Australian Centre for Climate and Environmental Law

The Institutional Design of the NSW Planning System - Councils, Panels and the Minister

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Speech to a seminar conducted by Australian Centre for Climate and Environmental Law

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INTRODUCTION

The recent 'reforms' to the planning system of NSW have seen a significant centralization of power in the hands of the Minister and appointed rather than elected officials.

Tonight I want to discuss the administrative and legal principles raised by these changes. I will be suggesting that there are real problems of potential and actual conflicts of interest, a lack of due processes and transparent procedures and therefore an increased perception of undue influence. The consequence is likely to be a continuing loss of community trust in the administration of the planning system.

To provide a theoretical background I will briefly discuss the separation of powers doctrine, the nature of a development assessment decision, and the principles of due process.

In the light of this background I will examine the range of hearing and decision bodies in the NSW planning system. I will suggest that the recent changes reflect the development industry's increased power over the development of planning policy and the assumption that the objective of the planning system is to facilitate development, rather than achieve well designed, sustainable and environmentally sensitive development.

THE SEPARATION OF POWERS ISSUES

It is one of my several public policy regrets that, when putting together the many reforms which appeared in the Local Government Act 1993, I did not pursue the complex task of applying the separation of powers doctrine to councils. I was too intent on sorting out the nineteenth century legislative legacies which required every council to have exactly the same guild based employment structure and division of jobs as every other council. Getting rid of the Town Clerk's and

Council Engineer's Certificates and their statutory roles and creating the new position of General Manager was change enough.

So the Act continues the confusion about the nature of the council itself. As a corporate body, saw a number of provisions in the Act the managerialist approaches of the then government which saw the council as a board of directors. However, the fundamentals of the Act assume, correctly, that a council is a parliament that meets in accordance with parliamentary rules of debate, with members usually operating as a government and opposition.

Yet the most publically contentious decisions that councils make are development control decisions having regard to a complex set of rules. To do this, elected representatives, meeting in parliamentary mode, conduct so-called hearings where submitters are given the right to address the meeting. There is then a debate amongst the councilors and the vote is taken. So what is wrong with this?

Well a great deal, I would suggest.

I want to spend a little time outlining why I have this view. I may say that I have had to address many councils either on behalf of an applicant or an objector, so I have had plenty of time to form the view that trying to conduct a proper hearing process in front of an elected council will always be wrong.

NATURE OF A DEVELOPMENT APPLICATION DECISION

A critical issue is the nature of a decision on a development application.

The courts have been confused but are moving to the inevitable and correct position that a development control decision is an arbitral decision. Part of the courts' hesitance is, I suspect, a reluctance to accept that the principles on which the courts work should fully apply to a class of decisions taken by a non-judicial person. Yet, while the council is not assumed to behave like a court, when the court 'stands in the shoes' of the council on a merit appeal, it behaves like a court.

A development control decision is required when a development application is to be judged having regard to rules to which statutory recognition has been given, or which have been consistently applied. A decision is needed because some measure of discretion is to be exercised within bounds set out in the policies.

Being an important mechanism to implement public policies, the public interest is an important factor in the making generally applicable development controls. The making of generally applicable development controls, I suggest, is a legislative decision.

When making an individual development control decision, as well as the public interest generally, there are likely to be parties with an interest in the decision. Obviously the applicant is one such person, but so also are those who may be

impacted by the exercise of the discretion. There may be public or community organizations with an interest in the proper administration of the development assessment system.

All those with an interest should be able to be heard and to be satisfied that their concerns have been properly considered.

SHOULD CONFORM WITH PRINCIPLES OF DUE PROCESS

In other words, an individual development control decision should comply with the principles of due process.

In this audience I am sure I do not have to spend time in detailing these principles, so let me just list my understanding of them. They include the right:

- To be heard,
- to know the case to meet,
- to a decision by an independent hearing body,
- to question and respond,
- to written reasons,
- and, possibly, to appeal on the merits.

HOW DO COUNCILS, COURTS, IHAPS, DAC, JRPPS, MINISTER MEASURE UP AS DECISION-MAKERS?

- THE COURTS COMPLY WITH THESE PRINCIPLES

The courts in NSW clearly provide due process. Judges cannot be and are not lobbied. Who will be the judge is not known until the day before the hearing. Judges should have no expectations from government or the private sector. (Although the out-of-date retirement age is watering this down a bit.)

A key accountability mechanism is that judges (and L&E Court Commissioners) have to provide written reasons for their decisions. This provides accountability and public assurance that the issues at stake have been properly considered.

I have one complaint about the Court's procedure. Instead of being adversial, merit appeals should be inquisitorial. The Court 'stands in the shoes of the council' and makes the decision anew. Instead of 'X v. The Council', the matter should be called 'Concerning the application of X'.

The Court should have before it the assessment (and any IHAP report) put to the council, any other submissions that council, objectors, or applicant may wish to put to the Court and an agreed list of issues. The hearing should only take submissions, unless there is a real contest about a fact. Expert 'evidence' should be given by submission. These changes, which are along a path that the Court has been taking anyway, should reduce costs and time.

- COUNCILS DO NOT COMPLY

Little about a hearing and decision before an elected council complies with due process principles.

Although the council officers' assessment report is usually made available a few days before, a party can raise new matters and make unfounded allegations at a hearing in front of the council and there may be no opportunity to respond or ask questions.

Being representatives, Councilors are not independent. They can be and are lobbied, with the possibility of them being told things that are not part of the material before the hearing.

Despite quite unrealistic ICAC recommendations, councilors cannot act more like judges in a council meeting. Decisions are not given following a private consensus seeking process, or the exchange of detailed written reasons. Given the parliamentary-like forum, the preparation of detailed written reasons and responses to those making submissions cannot be prepared. Often, again contrary to unrealistic ICAC recommendations, voting is often along party lines; suggesting decisions were arrived at prior to the hearing.

The absence of third party merit appeals against most development decisions means that, for applicants, there can be benefits in unduly influencing council decisions. Getting the numbers is usually the end of the matter. In States where there are wide ranging TP appeals there is less to be gained as an objector can always ask the court to reconsider the decision. In NSW objectors are left with only legal challenges which are much more expensive to mount and far more fraught.

- IHAPS

Deeply irritated with having to spend long hours waiting for my often pointless opportunity to address for three minutes a bunch of tired councilors who, too often, after a confused debate, just raised their hands in the same pattern as they had been all night, I started to advocate the establishment of what became known as 'Independent Hearing and Assessment Panels', or IHAPs.

For many years the Department of Planning dismissed the concept with a one-line comment so typical of policy discussion in this State, but, around 1997, by chance, an enlightened couple of Councilors at Liverpool supported the idea and the first IHAP was established. Fairfield City Council followed and a several more IHAPs have appeared since then.

Unfortunately, despite my sending regular papers to the ICAC, the Department, and the Local Government and Shires Associations, only recently has there been any real support for the concept of having a proper hearing process before a council considers an application.

IHAPs comply with all of the due process principles.

I will use the example of the one I served on for a while – the IHAP at Sutherland Shire Council.

Although those on the general panel of 18 are mostly active professionals, they are not allowed to practice in the Sutherland area. The members of the four-person panel conducting a hearing are only announced on the night of the hearing. With the reports and recommendations being drafted immediately following the hearings, there is no opportunity for lobbying.

Those attending a hearing will have seen the staff assessment report. All the original written objections are available to the panel. A proper hearing is conducted. People express a point of view; sworn evidence is not required. To get through the work, short time limits are set but the practice is to ensure everyone feels that the points they wanted to make have been put.

The written reasons for the recommendation to council generally reflect a consensus view reached by the panel members in a closed meeting immediately following the hearing. All of the issues put are responded to.

Councilors are not cut out of the decision process, but they don't hold another hearing in the inappropriate procedures of a council meeting. They do not have to follow the IHAP recommendation but, given that it is made public before the council meeting, there are political sanctions if those recommendations are carelessly ignored.

(I would like to see the Court to award costs where it comes to a similar decision as an IHAP.)

- MINISTER UNDER PART 3A

The Minister's decisions under Part 3A do not comply with the due process principles.

For a start, the Minister is potentially conflicted. She is a member of Cabinet and of a Party that, at least in the past, has collected sizeable donations from development applicants. She has responsibilities for ensuring that there is sufficient land for development and she clearly considers she has an obligation to encourage development and employment.

While these policy issues may be important matters for a decision-maker to have regard to, they should not overwhelm other environmental and sustainability issues, for which she and other Ministers also have responsibility.

Apart from the conflict of interest issues, there are a number of practices that give cause for concern about the transparency of the process.

Under Part 3A the Minister has powers much wider than any other Minister in Australia. Effectively she can ignore the local government controls applying to the site, so long as they do not specifically prohibit the use, in which case she has the power to spot rezone the site using the same application. She can also ignore the provisions of some environmental legislation for which another minister is responsible. (All this supports the adage that *planning controls are for vendors and flexibility is for purchasers.*)

Once an application has been accepted as falling under Part 3A, the applicant receives a list of matters that have to be addressed in the application. Following exhibition of the proposal and the receipt of submissions, the applicant is called on to respond to the submissions making any adjustments to the project. A list of commitments is to be proposed.

The Department then assesses the response and the proposed commitments and prepares a report and recommendation for the Minister, who then makes a decision. Only following the decision is the report from the Department made public.

There is only one point of time early in the process at which the public can make a comment. There is no opportunity to public comment on the applicant's response to submissions or its preferred proposal, unless there is a substantial change from that exhibited. Unlike when a council makes a decision, there is no opportunity to make submissions on the Department's advice to the Minister.

Although the Director General acknowledges that he meets with applicants, and presumably some objectors, there is no formal hearing process. The practice of responding to requests for meetings with interested parties throughout the process but not providing a formal hearing where all parties can hear and respond to all of what is being said clearly does not provide fairness and transparency.

The applicant has an appeal right but the public does not (unless the application is for 'designated development', i.e., large developments with major environmental impacts, generally not urban development).

Anyone may challenge the decision legally. For the most part judges have accepted that the Parliament wanted Part 3A to empower the Minister and have refused to interfere with the decisions on the grounds of unreasonableness or lack of consideration of all possible issues.

Because the transparency of the process is more opaque than that before a council, the powers under Part 3A do not comply with the adage '*that the greater the discretion, the greater the transparency'.*

There are some good aspects in the process under Part 3A – the setting of project specific application requirements for example – but so far a public consultation and application of the principles of due process are concerned, the process is deeply flawed.

- PAC

The Planning Assessment Commission has eight members, five of which are ex-senior public servants. The Chair is Gabrielle Kibble, who was for many years the head of the Planning Department and since retirement has held several important government positions. She is also Chair of the Heritage Council.

When the PAC conducts a review a panel of three members is formed. So far, the Chair has appeared to head all reviews.

Contrary to ex-Minister Frank Sartor's promise to have around 80% of his decisions under Part 3A delegated to the newly created Planning Assessment Commission, in November 2008, newly appointed Minister Keneally's made only a very limited delegation of her powers. The Commission's web page lists four decisions and somewhat more references for advice. By contrast, the Minister has made a large number of decisions of the type that Minister Sartor had intended to refer.

The procedures of the PAC are complex. Generally speaking, the Minister determines whether there is to be a public hearing. The majority of the determinations by the PAC have not involved a public hearing. Indeed there have only been two public hearings. Presumably, this is because a public hearing by the PAC abolishes any appeal rights by the applicant or third party if it is designated development.

For the non-public hearing determinations, as with the Minister's procedure, the PAC's procedure fails to comply with a number of the principles of due process. The assessment of the application is not made public prior to the Commission considering the application. There appears to be no right to address the Commission. Reading the short reports on its decisions, the Commission appears to conduct consultation limited to other public bodies.

- JRPPS

Joint Regional Planning Panels have been established for the six regions of the State. In the place of councils, they are to be the decision bodies on a wide range of middle developments of comparative small developments e.g. those costing more than $10millon.

JRPPs consist of three nominees of the State and, if the relevant council is prepared to play its part, two from the council of the area in which an application is being considered. One of the State nominees is the Chair, a position that has a clear leadership role. As well as making decisions in the place of the Councils, panels have been empowered make recommendations on LEPs and DCPs.

Effectively the five persons on a JRPP will merely replace the councilors. Little else of the typical council procedure will change. With DAs, Council staff will assess applications and make a recommendation. Hearings will be held similar

to those before a council. If the format of the Central Sydney Planning Committee is any precedent, the debate of the panel presumably will be conducted along parliamentary lines, with a decision by a show of hands. As is now the case with councils, reasons need only be given if the panel departs from the staff recommendation. The 'reasons' may be merely contained in a single sentence.

The main difference between a council and a panel is that, instead of being elected representatives and subject to re-election, the panel members will be appointed by the State and local governments. It is argued that panel members will not have to face the electorate and therefore should be less open to some pressures. But electoral accountability has not been replaced by a requirement to give detailed written reasons. And there are other concerns.

Policy Role a Denial of Democracy

The JRPPs have the potential to take away any form of local control over planning policies. The standard template for LEPs has already substantially downgraded the role of councils and communities in determining the future of their various places. The JRPPs can take away what power is left.

Not only is the assumption of this policy making role a denial of local democracy, it destroys the separation of powers justification for panels by giving it a legislative role as well as an arbitral role. We have seen the consequences of this lack of legitimacy in the farcical procedures of consultation recently adopted by the Planning Panel for Kur-ring-gai. This is no way to engender any community confidence in policy making under the planning system.

Conflicts of Interest and Panel Members

The State appointees are required to meet one of a range of expertise, including that of '*government and public administration'*. (Interestingly neither the SA or proposed WA panels have elevated ex-politicians to the status of 'expert'.)

One of the two council's nominees is required to have the same type of technical expertise as the State members, except the '*government and public administration'* category has not been included. Ex-State politicians can be appointed but not ex-local politicians.

Councils can nominate one non-qualified councilor and one that is qualified, or an external expert. The Code of Conduct issued for the members appears to discourage the appointment of staff, for conflict of interest reasons.

The Minister's *current* appointments, in the main, are a reasonable set of respected professionals; I note that few have design qualifications. (There is no oversight of Ministerial and Cabinet power to ensure this remains the case. Recent appointments to similar bodies in SA have seen some with close party connections and little else to recommend them. Given that in NSW ex-State politicians are included in the range of acceptable expertise, this is a concern.)

The problem is that, despite being quality appointments, a number of the members appear to be in active professional practice, some in the region of their responsibility. Chairs two of the most crucial regions are ex-politicians, one, an ex-National Party Minister and ex-orchardist, who has responsibility for planning decisions for the hotly disputed North Coast Region, is listed as being a strategic advisor to private clients.

While the Code of Conduct provides rules about conflicts of interest similar to those for councilors, there must be concern about a continuing and, possibly, fatal conflict between running a consulting business when you are one of three permanent members making discretionary decisions about very substantial developments. Unlike those sitting from time to time on an IHAP panel, the State appointed members of the JRPPs will become well know and visible individuals.

Obviously, if a panel member has acted for an applicant or an objector in the past that member would have to withdraw, letting an alternate member take the position. But what about the situation where, subsequent to voting to grant or refuse an application, the successful applicant, or objector, approached the panelist, or a partner of a panelist, with the offer of consulting work. Would it be appropriate to accept that offer, or should it be rejected because of the impression that it might be a reward for services rendered?

The Code of Conduct warns about members expecting preferential treatment from councils in their areas and gives the example of potential favors as a 'ratepayer'. But what about the dangers of being a consultant to a past applicant or an objector with respect to a development being decided by a council?

Comparing IHAP members

The IHAP process has been carefully designed to make the experts anonymous and not able to be lobbied.

By contrast, the Minister's panel members will quickly become significant figures in their respective regions. One can expect that the behaviour of panel members will be under very close scrutiny, especially in areas like the Northern Region where, in the past, activists have shown little fear of defamation in vigorously attacking the *bona fides* of those who make decisions contrary to their views.

Members are likely to become targets for all sorts of pressures and will need to carefully manage their contacts with the community and the developer worlds. They should foreswear invitations to lunches, corporate boxes and industry dinners. They should not respond in any way and at any time to any of the army of development facilitators that so pervade the NSW development scene and who will seek to attract clients by claiming influence on panel members.

Pity the Poor Council Nominees

The two council nominated members on the JRPPs are in difficult positions. Council assessment staff also may have problems.

Councils as a corporate body can make a submission, but that submission must be put together after council assessment staff have sent in their assessment and recommendation to the JRPP. According to the Code, staff are not to be influenced by the council's opinion. Given that assessment staff are employees of the council, although appointed and directed by the General Manager, they may, consciously or unconsciously, want to ensure that the assessment is not too out line with the likely view of the majority on Council.

And what does councilor member on the panel do? The Code expects that the councilor or councilors will form their own view, but, given that they are likely to be members of the majority on the council, it is likely that they will agree with council's view. The taking of decisions in public will make this more likely. The panel could find itself adjudicating between differing views between staff and councilors with a split in the panel between the majority of State appointed members and the minority of council appointed members.

Again the situation with IHAPs is superior. Because IHAPs either provide advice to councils, or have council's delegation, which can be removed, staff and councilors are reasonably comfortable with the respective separate roles. Councillors and the public can be assured that an independent body will scrutinize staff assessment reports. IHAPs can support staff who feel bound to recommend a DA that may be unpopular but in accord with the rules. Councilors can avoid public criticism about an unpopular but correct decision on the grounds it was supported by an independent body. And, in the end, councils are free to come to a contrary view.

Experience is that the IHAPs have a high measure of support from councilors, the public and, sometimes after an initial period, staff. By contrast, the relationships between the Minister's panels and councils and the public have the potential constantly to be fraught. Certainly the Department's convoluted rules regarding roles and conflicts reflect the unnatural nature of the relationships.

Supporters of the JRPP panels rejected the IHAP model because it does not take power away from elected councilors and therefore offends the proper application of the separation of power doctrine. This is true. It has been this ultimate power to reject an IHAP recommendation that has given the model high acceptance from the councils and communities that have one.

The concern that councils may irresponsibly reject IHAP recommendations could have been reduced had government, or the Court, have provided that if, on appeal, the Court came to the same conclusions as the IHAP, costs would lie against the appellant. An expansion of third party appeal rights, with the same costs rules, would also have assisted.

Lineage of JRPPs

The JRPP model is a distorted version of a panel established in South Australia over three decades ago. When a new plan for the City of Adelaide was legislated in 1976, a City of Adelaide Planning Commission was established consisting of four council nominees and four State nominees. The Chair was the Lord Mayor with the casting vote (only exercised once) being with the Minister. The Committee was seen as an intergovernmental committee, exercising a limited development control role, but sufficient to keep senior public servants attending. With a State Government place manager with an office in the Town Hall, there was a high degree of integrated policy and implementation.

Somewhat similar bodies, together with place managers, were set up in other SA areas where there was a major development or redevelopment, thus avoiding the creation of expensive development corporations.

These bodies had as much to do with managing urban development as exercising development control. And they were seen equal partnerships between State and local governments, designed to build consensus and team work. They were not win/lose arrangements.

When the NSW Government copied the City of Adelaide model for Sydney City, not surprisingly, a win/lose approach was taken. While the Lord Mayor was made the chair, the numbers were 4/3 in favor of the State.

The JRPP model clearly puts the local council in the below the salt position. The Mayors are not the chairs. Council nominees are there as uncomfortable tokens. These panels are State bodies with appointed members who have no formal government positions and are able to operate in their region as private consultants. It is a flawed model as an arbitral body, still more so as a policy body. It is a reform that is likely to increase the public's concern about the transparency of the NSW Planning System and the extent of capture by development interests.

The same can be said about the role of the Minister under Part 3A. Compared to decisions by councils there is a substantial increase in the amount of discretion and a substantial reduction in transparency with the same level of conflict of roles and interests. The PAC procedure is no improvement on the processes adopted by councils, indeed the absence of procedures that expose the Department's assessment report to applicant and objector submissions, it is less transparent. The only improvement is that the members of the PAC do not have to face elections and may therefore be less conflicted.

CORPORATISM IN PRACTICE?

Looking around for some model of government that would best describe the thrust of the reforms to planning decision-making, I was attracted to the following description of *corporatism* as practiced in parts of Europe in the last century.

Government was by groups of friends and associates who appoint each other to government positions and use governmental power and authority to protect their friends from accountability.

Given the role of the lobby organisations for the development industry in pushing for the reforms, corporatism is a fair description of nature of the changes. There certainly were things that should have been done to increase the compliance with due process principles but the substitution of council decisions by decisions by the Minister, the PAC and the JRPPs probably have more to do with corporatism than democratic and transparent government.