

**ADDRESS TO SEMINAR FOR NEW COUNCILLORS CONDUCTED BY NEERG  
SEMINARS**

**MERIT APPEALS – FUTURE DIRECTIONS**

**FRIDAY 14 MAY 2004**

May I firstly congratulate those of you here today who have recently taken up office as members of a Council. I would particularly like to congratulate those of you who have been elected for the first time. I have no doubt that you bring to your new role a vision of the contribution you can make to the good government and planning of your local community.

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

Planning is quite different. The role of a council in planning is complex, both at the policy or macro level, where local environmental plans and development control plans are made, and at the operational or micro level, where in relation to a particular development project, state and regional plans and policy objectives may have to be reconciled with the perceived needs of the local community, often confined to the residents of one street or indeed only a few of the residents of that street. It is not

uncommon to find that a decision with respect to the permissible uses or height or density of development in a particular area, which seemed quite sensible at the policy stage, comes to be seen by some people as quite alien when the architect prepares a design for a project on a particular block of land which conforms to those parameters. It is also not uncommon to find that the perceived impacts of a particular project will lead to a response that the zoning should be changed or a new development control plan made in order to defeat the application which is commonly described as being “contrary to the public interest.” I venture to suggest that most, if not all of you, will be subject to the pressure of lobbying, petitions and streams of correspondence in relation to a particular development application during your term of office.

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

I trust that as you embark upon your term of office you will enjoy the challenge which comes with making decisions which require the reconciliation of disparate community values and aspirations in an environment where the decisions you make will have significant and lasting impacts upon the community. Decision making in planning is not some academic or theoretical exercise. If a project is approved, the chances are

that you will get to see the real thing accompanied by either a sense of pleasure, tinged with relief, or sometimes, humility, tinged with embarrassment.

Since the earliest days of local government, council decisions in relation to applications for permission to erect buildings or subdivide land have been the subject of review. The right of appeal has generally been to a court - initially the District Court, at times to an expert tribunal. Today, an appeal lies to the Land and Environment Court, which is comprised of lawyers and expert planners, engineers and architects.

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

- a change in the hearing process for class one appeals which now commence on site and where objectors' and other evidence is taken in an informal manner;
- the pre-trial case management of many appeals, which identifies and limits the issues to be litigated and the evidence to be presented at a hearing;
- the taking of concurrent evidence from experts, who are sworn in together and whose evidence is taken in discussion with each other, the representatives of the parties and the Court;

- the appointment of court experts to provide evidence in many cases. This involves the Court identifying issues suitable for a court expert, whereupon the parties are invited to agree upon the person to be appointed. The parties may cross-examine the court expert and, with the leave of the Court, call an additional expert to give evidence on the issue;
- the confining of cross-examination to matters which will be of real assistance to the Court;
- changing the basis for orders for costs in merit appeals so that they can be made if the Court is satisfied that it is fair and reasonable to make such an order.

Because some of the changes are relatively recent, it is not possible to provide you with a comprehensive set of statistics as to their impact. However, the reports I have indicate that in many cases the hearing time of relatively complicated appeals has been reduced by one third to one half of the previously accepted time for such a hearing. Concurrent evidence is estimated to have saved six days in one complicated appeal and four days in another. Savings of this order are consistent with my expectation and, as practitioners become more familiar with the new processes, the time savings will increase.

I have spoken previously about the problems which courts have found with expert evidence in recent years. The Land and Environment Court must, by the nature of the problems which come before it, consider many questions in areas of increasing complexity. In some cases, numerous questions involving areas of special learning may have to be resolved. The Court must be confident that the evidence which it

relies upon to resolve these matters is not affected either consciously, or more likely subconsciously, by the knowledge that the “client” has a significant “investment” in the outcome. This is only possible if a court expert, briefed by both parties and funded jointly by them, is available.

It is still early days for court appointed experts. At the time of preparing this speech about 40 had been appointed but only two cases had been heard where a court expert gave evidence. I have previously indicated that at this stage, a court expert will usually be appointed only when cost savings to the parties are likely or where the issue is of such complexity or significance that the additional cost is justified by the contribution to the integrity of the decision which is ultimately made. My expectation is that when a court expert is appointed, many more cases will settle and those which do not may occupy less time. The consequence will be that although preparation of the case may be more costly, there will be such significant overall savings that the appointment of a court expert will be justified in most cases. The court will monitor the position and, when I am satisfied that it is justified, the basis for appointment of an expert will be changed to require them in most cases.

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

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

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

It is likely that during your time as councillors, some matters will come to the Court in which your decisions as councillors will be overturned. This may happen for any number of reasons. The project may have been refined or the evidence given to the Court may provide a different emphasis of some aspects of the matter or bring forward critical information which was not available to the council. It has been my experience, both as an advocate and as a judge, that the appeal process, with the intense scrutiny it brings to a project, very often leads to improvements which allow consent to be given to a proposal which was previously unsatisfactory.

It is also often the case that when an appeal is upheld, it is because the perspective which the law requires the court to bring to a problem has the consequence that matters of state or regional significance, which may not have influenced the council, which has concentrated on the local issues, require that consent be granted.

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

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

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

With time, I anticipate that the publication of Commissioners' decisions which embody these principles will enable councils and other decision-makers, as well as

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

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

I wish you well during your time as councillors.