PLANNING APPEALS AMENDMENT BILL 2001

Council's Amendments

Amendments made by the Council now considered.

Consideration in Detail

The amendments made by the Council were as follows -

No. 1

Clause 9, page 10, lines 6 and 7 - To delete "responsible authority" and insert instead -

" local government ".

No. 2

Clause 9, page 10, line 14 - To delete "If" and insert instead -

" The Minister may determine not to take any action in response to the representations or, if ".

No. 3

Clause 11, page 14, lines 22 and 23 - To delete the lines.

No. 4

Clause 11, page 14, line 24 - To delete "an appeal".

No. 5

Clause 11, page 14, line 30 - To delete the line.

No. 6

Clause 11, page 15, line 28 - To insert after "may" -

" , with the written approval of the Minister, ".

No. 7

Clause 11, page 15, line 29 - To insert after "any" -

" senior ".

No. 8

Clause 11, page 15, line 29 - To delete "or class of member" and insert instead -

" or to all senior members or the Deputy President ".

No. 9

Clause 11, page 19, lines 27 and 28 - To delete "except to the extent that it adopts those rules".

No. 10

Clause 11, page 19, after line 29 - To insert -

"

(d) is to encourage the parties to an appeal to reach agreement on some or all of the issues arising in the appeal;

".

No. 11

Clause 11, page 20, lines 20 to 24 - To delete the lines and insert instead -

"

(3) Subject to subsection (4), a hearing of an appeal before the Tribunal is to be in public.

(4) If the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, it may, of its own motion or on the application of a party, make an order that the hearing be conducted wholly or partly in private.

(5) In the circumstances set out in subsection (6) the Tribunal may order —

(a) that any evidence given before it; or

(b) that the contents of any documents produced to it,

must not be published except in the manner and to the persons (if any) specified by the Tribunal.

(6) The Tribunal may make an order under subsection (5) if the Tribunal considers it is necessary to do so —

(a) to avoid prejudicing the administration of justice;

(b) to avoid the publication of confidential information; or

(c) for any other reason in the interests of justice or safety.

".

No. 12

Clause 11, page 20, line 29 to page 21, line 3 - To delete the lines and insert instead -

"

52. Failure to comply with summons or requirement of Tribunal

(1) A person served with a summons to give evidence before the Tribunal must not, without reasonable excuse, fail to attend as required by the summons.

Penalty: $5 000.

(2) A person required by the Tribunal to produce any documents, plans or other papers in the custody or control of the person must not, without reasonable excuse, fail to comply with the requirement.

Penalty: $25 000.

(3) A person appearing before the Tribunal must not, without reasonable excuse —

(a) when required either to take an oath or make an affirmation - refuse or fail to comply with the requirement; or

(b) refuse or fail to answer a question that he or she is required to answer by the member presiding.

Penalty: $10 000.

53. False or misleading evidence

A person must not give evidence to the Tribunal that the person knows is false or misleading.

Penalty: $25 000.

54. Offences against Tribunal

A person must not —

(a) interrupt the proceedings of the Tribunal;

(b) insult the Tribunal or a member of the Tribunal; or

(c) create a disturbance, or take part in creating or continuing a disturbance, in or near a place where the Tribunal is sitting.

Penalty: $10 000.

55. Protection of members, practitioners, witnesses and others

(1) A member has, in the performance of his or her functions as a member, the same protection and immunity as a Judge of the Supreme Court has in the performance of his or her duties as a judge.

(2) A person representing a party before the Tribunal has the same protection and immunity as a legal practitioner has in representing a party in proceedings in the Supreme Court.

(3) A party to a proceeding has the same protection and immunity as a party to proceedings in the Supreme Court.

(4) A person appearing as a witness before the Tribunal has the same protection as a witness in proceedings in the Supreme Court.

56. Evidentiary provision

In all courts and before all persons and bodies authorised to receive evidence —

(a) a document purporting to be a copy of a decision or order of the Tribunal and purporting to be certified by the Registrar to be such a copy is admissible as a true copy of a decision or order of the Tribunal; and

(b) judicial notice is to be taken of the signature of the Registrar on a certificate mentioned in paragraph (a).

".

No. 13

Clause 11, page 25, after line 25 - To insert -

"

(4) The President is not to review a direction, determination or order upon a matter involving a question of law if the President has given an opinion on that question of law under section 58.

(5) A review by the Tribunal —

(a) of its own motion is not to be made later than one month after the direction, determination or order is given to the party; or

(b) on the application of a party is not to be made later than one month after the application is made.

".

No. 14

Clause 11, page 28, after line 12 - To insert -

"

(5) If the Minister gives a direction under subsection (2)(a), each party to the appeal may present the case of that party to the Minister.

(6) The Minister is to have regard to the submissions of the parties and may have regard to any other submission received by the Minister.

(7) A copy or transcript of any submission to which the Minister has regard is to be —

(a) given to each party to the appeal; and

(b) published in the manner prescribed by the regulations.

".

No. 15

Clause 11, page 30, after line 13 - To insert -

"

(2) Without limiting subsection (1), the rules may empower the Tribunal to make and enforce such orders as it thinks necessary with respect to interlocutory and procedural matters, and for those purposes the rules may apply all or any of the *Supreme Court Rules 1971*.

(3) Section 42 of the *Interpretation Act 1984* applies to rules made under this section.

".

No. 16

Clause 12, page 30, after line 31 - To insert -

“

(2) In the course of that review the Minister is to consider and have regard to —

(a) the operation and effectiveness of the Town Planning Appeal Tribunal;

(b) the operation and effectiveness of sections 40(3), 42 and 43(3)(b) of the *Town Planning and Development Act 1928* as amended by this Act; and

(c) such other matters as appear to the Minister to be relevant to the operation and effectiveness of Part V of that Act.

”.

No. 17

Clause 14, page 33, line 17 - To delete “Subject to the *Salaries and Allowances Act 1975*, a” and insert instead -

“ A ”.

No. 18

Clause 14, page 33, after line 20 - To insert -

“

(2) Subclause (1) has effect subject to the *Salaries and Allowances Act 1975*, if that Act applies to the member.

”.

No. 19

Clause 20, page 38, lines 24 and 25 - To delete the lines and insert instead -

“

(3) If regulations made under subsection (1) and published in the *Gazette* are expressed to take effect on a day that is earlier than the day on which they are published, the regulations have effect accordingly.

”.

No. 20

Clause 20, page 39, line 4 - To insert -

“

(5) This section expires on the first anniversary of the *Planning Appeals Amendment Act 2002* being assented to.

”.

No. 21

New Clause 20, page 38, after line 10 - To insert the following new Clause -

“

20. Submissions under *Metropolitan Region Town Planning Scheme Act 1959*

On the coming into operation of section 25 of this Act, any submission received by the Minister under section 33A of the *Metropolitan Region Town Planning Scheme Act 1959*, and not reported on under section 33A(5) of that Act, is to be dealt with by the Commission as if the submission had been received by the Commission under section 33A of the *Metropolitan Region Town Planning Scheme Act 1959* as amended by this Act.

Ms A.J. MacTIERNAN: I seek leave to take amendments Nos 1 to 21 en bloc. I recognise that the member for Kingsley wishes to raise and seek more detail on a particular issue, and that can be accommodated. I will give a general response to the message and then the member for Kingsley can respond and seek further information on the particular item that is of concern to her.

The ACTING SPEAKER: Leave is granted. That allows the minister to move that message en bloc and any of its elements can then be discussed in the response.

Ms A.J. MacTIERNAN: I move -

That the amendments made by the Council be agreed to.

I will recap where we have reached to date. This legislation was aimed at abolishing the current dual system for planning appeals, which gives proponents the choice of lodging appeals either with the Town Planning Appeal Tribunal or with the Minister for Planning and Infrastructure. This legislation provides for a single appellant body, which is the Town Planning Appeal Tribunal. In that process, the existing tribunal is to be reconstituted with increased powers and increased flexibility to enable it to deal with an increased workload in a timely and cost-effective manner.

This Bill has had an enormously long gestation period. Not only was it based on a paper that we prepared and circulated within the industry and the community in 2000, but also it has spent a long time in the Parliament. It was passed in this place on 23 August 2001 and a week later went into the Council. Therein it languished and, unfortunately, in my view has been treated as a political football. The Greens (WA) wanted to consider the introduction of third party appeal rights into the legislation. On that basis, on 8 November it was referred to the Standing Committee on Public Administration and Finance. The committee was instructed to report by 5 December 2001. Since then, the date of reporting was extended to 19 December 2001, 13 March 2002, 21 March 2002 and, finally, to 28 March 2002. Having arrived back from the committee, it then spent a long time in debate in the Council. Now, over a year later, it has emerged from that place and is back with us. The fundamental issue that was supposedly engaging the mind of the Legislative Council was third party appeals. The committee determined that it required a conscious decision of the Government to canvass and promote the issue. Indeed, I would have thought it was outside the scope of the legislation.

I have made it clear to Parliament and members of the community that I am prepared to entertain the prospect of third party appeals. However, I am very firmly of the view that this must await the establishment of the new regime. The new regime must be given a reasonable time in which to operate. A proper dialogue on the issues between the Government, industry and the community must proceed before a third party appeals process can be established.

The members of the committee argued that, insofar as they may be necessary to the hearing and determining of an appeal, the provisions relating to rights and privileges of parties and witnesses were excessive. Therefore, the committee recommended an alternative provision to address possible contempt. As a consequence, the Legislative Council amended the Bill to insert a series of provisions after section 1 to replace the previous use of the powers of the Supreme Court with specified powers relating to the failure to comply with the summons required by the tribunal; giving false and misleading evidence; committing offences against the tribunal; providing protection of members, practitioners and witnesses; and other necessary evidentiary provisions. These amendments then had a flow-on consequence whereby we needed to make further amendments to give the tribunal powers over interlocutory and procedural matters and to make rules to govern its proceedings, and the option of not having to create rules on every issue. An amendment has been introduced to enable the tribunal to adopt such of the rules of the Supreme Court that it thinks are necessary.

Mrs C.L. EDWARDES: Would the minister like to complete her remarks, as long as she is relatively quick, and then give me an opportunity to make my comments?

Ms A.J. MacTIERNAN: The committee considered that the powers of the president should be limited by being subject to the approval of the minister and that further restrictions should be imposed. Following the committee's concern that proposed section 42 was too open-ended, delegation of the president's powers has been restricted to senior members or the deputy president. The committee recommended that the section requiring hearings to be held in public subject to various exceptions set out in the regulations and rules be replaced in favour of a provision specifying the circumstances whereby hearings would not be heard in public. Proposed section 51(3) has accordingly been replaced by proposed section 51(3)-(6).

The committee was concerned that the tribunal's rules could be used to vary and extend the criteria determining appeals that could be categorised as class 1. When we drafted these provisions, we were keen to ensure maximum flexibility so that best practice could evolve. These amendments will make that more difficult, but we have been prepared to agree to them. We also foreshadowed other amendments in this place that have now been agreed to; for example, an amendment to clause 9 clarifies that proposed section 18(2) refers to local government, not responsible authority. Another amendment to clause 9 will make it clear that the minister may refuse to take action in response to representations of a person regarding the enforcement of the provisions of a town planning scheme.

The following amendments have also been made to clause 11: an amendment to proposed section 40(3)(b) to delete the words "an appeal" to correct a drafting error; to delete from proposed section 51(1)(b) reference to the possibility of overriding the rules of evidence by adopting those rules; and the inclusion of proposed section 51(1)(d) to encourage parties to reach an agreement of some or all of the issues arising from an appeal. I also gave various undertakings in this place that have been met. Proposed section 61 has been amended to ensure

that if the president initiates a review of a decision, which he or she can do when a tribunal is constituted without a legal practitioner and the matter relates to a question of law, that review must take place within one month. Proposed section 65 has been expanded by the addition of proposed subsections (5) and (7) to enable parties to present information to the minister prior to the determination under the call-in provisions, and for that information to be made available to other parties and published.

During consideration of the legislation in this place, I introduced a provision to require a review of the legislation to be undertaken within two years of the implementation of this new system. That provision has now been amended and agreed to by the Legislative Council to give some direction to the nature of the review, particularly in respect of section 43 - class 1 appeals; section 42 - delegation by the president; and section 43 - the functions of the principal registrar. Additional minor amendments have been made to the Salaries and Allowances Act so that it is clear to tribunal members that the transitional regulations do not have effect until they are published - although from time to time on publication they may have retrospective effect - and to provide transitional arrangements for those amendments to be made to the metropolitan region scheme initiated prior to the legislation coming into effect. Those amendments will enable the commission to provide a report on submissions in the place of the Town Planning Appeal Committee, which will be disbanded under this legislation. The amendments arising from the consideration of the Legislative Council's Standing Committee on Public Administration and Finance are minor, resulting in clarification of provisions and the introduction of additional parliamentary controls of various matters concerning the operation of the new tribunal. The legislation remains a very fundamental reform.

Mr Speaker, I now give the member for Kingsley an opportunity to comment.

Mrs C.L. EDWARDES: I thank the minister for going through those amendments in some detail so that I do not have to go down that path again.

The minister said that the legislation was the subject of a political football when it went to the Legislative Council. The minister has acknowledged some amendments that have been made, such as the drafting errors, the new rules she introduced as a new amendment as late as a couple of weeks ago, and the amendment to section 33A of the Metropolitan Region Town Planning Scheme Act which allows for a transitional period. Although things may not occur as we might like them to occur - the industry wanted this legislation put in place as quickly as possible - I suggest that those amendments have improved the legislation. I have no doubt that this Parliament will again be asked to consider the Town Planning Appeal Tribunal, not the least when the Attorney General brings into the Parliament the state administrative tribunal Bill. I wonder what on earth we have been doing all this time. Why has the Parliament's time being taken up going through a new process when it is likely to be changed in future? The reason is that the minister has always believed that it is not a minister's role to deal with planning appeals, which is of major concern to those in the industry and in the community. I ask the minister how many appeals are ready to be signed off by her; how many are before the Town Planning Appeal Committee and continue, therefore, to be under investigation; and how many of those are likely to be transferred to the new entity? Now that a time frame for the legislation is known, when does the minister expect the new tribunal to be in place?

I refer to amendment 21, which deals obviously with minor amendment 1060/33A, relating to section 33A of the Metropolitan Region Town Planning Scheme Act. That minor amendment does not relate to the southern railway proposal; it is very general and broad in its application in that it can provide for rail on any road reserve. As such, it would obviously have been caught in the middle of the transitional provisions. Currently the submissions are before the appeal committee, and that minor amendment will allow those submissions to be dealt with as if the commission had received them. The amendment in this Bill to section 33A will allow the commission to refer the decision back to the minister. Given the fact that it was the Western Australian Planning Commission that made the recommendation to the minister that it be a minor amendment, any submission on the basis that it should be a major amendment is not likely to be met with support. I refer the minister to her answer to my question without notice yesterday in which she said that planning approval will not be sought when a minor amendment applies to the railway. I suggest that the minister was incorrect when she said that she was following the Government's intentions. In any event, the minister signed off on the amendment, which this minor amendment is supposed to address. In the practice of previous planning ministers, that amendment, whether minor or major, would have formed part of an omnibus Bill.

Ms A.J. MacTiernan: Are you saying that your Government did not use minor amendments?

Mrs C.L. EDWARDES: We used minor amendments regularly. We brought them into the House as part of omnibus Bills, as the minister well knows.

Ms A.J. MacTiernan: No, you made major amendments.

Mrs C.L. EDWARDES: Omnibus Bills were brought into the House so that minor amendments that would not have previously received the scrutiny of Parliament would receive that scrutiny. The minister has acknowledged that in the past in the House.

Ms A.J. MacTIERNAN: The previous Government also used the minor amendment process. I will clarify some of the issues, and I thank the member for her support. I did not in any way reflect negatively on the fact that the Legislative Council saw fit to undertake scrutiny of this legislation. I am firmly of the view, though, that the delays in dealing with this Bill were unacceptably long and, unfortunately, I am not convinced that the same sort of constructive contribution that has been made by the member for Kingsley in progressing this Bill was entirely the motivation of other members. Notwithstanding that, the Bill has finally passed through the Legislative Council, although it should not have taken well over a year to do so.

The member for Kingsley asked for some figures and I have with me some very interesting figures going back to 1980 on the sum total of appeals. There is a clear pattern in these figures; that is, under conservative Governments there was a much higher rate of ministerial appeals. That high rate dropped off dramatically when Labor Governments were elected - an interesting phenomenon. In the early 1980s, under a previous conservative Government - I think June Craig might have been the Minister for Local Government, and for urban development and town planning then - there was an average of 700 appeals a year. Then, in 10 years of a Labor Government, that figure dropped to an average of 523 appeals. As soon as we had a conservative Government, it zipped up again to an average of 772 a year, with a very high point under the last minister of 840 appeals. These then dropped last year to 460, I am pleased to say, and it looks like we are working towards that level this year. The reality is that very many of these appeals had no real basis in fact; they were entirely speculative. A culture of appeals had sprung up in that, because it cost virtually nothing to appeal a planning decision, people decided to have a go to see whether the minister would revisit it. Many claims had no planning basis whatsoever but were based purely on supposed compassionate grounds. One could only begin to believe that no-one who owned any land in this State did not have extraordinary circumstances that rendered his life somewhat of a soap opera. Clearly, that has undermined the legitimacy of planning and the value given to schemes. It is good that people will now have to think seriously about the basis on which they make appeals and the credibility of their arguments.

The member sought more information about clause 21 and its impact on the process of minor amendments. I am unclear about the member's intention other than that she was making the broader political point that she does not like minor amendments. Under the existing regime, comments on minor amendments are assessed by the Town Planning Appeal Committee. Obviously, that will no longer be in existence. This mechanism will enable the Western Australian Planning Commission to provide that advice. I am not sure that the Town Planning Appeal Committee is well placed to provide such advice on these appeals. It is important to set the record straight, and I make it very clear that although the previous Government used the omnibus provisions to treat a heap of what might have been considered minor amendments as major amendments, on 23 separate occasions it used the minor amendment process rather than the omnibus process. Some consistency is needed here.

Mrs C.L. EDWARDES: I am disappointed that the minister did not respond to my request about the number of appeals.

Ms A.J. MacTiernan: I do not have those figures.

Mrs C.L. EDWARDES: It would be appreciated if the minister could provide that information to the Parliament at some point.

Ms A.J. MacTIERNAN: Again, I thank the staff who have gone through the tortuous process of getting this legislation up and running. I express my very profound gratitude for the work they have put in. I also acknowledge the constructive role the member for Kingsley has played in that regard. She has contributed to the improvement of this legislation.

I want to ensure that as we move into this new regime, we have a tribunal with a philosophical underpinning that gives proper regard to the principles and policy of planning. Planning law has at its heart the circumscribing of individual property rights to create a benefit for the whole community. It recognises that no man is an island and that what each of us does affects our fellow citizens. Planning policy should create a rational, transparent framework in which the benefit of land development is harnessed for the economic, social and environmental wellbeing of our whole community. I fervently hope that the members of our new tribunal will embrace that ethic and ethos, and that planning policy becomes enshrined in and not resisted by the Town Planning Appeal Tribunal.

Question put and passed; the Council's amendments agreed to.

The Council acquainted accordingly.