PLANNING APPEALS AMENDMENT BILL 2001

Second Reading

Resumed from 6 November.

HON J.A. SCOTT (South Metropolitan) [8.47 pm]: I have spoken for only a brief time on this Bill. Basically the Greens (WA) support the Planning Appeals Amendment Bill but do not think that it goes far enough. As I have already stated, what is needed in this legislation is provision for third-party appeals. We agree with the principles underlying this legislation. We think the Government has got it right. We believe the minister should not be involved in the appeals process, as far as possible; we do not think it is an efficient use of the minister's time, apart from anything else. Direct involvement with these sorts of issues is not really a role for the minister. We know there were problems under the previous system in terms of natural justice. Hon Derrick Tomlinson has already outlined a few of those issues which came from the R.J. Chapman review of the town planning appeals system in Western Australia. He quoted from statements by various people. Members may not be aware from the speech by Hon Derrick Tomlinson that that review was not really about the current legislation but was a review of the existing system and the legislation that was proposed in 1995 by the previous minister. The date on the review was 1997, but the legislation was proposed in 1995, when they were looking at removing the minister and setting up not two levels of tribunal as we have now but a team of assessors.

Among the major criticisms that the Chapman review made of the tribunal was that, by its nature, its proceedings were intimidating and involved a high legal cost. A common comment from the peak bodies interviewed was that the tribunal was too involved with legal procedures and made its decisions on legal niceties rather than on the planning merits of the appeal. One of the concerns I have about the current Bill is that it may lean too much towards the legalistic side. Even though I recognise the need for legal expertise on the tribunal, we need a better balance of planning expertise. At the end of the day, this Bill is not so much about the justice issues involved, but linking those issues to the best planning outcomes, and the outcomes that will benefit the wider community.

The other problem with the existing system is that someone who did not succeed in an appeal would have no further right of appeal. Under the ministerial appeals system there was no requirement on the minister to give reasons for a decision. I note that in the current Bill the minister has some ability to undertake an appeal when he or she believes that the issue has a regional or statewide significance. There has been debate among people in my circles on whether that is a good thing or not. I am inclined to think that there will be occasions on which the minister will need to become involved at that level. We need proper safeguards and a note in the Bill that the minister is required to fully state the reasons for a decision in a public way. That is a very accountable approach for which the Government is to be commended.

A criticism of the ministerial appeals system, which I heard on a number of issues, is that the minister of the day might be looking after special interests - his mates or whatever. That was a weakness of that system. It lent itself to either favouritism or corruption. The Government is right to move the minister away from that possibility.

The Bill seeks to deal with the tribunal's weakness, which was its overly legalistic approach, by having a secondary, non-legalistic tribunal. As has already been pointed out by previous speakers and in the second reading speech, that would require more people to deal with appeals than are available under the current legislation. The secondary tribunal would adopt a non-legalistic approach and would achieve things through negotiation rather than through litigation.

I have concerns about the Bill. I believe that the president's position should be a full-time position. Part of the problem at the moment is that the president of the tribunal is able to do other work, perhaps in the area in which there may be appeals. I understand that is exactly what is occurring at this time. There are some contentious cases in which the president of the tribunal is representing developers in appeals. Apart from the perception that gives, that is plain wrong. The president of the tribunal must be completely removed from areas in which there would be conflict of interest. Even if he were to remove himself from a particular case and the deputy president took his place, because he was involved in that case in front of the tribunal, people would have great difficulty in perceiving that as other than a conflict of interest, thereby putting pressure on the tribunal.

Another area of the Bill is of concern. A decision had been made to cause a development to be demolished because it did not comply with the rules. An appeal had been lodged. On my reading of the Bill - I have been told by others that this may not be the case - it appeared that while the appeal was in place, the building could be demolished. If that is the case, I do not think that is sensible. Therefore, when the parliamentary secretary replies to the speeches, I look forward to his comments about whether that is the case.

Another issue about which I am concerned is that, under the provisions of the Bill, there is the ability to make transitional regulations without gazettal. Members of the Joint Standing Committee on Delegated Legislation would be interested in delegated legislation that can come into force without being gazetted.

Hon Simon O'Brien: That is a Henry IX clause now.

Hon J.A. SCOTT: Yes. Members know my concern about that. It should be looked at closely. Another matter is the rules. I am assured that all our courts have rules. The tribunal's rules are much like those used by the courts. I will quote the draft rule that concerns me. In part 1, under application of rules, clause 4 states -

> The Tribunal may, on its own initiative in any Appeal, suspend or modify any Rule in order to resolve an Appeal as expeditiously as possible.

That makes me wonder what is the purpose of the rules in the first place. More competent legal minds than mine, which would not be hard to find, might see sense in that, but I do not. Therefore, I would like the meaning of that to be explained in a detailed way. We should have confidence in the rules of the tribunal. If, at any given time during a football match one side and the referee decided to change the rules and did not tell the other side, some inequality would creep into the game. Hon Derrick Tomlinson referred to the rules as being a disallowable instrument. It would not be kosher and would cause a few problems if a disallowable instrument could be overridden at the whim of the tribunal.

When we examined the directions statement on planning appeals that was released by the minister some time ago, which my electoral officer downloaded from the Internet, we found that it was quite a good summary of the system and of what has been proposed. Of the current system, the directions statement says that the concealed nature of the deliberations is also contrary to notions of transparency and accountability, which are important building blocks in a democratic system. That is exacerbated by the absence of any requirement for the minister to give reasons for his decisions. The previous Minister for Planning was notorious for claiming that his decisions were based on new evidence, but refused to disclose the nature of the new evidence. Transparency and accountability are particularly important because the outcomes will almost inevitably affect third parties and sometimes even whole local communities.

More must be done to ensure that the voices of the local community are heard in the planning appeals process. I am in full agreement that more must be done in that regard; although the ability for those communities to appear at the behest of the tribunal rather than as a right does not go far enough. In the real world, people are not aware necessarily of the little ads in the back of newspapers. It may be a surprise to some members that members of the general community do not spend Saturday afternoon's peering through the back pages of the newspapers looking at little government ads about what planning decisions or what environmental issues have been put forward by the Department of Environmental Protection.

Hon M.J. Criddle: How will the member overcome that problem?

Hon J.A. SCOTT: These people must rely on being invited by a tribunal to make a submission. If they do not know anything about the tribunal and are not invited, they cannot be involved; therefore, the current system does not allow for appropriate community participation. The newspaper ads only slightly improve the position of making people aware of what is happening. Some people who are keenly interested in these issues will already be aware of them and others will become aware of them. The local government of Fremantle has precinct groups and the planning decisions of the Fremantle local government go before that group. However, not every council or shire has that arrangement.

Hon M.J. Criddle: How would you overcome that?

Hon J.A. SCOTT: The precinct arrangement is very good. If other local governments are not prepared to set up precinct committees, they should at least use some of its methods. They should ensure that a community of people that may be impacted by a development is notified and able to have some input. That is a reasonably fair thing to do.

Hon G.T. Giffard: Would that relate to any development in an area?

Hon J.A. SCOTT: There should be a requirement for the developer or the owner of a block upon which an ordinary house is to be built to notify his immediate neighbours; however, information about major facilities should be more widely available.

As I said the other night, the system does not go far enough. At the beginning of my remarks, I referred to Hon Derrick Tomlinson's comments that the ministerial system is better than the proposed system because someone is accountable for the decisions. A minister would be more accountable than a public servant or a tribunal president. If a decision were really bad, the minister would be subjected to some accountability through the

ballot box and the party to which that person belongs would feel some pain. Some sort of democratic accountability lies with the minister. If we remove the minister from the system, we must increase the democratic accountability of the tribunals.

As I also said previously - this is worth reminding people - we must ask to whom are we accountable. We are accountable to the people who entrust courts and politicians with such powers. It is important that if the minister is removed from the system, we in some way maintain the link of those people with the system and their power within it. The best way to do that is to not only give them permission to make submissions when the tribunal sees fit, but also allow them to make appeals on planning and rezoning decisions.

We discussed this issue with a range of people, some of whom were concerned that if we give planning appeal rights to the hoi polloi, the tribunal will be overrun with appeals and the system will be unmanageable. I remind members that every other State already has the right of appeal. The Australian Capital Territory has a third-party appeal right in some cases. In Queensland, any person who makes a submission may make an appeal. In Victoria, a person who has objected to a development permit may appeal. In addition, any person who is affected may appeal; and, in that case, the person must also have the leave of the tribunal to do so. In Tasmania, any person or relevant agency that made a representation may appeal. In South Australia, a person who has made a representation, and the development is a category 3 development, may appeal. In New South Wales, there is a right of a third-party appeal in respect of an application for development consent for a designated development.

It is interesting to look at the Acts under which the various States work. The Australian Capital Territory operates under the Land (Planning and Environment) Act 1991; Queensland operates under the Integrated Planning Act 1997, which contains an appeal right; Victoria operates under the Planning and Environment Act 1987; South Australia operates under the Environment, Resources and Development Court Act 1993; New South Wales operates under the Environmental Planning and Assessment Act 1979 and the Land and Environment Court Act 1979. All those Acts are rather less archaic than our Town Planning and Development Act of 1928. We are patching up a very old Act. Tasmania, which has a third-party right of appeal, outdoes Western Australia; it has a 1927 Act.

In each of those States, there is also a difference in who hears the appeal. In the ACT, the Administrative Appeals Tribunal hears the appeal; in Queensland, it is the Planning and Environment Court; in Victoria, it is the Victorian Civil and Administrative Tribunal; in Tasmania, it is the Resource Management and Planning Appeal Tribunal; in South Australia, it is the Environment, Resources and Development Court; and in New South Wales, it is the Land and Environment Court. Western Australia is the only remaining State that has a Minister for Planning and Infrastructure or Town Planning Appeal Tribunal. We lag well behind every State in Australia, except for the Northern Territory. Even though the Northern Territory has quite a modern Act of 1999, it does not have a third-party right of appeal and it has the Lands and Mining Tribunal. It has quite a different focus from other States.

I will quote from a page from the proceedings of the planning for the environment seminar of Friday, 19 May 2000, which was put on by the Environmental Defenders Office. It states that in Western Australia, no third-party appeal is available from a decision by a local government to grant planning approval, a decision by the Western Australian Planning Commission to grant planning approval, or a decision by the Western Australian Planning Commission to grant subdivision approval. In that respect, it states -

> Western Australia is out of step with the rest of Australia in denying appeal rights to third parties. Every other State and Territory, with the exception of the Northern Territory, gives third parties appeal rights in respect of planning approvals.

Western Australia is the odd State out. I wonder why we do not trust our citizens as much as the other States do. Clearly, we are rather more devious characters, or perhaps we are too bolshie and people will be appealing all the time. Western Australia appears to be on its own in not granting that appeal right.

Data from other States shows that the argument that we will be overrun if we allow third-party rights of appeal is simply not true. The Legislative Review Committee of the National Environmental Law Association made a submission on the Bill. The association argued for having lawyers on a specialist tribunal. It said that there is a perception that including lawyers on a specialist tribunal only leads to the creation of an esoteric, abstract body of laws, accessible only by other lawyers who have a vested interest in its perpetuation. It said the perception was that having lawyers involved leads to obfuscation of issues that should be resolved by commonsense. The association pointed out that the body of law associated with planning appeals is neither abstract nor esoteric, and it has developed as a result of cases involving actual developments and actual parties, when answers to questions of law and statutory interpretation were required to resolve actual disputes. Trying to determine those disputes on a commonsense basis means that inevitably there will be at least two commonsense answers. Each party will

sincerely believe and contend that its contention reflects commonsense. That often happens here - although I sometimes wonder about that.

The association said that the introduction of third-party appeal rights in Western Australia should be considered by the Government as a matter of priority. It said that at present in Western Australia no third-party appeals are available from a decision to grant development or subdivision approval. The Bill will not alter this position; it retains the appeal rights in their current form with reference to relevant legislation, such as the Town Planning and Development Act 1928. The association said that there are compelling grounds for the introduction of third-party appeals into the Western Australian planning system. It said this is because the current developer-only appeals model, excluding parties with a legitimate interest from participating in the appeals system, may be perceived as encouraging the primary decision makers to make decisions in favour of applicants to avoid being subjected to appeals. The association said that this is out of step with every other jurisdiction in Australia, with the exception of the Northern Territory. It said it is unfortunate that the Government did not address the issue of third-party appeals in the Bill or in its review of the planning appeals system which preceded the introduction of the Bill.

Hon Simon O'Brien: Will you be introducing an amendment to that effect?

Hon J.A. SCOTT: Yes.

Hon Simon O'Brien: You do not have it yet?

Hon J.A. SCOTT: No, I understand it is very complicated. It is being drafted, and I am not quite sure whether it is finished. I do not have the same access to drafting facilities as the larger parties.

Hon Simon O'Brien: I have received a number of letters from constituents recommending your amendment.

Hon J.A. SCOTT: That is right.

Hon Simon O'Brien: They have great confidence in you.

Hon J.A. SCOTT: Good. I wonder how that happened. They are genuine people.

Hon Simon O'Brien: I know many of them.

Hon J.A. SCOTT: I informed them that I was doing this, because I knew it would be of interest to them.

NELA urges the Government to consider, in consultation with the community, whether third-party appeal rights should be introduced in planning matters; and, if so, the best model to adopt to facilitate such appeals; and to prepare appropriate amendments to the statutory provisions conferring appeal rights, such as section 8A of the Town Planning and Development Act 1928. It points out also that other States are not inundated with appeals and that their systems are workable and are not blown out by litigious community members.

Hon Derrick Tomlinson gave some examples of unfair impacts on communities in his area, and of how people had been pushed into selling their properties and moving away, because they found the new development incompatible with the lifestyle that they had enjoyed previously. There are many examples of how this is an issue of hot debate not just in the metropolitan area, but all over the State. Members will be aware of the names Leighton, Smiths Beach, Gnarabup and Wattleup. All these places have proposals for development and rezoning, and the community has no real voice. It is imperative that this be changed and that people be given the right to appeal. As I have said, I will be moving amendments to achieve this end. I sincerely hope I will get support from all members in this Chamber to give back to the community that right to appeal that it used to have under the Environmental Protection Act.

The direction statement from the minister states that the Government is keen to improve access by the community to the tribunal. This is clearly in line with achieving that objective. It is important that this Bill be amended to allow that to happen. I would like some of the community groups, and groups such as the Environmental Defender's Office, which has held many seminars on this and other planning issues, to be given the opportunity to speak to members of Parliament. For that reason, I move that at the end of the second reading stage, the Planning Appeals Bill 2001 be sent to the Standing Committee on Public Administration and Finance for its consideration, and that the committee report to the House by 6 December 2001.

Point of Order

Hon M.J. CRIDDLE: If the motion to refer this Bill to that committee is passed, will it preclude other members from speaking?

Hon J.A. SCOTT: I said at the end of the second reading stage.

Hon Derrick Tomlinson: You are giving notice.

The PRESIDENT: Order! What is the member doing?

Hon J.A. SCOTT: I am giving notice that at the end of the second reading stage, I will move that the Bill be referred to that committee.

The PRESIDENT: Other members now have the opportunity to speak, prior to the possibility of supporting any referral motion.

Hon M.J. CRIDDLE: Thank you for clearing that up, Mr President. I was a little concerned that I was not going to get even two minutes.

The PRESIDENT: So was I.

HON M.J. CRIDDLE (Agricultural) [9.24 pm]: The Government's purpose in this Bill is to remove the ability for ministerial appeals, to add transparency and accountability and to abide by the principles of natural justice. From the outset I have some concerns about the removal of the ability of the minister to make the final decision. Ministers are elected to that position to make the final decision. I have some concerns in that area having been a minister. We sometimes suffer because, in some portfolios, that responsibility does not rest finally with the minister. I need to make clear that the Bill does not remove the provision for the minister to be involved in the appeals. The minister can call for an appeal if the matter is deemed to be of state or regional significance. There is no firm definition of what that would include. Furthermore, the minister can make a submission to the tribunal at any time during an appeal. That is obviously necessary. In a moment, I will express my views about what might be put in place by way of an amendment.

Criticism of the existing appeals process is not so much about the minister having the decision-making role, but about the information upon which the decision was based only being available to the appellant. That is an important issue. The decision and the basis upon which it was arrived at were not made publicly available. That led to a lot of animosity in the community. That could simply be recognised through some small change to the legislation. The Bill needs to be absolutely clear about that determination and the reason for which a minister has called in an appeal. It needs to be published in a statewide newspaper and tabled in Parliament. The Bill is not absolutely clear on that matter.

The Labor Party direction statements on planning appeals said that ministerial appeals were favoured by appellants, in part, because they were cheaper, quicker and less intimidating. Anybody who goes before a tribunal is to some extent intimidated. That has been clearly demonstrated with people who have gone before the committee dealing with electoral reform, which has travelled around the State. I do not single out that committee, but it is an example of a situation in which the community is uncomfortable about going before a legalistic forum in which seven or eight people sit around and take evidence. It is an imposing arrangement. The proposed tribunal system might require legal representation and physical appearance at the hearing. That leads to travel costs, which is one of the matters that must be well and truly taken into account. That might be costly in regional areas. All appeals must go through the tribunal, which is time consuming. I will talk about third-party objections and their participation in the hearing shortly, as I want to make some remarks on that. The penalties have had a trial in the Supreme Court. The question was whether the Bill addressed past concerns with the tribunal. Additional costs need to be considered with ministerial appeals that do not require legal representation.

Furthermore, local governments in rural areas will incur additional expenses if they must attend appeals in person. No mention is made in the Bill of regional appeals, which is something upon which I would like some comment. Will appeals be held in regions or will there be a necessity for extensive travel? The parliamentary secretary could perhaps clear up that point.

The ability of persons who are not parties to an appeal to make submissions to the tribunal has the potential to make this process very slow and open to considerable criticism. The legislation states that this can occur if the tribunal is of the opinion the person has sufficient interest in the appeal. That could easily be interpreted as being very subjective. They are just a couple of the points I wanted to make, but I give notice that I will be placing some amendments on the Notice Paper. These amendments are designed to minimise the potential for third parties to disrupt and delay the appeal process, and also to give them the opportunity of 14 days as a reasonable time in which interested parties can register their interest in writing. That does not require the third parties to make the final submission, just to express an interest in the matter.

Another amendment I intend to move relates to the time frames of the single-member tribunal and the three-member tribunal. The intent is to establish a maximum period of 90 days for the single-member tribunal to reach a decision, and 180 days for the three-member tribunal. This reflects the time required for a more complex appeal. Many other points have been made on the way through, but those are the only points I wish to make. I will watch the progress of this legislation with great interest, and certainly I will make a number of comments at the committee stage.

HON CHRISTINE SHARP (South West) [9.32 pm]: My comments on the Bill relate only to the membership of the tribunal. I do not intend in any sense to repeat or second-guess the remarks of my colleague. I am concerned about the provisions for the establishment of the tribunal. In her second reading speech in the other place, the minister describes certain fundamental characteristics that a planning appeal system should contain. The first of these is that an appeal body should be impartial and unbiased, and decisions should be made on sound town planning principles, and not for personal or political reasons. The last and most important principle is that the community should have confidence in the appeal system.

I would like to place on record the concern being felt amongst community groups dealing with conflicts over planning decisions, that the current chair of the Town Planning Appeals Tribunal, Dr Les Stein, is also employed as a consultant to two very controversial development proposals in the south west - Smiths Beach and Gnarabup. This is being quite widely discussed in the south west, and people are asking how they can have confidence in the current tribunal or in a tribunal system, when the most senior member of that tribunal is working so closely with property developers on such controversial proposals. Of course, Smiths Beach and Gnarabup have been extremely controversial, and neither of them has yet been resolved. They may well be resolved according to the provisions that we are establishing at the moment. Because of this dual role in the conduct of the current chair of the tribunal, the reputation of the tribunal itself becomes controversial. I am not saying that Les Stein has behaved improperly. I am confident that should either of those issues come before the tribunal, he will declare his interest and not hear the appeals. Nevertheless, the perception is that as the chair of the tribunal, he is familiar with the way the system works and is in a position to give the developers insider trading type of information, which will undermine the impartiality of the tribunal system. Although his activities are not improper, they are certainly undesirable and are undermining the reputation of the tribunal.

The provisions in the Bill do not seem to have the necessary characteristics to prevent this problem. Surely the way to prevent the perception of a conflict of interest which could undermine the perception of the impartiality of such an important tribunal, would be to make its most senior office bearers full-time appointments so that they are not under any financial pressure to supplement their income from sources such as the very lucrative sources that large-scale and coastal developments offer.

Among the provisions covering members' qualifications I would like to see a further clause containing reference to the need for a clear impartiality by tribunal members.

Hon Derrick Tomlinson: Perhaps a declaration of interest will do.

Hon CHRISTINE SHARP: I do not know that that would be sufficient. As I just said, should those cases come before the tribunal, I am sure any interest would be declared. It, nonetheless, undermines the confidence in the system. The proposed president of the Town Planning Tribunal will hold an extremely powerful position in this State.

Hon Derrick Tomlinson: How do you overcome that perception?

Hon CHRISTINE SHARP: I am suggesting it could be overcome by making full-time positions those of the proposed president and any member who conducts single-member hearings. There would be no conflict of loyalty within the culture of the tribunal.

These matters are being raised with me in my electorate by community groups that have been working very hard on the issues of Smiths Beach and Gnarabup. They have been horrified to see this connection in the current membership of the tribunal and are concerned that the Bill does not contain firm provisions that will prevent that problem continuing and conflicting on these issues.

I would like to hear what the parliamentary secretary can commit to in that regard, whether the minister will consider tightening the membership provisions, whether she is aware of the extra activities of the present chair and that it is being discussed widely in the community and whether something can be done to put this problem to rest.

Debate adjourned, on motion by Hon G.T. Giffard (Parliamentary Secretary).