

**2019 LOCAL GOVERNMENT, PLANNING &
ENVIRONMENTAL LAW CONFERENCE**



**The Role of Panels in
Court Proceedings**

and

**Council Staff as Expert
Witnesses in Court
Proceedings**



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Who determines development applications?

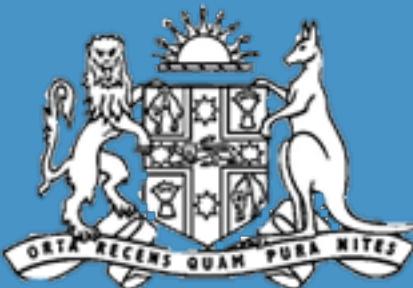
Greater Sydney Region and City of Wollongong

Environmental Planning and Assessment and Electoral Legislation Amendment (Planning Panels and Enforcement) Act 2017.

- Councillors lost power to make any decisions under Part 4 of the Act.
- Council officers retained ‘delegation’ from the councillors or the panels
- Mandatory Local Planning Panels required from 1 March 2018
- Regional Planning Panels and Sydney Planning Panels responsible for determining ‘regional development’



Appeals to the Land and Environment Court



ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

PART 8 Reviews and Appeals

Division 8.3 Appeals – Development Consents

Section 8.6 Decisions subject to appeal to Court under this Division

(1) A decision of a consent authority under Part 4 in relation to an application for development consent or a development consent is (if this Division so provides) subject to appeal to the Court under this Division.

(2) A decision subject to appeal includes a decision made after a review under Division 8.2.

Section 8.15 Miscellaneous provisions relating to appeals under this Division

(4) If the determination or decision appealed against under this Division was made by a Sydney district or regional planning panel or a local planning panel, the council for the area concerned is to be the respondent to the appeal but is subject to the control and direction of the panel in connection with the conduct of the appeal. The council is to give notice of the appeal to the panel.



*What is a **determination** or **decision***

Section 4.16 Determination

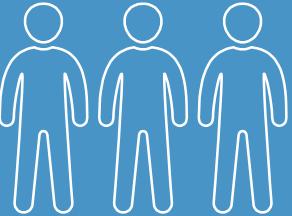
(1) General

A consent authority is to determine a development application by:

- (a) granting consent to the application, either unconditionally or subject to conditions, or*
- (b) refusing consent to the application.*

Clause 8.11 Circumstances in which consent taken to have been refused for purposes of appeal rights

(1) A consent authority that has not determined an application for development consent (or for the modification of a development consent) within the period prescribed by the regulations for the determination of the application is, for the purpose only of this Division, taken to have determined the application by refusing development consent (or refusing to modify development consent) when that period ends.



What is a consent authority

Division 4.2 Consent authority

Clause 4.5 Designation of consent authority

For the purposes of this Act, the consent authority is as follows:

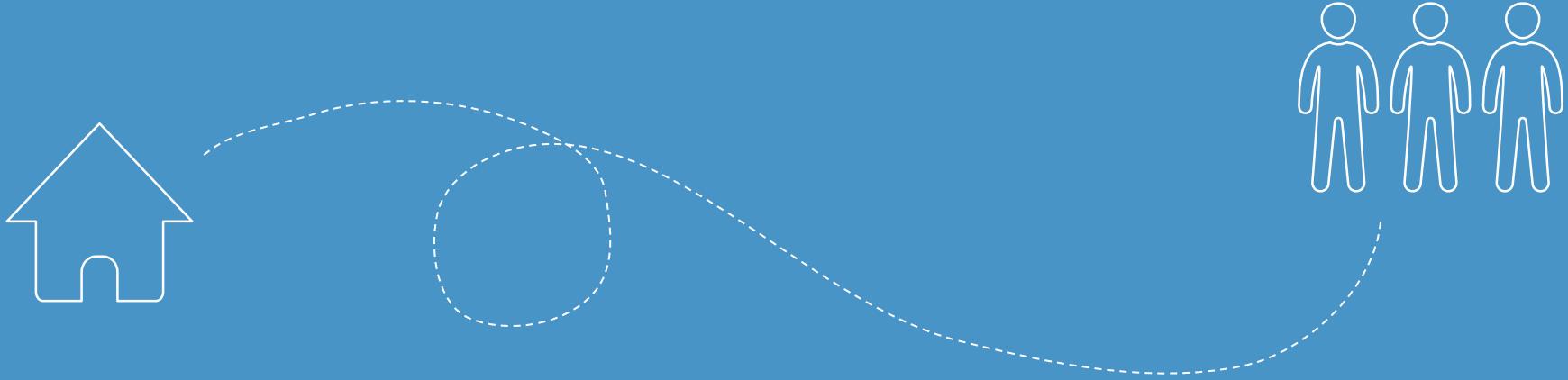
- (a) in the case of State significant development—the Independent Planning Commission (if the development is of a kind for which the Commission is declared the consent authority by an environmental planning instrument) or the Minister (if the development is not of that kind),*
- (b) in the case of development of a kind that is declared by an environmental planning instrument as regionally significant development—the Sydney district or regional planning panel for the area in which the development is to be carried out,*
- (c) In the case of development of a kind that is declared by an environmental planning instrument as development for which a public authority (other than a council) is the consent authority—that public authority,*
- (d) In the case of any other development—the council of the area in which the development is to be carried out.*

Who controls and directs the appeal?

	Deemed refusal	Actual refusal
Council staff		
Local Planning Panel		
Regional Panel		



What happens when an appeal is commenced in relation to a deemed refusal, and the development application is then determined by the Local Planning Panel?



Has your local panel delegated its' functions for Court appeals?

Delegation can be given on a case by case basis, or in relation to all Class 1 Appeals in the Land and Environment Court.

What does “control and direction” look like?



Proof reading

Generally, we find Regional Panels do not play a significant role in cases and review documents to ensure Council's position is appropriate



Taking the steering wheel

There are matters where a Regional Panel plays a more active role, particularly where the decision being appealed was made by the Panel, and that decision was inconsistent with Council staff recommendation



Did you know...

When an application is appealed the Regional Panel is represented by the Department of Planning, and we liaise with a lawyer from the Department to obtain instructions

Council staff
as expert
witnesses in
Court
Proceedings

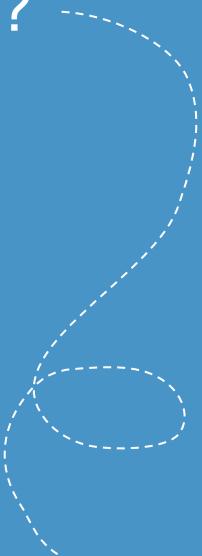


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Expert evidence is today fundamental to adjudication in the court. Science and technology have grown exponentially and permeate all aspects of our lives. Matters which previously might have been left to the commonsense of the courts, now need to be illuminated by specialised knowledge.

The Hon. Justice Brian J Preston - Chief Judge, Land and Environment Court of New South Wales

What is an 'expert'?



The 'Qualifications Test'

An expert witness must be qualified as an expert in the recognised field and have acquired specialised knowledge based on their 'training, study or experience'

- The type of specialised knowledge and the means by which specialised knowledge is gained will depend on the field of knowledge in question.
- Can include "ad hoc" experts who have acquired their expertise based on particular experience in that area
- Where the field of knowledge in question is a technical field of science, training and study would be required.
- The qualifications required will depend on the question the evidence is addressing

Council staff vs. external consultants

who should you use?

Matters for consideration:

- Is the field of knowledge in question one which requires formal training? If so, what formal qualifications does the Council officer have?
- Are they available to assist as required and attend the hearing?
- Has the Council officer ever given evidence in Court before? Do they understand their obligations as an expert witness?



What work is required of an expert?



Commencement of Appeal

Assess the development application

Assist with the preparation of Council's Statement of Facts and Contentions.



Conciliation Conference

Assess and provide feedback on amended plans and documents leading up to the conciliation.

Attend the conciliation conference.

Assess and provide feedback on amended plans and documents provided after the conciliation conference if adjourned.

Draft conditions of consent



Hearing

Assess and provide feedback on amended plans and documents.

Assist with the preparation of Council's Amended Statement of Facts and Contentions.

Joint conference with the Applicant's expert and prepare a Joint Expert Report.

Draft conditions of consent.

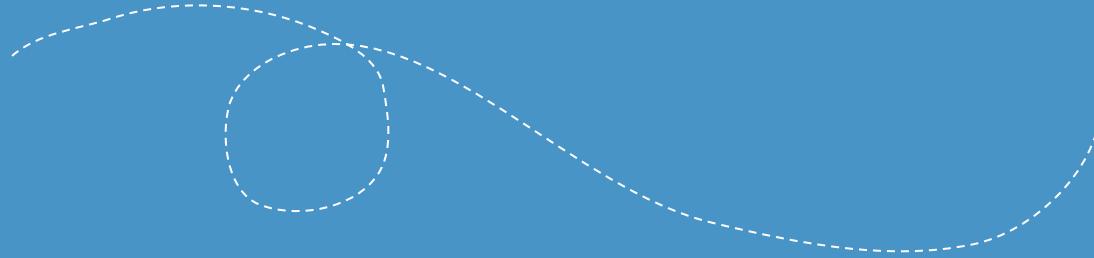
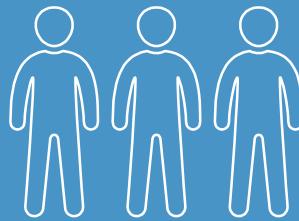
Attend the hearing to provide oral evidence.

Expert opinion, not Council policy

- The general rule is that witnesses should only give evidence of fact, not opinion.
- Exception to the opinion rule for matters calling for specialised knowledge.
- Opinion should be the opinion held by the expert, not the Council
- The experts' role is not a contest – their duty is to assist the Court

If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

Section 79 of the *Evidence Act 1995 (NSW)*



Using council staff as expert witnesses in Court proceedings

If you have any questions about using Council staff or external consultants as expert witnesses in Court appeals please don't hesitate to get in touch.



Thank you very much for your time

If you have any questions about this presentation
or would like a copy of the slides please don't
hesitate to contact us at:

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- jedney@marsdens.net.au
- [@marsdenslawgroup](https://twitter.com/marsdenslawgroup)

