



THE COUNCILLOR'S ROLE IN THE PLANNING AND APPROVALS PROCESS INCLUDING LAND AND ENVIRONMENT COURT PROCEEDINGS

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1. THE ROLE OF COUNCILLORS GENERALLY UNDER THE LOCAL GOVERNMENT ACT

1.1 Council as a Body Corporate (Section 220)

- Council exists separately of its Councillors.
- Councillors make up the “governing body” of Council (section 222).
- Rather than look to the states of mind of individual Councillors in the decision-making process regard will generally be had to the Council’s “collective state of mind”.

1.2 A Councillor’s Role is not Comparable with that of a State or Federal Politician

- A Council is not a parliament.
- A Council has no legislative function.
- A Council is an administrative, not a legislative, body.

The Councillor’s role, therefore, is something akin to an appointment to the board of a public utility.

1.3 Implications

Constraints

- The decision-making activities of Councillors are subject to review:
 - from statutory sources (eg. pecuniary-interest provisions; Ombudsman; Department of Local Government); and
 - under the general principles for judicial review of administrative decisions.

1.4 Pecuniary Interest Controls

- NSW Rural Council Councillors – Planning Review Committee recommendation for amendments to LEP to permit subdivision and excision from farm lots of dwelling houses.

- Widespread public support/electoral mandate.
- Councillors had the same pecuniary interest as many other members of the community.
- Councillors found to be in breach of the Act and suspended.

1.5 Principles of Judicial Review

- Manner of exercise of decision-making functions.
- Procedural fairness in the carrying out of those functions.

1.5.1 Manner of Exercise of Decision-Making Functions

- The decision maker must properly direct itself as to the scope or content of its statutory power or duty.
- The decision maker is to take into account all relevant matters and disregard irrelevant ones.

1.5.2 Procedural Fairness in the Carrying Out of Council's Functions

- This includes an obligation to act impartially.
- There may be a perception of bias where Council is the consent authority and yet has an interest in the application (ie. Council may be redeveloping a carpark or other operative land under its ownership).
- The doctrine of necessity applies (ie. there is no other consent authority) so that Council can continue to determine the application notwithstanding its "interest" in the outcome.
- Various practices have been recommended to overcome the perception of bias including:
 - fostering a greater level of public participation in the decision (Willoughby poll);

- use of an independent external consultant;
- ICAC recommendations.

2. THE ROLE OF COUNCILLORS SPECIFICALLY IN RELATION TO THE CONSIDERATION OF DEVELOPMENT APPLICATIONS

2.1 Specific matters for consideration in the determination of a Development Application

Section 79C(1) of the Environmental Planning and Assessment Act 1979:

“Matters for consideration – general

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

- (a) the provisions of:
 - (i) any environmental planning instrument, and
 - (ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority, and
 - (iii) any development control plan, and
 - (iv) any matters prescribed by the regulations,

that apply to the land to which the development application relates,

- (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

- (c) the suitability of the site for the development,
- (d) any submissions made in accordance with this Act or the regulations,
- (e) the public interest.”

2.2 Preconditions

Generally, the onus will be on a person challenging the consent to establish that all relevant matters were not adverted to by Council or, alternatively, that irrelevant matters were taken into account. This is not the case, however, where there is a precondition to consent about which Council must satisfy itself. In such a case, there may need to be express evidence that Council has adverted to and satisfied itself of that precondition.

2.3 Weight

Subject to some exceptions, the weight that Council gives to these individual considerations is a matter for Council.

Clearly, however, if the LEP prohibited the proposed activity, that would be a determining factor leading to refusal.

2.4 DCPs

Council is the author of its own DCPs. (This is different from an LEP where the Minister ultimately determines the content.)

The function of a DCP is to provide more detailed provisions (usually in the form of objectives, performance criteria and/or controls) to those contained in the LEP.

These controls can, in some instances, go as far as being prohibitions.

Neither the Council (nor the Land and Environment Court on appeal) is necessarily bound by the terms of the DCP. If it were otherwise, Council would have fettered its discretion under section 79C.

The terms of a DCP cannot, however, be departed from lightly. The terms of the DCP must be given significant “weight” in the decision-making process. They must form

a “fundamental element” and/or “focal point” in the consent authority’s determination process.

2.5 Public Interest

The application of a clear and consistent policy is a valid matter for consideration.

3. THE INGREDIENTS IN A SUCCESSFUL DEFENCE OF AN APPEAL

3.1 Non-compliance with the terms of an environmental planning instrument

Although Council does not make its LEP (ie. an LEP is proclaimed by the Governor upon recommendation of the Minister), Council is responsible for the preparation of its LEP and seeking amendments to same.

3.2 Non-compliance with the Development Control Plan

Council is the maker (by adoption) of its Development Control Plans which are limited only in as much as they must not be inconsistent with the LEP.

Canterbury v Zhang – considerations raised by Council’s DCP must be given fundamental weight in the determination of the application.

3.3 Non-compliance with a clear and consistently applied policy of Council

This is a relevant consideration under “public interest” *Castons v Pittwater*.

3.4 Clear and demonstrable adverse amenity impacts

These include matters such as impacts on privacy, overshadowing, streetscape impacts, etc.

4. OPPORTUNITIES FOR COUNCIL

Opportunities exist for Council to:

- improve the decision-making process; and
- to improve its prospects on appeal

by closely monitoring its LEP and DCPs to ensure that they reflect its desired future planning outcomes.

The insertion of detailed provisions in DCPs can assist in the identification of amenity impacts (ie. by specifying minimum setbacks, minimum periods for sunlight penetration, streetscape studies, and the like).