Report of the Land and Environment Court Working Party

September 2001

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Terms of Reference

On 7 April 2000, the Attorney General, the Hon J W Shaw QC MLC announced the establishment of a Working Party to 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 should 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.

Participants

The Working Party

The Hon J S Cripps QC, Chair

Justice D Lloyd, Land and Environment Court

Councillor Peter Woods OAM, Local Government and Shires Associations

Paul Chapman, Department of Local Government

Garry Fielding, Department of Urban Affairs and Planning

Maureen Tangney, Attorney General's Department

The Reference Group

A Reference Group, comprising legal, environmental and planning experts, was established to assist the Working Party. Members of the Reference Group played an ongoing advisory role, providing informed comment on issues raised in submissions or which otherwise came to the Working Party's attention in the course of the review. The members of the Reference Group were:

Justice Paul Stein, Supreme Court

Jeff Angel, Total Environment Centre

Christine Hanson, Department of Urban Affairs and Planning

Lisa Ogle, Environmental Defenders Office

Gary Shiels, Royal Australian Planning Institute (NSW Division)

Dr Lindsay Taylor, Property Council of New South Wales

Mary Lynne Taylor, Urban Development Institute of Australia

Dennis Wilson and Gary Green, Environmental and Planning Law Association

The Working Party extends its thanks to the Reference Group for the valuable assistance provided.

Executive Summary

The Working Party was established to review the way development applications are dealt with by the Land and Environment Court, and to examine the scope for the greater use of alternative dispute resolution. It was concerned with decisions made by councils pursuant to Part 4 of the *Environmental Planning and Assessment Act 1979*. It assumed the continuing operation of Part 3 of the legislation and examined processes by which applications for developments were assessed and decisions made, commencing with pre-lodgement discussions and concluding with a decision of the Court.

The Working Party viewed some recommendations as more significant than others. The purpose of this executive summary is to identify the more significant recommendations and to ensure their importance is not diminished by reason of their place in the list of recommendations.

Merits Review

The threshold issue the Working Party needed to address, and the issue which attracted most comment during the course of the review, was whether the Land and Environment Court should continue to conduct full merit planning appeals. Some submitted that full merits reviews should be abolished. Others submitted that merit reviews should be restricted. Most submissions directed to this matter were that the present system of merits review should continue. Some submitted that merit appeals, whether de novo (as at present) or restricted, should be determined by a tribunal and not a court.

For reasons which are explained in the body of the report, the Working Party recommended a continuation of full merits appeals and that they continue to be heard by the Land and Environment Court.

Alternative Dispute Resolution

The Working Party was of the opinion that greater use should be made of alternative dispute resolution (ADR) for the settling of development disputes and that the mechanism should be considered at every stage of the development application and review process. The term ADR encompasses a wide range of mechanisms, including mediation. The Working Party was of the opinion that even where ADR does not prevent a matter being litigated, it may serve to reduce the number of issues in dispute, and therefore the time required for hearing and the costs of both parties. Specifically, the Report recommends that Councils should consider establishing Independent Hearing and Assessment Panels, modelled on those of Fairfield and Liverpool City Councils, to provide a forum in which objectors and applicants may be heard in person, development applications may be independently assessed, and recommendations made as to how they should be determined.

Changes to Court Procedures

Less than 1% of development applications are determined by the Land and Environment Court, and these are generally dealt with in a timely way. However, it is still an expensive exercise to litigate a matter in the Court, and may cost parties tens of thousands of dollars. As parties normally bear their own costs, legal costs can seem prohibitive, especially for small, non-commercial developers, such as home owners.

Notwithstanding the Working Party's recommendations that the present system be retained, it was concerned that appeals to the Land and Environment Court were too costly. It must be remembered that although some people speak of developers in a pejorative sense, the term applies to anyone who needs permission to carry out activities on his or her land. A large number of applications lodged with councils and later the subject of an appeal to the Land and Environment Court are for building additions to houses and small businesses and/or the use of land for small commercial ventures. A significant number of applications heard in the Land and Environment Court extend over a period of 2 days. Although the information given to the Working Party varied, it took the view that the average cost of a 2 day hearing (including lawyers and experts) was between $20 000 and $25 000 for each party. The Working Party was of the opinion that the costs were excessive. As mentioned above, it recommends that ADR should be used more frequently. Further, it makes recommendations which, if implemented, would result in a reduction of costs without prejudicing the rights of any party. In particular, it recommends:

- Minor matters (that is, where the value of the development is less than half the medium house price in the local government area, and the development raises no general pubic interest concerns) should be dealt with by way of compulsory conferences with the presiding commissioner having the power to make a binding decision.
- Conferences for minor matters should generally be held on site, rather than in the Court, and should be conducted by a Commissioner with no cross examination and minimal formality. Appeals from compulsory conferences should be limited to questions of law.
- Subject to resources and it otherwise being appropriate, major matters should be dealt with by way of formal hearings before a panel comprising commissioners or a judge and commissioners. However, it recommends that cross examination be restricted.
- The formality of proceedings should be reduced and matters should be dealt with in a less adversarial manner
- Applicants should not, generally speaking, be permitted to rely on amended plans of development proposals unless the council has had a reasonable opportunity to consider the amended plans.

Changes to the Law

Although, as mentioned above, the Working Party concentrated on decisions made pursuant to Part 4 of the *Environmental Planning and Assessment Act 1979*, it deemed it appropriate to make certain recommendations for changes to the law which would assist the general decision making process. For example, it recommended:

- Section 82A of the *Environmental Planning and Assessment Act 1979* should be amended to allow councils to review their decisions in relation to development applications (granting consent and/or attaching conditions to a consent) for up to a year. At the moment, a 28-day time limit applies, and this forces applicants who have new information which could satisfy a council's concerns, to either submit a fresh application or seek consent orders from the Court.
- Section 96 of the *Environmental Planning and Assessment Act 1979* should be amended to give councils the power to modify development consents granted by the Court, subject to some safeguards. This should ensure that matters are not returned to the Court for determination without good reason.
- The importance of heritage and urban design should be reflected in an amendment to section 12 of the *Land and Environment Court Act 1979.*

List of Recommendations

For ease of reference, the Working Party's recommendations are listed below by chapter and cross-referenced to the page on which each recommendation appears in the text of this report. In the text itself, each recommendation appears at the end of the discussion to which it relates.

3. Pre-Lodgement Processes

Recommendation 1: Provision of information (page 18)

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

Recommendation 2: Pre-lodgement discussions (page 19)

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

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

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

Recommendation 3: Alternative dispute resolution (page 20)

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

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

Recommendations 9 and 32 also relate to alternative dispute resolution.

4. Council Processes

Recommendation 4: Duration of the assessment periods (page 24)

The 60-day assessment period applying to development applications for designated or integrated development, or development for which concurrence of a concurrence authority is required, and the 40-day period applying to applications for other types of development, should be retained.

Recommendation 5: Training on integrated development (page 26)

There is a need for appropriate training of approval body staff in the processes associated with the assessment of applications for integrated development. Lack of knowledge appears to be contributing to delays.

Recommendation 6: Training of local councillors (page 27)

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

Recommendation 7: Delegation to council staff (page 27)

Councils should consider delegating the power to determine development applications for development:

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

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

Recommendation 8: Modification of consents granted by the Court (pages 28-9)

Section 96 of the *Environmental Planning and Assessment Act 1979*, and the *Environmental Planning and Assessment Regulation 2000*, should be amended to give councils the power to modify development consents granted by the Court.

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

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

Recommendation 9: Alternative dispute resolution (page 33)

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

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

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

See also Recommendation 3, which refers to mediation and conflict management services offered by organisations such as the Community Justice Centres and the Australian Commercial Disputes Centre. Recommendation 32 also relates to alternative dispute resolution.

Recommendation 10: Councils' power to review their determinations (page 34)

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

5. Appeals to the Court

Recommendation 11: Training of judges and commissioners (page 39)

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

Recommendation 12: Time limits for lodgement of appeals (page 41)

The time limit of 28 days for appeals by objectors (under section 98 of the *Environmental Planning and Assessment Act 1979*) against a council's consent to an application for designated development should be retained.

The time limit of 12 months for appeals by applicants (under section 97 of the *Environmental Planning and Assessment Act 1979*) should be retained.

6. Options for Review of Council Decisions

Recommendation 13: Material available to the Court (page 47)

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

Recommendation 14: Merits review (page 50)

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

7. Composition of the Court

Recommendation 15: Qualifications for appointment (page 53)

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

Recommendation 16: Local government representation (page 54)

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

Recommendation 17: Use of panels (page 55)

Where appropriate, and subject to the availability of resources, major matters should be decided by panels comprised of commissioners, or a judge and commissioner(s), with relevant expertise. Recommendation 27 describes what matters are "major matters".

Recommendation 18: Part-time commissioners (page 56)

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

Recommendation 19: Role of commissioners (page 56)

Commissioners should continue to decide planning appeals, including both minor and major matters. Recommendation 25 describes what matters are "minor matters" and Recommendation 26 describes what matters are "major matters".

8. Court Processes

Recommendation 20: Cross-examination (page 60)

Rule 16(d) of Part 13 of the *Land and Environment Court Rules 1996*, which provides that oral evidence of any expert may only be given with leave of the Court, should be amended so that the leave requirement applies to all witnesses, not just experts.

A judge or commissioner should not allow cross examination unless he or she is satisfied that it will contribute to his or her understanding of the issues in dispute, and to control it accordingly

If Recommendations 25 and 26 are adopted, this recommendation would not affect conferences conducted to decide minor matters.

Recommendation 21: Use of experts (page 61)

The Court should encourage conferences of expert witnesses. Where the Court considers it appropriate, it should direct expert witnesses to confer of its own motion. The Court should consider amending its *Expert Witness Practice Direction 1999* to provide more details about conferences of expert witnesses, with the Supreme Court's new *Practice Note No. 121: Joint Conferences of Expert Witnesses* being considered as a possible model.

Recommendation 22: Formality of proceedings (page 62)

In accordance with section 38(1) of the *Land and Environment Court Act 1979*, the Court should discourage legal formality and technicality in dealing with development applications.

If adopted, the Working Party's recommendations in relation to minor matters should dispense with much of the formality currently associated with planning appeals: see Recommendations 25 and 26.

Recommendation 23: Case names (page 63)

Planning appeals should no longer be referred to as, "[applicant] v [council]", but instead as, "In the application of [applicant]; ex parte [council]".

Recommendation 24: Role of lawyers (page 64)

Lawyers should not be excluded from participating in the conduct of planning appeals.

Recommendation 25: Minor matters (page 65)

Where proposed development the subject of an appeal would have little or no impact beyond neighbouring properties, and there is no wider public interest involved, the appeal should be identified and dealt with as a "minor matter". In determining whether an appeal is a minor matter, the estimated value of the development should be used as a guide. As a starting point, where the estimated value of the proposed development is less than half of the median house price in the local government area, the appeal should be regarded as a minor matter.

Where a party submits that the appeal is not a minor matter, a judge should determine the question. Recommendation 26 describes how minor matters should be dealt with.

Recommendation 26: Conferences for minor matters (page 66)

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

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

Appeals from compulsory conferences should be limited to questions of law. Recommendation 25 describes what matters are "minor matters".

Recommendation 27: Major matters (page 67)

"Major matters", identified as those which are not minor matters, should be dealt with by formal hearings unless the parties reach a settlement by way of alternative dispute resolution facilitated by the Court (that is, preliminary conferences and mediation). As to the use of panels to determine major matters, see Recommendation 17. Recommendation 25 describes what matters are "minor matters".

Recommendation 28: Site visits for major matters (page 67)

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

Recommendation 29: Amended development applications (pages 69-70)

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

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

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

> *"(b1) except with the consent of the respondent, or by leave of the Court, the applicant shall not be entitled to rely at the hearing upon any amended plans of the development proposal unless and until the respondent has had a reasonable opportunity to consider the amended plans;"*

Recommendation 30: Applicable law (page 70)

The present legal position, that development applications are to be determined in accordance with the law at the time the decision is made (whether by the council or the Court), should be retained.

Recommendation 31: Stamping plans (page 71)

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

9. Powers of the Court

Recommendation 32: Court-assisted alternative dispute resolution (page 74)

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

Recommendation 33: Application of SEPP 1 by the Court (page 75)

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

Recommendation 34: Consideration of council policies (page 76)

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

Recommendation 35: Costs orders (page 79)

In planning appeals, the Court should generally make no order as to costs unless it considers that the making of such an order is fair and reasonable in all the circumstances.

Recommendation 36: Consent orders (page 81)

The Court should no longer grant development consents by consent.

Recommendation 37: Ancillary orders (page 82)

The Court should be given a broad power to grant easements as ancillary orders to a grant of development consent. This may be achieved by giving the Court concurrent jurisdiction under section 88K of the *Conveyancing Act 1919*. The power should be exercisable only by judges.

1. Introduction

1.1 Background

In April 2000, the Attorney General, the Hon J W Shaw QC MLC, announced the establishment of a independent Working Party to review the way development applications are dealt with by the Land and Environment Court ('the Court'), and to examine the scope for greater use of alternative dispute resolution. The Working Party was assisted by a Reference Group which provided expert advice on a range of issues that arose in the course of the review.

1.2 Public consultation

More than 400 individuals, community groups, industry and professional associations, local councils and government agencies were individually invited to forward submissions to the Working Party. In addition, public advertisements were placed in the press in May 2000, calling for interested persons to forward submissions by the end of June 2000. In the event, the Working Party continued to accept submissions until early 2001.

More than 300 submissions were received in total, with local councils well represented. A list of individuals and organisations which made submissions or gave advice is provided in **Appendix E**.

The Working Party also invited a number of organisations to make presentations to Working Party meetings, including representatives of Community Justice Centres, Fairfield and Liverpool City Councils' Independent Hearing and Assessment Panels, and the Council of the City of Sydney.

1.3 Scope of inquiry

The focus of the inquiry is on decision-making by councils and the Court with respect to development applications under the New South Wales planning system. Accordingly, the Working Party has examined processes ranging from the provision of information by councils (and other consent authorities) to prospective applicants, through to the delivery of written reasons for decision by the Court.

1.4 Consensus

As far as possible the Working Party sought to achieve consensus and was, to a large extent, successful in this endeavour. However, where unanimous agreement could not be reached, dissenting views have been recorded.

The representative of the Local Government and Shires Associations, Councillor Peter Woods OAM, concurred with many of the Working Party's recommendations. However, there were some key areas of disagreement and Councillor Woods prepared a minority report on these matters.

1.5 Developments during the course of the inquiry

During the course of the inquiry there were a number of developments relevant to the matters being considered by the Working Party. These developments are briefly described below.

1.5.1 PlanFIRST

The Department of Urban Affairs and Planning ('DUAP') has issued a White Paper, *PlanFIRST*, containing a package of reforms to modernise and simplify the environmental planning system. The purpose of the White Paper is to inform people about the changes and to seek comments.

The White Paper proposes changes to the form and content of plans at local, regional and state levels. There will be:

- A single local plan for each council area
- A single regional strategy for each region in NSW, to give a common direction to local plans
- State planning policies in a single document to improve accessibility and inform regional planning

Further information on *PlanFIRST* is available on DUAP's web site:

www.duap.nsw.gov.au/planfirst

1.5.2 Review of SEPP 1: Development standards

State Environmental Planning Policy 1 ('SEPP 1') is a State policy that allows a local council to vary a development standard where strict compliance with the standard would be unreasonable, unnecessary or would hinder the objects of the Environmental Planning and Assessment Act 1979. SEPP 1 was gazetted in 1980.

DUAP commissioned an independent review of SEPP 1 and the report on this review was completed in November 2000. The report concluded that SEPP 1 should be retained but recommended changes to improve how it is used.

DUAP has now exhibited a number of proposed amendments to SEPP 1, and has advised that the intention of these amendment is to:

- reinforce the original purpose of SEPP 1 (see **9.2 Perceived overuse of SEPPs)**
- restrict the use of SEPP 1 for subdivision of rural land

The Working Party noted that the Court's approach to SEPP 1 is already consistent with the first dot point above. However, the Working Party acknowledged that the proposed restrictions on rural subdivision represent a significant change.

1.5.3 Land and Environment Court On-Line

Another development during the course of the reference was the launch of the Land and Environment Court On-Line. This comprises a number of innovations which the Working Party believes will result in time and cost savings to parties, particularly those in rural and remote areas.

One of the most significant of these is an electronic callover process where a callover can now be conducted from a practitioner's office via the internet rather than requiring a person to appear before the Court. The advantage to practitioners (particularly those in rural or remote areas) is immediately apparent, having the potential to significantly reduce the costs associated with callovers. Other initiatives include the option to lodge documents and pay filing fees electronically, and an electronic diary in which parties will be able to view dates available for hearings and electronically request the allocation of those dates.

More information on the Land and Environment Court on line project is available on the Court's web page:

www.lawlink.nsw.gov.au/lec.nsf/pages/ecallover