ACCESS TO JUSTICE: - notes for Submission

Class 4 actions in the Land and Environment Court.

1**. Background: Why we need changes** : There is no merit review under the Environmental Planning & Assessment Act 1979. for a person aggrieved as an objector to a neighbouring development in a case of possible breach of the planning laws. It is a particularly unfair system. The literature and commentary recognises that 'public interest' cases (which ameliorate the extremely prejudicial aspects of this regime) are not brought as often as one might expect.

2. The numbers of people potentially affected in this category is on a large scale. Home ownership in Australia is about 70%. (Radio National, Life Matters, 5.5.09).

3. In particular, certain groups are further disadvantaged in their ability to obtain redress for a number of reasons. In particular, the elderly are often severely compromised in their ability to access a legal solution. Further injustice is apparent when access to other avenues of complaints such as the Ombudsman is made unavailable because of the so called legal remedy of litigation in the Land & Environment Court (a Superior court on the same level as the Supreme Court in its class 4 jurisdiction).

4. The problems of appearing in a public forum for non- English speaking background persons are formidable. Public confrontation runs against the mores of many sub groups and anecdotally there is already a perception which is further engendered that there is one law for the 'haves' and another for the 'have-nots' and ditto for anyone compromised by age, health, lack of education or financial resources! *.

5. Pensioners, retirees, i e those in 'Seniors" age group are especially affected by changes in the status of their main financial asset, the principal residence and the object of strong attachment, the home. Many older people, in the later years of their lives, prefer to remain in their home of many years and the State government is now encouraging them to do so. Adverse impacts on the dwelling that is the home can adversely affect this group. These are the very people who find the legal 'remedy ' of pursuing litigation a source of further compounding and aggravation of existing disadvantages.

6. Seniors (fifty- five years of age and over), generally speaking, it would be commonly accepted cannot take risks such as a prolonged stress- inducing undertaking such as litigation against a government authority with such power and resources as a local council. There would be good strong consensus with this viewpoint. Losing weight, onset of allergic reaction and elevated blood pressure are just two symptoms which have been demonstrated in the personal experience of the group of local residents the writer knows. Chronic disturbed sleep must also be an accepted condition for someone challenging a council in this court..

7. **How the law works** The Environmental Planning & Assessment Act (EPAA) is supposed to be available to 'any person' in the state of NSW who is concerned to protect

the environment against a breach of the act and yet, the s 123 EPAA regime presently is unfair because

(1). it is based on judicial review
And (2). it is on a "loser pays" basis.
This is in contrast to the legal redress that is available to the developer .

8. The combination of these two conditions, on which an appeal to the Land & Environment court operates, is, in this writer's view, in contravention of the original intent of the EPAA 1979, and is unnecessarily unfair to ordinary people. Even wealthy people will hesitate before embarking on a judicial review case when there is a possible costs order against them should something go amiss in court. The present regime is skewed in favour of developers as they or the Council are in a position to engage more experienced and therefore more expensive legal representation. Even where a simple legal issue is involved, the costs are out of proportion. There is a perception that the court is not for ordinary people. As one registrar said in court to a hapless objector facing a possible costs order, one should never forget that the 'commercial' considerations set the bar in that court (or words to that effect). Of course seen in the light of taxation offsets, a commonly held perception that the court is not accessible to ordinary mortals is understandable. Litigation in that court might be characterised as being on the 'real estate' scale of costs. Average costs are in the range of $300-$400 per hour for solicitors and as for barristers, whatever their rate, a minimum of a day's work if the matter goes to court applies. Justice in this area of planning law is out of reach for even the average person of means.
(An objection against a development involving heritage properties, cost over $100,000.00 and yet the successful objector was still out of pocket some tens of thousands of dollars and then the development got the go-ahead!)

9. Furthermore, the prospect of litigation is not an avenue that the average 'Joe" jumps at. Whilst it is, apparently, fine for the developer to sue council for a perceived error and then to 'walk away' without a costs order should he/she be mistaken, the message from the present regime is that the unsuspecting neighbour has to tolerate a developer's aggrandisement (resulting from the increased value of the improvements) at the expense of the hapless adjoining neighbour not to speak of the detriment to the built environment and possibly other environmental aspects.

10. The potential area for 'factual error' is enormous and with the concern that we all have now for a sustainable environment, the built environment (as exemplified by a mere residential dwelling) might rightfully be given an emphasis that has not been recognised.

11. Nearly all avenues of public legal aid are unable to assist a litigant in a class 4 matter. Community legal centres have limited resources and so the assistance that was available in the writer's own case was very restricted and only available after 6 p.m. It was very distressing that even in a case where thee was arguably a public interest element, funding did not stretch to this particular area of law. A major factor is that neither legal aid nor the law society 'pro bono' schemes will assist in this area being 'private' matters. However, just because 'property ' rights are concerned does not remove the fact that adjoining neighbour's objections may also include detrimental impacts on the

environment taken as a whole. This facetious emphasis on the financial aspects of ownership of real property obscures the reality of the situation. The cumulative denial of impacts on the built environment involves, indirectly, a denial of the value of the natural environment.

12. The quality of **councillors' assessments** is highly variable. Unfortunately, it appears the same must be said for some council town planners, who unlike councillors are meant to have professional expertise, especially when there is as now a high demand for town planning staff. (As the EDO is aware, the experience of the [deleted] reflects that of many ratepayers.) Anecdotal evidence abounds and provided someone has the time, energy and more examples could be documented.*

13. It is understandable that the parliament may have decided to adopt this approach, (judicial review and 'loser pays' combination, see above, to prevent a situation of 'opening the floodgates'. However, the correct balance between the requirements of caseload management and the interests of justice to ordinary individuals is not presently achievable, as the courts can only go some way in mitigating harsher aspects through judicial means.

14. There are many avenues where fine tuning will assist to some extent, but there is a concern that this would be a band-aid approach. .The conclusion reached in this submission is that legislative changes need to be made to achieve the best outcome.

*** Basis For this Submission**

15. The writer's own experience and knowledge of her local area over the last few years provide the basis for the claims in this submission. She is supported by a friend.

16. The writer has also canvassed opinions on a local issue and obtained a sampling of over 100 signatures in a petition requesting review on a specific D A. .) There are a number of us locals who believe it to be a public interest.

See also "A case study" attached which illustrates the difficulties in this area which would be compounded for vulnerable groups. Exercising legal rights is unattainable for many people in her ("A's") experience.

Footnotes There are many documented cases of unsatisfactory performance by council staff. In particular, see below Dunoon Community Gazette (EDO (NSW) NEWSLETTER April 2009) below and in other municipalities including a case where a council lost a case in the Land & Environment Court over a request to install a vergola.

A CASE STUDY: PROBLEMS ENCOUNTERED BY 'A' in class 4.

'A' was an objector to her neighbour's development application. She had tried everything – spoken to the General Manager of the Council, emailed all the councillors, wrote to the council, approached Council's solicitor, arranged for a session with the Community Justice Centre, all to no avail. The Ombudsman cannot help whilst there remained a legal remedy i e go to court. 'A' thought it was a public interest issue. She would go ahead. 'A' had had a discussion with a lawyer friend and having practised as a solicitor many years prior, she thought that her chances were good.

The search for legal advice. There are numerous firms. She approached one. However, to her surprise and chagrin, she found even 'accredited specialists' gave advice based on incomplete data. The lawyer from one respected firm had not looked at the second half of the technical diagrams. When questioned as to why they had not addressed an issue specifically put to him on the telephone, his reason was that he had forgotten. "Many papers on my desk" or words to that effect. Being short on time, they had agreed on oral instructions. (Error 1-do it in writing). Mr Muir of *MCC Energy v Wyong Shire Council* had a similar experience. Asked why he was unrepresented by a lawyer, he said in court that he couldn't find a good one.

Two or three others were approached, with conflicting opinions, and by this time the matter was in train. She had researched the topic extensively (technically). She felt sure she would find legal grounds for challenging. Doing the documents herself would suffice until she found someone to represent her in court. A went ahead and filed and served the papers, managing to get into see a volunteer lawyer with some experience in administrative law (about 20 minutes.)

A trek to another community legal centre was a waste of time, because the appointments clerk failed to say that Planning matters were barred from their practice- a., they had no such expertise and b. it was not the type of matter they were funded for. (Error 2 – make sure of what the legal centre can do so you don't waste time and energy.) In the meantime, A did legal research as best she could. Being all new to her, initially it was very hard. Things had changed too.

Enquiries to the Public interest Advocacy centre could not resolve whether there was a public element to the case. Enquiries with the Environmental Defenders Office, Sydney were also not encouraging- funding allocation did not stretch to 'private cases.' This case was

probably considered ‘borderline’. Lawaccess would eventually direct A to the Legal Aid service, but again the same problems outlined above were encountered, to a greater or lesser degree. It’s pot luck who you will see. Everywhere resources are very restricted.

Eventually, A found a junior barrister who advised he needed an instructing solicitor. A also persuaded a solicitor that the case had merit. Although the lawyer was agreeable about becoming involved, A needed to carry on awhile herself. (Error 3 – don’t settle for less).

Then at the next stage-other obstacles arose. A’s matter was not so straightforward according to the lawyers. There were difficulties and there never was a conference with all present. (Error 4) The barrister decided he was able to run it himself with limited involvement from the solicitor. Unbeknown to A, the Council decided about this time to engage Senior Counsel.

The hearing day was fast approaching. The solicitor advised he wanted to withdraw. This happened with two days to go before the hearing. (Error 5,6. Don’t get frustrated with setbacks and make sure the channels of communication are always clear.) Last minute developments meant that A would lose her court case.

Post Mortem: Did A have a good case in any event? We can presume so, A having persuaded a seasoned lawyer to re consider his initial opinion. Even if not so good, there were unforeseeable problems.

What were these? Remember most cases in this court involve big developments or ‘big’ issues. A neighbour’s dispute does not engender the respect that a shopping centre, a mining venture, a subdivision of allotments would appear to warrant. A was told she would need a big name to represent her. Her opponents repeatedly asserted that the case was a ‘mere merit review, thinly disguised.’ Sometimes, the court acknowledges, bullying tactics are deployed by lawyers, a pity for the self- represented litigant.
At every stage of the process there are traps to catch the uninitiated. The foregoing point to where traps lie (‘Error n ’ flagged above). Unfortunately the problems with a council can be replicated across the state, for various developments within a particular municipality, because mistakes will happen. Problems with the legal fraternity are an additional hurdle and just as stress inducing.
Speaking with other concerned residents, A found her experience not unique to her.

A was told by one high profile lawyer that no one can be sure of a win in court, 'with the best case in the world.' A found that they (the barristers) will do their 'own thing' which is called "forensic judgment" and you, the client, have the benefits or disadvantages of their good or bad judgment.

The objector cannot get a merit review, must pay if he loses. But the question is how much? He pays even if it's not his fault personally, i.e. because the lawyer who was paid, sometimes up front, was lousy. The objector may end up having to pay for council's mistake and his own lawyers' mistakes. Can he sue his own barrister? Compared with the developer, the system is so unfair to objectors. Compare with the situation in Victoria.

Some practical measures: re instate the Chamber magistrate system. Simply disclaim any liability. More funding to expand services at LIAC at the State Library of NSW.

Legal advice to point people in the right direction (see a reference to 'coaching' on one of the legal websites) would assist in cases where there is a public interest element, because public litigants often are sufficiently motivated to do the legwork necessary. Paying for legal advice was not the most desirable option at the rates charged. $1000 is the minimum for a barrister's initial advice on prospects, if you're lucky.

Litigation in this area is too expensive. Unless one has 'deep pockets' to match a developer or the council, one has little choice. With less experienced and more affordable professionals one runs the risk of becoming dissatisfied with the quality of legal services. With pressure from time constraints set by the court, the legal services process itself can become both cumbersome and frustrating, as A found.

On the other hand, self –represented litigants face Herculean obstacles. The courts are able to assist, but only with minimal information. In drafting forms and documents, so much turns on the formulation. There are potentially severe costs implications here as well.

Incidentally, as a result of this case, A's partner is depressed, affecting their relationship and the family dynamics. Disturbed sleep and loss of weight are concomitants of undertaking litigation. There is a fear for a recurrence of previous (morbid) conditions due to ongoing stress.