

## **Whose Neighbourhood is it Anyway?**

### **What is the Role and Function of Public Participation in the Making of Decisions About the Future of Neighbourhoods and the Disposition of Property?**

**Grant GLEESON, Australia**

**Key words:** key word 1: planning law, key word 2: property development, key word 3: judicial review.

#### **SUMMARY**

Urban planning depends on laws that make development “permissible” in a specific location. In NSW planning law, the mechanism that makes development of a particular parcel of land permissible is the “zoning” of land by a planning instrument. However, generally, the instrument makes permissible a range of uses allowing the applicant for development to choose what particular type of development is proposed for a specific parcel of land.

The *Environmental Planning and Assessment Act (NSW) 1979* regulates development in NSW. The EP&A Act, and its cognate legislation, is unique. It endeavours to attempt to create a “system of environmental planning under which decisions on land use and resource management are made within the physical capacity of the environment in order to promote the economic and social welfare of the people of NSW.”<sup>1</sup> Reforms made to the Act in 2008 introduced a system of assessment designed to produce an outcome that approves development, no matter what its impact on the community may be. The Government policy is for the majority of decisions on development to be made without the exercise of administrative discretion. Even for development that requires a merit assessment, the approach is: if it is permissible, and if the development complies with codes, then the development shuold proceed.

Development does not occur in a vacuum. It occurs in a neighbourhood. Whilst the government may want to fast track development, when the planning system shuts out the voice of the public in the process, the fast track created may be a slippery slope to the Courts. Even though the 2008 reforms exclude the involvement of a substantial proportion of the community from the decision-making and decision-review processes, the community can still have recourse to Judicial Review proceedings. Those interested in taking up the Government’s invitation to develop need to be aware of the implications.

It is timely to ask the question: whose neighbourhood is it anyway?

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<sup>1</sup> NSW *Parliamentary Debates*, Legislative Assembly, 17 April 1979, Hansard p 4278 Hon Mr Haig Minister for Corrective Services when introducing the legislation to Parliament.

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**'But anti-development lobbyists and activists are a big problem. Urban growth boundaries have to be extended and restrictions on development in inner urban areas relaxed.**

**... Nevertheless, the anti-population crowd is a pretty diverse bunch. Maybe you shouldn't be judged by the company you keep, but they're not all very sensible.'**

Chris Berg SMH 18-20 December 2009

#### **1. INTRODUCTION**

When we survey or map land, we facilitate it being reduced into someone's possession, we enable the parcel to be owned. Individual parcels are of no utility unless they are related to other parcels, to infrastructure such as roads and to a legal frame of reference to secure the benefits of ownership. Aggregations of separate parcels, linked to community infrastructure, form neighbourhoods. Surveyors are very familiar with cadastral surveying. By giving definition to individual parcels of land surveyors assist and make possible the system of property development.

It is the Government which authorises or makes permissible development. Since the inception of planning legislation in NSW in 1945, the State Government has only ever envisaged a nominal role for the public in the processes of authorising development, reserving to itself the power to both make the planning instrument and to permit specific applications for development. The Objects of the *Environmental Planning and Assessment Act (NSW) 1979* (EP&A Act) incorporate an express and specific purpose, namely "to provide increased opportunity for public involvement and participation in environmental planning and assessment".<sup>2</sup> By giving legislative expression to this social policy, an expectation is created that participation and involvement by the citizenry in the processes created by and regulated under the Act will have genuine social relevance.

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<sup>2</sup> *Environmental Planning and Assessment Act NSW 1979 s5(c)*

This paper focuses on the impact of the 2008 reforms of the EP&A Act. It is argued that by implementing the reform agenda to fast track development, the Government has signalled that it and not the community owns the neighbourhood. Whilst the amendments continue the historical appeal in the Act to civic participation, the practical outcome of the 2008 reforms, expressed in the resultant processes applicable to the assessment and determination of applications for development, has been to effectively silence the voice of the public in the development-assessment and decision-review processes of the Act. In acknowledging that there are significant economic benefits to the State from encouraging development, there is the potential for conflict if the community is shut out of the processes.

Yes, the Government has the power. It makes the laws. The Government may own the neighbourhood. What should surprise a developer is the power of the Court to curtail planning decisions. Even the Minister is not immune from legal challenge. Anyone planning to act on the Government's recent invitation to develop in its neighbourhood should make sure that the natives don't surprise you.

## 2. SPATIAL PLANNING AND ZONING REGULATION

### 2.1 An Exercise of Coercive Power by the State

#### 2.1.1 Planning Law and Property Interests

Just as it is true to suggest that all politics is local,<sup>3</sup> it is also true that all planning law is local in that eventually (indeed sometimes immediately), the “plan” impacts upon land and, therefore, the owners of land within the locality. Whether planning instruments impose constraints on development via a top down (centralised) or in a shared (decentralised) fashion, because the EP&A Act impacts upon the use of specific parcels of land, it can be said that the Act creates a topical or place based system.<sup>4</sup>

Individual decisions made to reside in a locality, to purchase land, to build or renovate a dwelling have real meaning to both the person who makes that decision and to their community. There is in fact a community of interest as these decisions are interrelated. Whilst we live in a “global village”, we are in fact still tribal people who seek to live in community.<sup>5</sup> The externalities of locality impact on the subjective enjoyment of being resident in a place as well as on the financial decision made to invest capital in a locality and/or to exploit an

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<sup>3</sup> Attributed to Congressman Thomas ‘Tip’ O’Neill former Speaker of the US House of Congress.

<sup>4</sup> *The Macquarie Dictionary* (1981): ‘Topical: 3: of a place, local.’ In this paper topical is used in the context of place and locality. The EP&A Act regulates how the development selected by the applicant will proceed in the place chosen by the applicant.

<sup>5</sup> H MacKay, *Advance Australia ... Where?* (2007) 287:

Although many of us belong to a variety of groups - the workplace, special interest groups, clubs, churches, friendship circles – there’s a strong intuitive sense that we also need to feel part of the local neighbourhood where we actually live. The need for a sense of *a sense of place* that is both secure and familiar is strong within us; no matter how connected we may feel in other ways, there is a special meaning of ‘community’ that relies on locality.

investment opportunity. Conversely, decisions made by others in that locality also impact directly upon the amenity of the locality and its attractiveness as an investment opportunity. Davies and Whinston argue that this concept is “so obvious as hardly to merit discussion.”<sup>6</sup> Gleeson and Low suggest, in the context of the neighbourhood, that the purpose of planning regulation is to ”protect the value of land, which everyone recognises is derived from the environmental context, the ‘umwelt’, in which the plot of land is situated.”<sup>7</sup>

Historically, this is why communities have sought to influence decisions made about development in the locality. Whether the decision is about the type of zone to be applied or the type of particular development proposed for a site, there is community interest in the outcome of many decisions, interest that continues to be reflected within daily newspapers, not uncommonly, on the front page.<sup>8</sup> The frequency with which planning matters are being politicised, made the subject of newspaper reports, media comment and even ICAC investigations,<sup>9</sup> reinforces the genuine public interest in the outcome of planning decisions.

In that context, all planning laws are an interference with the interaction of market forces. That is, they are laws enacted by Government directed towards distorting the operation of the market to achieve social and economic goals, being outcomes (policy) determined by the Government. Because we must abide by laws made by Government, planning laws are therefore an example of the exercise of coercive force (power) by Government. Where the exercise of this power is not sought by a community, this creates a tension which frequently finds its expression in legal proceedings. In those proceedings, the applicant for development is drawn into a vortex of confusion not necessarily of their own making.

Following the logic of Lindblom’s theory of “incremental planning”, Stein suggests that planning could be perceived as merely a regulatory system that facilitated a “battle that [takes] place in the bunkers of local councils with community and commercial interests vying for power, causing planning to be primarily a political exercise.”<sup>10</sup> This is certainly true of NSW in that the EP&A Act attempts to create a regulatory system for resource management in the sense that the Act attempts to promote and regulate development, whilst providing

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<sup>6</sup> Otto A Davies and A B Whinston Ch 3 “The economics of urban renewal” in James Q Wilson (ed) *Urban Renewal: The record and the Controversy* (1966) 50, 53:

First of all, the fact that the value of any one property depends in part upon the neighbourhood in which it is located seems so obvious as hardly to merit discussion. ... Pure introspective evidence seems sufficient to indicate that persons consider the neighbourhood when deciding to buy or rent some piece of urban property. If this is the case, then it means that externalities are present in utility functions; that is to say the subjective utility or enjoyment derived from a property depends not only upon the design, state of repair, and so on of that property, but also upon the characteristics of nearby properties.

<sup>7</sup> B. Gleeson and N. Low, 'Revaluing planning: Rolling back Neo-liberalism in Australia' (2000) 53 *Progress in Planning* 83,151. Umwelt being the German concept for the environment which unites all semiotic processes of an organism into a whole – to function, all parts must work together co-operatively.

<sup>8</sup> The examples are numerous and even as this paper is finalised the debate and interest continues to generate headlines: see Andrew Clennell ‘Smaller retailers face new threat’, *Sydney Morning Herald (SMH)* (Sydney), 14-15 November 2009, 1.

<sup>9</sup> Most notorious recently see ICAC 2007 “Report on an investigation into corruption allegations affecting Wollongong City Council.”

<sup>10</sup> L. Stein, *Principles of Planning Law* (2008), 2.

increased opportunity for public participation and involvement. All this is to be achieved, as stated by the Government in 1979 (when introducing the legislation), within the physical capacity of the environment.<sup>11</sup> If that is right, then perhaps it is the 'Law' which is at fault?

### 2.1.2 Parliament Makes Laws

It was Hobbes who postulated a civil society under the dominion of a forceful sovereign. As Uhr reformulated the concept, this civil society functioned through "the accommodation of competing self-interests, regulated into peace and security by the forceful sovereign".<sup>12</sup> Locke softened the impact by postulating the concept of popular sovereignty in which "legitimate government rests on the consent and not simply fear of the governed".<sup>13</sup> Stein argues that under Locke's conceptualisation of civil society, its purpose was to protect property rights which rights "precede government and are inviolable".<sup>14</sup> Yet, in the history of the development of planning law, these individual property rights were interfered with regularly by a forceful sovereign, exercising coercive power for the common good.<sup>15</sup> If the 2008 reforms have excluded civic participation from the decision-making process, the antecedents for this can be traced to the historical roots of planning law.

The NSW planning system draws heavily on its UK heritage, both in the context of its legislative framework and in the context of the model for public participation. Before planning laws were first enacted in the late eighteenth century, generally, the common law of property governed exchanges and "market forces" determined the allocation of resources such that, apart from public health issues, "planning laws" were an irrelevance. As required, the King could interfere with the market by conferring favours and granting monopoly rights but generally, these rights were usually created as an additional "right". The King did not "dispossess" the people of their rights to enjoy the land (whether as individuals or, by custom, in common with others). Indeed, the common law did not condone such a dispossession.<sup>16</sup>

The coercive power of planning laws has its genesis in the industrial revolution in Britain and the advent of Private Bill legislation. The inhabitants of local communities had to be coerced into accepting the "benefits" of industrialisation because Parliament recognised that it was unlikely, in the absence of legislation, that communities which would be directly affected by infrastructure projects such as swamp drainage, commons enclosures, railways and roads would willingly give up their "private" and "common" rights to enjoy the use of these land

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<sup>11</sup> NSW *Parliamentary Debates*, Legislative Assembly, 17 April 1979, Hansard p 4278 Hon Mr Haig Minister for Corrective Services :

The essential aim of the Bills is to create a system of environmental planning under which decisions on land use and resource management are made within the physical capacity of the environment in order to promote the economic and social welfare of the people of NSW.

<sup>12</sup> J Uhr, *Deliberative Democracy in Australia* (1998), 44.

<sup>13</sup> Ibid.

<sup>14</sup> Stein, above n 10, 6.

<sup>15</sup> Ibid. Stein cites *Ambler v Village of Euclid* (1925) where the US Supreme Court determined that planning law was "a proper regulatory subject for the good of the community, whereby the state can modify rights associated with the free and unfettered use of one's land."

<sup>16</sup> See in this regard the passage of Brennan J in *Mabo v The State of Queensland* (1992) 175 CLR 1, 46-52, Brennan J: "The feudal basis of the proposition of absolute Crown ownership."

rights.<sup>17</sup> However, it cannot be said that these social changes had a democratic legitimacy or that Parliament had been given a mandate by the people to dispossess rights. Public participation in the process was notably absent.

In NSW, until 1945, Part XII of the Local Government Act 1919 (LGAct 1919) regulated building, public health and subdivision of land, but not land use.<sup>18</sup> In 1945, the NSW Government enacted Part XIIA to the LGAct 1919 and the first planning regime in NSW was created. Beverling and Taylor argue that prior to this "land owners were legally entitled to use their land ... subject only to the laws of nuisance".<sup>19</sup> For the first time in NSW "consent" had to be obtained for the "use" of land. The scheme created by Part XIIA was cumbersome and was not widely used by local councils.<sup>20</sup> Despite the Minister's optimistic exhortation about democratic principles given to the County of Cumberland Council in 1945,<sup>21</sup> the opportunity for public participation was, in fact, limited.

In relation to the exercise of administrative discretion, the mechanism contained in the LGAct 1919 for obliging the council to "determine" an application in respect of building and subdivision applications was expanded in respect of the determination of land use applications under Part XIIA. This approach was similarly retained as the mechanism in the EP&A Act upon its enactment in 1979 for the determination of development applications. Throughout this period, it was only the applicant for development who enjoyed a right to appeal against the determination of the Council. The Land and Environment Court, created in conjunction

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<sup>17</sup> "The linear character of the canal, railway and road networks that were developed required inevitably the exercise of coercive powers. The land owners could not be expected to co-operate unconditionally in surrendering land to the greater commercial enterprise of the railway companies or the turnpike trust, and the only mechanism available to the promoter of such a scheme was to secure the necessary powers under Parliamentary legislation to acquire land compulsorily subject to an obligation to pay compensation to the owner, and to construct and operate a railway, without being liable to action for nuisance from those with land alongside the route. For the previous two centuries it had been local authorities who alone had the willingness or ability to promote improvement works such as harbour or river improvements and who sought Parliamentary powers not only for the works themselves but also to levy a special rate on ships to meet the costs." Department of Environment, Transport and the Regions, UK, *Environmental Court Project Final Report* (2000)(UK report), section 9.2.1.

<sup>18</sup> Butterworths, Butterworths Local Government & Planning Law Service Vol C 'Land Use Planning, Development & Building Control' S Berveling & L Taylor C60,001, 152. See also Stein above n 30, 6 who relates the concept back to the laissez-faire doctrine and bundle of rights flowing from ownership of land.

<sup>19</sup> The LGAct 1919 did create a procedure for Residential District Proclamations, but it could not be said that these were planning laws strictly speaking.

<sup>20</sup> NSW Report to the Minister for Planning and Environment required under s20(1) of the NSW Planning and Environment Commission Act 1974 (November 1975) 28 'Experience subsequent to 1945 clearly showed that the procedure adopted was unduly cumbersome.'

<sup>21</sup> Joe Cahill NSW Minister for Local Government 1945 cited in R. Stokes, 'Reflections on the Environmental Planning and Assessment Act 2008' (Paper presented at the EPLA, Bangalow, NSW, 17 October 2008) referencing McKell, *Five Critical Years* (1946) 52: "It is the Government's intention that town and country planning shall be democratic and that, under skilled guidance, the people themselves shall join in the planning to the greatest extent possible."

with the EP&A Act in 1979, was invested with the jurisdiction to hear and determine both LGA 1919 and EP&A Act appeals.<sup>22</sup>

### 2.1.3 Deliberation and Democratic Theory

Civic participation and involvement is emblematic of democratic processes. Indeed, in democratic societies, citizenship denotes the right of a person to participate in social institutions and to exercise deliberative rights. Without such rights of participation, we are rendered mere subjects – in the sense of being under dominion to a sovereign which is not popularly elected. There is therefore a tension between the concepts of participatory democracy (or public deliberation) and political representation and between the role of central government and the rights of the individual. Uhr suggests that the tension is about the means by which participation is made active.<sup>23</sup> In the NSW planning system, there is also a tension between the exercise of a power to approve development and the social consequences of the exercise of that power. This tension exists because of the competing public/private interest dimension to each and every exercise of the discretionary power to zone land and/or approve/refuse development.

Considered in the context of democratic theory, the public does not have a democratic role in the administrative decision made in respect of the “plan” or in respect of the “application”. There is no deliberative function exercised by the public when the Minister determines to make a planning instrument. Similarly, when assessing and determining an application for development, the council is not exercising a representative parliamentary function in the capacity of lawmaker. Council’s LEPs and planning instruments generally are “made” by the Minister. This is an administrative act of the executive arm of the Government. In determining applications for development made under the “plan”, the council is therefore performing a delegated function of the executive government, also exercising an administrative power.

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<sup>22</sup>NSW Parliamentary Debate Legislative Assembly 21 November 1979 Cognate Environmental Planning Bills second reading speech Hansard p3350 Minister for Planning & Environment, Hon D.P. Landa. On the creation of the Land & Environment Court, the Minister said:

The Court is an entirely innovative concept, bringing together in one body the best attributes of a traditional court system and of a lay tribunal system. The Court ... will be able to function with the benefits of procedural reform and lack of legal technicalities as the requirements of justice permit ... The Court will establish its own body of precedents on major planning issues, precedents sorely sought by councils and the development industry but totally lacking in the now to be abolished Local Government Appeals Tribunal.

The benefit of this approach was more recently highlighted by the Court of Appeal in *Port Stephens Council v Jeffrey Sansom* [2007] NSWCA 299 (per Speigleman CJ) at [72]:

In my opinion, a significant purpose served by planning appeals is to improve the quality of the decision-making process. This is a purpose which any statutory consent authority should be presumed anxious to achieve as an incident of its exercise of the statutory powers which Parliament has reposed in it. Individuals and corporations who challenge such decisions do not have the same obligations. They do however, have a legitimate expectation that the decision-making process will result in the correct or preferable decision.

<sup>23</sup> Uhr, above n 12, 11: “Advocates of liberal democracy have long been interested in exploring ways in which practices of active citizenship can be devised to keep alive the prospects of popular sovereignty in fact as well as in theory.”

Functionally, the role of citizen participation in the processes is passive, and this will remain so whilst the public is allocated no deliberative function in the procedural mechanisms. Whilst the wording of s5(c) suggests a positive disposition by the Government towards social inclusion in the processes created under the EP&A Act, it is an illusion. At the operational level, the institutional and procedural arrangements created under the Act to “increase” involvement and participation do not actually allow for social inclusion. Social inclusion is here discussed as an aspect of citizenship which, according to Bora and Hausendorf, can be defined in theoretical terms as “a communicative, semantic concept that gives a specific answer to the structural question of how persons become relevant in social systems.”<sup>24</sup>

Bora and Hausendorf identify a theoretical approach to the study of the semantics of citizen participation and adopt as their “programmatic keyword” for the analysis of the language of participation the concept described by them as “communicating citizenship”.<sup>25</sup> In this model, the means by which inclusion can be assessed is through an analysis of the social positions as observed in participatory decision-making procedures. Under this theoretical model, it is possible to identify within the procedures created under the EP&A Act the social task or problem being addressed in the semantics of citizenship (public participation); its function (influencing the decision-maker) and its locus of interest or reference (the legal system created by the EP&A Act). Within the system of reference there are structures of communication (ie the decision-making and decision-review processes under the Act), which are intended to be the means by which the social task is realised by “provid[ing] for direct, every day contact among competent authorities, interested parties and the concerned public.”<sup>26</sup>

If the neighbours had a role in the planning process, then there would evidence within the legislation of how that deliberative power could be exercised. For example, the public could influence the outcome of the plan-making process if they had a direct democratic right to vote on the plan. For the public to have such a democratic function, it would more likely have to take the form of a referendum. The potential for direct participation was dramatically demonstrated recently when Swiss voters “shocked” their Government in a direct referendum approving a ban on the building of Minarets.<sup>27</sup>

If democracy in operation means the “open weighing of contending opinions about how best to protect the diverse interests of society against the partial interests of any ruling group,”<sup>28</sup> then the functional model for participation will be one which “prove[s] itself in terms of social positions emerging in the course of the participation process.”<sup>29</sup> Social position is here used in

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<sup>24</sup> A Bora, H Hausendorf ‘Participatory science governance revisited: normative expectations versus empirical evidence’ (2006) *Science and Public Policy*, 33 477-488,480.

<sup>25</sup> Ibid, 480.

<sup>26</sup> Ibid, 483.

<sup>27</sup> P. Totaro, 'Anti-Islam vote reveals growing Swiss hostility', *Sydney Morning Herald* (Sydney), 1/12/2009 2009, 11. “The referendum was sparked by a development application by the Muslim community of the town of Langenthal...”

<sup>28</sup> Uhr, above n 12, 24.

<sup>29</sup> Bora and Hausendorf above n 24,482.

the context of “coherent sets of social expectations,”<sup>30</sup> meaning structures of communication which are dynamic and have the potential to demonstrate “mutual resonance among the social positions involved.”<sup>31</sup>

If the public interest in planning decisions is so obvious that it hardly merits discussion, it could be assumed that the system created to determine applications for development would facilitate the resonance of the views of the community. After all, the community is simply seeking to protect its proprietary rights and interest in the neighbourhood. Prior to the 2008 reforms to the Act there was an informal means of indirect participation by the public in the processes of the Act. Under the former procedural provisions, which allocated to councils the role of determining the majority of development applications, the public had the opportunity to exercise the informal “right” of access to lobby local councillors who had to determine the application. In this context, the councillors, when making a decision, would be exercising a representative democratic prerogative, consistent with the often stated function of councillors to represent the community in the decision-making process.<sup>32</sup> Because this politicised the process, the Government has now removed Councils from having a functional role in the assessment of most applications for development.

It is at the intersection of public/private rights that planning law has its genesis. The subjugation of the individual’s property rights in respect to the development of land was a concomitant outcome of the necessity to create civil society. This is where the concept of public interest needs to be considered more closely.<sup>33</sup> If the voice of the public is not to resonate i.e. influence the decision-making process, then a social exclusionary dynamic is manifested. There is no means for actual participation, either at a democratic level or at a functional level. In the context of decisions being made about development in the neighbourhood, by creating, via the planning system, such an exclusionary dynamic, the Government is clearly suggesting that the neighbourhood belongs to the Government, not to the community.

If that is the position, then how does the public find an expression for its voice? What are the implications for developers?

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<sup>30</sup> Ibid, 483.

<sup>31</sup> Ibid, 484.

<sup>32</sup> As expressed by the former President of the Local Government and Shires Association P. Woods, ‘NSW Attorney General’s Working Party Report (Minority Report)’ (NSW Government, 2001).

<sup>33</sup> In *Shoalhaven CC v Lovell* (1996) 136 FLR 58, 63, Mahoney P noted that the term ‘public interest’ was not defined in the EP&A Act. Citing with approval *O’Sullivan v Farrer* (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ) the Court affirmed the following statement of principle:

Indeed, the expression ‘in the public interest’, when used in a statute classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only “in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitively extraneous to any objects the legislature could have in view”: *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J.

### 3. NSW PLANNING SYSTEM

#### 3.1.1 EP&A Act 1979

Upon its enactment in 1979, the EP&A Act and its complimentary legislation such as the Land and Environment Court Act, was radical in its approach to social inclusion in planning processes. The introduction of an open standing provision in section 123 of the EP&A Act, which allowed any member of the public to bring a challenge in the LEC both against and to enforce decisions made under the Act, was unique in Local Government processes.

Previously, a person had to have legal standing. An illustration of the principles applicable is found in *Mutton v Ku-Ring-Gai MC*.<sup>34</sup>

The language of the Objects of the EP&A Act clearly manifested a new, socially inclusive approach to resolving the dialogue which necessarily occurs between the Government, the people and the specific actors (applicants for development) who seek to exercise rights enshrined in the Act to permit development to occur in a locality. After the 2008 reforms, the decision-maker can be the Minister, the Planning Assessment Commission (PAC), a Joint Regional Planning Panel (JRPP) or the Council (or its delegate), depending upon whether the application for development is made under Part 3A or Part 4 of the Act.<sup>35</sup> It is the applicant for development which invokes the procedures by lodging an application seeking consent to a development proposal. Prior to the reforms, the involvement of the public and its participation in the decision-making process was wholly dependent upon procedures to bring to the attention of the public the fact of the making of the application (usually by notification of the lodgement of the application). Participation was (and remains) limited to the making of a submission about the development.

The decision review mechanism in the Act has two aspects. Firstly, there is a mechanism for a “merit review” of a determination by way of an appeal *de novo* to the LEC.<sup>36</sup> Secondly, there is a mechanism for a judicial review in the LEC in respect of a decision made by a consent authority. Generally, unless the development is of a particular character known as designated development, the public do not have a right to initiate a merit review.<sup>37</sup> By reason of the open standing provision of s123 of the Act, the public do have a general right to initiate a judicial review of a decision made by a consent authority. A judicial review involves the Court in reviewing the decision making process followed by the decision-maker and applying to it settled administrative law principles.

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<sup>34</sup> (1973) 1 NSWLR 233; 241-2: “However, if individual rights are not affected, the courts do not, at the instance of the Attorney General or otherwise, undertake a general supervision of the acts and decisions of local government bodies.”

<sup>35</sup> See s75D in relation to Part 3A applications and s78 in relation to Part 4 applications.

<sup>36</sup> See sections 97 and 98 of the EP&A Act.

<sup>37</sup> Where the development is ‘Designated Development’ (see cl 4 and Schedule 3 to the EP&A Regulations 2000) then those persons who made a submission against the development have a right to take proceedings in the LEC by way of merit review.

Development is defined very broadly in section 4 of the EP&A Act.<sup>38</sup> Seen in the context of that definition, what is created under the EP&A Act is a site specific or topical system for the regulation of development.<sup>39</sup> Once a Local Environmental Plan (LEP) makes a specific type of development permissible (as opposed to making development prohibited), it is the applicant for development who determines whether and if so what type of development is proposed for a specific parcel of land.

Fundamental to the system created in 1979 is the overlapping and hierarchical nature of planning schemes created under the EP&A Act. Whilst the Act and the Regulations are the overriding scheme, within it there are:

- State Environmental Planning Policies (SEPPs)
- Regional environmental plans (REPs)
- Local plans (LEPs)

all of which plans are intended to have a binding legal force.

There are also specific Development Control Plans (DCPs) and adopted policies created by a particular council for development within a Local Government Area which, whilst not binding, nonetheless give direction to a Council in relation to how it is to exercise its planning discretion.<sup>40</sup>

Whether an application for development consent is required, and if it is, whether the application requires a “determination” depends on the nature of the proposed development and the requirement of the planning instrument. The LEP can identify certain type of development (for example development in the nature of a fence) as “development that does not require consent”. Pursuant to s76 of the Act, that type of development is then “exempt” and can be carried out without first having to submit an application. The LEP may also provide that a type or class of development is of such a nature that it does not require

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<sup>38</sup> Development means:

- (a) the use of land, and;
- (b) the subdivision of land, and
- (c) the erection of a building, and
- (d) the carrying out of a work, and
- (e) the demolition of a building or work, and
- (f) any other act, matter or thing referred to in s.26 that is controlled by an environmental planning instrument,

but does not include any development of a class or description prescribed by the regulations for the purpose of this definition.

Although ‘work’ is not defined, s.4(2) of the Act also provides:-

A reference in this Act to: ...

...

(d) a work includes a reference to any physical activity in relation to land that is specified by a regulation to be work for the purpose of this Act but does not include a reference to any activity that is specified by a regulation not to be a work for the purposes of this Act

<sup>39</sup> Macquarie, above n 4.

<sup>40</sup> The NSW Government recognised the strength of the planning system in its discussion paper: NSW Government Department of Planning Discussion Paper *Improving the NSW Planning System* (November 2007), 13 where it is stated: ‘the system which has been in place since the EP&A Act was adopted in 1979 continues to provide a solid foundation for planning, but like any system, could be improved.’

assessment. This type of development is known as “complying development”.<sup>41</sup> Provided the nature of the development meets “specified predetermined development standards”,<sup>42</sup> then once the development is certified, by either the council or an accredited certifier, as complying with those standards, the development may proceed without further assessment. There is no administrative decision made about the merits of the development. All other development is development that requires consent. Carrying out development without consent is a breach of the Act.<sup>43</sup>

Generally speaking, until the 2008 reforms it was the local council that was invested with the function and duty under the EP&A Act to determine the widest range of development applications. The vast bulk of applications for development were regulated by Part 4 of the Act and, insofar as a determination was required, the Act made the council the consent authority.<sup>44</sup> In respect to such applications, councils had the capacity in its LEP, or in a Development Control Plan (DCP) or adopted policies, to make provision for applications to be notified. This brought the application to the attention of the public and enabled the public to make a submission in relation to the development. Pursuant to s79C(d) of the Act, submissions form part of the material evaluated by the decision-maker and are material which the decision-maker is bound to take into account.

### 3.1.2 2008 Reforms

The NSW Government now appears to take the view that, in the context of development assessment and review, the right of the public is only to have a say ‘commensurate with the level of impact and significance of the development’.<sup>45</sup> In contradistinction to the objects of the EP&A Act, the 2008 reforms to the EP&A Act remove a substantial body of decisions from the development approval process and modify the decision-making process for the determination of the majority of the balance of applications made under the EP&A Act<sup>46</sup>

The Government set as its aim the creation of a system ‘robust enough to deal with a much larger range of proposals than at present’,<sup>47</sup> with a target of 30 per cent of all development

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<sup>41</sup> See s84A. Specific provision is also now made in 2008 SEPP (Exempt and Complying Development Codes) to facilitate such development occurring.

<sup>42</sup> See s76A(5)

<sup>43</sup> See s76A

<sup>44</sup> The procedure for making such applications is set out in s78.

<sup>45</sup> 2007 Discussion Paper above n 40, 60.

<sup>46</sup> The amendments were effected by the *Environmental Planning and Assessment Amendment Act 2008* (NSW)(2008 Amendment Act). Not all of the amendments effected by the 2008 Amendment Act are in force. The new Regulations to give effect to some of the reforms are, at the time of writing (January 2010), yet to be published. In this paper it is assumed that the amendments effected by the 2008 Amendment Act will be proclaimed and will commence. The impacts identified in this paper may be affected by the manner and scope of changes incorporated in the Regulations, for example, s96E introduces a new type of third-party review. The scope of this entitlement is wholly dependent upon the enabling Regulations being drafted. Presently, the provision is not in force – see 2008 Amending Act – historical information.

<sup>47</sup> 2007 Discussion Paper above note 40, 72.

applications being complying/exempt development applications within two years, rising to 50 per cent of all applications within four years.<sup>48</sup>

As indicated above, before the 2008 reforms, there was some measure of accountability because of the ability of the community to engage their democratically elected officials in the determination process. As the majority of applications were determined by councils, there was an opportunity for the community to raise concerns with their elected councillors. If the councillors decided to take an active role in the assessment of an application then the community had an opportunity to scrutinise the proposed development. Whilst this necessarily politicised the process, councils were accountable because of the existence of the right in favour of the applicant for development to seek a merit appeal if the community obtained, through the political process, a refusal of the application.<sup>49</sup>

The amending Act introduces a new Part 2A to the Act which creates additional layers of bureaucratic assessment of applications.<sup>50</sup> The Minister for Planning constituted five Regional

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<sup>48</sup> Ibid, 81. This target was reinforced by the then Minister when introducing the legislation in August 2008 see above n 46.

<sup>49</sup> The 2007 ICAC Position Paper, *Corruption Risks in NSW Development approval processes*, (2007), 21 expressly states:

Based on all the information available to the Commission (eg complaints, advice requests, investigations, etc) and in consideration of the submissions made, the Commission cannot conclude on the evidence available that councillor involvement both in preparing LEPs and determining development applications in itself creates a significant and unmanaged corruption risk. Nor did submissions identify any particular need to enhance accountability within the current system. Consequently, it is neither necessary nor appropriate for the Commission to make recommendations or outline options for reform of the current arrangements.

That is, ICAC did not recommend the removal of this avenue of participation.

<sup>50</sup> There will now be:

- A Planning Assessment Commission (PAC) created by s23B which will assist the Minister in the determination of Major Projects.
- A Joint Regional Planning Panel (JRPP) created by s23G which will determine significant regional applications.
- Independent Hearing and Assessment Panels (IHAP) created by s23I which will assess applications referred (or required by an Environmental Planning Instrument to be referred) to it.
- Planning Arbitrators created by s23K who will assess applications refused by Councils.

The scope of the powers of the Panels is also uncertain but clearly the Government is moving to sideline councils in the delivery of the Government's policy – see P Bibby, 'Planning power play earns council's ire', SMH (Sydney), 30-31 May 2009,<sup>6</sup>:

"Soon, however, they will have additional powers [by reason of amendments introduced by the Minister to Parliament on May 13 2009]. They will be able to write the detailed guidelines for smaller sections of a local government area and specific types of development. ...But the president of the Local Government and Shires Association, Genia McCaffery, said this was a significant expansion, allowing panels effectively to take over councils' core business. ...Councils and local communities are effectively locked out of that process."

Panels by making the Joint Regional Planning Panels Order 2009 on 26 June 2009.<sup>51</sup> The first decision by a panel was made by the Wollongong Panel on 24 September, 2009.<sup>52</sup>

The 2008 reforms retain the right in favour of the developer to seek a merit review if the outcome in the bureaucratic process is not an approval for development. Whether the exercise of an appeal right is a "second go" as suggested by the former Minister Frank Sartor (when formerly Lord Mayor of the City of Sydney),<sup>53</sup> is debateable. Developers exercise the right to a merit appeal at their peril in that it throws open to the Court for review the whole of the application. If the process is activated by the applicant for development, then the public has an opportunity in the decision-review process to engage the decision-maker. If an appeal is commenced then regardless of whether or not the development is designated development, third party objectors have the right to seek separate representation.<sup>54</sup>

Whilst it is true that the 2008 Act introduces 'a new type of third-party objector review' via a new s96E,<sup>55</sup> these rights are likely to be severely constrained. Firstly, the person must have made a submission objecting to the development.<sup>56</sup> Secondly, the person must own land within one kilometre of the proposed development.<sup>57</sup> Finally, the right only applies in respect of 'a class of development' prescribed by the Regulations for the purpose of this section.<sup>58</sup> These regulations have not yet at the time of writing been made but the Minister, in introducing the Bill, explained that the right to appeal would be limited.<sup>59</sup> In the context of process, the intent of the 2008 reform of the EP&A Act was to remove scrutiny of

<sup>51</sup> Department of Planning, Planning Circular PS 09-016 issued 2/7/09.

<sup>52</sup> Southern Region JRPP, 'First Joint Regional Planning Panel Meeting Held in Wollongong' (Press Release, 24 September 2009). The determination was to approve development for two office and research laboratory buildings.

<sup>53</sup> Nadia Jamal, 'Sartor seeks curbs on "out of control" planning court', *SMH* (Sydney), 23 August 2000, 6.

<sup>54</sup> Cf *Double Bay Marina Pty Ltd v Woollahra MC* (1985) 54 LGRA 813. Leave of the court is required and the 'rights' of the objectors are limited and qualified but, once the developer lodges an appeal, it crystallises the objectors' right to participate in the proceedings. More recently though the extent of this right was questioned. In *Morrison Design v North Sydney CC* (2008) 159 LGERA 361, Preston CJ held (at [53]):

A mere dissatisfaction with the merit outcome of a determination by a consent authority does not entitle a person who objected to be joined as a party so as to be able to continue to argue its particular submission.

<sup>55</sup> EP&A Act s96E(3).

<sup>56</sup> Ibid s96E(3)(a).

<sup>57</sup> Ibid (3)(b).

<sup>58</sup> Ibid s96E(1).

<sup>59</sup> Minister's 2008 Parliamentary speech introducing the reforms above n 46 and see Schedule 2 cl [13] to the Bill which outlines these provisions as being inserted as a new cl 285 of the EP&A Regulations. As the Minister explained:

The types of development to which these neighbourhood reviews will apply will be listed in the regulations and will include: development for residential purposes that exceeds two storeys or contains at least five separate dwellings on a site of more than 2,000 square meters where development standards for height or floor space ratio would be exceeded by more than 25 per cent; and development for commercial, retail or mixed-use purposes that is greater than nine meters in height and has an area of more than 2,000 square meters where the development that would result in standards being exceeded or otherwise not complied with.

applications so as to speed up the approval process. The development industry had complained about the time taken to assess ‘residential approvals’,<sup>60</sup> which comprise the majority of all development applications.<sup>61</sup>

The introduction of Joint Regional Panels to determine applications formerly determined by councils means that the ability of the public to politically engage the council in the democratic process is removed. The exclusion of notification provisions means that the public will not now know that an application for development has been made until after the application has been determined. The current explanation for there being no general right to be informed of the lodgement of an application for development is that the Government believes that the ‘[p]reparation of simple advisory documents and education campaigns could assist in defining what the rules are about development in an applicant’s backyard, as well as the backyard of their neighbour.’<sup>62</sup>

There is an elegant simplicity to the logic, there is no need to confer a discretion if the development ‘complies’, such development should be approved without scrutiny. As the Minister said when introducing the NSW Housing Code on 12 December 2008:

If a proposed house meets set standards which limit its potential impact on neighbours and the look of a street, it should not be tied up in red tape.<sup>63</sup>

The NSW Government set out its rationale for reforming the NSW planning system in its 2007 Discussion Paper.<sup>64</sup> Whilst the Government acknowledged the importance of the planning system to the community, the Government, it is suggested, appears to have moved away from the commitment to public involvement in the planning process encapsulated in the objects of the EP&A Act.<sup>65</sup> The statement that the role of public should be limited to active participation in the development of plans,<sup>66</sup> suggests a policy change by the government in relation to public participation. It is plain from the 2007 Discussion paper that the role of the public in the decision-making and decision-review processes is viewed negatively because public participation is described as ‘adversarial and discouraging’, the Government noting a perceived ‘expectation that the community should be entitled to veto development even when such development complies with the planning intent and controls’.<sup>67</sup>

This does not mean that anything goes in NSW. A notable recent example of the effectiveness of the exercise of the entitlement to seek a judicial review is the recent decision of Justice

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<sup>60</sup> 2007 discussion paper above n 40,17. The Discussion Paper also notes (at p 74): ‘The development industry has said that it does not use complying development because it is just too complicated’.

<sup>61</sup> Ibid 71. The Government’s reasoning was expressed as follows:

Given that more than 60 per cent of all development applications are for either new housing, or alterations and additions to existing houses, the residential building sector is the most likely development type that can benefit from a streamlined use of the complying development path.

<sup>62</sup> 2007 Discussion Paper above n 40, 79.

<sup>63</sup> Minister for Planning K Keneally at the NSW Housing Code Forum, Sydney 12 December 2008.

<sup>64</sup> 2007 Discussion Paper, above n 40.

<sup>65</sup> See EP&A Act section 5(c).

<sup>66</sup> 2007 Discussion Paper above n 40,7.

<sup>67</sup> Ibid 19.

Lloyd who struck down the Minister's approval given to a major project. In the Court's view, the decision was tainted by apprehended bias because the Minister had, in His Honour's view, accepted a "land bribe" in the negotiation phase of the application.<sup>68</sup> However, given the limitations of judicial review proceedings,<sup>69</sup> it is accepted that the 2008 reforms have decreased, not increased, the opportunities for public participation in the decision-review process.

#### 4. FAST TRACK?

##### 4.1.1 Development Occurs in Neighborhoods

It seems that the NSW Government has deliberately created a system which is engineered to produce an outcome which approves development, no matter what its impact on the community may be.<sup>70</sup> At a time when urban allotment size is reducing, bringing neighbours closer together and creating the potential for greater neighbour impacts, the Government is introducing a no notification regime where neighbours and the community will not know that an adjoining or nearby neighbour has even applied for permission until the improvements are being built or the development commenced. The Government's position, it is suggested, is that *compliant development* is consonant with *good planning outcomes*. However, if the level of specificity and prescription at the plan making stage (or in the adopted Code) is not adequate, then we are setting up a system which will enrage the community. If developers such as the developer in the *Gwandalan* decision above act on approvals issued only to find them under challenge in judicial review proceedings, have we in fact created the certainty of outcome sought by the Government?

The 2007 Discussion Paper suggests that the motivation for the 2008 reforms was the imperative to facilitate quicker processing of applications so that they were not tied up in red tape.<sup>71</sup> Whether the system that has been created by the 2008 reforms meets the Government's stated benchmark for an "efficient system" is a matter which is beyond the scope of the

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<sup>68</sup> *Gwandalan Summerland Point Action Group Inc v Minister for Planning* [2009] NSWLEC 140. Lloyd J declared a consent granted by the Minister to be void as it was tainted by apprehended bias flowing from the Minister's earlier decision to enter into a MOU in relation to the same development.

<sup>69</sup> *Parramatta CC v Hale (Hale)* (1981-2) 47 LGERA 319: 345 (Mason P):

Where it is a collegiate body which makes the s.91 [now s80] determination, s.90 [now 79C] requires that the collegiate mind, in granting its approval, shall have considered the s.90 matters. Proof of a state of mind, whether by person or collegiate body, may be a matter of difficulty, but the person who seeks under s.123 to bring down a decision, must discharge that onus however difficult that may be and he must do so in accordance with proper legal requirements and by inference, not suspicion. The responsibility to make the consent determination is given to a responsible authority, which will normally be a council democratically elected. The Court exercising jurisdiction under s.123 does not sit on appeal from its determination. A conclusion by a Court finding a breach of s.90 by way of inference is one to come to only after anxious consideration, but when the inference is available and ought to be drawn, the Court should, in service of the policy which underlies the Act, not hesitate to give effect to the inference it has drawn.

<sup>70</sup> 2007 Discussion Paper above n 40, 18.

<sup>71</sup> *Ibid* 12.

present analysis and awaits full implementation of the reforms.<sup>72</sup> However, by excluding the involvement of a substantial proportion of the community from the decision-making and decision-review processes, there is now greater incentive for members of the excluded public to seek judicial review of planning decisions.<sup>73</sup>

#### 4.1.2 Have your say in the Land and Environment Court

Whether or not, by engaging the judicial review processes of the LEC, the voice of the public can resonate and influence the decision-maker when that person is the Court is problematic. Where there is an exercise of the decision-making power based on discretionary factors, then absent a general right to request a merit review, the only available process of external review will be judicial review. In these circumstances, councils and other decision-makers will not be accountable to the community unless the decision can be shown to be ultra vires or manifestly unreasonable. The availability of a right to seek judicial review is not designed to protect the community against discretionary decisions.

Under administrative law principles, discretionary decisions are a legitimate exercise of the administrative function of Government. Discretionary decisions are therefore not reviewable *per se*, which is why a specific category of review was created in the LGAct 1919 to enable the administrative decision to be reviewed on its merits.<sup>74</sup> Judicial review does not involve a review of the merits of the decision under review. Judicial review of administrative actions involves no more than the Court evaluating the decision making process of the agency under review and applying to that process decided principles.<sup>75</sup> In this way, the Court gives deference to the distinctly different roles of policy making or administrative decision-making (in which arbitrary or discretionary decisions often associated with the executive branch of Government are made) on the one hand and the judicial function of adjudication (in which the manner of the making of the decision is reviewed) on the other. As such, the merits of the decision under review, whether or not that decision ought to have been made, is not part of the assessment of the Court.

Willey suggests the “very arguments that justify appeal rights for permit applicants extend to legitimate third party rights also.”<sup>76</sup> The benefit of widening the process for merit review is

<sup>72</sup> Ibid, 49. Section 4.1 sets out the ‘objectives’, according to the Government, of an effective system. They include: delivering outcomes; appropriately engaging the community, ensuring assessment fits the size and scale of the proposal; and promoting independent models of determination.

<sup>73</sup> In the context of reforms intended to facilitate development, there is now little likelihood that a determining authority will feel constrained, when exercising the wide discretionary powers conferred under the EP&A Act, to act in the public interest when assessing the limited range of development now left for determination by Council. This possibility exacerbates, not alleviates, the concerns raised by ICAC Position Paper 2007 above n 49.

<sup>74</sup> First introduced in 1919 - see LGAct 1919, s 341.

<sup>75</sup> See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (Peko-Wallsend)(1986) 162 CLR 24, 40 (Mason J): It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned: *Wednesbury Corporation* (41).

<sup>76</sup> S. Willey, 'Planning Appeals: Are Third Party Rights Legitimate? The Case Study of Victoria, Australia' (2006) 24 *Urban Policy and Research* 369, 370.

that it results in improved decision-making. In a merit review of the administrative decision initiated by the public exercising a right of appeal, the relevant "actors" in the process are: the Court (now acting in the role of administrator), the public (represented by the objector who is the applicant- the protagonist), the council (now in the role of respondent which made the decision) and the applicant for development (an interested party to the proceedings). There is no exclusionary dynamic. All actors have a legitimate role and their "voice" will be heard.

Since 2003, when the LEC introduced reforms to its processes, there has been an emphasis in the Court on achieving the 'best community outcome' in matters determined before the LEC.<sup>77</sup> This has meant that the opportunity for the council to adopt a defensive or antagonistic position is contrary to the practice of the Court. As the development is usually permissible, the contest being about aspects of the proposed development, the weight of evidence is directed to resolving technical aspects. In such circumstances, it is not to be unexpected that the result will be an approval. If an approval is the result of the process, then the resonance of matters raised by citizens may be seen in the resultant outcome being a better development. Even if the decided matters determined in the LEC cases show a bias in favour of developers,<sup>78</sup> which is disputed,<sup>79</sup> the fact is that the processes adopted in the Court enhance the prospects for a better planning outcome. In the context of the rhetorical appeal in the EP&A Act to increasing opportunity, widening the opportunity to access merit appeals enhances the voice of the citizenry in the process "by acknowledging that in some instances, parties other than the appellant and the government have a legitimate interest in planning decisions".<sup>80</sup>

Given the extent of the reforms adopted by the LEC since 2003, it would have been possible for the NSW Government in 2008 to have ensured good community outcomes by adopting the recommendation of ICAC and extending the right to seek a merit review to third parties. Instead, the Government has sought to exclude from the development assessment process a large body of applications identified in the 2007 Discussion Paper as 'locally significant

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<sup>77</sup> The reform process began with the appointment of His Honour Peter McLellan as Chief Judge of the LEC in 2003. His Honour first signalled the reform process in his speech to the EPLA conference in November 2003 see McLellan P 'Land & Environment Court – Achieving the best outcome for the community' (Paper delivered to the EPLA conference , Newcastle, 28-29 November 2003) 3. In that speech he stated:

This has meant that merit review is often an intense forensic contest in which there are 'winners and losers' when the legislation intended that public and private resources would be applied to achieving the 'best community outcome'. In the context of planning law we should not think of any consent authority as winning or losing appeals. Rather we should see the review process as part of the structure designed to ensure that decisions in difficult matters are made after an appropriate level of informed scrutiny.

<sup>78</sup> SMH above n 53: 'Approx 60:40 in developers' favour according to the Lord Mayor'. The 2008 Land and Environment Court Annual Review report does not identify the results of matters determined in Class 1 appeals.

<sup>79</sup> See J Kelly "Court provides an important buffer". *SMH* Sydney 26/3/01, 12. As to the bias, in 2000 the NSW Attorney General established a Working Party to examine the operation of the LEC. The Majority Report of the Working Party published in September 2001 (at 12) notes that of the 48% of cases actually adjudicated between 1996 and October 2000 56% of appeals were upheld and 44% were dismissed, hardly a bias in favour of developers.

<sup>80</sup> Willey, above n 76,386.

development' (via the mechanism of complying and exempt development).<sup>81</sup> This may mean that a significant number of applications for development will not even reach the stage of development assessment.

The opportunity for the public to influence the decision in judicial review only arises where a relevant administrative decision is made. If, following the 2008 reforms, the intent is for up to 60% of decisions to be exempt/complying development, then there may be no relevant decision to attack as no administrative discretion has been exercised. As a matter of administrative law, it is only where a council is called upon to make an assessment of an application that an administrative action is made. Once it is, the objects provision in s 5 of the EP&A Act can be called in aid by the Court in determining whether the decision is valid.<sup>82</sup> Taking into account is a mandatory requirement of s 79C. Previously, if the application was notified, then a submission could be made in relation to the development. Where an administrative body fails to take into account 'a substantial, clearly articulated argument relying upon established facts', then the decision may be susceptible to challenge upon the ground of a denial of natural justice.<sup>83</sup> The difficulty flowing from the 2008 reforms is that the number of reviewable decisions likely to be made has been significantly reduced.

It is suggested that the 2008 reforms have further weakened the voice of the community (in the context of neighbourhood). In a theoretical analysis of the processes, the social positions of Administrator and the Public are dysfunctional. The administrator's social position in the legal frame of reference or process is completely disconnected from the social position of the public. The social position of the public in the assessment of an application remains excluded from the legal frame of reference manifesting, at the surface level of discourse, an exclusionary dynamic.<sup>84</sup> There is no inclusion of the voice of the public in this process, here used in the context of a process "that frames the communicative construction of citizenship."<sup>85</sup> What this means is that the voice of the public will find resonance in another way.

## 5. CONCLUSION: RESOLVING THE TENSION BETWEEN GOVERNMENT OBJECTIVES AND LOCAL SENTIMENT

ICAC has consistently identified concerns that the highly discretionary nature of the decisions made by councils under the EP&A Act is conducive to corruption.<sup>86</sup> In the 2007 Discussion

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<sup>81</sup>2007 Discussion Paper above n 40, 54: 'applications involving single dwellings, residential alterations and additions, small businesses and the like, usually less than \$1 million in value.'

<sup>82</sup> See *Parramatta CC v Hale* (1981-2) 161 LGERA 230 and also *Carstens v Pittwater* [1999] NSWLEC 249, [22] Lloyd J: 'These objects, in my opinion, can only be given full effect by not adopting a narrow construction of s79C(1). A narrow construction would exclude from consideration the objects of the Act.'

<sup>83</sup> *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088,[24] cited with approval in *Kindimindi Investments P/L v Lane Cove MC and anor* [2006] NSWCA 23, [73] (Basten JA).

<sup>84</sup> Evidence of this dynamic is the creation, in 2002, of the Save our Suburbs party formed "to return Planning democracy to NSW".

<sup>85</sup> Bora and Hausendorf, above n 24, 481.

<sup>86</sup> See ICAC Position Paper above n 49, 24:

Paper the Government justified the 2008 reforms on the basis of the value of development to the State, not upon the need to make decisions more transparent.<sup>87</sup> In terms of economic analysis, it can be shown that an individual's decision to develop or not to develop in a locality has economic and social impacts.<sup>88</sup> Unwelcome development in a locality leads to social unrest and disruption,<sup>89</sup> and has in the past spawned the creation of new political parties such as the Save Our Suburbs.<sup>90</sup> The green bans of the 1970's contributed to the pressure for legislative reform ultimately expressed in the EP&A Act in 1979. In the First Report of the Minister for Planning and Environment in 1974 (what became known as the Green Book),<sup>91</sup> it was suggested to the Government that mandating minimum compliance did not encourage good design.<sup>92</sup> That the principle still holds true.

Participation means more than just holding a public meeting and calling for submissions. Accountability entails more than just a process whereby the council is responsible for its decisions.<sup>93</sup> Throughout the history of our reforms to the NSW planning system successive Governments have deliberately given only lip service to the concept of public participation in the hope that the Government's policy could be forced through. It is not suggested here that this situation is likely to change any time soon because of the close relationship between the

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There is evidence from several Commission investigations, and from literature on corruption prevention, that a high level of discretion, particularly coupled with low transparency, is conducive to corruption. ...On the other hand, the Commission is conscious that the availability of broad discretion is a deliberate feature of the current system, intended to produce better planning outcomes. It is also seen as allowing for the operation of local democracy.

<sup>87</sup>2007 Discussion Paper above n 40, 49-50.

<sup>88</sup>Otto A Davis and Andrew B Whinston above note 6. The externalities always have to be considered in environmental decision-making, the more so in relation to urban planning because, as cited earlier, 'the subjective utility or enjoyment derived from a property depends not only upon the design, state of repairs, and so on of that property, but also upon the characteristics of nearby properties.'

<sup>89</sup>J Huxley, 'Tell 'em they're dreaming - north shore gets bolshie', *Sydney Morning Herald* (Sydney), 28/9/2009 2009, 1. "It was billed as a state funeral to mark the Death of Democracy, slain by the NSW government ignoring residents, taking money from developers, turning pleasant communities into high-rise jungles."

<sup>90</sup>Created in 2001 and registered following a successful challenge against the refusal of the Electoral Commissioner to register it as a party – see *Save Our Suburbs (SOS) NSW Inc v Electoral Commissioner of NSW* [2002] NSWSC 785. As explained in its history document: SOS "found that politicians took no notice of submissions and protestations. SOS therefore decided to apply pressure where the politicians would feel it most – at the ballot box."

<sup>91</sup>NSW, *Towards a New Planning System for New South Wales* Minister for Planning and Environment, First Report (November 1974)(Green Book).

<sup>92</sup>Ibid, 17:

The best hope for encouraging good design generally lies in a gradual move away from the present negative form of control. Development proposals now tend to be judged according to whether they conform to minimum requirements. A more positive approach would specify the character and scale for an area together with certain desirable attributes for development.

<sup>93</sup>The ICAC reports on various Councils over the years are replete with examples of decision-making gone wrong, sometimes for base personal/financial reasons. Presently, when this occurs, the only avenue available is to seek a Judicial Review of the decision, subject to the Minister's right to suspend the consent pursuant to EP&A Act s124A.

pressure to accommodate population growth, the need for development and the ubiquitous profit motive. In the context of planning in NSW, the observations of Gleeson and Low that it is arguable that planning is “a servant of power” appear to have been borne out.<sup>94</sup>

It may be true, as the Government suggests, that the community wants a ‘faster and cheaper review process for stalled minor applications’,<sup>95</sup> however, each of the ‘mums and dads’ referred to by the Government will have a neighbour beside them, at the rear and across the street. The NSW Government set out its objective in the 2007 Discussion Paper. It seeks a system that delivers outcomes which “support sustainable development and improve local amenity”.<sup>96</sup> If the planning system now totally excludes the voice of the public, the fast track created may be a slippery slope to the Courts. If even a Minister’s decision is not immune from review, then the Government may not have the final say.

There is clearly a short term opportunity to take advantage of the Government’s invitation to develop in NSW. Whether there is certainty of outcomes is yet to be seen. In the meantime, surveyors need to be alive to the possibility of judicial review when assisting clients to make development decisions. If notification is not a feature of the current system, it may be timely to consider how best to ensure that the natives do not get restless by engaging the neighbours in the pre application process.

Then again, we are now in an election year. It may be the case that presently, the neighbourhood does belong to the Government. If that is right, then it holds it upon trust for the people. If the theory of popular sovereignty holds true, then perhaps the voice of the people may yet be heard?

## BIBLIOGRAPHICAL DETAILS

Grant Gleeson specialises in Local Government and Planning Law and has over 25 years post admission experience. He provides specialist advice to applicants for development, local government authorities and councillors. Grant regularly looks after the carriage of cases through the NSW Land and Environment Court, including acting as a solicitor advocate in merit appeals. As a regional practitioner, Grant also works across a broad spectrum of the Law, including commercial advice and litigation. In addition to matters in the Land and Environment Court, he has been responsible for cases in all jurisdictions, including District Court, Supreme Court and Court of Appeal.

After graduating from the University of NSW with BA (1980) and LL.B (1982) degrees, Grant went Newcastle before becoming a partner in the Nowra firm Morton + Harris in 1987. In 2008 the firm merged with RMB Lawyers, now one of the largest regional law firms in

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<sup>94</sup>Gleeson and Low, above n 7, 102.

<sup>95</sup>2007 Discussion Paper above n 40, 4.

<sup>96</sup>Ibid, 49.

NSW and he is a partner in the merged firm. Grant was accredited as a specialist in Local Government and Planning Law by the Law Society of New South Wales in its first intake in 1998 and has maintained his accreditation in that area. He is a founding member of the Local Government Lawyers Group, a member of the Environmental Planning Law Association, a past president and secretary of the Shoalhaven Regional Law Society and a past member of the Law Society Marketing Committee. Grant is currently completing a Masters of Laws degree (Research) at the University of Wollongong.

For the curious, Grant is actively involved in his community. Married with two daughters, Grant is kept busy keeping up with various family activities yet he has maintained an interest in squash. Golf has taken over as the prime recreational activity whilst winter often means a brief sojourn with the family for a skiing holiday.

## **CONTACTS**

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