Community Litigants in the Queensland Planning and Environmental Legal System

By Jo-Anne Bragg[1]

Who are community litigants and why are they important?

Community litigants are parties to court proceedings who are motivated to protect environmental values or to advocate for a feature of value to the community. Examples of environmental community litigants include the Karawatha Forest Protection Society and the Community for Coastal and Cassowary Conservation. They may be individuals or groups. They are not there to gain financially from development or to fulfil a statutory obligation.

Community litigants are amongst the users of the Queensland Planning and Environment Court ("Court"). Community litigants most frequently use the Court to defend or challenge a local government's decision to approve an impact assessable development application. The perspectives and issues of community litigants in relation to the Court are often overlooked or at least overshadowed by the views of more frequent users[2] of the Court such as councils and developers.

This article seeks to reduce that imbalance and will:

1. give examples of the outcomes community litigants achieve;
2. look at impediments to community litigants launching appeals/applications in Court and issues pertaining to the Court process; and
3. propose improvements to the Court processes that might benefit community litigants.

1. Outcomes for Community Litigants

1.1 Development application is modified or conditions improved

The community litigant rarely defeats the development application in Court, however, often achieves changes to the development application or improvements to conditions[3]. This was the case in *Friends of Springbrook Alliance Inc. and Ors v Gold Coast City Council & Anor*[4]. This matter concerned a 14 hectare parcel of land on Springbrook plateau which was mostly covered with rainforest. The site already contained 4 tourist cabins in that part of the forest nearest the road and a nursery on cleared ground. Springbrook is widely recognised by ecologists as having biodiversity values equivalent to the natural values of the nearby World Heritage Areas.

After Friends of Springbrook Alliance, ("FOSA"), launched the appeal, their ecologist Dr Mike Olsen inspected the site and identified thousands of rare plants which would have been destroyed by the construction of the proposed additional cabins and road extension. In consequence, the developers changed the development application so as to move the location of the tourist cabins out of the forest and into already cleared land, preventing the destruction of thousands of rare plants. The application was further modified after the community litigants' experts noticed, during a site inspection, that part of the wastewater system for existing cabins was malfunctioning. The wastewater system was then proposed to be improved and relocated.

At the hearing, Judge Newton considered the modified application and heard arguments on behalf of FOSA based on provisions in the local structure plan that expressed the importance of natural values in that Springbrook locality. His Honour dismissed the appeal by FOSA. The developer then changed the

1 Principal Solicitor, Environmental Defenders Office (Qld) Inc Paper delivered at the 2006 QELA Annual Conference 'Making it Better'

2 I have endeavoured to estimate the number of community litigants appealing to the Queensland Planning and Environment Court during 2005 Of those 661 appeals/applications filed in Court during 2005 and notified to the Chief Executive of the Department of Local Government and Planning, a search reveals 142 submitter appeals/applications of which I identified 95 as "non commercial submitters" Not all that 95 would fit the definition of community litigants However the figure of 95 does not include co-respondents

3 On Wednesday 3 May 2006 law student volunteers at EDO Qld Emily Dux, Cecelia Mehl and Claire Bookless, later helped by Nancy Alexander, looked at every Planning and Environment Court decision listed for 2005-6 on the Queensland Court's website to identify the results for submitter appellants There were a total of 122 decisions in 2005 and 35 so far in 2006 Amongst those 157 decisions they identified 48 appeals on impact assessable development applications Of the 7 cases which were finalised "non-commercial submitter appeals", in 5 cases the development was approved with changed conditions and in 2 cases the development was approved with conditions unchanged

4 *Friends of Springbrook Alliance Inc & Ors v Council of the City of Gold Coast & Anor* [2005] QPELR 148 Judgement delivered by Judge Newton at Southport on 19 December 2003 There were three appellants also including Ken and Jeanette O'Shea and the Gold Coast and Hinterland Environment Council Inc The appellants were represented by EDO Qld, barrister Paul Howorth, town planner Chris Buckley and ecologist Dr Mike Olsen.

development application again, including proposing to roof the proposed recreation facility. A number of the original conditions were varied, including insertion of a new condition that the proposed ancillary recreational facility for the site could only be used by a maximum of 12 guests staying at the cabins. The result was disappointing for FOSA. While the extra tourist cabins and recreation facility might seem to have a small footprint, the decision gave further encouragement to other similar ventures on the narrow plateau. Cumulatively those developments were eroding the natural values of the area and altering the type of tourism.

1.2 General Benefits of Submitter Appeals

Well-run submitter appeals have other more general benefits to community litigants as a whole. Councils and developers are reminded that it may be worthwhile to meet the valid concerns of submitters to avoid appeal rather than doing a quick job. An experienced planner who is employed by a local government in development assessment wrote to Environmental Defenders Office (Qld) ("EDO Qld") in April 2006. The planner stated that submitters' views were routinely overlooked by planners during the development assessment process as submitters generally lacked the resources to back up their submission in Court. The planner opined that the whole development assessment process was heavily biased towards the developers and those with the biggest financial backing.

1.3 Occasional Wins

Some of the most prominent wins by Queensland community litigants in recent years on environmental matters have been in the Federal Court[5], however community litigants occasionally successfully defeat development proposals in the Queensland Planning and Environment Court. For example in Northern Queensland in 2004 the Yorkey's Knob Residents Association successfully appealed against the approval of a coastal development as the site was in a constrained development area under the planning scheme and the height and bulk was held to be against residents' reasonable expectations[6]. Also in 2000, a community group, Save Our Riverfront Bushland,[7] was instrumental in defeating a major development application approved by the Brisbane City Council which included unsightly development on a prominent ridgeline. In 2002 Stradbroke Island Management Organisation[8] successfully opposed an application to develop a tourist resort on the site of the Point Lookout Hotel on North Stradbroke Island, though only after going to the Court of Appeal. The proposal failed to comply with development standards in the Development Control Plan regarding vegetation retention, building height, building length, boundary clearance and site coverage.

1.4 Co-responding to support and check local government

Occasionally a community litigant elects to become a co-respondent when the local government has rejected an application and the developer appeals. This is often to support the local government but also to ensure that the community view point is still represented if the local government decides for political or financial reasons to settle the appeal with the developer. So for example, the Karawatha Forest Protection Society joined as co-respondent to a developer appeal after the Brisbane City Council rejected a residential development in land subject to environmental constraints over the road from the 900 ha Karawatha Forest.

1.5 Outcomes helped by costs rules and legal standing provisions

Community litigants would rarely venture into Court if there were not legislative provisions to the effect that each party pays his or her own costs, rather than the general rule in other jurisdictions that costs follow the event. These favourable costs provisions[9] are essential for community participation in a public interest jurisdiction. None of the above outcomes could be achieved if there were not favourable legal standing rules (recognition by the Court as an appropriate party) under the *Integrated Plannng Act 1997* (Qld) pertaining to submitter appeals[10] and enforcement[11] in the Planning and Environment jurisdiction.

5 *Booth v Bosworth* [2001] FCA 1453
Queensland Conservation Council Inc v Minister for the Environment and Heritage [2003] FCA 1
Minister for the Environment and Heritage v Queensland Conservation Council Inc [2004] FCAFC 190.

6 Yorkey's Knob Residents Association was represented by solicitor Kirsty Ruddock of EDO of Northern Queensland Judgement was delivered by Judge White 1 April 2005

7 *Wingate Properties Pty Ltd v Brisbane City Council & Ors* [2001] QPELR 272. The group was represented by barrister Stephen Kelliher with solicitor Robert Stevenson of EDO Qld

8 *Stradbroke Island Management Organisation Inc & Ors v Redland Shire Council & Ors* [2002] QCA 277. Counsel for SIMO was Mr Tom Quinn Some years later the Hotel site is however being redeveloped.

9 s4 1 23 *Integrated Planning Act 1997* ("IPA")

10 s4 1 28 IPA.

11 s4.3.22 IPA

However, impediments to community litigants using the Queensland Planning and Environment Court include the overwhelming number of development applications and the lack of legal and expert resources.

2. Impediments to Court and issues with Court Process

2.1 Number of development applications

The rate of development in Queensland is overwhelming with South East Queensland the fastest growing region in Australia[12]. During March 2005, a total of 591 development applications (all categories) were lodged with local governments in Queensland alone, of which 279 were in South East Queensland[13]. The environmental impacts include: increasing degradation of Moreton Bay[14]; unsustainable demands on our water resources evident in current public discussion of the water crisis; and koalas approaching extinction in our region. The number of development applications means that many volunteer community groups are unable to fully respond to even major development proposals, even though once built the developments are effectively permanent. To give an example, in 2003 the Gold Coast and Hinterland Environment Council ('GECKO') lodged three planning appeals that I am aware of but only had the resources to pursue one to a major hearing and that was jointly with FOSA in the Springbrook case as described earlier. GECKO cannot handle many major projects at the one time as they also make submissions on numerous development applications, prepare detailed responses to draft planning documents, engage in public debate on environmental issues, and recently, lodge submissions with the Crime and Misconduct Commission. The Wildlife Preservation Society of Queensland Bayside Branch (Qld) Inc. ("WPSQ Bayside") is equally overworked.

In 2005/6 the WPSQ Bayside lodged two planning appeals and considered declaration proceedings in a third matter. Mr. Simon Baltais of the WPSQ Bayside said;

> *"The pace of development is too fast and disenfranchises our community. While our group has a lot of experience in the planning process we are a volunteer organisation and it is a great difficulty to go to Court opposing even a fraction of the developments.*

The South East Queensland Regional Plan redirected population growth but made no effort to ensure it is ecologically sustainable or to slow it down so a continuation of the rate of development applications is expected. EDO Qld has asked for that Plan to be amended to reflect reduced population increase. The EDOs have also made a number of suggestions for amendment to the *Integrated Planning Act 1997* (Qld) ('IPA') to increase the accountability of applicants for development approval in the development assessment process and reduce the demands on both council staff and community group time[15]. Local governments and State government alike are lacking resources to deal effectively with the rate of development and would benefit from less rapid development. Another major impediment to community litigants participation is the lack of legal and expert resources to assist them.

2.2 No Legal Aid for any planning or environmental matters in Queensland

WPSQ Bayside and GECKO mentioned above cannot afford to brief a legal team and bevy of experts in relation to all major development applications of concern to the community. Instead they rely on pro bono and reduced price assistance in order to run even a few cases. The funds they raise are from after-tax dollars donated by mums and dads supporters. The developers on the other hand can claim legal fees as a tax deductible business expense and often have a full team of lawyers and experts engaged prior to the lodgement of the development application. Lack of resources is a barrier to many cases being initiated or run to a hearing by community litigants in the Planning and Environment Court.

Queensland, in effect, does not grant legal aid in environmental or planning cases, even for important public interest cases. The last legally aided planning appeal dates back to 1992 and concerned a concrete

12 South East Queensland Regional Plan 30 June 2005, page 1

13 Local Government Association of Queensland, "Survey of Development Application Process" March 2006, page 1

14 Tarte D and Greenfield P , "Developing the SEQ Healthy Waterways Strategy" 2006

15 Environmental Defenders Office (Qld) Inc, Environmental Defenders Office of Northern Queensland Inc and Queensland Conservation "The review of the *Integrated Planning Act* 1997 Making the System Fairer and Achieving Ecological Sustainability", March 2006

batching plant at Maleny. A community group or individual seeking legal aid for a public interest planning case has next to no chance of aid. This is partly because other areas of law are given priority but also because the applicant for aid must pass not merely a test of the *merits* of the case but also a *means* test of income and assets with a very low threshold. For a group to pass the means test, Legal Aid adds up all the resources of members of the group and checks to see if the total is below the means test. To see whether Legal Aid might grant aid for a very important test case concerning nature conservation laws, EDO Qld assisted client Dr Carol Booth to lodge an application to Legal Aid Queensland. The application was for funds for an appeal to the Court of Appeal relating to a decision of the Planning and Environment Court on the first third party enforcement action under the Queensland *Nature Conservation Act 1992*. The merits of the case were not an issue as we had Senior Counsel's opinion, however, aid was refused on the means test. That Court of Appeal case[16] was successful but other similar cases are not run at all due to the absence of legal aid.

By contrast, New South Wales does have legal aid for environmental matters which explains in part why community litigants in New South Wales over time have been able to effectively run a large number of important test cases in the Land and Environment Court. Legal Aid Queensland in 2005 conducted a review of its Civil Law Services and the EDOs lodged a submission calling for public funding for public interest environmental test cases. The Queensland Public Interest Law Clearing House, known as "QPILCH", lodged a submission calling for a more general public interest test case fund.

So now it is established that where community groups do make it to the Planning and Environmental Court it has been hard to get there and usually they lack the resources to engage experts on all relevant issues - how is their experience with the Court process?

2.3 Cost of Experts and link between Client and Expert

Some of the gravest problems with the Planning and Environment Court from the perspective of community litigants relate to expert evidence. As previously mentioned, affording to pay for experts is a barrier to participation in the Court by community litigants. Often the only way that experts are retained is by obtaining a vastly reduced price or free assistance which is available usually only from a small number of generous experts or where the client already has a good contact. Many community litigants come to Court with either no experts or with far fewer than their well resourced opponent. So for example, in the FOSA case mentioned above, the Appellants' experts accepted very reduced fees. Waste disposal was a major issue in that case, but the Appellants could not afford a waste water quality expert to debate with the developers' expert, nor a traffic expert.

The adversarial way in which expert evidence is adduced in the Court has been strongly criticised by Justice Davies, who considers the current system encourages expert witnesses to express opinions biased in favour of their client. Justice Davies has spoken out in favour of Court appointed experts on a number of occasions[17], giving opinions that the financial link between client and expert is a powerful one and that the duty to the Court by the witnesses is not a sufficient counter balance.

Community litigants often complain to EDO Qld of bias by opposing experts and point to where a particular developer routinely uses the same experts. This issue of bias by experts is also a problem in the development application process that precedes court and the EDOs have proposed a few ideas to reduce the problem[18]. The idea of a Court appointed expert is attractive so that the Court does in fact obtain independent advice. Due to the financial constraints on community groups it is, however, important that in public interest cases community litigants do not have to pay a share of those witness costs. Another issue is that there is a lack of easy to understand information for community litigants using the Court.

2.4 Lack of information for Self-represented Litigants

Community litigants are often uncertain of and alarmed by the Court processes and have insufficient information. The problems are particularly acute when they are not legally represented. Self-represented litigants, in a small but unacceptable number of cases, are threatened with adverse costs by opposing solicitors when they have done nothing to risk a costs order or sometimes misleadingly treated. They are often worried to be even one day late complying with the Court timetable. In November 2004 I received a

16 *Booth v Frippery P/L & Ors* [2006] QCA 074

17 For example of some of his views see *Reservult v Maroochy* [2002] QCA 367 at [9]

18 See 14 above.

copy of a five page letter to a self-represented litigant sent by a well-known Brisbane firm seeking further and better particulars of the submission the self-represented litigant group lodged with council *before* the development application was decided. The letter stated the request was made pursuant to the directions order of the Court however that was a most unusual interpretation of the directions order to the extent it was misleading. The letter from the solicitors was generally worded in such a way that the self-represented litigant thought compliance was required under the directions order. To comply with this type of request would have taken the self-represented litigants eight to twelve hours of work at least.

It is very important that the Planning and Environment Court produce easy to understand information about Court procedure and the operations of the registry, including an outline of when the Court has the power to award costs against a party. I understand that such an information paper is in an advanced state of preparation, largely courtesy of Judge Alan Wilson's efforts. As well as putting this on the website, such information needs to be given to every party without legal representation when the appeal or application or notice of election is lodged so it can be read before any directions hearing is held. It would be useful to change the Notice of Appeal to refer to the availability of such an information paper or for the paper to be supplied with the Notice of Appeal so that submitters receiving that Appeal and trying to decide what course of action to take have basic information.

The Environmental Defenders Offices have prepared a Community Litigants Handbook[19] with detailed advice and guidance for litigants, even with example forms. This will be available on our website and for purchase in hard copy format for a modest fee.

2.5 Tension between Speed and Justice

Developers and their lawyers frequently argue for fast directions timetables and early hearings, often producing affidavits about how much interest their finance is costing them while the appeal proceeds.

Developers often try to create a sense of urgency about their appeal to hurry along the other parties. Self-represented litigants are in many cases badgered with ominous letters warning them not to be late with the Court direction timetable. However the developers will in many cases be late and breach the Court timetable when it suits them[20] or leave an appeal unpursued for years[21]. Similarly developers complain that local governments are slow in development assessment yet fail to promptly supply information requested by council, some taking more than ten months.

My observations are that Courts on occasions give too much credence to developers' demands for a fast timetable. This is partly because the Courts are laudably endeavouring to run the Court efficiently and deal with cases in a timely manner. However, this may lead to injustice for the community litigant who does not understand court procedure or forms and who may still be trying to find an expert at a reasonable fee. It is also worth remembering that community litigants, unlike developers and their lawyers, may have to work on their case in the evenings after work or on weekends. So for example, if the timetable gives two weeks to respond to a request for further better particulars, for a self-represented litigant not only will it take many times longer than an experienced professional, it will need to be done on the weekend. Two weeks is really four days for such a litigant. There are also provisions in the IPA pertaining to appeals that are too fast for submitter appellants, such as two business days to serve the Notice of Appeal!

There have also been a number of costs decisions that are harsh against submitters. For example, costs were awarded against a submitter who applied to respond to a developer appeal five weeks after the allowable time when it appeared that the council was going to settle with the developer[22]. Community

19 The Community Litigants' Handbook Using the Planning Law to Protect Our Environment has been prepared by Anita O'Hart, Project Officer and Solicitor on behalf of Environmental Defenders Office (Qld) Inc, and Environmental Defenders Office of Northern Queensland Inc It is expected to be available in early June 2006

20 *Land Far Pty Ltd v Brisbane City Council and Karawatha Forest Protection Society* No BD 3534 of 2004

21 *Jimbelung Pty Ltd v Beaudesert Shire Council & Ors* [2005] QPEC 032 The Appeal was filed on 17 April 1998 then notices of election lodged The next step in the litigation by the Appellant was taken on 25 February 2005 when the developer's lawyers lodged an application for directions By that time some members of the multiple respondents by election had died, a number of members of the Friend of Mount Tambourine Mountains Association Inc had expended considerable energy on other major planning projects relating to the Mountain and the regulatory regime had changed However Judge Alan Wilson granted the Appellant leave to proceed with the appeal under r389 Uniform Civil Procedure Rules

22 *King v Charters Towers City Council* [2003] QPEC 036

people want to keep out of court if council is doing its job, so that decision is harsh

2.6 Decisions made out of step with community values

Community litigants are frequently gravely disappointed by the Court's decisions In most cases the community litigant (though not every submitter) has made detailed submissions on the planning scheme and seeks to uphold parts of the planning scheme Sometimes, the reasons for these disappointing decisions are the strength of the expert evidence, or flexibility in the planning scheme skilfully argued by the developer However in other cases disappointing results can be traced back to a lack of strong State policy on environmental issues where the system is lagging behind community values For example of deficits in State policy, there is no State Planning Policy on climate change or on biodiversity in general There is however legislative scope for Judges considering impact assessable development applications in the Planning and Environment Court to consider and give weight to issues such as climate change that may not have been addressed in the relevant planning instruments or even in the list of issues by parties I base that comment on the purpose of the *Integrated Planning Act* 1997 which is to seek to achieve ecological sustainability[23], the definition of "impact assessment"[24] which requires a broad consideration of the impacts of development by the decision maker and on the role of the Court in making a fresh decision in relation to the development application before the Court

3. Improvements to the Court process to benefit community litigants

In conclusion, here are some proposals for making things better for community litigants in the Planning and Environment Court

Getting to Court

- Reduce the number of development applications in the system so the community has a more realistic chance to consider and if necessary appeal on development applications[25]
- Restore Legal Aid and increase resources for Queensland public interest environmental and planning cases

Court Process

- Proceed with Court appointed experts but ensure community litigants are not priced out of Court
- Improve the Court website to include an information paper on the Court for self- represented litigants, including information on costs We understand such a paper is close to completion
- Provide each self-represented litigant with a copy of the information paper and require Appellants to give a copy of the information paper to each submitter when serving the Notice of Appeal
- Keep updated a Community Litigants Handbook[26] containing detailed advice
- Continue with and strengthen active public interest community legal services -Environmental Defenders Offices
- Set timeframes pertaining to court processes, such as directions timetables or time to serve the Notice of Appeal under the IPA, so as to relate to valid needs of submitters, not just developers' insistence on a speedy process
- Courts to take a hard line against harassment and intimidation of self-represented litigants by solicitors

Decision making and Outcomes

- Invite the Court to consider the purpose of the IPA, the definition of impact assessment and the nature of the merit hearing where appropriate in impact assessable development applications on appeal This is so the Court may explore and give weight to issues such as climate change that may not be dealt with in the planning documents or even the issues of the parties

23 s1 2 1 IPA

24 Dictionary IPA *impact assessment* means the assessment (other than code assessment) of—(a) the environmental effects of proposed development and (b) the ways of dealing with the effects

25 See 14 above

26 See 18 above