ENVIRONMENTAL DEFENDERS OFFICE (SA) INC
A Community Legal Centre specialising in public interest environmental law.

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Appeal Costs Regime

Pursuant to section 38 of the *Development Act 1993*, in respect of Category 3 development only, any person who makes a representation (whether because their private interests are affected or because the public interest is affected) has a right of appeal.

The ERD Court has limited discretionary costs security, costs undertakings and (misconduct) costs orders powers under sections 29 and 39 of the *ERD Court Act 1993*.

EDO(SA) is <u>strongly opposed</u> to any changes from the current 3rd party appeals "no costs (each party bear its own costs)" regime to a "costs follow the event" regime. Such changes will severely disadvantage 3rd party litigants and the South Australian community. Some important points concerning the nature of the disadvantage and the importance of retaining real third party appeal rights are set out below:

1. Imposing a "costs follow the event" regime, will strongly deter prospective 3rd party appellants (whether private or public interest) from exercising their appeal rights because of the uncertainty inherent in litigation outcomes and the consequential uncertainty as to the quantum of costs potential liability.

    a. Imposing a "costs follow the event" regime is contrary to the object of the *Development Act 1993*. The parliamentary intention behind Category 3 representation and appeal rights in a 'no costs' jurisdiction (which have existed for more than 40 years in South Australia) is:

        i. to enable any person (because their private interests are affected or because the public interest is affected) to appeal against a decision to grant a development authorisation. In principle, section 38 enables a member of the community in limited circumstances to challenge the merits of a planning decision and to seek to have reviewed the procedural steps of the planning authority.
        ii. to assist in giving effect to the object of the *Development Act 1993* which is to "provide for proper, orderly and efficient planning and development in the State" and, for that purpose to (inter alia) "establish and enforce cost-effective technical requirements, compatible with the public interest, to which building development must conform;" and "provide for appropriate public participation in the planning process and the assessment of development proposals."

    b. The retention of realistic third party appeal rights reflects the good sense in providing for public participation in decisions on certain development proposals and thus avoiding the kind of public outcry and protest that led to the instigation of third party appeal rights in a 'no costs' jurisdiction in this State in 1972. These rights are consistent with Australia's obligations to provide access to justice in the interests of the attainment of sustainable development. To effectively reduce

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these rights by implementing a "costs follow the event" regime for third party appeals is not in the interests of public participation in planning or the provision of the means for access to justice.

c. Real third party appeal rights and effective public participation are corruption prevention safeguards and assist to maintain the integrity of the planning and development process in South Australia:

i The NSW ICAC, in its February 2012 Report, *"Anti-corruption Safeguards and the NSW Planning System"*, emphasises the significance for transparent decision making, of community participation:.

> "Meaningful community participation and consultation in planning decisions helps ensure that relevant issues are considered during the assessment and determination of plans and proposals. It also allows the community to have some influence over the outcome of decisions.
> Community participation and consultation requirements also act as a counter balance to corrupt influences. The erosion of these requirements in the planning system reduces scrutiny of planning decisions and makes it easier to facilitate a corrupt decision." (at page 19)

> "The limited availability of third party appeal rights under the EP&A Act means that an important check on executive government is absent. Third party appeal rights have the potential to deter corrupt approaches by minimising the chance that any favouritism sought will succeed. The absence of third party appeals creates an opportunity for corrupt conduct to occur, as an important disincentive for corrupt decision-making is absent from the planning system." (at page 20)

ii. Concerns regarding accountability and integrity in government decision-making processes are not restricted to NSW.

In 2013, the SA Government established the office of Independent Commissioner Against Corruption to:

- identify and investigate corruption in public administration;
- assist in identifying and dealing with misconduct and maladministration in public administration; and
- prevent or minimise corruption, misconduct and maladministration in public administration through education and evaluation of practices, policies and procedures.

In SA, in regard to the FOI regime, the Ombudsman SA, in his *"Audit of state government departments' implementation of the Freedom of Information Act 1991 (SA)"* Report (May 2014) made the following observation:

> "In summary, the evidence provided to the audit strongly suggests that ministerial or political influence is brought to bear on agencies' FOI officers, and that FOI officers have been pressured to change their determinations in particular instances. I have no reason to disbelieve this evidence." (at paragraph 337)

2. 3rd party appeal rights are available in very limited circumstances - only to persons who are notified of a Category 3 development, make a written representation and file an appeal under section 38 of the *Development Act 1993*.

   Category 3 developments are those that are not assigned to Categories 1, 2A or 2 under the *Development Regulations* or a Development Plan. Category 3 developments can be described, in a general sense, to be the types of development that may not be appropriate for a particular Zone, unusual types of development and/or types of development that may be the subject of community concern.

   As a consequence, there are very limited numbers of Category 3 type developments and very limited 3rd party appeal rights.

   Imposing a "costs follow the event" regime, will strongly deter prospective 3rd party appellants (whether private or public interest) from exercising their limited appeal rights – in effect removing a very important check and balance in the development assessment process.

   Imposing a "costs follow the event" regime will reduce 3rd party appeal rights to little more than "window dressing" because potential liability for an unknown quantum of costs will deter all but the wealthiest 3rd party appellants. If a security for costs and costs undertaking regime is also imposed in relation to third party appeals, "public interest" 3rd party appeals by individuals and organisations with limited financial resources will, in effect, be prevented.

3. The uncertainty as to the application of a "costs follow the event" regime in the common circumstance when a development approval is upheld but conditions are tightened and/or imposed as a result of the 3rd party appeal.

4. It is spurious to argue that a "costs follow the event" regime will create a "level playing field" in regards to costs in that successful 3rd parties will obtain their costs from the unsuccessful applicant and/or relevant authority. The financial resource imbalance between applicants and 3rd parties (particularly "public interest" third parties) which is common and the financial incentive (arising from commercial or residential development) for applicants to pursue development approval mean that a "costs follow the event" regime clearly favours the applicant. Will an unsuccessful 3rd party be required to pay the costs of both the relevant authority and the applicant? Will an unsuccessful applicant be allowed to split liability for the costs owing to the successful 3rd party with the relevant authority?

5. Any proposal to provide a "public interest" exemption from a "costs follow the event" regime raises the question of how that "public interest" is to be defined/determined. There are two options: prescribe a statutory test or rely upon common law principles such as those set out by the High Court in *Oshlack v Richmond River Council (1998) 193 CLR 72.*

   What of appeals that involve a consideration of both private and public interests in varying proportions? Will the exemption only apply to pure "public interest" appeals? On the preliminary "public interest" costs exemption argument itself, will the "costs follow the event" regime apply to costs incurred on the preliminary argument?

   Even with a "public interest" exemption, a "costs follow the event" regime for "non-public interest" third party appellants would not be equitable and cannot be justified. Many of

those "non-public interest" third party appellants [who currently make up the overwhelming majority of 3rd party appeals] are going to be deterred by the prospect of unknown quantum of costs if their appeal is unsuccessful. As a consequence, with the effective removal of 3rd party appeals due to the costs risk - as argued above, the intent of the *Development Act 1993* will be undermined, an important corruption safeguard will be undermined and a very important check and balance in the development assessment process will be undermined.

Civil Enforcement Costs Regime

EDO(SA) reiterates its strong concern that the intent and purpose of third party civil enforcement provisions in the *Development Act 1993* (section 85) is completely undermined by the oppressive costs regime within section 85.

> s. 85(1) *Any person* may apply to the Court for an order to remedy or restrain a breach of this Act or a repealed Act (whether or not any right of that person has been or may be infringed by or as a consequence of that breach).
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> s. 85(4) An application may be made without notice to any person and, if the Court is satisfied on the application that the respondent has *a case to answer*, it may grant permission to the applicant to serve a summons requiring the respondent to appear before the Court to show cause why an order should not be made under this section.
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> s.85(15) The Court may order an applicant in proceedings under this section—
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> (a) to provide *security for the payment of costs* that may be awarded against the applicant if the application is subsequently dismissed;
>
> (b) to give *an undertaking as to the payment* of any amount that may be awarded against the applicant under subsection (16).
>
> s.85(17a) The Court may make such *orders in relation to costs* of proceedings under this section as it thinks fit.

The parliamentary intention of section 85 is to enable ***any person*** (because their private interests are affected or because the public interest is affected) to bring enforcement proceedings. In theory, section 85 enables the community to seek to remedy, not just breaches by proponents, but also breaches by planning authorities.

Section 85 is intended to assist in giving effect to the object of the *Development Act* which is to "provide for proper, orderly and efficient planning and development in the State" and, for that purpose to (inter alia) "establish and enforce cost-effective technical requirements, compatible with the public interest, to which building development must conform;" and "provide for appropriate public participation in the planning process and the assessment of development proposals."

However, the practical effect of the discretionary costs security, costs undertakings and costs orders powers has been to almost totally dissuade enforcement proceedings being undertaken by third parties to protect the public interest.

In essence, the financial risk is too great for third parties acting in the public interest. Certainly, the ERD Court has exercised its costs related discretion in a number of "public interest" cases to not impose a financial burden upon public interest third parties.

However, the Court's discretionary approach does not prevent the respondents in enforcement proceedings from using the express or implied threat of adverse costs orders to (at best) dissuade and (at worst) intimidate public interest third parties.

> **As part of the Planning Review, the EDO(SA) makes the following recommendation:** *Amend section 85 to require the Court, at the same time as determining if it is satisfied that respondent has a case to answer (s.85(4)), to determine if it is satisfied that the applicant is acting in the "public interest".*
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> *If the Court is satisfied that the applicant is acting in the "public interest", the applicant should, under express amendments to s. 85:*
> - *be exempt from s85(15) orders;*
> - *be exempt from s.85(17a) adverse costs; and*
> - *remain entitled to seek s.85(17a) costs orders.*

The "case to answer" threshold test, the "public interest" threshold test and the practical complexities, time commitment and associated costs for "public interest" applicants will dissuade and filter out disingenuous and non-meritorious "public interest" applications.

As a consequence, the much overused "opening of the litigation flood gates" argument, that is used to oppose such "public interest" reforms, continues to lack any practical or academic merit.

Implementation of the Recommendation will reinforce the parliamentary intent behind section 85 in regard to public participation and will increase community confidence in, and support for, the planning system.