

# **TOWN PLANNING LAW – PAST, PRESENT AND FUTURE**

## **Conference to mark 80 years of town planning law in Western Australia**

### **18 November 2009**

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## **Third-Party Appeal Rights: Past and Future**

**Judge Christine Trenorden,  
Senior Judge,  
Environment, Resources & Development Court, South Australia**

### **Introduction**

The first comprehensive town planning legislation in Australia was enacted by the Western Australian Parliament<sup>1</sup> in 1929. This followed a number of events in Australia to showcase the benefits of town planning, from 1914, onwards. They included an Australasian town planning tour by Charles Reade on behalf of the Garden Cities and Town Planning Association of Great Britain, in 1914 -1915, after which Reade became town planning advisor to the South Australian government and in 1916 introduced the Town Planning and Housing Bill into the South Australian Parliament (where it was defeated by a property-franchise based Legislative Council). In 1917 the first Australian Town Planning and Housing Exhibition and Conference was held in Adelaide, attracting some 250 persons. A second conference was held in Brisbane in 1918. In 1920 the *Town Planning and Development Act 1920 (SA)* became law, and provided for a Department of Town Planning, with a government town planner, a central advisory board of town planning and town planning committees at local council level.

This early legislation did not provide for third-party appeal rights, nor even applicant appeal rights. In the years since 1961, the parliaments in each of the states have provided for third-party appeal rights, except in Western Australia. As you will be aware, third-party appeal rights have not been available in Western Australia, except to a very limited extent, under one or two local planning schemes.

I would argue that, just as town planning legislation in Australia was inevitable following the developments in Europe and United States of America in the late 19th and early 20th centuries and the consequent groundswell of opinion in this country as to the benefits of town planning, so the adoption of third-party appeal rights in Western Australia is inevitable.

There are compelling reasons for providing appeal rights to third parties in relation to a decision on an application to undertake development, notwithstanding the fears of those who oppose their provision. There are also compelling reasons as to why any appeal rights should be limited, and consequent appeals conscientiously managed.

In this paper I will look back to the history of third party appeals in Australia, particularly but not exclusively, in South Australia. There may be some lessons to be learned from the history. I will outline the position today in South Australia. Concern is often expressed about floodgates being opened if third party appeals are permitted, so I will address the numbers of such appeals in two States. I propose to articulate reasons for and against third party appeal rights, and looking to the future, how appeals might best be managed to minimise the consequences most feared by those who oppose granting a right of appeal to third parties.

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<sup>1</sup> *Town Planning and Development Act 1928 (WA)*

### Third Party Rights of Appeal in Other Jurisdictions Before 1982

My research so far indicates that appeal rights against a decision to grant a planning consent, permit or authorisation for third parties have been available in other states of Australia, as indicated below:

- Victoria: since 1961 - *Town and Country Planning Act 1961*
- New South Wales: since 1970 - s 342ZA *Local Government Act 1919*
- Queensland: since 1964 (Brisbane) - s 22(8) *City of Brisbane Town Planning Act 1964*; since 1966 (rest of Qld) - s 33(18) *Local Government Act 1936-1970*
- South Australia: since 1972 - *Planning and Development Act*
- Tasmania: since at least 1974 - s 734 *Local Government Act 1962*

However, the appeal rights were limited, subsequently expanded and then have been diluted in many cases. I recall that when I examined the relevant legislation in preparation for the report *Combined Jurisdiction for Development Appeals in the States and Territories* (1990)<sup>2</sup>, it appeared that in Victoria a right resided in third parties to appeal at each step of the processes associated with the consideration and determination of an application for a planning permit.

In Victoria under the *Town and Country Planning Act*, third parties who either had been objectors to an application or had objected in writing to the determination of the responsible authority, had a right of appeal against the authority's determination<sup>3</sup>.

In New South Wales s 342ZA of the *Local Government Act* was enacted in 1970 to allow limited third-party rights<sup>4</sup>. Owners of land adjoining a proposed residential flat development and those whose enjoyment of their property would be detrimentally affected by such a development could object to the development and subsequently applied for and be granted leave to appear in any appeal by the applicant against the council's refusal to grant consent, or the conditions imposed on the consent<sup>5</sup>.

Third-party appeals were further considered in 1975 in *Proposals for a New Environmental Planning System for New South Wales*. This report expressed doubts about the practicality of these appeals fearing that they were likely to increase the number of appeals and thus slow development, but on balance concluded that allowing third-party appeals would preclude the controversy and subsequent litigation that at the time surrounded many development proposals following their approval<sup>6</sup>.

In a subsequent report by the New South Wales Planning and Environment Commission the conclusion was that "the likely benefits flowing from a third-party appeals system were marginal and were outweighed by the disadvantages of slowing down and adding costs to the whole development control process"<sup>7</sup>.

In Queensland, Fogg reported the "somewhat unusual right" whereby multiple dwellings of more than 2 storeys in certain zones in the Brisbane area could be the subject of objection and subsequent appeal by a third party<sup>8</sup>. Also in Brisbane, objectors could join certain

<sup>2</sup> Hayes, BRH and Trenorden CL *Combined Jurisdiction for Development Appeals in the States and Territories* (1990, Department of Industry, Trade and Commerce)

<sup>3</sup> AS Fogg, *Australian Town Planning Law*, 1974: University of Queensland Press, p 320

<sup>4</sup> see generally the comments of Else-Mitchell J. in *Peter Rommel and Associates Pty Ltd and Others V North Sydney Municipal Council* (1971) 23 LGRA 99 at 107

<sup>5</sup> *Local Government Act 1919-1973* section 342ZA

<sup>6</sup> Hort, LD & Mobbs, M, *Outline of New South Wales Environmental and Planning Law* (Butterworths, 1979); p9

<sup>7</sup> Hort & Mobbs; op. cit., p12

<sup>8</sup> Fogg, op. cit., p 304.

applicant appeals as respondents, supporting the Council decision<sup>9</sup>. Across the state of Queensland, objectors could appeal against the decision to grant consent to development that fell within the discretionary column on the table of zones in a planning scheme<sup>10</sup>. Thus Queenslanders enjoyed reasonably broad rights of appeal. Third-party rights of appeal, at least by 1987, were against the *proposal* by the local authority to grant development consent, notice of the proposal being statutorily required to be given to each objector<sup>11</sup>.

In South Australia, third-party appeal rights appeared for the first time in a 1972 amendment to the legislation. However development within the area of the Council of the City of Adelaide was subject to separate legislation, namely the *City of Adelaide Development Control Act 1976*, that at no time provided third party appeal rights.

The Tasmanian legislation provided the right to appeal for third parties who were "injuriously affected" by decisions of councils with respect to development<sup>12</sup>.

It is clear that there existed a strong culture of third party appeal rights in Queensland, Victoria, Tasmania and South Australia by the 1980s. To some extent, the impetus for Parliaments to establish third party appeal rights, at least in South Australia and New South Wales, may have originated from comments made by the relevant appeal bodies<sup>13</sup>. In New South Wales, Hardie J in *KR Wilson Pty Ltd v Kogarah Municipal Council*<sup>14</sup> said in relation to large three storey residential flat buildings in the context of the particular locality:

The time is now opportune to place on record that there is a real danger that this type of multi-unit residential development is likely to proceed apace in other suburban areas unless and until an amendment to the relevant legislation is made to enable aggrieved owners of properties in the localities, subject to appropriate safeguards and to the establishment of an important question of planning principle, to challenge by appeal decisions of local councils granting consents, just as aggrieved owners can by appeal challenge decisions refusing such consents.

Failure to provide some adequate machinery to reverse erroneous decisions of councils granting planning consent will put it beyond the power of the community to call a halt to still more and more development of a type which must ultimately destroy the amenity of many residential areas.

His Honour reiterated his view three years later in *Heszberger v Marrickville Municipal Council*<sup>15</sup>.

### **Current Limitations on Third-Party Appeal Rights**

In Victoria now there are limits concerning appeals from the final decision of the planning authority as to the granting of a permit. Some of these are set out below:

- a commercial competitor cannot object and so has no right to a review or an appeal.
- a person who has lodged an objection (an objector) may not appeal if the proposed development falls within a class exempted from review by a planning scheme<sup>16</sup>.

While a person who has not lodged an objection may also seek to have the responsible authority's decision reviewed by the appeal body (the Victorian Civil and Administrative Appeal Tribunal), there is no automatic right to do so. First, the decision has to be one which has not been exempted from review. Secondly the person seeking to have the

<sup>9</sup> Fogg, op cit, p 305

<sup>10</sup> Fogg, op. cit., p 304

<sup>11</sup> see *Local Government Act*, s 33(18) and *City of Brisbane Town Planning Act*, s 22 (9), cited in Fogg, Alan, *Land Development Law in Queensland* (The Law Book Company Ltd, 1987),p 440

<sup>12</sup> Fogg, op. cit., p 317

<sup>13</sup> For South Australia, see: *Residential Development v Director of Planning* (1970) SAPR 42

<sup>14</sup> (1966) 12 LGRA 259 at 264

<sup>15</sup> (1969) 18 LGRA 122 at 124

<sup>16</sup> see sections 57, 82 *Planning and Environment Act* (Vic) 1987

decision reviewed has to be a person who is affected; thirdly there has to have been a written objection made to the responsible authority against the grant of a permit and fourthly, the Tribunal has to grant leave for the affected person to apply for review of the decision to grant a permit<sup>17</sup>.

In Tasmania, a person who made a representation (a representor) in respect of a development application may appeal to the Resources Management and Planning Appeal Tribunal within 14 days after the notice of the grant permit was served on the representor<sup>18</sup>. Any appeal must be determined within 90 days or, where all parties have agreed to an extension and is granted by the relevant minister, that period<sup>19</sup>.

Since the advent of the *Environmental Planning and Assessment Act 1979* (NSW), there is a very limited right appeal for third parties in New South Wales, although John Mant has said that the original draft of the Act promised wide-ranging third-party appeals. According to John Mant<sup>20</sup>, the Act was changed at the last minute to provide for third-party appeals only for designated developments. He is quoted as having said:

Under pressure from the development industry only a limited range of large-impact developments were designated - mines, polluting industries but not houses, flats or retail buildings.<sup>21</sup>

Hort & Mobbs throw doubt on the Mant comment. The Environmental Planning and Assessment Bill 1979 was introduced in April of that year. The Hort & Mobbs book, published in May 1979 states that the Bill provides that objectors may appeal against the grant of consent to designated development, and does not describe any other right for objectors or third parties to appeal<sup>22</sup>. It would appear that more fulsome provisions for third-party rights of appeal, if contained in the draft versions of the Bill, were not included in the Bill as introduced into Parliament in 1979.

A person in New South Wales who has lodged an objection against the grant of consent to a development application for designated development may appeal against the decision to the Land and Environment Court<sup>23</sup>, except in those cases where the proposal has been declared to be of state or regional planning significance; a "major development" or a "critical infrastructure project"<sup>24</sup>. A "major project" includes a railway corridor costing more than \$30million, marinas and performing arts facilities costing more than \$30m. "Critical infrastructure" includes a major gas pipeline, major highway upgrades and the Kurnell desalination plant. "Designated developments" are generally those larger projects such as aquaculture, coal mines, chemical storage facilities, waste management facilities, mineral processing facilities, ports and railways, which are likely to have a significant risk of environmental impact<sup>25</sup>, and in respect of which an environmental impact statement is required. However, if only part of the development is a "designated development", then subject to Part 3A the whole of the development will assume that character and thus any decision may be open to appeal by a third party who lodged an objection, whether or not the designated development component is ancillary to the dominant or primary purpose of the application<sup>26</sup>.

<sup>17</sup> Section 82B *Planning and Environment Act*

<sup>18</sup> *Land Use Planning and Approvals Act 1993* (Tas) section 61

<sup>19</sup> *Resource Management and Planning Appeal Tribunal Act, section 16(1)(f)*

<sup>20</sup> Included in his extensive experience in advising government since 1971, John Mant 'spearheaded the integration of development control systems in Queensland, South Australia, Victoria and the ACT', and was acting Town Planning Commissioner in WA, 1985.

<sup>21</sup> *The right to appeal is that there, says planning manager* (Harvey Grennan, September 29, 2009) at <http://www.brisbanetimes.com.au/national/the-right-to-appeal-is-there-says-planning-manager-20090928-g99n.html> accessed 29/09/2009

<sup>22</sup> Hort & Mobbs; op. cit., p17

<sup>23</sup> see section 98 *Environment Planning and Assessment Act*

<sup>24</sup> see Part 3A *Environmental Planning and Assessment Act*

<sup>25</sup> see section 77A *Environment Planning and Assessment Act* and Part 1 of Schedule 3 to the Environmental Planning and Assessment Regulations 2000

<sup>26</sup> *Residents Against Improper Development Inc V Chase Property Investments Pty Ltd* [2006] NSWCA 323

Thus third-party appeal rights in New South Wales are very limited.

In Queensland, the *Sustainable Planning Act 2009* recently came into operation, replacing the *Integrated Development Assessment Act 1997*. There was little or no change to third party appeal rights. A person who has lodged a valid written submission (submitters) within the requisite time frame may appeal against the decision of the authority, but only against that part of the approval relating to the assessment manager's decision (read "planning authority's decision") on any part of the application requiring impact assessment. Third-party appeal rights do not attach to exempt, self assessable or code assessable applications, because these do not require public notification<sup>27</sup>.

### **The History of Third Party Appeal Rights in South Australia**

Rights were granted to third parties to appeal against a decision to grant planning consent in 1972, following a public outcry over the approval of residential subdivisions in the Adelaide Hills ("Hills Face Zone"). The Town and Country Planning Association unsuccessfully attempted to appeal to the Planning Appeal Board against the decisions. The outcome grabbed media attention in November 1970, and the Association's position was supported by editorials in *The Sunday Mail* and *The Advertiser*, including statements such as the following:

The Authority does not do enough to ensure that the ordinary man has any say in the planning of the future of South Australia.....<sup>28</sup>

The Director of Planning was sent to New Zealand and Victoria to study third party appeal systems with a view to their introduction in South Australia. In 1972 a Bill was introduced into Parliament to amend the *Planning and Development Act* to provide for third party appeals. The Government had concluded:

...that it is fair and just to give a right of appeal to persons who claim their interests are affected adversely by permission being granted for any development to proceed. As the problems associated with urban development are becoming more complex, much ill-feeling will be overcome by giving both applicants and objectors the right of appeal to the Planning Appeal Board.<sup>29</sup>

The move had the benefit of bi-partisan support. There was palpable concern over the lack of appeal rights for persons directly affected by proposed development and also in situations where the authorities were not prepared to prevent perceived destruction of an area of conservation value and scenic amenity.

The appeal rights in the new section 36a were extensive, giving a right to any interested person in respect of all applications for development that were publicly notified, that is, that were neither permitted nor prohibited according to the table in the relevant zoning regulations, but not in respect of land division proposals.

In the first full year of operation of the new provision, the third party appeals lodged with the Planning Appeal Board numbered 44, that is, 10.4% of the total lodgements. Over the period of 10 years between the introduction of section 36a and the repeal of the *Planning and Development Act*, the number of third party appeals lodged as a percentage of total appeals lodged averaged 9.2%.

In the course of the 8 years during which extensive records were kept by the Planning Appeal Board of third party appeals actually heard and determined (54% of appeals lodged),

<sup>27</sup> *Sustainable Planning Act 2009*, section 462

<sup>28</sup> *The Sunday Mail*, 22 November 1970, quoted in Hodgson, John "Third Party Appeals in South Australia 1972-1993", a research paper submitted for the degree of Master of Environmental Law (1995)

<sup>29</sup> *Hansard*, House of Assembly, 31 October 1972, p 2556, quoted in Hodgson, op cit.

approximately 40% resulted in reversal of the decision of the planning authority; in about 19% of matters the decision was varied, and the appeal was dismissed in approximately 41% of matters.

In addition, it is noteworthy that 43% third party appeals were withdrawn before hearing, a factor attributed by the Board itself to the opportunity provided by an appeal, for the parties to meet, often for the first time, and understand both the proposal and the objections to it and talk through a consensus position.

From 1975, the Board had the authority by an amendment to the *Planning and Development Act*, to join as a party to an appeal by an applicant, a person who had objected to the application.

As I have noted, in 1976, the Parliament enacted separate legislation for planning within the area of the City of Adelaide, which contained no third party appeal rights. The then Minister responsible justified this with the usual arguments, namely that the City had well-qualified staff to advise it, it invited public comment on proposals in any event, and that appeal rights would result in increased costs and delays which would be untenable for development within the City.

Following an extensive report, published in 1978, entitled *Objector Appeals in South Australia*, and a change of government, in the early 1980s a Bill for a new Planning Act was introduced into Parliament. After extensive consultation and redrafting the Bill became the *Planning Act 1982*, which repealed the *Planning and Development Act*.

Concerning third party appeals, the *Planning Act* provided:

1. a right of appeal for persons who had made representations following public notification of a planning application. However, not every application required notification; the Regulations made under the Act exempted specified forms of development, except where they were prohibited. These included the following:
  - the most usual forms of residential accommodation but not residential flat buildings
  - land division to create 5 allotments or less
  - development that in the opinion of the Council was of a minor nature and unlikely to have significance beyond the boundaries of the subject land
  - the division of land where the subsequent use proposed would be permitted absolutely or conditionally under the relevant principles of development control contained in the planning policy document, the development plan;
2. that every appeal proceed first to a conference of the parties convened by the Planning Appeal Tribunal (the continuation of the Planning Appeal Board under a new name) and chaired by a member of the Tribunal; and
3. that an appellant could pursue an appeal to hearing and determination after the conclusion of the conference, only if the Tribunal had heard and determined in the appellant's favour, an application for leave to continue.

The conference requirement at the time appeared to be very successful, but on reflection, the number of matters that were withdrawn because a settlement had been reached, did not exceed the number of third party appeals withdrawn prior to hearing under the repealed *Planning and Development Act*, while utilising a significant proportion of commissioners' time. There was also a requirement for the chairperson of the Tribunal or another judge, to ratify any settlement reached by the parties with a commissioner. The judge could require attendance by the parties, if it was considered that the settlement might not be consistent with the Act, and therefore not appropriate to be ratified.

The requirement for leave to continue an appeal created problems. The Act did not set out any criteria upon which the Tribunal could assess an application. An application had to be made within 7 days of the conclusion of the conference of the parties. In the first year, leave was not refused in any application by a third party appellant to continue the appeal. Inevitably, an application was refused and upon appeal to the Supreme Court, Wells J set out some words of guidance for the Tribunal and parties, as follows:

...on application... for leave to continue the appeal, the Tribunal must be persuaded that the grounds upon which the appeals would be argued possess an importance that extends beyond that which would be attributed to them by the legislature and the parties immediately concerned – that they have, in other words, more general and public importance, and, moreover, that there is a case to be made that is reasonably arguable on the merits. It is not enough, with all due respect to the Tribunal, to grant leave to continue because the grounds of appeal reveal that something in them could, if made good, lead to the allowance of the appeal, in whole or in part.<sup>30</sup>

The effect of this judgment and that in a subsequent Supreme Court appeal<sup>31</sup> was that the Tribunal effectively conducted an appeal hearing on the merits upon the application for leave to continue, in the interests of determining whether (1) the grounds of appeal were of public and general importance, and (2) there was a reasonably arguable case on the merits.

The requirement for leave to continue was an abysmal failure, causing increased costs and delays for all parties where a third party appeal was lodged, and enormous difficulty for third parties, because, as the Minister said in introducing a bill for an amendment to the Act: “The (Supreme Court judgment in *Rimington*) effectively removes third party appeal rights in the majority of cases.”<sup>32</sup> The life of the leave requirement was destined to be short. In August 1985 the Act was amended to remove the relevant provisions. They had operated for less than 3 years.

As I have said, the Regulations made under the *Planning Act* set out those kinds of development that were exempted from notification and therefore could not be the subject of a third party appeal. Over the life of the *Planning Act* (1982–1993) the list of exempt development was extended. In support of further extension of the list of exempt developments, the then chairman of the South Australian Planning Commission, unconsciously foreshadowed more recent justifications made in Commonwealth and State fora for reducing opportunities for third party appeals; namely that as the general community has an opportunity to comment on future development in an area at the time the land is zoned, further opportunity to comment on development in accordance with the zoning is unnecessary.<sup>33</sup> These sentiments have been repeated by organizations whose membership comprises representatives of developers, as well as politicians and their advisors, when it suits.

The *Planning Act* was replaced in late 1993 by the *Development Act 1993*, following a 2 year planning review that culminated in a final report: *2020 Vision: A Planning System*. In the life of the *Planning Act*, third party appeals comprised 18.4% of the total number of appeals lodged (compared with 9.2% under the earlier legislation,) and 58% matters proceeded to a hearing (compared with 54%). In 31% appeals, the decision of the planning authority was reversed (compared with 40%), in 43.5% of matters the decision was varied (compared with 19%), and in 23.2% of matters the appeal was dismissed (compared with 41% ).

On the “floodgates” argument, it is interesting to note that under the *Planning Act*, the total number of third party appeals comprised approximately 18% of all appeals lodged. This is approximately twice the percentage of third party appeals lodged under the *Planning and Development Act*.

<sup>30</sup> *Hassen v District Council of Murray Bridge & Onsoy* (1984) 35 SASR 448 at 451-2

<sup>31</sup> *Rimington v City of West Torrens* (1985) 39 SASR 481

<sup>32</sup> *Hansard*, House of Assembly, 8 May 1985, p 4004, quoted in Hodgson, op cit.

<sup>33</sup> South Australian Planning Commission, *Planning Act 1982; Report on Amendments to the Development Control Regulations*, 7 November 1984, p 2

## The Current Legislation and Practice in South Australia

The *Development Act* came into operation in late 1993. In general third party appeal rights were left unchanged. A right of appeal exists where a person has lodged an objection (called a representation), in relation to an application for consent to a category 3 development. Under section 38 of the Act, certain categories of development must be publicly notified, but a right of appeal exists only for category 3 developments. The category to which a proposed development is assigned depends on the characterisation of the development (determining the *nature* of the development) and whether either the Regulations or the relevant development plan (the policy document) have assigned development of that nature to a category other than category 3. Category 3 is the default category.

The nature of the appeal is limited to “what should have been the decision of the relevant authority”<sup>34</sup>; in other words, a merits appeal.

Appeal rights for third parties have been increasingly restricted, by the addition of classes of development to categories 1, 2 and 2A, and by the incorporation of the residential code provisions into the Development Regulations in 2007 through extending the class of acts that are not development and varying so as to extend, the developments that are complying, to implement the August 2005 Council of Australian Governments (COAG) agreement to endorse the adoption by governments of the 2005 *Leading Practice Model for Development Assessment*, in the economic interest.

Another opportunity for third parties is provided where an applicant has appealed against the decision of an authority to refuse consent. A person who made a representation is given notice of the appeal by the Court and advised that they may apply to be joined as a party to the appeal. This procedure occurs pursuant to the ERDC Rules, and has no legislative basis. It has been the practice of the Court and its predecessors for a very long time.

A third party appellant or a party joined who has a commercial competitive interest, must declare that interest to the Court<sup>35</sup>, and may be faced with a claim for economic loss suffered by the applicant for consent if upon the determination of the appeal, the development is entitled to proceed in the same or substantially the same form, as that approved in the first instance<sup>36</sup>.

In search of a right of appeal, representors have argued that the relevant authority assigned the development to the wrong category; that the development was properly a category 3 development, and that therefore, having lodged a representation in compliance with the Regulations, the representor should have a right of appeal. These arguments by third parties, before April 2007 had to be by way of judicial review proceedings in the Supreme Court, but can now be made in the Environment, Resources and Development Court, provided the applicant is a person who can demonstrate an interest in the matter by virtue of being an owner or occupier of the development site or adjacent land (defined as abutting land or land that is no more than 60m distant)<sup>37</sup>.

In 2007 the *Development Act* was also amended to give the Court criteria by which it could refuse an application to join a person as a party to proceedings (other than a person who was entitled to be given notice of the decision of the authority in an application for a category 3 development). Prior to this, the Court had been guided by the Supreme Court decisions in *Pitt v Environment Resources and Development Court* (1995) 66 SASR 274 and *Onesteel Manufacturing Pty Ltd v Environment Protection Authority* (2005) SASR 67. The criteria are:

<sup>34</sup> *Development Act 1993*, section 38(6)

<sup>35</sup> *Development Act*, section 88B

<sup>36</sup> *Development Act*, section 88C

<sup>37</sup> *Development Act* section 86(1)(f)



- that the Court is not satisfied that the applicant for joinder has a special interest in the subject-matter of the application;
- regardless of the interest of the applicant, that the Court is not satisfied that the interests of justice require the applicant be joined; or
- upon any other ground determined by the Court to be appropriate<sup>38</sup>.

The Supreme Court considered the provision in *O'Neill v Kimhi & The City of Charles Sturt* [2009] SASC 109. The Honourable Justice Debelle said that the ERD Court was invested with a wide discretion and that the terms of the provision do not create a presumption against joinder of an applicant in relation to a category 1 or 2 matter. The discretion had to “be exercised within the scope and ambit of the *Development Act*, the *Development Regulations* and the *Development Plan*”<sup>39</sup>. Given the Supreme Court considered the meaning of “special interest” in the context of the planning system in the State, it is worth quoting extensively from the judgment. His Honour said:

#### **A Special Interest**

19 There can be no doubt that the O’Neills have a special interest in the subject matter of this appeal and the judge held that they had that special interest. They reside in a dwelling on land that adjoins the proposed development. The proposed development is a Category 2 development that required the Council to give notice to them. They took up the opportunity of being heard by the Council in relation to the proposed development. They lodged a representation opposing the development. They appeared before the Council to voice their opposition. The proposed development is of a height and bulk that will cause overshadowing of their building. The O’Neills hold a development consent for alterations and additions to their dwelling which are designed so as to gain the full benefit of light and warmth on the northern aspect. The O’Neills allege that the building proposed by the Kimhis will overshadow their dwelling throughout the year and deny them the benefit of their proposed alterations and additions. The Kimhis’ proposal also involves excavation of their land and that has a potential to cause subsidence on the O’Neills’ land if adequate precautions are not taken. The Council refused the development application because of overshadowing of the O’Neills’ land. On any view, the O’Neills will be directly affected by the proposed development. They have an immediate and special interest in the subject matter of the appeal. These same considerations also mean that it is in the interests of justice that they be joined. These are sufficient reasons why the O’Neills should have been joined as parties.

20 It might be added that, as a general rule, an adjoining neighbour will always have a sufficient interest in an application to justify joinder.

.....

22 It is plainly desirable that an applicant for joinder should be able to inform the court in clear terms of the grounds on which he or she seeks to be added as a party and to state how he or she will assist the court in the resolution of the issues. At the same time, the Environment Court must make due allowance for the fact that lay persons frequently appear before it. In this case, the court was told that the O’Neills would be represented. The question of overshadowing was obviously an important issue that directly affected the O’Neills. As the Council’s Development Plan contains provisions intended to prevent overshadowing and to protect access to sunlight in residential zones, the O’Neills seek to argue an issue relevant to the question whether development consent should be granted. On any view, the O’Neills have a real and proper interest in an important and relevant question as to whether development consent should be granted. It was a clear case for ordering joinder. Having recognised as she did that the O’Neills had a significant personal as well as planning interest in the subject matter of the appeal, the judge ought to have joined them as a party. If the judge had a concern as to how they might assist the Environment Court, the judge, knowing that the O’Neills intended to be represented, should have adjourned the application to enable the O’Neills to instruct a legal representative to appear on their behalf and present the case for joinder.

23 The judge’s reasoning in all likelihood stemmed from a justified concern that the appeal would proceed in an orderly manner and with reasonable expedition. However, both those goals can be achieved by giving appropriate directions after the order for joinder. Where required, the directions can deal with such matters as directing the party joined to lodge within a specified time a statement of the issues he seeks to agitate on the appeal and to advise the nature of the evidence to be called. This appeal highlights the fact that, as a general rule, an adjoining owner should be joined. The question of overshadowing was an obvious issue. Appropriate directions could have been given to require the O’Neills within a specified time to give particulars of their case on that issue and the evidence they intended to call. The O’Neills would then have had an opportunity to obtain legal and planning advice and comply with that direction.

<sup>38</sup> *Development Act* section 88(2)(c)

<sup>39</sup> *O’Neill* at [12]

### **No Common Interest**

24 It is apparent from the extract quoted above that the judge has also relied on her belief that the case for the O'Neills coincided with the case for the Council and that the Council was willing to call Mr O'Neill to give evidence. The judge erred in relying on that ground. There can be little doubt that to some degree the case for the Council might overlap against the case for the O'Neills. However, the Council and the O'Neills do not have a common interest. While the Council's role in the appeal was to defend its decision and to seek a development which accords with planning principle, the Council might be willing to agree a modified proposal. The O'Neills' interest was to modify the proposal in a manner satisfactory to them and, if not modified, to oppose the development. There may well be issues where the interests of the O'Neills will conflict with the interests of the Council or, at least, will diverge from them. The judge ought also to have considered the fact that it is not uncommon on an appeal in the Environment Court for a Council to agree a modified development proposal and that the modified proposal is not always to the satisfaction of an adjoining owner. It cannot be assumed, therefore, that the Council will maintain its opposition to the proposed development and continue to represent the interests of the adjoining owner. It is prudent, therefore, to proceed on the footing that the Council might accede to a modification of the proposal so that the preferred course is to join the adjoining owner as a party to the appeal. The judge therefore erred in relying on the asserted common interest. Further, it was not possible to conclude that the O'Neills would not have led additional evidence to that to be adduced by the Council until the O'Neills had outlined through their legal representative the nature of the case they intended to present. The interests of justice therefore required that the O'Neills be joined.

26 The judge also relied heavily on the decision in *Onesteele*. That was a decision on its own facts and provides little assistance in the case of an application for joinder by owners of land adjoining the land on which a development is proposed.

27 For these reasons, the judge erred in refusing to join the O'Neills as parties to the appeal. Subject to the question whether it is appropriate to extend the time within which to appeal, the decision should be set aside so that it is necessary for this court to consider afresh the issue in relation to the overshadowing of the O'Neills' house. The fact that the Council's Development Plan permits semi-detached dwellings does not have the necessary consequence that this development should be approved. The Development Act recognises adjoining owners have a right to be heard in respect of certain developments. The Council had refused to grant development consent. The issue the O'Neills seek to agitate is relevant and is based on provisions in the Council's Development Plan. The O'Neills' interests are not the same as those of the Council. It is manifestly in the interests of justice that the O'Neills should be permitted to present a case in opposition to the proposed development or at least to present some suggestions for modification of it.

It is now clear that the insertion of s88(2)(c) does not necessarily limit applicants for joinder where the development is not category 3 development.

### **Third Party Appeals: The Numbers**

#### **Victoria**

In Victoria in the year 2007-2008, 2239 planning appeals were instituted, of which 688 (32%) were third party or objector appeals.

The average time taken from lodgement of third party appeal to finalisation, in 2007-2008, was 19 weeks, compared with an average of 26 weeks for appeals against refusals to grant a permit, by applicants. For the period from 2002-2003 to 2007-2008, the median period between lodgement and finalisation for third-party appeals was between 19 and 14 weeks.

Regarding outcomes in third party appeals, the VCAT website reveals that during the period 2001-2002 to 2007-2008:

- the appellant was fully successful (which I have taken to mean resulted in overturning the planning authority's decision) in 7 - 12% of matters,
- the appellant was partially successful (which I take to mean resulted in a variation of the approval or permit conditions) in 36 - 58% of matters,
- the appellant was not successful (which I take to mean resulted in the appeal being dismissed) in 20 - 35% of matters, and
- the appeal was withdrawn before hearing in 12 - 19% of matters.

### South Australia

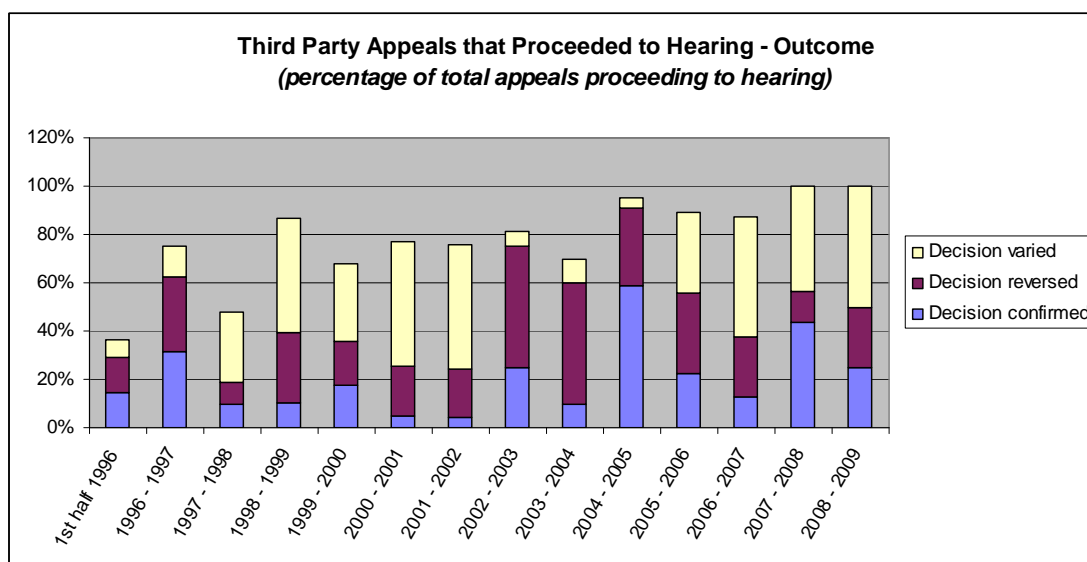
In South Australia the number of third party appeals lodged has been around 50 for the past four financial years, down from around 100 for the early 2000s. In the same period, the total number of appeals lodged has been 419 - 461. The annual numbers of third party appeals have been more consistent than the numbers of applicant appeals, which have been generally increasing over the past 10 years.

The number of third party appeals as a percentage of the total number of merit appeals has varied significantly, ranging from 14% in 2005–2006 to 37% in 1998–1999. For the past seven financial years the figure has been 20 – 14%. In 2008-2009, 16% of appeals lodged were third party appeals. It should be noted that there can be and often is, more than one notice of appeal lodged in relation to a development consent. The numbers of third party appeals reported are raw numbers and so are likely to be in respect of a lesser number of developments. Appeals in relation to the same development proceed to conference, and where necessary, hearing together.

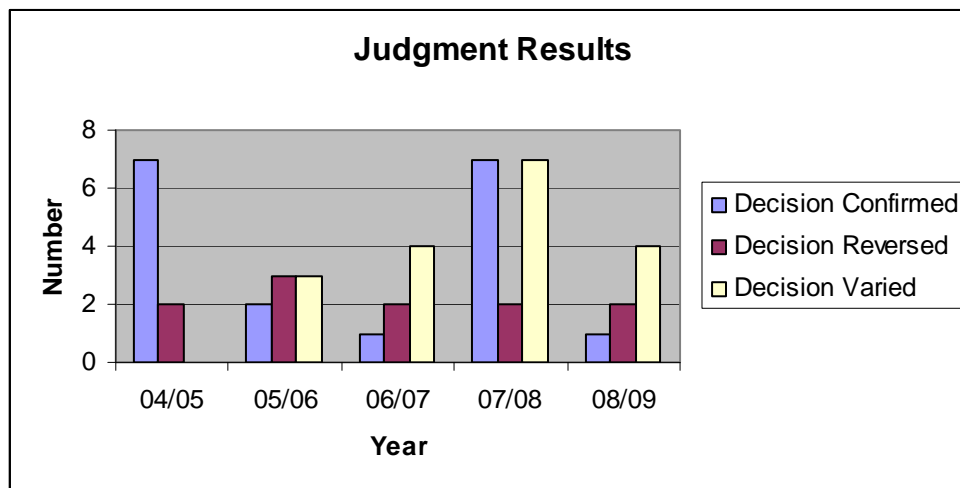
Over the past five years the period between lodgement and final disposal of third party appeals has been on average, between 16 weeks and 23 weeks.

The numbers of third party appeals proceeding to hearing, as a percentage of the total number of merit appeals, has generally mirrored the lodgement figures. For the past seven financial years has been 11 – 22%. The actual number of third party appeals proceeding to hearing has been less than 20 since 2004–2005.

Of the third party appeals that proceed to hearing, the percentage of those matters where the decision has been varied, reversed, or confirmed has fluctuated over the past 15 years. Over the past four financial years however, the decision of the planning authority was varied in 33 – 50% of matters. Generally, this means that the conditions of consent were varied. The consent was reversed in 10 – 27% matters only. The chart below presents a picture of the outcomes of third-party appeals since 1996.



However, as the following chart shows, the actual numbers of third party appeals proceeding to hearing and judgment has been very low. Accordingly it may be dangerous to draw any conclusions from the percentages provided above.



### Arguments Against and For Third Party Appeal Rights

The usual arguments against providing third-party appeal rights in planning legislation are well-known. They include that appeals would:

1. add significantly to delays in the planning system
2. add to the cost of development
3. open the floodgates and create a "meddler's charter"
4. be a deterrent to investment in the local economy
5. create an unmanageable administrative burden
6. provide an opportunity for a well-heeled vocal minority, not representative of the local community, to dominate
7. exacerbate issues such as social exclusion and lead to greater social disadvantage
8. reinforce an adversarial approach to development
9. weaken the representative nature of local democracy and decision-making

In addition, it is argued that appeal rights at the time of consideration of development proposals are unnecessary because the community has had an opportunity for input into the determination of appropriate forms of development within the local area at the time of community consultation on the proposed planning policy (town planning scheme or development plan) for the area.

This position assumes that there has been adequate and meaningful consultation of the community, with the community understanding the implications of settling planning policy for the area. I am not convinced that consultation presently is adequate, nor that the community generally understands or is was aware of planning policy. Secondly, the position assumes that the planning policy is able to exhaustively identify all possible uses and indicate whether they are desirable or undesirable in the area, leaving no room for argument as to whether a particular proposed development might be desirable if it can be shown to have no adverse impacts on the environment or the amenity of other occupiers of land.

Of course there are some negative effects of providing for third party appeals. They will add to costs, and delay the commencement of development, where approval for a development is ultimately confirmed. However, the evidence shows that the right to appeal on the part of third parties has not opened the floodgates. The prospect of an appeal will not deter investment in quality projects; namely those that accord with the planning policy for the area and have been designed to have minimal impact on neighbours and the surrounding community.

There have been many commentators who are convinced that the benefits outweigh the negative impacts. One of these commentators, Stephen Willey, articulated the case for third-party appeals in his 2006 article<sup>40</sup>. He has made the following points:

- The traditional argument that planning legislation was not intended to give broad ranging rights to individual members of the public derives from a classical property rights approach. The postmodernist view is that planning is ultimately a communicative process which needs to embrace the public in more meaningful ways. It is now recognized that society is not homogenous but comprised of a range of interests that are fragmented, contradictory and even conflictory. Thus, local government decisions presented as being in "the public interest" make an ambitious claim. Third party appeals facilitate greater public participation and beneficially draw the public into land-use decision-making.
- Third-party appeals allow multiple views to be advanced concerning good planning. They provide a forum where individual rights and concerns, particularly of those who are likely to be affected, can be weighed against collective concerns.
- Third-party appeals may actually improve planning decisions. They recognize the fact that parties other than the planning authority and the developer have an interest in, and can make a contribution towards, a preferred land-use outcome. They recognize that third parties can bring detailed local knowledge, not necessarily held by the planning authority or the developer, to the planning decision.
- The third-party appeals ensure greater transparency of the decision-making process. They dispel fears about collusion between the developer and planning authorities. They are a means of checking that planning authorities do not act capriciously or arbitrarily.

In addition, I would add that the fact that most jurisdictions in Australia have long provided for third-party appeal rights suggest that they are perceived to be of benefit to the community, perhaps for different reasons in different locations. I must acknowledge however, that where there is a strong culture of third-party appeals, as there has been in Victoria for nearly 50 years, it would be difficult to withdraw third-party appeal rights from the community.

Ultimately, our views about third-party appeal rights are generally a product of the culture within which we have worked. Arguments can be made either way. Whether third-party appeal rights are adopted, limited or abandoned may well come down to a decision about the kind of society we want to live in and the clarity of the development plan, planning scheme or other policy document. Assuming that there is a discretion in the decision-makers, the issue of to whether third-party appeal rights are necessary, may be resolved by the answers to the following questions:

- Does the community have confidence that the policy document for a particular area sufficiently describes the desired future character, and contains a comprehensive set of objectives and principles for development in the area, relevant to the local context including the environment?
- Does the community have confidence in the decision-makers to make a decision in the best interests of the community now and in the future?
- Is there a transparency about the decision-making?

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<sup>40</sup> Willey, Stephen, "Planning Appeals: Third-Party Rights Legitimate? The Case Study of Victoria, Australia" in (2006) 24 *Urban Policy and Research* 369

- Is there a guarantee that the decision-makers will assess the development in the context of the desired future character, objectives and principles of development for the area (assuming the adequacy of these policy statements)?

## The Future

Appeal rights for applicants have traditionally been justified on the basis of property rights. As the Premier of South Australia, in introducing the bill for the Planning and Development Act in 1966, said:

A satisfactory urban environment cannot be achieved without the acceptance by the community of some degree of legal restriction on the use and development of land, but it is essential that in a democratic society every individual who feels aggrieved by any administrative decision should have a right of appeal to an independent appeal body.<sup>41</sup>

However property rights have to be balanced against citizen rights of participation, and the modern desire on the part of citizens for transparency and accountability in government and decision-making bodies.

Indeed, in 2001, the Independent Commission against Corruption in New South Wales produced a discussion paper entitled *Taking the Devil Out Of Development*. Following the statement that many complaints received each year about councils approving developments where people who consider that they are affected by the decision so they did not receive notification of proposed development, and considers that the failure is indicative of maladministration or corrupt behaviour, the Commission proffered the following:

It is far better to be open and transparent than limit public awareness through minimalist approaches to notification of applications....,

and one could add, through limiting appeals by third parties.

Leslie Stein put it another way, in an article on planning and accountability<sup>42</sup>, although he was not speaking particularly about third-party appeals:

The Courts and Tribunals have an important filtering function to prevent irrelevant considerations from influencing an application.

Stein concluded, inter alia, with an observation on the benefits of appeals generally being heard by courts or tribunals. Although he may not have intended it, the following statement is a clear argument for third-party appeals rights to a court or tribunal:

After 25 years as an academic, practitioner and judge in this (planning) area, it is my clear belief that the authorities must be kept in line and planning must be viewed as a matrix of interconnected policy, legal, scientific and political filaments which can only be seen when the fullest testing is done on the evidence that is brought forward.

Where there are third-party appeal rights, their scope has been narrowed, particularly in recent years. One of the recent catalysts for the reduction of the extent of third-party appeal rights was the endorsement in 2005 by the Local Government and Planning Ministers' Council of the *Leading Practice Model for Development Assessment*. The Council agreed "the Model was an important reference for individual jurisdictions in advancing reform of development assessment".<sup>43</sup>

The Model developed by the Development Assessment Forum, did not seek to eradicate third party appeals. Instead, it recommends limiting third party appeals as follows:<sup>44</sup>

<sup>41</sup> *Hansard*, House of Assembly, South Australian Parliament, 3 February 1966, page 3789

<sup>42</sup> Stein, L, "Planning and Accountability" in (1995) *Australian Planner* vol 32, no 2, p 71

<sup>43</sup> Local Government and Planning Ministers' Council Communique 4 August 2005

<sup>44</sup> Development Assessment Forum, *Leading Practice Model for Development Assessment 2005*, p 33

**Opportunities for third-party appeals should not be provided where applications are wholly assessed against objective rules and tests.**

**Opportunities for third-party appeals may be provided in limited other cases.**

Where provided, a **review of a decision should only be against the same policies and objective rules and tests as the first assessment.**

**What this leading practice achieves:**

Avoids unnecessary review where objective rules and tests have already been established by a consultative process. Where Option B in Leading Practice Eight applies, an opportunity can be provided for a review of a decision by an expert panel that a council considers contrary to policy objectives.

**What CDC said:**

*"...In a criteria-driven system, where value judgements are not being made in assessing a project, third party appeals are not required: instead, full community engagement should characterise the formulation of the criteria and the approval of the statutory documents. On a case by case basis, if the assessment authority believes that the criteria entail third parties being significantly affected by judgements about quality or impact, rights to third party review can be defined in the statutory document itself" (CDC Vol 1<sup>45</sup> p15)*

As the Chair of the Development Assessment Forum said in the foreword to the document:

The leading practice model is simple and logical. ....

By adopting the DAF leading practice model, jurisdictions will be able to ensure appropriate scrutiny of development applications, while delivering faster, cheaper assessments.

While I make no comment on the above extracts from *The Leading Practice Model For Development Assessment*, it is obvious from a perusal of legislation in various jurisdictions that its recommendations in relation to third-party appeals have been adopted and implemented. However, while I don't have a crystal ball, I think it unlikely that third-party appeal rights will disappear from those jurisdictions that presently enjoy them. Apart from those people who consider that they will be directly affected by proposed development, there are groups concerned, as most of us are, with the consequences of climate change, impacts on biodiversity conservation, water resources, etc, who will seek out opportunities through third party appeals, to be heard in relation to development perceived to have an impact in these areas.

This brings me to how third party appeals are best managed to endeavour to avoid the negative aspects that developers are wont to assume will follow their introduction. The following suggestions assume that the nature and the limits of third party appeals are set out in the relevant legislation.

The experience in the ERD Court has shown that the following actions are necessary:

- Applications to join as a party to an appeal must be heard, on notice to the parties, and determined, promptly after lodgment.
- The court/tribunal will need to explain to applicants for joinder what is expected of them if they are joined as a party to an appeal.
- The court/tribunal will need to have information that is readily accessible in a variety of formats and in plain language, about the conduct of appeals and procedure.
- Third party appeals should be listed for hearing without delay, but only after:
  - There has been a conference of the parties facilitated by a member of court with relevant knowledge and/or experience, in the nature of conciliation or mediation, with a view to resolving the issues between the parties;

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<sup>45</sup> Centre for Developing Cities 2003a, *Leveraging the Long Term: A Model for Leading Practice Development Assessment*. Volume 1, University of Canberra, ACT

- The appellant has articulated the nature of its case, including the issues and the nature of the evidence it will call in support thereof;
- Orders have been made for exchange of experts' statements and a meeting of the experts; and
- Third parties have been reminded that they should familiarise themselves with the relevant rules and practice directions.

Apart from the above, it goes without saying, that the hearing of a third party appeal particularly where the appellant is self-represented, will benefit from firm management by the presiding member, and that criticism based on delay will be unfounded if a decision/judgment in the matter is delivered promptly.

## **Conclusion**

As with town planning legislation in the 1920s, there is an inevitability about the advent of third party appeals in Western Australia. They will result in some projects being delayed and in some cases, cancelled, with the developer returning to the drawing board. There will be costs. However, the result is likely to be beneficial in the long term, leading to consequences such as better planning outcomes, based on a full and proper assessment taking into account local knowledge, and transparency of decision-making with consequent community confidence in the process and resulting in better, higher quality development.

Given the inevitability of (limited) third party appeals – either soon or when there is such controversy over a planned development, as happened in South Australia many years ago, that it is forced upon a reluctant government - I have tried in this paper, through articulating some history of third party appeals, to draw attention to the courses that might best be avoided and generally as to what might be expected, and how they might be managed in everyone's interests.

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