PLANNING AND DEVELOPMENT BILL 2005

Committee

Resumed from 13 October. The Chairman of Committees (Hon George Cash) in the chair; Hon Adele Farina (Parliamentary Secretary) in charge of the bill.

Clause 145: Endorsement of approval upon diagram or plan of survey of subdivision -

Progress was reported after clause 145 had been called on.

Hon ADELE FARINA: I move -

Page 98, after line 19 - To insert -

(3) If a subdivision is being carried out in stages, a diagram or plan of survey of the subdivision may be submitted to the Commission under subsection (1) in relation to a stage of subdivision.

With the indulgence of the Chair, I will speak to amendments 1/145 to 5/145. As they all deal with staged subdivisions, it makes sense to speak to all of them at the one time. These amendments arise as a result of the need to confirm the validity of staged subdivision practices, which are common practice at the Western Australian Planning Commission. However, recent Supreme Court decisions have raised some question about the practice. It is a widespread practice and there is widespread support for the continued practice of staged subdivisions. The practice has worked well to date and is a common and accepted feature of the subdivision process in Western Australia.

The purpose of the staged subdivision is to enable proponents of very large scale subdivisions to get a number of subdivisions under way rather than seek approval for the whole lot. The process is guided by commission policy and this will continue to be the case.

Two recent Supreme Court decisions have raised some doubt about whether staged subdivisions are valid under the current legislation. The first doubt was raised in the decision of Empire Securities Pty Ltd v Western Australian Planning Commission 2003. In that case the tribunal raised a question about whether section 20AA seems at odds with the whole nature of staged subdivisions. The tribunal said that one could imagine that under section 20AA, if it was planned to be a planned subdivision, each stage should itself be the subject of an application for subdivisional approval so that the plan or diagram relevant to each stage could be separately referable to the specific approval.

That seemed to be the source of the problems of the case before the tribunal at that time. The issue was also raised earlier this year in the Supreme Court when a declaration was sought on the meaning of section 20(1)(a) of the Town Planning and Development Act 1928 and the commission's practice of allowing applicants to stage a subdivision. In these proceedings it was asserted that the legislation did not contemplate staged subdivisions, as all conditions are required to be satisfied before a plan of subdivision can be endorsed. This raised the question of the validity of this well-accepted and common practice. The amendment seeks to put this practice beyond any doubt.

Clause 145 is headed "Endorsement of approval upon diagram or plan of survey of subdivision". It governs the circumstances in which the WA Planning Commission is to give its endorsement to a diagram or plan of survey following the commission's earlier approval of the plan of subdivision. Amendment 1/145 proposes to amend the Planning and Development Bill to insert this new provision, which will recognise a staged subdivision. The commission must be satisfied that an earlier approved plan of subdivision is consistent with a diagram or plan of survey and that any conditions have been complied with, and the new provision, as stated in proposed amendment 4/145, addresses that particular aspect.

The discretion of the commission will be retained to ensure that the staging of a subdivision arises from legitimate considerations. This will be secured by proposed amendment 5/145. Proposed amendments 2/145 and 3/145 are administrative amendments that will help the flow of the bill.

Amendment put and passed.

Hon ADELE FARINA: I move -

Page 98, after line 26 - To insert -

or

(ii) in the case of a diagram or plan of survey submitted in relation to a stage of subdivision, the conditions imposed in relation to that stage of subdivision, or that in the opinion of the Commission are relevant to that stage of subdivision or the

subdivision as a whole, have been complied with or will be complied with at the time a certificate of title is created or registered.

Amendment put and passed.

Hon ADELE FARINA: I move -

Page 98, after line 28 - To insert -

(5) If, in the case of a diagram or plan of survey submitted in relation to a stage of subdivision, the Commission is of the opinion that, because of planning considerations, it is not appropriate to approve the diagram or plan of survey, the Commission may refuse to endorse its approval on the diagram or plan of survey.

Amendment put and passed.

Hon ADELE FARINA: I move -

Page 98, line 20 - To insert before "If" -

Subject to subsection (5),

Amendment put and passed.

Hon ADELE FARINA: I move -

Page 98, line 23 - To delete "conditions," and insert instead -

conditions -

(i)

Amendment put and passed.

The CHAIRMAN: There is an argument to say that the last amendment could have been a Clerk's amendment. However, it is proper that it be dealt with and that it be recorded in *Hansard* that that action has been taken.

Clause, as amended, put and passed.

Clauses 146 to 148 put and passed.

Clause 149: Conditions on rural land (tied lots) -

Hon DONNA TAYLOR: Clause 149 deals with conditions of rural land. The parliamentary secretary might be aware that the Pastoralists and Graziers Association wrote to the minister about this issue and its concern about how the offences will affect rural landowners. I am hoping for an explanation.

Hon ADELE FARINA: The application of tied lots and agricultural trade lots is actually supported by rural landowners. It enables the growing of rural landholdings by allowing subdivisions from adjoining landholdings to be tied to a principal landholding. It was initially proposed that this would come into place through planning policy DC3.4 - subdivision of rural land. The concern was that the small subdivision lots that were created and tied to the principal lot would be excluded from having any dwelling constructed on them. The intention was that restrictive covenants would be used to implement these conditions. Some concerns were raised about whether the restrictive covenants provided enough security. As a result, the minister felt that it was important to make legislative changes to ensure that that security was firmly in place. That is being done through the tied lots proposal and is covered in this clause. Clause 149 will pick up those items that were intended to be included as restrictive covenants. Clause 223 contains a general penalty provision of a lump sum fine of $50 000 plus an additional $5 000 for each day on which the offence continues. Although on the face of it that appears to be quite a steep penalty, it is important to acknowledge that a breach of this provision would be done with wilful intent. A house could not be accidentally constructed on one of these tied subdivision lots. The penalty clearly reflects the strong element of intent and applies across the bill.

Hon MURRAY CRIDDLE: I have been talking to the Pastoralists and Graziers Association on this issue. Where does the responsibility lie? The parliamentary secretary referred to the construction of a building. Does this involve a chain of responsibility issue, beginning with the people who issued the construction permit? To whom will the fine apply?

Hon ADELE FARINA: An offence is committed as a result of the transfer of the lot. If it is intended that, with the transfer of the lot, a dwelling is to be constructed, an offence will be committed by the landowner.

Clause put and passed.

Clauses 150 to 172 put and passed.

Clause 173: Entitlement to compensation where land injuriously affected by planning scheme -

Hon DONNA TAYLOR: As the Chairman indicated, I am considering moving an amendment to insert the words "fair and just" before the word "compensation" in subclause (1). However, before I do so, will the parliamentary secretary clarify what relevant matters are to be considered in determining the amount of compensation? The New South Wales Land Acquisition (Just Terms Compensation) Act 1991 provides that relevant matters be considered in determining the amounts of compensation. It also provides that regard must be given to such things as market value of the land on the date of the acquisition, any special value of the land, any loss attributing to severance and any loss attributable to disturbance. It also refers to "justly compensating". The Northern Territory Lands Acquisition Act also provides that compensation payable to a claimant as a result of acquisition of land under the act is the amount that fairly compensates the claimant for the loss he has suffered or will suffer by reason of the acquisition of the land.

I could not see anything in this bill that refers to those matters. Is it in this bill or an act?

Hon ADELE FARINA: The factors taken into consideration are, firstly, market value, which is determined on the basis of the High Court decision in the Spencer case; and, secondly, the attributes of the land. The reservations proposed by the purchase of the land are not taken into consideration. If the land is being purchased because of a region scheme, or a parks and recreation reservation, that reservation is not taken into consideration in determining the market value. In other words, the market value of the land is taken into consideration, based on the attributes of the actual land and without regard for any proposed reservation.

Hon GEORGE CASH: I support Hon Donna Taylor's general proposition to include in this clause the words "fair and just". I realise that she has not yet moved her amendment. Section 51(xxxi) of the Commonwealth of Australia Constitution Act provides for the acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws. That was an important inclusion in the commonwealth Constitution because the founding fathers wanted to make it very clear that when land was taken from a state or person, just compensation should be paid on just terms. The courts have had time to consider the words "on just terms", and judicial comment and judicial decisions have been made on the basis of the meaning of those words. The state Constitution does not contain a similar provision. Land could be taken from a person without any guarantee that "fair and just compensation" or compensation "on just terms" will be paid, depending on which particular phraseology is used, although the courts have viewed differently the terms "fair and just" and "on just terms". We should include in this legislation the words "fair and just" concerning compensation.

In answer to a question, the parliamentary secretary said that certain matters are taken into account. Section 55 of the New South Wales Land Acquisition (Just Terms Compensation) Act 1991 sets out the relevant matters that are to be considered when determining an amount of compensation. It makes it very clear and states -

> In determining the amount of compensation to which a person is entitled, regard must be had to the following matters only (as assessed in accordance with this Division):
>
> (a) the market value of the land on the date of its acquisition,
>
> (b) any special value of the land to the person on the date of its acquisition,
>
> (c) any loss attributable to severance,
>
> (d) any loss attributable to disturbance,
>
> (e) solatium,
>
> (f) any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.

That Land Acquisition (Just Terms Compensation) Act is very clear. In fact, section 54, which deals with entitlement to just compensation, makes a broad statement.

Subsection (1) states -

> The amount of compensation to which a person is entitled under this Part is such amount as, having regard to all relevant matters under this Part, will justly compensate the person for the acquisition of the land.

Subsection (2) deals with matters relating to native title.

I would like the parliamentary secretary to tell the committee why the words "fair and just" or the words "on just terms" should not be included in this bill, given that the inclusion of those words would clarify the position that is required to be adopted on the question of compensation. Secondly, I am interested in knowing why the bill does not set out in specific terms the various matters that are required to be taken into account, recognising, of course, that the Land Administration Act in this state has, in parts 9 and 10, considerable provisions for the acquisition of land or the compulsory taking of land and the compensation that is payable when that occurs. I

see the words "fair and just", or the alternative words "on just terms", as being an important inclusion in this legislation. I would like the parliamentary secretary to tell us whether there are any legal reasons that they should not be included; and, if there are no legal reasons that they should not be included, what negative effect could or would occur if they were included, if that is the argument raised by the parliamentary secretary. I recognise that in the compensation cases in Western Australia that the courts have had an opportunity to consider over the years, there has always been the principle of fair and just compensation, and, equally, compensation on just terms, but that is only because the courts believe that that is the common law right of an individual when land is taken.

The issue of property rights generally has been the subject of considerable comment in recent years. I recently received a fax from a group of people who represent farmers in the greater Bunbury region. Those farmers say that they are currently under attack by the Department for Planning and Infrastructure in the taking of certain lands, and they are very concerned about the compensation that will be payable to them under the current provisions of the law. They think that they will not have the opportunity to receive fair and just compensation, having regard, for instance, to the various issues that are set out in section 55 of the New South Wales Land Acquisition (Just Terms Compensation) Act 1991. I invite the parliamentary secretary to comment on those issues.

Hon MURRAY CRIDDLE: In my experience of compensation over time as the Minister for Transport, I found that this was one of the most difficult areas. However, I well recall being a member of the committee chaired by Hon Barry House and this issue being one of the main discussion points of that committee for some time. The words "just terms" would provide some resolution to the difficulty that we have had over time. Having had the experience that we had in settling some claims - members would be well aware of the claims that we had with the Graham Farmer Freeway and others, the solatium and the 10 per cent that is required under the Land Administration Act - I believe that there certainly needs to be some resolution of this issue. Including those words in the legislation would improve the situation.

Hon ADELE FARINA: I will deal with the second or third question of Hon George Cash first; that is, why have we not set out a list of matters to be considered in determining compensation under this bill. The reason is that, fundamentally, it is a consolidation bill, and we have simply taken the existing legislation and consolidated it into one bill. I note that first.

The government would have concerns about introducing the words "fair and just" at this very late point in the process because, firstly, we have not had an opportunity to have wide consultation on it with all the relevant bodies; and, secondly, without having an opportunity to consider the full implications of those words, there would be some concern about including them. There is some uncertainty about how the State Administrative Tribunal and the courts would generally interpret the inclusion of those words and whether they would feel that those words would represent a departure from what is currently in the legislation. Therefore, it could be argued that the Parliament had intended to introduce a new regime of compensation that differs from the present one. The problem is that, by the simple use of those words, it would be unclear exactly what that new regime would be; for example, what matters would be considered as a result of that, which was the very point raised by Hon George Cash. There is a very great risk that we would introduce a lot more uncertainty into the provision than is currently the case.

I go back to the concern about doing this on the run, without proper consultation and without a proper examination of the implications of such a provision. Perhaps it is something that we could consider more appropriately as an amendment to the consolidated act once it is in place, when we will have an opportunity to consider it in more detail.

I will deal with the recommendations made in the report of the committee chaired by Hon Barry House. That report refers to the inclusion of the words "just terms", whereas the amendment that may be moved today refers to "fair and just" terms. It adds a whole new expression, which we do not have any judicial interpretation of and which could further add to complications. The House report also made a recommendation that the words "just terms" be included in the state Constitution and not in the legislation. Certainly, I believe that the full intent of that recommendation would not be achieved by including those words solely in this legislation, particularly when there is also the Land Administration Act. There would then be a discrepancy between the words that appear in this legislation and the words that do not appear in the Land Administration Act and any interpretation that the courts may place on that. In addition, the words that appear in the commonwealth Constitution are "just terms" and not "fair and just terms". Again, we would be introducing a new expression when we have no clarity of the intent of the meaning of the term. Also, the provision that we are dealing with in this bill is an injurious affection clause. In the commonwealth Constitution and in the recommendations proposed in the House report, consideration was given to including that term as an acquisition of property provision, rather than an injurious affection provision. The government does not have a strong objection to the intent of the proposal; it is just that doing it on the run may cause so much more uncertainty that any benefit a landowner may have because of the

addition of these words, if any at all, could be outweighed by the landowner losing all his money in court challenges while we try to work out what was intended by the Parliament because there was no clear definition or understanding. I urge that we do not rush this amendment through at this time.

Debate interrupted, pursuant to sessional orders.

[Continued on page 6419.]