

PLANNING LEGISLATION AMENDMENT BILL 2000

Second Reading

Resumed from an earlier stage of the sitting.

MR KIERATH (Riverton - Minister for Planning) [4.18 pm]: The member for Armadale raised some issues earlier to which I will respond. The member asked whether the WA Planning Commission requested legislation. It did not. The decision was made by the Government in the public interest that, based on Ministry for Planning advice, it would seek legislation. The second question asked by the member for Armadale was whether the minister directed the WAPC to withdraw its delegation to local government. No, it did not. The WA Planning Commission made that decision. She then asked why everyone but the Government should comply with the planning processes. Frankly, she touched on the answer herself. She said that I would probably say that this legislation restores the status quo of the planning system over the past 35 years. In that case, she is dead right; I am saying that.

Since the introduction of the metropolitan region scheme in 1963, it has always been understood that public works are exempt. A decision of the court to overturn all those years of practices and procedures has changed the situation. That court decision has the ability to delay public works for essential services including schools and hospitals. That is why the Government believes that the Crown should not have to go through those processes. The member also raised the point that the Opposition would support an exemption provision for minor public works. Even they will still require consultation, but not necessarily approvals. The member also said that the Labor Party would support a Bill that validates existing developments, and the Government supports that. The member made a statement that the minister can direct the WAPC to approve development applications. The Crown Solicitor's Office has advised that the minister cannot direct the WAPC how to determine a development application. Another issue raised by the member was that the WAPC ought to be involved in decisions on major public works.

The Western Australian Planning Commission is involved in the consultation process as required under section 32 of the Town Planning and Development Act. It is also involved in consultation about major public works on land reserved under the metropolitan region scheme or local schemes. The reservation takes into account the planning impact of a proposal, and the public is involved in the reservation process. In the event that the Planning Commission were to refuse approval or impose conditions on a public work, a right of appeal to the minister or the Town Planning Appeal Tribunal would be available.

The member for Bassendean recounted the history of the Pyrtton prison proposal and went through the issues. I acknowledge what he has put on the record. He said that he believes that, in light of the court decision, the Government would be acting in contravention of the MRS if work were to proceed on the prison without approval. His comments are interesting but irrelevant. The work being undertaken at the Pyrtton site is refurbishment of existing buildings, so it does not constitute development for the purposes of the MRS. In those circumstances, approval is not required irrespective of the Supreme Court's decision.

I have tried to address the issues raised by members of the Opposition.

Ms MacTiernan: Why is this necessary?

Mr KIERATH: I provided an explanation, but the member was not in the Chamber at the time. I went through those issues. Since the MRS was introduced in 1963, public works have not required approval. The process does involve consultation, but approval is not required. This legislation will reinstate that situation.

Ms MacTiernan: What is wrong with the current situation?

Mr KIERATH: It is cumbersome, inconvenient and difficult, and it causes delays. Most of those involved in the system were happy with past procedures and practices because the system worked very well. They knew exactly where they stood.

I went through my history books and found some examples. Formal approval was not obtained for the Casuarina Prison, which was built in 1991 and which was a Labor Government initiative; the Mt Claremont Challenge Stadium, which was built in 1988; the Perth busport, which was built in 1986; and the north block extensions to the Royal Perth Hospital undertaken in 1992. There was consultation in those circumstances. Those involved in the development of the Casuarina Prison consulted with the council, but the project did not require council approval. Good procedures have been established.

Ms MacTiernan: Will you acknowledge that at the moment these public works do not require council approval?

Mr KIERATH: The Government thought they were exempt from approval, but the court has determined that they are not. These issues are currently referred to the Planning Commission.

Ms MacTiernan: You have withdrawn the delegation.

Mr KIERATH: I did not withdraw the delegation. While the member was not in the Chamber I explained what happened with those powers.

Several members interjected.

Ms MacTiernan: He does not understand.

Mr KIERATH: I do understand. We have restored the practices with which everyone was comfortable. The Government believes that is the appropriate process.

Question put and passed.

Bill read a second time.

Consideration in Detail

Clauses 1 and 2 put and passed.

Clause 3: Section 45 of the Metropolitan Region Town Planning Scheme Act 1959 replaced and validation -

Ms MacTIERNAN: This is the essential clause of the Bill. It will restore the situation that was thought to exist prior to the City of Bayswater case. The minister has not been able to explain why the current arrangements are not satisfactory. He has said that this will restore the situation with which everyone was comfortable. The inherent flaw in that logic is that we had the City of Bayswater case. Why would the City of Bayswater have taken the case to court if it had been happy with the situation? Why would there have been general support for its taking the case to appeal if everyone had been comfortable with the arrangement? It is a nonsense. People in local government thought the process was wrong, and that is why they challenged it, and that challenge was successful.

The Opposition has acknowledged that there would be grave difficulties if the State Government had to obtain local authority approval for many public works. The Opposition is not advocating this or, by not supporting this legislation, forcing the Government into that position. The reality is that the Western Australian Planning Commission has taken action. It exercised its powers, under the Planning Commission legislation, to withdraw all delegations on public works from local authorities. It is not within the province of local authorities to hold this up. There is no practical problem. The process is not captive to local government, which perhaps considers things parochially. It requires the WA Planning Commission to make a decision.

The Government's other argument is that delays occur. The Opposition has two answers to that: First, include a provision to exclude minor development applications for small matters such as the sale of a sandpit and the Opposition will agree to it; and, secondly, although the minister says that the process is too cumbersome, it is actually less cumbersome. At the moment, it must go to the local authority and the WAPC for consultation before the Government can make a decision. This proposal would create a shorter process than the one advocated by the minister. The reality is that the Government does not want to lose control. I understand that. However, the community does not want that. It wants the Government to be subject to the same planning laws as everyone else. It does not want the State Government to operate as a maverick, outside the framework of planning laws.

Mr KIERATH: I previously raised the issue about restoring the status quo. In answer to the issue about distinguishing between minor and major public works, raised by the member for Armadale, the Government received advice from Crown Law that it would be difficult to distinguish between what constitutes minor and major public works. Many would suggest, for example, that the redevelopment of a hostel to provide emergency accommodation for children would constitute a minor public work, especially considering that the hostel had existed on the site for about 28 years. Yet this same development gave rise to legal action. I said that everyone was happy. Perhaps I should have said that everyone, bar the City of Bayswater, was happy. Planning laws have been tried and proved over many years. Most people are happy with them and accept that public works do not go through the approval process, although the Government is required to consult with both the Planning Commission and local government. This restores it to that position.

Mr BROWN: I was not in the Chamber when the minister responded to the second reading debate. However, I understand that he did not reply to the matters that I am about to raise concerning Pyrron prison.

Mr Kierath: I did.

Mr BROWN: My information is that the minister did not. I will raise them again to give the minister the opportunity to respond. Clause 3(2) states -

An existing work is not, and never has been, invalid or illegal by reason only that approval for that existing work was not obtained.

Approval was never obtained from the Planning Commission, under the metropolitan region scheme, for the proposed women's prison at Pyrtton. Is that subclause intended to validate what is attempted at Pyrtton?

Mr KIERATH: The short answer is no. I did answer it before. I do not know who gave the member his advice - it was probably the member for Armadale. The member asked whether it was in contravention of any law and I pointed out that, because it was refurbishment of an existing building, it was not development under the definition in the Act and did not require approval. The member for Armadale did not report that to the member for Bassendean, but that is -

Mr Brown: You are making assumptions.

Mr KIERATH: Whoever reported to the member did not understand the issue. The member for Bassendean made it plain that he wanted an answer. I sought the advice and gave the answer on record.

Ms MacTiernan: The development consisted only of refurbishment?

Mr KIERATH: That is as I am advised. As it is only the refurbishment of an existing building -

Ms MacTiernan: There was no additional work? You were going to create a prison without putting up any additional constructions?

Mr KIERATH: That is as I am advised.

Mr BROWN: I am interested in the minister's response because he said that approval was not required. As I indicated in my speech, the matter went to the statutory planning committee of the Planning Commission in 1999. That committee indicated that the proposal, which was for a prison on part of the site, did not meet with its approval and it suggested that two other matters required examination: First, the significance of the site to Aboriginal people; and, secondly, the question of a concept plan for the whole site, rather than a small part. Chairman Simon Holthouse gave those two reasons that the Planning Commission did not find in favour of the proposal. The Opposition has never been able to work out why, if there was no requirement for the matter to go to the Planning Commission, it went to the commission in the first place? Was it because the Planning Commission had nothing to do and thought, "It would be nice to go out to Eden Hill and have a look around"? Did the Planning Commission have jurisdiction? I was amazed when the Government said that the Planning Commission never had a role in this matter because it was not a redevelopment. What the heck were we doing making submissions to the Planning Commission? Why was the Planning Commission listening to those submissions? It should have told people that it had no role in the matter. Why was the Government waiting on a decision by the Planning Commission? I am amazed that, at this late stage, we are told that the Planning Commission has nothing to do with it. It is a bit like the local postman. The commission went through this extraordinary process of requiring plans, asking people to make submissions, making officers available, making a formal decision and issuing a media release, all to say that it did not agree with it - and then it has no role. Perhaps the Planning Commission has too many resources. The officers sit there and say, "What are we thinking about today? Maybe we will have a stickybeak at this." I am amazed that the minister does not think the Planning Commission has a role because it was a matter of refurbishment. I will tell the minister what a prison needs that is a bit different from other places. It needs a fence around it. It is not a little garden fence - it is normally about 10 feet high with razor wire and a few other things. A story in this morning's newspaper said that three minimum security prisoners went for a wander yesterday. They are at large; or they were when the item for this morning's paper was written.

I am bewildered by the whole process as I thought the Western Australian Planning Commission had a role. The minister is telling me that it has never had a role, it does not have a role and is not involved. It is a mystery to people - they do not understand. If it does not have a role then what the heck has it been doing in dealing with this issue for months?

Mr KIERATH: The situation is easy to understand. I would have thought that the member understood it but he obviously does not. The first proposal required the approval of the WA Planning Commission. The current proposal does not require the approval of the WA Planning Commission.

The member asked about some other issues. A planning approval is not required for the use of a reservation. That condition is contained in clause 16 of the metropolitan region scheme.

The member mentioned fences around prisons. The Ministry of Justice had some difficulties getting its proposal passed. It checked the requirements. Refurbishment did not require development approval. The member stated that it required a fence. I am advised that planning approval is not required for a fence on reserve land and that is under clause 13 of the metropolitan region scheme.

Mr BROWN: I am keen to pursue the matter with the minister. The minister has got some things right and some things wrong. I will enlighten the minister so he will be able to give a more comprehensive response. In 1997 a proposal was made by the Disability Services Commission to have the land rezoned from public purposes-hospital to urban. The proposal went to the WA Planning Commission. The commission decided not to go down that path. It was an appropriate decision as the WA Planning Commission asked for comment and took all matters into account. That was not the end of the WA Planning Commission's role. In 1999 a proposal came to light that the Government wanted to place a minimum security women's prison on this site. It did not require urban zoning but it did require a different type of public-purpose zoning. That involved lots of discussions and eventually a proposal was put by the Disability Services Commission on behalf of the Ministry of Justice. Approval was sought from the WA Planning Commission that the site was appropriate for that use. The statutory planning committee of the WA Planning Commission stated it was not appropriate to tick off the proposal for the two reasons to which I have referred previously.

The minister's explanation of the first matter, the 1997 application, is correct. Quite clearly there has been a major change in zoning - from public purposes to urban - and the WA Planning Commission has had to approve it. On the minister's rationale, it would not need to approve or be involved with the 1999 matter, yet it was. Its determination in 1999 stated two things: First, the land must be examined for its significance to Aboriginal people. As a result of that, the Ministry of Justice contracted two people who prepared an extensive report that dealt with the significance of the land to Aboriginal people. That is the report to which I referred earlier. Secondly, in its decision, the statutory planning committee stated that the site would not be ticked off as there was no concept plan for the whole site. That caused the Government to think about how it would overcome the difficulty. An allocation was made in the forward estimates for another \$4.5m to be given to the Disability Services Commission to pay the balance of the cost of the site. A proposal was put to the Town of Bassendean that the site, excluding the prison, would be gifted to the town. It is an extraordinary set of events. The statutory planning committee has made a decision that the minister says has no force. Three matters have arisen from that: First, through the Ministry of Justice, the Government commissioned a major report and that report went to the Aboriginal Cultural Materials Committee; secondly, there was an allocation of \$4.5m for the rest of the land; and, thirdly, there was a taking order. I cannot understand how the minister can now say that the WA Planning Commission had no role.

Mr KIERATH: It obviously did in the first two cases. It does not have a role in the third case. I gave the member a clue to that. I said that the Ministry of Justice revised its proposal to fit something that did not require approval. I am advised that the second case the member is talking about required some extensions to buildings. As such, it would have required development approval. In respect of the third case, which is the one we are dealing with now, I understand from the Ministry of Justice that the current proposal is for refurbishment only and the use of land including a boundary fence does not require approval under clauses 13 and 16 of the metropolitan region scheme. That is what I said to the member before. Whether the member likes it or not, the Ministry of Justice has continued to change and refine its proposal to the stage at which it does not require approval.

Ms MacTIERNAN: The subclause being discussed at the moment deals with the ability to approve retrospectively legitimised matters that have not received planning approval. Can the minister explain the situation with the Kwinana motorplex? I know that the minister did not obtain planning approval for the motorplex. What is the current advice about the requirement for approval?

Mr KIERATH: The WA Sports Centre Trust submitted a development application for the complex to the WA Planning Commission.

Ms MacTiernan: When was that?

Mr KIERATH: I do not know the date. I will have to find out for the member. The application was submitted on the basis that the land was part reserve and subject to a notice under clause 32 of the metropolitan region scheme. Following a decision of the Supreme Court in the City of Bayswater case, the WAPC concluded that the proposal was exempt from approval under the metropolitan region scheme and should comply with section 32 of the Town Planning and Development Act. The WAPC accordingly advised the WA Sports Centre Trust that the proposal had not been dealt with as a development approval under the metropolitan region scheme. It advised of certain further studies that should be undertaken to address issues that have come to light during the examination of the proposal. The process of consultation, in response to the Western Australian Planning Commission, in effect, achieved the same outcomes as a formal development approval.

Ms MacTIERNAN: As with the Pyrtton site, this issue raises major question marks about the propriety of some of the conduct of our planning agencies. Although it was thought the Government was exempt from planning approval, everyone was happy with the orthodoxy that planning approval was required. As a result of a decision in the City of Bayswater case, planning approval is required, and when it looks like the matter might go to the

local authority the Government suddenly comes up with a plethora of different advice. Apart from the City of Bayswater case, what happened to change the view that this development did not require planning approval? It required planning approval before the decision in the City of Bayswater case, but because that case went against the Government the minister's legal advice on whether such a provision required planning approval suddenly changed. It is literally as incredible as the situation with Pyrtton, in which the views that are put forward - supposedly - by the minister's legal advisers are a constantly moving feast. I would like some of this legal advice to be tabled to give some credence to what the minister is saying.

Mr KIERATH: I understand that previously public work required approval on reserve land but not on zoned land. Pyrtton was reserve land, and parts of the motorplex were reserve land and part zoned land. One of the purposes of this Bill is to clear up part of that confusion.

Ms MacTiernan: Let us talk about the situation as it stands now and not as it might stand if and when this Bill is passed. Part of the motorplex site is not on reserve land. Is planning approval required for the part that is not on reserve land and, if not, why not?

Mr KIERATH: Let us look at the sequence of events. Justice Murray's decision resulted in a complete change in the advice coming through. The Government had to abide by that decision until either legislation was passed or -

Ms MacTiernan: Justice Murray's decision changed nothing.

Mr KIERATH: Yes, it did. The Murray decision said that the development was exempt from approval on both zoned and reserved land. That is why, in light of Justice Murray's decision, the advice of the Planning Commission was that the motorplex development did not require approval.

Ms MacTiernan: That is because it is public works; that is fine and what we have always thought. What did the Government do after the Full Court decision in which Justice Murray's decision no longer represented the prevailing law, so that planning approval was required?

Mr KIERATH: I was not required to do anything; it was up to the Planning Commission to take action if it thought it was appropriate.

Ms MacTiernan: The minister should not play this rubbish role; this is a whole of government role. What did the Government do about its public work that now required planning approval? Did the minister break the law?

Mr KIERATH: No, because the decision was made in light of the law that existed at that time.

Ms MacTiernan: Then the law changed.

Mr KIERATH: This is one of the problems that arise when a court case completely turns planning law on its head. The decision was made in light of the advice and decisions that were known at the time.

Ms MacTiernan: You had not constructed the motorplex then.

Mr KIERATH: It is not completed now. Construction had commenced.

Ms MacTiernan: The minister knew he was wrong, but he did not go back and seek planning approval.

Mr KIERATH: No, not at all.

Ms MacTIERNAN: I do not the blame the Government for its decision about the motorplex, in the first instance. Although it was aware of the controversy, the law as it stood then allowed it to proceed without planning approval. However, the law was revealed to be something other than it was initially believed to be. At that point the Government should have attempted to get planning approval. However, it allowed this government structure to continue to be built without the requisite planning approval. One of the arguments for passing the Bill today is that a lot of those developments would otherwise be challenged. We accept that for developments that occurred many years ago. However, we do not accept that it is legitimate to retrospectively approve laws that were deliberately flouted. The situation with the motorplex is a deliberate flouting of the law, because it was inconvenient.

Mr BROWN: In response to the last set of questions that I raised, the minister indicated that the reason that Planning Commission approval was not required for the third time was that the Ministry of Justice had changed its plans for the minimum security women's prison. That will come as a surprise to the local community, because the local community has not been advised of any change in plans.

Mr Kierath: The formal proposal required some extensions to buildings. The current proposal does not, because they have decided to operate within the existing building and to refurbish. The advice is that on that basis they do not require approval.

Mr BROWN: That will come as a surprise to members of the local community. I have not heard that explanation before. I am still trying to come to grips with how that will impact on the role of the Planning Commission. I draw the minister's attention to what was said in the media release the Planning Commission issued on 29 June 1999.

Mr Kierath: That is irrelevant. That was for a proposal that required approval. We are advised that the current proposal does not require approval. The advice from the Planning Commission is that it does not require approval under those circumstances.

Mr BROWN: The distinction that the minister draws is that what is now proposed does not include additions to the buildings.

Mr Kierath: There will be no new buildings or extensions to existing buildings.

Mr BROWN: The previous proposal was for additions and extensions.

Mr Kierath: Yes.

Mr BROWN: The reason I have difficulty coming to grips with that is that the previous decision does not refer to additions or extensions. It refers to two matters: First, it refers to the need for Aboriginal interests in the land to be considered.

Mr Kierath: However, the triggering mechanism is whether approval is required. If approval is required, that is the concern of the commission. If approval is not required, the commission does not have a say. My advice is that if approval were required, the commission would still have the same concerns. However, at the moment, if people are operating within the limits imposed on them and they do not require approval, the Western Australian Planning Commission does not get the chance to put forward its views.

Debate interrupted, pursuant to standing orders.

[Continued on page 3207.]