

**Delivered at the Premier's Forum on Residential Flat Design
Australian Technology Park, Redfern
24 March 2000**

**The Honourable Justice Terry Sheahan
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The Deputy Premier suggested that I might usefully take this opportunity to clarify the role and operation of the court, as, **apart from criticism**, there is surprisingly **widespread misunderstanding** of the position and work of the court in the process by which development, including residential flat development, gets the "go ahead".

Today is not the day - and probably **no** day is appropriate for a **Judge** - to answer some nonsense that is peddled about the court by its critics, but I will endeavour to clarify some of the recurring issues in a brief and fairly simplistic way, of relevance to the main issues of this Forum.

The court was established, very largely in its current form, and with most of its current functions, in the far-reaching package of ground-breaking Planning & Environment legislation introduced by Paul Landa in 1979.

I was honoured to serve as a member of that government, as Housing Minister 1980 to 83, and subsequently as Minister for Planning & Environment and, later, Attorney General, between 1984 and 88, and, as I have also now been a judge for some 3 years, I have some continuity of relevant knowledge, experience and involvement, with all elements of that legislative package, as they have functioned and evolved over that 20 years.

Paul Landa's second reading speech on 2 November 1979 gives valuable historical background to the **current scheme** of our planning legislation, and to the establishment of the Land & Environment Court as a Superior Court of Record, absorbing the old Land & Valuation Court (which lived "within" the Supreme Court), and the Local Government Appeals Tribunal, reflecting by the new court's status the then Government's sense of the importance of all types of planning and environmental litigation.

The first thing to note about the court is exactly that simple fact - it is a court! It is proud of its somewhat avant-garde procedures, and of its positive efforts to remain abreast of issues of importance to its users, but **it is a court - not** a lobby or pressure group, a research body, a debating society, an executive decision-maker, or a planning or architectural consultancy.

Courts are certainly neither immune from, nor oblivious to, public criticism.

Our daily papers are full of adverse comment about sentences, bail, parole, damages verdicts, and **various** types of successful appeals, but the court system is the **third arm of government**.

The Common Law world places great emphasis on the both the **supremacy** of the legislature, and the **independence** of the judiciary in a system of justice, and I believe a major challenge for a free society in modern times is to harness the creative energy of any conflict between separate arms of its government.

The courts **do not make** the statute law, **nor do they set** government policy, and they must, of necessity, function somewhat differently from the legislature and the executive. For a start, they cannot respond to criticism in the same way as the other two arms.

In doing their work courts must **be** fair, efficient, cost-effective, thorough and timely. To that list the Land & Environment Court would add “user-friendly”. Courts also must be **seen** to be all those things; **plus** they must **observe** principles of law to solve new problems or adapt old solutions; **and** they must **explain** their decisions.

The product of any court’s work is **decisions**, and **decisions are the answers to questions posed by litigants**. It is a source of eternal frustration to judges that these answers are loudly criticised most often without **any regard at all** to the questions.

The Land & Environment Court does **seven** classes of work. In today’s discussion the court’s work in class 4, where it reviews the **processes** followed by councils in reaching decisions on development proposals, is perhaps not as **directly** relevant as the court’s work and jurisdiction in **class 1** - the environmental planning and protection appeal division - which accounts now for more than half our annual filings, and is where the court examines the **outputs** of those Council processes.

In class 1 the court hears and determines appeals, which are brought largely by those whose development proposals have not met with a favourable decision from the relevant local government council, which is charged by statute with the **primary** responsibility to grant consent to, or to refuse, development applications.

Faced with a council refusal of a DA, one would expect a proponent to seek advice on the prospects of a successful appeal. Faced with an appeal the Council presumably seeks advice also as to those prospects. Only about 1% of development applications find their way to the court, and many of those are then resolved by the disputants without the need of formal adjudication.

As with all court adjudications, some cases which come on for a full court hearing succeed, and some fail. The judgments that are made and published are obviously the resource upon which those who advise proponents and Councils will draw, in predicting outcomes.

We are all vigilant about the precedential impact of our decisions.

In the event of a disappointed proponent bringing an appeal in class 1, the law lays down quite precisely the way in which the matter is handled and determined by the court.

The Court Rules set out the pre-trial procedures to be followed by all parties; the Registrar supervises the narrowing of issues in dispute, and the filing of statements of the evidence to be relied on, and then the court sets a date for the hearing.

If any issues pose specific **legal questions** they are often set down for a separate trial before a judge but, if not separable, the whole matter may be so listed. A recent example of that is the Chief Judge's decision regarding a Salvation Army project in the Newcastle area - a project she found to be both of merit and legally prohibited.

When the issues are down to purely **merits matters** the Chief Judge sets the case down before one commissioner, two commissioners, a judge, or a judge and a commissioner.

That is the Chief Judge's statutory role (Court Act s 30ff) and she takes into account the current state and backlog of the court's list, together with matters such as the size, nature, complexity and possible controversy of the proposal, the number of issues involved, and the possible length of the hearing. As she herself recently said of listing **more than one person**:

“The purpose of doing that is not that it will result in a better decision, but it enables a difficult task to be shared. I emphasise that such an allocation of cases has a trade-off - it has an effect on the median time for disposal of cases, since less (sic) judges and commissioners will be available to hear them. Accordingly, a balancing act is required, and I endeavour to reach that balance when settling the court list.”

It is sometimes suggested that the planning appeal system could benefit from more “safety in numbers”; that appeals could or should be heard more regularly by more than one full-time member of the court’s personnel, and/or that those personnel could possibly be supplemented, or even **replaced**, by a panel of part-time experts.

Such initiatives will call for more government resources, and/or more customer patience.

For my own part I would like to see more use of mediation processes, but the relative value of any alternative systems suggested, and their respective costs to all concerned, are properly matters for the executive, and perhaps then the legislature, to consider, and they seem set to be the subject of some further review quite soon.

The court will, as always, be happy to help in any examination of its work.

However, it should be remembered that the court was set up, in part, to **replace** a predominantly lay, expert, and part-time tribunal, and any reversal of that policy decision should receive the most careful of consideration.

A **specialist** court, with exclusive jurisdiction in planning and environmental matters, and with judges and commissioners specialising in those matters, seems to me to be in the best interests of the public, the litigants and the environment generally, but that is my own opinion on an issue best left for another day.

Let me now say a little about the hearing of a class 1 appeal.

In dealing with the substance of the class 1 appeal, the court has the same functions and discretions as the consent authority appealed from, and the rules require the tendering in evidence, by the council, of **the conditions it would wish to see imposed** on any approval the court might, **against** the wishes of the council, grant to the proposal.

Standing in the shoes of the council, the court must fully re-hear the matter and determine the application in accordance with the law. It is not **judicial review** of the council’s decision - the court decides the development proposal afresh on its “merits”. It embarks on a thorough, focussed examination and assessment of the particular DA. The evidence of each side, especially their expert evidence, is rigorously tested under cross-examination, and, at the conclusion of the evidence, the parties make submissions on the evidence and the relevant law.

When I use the term “**the relevant law**”, I am referring to the EPA Act and other relevant State legislation, both statutory and delegated, especially that in the form of the hierarchy of environmental planning instruments provided for in the legislation. However, the court must also have regard to council’s DCPs and other policies,

and s 39(4) of the Court Act further requires the court to have regard also to “the circumstances of the case and the public interest”.

As with courts generally in Australia, and the rest of the English-speaking world, this appeal hearing is an **adversarial** proceeding, rather than a European-style inquisitorial one. The rules of procedural fairness or natural justice apply, but the strict rules of evidence do not - the proceedings are conducted with decorum, but with less technicality and formality than judicial review and criminal matters.

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. The judge or commissioner reaches the decision on the basis of the evidence, and **only the evidence** - we cannot take into account what politicians or the media say about the project, but **objectors** to a proposal often give evidence, even if the proponent and council reach agreement, and such evidence must be taken into the court's balance exercise. [See discussion in *Mobil Oil v Baulkham Hills Council (No.2)* [1971] 2 NSWLR 314 at 316-319].

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.

The Court Act (s 38(2)) provides that the court “may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the court permits”. The court also has the power to direct experts to confer; and it can obtain external assistance (Court Act s 38(3)), subject of course to remaining mindful that there are limitations on the court's resources.

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 often think it “wrong”.

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. That again is the law, laid down by the Legislature.

In determining the class 1 appeal, i.e. in giving “**proper consideration**” to the appeal, the judge or commissioner is **bound**, like the council, by s 79C(1) 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 ..., **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 judgment to see the considerations which prevailed, and/or the court’s analysis of them.

Obviously issues of **urban design**, defined more broadly than the architectural features of any class of buildings, will arise under the umbrella of “environmental impact” in s 79C(1)(b).

In our experience the usual urban design issues are those of setback, bulk, mass, size, depth, scale, overshadowing, site coverage, etc, **rather** than the aesthetics or architectural style of the proposed building, or questions of “**taste**”. Some of the first list of factors lend themselves to some level of objective assessment, but aesthetics largely do not.

General urban design considerations arise also under s 79C(1)(a), because specific criteria have been incorporated in various ways into environmental planning instruments, DCPs, and the Regulations under the Act.

So what do the critics find wrong with the Court's process and product?

Although I am conscious that some people think that the court should be abolished and local government left as a supreme decision-maker, I shall leave aside the question of whether decisions of councils **should** be subject to review by the courts **at all**.

That question has long been answered in the **affirmative** - in the case of development decisions, since 1946, and, in some other areas, much longer than that.

The State Legislature makes those decisions. It is elected from time to time by **all** the people of the State, not just those in any one local government area, and this State has long adhered to the legislative position that there **should be** a system of local government, but that the courts system should have the power, **in specifically defined instances**, to overturn or override decisions of elected local councils. As the Chief Judge said last year:

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 the commissioners of the court should also be accountable by means of the appellate process.

Councils seem generally to have **preferred judicial intervention** to that of the executive arm of government.

It is all a question of the community's desire for checks, balances, transparency and accountability.

The major criticisms I hear of the court's work and output, **apart** from its wide powers on appeal, and its usual single-member benches, seem to revolve around the use of **SEPP 1** to vary a council-sponsored development standard, and the inclusion in some court approvals of plans, which **differ** in some way not earlier considered by council, from that it rejected when it refused consent.

Let me touch briefly on each of these major criticisms.

The court has no greater latitude conferred on it by SEPP 1 than the council itself has, and **has had** for many years. Any departure from the stated development standard must be "reasonable", and, if the court allows the

objection, it will be **only after** the adversarial process has run its course, and the court **must give its reasons** for so allowing it.

Any change to SEPP 1 is a matter for negotiation between the levels of government. It has been around since 1980, and I understand there is a current specific, as well as an ongoing general, **review** of its operation. Any change in it will address the roles to be played respectively by councils, and, on appeal, by the court.

On the question of applicants **amending their plans**, “in running” as it were, the Chief Judge undertook, to the Local Government Association and the Court Users Group, to consider a rule change or a practice direction, if such were thought necessary and appropriate, and a draft has now been circulated for comment.

In the court’s experience, plan amendments are usually made in **response** to council or objector criticisms of the proposal, and to lessen its alleged adverse impacts.

Such concerns are usually raised in the statement of issues or in the statements of evidence of council’s witnesses. Very often they deal with design matters, but sometimes the concerns are spelt out late, and remedial suggestions arise late.

Urban and building design were issues in *Ricki* [1999] NSWLEC 295, which concerned the redevelopment of the Ambulance site in Quay Street near Railway Square. A very minor amendment to the design, made during the hearing and agreed to by the council, removed any reservations I could regard as reasonable in respect of the proposal’s overall quality.

However, we should put this amending plan debate in its proper context.

The Court of Appeal made it perfectly clear as long ago as 1974 - in cases such as *Manchil* and *Cambridge*, both reported in volume 2 of the 1974 NSWLR - that not only has the court **no** jurisdiction to entertain an **original** application, it cannot entertain **any** amendment which converts the original concept into something which is “substantially different” from that in the DA rejected below, or which produces a subject matter differing “in any material respect” from that which resulted in the appeal.

The present position, therefore, is that the council is **before** the court in the appeal in every real sense, other than (usually) assembly of all elected personnel, and can either raise a *Manchil* objection for decision when the question of amendment arises, or appeal to the judge or commissioner to exercise the court’s discretion to reject such a late amendment which the council has not had any or much opportunity to consider, let alone notify or exhibit. Such exercise of discretion may result in an adjournment of the case.

As a matter of interest to this discussion, both generally and specifically, Nott C did two things in a December 1999 decision [*Ly & Ors v Parramatta City Council*, 10375 of 1999]:

1. He exercised the court’s discretion to reject amended plans at a late stage of the hearing, even though they in his words “probably” satisfied the *Manchil* test [see par 35].

2. He rejected the proponent's appeal, partly on the grounds of its lack of quality design as required by an REP which had (under the terms of its own savings and transitional provision), in the case of the relevant application, status only as an exhibited draft REP [pars 5, 14, 36f].

Now, let me acknowledge at once that making decisions on what is "reasonable", "substantial", or "material", involves elements of subjectivity.

So does making judgments, at any level, as to what constitutes "good urban design", "design merit", or "design excellence".

All human decisions have, at least in part, **subjective elements**.

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.

Minds differ on such matters, particularly if one has to determine something like "excellence" rather than "merit".

Fortunately, however, the court has access to many years of precedents in which, at least, concepts of materiality, reasonableness, etc. have been explored, and, on these issues, **and** on design issues, it has, in an adversarial proceeding, the advantage of competing evidence and submissions.

So, what is good urban design?

The *HMAS Platypus* case in 1998 was a major and controversial class 1 appeal involving many issues.

The Commonwealth had developed a strategy plan for the site including specific design principles which "articulate(d) the built form to relate to adjacent properties", including one neighbouring property attacked by council in the court hearing, despite its earlier approval of it.

When the appeal was brought against the council's refusal, the proposal was very clearly presented to the court, in great, and graphic, detail.

Urban design was specifically raised as an issue in the planning context. Some minor but environmentally perceptive amendments were made to some design features during the hearing to soften the appearance and presentation of the project. **Everyone** agreed they improved it.

The case ran for 6 or 7 days, and, despite the assistance of a Commissioner, the judgment took me 2 ½ months. It ran for 56 pages, apart from voluminous attachments, and I **defy any council to publish in such detail its deliberations and conclusions** on a development application.

The council's criticism of my decision to allow the appeal neglected to mention that council's own LEP provided expressly that residential development was allowed on the site.

My judgment set out **all** the evidence and arguments in great detail. I had the benefit of hearing from an array of the most eminent of experts in Australia in all relevant fields, and I heard also from several neighbours.

One expert architect called by council said the development was “boring, repetitious and [involved] a process of extrusion as a substitute for urban design”. The Commonwealth called Professor Phillip Cox in support of the project and he said the proposal was very good, but “almost too modest for the site”.

The conflict between these two opinions was even more stark than any element of the proposal itself, but a choice had to be made, and, on balance, I preferred the evidence and arguments of the Commonwealth.

Lastly, I should like to say this.

It is not part of a judge's lot to be critical or didactic in a discussion such as this, and I readily acknowledge how hard it is to make clear "laws", or even clear statements, about subjective things, but, if I were to be allowed to give one piece of advice to councils and the department, it would be this:

In the court we see a wide variation in the quality, the internal consistency, the comprehensiveness, and the contemporary value and utility, of councils' planning instruments, their DCPs and other policy documents. Some are excellent, some quite ordinary, and some very poor and unhelpful to anyone.

It is to these documents that the court **must pay very close attention** under s 79C(1)(a).

It is in LEPs and DCPs that one usually finds planning objectives, performance criteria, and development standards. That is where one would normally find any urban design or architectural targets. If so, the court will deal with such matters in the same way it does other evidence and considerations.

The "**better**" the various documents clearly reflect the prevailing views of a council, and its community, the more weight will be accorded them, and the more certain it will be that the decisions that emerge from the planning and development assessment processes, at the local level, and at the court level, will be of value.

Regrettably, clarity and consistency are the exception rather than the rule in this regard. The instrument analysed twice by me and once by the Court of Appeal in *Kinley v Wyong Council* is an example of the least clear and most unhelpful of instruments we encounter.

These values of clarity, consistency and contemporary relevance should not be lost simply because council and the Minister have disagreed on the content of a proposed LEP, and council has sought to achieve its desired result by putting other matters in a DCP.

The court cannot adjudicate on any difference between the council and the Minister, and substitute its own planning opinion for the plain words of the LEP, and the DCP must necessarily come lower in the documentary "pecking order".

This problem of drafting good instruments poses a resources issue for local councils, particularly the smaller ones, but I am sure that the Department - with the government's support - could prove to be helpful, if both levels of government worked together to maintain a high level of quality in **all** environmental planning instruments.

All of this work will take place against a background of what appears to have been a fairly steady move towards highly discretionary instruments.

Greater discretion, rather than clear and reasonably specific control, seems to me to assume a proposition that there is a level of fundamental agreement among planners as to what is a proper and appropriate planning outcome for any number of different situations.

The juxtaposition of expert witnesses' testimony in our court **every day**, espousing diametrically opposed positions, serves to demonstrate on a daily basis that this underpinning proposition is fairly thin.

The court operates with every intention of giving effect to the relevant planning controls, but often finds it enormously difficult to do so because of their lack of clarity.

If you want it, **prescribe** it; if you don't want it, **prohibit** it; but please do so specifically and unequivocally.

When all is said and done, environmental planning instruments are a species of subordinate legislation, and one must always opt for greater certainty and consistency when it comes to the application of legislation.

It should say what it means and mean what it says.

Similarly, at the court level, pay very close attention to the "without prejudice **conditions**", albeit they are prepared on the reluctant assumption of a court approval.

They are often the subject of a significant "trial within the trial" at the end of a merits hearing.

The conditions Council asks the court to impose on any approval are often stringent, demanding and costly.

The better they are, and the better the arguments that are assembled to support them, the better will be the development which results from a court-upheld appeal.

Let me conclude

We are all striving to play a useful role in achieving a better built environment, and the court wishes this Forum every success in its deliberations.

Thank you.
