proceed to the Court with their appeal.**

8. Inappropriate comments by Judges and Commissioners during hearings

The Associations received numerous representations from councils concerning inappropriate comments by Judges and Commissioners during a hearing. The increasing practice whereby Judges and Commissioners effectively redraft planning controls in the process of assessing an appeal is unsatisfactory. Examples have been provided whereby a Judge or Commissioner refuses the appeal but in the course of the proceedings, they specifically instruct the applicant on how to circumvent the council planning controls in their next application.

There have been instances where during the course of a hearing before all the evidence has been presented, a Commissioner has made comments which clearly indicates to the parties of the appeal what his decision is likely to be.

In one particular case furnished by Manly Council, the Commissioner adjourned the case, indicating his preference to approve the application and put the objectors on notice that they either allow the applicant to use their private access road or he would approve the application as submitted. This was seen by the objectors and councils as being totally inappropriate conduct by the Commissioner and beyond the role of the Court.

In another example from Manly Council, the council was defending an appeal from an applicant against an Order seeking compliance with Council's planning controls. The Commissioner, who

supported the Council in its Order, granted an extension of time to enable the applicant to comply and further advised the applicant to submit to Council an application for a Building Certificate as a way of having Council approve the illegal works.

It is clearly not the role of a Judge or a Commissioner to assist an applicant or respondent during the hearing. Commissioners have taken to creating design solutions for applicants during the hearing and our assertion is that this is not appropriate.

Recommendation:

- **That Judges and Commissioners should be prevented from expressing personal opinion, suggestions, design amendments or alterations during a hearing, other than in relation to conditions of development consent.**

9. SEPP 1

The application of SEPP 1 by the Court has been disappointing and has not been in accordance with the intent of the Policy. Judges and Commissioners have taken to questioning whether a council's development standard is appropriate as opposed to exploring why it is that a development should not comply with a council's development standard. It is not the role of a Judge or Commissioner to act as a strategic planner for a local government area and to rewrite the planning controls. It is imperative that the Court's application of SEPP 1 returns to an approach which is consistent with the intent of the Policy – to examine whether the objection to a council's development standard is convincingly justified, in so far as that compliance with the development standard is 'unreasonable or unnecessary'.

Development applications which rely on SEPP 1 variations should not be appealable. If an applicant has been allowed to vary a development standard there should be no right of appeal in order to prevent the applicant from further abusing the flexibility afforded to them by SEPP 1 and to prevent further significant deviations from council's standards.

Recommendations:

- **The Court should return to a conservative application of SEPP 1 which is consistent with the original intent of the Policy.**
- **There should be no right of appeal to the Court on development application which rely on SEPP 1 variations.**

10. Cumulative impact

The Court considers matters on a case by case basis and does not appear to consider the cumulative impact of development or of its own decisions. It is the community which must suffer the consequences of a decision by the Court, which allows a deviation from the council's policies. Furthermore, such deviations set a precedent and increase the impact of such development applications by virtue of the question of cumulative impact being disregarded or not properly considered.

A particular concern was expressed by councils regarding the cumulative impact of the proliferation of telecommunications facilities within local government areas and the Court's disregard for councils' policies. Councils are further frustrated in their efforts to ensure the co-location of telecommunications facilities by the carriers due to the inability of the Court to ensure that the carriers do co-locate their telecommunications facilities so that the impact on the community is reduced as much as possible.

Recommendation:

- **The Court must be required to consider the cumulative impact of a proposed development on a local government area and the cumulative impact of its own decisions.**

11. SEPP 5

The Associations have pursued concerns regarding SEPP 5 Housing for Older People and People with a Disability directly with the Department of Urban Affairs and Planning as part of the SEPP 5 review but it is prudent to mention some unacceptable decisions from the Court regarding SEPP 5.

Two SEPP 5 applications were made and subsequently refused by council for a number of reasons, one important factor being that on both occasions, the land in question was located in a floodway. Evidence was given by an eminent expert who attested that housing for older people and people with a disability should not be located in floodways. However, the Commissioner approved the development and people are to be located in an area which is inaccessible and unsafe at critical times. The landfill required for these two developments places surrounding residents at risk and raises the potential for flooding of their properties.

To highlight the inconsistency between decisions handed down by the Court, on another occasion, an appeal to the Court was made after council refused a SEPP 5 application located in a floodway. Two Commissioners heard the case and the appeal was dismissed. The Associations are concerned at the inconsistency but are also concerned such decisions may place lives and property at risk.

Councils have suggested that Commissioners and Judges should be required to demonstrate that each of the matters for consideration as per section 79C of the EP&A Act have been specifically assessed in reaching their determination. This would ensure more quality determinations and better outcomes for communities who stand to be affected by the decisions of the Court.

Recommendation:

- **That Commissioners and Judges be required to demonstrate that each of the matters for consideration as per section 79C of the EP&A Act have been specifically assessed in reaching their determination.**

12. Compulsory site visits by Judges and Commissioners

The Associations believe that great benefit would be gained by the Court if the Commissioners and Judges visited the site which is the subject of a hearing, before the hearing. This would facilitate

quicker proceedings and a better understanding of the evidence presented. On a related matter, it is felt that it would be worthwhile for Commissioners and Judges to conduct random visits to sites which they have made a determination on, in order for them to gain a better appreciation in situ of their decision.

Anecdotally, the Associations have received examples from councils whereby Judges or Commissioners have visited sites which they have previously made a decision on. One particular case in the Pittwater Council local government area, where the Senior Commissioner approved a SEPP 5 development in a floodway, the Senior Commissioner expressed that the site conditions were not as he had thought.

Recommendation:

- **That Judges and Commissioners be required to visit sites the subject of appeals before the hearing commences.**

13. Poor understanding by the Court of the concepts of ESD and TCM

Councils have expressed serious concerns that some Judges and Commissioners do not readily understand the concept of ecologically sustainable development (ESD) and total catchment management (TCM). Many councils suggested that some training of the Judges and Commissioners in TCM, ESD and the field of environmental science, would be an appropriate way of ensuring that decisions of the Court have full regard to ecological sustainability, just as councils are required to, in accordance with the provisions of the Local Government Act.

Recommendation:

- **That the Judges and Commissioners of the Court undergo training in the concepts of ESD and TCM.**

14. Time frustrations

Councils have become increasingly frustrated at the extensive time delays experienced when a matter proceeds to the Land and Environment Court, particularly in non metropolitan NSW. Developments which will have major implications on regional areas have been caught in limbo. Development consent has been previously granted, in some cases, longer than one year ago but the matter is still being held in abeyance awaiting the decision of the Court. Such practices whereby developments, which contribute to long term growth and prosperity are jeopardised must cease and decisions by the Court must be expedited accordingly.

Councils have expressed frustration at the unreasonably short time frame afforded to them when drafting the list of issues and deciding upon the witnesses to be called. Further, it is considered unreasonable that councils must set down in specific detail at the call over stage, every single point that council will raise.

Recommendations:

- **That the time standard for the disposal of matters be amended so that all class 1, 2 and 3 applications are disposed of in four months of filing and all class 4, 5 and 6 applications are disposed of within 6 months of filing.**

- **That the time standard for handing down reserved judgements be amended so that all judgements are handed down within 40 working days of the hearing.**

- **That the Pre-Hearing Practice Direction be amended to provide the respondent with 40 working days to file their statement of issues.**

15. Streamlining the process of development applications

In the planning system, greater emphasis should be placed on pre-development application discussions and analysis. The incorporation of a formal pre-development application process may assist in the processing of development consents. The integrated development assessment legislation of July 1998 went part of the way to achieving this but further reinforcement is required. Such opportunities provide the applicant and the council with the opportunity to clarify issues and to come to a greater understanding, hopefully eliminating the need for an appeal to the Land and Environment Court.

In the instance of integrated development applications, many councils expressed the view that the current process is inadequate and timeframes blow out significantly while councils await information from the State Agencies.

A way of streamlining the manner in which development applications are processed by councils, DUAP and other concurrent approvals bodies would be for DUAP to have the role of co-ordinating the State Agency concurrence bodies responses for integrated development and then the council would have 40 working days on receipt of the information, to fully assess the application. DUAP currently undertake this role when they or the Minister are the consent authority for integrated/designated development.

A number of councils suggested that the streamlining of the development application process could be improved if guidelines were issued on the information required to be submitted with an application.

Recommendations:

- **That the Working Party and Reference Group give consideration to a compulsory pre-development application process between the applicant and the consent authority.**

- **That the Working Party and Reference Group consider the benefits to the development approvals system if DUAP, in the case of integrated development, is given the role of co-ordinating the State Agency concurrence bodies responses. Councils should then have 40 working days on receipt of the information, to fully assess the application.**

- **That the Working Party and Reference Group give consideration to the preparation of guidelines which would detail the information required to be submitted with a development application.**

16. Practicality of Terms of Settlement

The Associations have received representations from councils regarding the practicality of some Terms of Settlement. A council furnished an example whereby the Terms of Settlement of a case perpetuates the statutory planning controls of an area and, in strict accordance with the terms of settlement, the council is to specifically notify the applicant in the case and a resident action group of any proposals to change a development policy for an area and also, to advertise the agenda, time, date and place of the council's development control unit meetings. However with the recent amendments to the Environmental Planning and Assessment Act 1979 and introduction of 'Exempt and Complying' development, it is virtually impossible for the council to comply with the specifics of the order, thus forcing council to break the law. Essentially, the Court has made a decision which will bind council forever, notwithstanding the circumstances of the area and the community will change. For any council to be in a similar predicament is impractical and somewhat ridiculous given that councils must in fact respond to changes within their local government area but if the terms of settlement of a particular case restrict council's ability to do so, the outcome is unsatisfactory.

Recommendation:

- **That the Court realistically consider the implications of Terms of Settlements on all parties.**

17. Court Orders concerning illegal uses

Currently, orders served by the Court are served on the current operator/owner of the illegal use. Consequently, if the business changes hands, council is required to recommence legal proceedings to again have the illegal use cease. To overcome this situation, it would be appropriate that Orders for prohibited or illegal uses be attached to the premises so that any future operator will inherit the Order served. Further, when the Order is breached, council should have the power to issue on the spot fines in accordance with the Self Enforcing Infringement Notice System. Currently when an Order is not complied with, councils incur significant Court and solicitor costs in trying to take additional action to have the Order complied with. Councils are not able to recover their costs and have no ability to ensure that the illegal use ceases to operate.

Recommendations:

- **Orders for prohibited or illegal uses be attached to the premises/land so that any future operator will inherit the Order served**
- **Councils should have the power to issue on the spot fines for breaches of Court Orders though the Self Enforcing Infringement Notice System.**

18. Stamping of approved development application plans

The Associations received numerous representations from councils regarding the stamping of approved plans. It has been a long standing practice for Consent Authorities to stamp plans of development applications when they are approved. Given the role of the private certifier in the

planning system, it is imperative that both council and certifier are able to easily ascertain Court approved plans. It is felt that the practice of stamping plans by the Court would prevent dishonest applicants from producing another set of plans and provide a further safeguard to the system.

Recommendation:

- **That as a matter of practice the Court stamp the plans of a development application when the Court approves the application.**

19. Alternative dispute resolution

The Associations have been working actively with the Law Society of NSW's Planning and Development Sub-Committee of the Dispute Resolution Committee to promote alternative dispute resolution (ADR) its benefits to Local Government. Currently a best practice guideline on dispute resolution and management is being prepared for Local Government.

There was considerable support of ADR from member councils but many councils and the Associations acknowledge that such techniques have their limitations and are best employed only in appropriate situations.

Recommendations:

- **That the Working Party and Reference Group examine the greater use of ADR techniques in relation to development applications.**

- **That the Working Party and Reference Group consider ways in which to promote the use of ADR in relation to development applications.**

Conclusion

The Associations welcome the review into the State's planning laws and the role of the Land and Environment Court in reviewing development applications.

There is concern amongst councils regarding the transparency of the review process, given the haste in which submissions were called for. It would therefore be appropriate that a report be published and be made publicly available, which provides a summary of all the submissions which have been received. Such feedback provides the stakeholders with the assurance that their submissions have been considered. The Associations also suggest that the Working Party consider holding a public forum to provide both the Working Party and Reference Group with a better understanding of the stakeholder's issues.

However it is encouraging to see the first stage of the review process under way. It is imperative that Local Government is appropriately notified of the future stages of the review to ensure continued involvement as the review process continues.

SUMMARY OF RECOMMENDATIONS

1. Matters of law only to appear before the Court

Recommendations:

Only appeals on a point of law should permitted to the Land and Environment Court.

Appeals on a point of law must be heard before a Judge.

2. Constitution of the Court

Recommendations:

- In complex appeals before the Court, a multi-member panel consisting of both Judges and Commissioners should be engaged to hear the appeal.

- Judges and Commissioners should have experience in non metropolitan planning and development issues.

3. Inconsistency between development applications and LEPs and DCPs

Recommendation:

- There should be no right of appeal to the Land and Environment Court by a developer when a development application is refused by council because it is inconsistent with the provisions of a DCP or LEP.

4. Amending plans

Recommendation:

- If an applicant seeks to rely on amending plans in a hearing, the application should be returned to council for full reconsideration of the application in light of the amendments made.

5. Complexities associated with such an adversarial system

Recommendations:

- That the Working Party and Reference Group examine the processes in Class 1,2 and 3 and consider changes to practice to allow these processes to be handled in a less formal manner.

- That the Court promote the option of having appeals determined based on written submissions.

6. Exploration of alternatives to a Court based appeals system

Recommendation:

- That both the Working Party and Reference Group examine interstate and international examples of alternative systems to a Court based appeals process.

7. Incidence of review of development applications, appropriateness of the timeframe for assessment and deemed refusals

Recommendations:

- That the current assessment time of development applicants be amended to provide for 40 working days.

- That in the case of deemed refusals there should be no automatic right of appeal.

- That a non adversarial process be established, consisting of an independent panel for when an applicant wishes to appeal after the deemed refusal period has expired. The applicant must demonstrate sufficient grounds for an appeal to that panel, who would then decide if the applicant can proceed to the Court with their appeal.

8. Inappropriate comments by Judges and Commissioners during hearings

Recommendation:

- That Judges and Commissioners should be prevented from expressing personal opinion, suggestions, design amendments or alterations during a hearing, other than in relation to conditions of development consent.

9. SEPP 1

Recommendations:

- The Court should return to a conservative application of SEPP 1 which is consistent with the original intent of the Policy.

- There should be no right of appeal to the Court on development application which rely on SEPP 1 variations.

10. Cumulative impact

Recommendation:

- The Court must be required to consider the cumulative impact of a proposed development on a community and the cumulative impact of its own decisions.

11. SEPP 5

Recommendation:

- That Commissioners and Judges be required to demonstrate that each of the matters for consideration as per section 79C of the EP&A Act have been specifically assessed in reaching their determination.

12. Compulsory site visits by Judges and Commissioners

Recommendation:

- That Judges and Commissioners be required to visit sites the subject of appeals before the hearing commences.

13. Poor understanding by the Court of the concepts of ESD and TCM

Recommendation:

- That the Judges and Commissioners of the Court undergo training in the concepts of ESD and TCM.

14. Time frustrations

Recommendations:

- That the time standard for the disposal of matters be amended so that all class 1, 2 and 3 applications are disposed of in four months of filing and all of class 4, 5 and 6 applications are disposed of within 6 months of filing.

- That the time standard for handing down reserved judgements be amended so that all judgements are handed down within 40 working days of the hearing.

- That the Pre-Hearing Practice Direction be amended to provide the respondent with 40 working days to file their statement of issues.

15. Streamlining the process of development applications

Recommendations:

- That the Working Party and Reference Group give consideration to a compulsory pre-development application process between the applicant and the consent authority.

- That the Working Party and Reference Group consider the benefits to the development approvals system if DUAP, in the case of integrated development, is given the role of co-ordinating the State Agency concurrence bodies responses. Councils should then have 40 working days on receipt of the information, to fully assess the application.

- That the Working Party and Reference Group give consideration to the preparation of guidelines which would detail the information required to be submitted with a development application.

16. Practicality of Terms of Settlement

Recommendation:

- That the Court realistically consider the implications of Terms of Settlements on all parties.

17. Court Orders concerning illegal uses

Recommendations:

- Orders for prohibited or illegal uses be attached to the premises/land so that any future operator will inherit the Order served
- Councils should have the power to issue on the spot fines for breaches of Court Orders though the Self Enforcing Infringement Notice System.

18. Stamping of approved development application plans

Recommendation:

- That as a matter of practice the Court stamp the plans of a development application when the Court approves the application.

19. Alternative dispute resolution

Recommendations:

- That the Working Party and Reference Group examine the greater use of ADR techniques in relation to development applications.

- That the Working Party and Reference Group consider ways in which to promote the use of ADR in relation to development applications.