

# PLANNING APPEALS AMENDMENT BILL 2001

## EXPLANATORY NOTES

### 1. Background

During the lead up to the last election, and after extensive consultation with relevant stakeholders, Labor issued a direction statement on *Reforming the Planning Appeals Process*. The statement proposed abolishing appeals on planning decisions to the Minister for Planning with consequential arrangements to enable the Town Planning Appeal Tribunal to deal with all future planning appeals.

The direction statement was well received by the community. The *Planning Appeals Amendment Bill 2001* gives effect to the proposals contained in the direction statement.

### 2. The need for the Bill

The planning appeals system in Western Australia is in need of urgent attention. Part V of the *Town Planning and Development Act* provides for a dual system which offers the alternatives of appeal to the Town Planning Appeal Tribunal or to the Minister for Planning. No other Australian jurisdiction retains a system of Ministerial appeals.

The primary objective of a planning appeals system is to provide an applicant aggrieved by a planning decision an avenue whereby that decision can be reviewed by a body which is independent of the authority which made the original decision.

To achieve that objective, a planning appeals system must contain the following fundamental characteristics:-

- a) the appeal body should be impartial and unbiased;
- b) each party to the appeal must be given the opportunity to fully present their case as well as respond to the case of the other;
- c) appeals should be determined in accordance with sound planning principles and the law, and the appeal body should be competent to judge an appeal on this basis;
- d) written reasons for appeal decisions should be given;
- e) the appeal process should not involve an unduly long period of time;
- f) the costs should not be such that a prospective appellant is constrained from making an appeal;
- g) the community should have confidence in the appeal process.

The Ministerial appeal system has been favoured by many appellants on the grounds of speed, cost-saving and informality of proceedings. The system, however, has fundamental shortcomings. The most important are:-

- There is a denial of natural justice at various stages of the process. Whilst the appellant is obliged by law to forward a copy of the grounds of appeal to the respondent authority, the respondent is not obliged to forward its response to the appellant. Additionally, members of the Minister's Town Planning

Appeals Committee can take information from any source and there is no right for either party to know or comment on any evidence which has been given.

- There is a lack of transparency. The Tribunal is required to give written reasons for its determination of an appeal but the Minister is not. Whilst as a matter of practice the Minister advises the appellant and respondent of the determination of an appeal in writing, the Minister is not obliged to give detailed reasons for the decision. This does little to promote community confidence in the appeal system.
- Reasons are not published. In other jurisdictions, the publication of detailed reasons for decisions assists in building up a body of precedent which not only serves in the consistent application of planning principles, but also provides a guide to decision making authorities in making planning decisions and to applicants in considering whether or not to appeal. This body of precedent is not available in the current Ministerial appeal system. If it was, the number of appeals may well be reduced thus providing cost savings to the appeals system and the community.
- There is the potential for bias arising from political and personal influence unrelated to planning considerations. Whilst this may not be manifest, the Ministerial system creates a climate where allegations of intervention or personal and political grounds can arise.

Since its inception in 1976, the Town Planning Appeal Tribunal has established a high standard of decision-making and a reputation for careful and thorough enquiry. It has provided a forum for examining appeals on the basis of sound planning principles and the law and in an open and independent manner. The Tribunal gives reasons for its decisions which provide a full and clear statement of the matters considered as well as the reasons for the decision.

Notwithstanding its success as an impartial and independent body, the Tribunal has not achieved its full potential and the majority of appeals continue to be lodged with the Minister. The perceived concerns with the Tribunal system are delays, costs and the formality of proceedings which can be considered to be an inhibiting factor. There have been recent improvements to the Tribunal procedures, in particular, the introduction of mediation as a means of expediting resolution of appeals.

It is evident, however, that changes will be necessary to the Tribunal to deal with the increased workload. The transfer of Ministerial appeals to the Tribunal provides the opportunity to restructure the Tribunal so that it is a more flexible and efficient appeal body. The overriding aim is to retain the strengths whilst eliminating the weaknesses of both the Ministerial and Tribunal systems in a new Town Planning Appeal Tribunal structure.

### **3. Overview of the Bill**

The Bill abolishes the Ministerial appeals system and directs all planning appeals to the Town Planning Appeal Tribunal.

Significant provisions of the Bill are:-

- to overhaul the Town Planning Appeal Tribunal to enable it to respond with greater flexibility and efficiency to appeals of varying complexity so that it adopts only as much formality as is necessary to ensure procedural fairness and soundly based outcomes;
- to ensure all appeals abide by the rules of natural justice and the principles of transparency, including full publication of reasons for decisions;
- to provide third parties who have a sufficient interest in an appeal with the right to be heard during the appeal.

#### **4. Structure of the Tribunal**

In order to achieve the objectives of the appeal system, the Bill introduces the following changes to the structure of the Town Planning Appeal Tribunal:-

- The membership of the Tribunal will be expanded and the quorum requirement removed so that the Tribunal may be constituted by three members or a member sitting alone, and more than one Tribunal may hear appeals at any one time.
- The Chair of the Tribunal will be retitled President, which is the appropriate term for Tribunals, and will be appointed from the senior ranks of the legal profession. The President will have responsibility for directing the business of the Tribunal including the appointment of members to different classes of appeal and determining the places and times for sittings of the Tribunal. The President will also hear and determine appeals particularly those which involve questions of law.
- There will be a Principal Registrar who will perform the role of the executive officer of the Tribunal. The Principal Registrar will also be a member of the Tribunal with the capacity to hear and determine appeals.
- There will be a Registrar who will assist the Principal Registrar in the administration of the Tribunal and will be responsible for keeping a register of all appeals made to the Tribunal and decisions on those appeals.
- Tribunal members will be appointed either full-time or part-time and will have experience in planning and related professions.
- There will be two tiers of members of the Tribunal: senior members and ordinary members. A senior member will have more extensive knowledge or experience in matters to be dealt with by the Tribunal. Ordinary members will be responsible for hearing and determining the more simple cases.
- The constitution of the Tribunal for any particular appeal will be determined on the basis of the degree of complexity and formality appropriate to its resolution. For smallercases, being developments of less than \$150,000, subdivisions of not more than three lots and other classes of appeal set out in

the Town Planning Appeal Tribunal Rules, the appeals will be conducted with a similar degree of informality and flexibility as found in the Small Claims Tribunal. The emphasis will be on inquisitorial rather than adversarial processes. These will be known as Class 1 appeals. More complex cases (Class 2 appeals) will be dealt with by Tribunal members sitting alone or on a bench of three.

- Appeals involving questions of law will be allocated to legally qualified members or the questions of law will be identified and referred to legally qualified members.

## **5. Proceedings of the Tribunal**

The Tribunal will have jurisdiction to hear and determine all appeals referred to it under the Bill and may affirm or vary the determination or direction appealed against, or set aside the determination or direction and make another in substitution for it.

The Tribunal will be required to ensure each party has the opportunity to fully present their case as well as respond to the case of the other.

With the minor Class 1 appeals, in order to ensure the appeals process is as informal as possible, legal representation will be at the election of the appellant at the time the appeal is lodged. If the appellant elects not to have legal representation, then no party to the appeal will be entitled to be represented by a legal practitioner unless the President considers that the appeal is of a complex nature or raises questions of law and directs that parties be represented, the appellant is a legal practitioner, or the appellant subsequently withdraws the election.

The number of appeals the Tribunal will be required to determine will increase substantially with the potential for a higher number of appeals to the Supreme Court on a point of law. In order to minimise the incidence of further appeals to the Supreme Court there will be a right for an appellant or respondent to request the President of the Tribunal to review a decision made by a member of the Tribunal on a point of law which has not previously been referred to, or determined by, the President or a legally qualified member.

The Bill retains the current provisions whereby the Tribunal (President) may make rules concerning the practice and procedures to be followed in conducting an appeal and other related matters.

The Town Planning Appeal Tribunal Rules will differentiate between the procedures to be followed for Class 1 and Class 2 appeals.

For Class 1 appeals, the parties will set out their grounds of appeal (appellant) and grounds for contesting the appeal (respondent) in writing and exchange statements. There will be the opportunity for informal hearings conducted by an ordinary member. At the hearing the member will lead discussion on the main issues.

For Class 2 appeals, the procedure will be similar to the current procedures of the Tribunal. Determination will be after formal hearings. The hearings will not be as

inflexibly adversarial as has been the case in the existing Tribunal. There will be provision for mediation to encourage parties to settle disputes outside of a formal hearing.

Decisions on appeals will be made public on a register and reasons for each decision will be given.

## **6. Ministerial Call-in Power**

Where appeals involve matters of regional or State importance, the Bill provides power for the Minister for Planning to call-in those appeals for determination. These are matters which require a broader community interest to be taken into account than can be properly represented by the appellant or the responsible authority. Such call-in powers must be exercised within 28 days of lodgement of the appeal, and must be immediately declared by notice in the *Government Gazette*.

The Minister may investigate a called-in appeal him/herself or request the Tribunal to investigate and report on the appeal for the determination of the Minister. Decisions made by the Minister, in the same way as decisions of the Tribunal, are to be in writing and to include the Minister's reasons for making the decision. The Minister's decision will also be on the public record and available for inspection.

## **7. Other matters**

The Bill extends the jurisdiction of the Tribunal to hear and determine all planning appeals. This includes certain appeals under the *Metropolitan Region Scheme (Appeals) Regulations*, *East Perth, Subiaco, Midland and Hope Valley-Wattleup Redevelopment Acts* and the *Western Australian Planning Commission Act* where the jurisdiction is currently only with the Minister.

There are changes to s. 10 *Town Planning and Development Act* relating to the enforcement of the provisions of a town planning scheme by a responsible authority. In subsection (3) there is currently a capacity for the person upon whom an enforcement notice has been served to request the Minister to act as an arbiter on the issue of whether or not a particular building or work contravenes the provisions of a scheme or whether any provisions of a scheme have not been complied with in the erection or carrying out of any such building or work. This arbitration system is to be replaced by a formal right of appeal to the Tribunal against an enforcement notice served by a responsible authority. The enforcement notice and appeal provisions are also extended to include any contraventions of a scheme including unauthorised uses and development which does not comply with the terms of a planning approval.

There is a change to s. 26 *Town Planning and Development Act* to clarify that appeal rights in relation to the refusal or conditional approval of a subdivision application apply to the applicant. This is to correct an anomaly in the Act and reflects a recent decision of the Tribunal. The amendment will remove any doubt in the future interpretation of s. 26.

The Bill will also enable the Minister to refer matters under s. 18(2) *Town Planning and Development Act* to the Tribunal for its report and recommendations. These matters concern representations which may be made to the Minister on the grounds

that a local government has failed effectively to enforce provisions of its town planning scheme. In the past the Town Planning Appeals Committee has provided advice on those referrals.

Currently submissions on Minor Amendments to the *Metropolitan Region Scheme*, (s. 33A *Metropolitan Region Scheme Act*) are currently referred to the Town Planning Appeals Committee for a report and recommendations to the Minister. These are not matters that should be referred to the Tribunal because they are in the nature of submissions and not appeals by an aggrieved applicant or person. Instead, it is proposed that the Minister determine the submissions on the advice and recommendations of the WA Planning Commission. This is consistent with the procedure for major amendments under s. 33 of the Act.

There will be provision for the Governor to make regulations prescribing all things necessary or convenient for the carrying out and giving effect to the purposes of the Bill. The regulations will include provisions for governing the time and manner in which an appeal is to be made.

Under the Bill and regulations, it is intended to remove some inconsistencies in respect of the time period for lodging appeals and to adopt a standard 60 day period in respect of all appeals under planning legislation.

## **8. Transitional Provisions and Consequential Amendments**

As a result of proposals within the Bill, a number of transitional arrangements and consequential provisions arise relating to other legislation.

The legislation is urgent as more than 700 Ministerial appeals are received each year. In order to ensure a speedy transition to the new system, the Bill includes transitional arrangements whereby any appeal made to the Minister after 1 June 2001 but not determined before the commencement date, may be referred by the Minister to the Tribunal for determination.

The Bill also requires amendments to the *Constitution Acts Amendment Act 1899*, the *East Perth Redevelopment Act 1991*, the *Heritage of Western Australia Act 1990*, the *Hope Valley-Wattleup Redevelopment Act 2000*, the *Metropolitan Region Town Planning Scheme Act 1959*, the *Midland Redevelopment Act 1999*, the *Strata Titles Act 1985*, the *Subiaco Redevelopment Act 1994*, and the *Western Australian Planning Commission Act 1985*. These amendments are largely to substitute the current appeal procedures by the processes to be established by the Bill. The amendments to the Redevelopment Acts provide for appeals on enforcement notices to cease unauthorised uses or remove unauthorised developments to be dealt with by the Tribunal instead of the Minister.