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**A Review of the Land and
Environment Court**

by

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EXECUTIVE SUMMARY

On 1 September 2000 the Land and Environment Court (the Court) had its 20th anniversary. However, this anniversary was not without controversy in sections of the community about the Court's role and method of operations. This controversy culminated in the Government announcing a Working Party to review elements of the Court in April 2000. As of August 2001, the Working Party has yet to report publicly. This paper explains the operation of the Court, and reviews the submissions from some key stakeholders that contributed to the Working Party review.

The Land and Environment Court is a superior court of record, with rank and status equivalent to the Supreme Court in the hierarchy of courts in NSW. The jurisdiction of the Court is divided into seven classes. Class 1 involves environmental planning and protection appeals, which are generally appeals under the *Environmental Planning and Assessment Act 1979* against refusals of local councils to grant development consent (pp2-3).

Class 1 appeals are merit appeals, in that the Court when hearing an appeal 'stands in the shoes of the council', and remakes the decision according to its merits. In contrast, appeals in class 4 of the Court involve judicial review. In this case, the task of the Court is to review the decision of the consent authority to determine if it has, in reaching that decision, acted in accordance with the law. Judicial review is not concerned about whether or not the decision was a good one, but rather: whether decision makers had any power to make it in the first place; and whether they followed correct procedures in arriving at that decision (pp3-7).

In 1999 and 2000, individual councils, mayors, some conservation groups and the Local Government Association became more active in their calls for reform of the Land and Environment Court and the merit appeals process. On 7 April 2000, the then Attorney General the Hon Jeff Shaw MLC announced the appointment of Jerrold Cripps QC to chair a working party to examine the State's planning laws and the role of the Land and Environment Court in reviewing development applications (pp7-8).

A number of submissions to the Working Party are reviewed, reflecting the views of various stakeholders that support the need for fundamental reform, and from other organisations which largely support the status quo (pp9-16).

The main issues of contention and agreement are reviewed (pp16-20).

It could be argued that if the status quo is maintained, reform of the planning system will be needed in an attempt to make the planning system less complex, so that communities, councils and the Court are clearer as to 'what should go where'. Earlier this year the Government released the White Paper, PlanFirst, envisaging the reform of planning legislation in the State (p21).

1.0 INTRODUCTION

On 1 September 2000 the Land and Environment Court (the Court) had its 20th anniversary. However, this anniversary was not without controversy in sections of the community about the Court's role and method of operations. This controversy culminated in the Government announcing a Working Party to review elements of the Court in April 2000. As of August 2001, the Working Party has yet to report publicly. This paper explains the operation of the Court, and reviews the submissions from some key stakeholders that contributed to the Working Party review.

2.0 THE ORIGINS AND HISTORY OF THE LAND AND ENVIRONMENT COURT

New South Wales has had a system of merit appeals in building and other matters since the promulgation of the Local Government Act 1919. Such appeals were held in the NSW District Court until 1945 when the Land and Valuation Court was vested with the jurisdiction. From 1958 to 1972 there was a Building and Subdivision Board of Appeal and from 1972 to 1980 a Local Government Appeals Tribunal.¹

In late November 1979, a series of cognate Environmental Planning Bills were introduced by the late Hon Paul Landa MLC, Minister for Planning and Environment, into the Legislative Council. The two most significant bills were the Environmental Planning and Assessment Bill and the Land and Environment Court Bill. Both Bills were subsequently passed by the Parliament, with the former containing provisions that deal with what can and cannot be done on land in NSW.

The Minister had the following comments about the proposed Land and Environment Court:

The judges of the new court will be equal in status to those of the Supreme Court. For the first time the jurisdiction of the new court will cover comprehensively the fields of planning, building, pollution, heritage, valuation and land tenure... Additionally, the proposed new court is a somewhat innovative experiment in dispute resolution mechanisms. It attempts to combine judicial and administrative dispute resolving techniques and it will utilize non-legal experts as technical and conciliation assessors. Such a method of operation does not fit harmoniously with the operation of the Supreme Court at present. Nonetheless, I predict that it will not be long before the Supreme Court adopts the novel and innovative structure and method of operation of the Land and Environment Court.²

¹ Hon Justice Terry Sheahan, "Environmental Law – Present and Future – Lessons Learned and Visions for the Future – the Experience of the Land and Environment Court of New South Wales, Australia." Keynote Address, International Seminar on Environmental Law, Superior Court of Justice Auditorium, Brasilia, May 9-11, 2001, at 21.

² *NSWPD*, 21 November 1979, at 3345, Second Reading Speech of the Hon Paul Landa MP, Minister for Planning and Environment.

3.0 THE ROLE AND OPERATION OF THE LAND AND ENVIRONMENT COURT

The Land and Environment Court is a superior court of record, with rank and status equivalent to the Supreme Court in the hierarchy of courts in NSW. Part 3 of the Act outlines the jurisdiction of the Court, and divides it into seven classes. These are:

Class 1: Environmental Planning and Protection Appeals. These are generally appeals under the *Environmental Planning and Assessment Act 1979* against refusals of local councils to grant development consent, but also includes appeals under the *Protection of the Environment Operations Act 1997*, the *Waste Minimisation and Management Act 1995*, the *Threatened Species Conservation Act 1995*, the *Native Vegetation Conservation Act 1997* and more.

Class 2: Local Government and Miscellaneous Appeals and Applications. This class includes appeals under various sections of the *Local Government Act*, as well as other Acts such as the *Catchment Management Act 1989* and the *Swimming Pools Act 1992*.

Class 3: Land Tenure, Valuation, Rating and Compensation Matters. This class, amongst other things, includes objections to land valuation and rating appeals and applications for compensation for resumption of land.

Class 4: Environmental Planning and Protection and Development Contract Civil Enforcement. This class includes the judicial review of decisions of consent authorities on administrative grounds, as well as applications for declarations and injunctive relief. Over 20 Acts are covered by this class of the Court, including the EPA&A Act, the *National Parks and Wildlife Act 1974*, and the *Coastal Protection Act 1979*.

Class 5: Environmental Planning and Protection Summary Enforcement. The Court exercises summary criminal jurisdiction in the prosecution of pollution offences and various breaches of environmental and planning laws.

Classes 6 and 7: Appeals from Convictions relating to Environmental Offences and Other Appeals Relating to Environmental Offences. These classes involve appeals from convictions for environmental offences in the Local Court.

The Court is composed of both Judges and Commissioners (once known as Assessors). Whilst the Governor may appoint any qualified person to be a Judge,³ a Commissioner must be qualified in the opinion of the Minister in an area of environmental management or local government.⁴ A single Judge, a Judge and a Commissioner, or one or two

³ Section 8 of the Act defines a 'qualified Judge' as one under 70 years of age, and is a Judge of the Supreme Court, or is a judicial member of the Industrial Relations Commission, or is a legal practitioner of at least seven years standing.

⁴ Section 12(2) of the Act outlines a wide range of features which defines the qualifications needed to be qualified as a Commissioner. These include knowledge and experience in:

Commissioners can deal with matters in classes 1 to 3, but only Judges can exercise the Court's jurisdiction in classes 4 to 7.

There are some important distinctions between appeals in classes 1, 2 and 3 of the Court, and Class 4. Classes 1 to 3 involve merit appeals. For instance, section 97 of the EPA&A Act states that: "An applicant who is dissatisfied with the determination of a consent authority with respect to the applicant's development application ...may appeal to the Court... ." It is important to note that it is only the applicant who has the right to instigate a merit appeal, not objectors to the development. The exception to this is for a designated development. In this case, an objector, who has lodged a formal objection, is entitled to appeal (within 28 days) to the Land and Environment Court if the council consents to the development application. This is known as a third party appeal. The applicant has 12 months to decide whether or not to appeal if not satisfied with the consent authority's decision.

Under section 39 of the *Land and Environment Court Act*, the Court shall have all the functions and discretions which the original consent body had. A merit appeal is by way of a rehearing of evidence, including the presentation of fresh evidence. The Court determines the development on its merits, and effectively replaces the local council as the consent body. Proceedings in classes 1 to 3 of the Court's jurisdiction are conducted with as little formality and technicality as the Court permits. The Court is not bound by the rules of evidence, and may inform itself on any matter in such manner as it thinks appropriate, including the use of expert evidence.

Appeals from decisions in class 1 appeals are only for errors of law, not on judgements as to merit.

Justice Terry Sheahan of the Land and Environment Court, has noted the following about merit appeals:⁵

The court's class 1 assessment process is to be contrasted with the council's own assessment of a development application. There, the council, through its professional officers and the councillors themselves, undertakes an assessment of the proposed development. However, it is not a two-way affair, not adversarial, and, generally speaking, it is a less focussed examination. I am not suggesting that it is not an appropriate assessment process. It is, and it operates impeccably for 95 per cent of development applications.

The contrast is simply that the court offers an independent adjudication of an adverse result to those who are aggrieved by the council's decision.

local government and town planning; environmental science; land valuation; architecture; natural resource management; and Aboriginal land rights.

⁵ Hon Justice Terry Sheahan, "Environmental Law – Present and Future – Lessons Learned and Visions for the Future – the Experience of the Land and Environment Court of New South Wales, Australia." Keynote Address, International Seminar on Environmental Law, Superior Court of Justice Auditorium, Brasilia, May 9-11, 2001, at 26.

It carries out its functions in the adversarial way Australian courts traditionally operate, albeit with “as little formality and technicality and with as much expedition” as the proper consideration of matters before it permits.

As noted later in this Paper, the adversarial nature of the merit appeal proceedings has attracted criticism from both developers and conservation groups. Sheahan J continued:

The hearing of a merit appeal involves a thorough, focussed examination and assessment of the particular development application, often conducted over several days. Each side, that is, the applicant for development consent on the one hand, and the council, on the other hand, engage relevant experts, such as town planners, engineers, architects, noise consultants, ecologists and others to present expert evidence, each side addresses the court and presents its submissions on the evidence and the relevant law. Then the judge or commissioner reaches a decision based on the evidence adduced at the hearing, and only upon that evidence, and in the result there will be a winner and a loser.

The court has by law the same functions and discretions as the council from whose decision the appeal is taken. In other words, it stands in the shoes of the council to determine a particular development application afresh, on its merits, and it must, as did the council, determine the application in accordance with the law, either by granting consent conditionally or unconditionally, or by refusing consent. The court, in such a case, is not reviewing the council’s decision. It is instead determining the development application strictly on its merits.

The court often has more information before it, and more subjective views expressed to it, than the council did. Such additional information and views may be as much for the council’s decision, as against it...

Section 32 (2) of the *Land and Environment Court Act* states that the Court may inform itself on any matter in such manner as it thinks appropriate. The Court also has the power to direct experts to confer with each other, and can obtain outside assistance. The role of experts in the Court is clearly an important one, and Commissioner Roseth has noted that as the Court bases its decisions on the evidence before it, expert evidence is therefore the most important element in a case.⁶ In this regard, Sheahan J noted:

The quality of the evidence and argument are paramount, and much of that depends on experts. To further improve the quality, and value to the court, of expert evidence, the court has recently promulgated a Practice Direction requiring experts to concentrate on assisting the court, rather than advocating their own client’s cause...

In the end analysis, the quality of the evidence dictates the result. If the parties are well prepared, if the relevant instruments and policies are clear and unambiguous, if the expert and objector evidence is cogent and well presented, if the competing cases are well advocated, a “better” decision will flow, but those on the losing end of it will still

⁶ Roseth, J “Expert Evidence in Merit Appeals in the Land and Environment Court”. Speech by Dr Roseth, Commissioner of the Land and Environment Court. See URL <http://www.lawlink.nsw.gov.au/lec.nsf/pages/index>

Disappointed litigants can become critics, or “noisy enemies” of the courts, as Chief Justice Gleeson has recently commented, but appeals from decisions in class 1 appeals lie only for errors of law, not on judgments as to merit...

In regards to what the Court must consider when determining an appeal, again according to Sheahan J:

...in giving “proper consideration” to the appeal, the judge or commissioner is bound, like the council, by s 79C(1) of the planning legislation, to:

take into consideration such of the following matters as are of relevance to . . . the development application:

(a) the provisions of:

- (i.) any environmental planning instrument; and
- (ii.) any draft environmental planning instrument that is or has been placed on public exhibition; and
- (iii.) any development control plan; and
- (iv.) the regulations that apply to the land to which the development application relates,

- (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality;
- (c) the suitability of the site for the development;
- (d) any submissions made in accordance with this Act or the regulations;
- (e) the public interest.

Those are our statutory instructions, and we cannot take into account any extraneous matters. Then, at the end of our considerations we are obliged to publish detailed reasons. That is a hallmark of judicial duty and judicial accountability. Yet the decisions are often criticised without recourse to the judgement to see the considerations which prevailed, and/or the court’s analysis of them.

It is possible for two perfectly reasonable people to come to different conclusions on the same evidence. Corporate groups of humans, such as councils, have split opinions. Multi-member benches accommodate dissenting views. Judges and commissioners strive for consistency but may have differing emphases.

No council ever publishes its deliberations, conclusions, and reasons for its decision on a development application to the extent that the court does in its judgments.⁷

The Court, except in exceptional circumstances, does not award costs to either party with

⁷

Hon Justice Terry Sheahan, “Environmental Law – Present and Future – Lessons Learned and Visions for the Future – the Experience of the Land and Environment Court of New South Wales, Australia.” Keynote Address, International Seminar on Environmental Law, Superior Court of Justice Auditorium, Brasilia, May 9-11, 2001, at 28.

a merit appeal. Each side must pay their own costs. Where a class 1 appeal has been heard and determined by one or two commissioners, without a judge presiding, an appeal lies to a judge of the court, but only for error of law, not on an issue of fact or merit. Where a case has been heard by a Judge, appeals in classes 1 to 4 are heard in the Court of Appeal, and in class 5 appeals are heard in the Court of Criminal Appeal.

In contrast to merit appeals, appeals in class 4 of the Court involve judicial review. In this case, the task of the Court is to review the decision of the consent authority to determine if it has, in reaching that decision, acted in accordance with the law. Judicial review is not concerned about whether or not the decision was a good one, but rather:

- whether decision makers had any power to make it in the first place; and
- whether they followed correct procedures in arriving at that decision.⁸

The usual basis for judicial review is that the consent authority has failed to take into account a relevant factor, or it has taken into account an irrelevant factor, or its decision is manifestly unreasonable.⁹

The effect of a successful application for judicial review is that the decision challenged will be declared invalid. The Court will not substitute a decision for the consent authority. If the Court found that the consent authority had the power to make a decision, but did not exercise it in a procedurally correct fashion, there is still the opportunity of deciding the matter again, this time following the correct procedures. The end decision of course, may be the same.¹⁰

Costs are usually awarded in class 4 to 7 appeals, but this may not always occur where the Court finds the litigation to have been in the public interest.

The Court also offers parties the option of mediation in planning and building appeals, and in civil enforcement cases through a voluntary and confidential mediation process.¹¹ In addition, preliminary conferences, known as section 34 conferences, are arranged between the parties for appeals in classes 1 to 3. Presided over by a single Commissioner, where agreement is reached between the parties (being a decision that the Court could have made

⁸ Farrier, D. *The Environmental Law Handbook. Planning and Land Use in New South Wales*. 2nd Edition, 1993, at 38.

⁹ Hon Justice Terry Sheahan, "Environmental Law – Present and Future – Lessons Learned and Visions for the Future – the Experience of the Land and Environment Court of New South Wales, Australia." Keynote Address, International Seminar on Environmental Law, Superior Court of Justice Auditorium, Brasilia, May 9-11, 2001, at 29.

¹⁰ Farrier, D. *The Environmental Law Handbook. Planning and Land Use in New South Wales*. 2nd Edition, 1993, at 38.

¹¹ The Hon Justice Terry Sheahan, Judge of the Land and Environment Court, "Environmental law – present and future – lessons learned and visions for the future – the experience of the Land and Environment Court of New South Wales." Keynote Address to the International Seminar on Environmental Law, Brasilia, May 9-11 2001, at 29.

in the proper exercise of its functions), the Commissioner shall dispose of the proceedings in accordance with the decision.¹²

4.0 A REVIEW OF THE LAND AND ENVIRONMENT COURT

In 1999 and 2000, individual councils, mayors, some conservation groups and the Local Government Association became more active in their push for reform of the Land and Environment and the merit appeals process. For instance, Councillor Peter Woods, President of the Local Government Association, was reported as saying that the fact that the Court's assessors judge development applications on merit, rather than points of law, was unfair. He continued: "It's appalling that you have one character sitting up there thinking they know the area better than nine or 12 elected representatives of the people...if the court has a role, it should be to make determinations according to law, not merit...they are far less qualified to be making decisions on merit than councillors and their communities collectively."¹³

Other commentators noted the effect of state government urban consolidation policies and the perceived failure of the Court to critically examine them when assessing merit appeals. For instance, Neville Gruzman noted: "Not only has the Government failed us, so too has the Land and Environment Court by merely parroting the Government's requirements and granting approvals without proper regard to community standards and practicalities like traffic problems...until the Government acts positively and creatively, we remain in the hands of a court out of touch with the community."¹⁴

In early 2001, Sydney City Council published a book, *Unwanted Legacies of the Land and Environment Court*, which highlighted some of the Court's controversial decisions. These included the following developments approved by the Court after being refused consent by the relevant council: a brothel opposite Liverpool Primary School; a licensed tavern in an alcohol free zone in Blacktown; and aged persons housing located in a floodway.¹⁵

On 7 April 2000, the then Attorney General the Hon Jeff Shaw QC MLC announced the appointment of Jerrold Cripps QC to chair a working party to examine the State's planning laws and the role of the Land and Environment Court in reviewing development applications. Mr Cripps is a former Chief Judge of the Land and Environment Court. The Working Group was to comprise representatives of the Attorney General's Department; the

¹² See Section 34 of the Land and Environment Court Act.

¹³ "Call to overhaul the Land and Environment Court" in *The Australian Financial Review*, 8 July 1999.

¹⁴ "Plans flounder in an unreceptive environment court" in *The Sydney Morning Herald*, 12 July 1999. Neville Gruzman is adjunct professor in the School of Architecture, University of NSW.

¹⁵ City of Sydney Council, *Unwanted Legacies of the Land and Environment Court. A selection of developments approved by the Land and Environment Court of NSW which highlights the need for reform.* 2001.

Department of Local Government; the Department of Urban Affairs and Planning; the Local Government and Shires Association; and a Judge of the Land and Environment Court to be appointed by the Chief Judge of that Court.¹⁶ In addition, an ‘expert reference group’ was also established. Submissions to the Working Party were invited with the closing date of 30 June 2000.

The Working Party had the following Terms of Reference.¹⁷

That the Working Party examine the legislative basis upon which decisions in relation to development applications are currently reviewed by the Land and Environment Court in accordance with the provisions of the Land and Environment Court Act 1979 and the Environmental Planning and Assessment Act 1979, including but not limited to:

(i) the most appropriate manner in which to review the decisions of councils in relation to development applications;

(ii) the constitution of the Land and Environment Court in reviewing the decisions of councils, including whether the Court should be constituted by more than one Judge or Commissioner or by Commissioners possessing specified qualifications or expertise;

(iii) whether the Court should have regard to any additional matters in reviewing a council decision in relation to a development application;

(iv) ways in which to streamline the manner in which development applications are processed by councils and the Department of Urban Affairs and Planning so as to reduce the incidence of such reviews; and

(v) whether greater reliance could be placed upon alternative dispute resolution mechanisms in resolving disputes in relation to development applications.

In conducting its review, the Working Party is to call for written submissions from all interested parties, and may call upon stakeholders to attend meetings of the Working Party, as appropriate, in the course of considering their submissions.

It is clear from the above terms of reference that the functions and roles of the Land and Environment Court in general are not under review. It is the merit appeals process, where the Court rehears a development application on its merits, and replaces the council as decision maker, which is under review. The Working Party and Government have yet to release their report, so this Paper reviews some of the submissions to the Working Party.

4.2 The City of Sydney Submission

The City of Sydney engaged PricewaterhouseCoopers Legal to develop their submission

¹⁶ NSWPD, 11 April 2000, at 4384.

¹⁷ See Attorney General’s Department website: <http://www.lawlink.nsw.gov.au/lpd>

to the Working Party. The Council argued that the present system of planning review has resulted in unsatisfactory outcomes for both council and developers, with the following consequences:¹⁸

- unnecessary delays, caused by both the number of lengthy appeals and the number of hearings in respect of minor matters;
- lack of responsibility by councils as they ‘opt out’ of difficult or uncomfortable decisions by refusing or failing to determine applications which comply with relevant planning policies;
- excessive legal costs to councils and applicants, due to a proliferation of cases;
- as an appeal is a full merits review there is little incentive for councils to improve their decision making processes;
- as plans can be amended on appeal there is little incentive for development applications to be prepared comprehensively prior to lodgement with consent authorities;
- in the absence of a requirement for the Court to adhere to local planning policies, there have been undesirable development precedents set by the Court;
- Councils are frustrated in their attempts to improve the quality of development and urban design, by adverse Court decisions on the merits;
- Confusion and uncertainty. Councils are required to make decisions according to their local planning policy which is subject to community consultation before approval. However, the Court is not bound to make a decision according to the relevant local planning policy.

The City of Sydney then proposed the following reforms:¹⁹

1. In class 1 and class 2 jurisdiction, the primary role for the Court should be to review decisions of the consent authority. The proposed review test is designed to focus consideration on whether the decision was unreasonable in the circumstances of the case;
2. A new review body (the local appeals panel) should be formed by each consent authority to deal with planning and development appeals that are minor in nature;
3. The role of the Court in merit appeals should continue only where the consent authority (and if relevant, local appeals panel) has made no decision in respect of a planning matter;
4. For major developments under \$10 million the Court be constituted by a Judge assisted by a nominee of Council, and for developments over \$10 million the Court be constituted by a panel combining a Judge of the Court, and nominees of the consent authority and the Minister for Urban Affairs and Planning, with skills relevant to the

¹⁸ City of Sydney, *A New Legal and Administrative Framework for Development Appeals. Submission by the City of Sydney*, prepared by PricewaterhouseCoopers Legal, February 2001, at 6.

¹⁹ City of Sydney, *A New Legal and Administrative Framework for Development Appeals. Submission by the City of Sydney*, prepared by PricewaterhouseCoopers Legal, February 2001, at 10.

- issues under consideration in the particular application;
5. The Court (and local appeals panel) will be required to apply existing planning policies created by the State and consent authorities after a process of public consultation, and to have regard to draft planning policies

The Council's submission proposes a new test for the grounds of review, that is, unreasonable in the circumstances of the case. The applicant should be able to show, by reference to those objective circumstances, that the decision was manifestly wrong or unsustainable. The submission noted that the onus to be borne by the applicant is the traditional civil test, that is, whether on the balance of probability the decision was unreasonable in the circumstances of the case. The Council further argued that the Court should be allowed to permit additional evidence only where the parties consent to the admission or with the leave of the Court. In exercising this discretion, the Court should require that party seeking to produce the fresh evidence to provide a satisfactory explanation as to why the evidence was not capable of being produced at the decision making stage. The Court should also be satisfied that the evidence is such that it would have produced a different decision.

Central to the Council's submission is the creation of a new body called the Local Appeals Panel (LAP). It was proposed that the LAPs would be established by each consent authority and would hear appeals for minor development matters. The LAP would be comprised of: one councillor (or equivalent); one senior representative from the Department of Urban Affairs and Planning; one independent person with appropriate skills and expertise (with qualifications similar to those of Commissioners in the Land and Environment Court). The review by the LAP would involve the same test as that proposed for the Court – whether the decision was unreasonable in the circumstances of the case.²⁰

The City of Sydney also undertook a review of 1,576 cases decided by the Court between 1997 and 1999. The review related to Class 1 and 2 decisions on full development applications (ie, minor matters were excluded). The Council's analysis indicated the following:²¹

- Overall decisions of the Court (both Judges and Commissioners) favoured applicants (developers) over Councils by 59% to 41%;
- Comparison of results from individual decision-makers showed a big range in favour of developers – from 72.9% for one Commissioner to 47.6% for another;
- Developers with commercial matters had an 11% greater success rate than residential ones.

²⁰ City of Sydney, *A New Legal and Administrative Framework for Development Appeals. Submission by the City of Sydney*, prepared by PricewaterhouseCoopers Legal, February 2001, at 21.

²¹ "Decisions, Decisions. A score card on the decision makers of the Land and Environment L&E CourtReview, Issue 3, February 2001. The *L&E CourtReview* is a newsletter of the City of Sydney.

The Council concluded that the number of appeals favourable to developers indicated a systemic bias, and reinforced the perception of uncertainty over the Court's decision making due to the inevitable subjectivity that arises when merit decisions are made by individuals.²²

4.3 The Views of the Environmental Defender's Office

In contrast to local councils the Environmental Defender's Office (EDO) endorsed the basic legislative basis of merit appeals, and considered that this jurisdiction of the Court should remain. In fact, the EDO considered that the power of the Court to review decisions of consent authorities on the merits is a beneficial feature of the legislation. The EDO noted that from a public interest perspective, the availability of rights for objectors to appeal against decisions of consent authorities regarding designated development is a vital element that should be retained. The EDO was strongly opposed to the suggestion that merit reviews should be removed. The EDO noted the following arguments put forward by Brian Preston and Jeff Smith in support of retaining merit reviews:

The rationale for merits review is founded in the notion of natural justice. The rights, liberties and obligations of citizens should not be unduly dependent upon administrative decisions which are not subject to review on the merits. Prima facie, an administrative decision should be reviewable on the merits if it is likely to affect the interests of a person. Interests can be commercial, property and legal interests as well as intellectual, and like interests (eg environmental interests or concerns within the objects of an organisation). Interests can also include legitimate expectations. The benefits of merits review include:

- Enhancing the quality of the reasons for decisions;
- Providing a forum for full and open consideration of issues of major importance;
- Increasing the accountability of decision makers;
- Clarifying the meaning of legislation;
- Ensuring adherence to legislative principles and objects by administrative decision makers;
- Focusing attention on the accuracy and quality of policy documents, guidelines and planning instruments; and
- Highlighting problems that should be addressed by law reform.²³

The EDO then made the following suggestions for potential improvements to the decision making process:

²² "Decisions, Decisions. A score card on the decision makers of the Land and Environment L&E CourtReview, Issue 3, February 2001. The L&E CourtReview is a newsletter of the City of Sydney, at 1.

²³ Preston, B and Smith J, "Legislation needed for an effective Court" in *Promises, Perception, Problems and Remedies, The Land and Environment Court and Environmental Law 1979-1999*. Conference Proceedings, Nature Conservation Council of NSW, 1999, at 107.

1. Move away from 'flexible' planning laws – the EDO noted that criticising the Court is by and large unjustified, as the Court is not the source of the problem. It was considered that the source of dissatisfaction is derived from the unsatisfactory legislative context in which the Court is deciding appeals. The EDO noted that it is important that environmental planning instruments contain strong, clear and unambiguous provisions defining what does and does not constitute acceptable development. The EDO also noted that the planning system is moving away from this approach.
2. Amendment of Section 79C(1) of the Environmental Planning and Assessment Act - this section defines what a consent authority must consider when determining a development application. Amendments to this section in 1997 reduced the number of 'heads of consideration' from an extensive list to five. The EDO considered that the effect of this amendment has given far greater discretion to consent authorities, including the Court on appeal, to decline or fail to consider certain matters without the decision being likely to be overturned under judicial review.
3. Mandatory consideration of environmentally sustainable development – the consideration of ESD principles is not included in section 79C(1) as a mandatory factor for consent authorities to take into account in determining development applications. The EDO considered that ESD is unlikely to be achieved unless it is mandatory that site specific development decisions take ESD into account.
4. Expansion of list of designated development – the list of designated development, found in schedule 3 of the EP&A 1994 regulations, needs to be updated and expanded. This list is a major determinant of whether an environmental impact statement needs to be prepared, and whether the concomitant public participation rights accrue.
5. Amendments relating to threatened species conservation – the EDO highlighted inconsistent provisions regarding the display and third party appeal rights for species impact statements.
6. Expansion of third party rights in class 1 proceedings – the EDO considered that the EP&A Act and the Land and Environment Court Act do not adequately provide for public participation in the determination of development applications by the Court. Areas of potential improvement included: extension of time for objector appeals; expansion of rights of third parties to be joined – there is no automatic right for third parties to be joined to class 1 proceedings as parties where they seek to oppose a grant of development consent, except for designated development.
7. Notification of modification applications – the procedure for notification of applications for modifying development consent is inadequate, with the result that the Court may not be fully informed of objector concerns when considering a modification application.
8. Benches of multiple Judges/Commissioners – the EDO considered that it would be conducive to a full and thorough consideration of issues raised before the Court if it was resourced to permit three Commissioners to sit on complex matters. The EDO noted that consideration should be given to the following: increasing the number of Commissioners to the Court; increasing the Court's budget to ensure the appointment of additional Commissioners; and amending the Act to require a panel of three Commissioners (or a Judge assisted by two Commissioners) to determine complex matters, such as applications for consent for designated development.
9. Expand expertise of Commissioners to include ecological expertise – the Court does not have a Commissioner with ecological expertise, ie, assessing the likely impacts of

development on flora and fauna. The EDO considered that at least one additional Commissioner having ecological expertise in flora or fauna should be appointed to the Court.

In regards to ‘any other matters’, the EDO supported the use of alternative dispute resolution techniques such as mediation. However, the EDO noted that the use of these techniques must recognise the importance of public involvement, and that the interests of third parties should be adequately taken into account.

In summary, the EDO considered that the Land and Environment Court has by and large operated successfully in reviewing decisions relating to development applications. In its view, the Court’s class 1 merits review jurisdiction should be retained, as should many of the practices which facilitate public access to the Court, including the practice that cost orders are only made in exceptional circumstances. The EDO considered that much of the apparent dissatisfaction with the Court is due to the failing of the planning system, which provides great discretion to consent authorities in approving developments, and therefore little guidance to the Court as to the range of development which is appropriate on a particular site.

4.4 The Submission of the Property Council of Australia

The Property Council argued that the role of the Court to review council decisions based on merit is of fundamental importance due to the structure of local government. The Property Council recognised that there is no separation between the legislative and executive powers of councils. The elected bodies are responsible for both making the law (ie planning instruments) and making decisions/judgements in determining development applications based on those instruments. The Property Council argued that councils are political bodies and often make political, rather than purely merits based, decisions. Development applications are often refused despite compliance with a council’s policies, or new draft policies are introduced as a basis for rejecting applications which councils are made aware of from pre-application development meetings. The Property Council concluded that it is crucial that there be a right to a merits appeal on council development control decisions to ensure justice, equity, transparency and accountability.²⁴

The Property Council also noted that the current system is too adversarial. It recommended that an inquisitorial system be adopted as this better suits the forensic task involved in planning disputes. The Council also noted that it is illogical for the Court to consider evidence without knowing the urban context in which the proposed development is located, and recommended that the Court should carry out site inspections prior to receiving evidence from both sides in Court.

The Property Council noted that many planning instruments are not reviewed on a regular basis. This can result in the instrument not reflecting existing community needs and the

²⁴ The Property Council of Australia, *The Land and Environment Court’s Role in Reviewing Development Applications*, 8 August 2000, at 1.

urban environment, and that strict compliance with the instrument would result in poor decisions. The Property Council argued: “Where there is compliance with the thrust of modern planning instruments, the development should be approved. The Court should also place a greater emphasis on the merits of the proposed development where there is non-compliance with out-dated planning instruments that no longer reflect the current needs of the community. Conversely, where modern instruments are in place, the Court should not undermine certainty in the planning process by approving development contrary to the standards contained therein.”²⁵

While the Property Council supported the principle of mediation, it noted that mediation often failed because councils have been unwilling to delegate the appropriate powers to their representatives to negotiate binding outcomes. Should this process fail, an appeal should be able to be made to the Court.

The Property Council then proposed an alternative model for dispute resolution. Under their proposals, an applicant can: elect to mediate; take the matter to an Expert Determination Panel; or proceed to a Court hearing.

An Expert Determination Panel would provide a legally binding decision, made by a panel of experts. This would be useful for issues of a technical nature and third party appeals. Only points of law could be referred to the Court for determination.

Under the third option, the Court would hear an appeal adopting an inquisitorial system, rather than the adversarial currently used.

The Property Council also believed that the Court should be accountable for the long term and cumulative impacts of its decisions, and should establish a process for monitoring decisions and publishing statistical information on the Court and its decisions.

4.5 The Submission of the Local Government and Shires Associations of NSW

The Associations have the following broad policy positions in relation to environmental planning and the Land and Environment Court:

- 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;

²⁵ The Property Council of Australia, *The Land and Environment Court's Role in Reviewing Development Applications*, 8 August 2000, at 3.

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

The Associations were of the firm view that only matters of law should appear before the Court, as value judgements should be made politically before council. They argued that 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.

In regards to the constitution of the Court as it now stands, the Associations believed that in the case of determining complex appeals before the Court, a multi-member panel with appropriate knowledge and expertise should be engaged.

The Associations also argued that where a development application is refused by council because it is inconsistent with the provisions of a development control plan or a local environmental plan, there should be no right of appeal to the Court. The Associations noted that significant time and resources, including community consultation, are spent developing these plans, and when a decision of the Court disregards these provisions the Court is marginalising the views of the community and disregarding their aspirations for their neighbourhood.

The Associations also strongly believed 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. It was noted that a 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 Associations argued that communities feel they have been marginalised. The Associations recommended that if an applicant seeks to rely on amending plans in an appeal hearing, the application should be returned to council for full reconsideration of the application in light of the amendments made.

The Associations also noted that they have received numerous representations from councils criticising the nature of class 1, 2 and 3 appeals as being too adversarial, complex and expensive. Councils must engage legal representation and experts, resulting in costs incurred which in some cases, the Associations argued, appear to go beyond what is reasonable and necessary in order for the Court to determine the matter. The Associations recommended that the Working Party consider changes to practices to allow appeal practices to be handled in a less formal manner.

The Associations were strongly critical of the time period in which councils can assess development applications. Current legislation provides that councils must assess an application within 40 days. Failure to determine an application within this period is termed a deemed refusal, which is appealable to the Court. The Associations noted that weekends, advertising periods (usually 21 days) and requests for extra information from applicants diminish the 40 day period. The Associations argued that the current time period to assess applications is not sufficient for proper assessment, and recommended legislative

amendment to provide for 40 working days be enacted.

Other recommendations that the Associations made include:

- Compulsory site visits by Judges and Commissioners;
- Judges and Commissioners of the Court should undergo training in the concepts of ecologically sustainable development and total catchment management;
- 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;
- The Court should return to a conservative application of SEPP 1 which is consistent with the original intent of the policy;
- Orders for prohibited or illegal uses be attached to the premises/land so that any future operator will inherit the Order served;
- The Court stamp the plans of development applications when approved by the Court;

6.0 THE MAIN ISSUES OF CONTENTION AND AGREEMENT

It is apparent from the above submissions that there are several key issues. These are discussed below.

6.1 Merit Appeal versus Judicial Review

The fundamental issue arising from the review was the merit appeal of a council's refusal of a development application. Clearly, councils and their representative organisations are not happy with the operation of this system, and strongly argue for the merit appeal option to be removed. It is argued that as councils are the 'community's representatives', they are the most appropriate body to determine an application based on merit. Sydney City Council also quoted the following judgement extracts to support the notion that courts should not be reviewing decisions on their merits. Their submission quoted the High Court in 1996:

In the present context, any court reviewing a decision upon refugee status must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision. This has been made clear many times in this Court. For example, it was said by Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR at 35-36:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the Court avoids administrative justice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.²⁶

²⁶ City of Sydney, *A New Legal and Administrative Framework for Development Appeals. Submission by the City of Sydney*, prepared by PricewaterhouseCoopers Legal, February 2001, at 5.

The City of Sydney submission then quoted observations from Brennan J that courts are not equipped to make policy:

If it be right to say that the court's jurisdiction in judicial review goes no further than declaring and enforcing the law prescribing the limits and governing the exercise of power, the next question immediately arises...what is law? And that question, of course, must be answered by the court itself. In giving its answer, the court needs to remember that the judicature is but one of the three co-ordinate branches of government and that the authority of the judicature is not derived from a superior capacity to balance the interests of the community against the interests of an individual. The repository of administrative power must often balance the interests of the public at large and the interests of minority groups or individuals. The courts are not equipped to evaluate the policy considerations which properly bear on such decisions, nor is the adversary system ideally suited to the doing of administrative justice: interests which are not represented as well as interests which are represented must often be considered. Moreover, if the courts were permitted to review the merits of administrative action whenever interested parties were prepared to risk the costs of litigation, the exercise of administrative power might be skewed in favour of the rich, the powerful, or the simply litigious (*Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1 at 37).

In contrast to the above suggestions, the Chief Judge of the Land and Environment Court has stated:

...I see the Land and Environment Court as a fundamental plank in the democratic process. Every individual person who considers himself or herself aggrieved by the decision of a decision-maker should, in a democratic society, have a right of appeal to an independent body. Such right of appeal exist for all sorts of other administrative decisions – those of the Tax Commissioner, or the Minister of Immigration, to name but two. The local council should not be the final decider, and the judges and commissioners of the Court should also be accountable by means of the appellate process. That is a model that has stood the test of time, and I can see no reason why it should be disturbed.²⁷

In relation to the merit review of a council's determination, Sheahan J has noted the following:

In that review local government appears to be arguing, firstly, that as councils are elected by the citizenry and courts are not, council decisions should be final, and not subject to appeal or review.

Historically, this argument has long since been rejected, and throughout my lifetime of dealing with councils, it has been clear that the institution of local government has been

²⁷

The Hon Justice Mahla Pearlman AM, Chief Judge of the Land and Environment Court, "The Role and Operation of the Land and Environment Court", 27 August 1999.

more opposed to review of its decisions by a higher level of government (such as the State Minister for Planning), than by a Court where it has a chance to argue its case.

Local government's 'fallback' position is that the court should review only those council decisions shown to be 'unreasonable'.

This would replace many class 1 merit appeals with class 4 judicial review cases. That would be a dramatic change, for which I can, as yet, detect no political will, but, if it happens, the impact on the court will be dramatic, and the role of the non-lawyer experts much reduced.

After the review is completed there will undoubtedly be some change.²⁸

Sheahan J adds that alternatives worthy of consideration involve the incorporation of more merit review processes before the council makes its decision on a proposal.

6.2 Reform of the Planning System

John Mant agrees that it is not the Court that needs to be reformed but the system before that stage.²⁹ Mant argues that it is before the appeal to the Court that the system is fundamentally flawed, and it is this part that needs fundamental reform. Mant then noted that Liverpool and Fairfield Councils have instituted independent hearing processes to hear and report on disputed applications, and that this model is working well.

Mant develops these themes further and argues that there is an inadequate separation of powers in the legislative and arbitral functions involved in operating the planning system, particularly at the council level. Councils are required to make all their decisions using parliamentary style meetings with parliamentary rules of debate. Decisions on development applications are arbitral and not legislative, and the principles of fairness and due process should apply to these decisions. Mant noted that the typical council meeting at which development applications are considered and decided bears little similarity to a meeting that complied with the principles of fairness and due process.

Mant then noted that some people consider this reasonable, on the basis that these decisions are not arbitral but legislative, and therefore political. However, Mant asks if the decision is political, why do we have the numerous statutory controls and legislation that requires the decisions to be taken within those controls? Why can the decision be considered political when taken before the council, yet when the decision is subsequently taken by the Court, 'in the shoes of the council', it clearly follows a process that is judicial in nature? Mant states:

²⁸ The Hon Justice Terry Sheahan, Judge of the Land and Environment Court, "Environmental law – present and future – lessons learned and visions for the future – the experience of the Land and Environment Court of New South Wales." Keynote Address to the International Seminar on Environmental Law, Brasilia, May 9-11 2001.

²⁹ See Mant, J, "The Land and Environment Court is not the problem", in *New Planner*, March 2001.

If the rehearing is subject to detailed rules of fairness and due process why is not the decision in the first instance? Why should a decision that takes a few minutes before a Council be taken again in a Court after a two day hearing? Surely we should spend more time the first time around and get a fairer process.³⁰

As noted in the review of their submission, the EDO also had strong views on the planning system, and suggested that the Court itself was not the problem, but the unsatisfactory legislative context in which the Court operates. The EDO noted that it is important for environmental planning instruments to contain strong, clear and unambiguous provisions defining what does and does not constitute acceptable development. The Property Council expressed their frustration at planning instruments that are not reviewed regularly, but expressed their support for them where modern instruments are in place. In regard to current planning legislation, Sheahan J has noted:

Our Court sees every single day confusing and conflicting planning documents, all of which we are supposed to consider closely in our decision-making. Clarity and consistency have proven to be the exception rather than the rule, and contemporary relevance is often hard to identify...

Clearer instruments prescribing what the community wants and proscribing what it does not, and doing so specifically and unequivocally, will be a great achievement, and a big help to all.³¹

In February 2001 the State Government released the White Paper – PlanFirst. The White Paper reforms provide a ‘whole of government’ approach to environmental planning, and it is envisaged that all plans will be written in plain, jargon free language.³² However, these proposed reforms do not remedy any of the problems that Mant has identified above.

6.3 Independent Panel Assessment of Development Application Appeals

Both Sydney City Council and the Property Council have suggested the establishment of panels to hear development application appeals, as an alternative to the Court. However, as noted earlier, the proposed alternatives suggested by the two parties are quite different from each other in their method of operation. The Sydney City Council option proposed that the panel not determine appeals based on merit, but on whether the decision was unreasonable in the circumstances of the case. In contrast, the proposed Property Council panel would be comprised of experts, and would be most useful for issues of a technical

³⁰ Mant, J, “The Land and Environment Court is not the problem”, in *New Planner*, March 2001, at 28.

³¹ The Hon Justice Terry Sheahan, Judge of the Land and Environment Court, “Environmental law – present and future – lessons learned and visions for the future – the experience of the Land and Environment Court of New South Wales.” Keynote Address to the International Seminar on Environmental Law, Brasilia, May 9-11 2001, at 39.

³² See: NSW Parliamentary Library Briefing Paper No 10/2001. *Proposed Changes to Environmental Planning in NSW*.

nature.

In contrast to the above suggestions, the Chief Judge of the Land and Environment Court has stated the following:

It has sometimes been said that merit planning appeals would be more successfully dealt with if they were hived off from the Court into some kind of planning tribunal. I believe that would be a grave and retrograde step at this stage of the evolution of the Land and Environment Court. The Court was set up to replace such a tribunal, and I venture to think it has done so successfully, and there is no justification for change....³³

6.4 Miscellaneous Matters

Sheahan J noted the following areas that the Court would be happy to act upon if the Land and Environment Court Act was amended, as follows:³⁴

- A compulsory and binding section 34 conference; or
- Compulsory reference of a case to mediation; or
- A compulsory ‘paper hearing’ in simple cases.

It is also noteworthy that there are a few areas that have been raised where the Property Council, conservation groups, and local government agree. These include the need for a compulsory site visit by either the Judge or Commissioner, preferably both before and in addition to visits during the course of the hearing. It was also noted that it would be helpful if Judges and Commissioners had time to review the Statements of Evidence prior to the hearing, so that they are familiar with the issues.

Another issue raised by several respondents was that of whether a merit appeal hearing should be adversarial, as it now is, or inquisitorial. The Local Council and Shires Association described class 1 to 3 appeals as being too adversarial, complex and expensive. The Property Council considered the current system to be too adversarial, and recommended the adoption of an inquisitorial system. Mant agrees with this, and notes that as the Court effectively ‘stands in the shoe of the council’, it is not a challenge to the Council’s decision, and the Council is not the defendant. Mant explained:

Instead of an appeal being called ‘Fred the applicant verses The X Council’, it should be called ‘Regarding the appeal of Fred in the area of X Council’. The Council and anyone else that had a view about the application would then appear before the Court and put that view. The Commissioner hearing the appeal would lead the interrogation of witnesses. Others with an interest would have an opportunity to ask for clarification of experts testimony....Planning appeals should be about a fair and balanced

³³ The Hon Justice Mahla Pearlman AM, Chief Judge of the Land and Environment Court, “The Role and Operation of the Land and Environment Court”, 27 August 1999.

³⁴ The Hon Justice Terry Sheahan, Judge of the Land and Environment Court, “Environmental law – present and future – lessons learned and visions for the future – the experience of the Land and Environment Court of New South Wales.” Keynote Address to the International Seminar on Environmental Law, Brasilia, May 9-11 2001, at 39.

consideration of the respective rights of property owners, neighbours, the wider community and the environment. For this task the inquisitorial process would do a better (and cheaper) job than the adversarial process.³⁵

7.0 CONCLUSION

It is evident that there is some dissatisfaction within sections of the community about the role and operations of the Court. Sydney City Council for instance has proposed an alternative to merit appeals to the Court, recommending that an alternative appeal 'test' at a local panels level should be based on whether the decision was unreasonable in the circumstances of the case. In contrast, the Property Council argued that due to the structure of local government, the merit appeals process to the Court is of fundamental importance.

The Chief Judge of the Court has clearly indicated that she is not in favour of any fundamental change to the merit appeals process. If the present merit based appeals system is to continue, and the Government is looking to reduce the perceived conflict of the Court and the community, then the only alternative is to look at reforming the planning system. These are issues that are relevant to the reform of the planning system currently underway, with the release of the PlanFirst White Paper earlier this year.

³⁵ Mant, J, "The Land and Environment Court is not the problem", in *New Planner*, March 2001, at 28.