Future directions of planning appeals in Western Australia

by **James Fletcher***

Introduction

The introduction of the *Planning Appeals Amendment Bill 2001* (WA) to Parliament on 28 June 2001 proposes a sea change in the way planning appeals will be heard in Western Australia. A Second Reading was agreed on 8 November 2001 following which the Bill was referred by the Legislative Council to the Standing Committee on Public Administration and Finance for review[1].

The Bill is likely to be approved in 2002. Its Second Reading debate has raised important issues about the objectives of planning appeals, the need for change and even the possibility – or at least consideration – of a Land and Environment Court in Western Australia. Further, this comes at a time when the West Australian Government has already established a task-force (headed by Michael Barker QC) to consider whether a specialist administrative appeals tribunal should be established with the State. The taskforce is expected to finalize its report in early 2002.

The purpose of this article is to consider the future direction of planning appeals in Western Australia. The article will:

- outline the objectives of planning appeals generally;
- examine the pre-2001 situation through a historical over- view; a discussion of the emergent dual system; criticisms of that system; and the inadequate legislative response of the previous State Government (the "Court Government");
- provide an overview of the Planning Appeals Amendment Bill 2001, some of its significant provisions, and its likely practical effects;
- suggest some directions for a future State Land and Environment Court including the beneficial effects it would have;
- examine the New South Wales (NSW) Land and Environment Court as a model for reform in Western Australia, its status and jurisdiction, and criticisms of it brought about by the NSW Attorney General's working party; and
- list issues arising from the operation and review of the NSW Land and Environment Court which the Western Australian Government may wish to consider in its consideration of an appropriate model for the State.

Objectives of Planning Appeals

The objectives of planning appeals are paramount in this discussion. On the Bill's Second Reading in the Legislative Assembly, a key objective and related characteristics were identified [2]. According to the Minister for Planning and Infrastructure, the Hon. Alannah MacTiernan, the primary objective of the Bill is to provide an applicant aggrieved by a planning decision with an avenue whereby that decision can be reviewed by a body that is independent of the authority that made the original decision[3].

To achieve that objective, a planning appeal system must contain certain fundamental characteristics:

- the appeal body should be impartial and unbiased, decisions should be made according to sound town planning principles, and the appeal body should be competent to judge an appeal on that basis.

- appeal procedures must be consistent with the principles of natural justice where both parties may fully present their case and respond to the case of the other.
- the system must be open and transparent, requiring an appeal body to give detailed reasons for its decisions. Such reasons should be open for public scrutiny and be used to establish a body of precedent.
- the appeal process should be accessible and timely with costs and time delays kept to a minimum.
- the community should have confidence in the appeal system.

The Position Pre-2001

Historical Overview

Before an amendment to the *Town Planning and Development Act 1928* (WA) (hereinafter the "TP&D Act") in 1970[4], the only available avenue of appealing planning matters was directly to the Minister. The 1970 amending Act provided the alternative avenue of a Town Planning Court, the appeal to one extinguished an appeal to the other. The same legislation contained provisions for the establishment of a town planning appeal committee to assist the Minister with the investigation of appeals and to provide recommendations on how they should be determined.

The Town Planning Appeal Court operated from 1971 to 1979 and did not provide an effective alternative to Ministerial appeals. During this period, only 30 of some 3,000 appeals were directed to the court. Under the system, each appeal was heard by a Supreme Court judge appointed for the purpose and two members – one each – appointed by the parties. The court proved to be time-consuming, overly legalistic and onerous for users of the system.

The TP&D Act was again amended in 1976 to replace the Town Planning Appeal Court with the Town Planning Appeal Tribunal[5]. The provisions of the 1976 Act were not proclaimed until 1979[6]. The Tribunal had three members appointed by the Governor; one, a person having legal training (with at least eight years experience) who acted as chairperson; another, a person experienced in planning; and, the third, a person having experience in public administration, commerce or industry[7]. Deputies were appointed to each of the three members to cover periods of absence. All members and deputy members were part-time appointments. Temporary appointments could also be made under the TP&D Act[8].

The Dual System of Planning Appeals

The dual system of appeals was created in 1979. The system operated on the assumption that the applicant could choose between Ministerial appeals and appeals to the Town Planning Appeals Tribunal. The Tribunal conducted itself with some regard for legal form and procedure, and tended to attract those appeals of a more complex nature raising points of law.

By contrast, the Ministerial system traditionally involved the allocation of an appeal case to one member of the town planning appeal Committee. The Committee then conferred with one party and then the other, usually independently of each other; contacts those persons who appear to have a significant interest in the outcome; and prepares the report and recommendation for consideration by the Minister. Two or three full-time appeal committee members presented those reports to the Minister, who made a determination in consultation with them[9].

Criticisms of the Dual System

The above process has come under close scrutiny and criticism, particularly in more recent years. Perceived problems with the system have been varied. Criticisms have included: no publishing of decisions; lack of transparency; the potential for bias; denial of natural justice; and pressure on the Ministerial portfolio.

Prior to June 2001, Western Australia was the only State to retain a system of Ministerial appeals. Reasons for Ministerial decisions were not published. This precluded the development of a body of precedent, as occurs in other jurisdictions. Precedent encourages consistency in decision-making and also provides a guide to decision-making authorities when they make planning decisions and to applicants when they consider whether or not to appeal[10]. Further, the existence of precedent may reduce the volume of appeals, and thus delays and costs. The Ministerial system has also been criticized because of the potential for bias and decisions being seen to be made 'behind closed doors'[11]. The lack of transparency contained the perceived threat of political and personal influence affecting appeal outcomes[12]. These concerns were related to a denial of natural justice at various stages of the process. In addition, the workload of the Minister attached to Ministerial appeals was unsustainable, especially given that some 700 appeals were received per year.

Conversely, the Ministerial system had been favoured by many appellants on the grounds of speed, cost saving and informality of proceedings. However, the criticisms precipitated an overhaul of the dual system.

Despite its success as an impartial and independent body, the Town Planning Appeals Tribunal was unable to achieve its fullest potential, contributing to the perceived problems. Prior to 2001, an average of less than 10 per cent of the total number of appeals was lodged with the Tribunal, with a balance of between 700 and 750 a year being processed through the Ministerial system[13]. Of these it was estimated that some sixty-percent involved residential issues and a further fifteen-percent involved minor building issues[14]. The perceived shortcomings of the Tribunal system included the intimidatory nature of the formality of procedures, the legal costs involved and the lengthy decision making process.

The Planning Appeals Bill 1999

The recently defeated Court government initiated amendments through the *Planning Appeals Bill* of 1999 in June of 1999. In essence the Bill sought to abolish both appeals to the Minister and to the Town Planning Appeal Tribunal ("the Tribunal"). The Bill proposed to appoint a number of planning appeal assessors to investigate planning appeals. The assessor's report and recommendation would be presented to a body appointed by the Minister, described as the Planning Appeal panel which would decide most appeals, except those called in by the Minister. The Bill sought to place considerable discretionary power in a newly created position of the Director of Planning Appeals. Although the Bill conveyed an appearance of independence, it was held to retain, and add to, many of the shortcomings of the dual system[15].

Overview of Planning Appeals Amendment Bill 2001

As outlined earlier, the Bill was introduced into Parliament on 28 June 2001, and a Second Reading was agreed to by the Legislative Council on 8 November 2001. The present Gallop Government introduced the Planning Appeals Amendment Bill 2001 as part of its election commitment to abolish Ministerial appeals from town planning decisions. The Bill attempts to restructure in a way that retains the strengths while eliminating the weaknesses of the respective systems. This was deemed as essential to restore the faith of the planning profession and the community generally in planning appeal decisions.

Significant Provisions

The Bill abolishes all Ministerial appeals and directs all appeals to the Tribunal.

- Extended Membership of the Tribunal

The membership of the Tribunal under the Bill consists of a president (a legal practitioner with not less than 8 years practice and standing[16]), a deputy president, senior members and ordinary members[17]. There are two tiers of members, senior members and ordinary members. A senior member will have more extensive knowledge or experience, and ordinary members will be responsible for hearing and determining more simple cases[18].

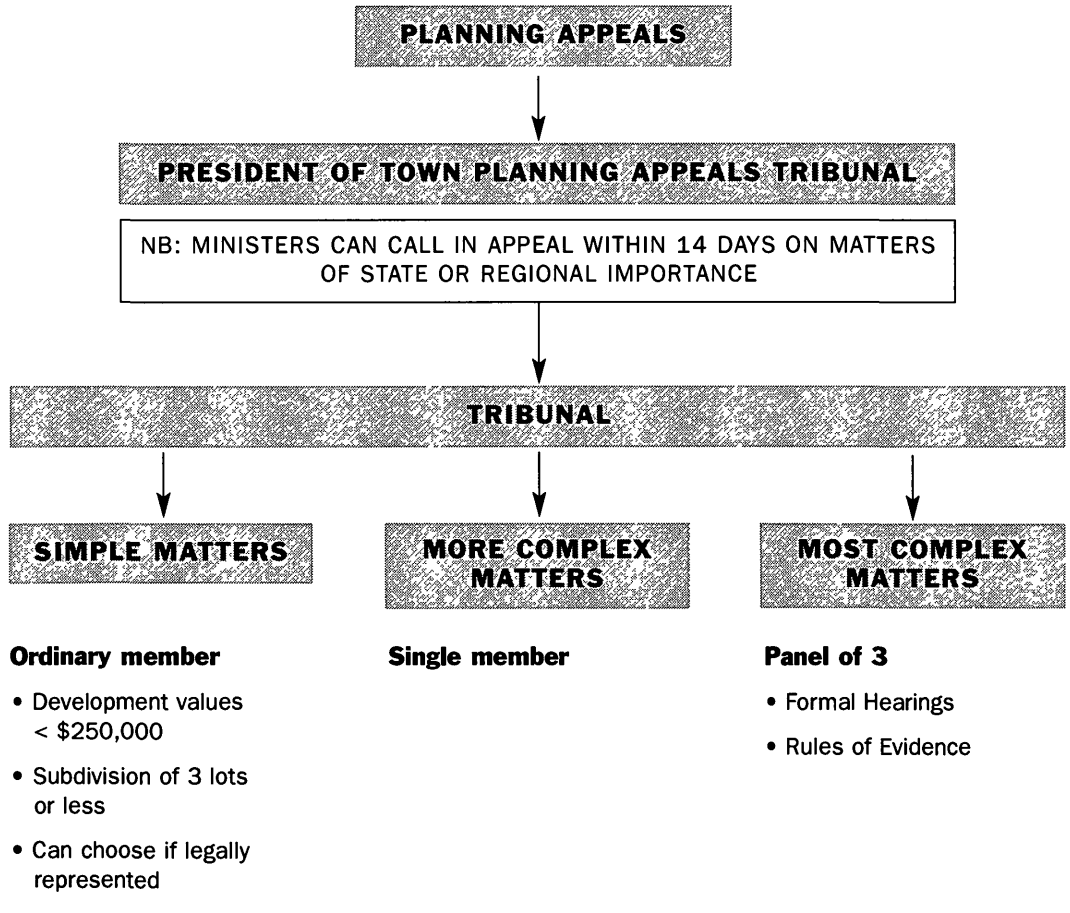
- Two Types of Appeals – Class One (simple) and Class Two (more complex)

Under section 40 of the Bill, simple appeals arise in respect of:

1) Developments of less than $250,000 (originally $150,000)[19].
2) Single houses on single lots of less than $500,000[20].
3) Subdivisions creating 3 or less lots[21].

Issues raising or likely to raise complex or significant planning considerations are directed by the President to the Tribunal constituted by three members[22] (see Diagram 1).

DIAGRAM 1: NEW PLANNING APPEALS FRAMEWORK



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- Third Party Right to be Heard

The Tribunal may hear submissions from a party who is not a party to the appeal if the Tribunal is of the opinion that the person has a sufficient interest in the appeal[23]. It is questionable whether the "sufficient interest" requirement is the same as the current public interest requirement, which examines factors such as length of formation, constitution, and long history of concern on the matter.

- Ministerial Call-In Power

Division 5 of the Bill provides for the Minister to call in certain appeals. Under section 65 of the Bill, the Minister may call in an appeal if the Minister considers it to raise "issues of State or regional importance". The Minister may make submissions under section 64 if it appears to the Tribunal that the appeal involves issues with a "substantial effect on the future planning of land" in the area the subject of the appeal. Such matters will apply where the determination could have a substantial effect on the achievement of State or regional planning objectives, or which could have significant effects beyond their immediate locality[24]. While this raises the question of whether Ministerial appeals have actually been abolished, it is expected that the power will be used infrequently. However, there have been calls for the call-in power to be narrowed. For example, the Royal Australian Property Institute (RAPI) have suggested that either the Tribunal is obliged to hear the called-in appeal and make a recommendation to the Minister; or that the Minister is obliged to consider the appeal under the same guidelines as the Tribunal. The RAPI consider this necessary to deliver on the principle in the Government's policy document that all appeals, including those subject to Ministerial call-ins, conform with the principles of natural justice and transparency[25].

- Other Provisions

There are other significant provisions. The Tribunal is to give each party written reasons, publish those reasons and make them publicly available upon payment of a fee[26] in respect of all decisions. Questions of law arising in the appeal are to be decided by the President[27], which may be appealed to the Supreme Court under section 62. The Tribunal is also bound by the rules of natural justice[28]. A party to an appeal may either appear personally, or be represented by an agent or legal practitioner[29], subject to certain restrictions[30].

Practical Effects

The Bill's Explanatory Notes suggest that the provisions will enable the Tribunal to respond with greater flexibility and efficiency to appeals of varying complexity; ensure natural justice and transparency; and to provide third parties with a right to be heard[31]. To this might be added some other likely practical impacts. The Bill ensures impartiality, independence and removes the possibility of bias. Appeals are likely to be more cost-effective given the separation of appeals into classes. Such improvements are likely to promote public satisfaction. The Bill was drafted after lengthy consultation with industry; environmental, planning and community groups and was therefore able to respond to concerns[32]. Some concerns voiced by the WA Property Council were delays, particularly third parties delaying the resolution of appeals[33]. There are some lingering questions about the status of remaining Ministerial appeals and questions concerning the test for "sufficient interest" in third party appeals.

A West Australian Land and Environment Court

Amidst the changes in Western Australia planning appeals, there has also been some discussion about the creation of a State Land and Environment Court. The present government has indicated that it will give consideration to the notion. This concept would involve the abolition of all Ministerial appeals to a single, specialist, non-political decision-making body. At present, the notion exists against the cross-current of other proposals; the creation of a West Australian Administrative Appeals Tribunal, for example[34].

The Benefits of a Land and Environment Court

It is submitted that the creation of such a court in Western Australia would lead to several beneficial outcomes. In the areas of mixed merits and judicial review, beneficial outcomes include less fragmentation; greater compliance with legislation and the development of a body of jurisprudence.

- Mixed Merits and Judicial Review

The first and most significant change would be in terms of administrative review. At present an applicant may have judicial review, but not merits review of an appeal. Judicial review is where the only task of the court is to review the decision of the consent authority. The court will rely on the council's or agency's record of the relevant facts and its decision and will seek only to review the legality of that decision[35]. Merits review, on the other hand, is where the Court is concerned with whether the council or agency's decision was made in accordance with the law and was the best policy decision on the merits. According to the Administrative Review Council, the principle objectives of merits review are to ensure that the decision made was correct and preferable. Correct in that the decision was made according to law with all available legal issues and relevant information, and preferable, in that the decision was the best policy choice possible on the basis of the facts[36]. Merits review ensures fair treatment of those affected by a decision, in addition to improving the quality and consistency of administrative decisions as well as the accountability of government[37].

It is submitted that the inclusion of merits review as part of a WA Land and Environment Court would be beneficial in planning appeals for the reasons outlined below.

- Better Integrated System

At present, planning appeals may be heard in more than one court, for example, the Tribunal, and the Supreme Court. The creation of a Land and Environment Court, with jurisdiction over all planning and environmental legislation (including pollution control, heritage, land valuation and the enforcement of environmental laws) would end this fragmentation.

- Development of a Body of Jurisprudence

The creation of such a Court would also lead to the development of legal precedence and principles, which contributes to greater consistency in decision making. In light of the recent Bill, jurisprudence is likely to be built up in any event.

- Compliance with Legislation

The Court would also be able to ensure compliance with planning and environmental legislation. The Court would be able to prescribe remedies, such as injunctions, to prevent breaches of legislation.

The NSW Land and Environment Court – a Model for Reform

Other Australian jurisdictions have taken the initiative to establish Land and Environment Courts, namely, New South Wales, South Australia (Environment, Resources and Development Court) and Queensland (Planning and Environment Court). Such a Court also exists in New Zealand (Environment Court) with similar bodies elsewhere (England and Wales, Germany, the Irish Republic, the Netherlands and Sweden).

Of all the existing Courts the most compelling model for reform is the New South Wales Land and Environment Court ("NSWLEC"). The NSWLEC, established over twenty years ago, is a specialist superior court with wide ranging civil and criminal jurisdiction in the administration and enforcement of environmental and planning laws in NSW. The Hon. Justice Mahla Pearlman noted three major achievements of the NSWLEC during its twenty years of existence. Firstly, it has become a model for environmental protection; secondly, it was a catalyst

for emerging jurisprudence; thirdly, of all NSW courts it is the only one without a backlog. Lord Harry Woolf acknowledged the NSWLEC as providing a precedent for his model, and described it as a "more radical solution"[38]. The NSWLEC was also extensively examined in the UK Department of the Environment, Transport and the Regions Report[39].

Status of the Court and it Jurisdiction

The NSWLEC was established as a superior court of record, its rank and status are equivalent to the NSW Supreme Court. This is significant as it reflects the government's attitude about the importance of planning and the environment.

The Courts' jurisdiction is divided into 6 Classes .

- Class 1: Environmental planning and protection appeals - generally appeals against refusals of local councils to grant development consent.
- Class 2: Local government and miscellaneous appeals – including those appeals against orders.
- Class 3: Land tenure, valuation and compensation matters, including objections to land valuations and rating appeals, plus miscellaneous appeals
- Class 4: Environmental planning and protection, and civil enforcement – includes judicial review of consent authorities on administrative grounds.
- Class 5: Environmental planning and protection: summary criminal jurisdiction and prosecuting various offences.
- Class 6: The Court hears appeals from convictions for environmental offences in the Local Court.

Merits review is available in Classes 1 and 2 of the court's jurisdiction with the rest open to judicial review. The Court is bound by the usual rules of evidence, and is essentially concerned with public law[41]. The Court is constituted by six full-time judges, with a Chief Judge and with nine full-time commissioners (formerly, "assessors"). Commissioners are able to hear cases in Classes 1 and 2 and valuation appeals in all three appeals. Judges may hear all cases, and only judges may hear cases in Classes 4, 5 and 6.

The NSWLEC has much to commend it. In terms of case flow, there has been an increasing number of appeals (by 24% in 1998), yet no backlog. Cases are dealt with in a timely fashion – 50% of cases are dealt with within 14 days of the hearing, 75% of judgements are delivered within 30 days of hearing, and 100% delivered within 90 days of the hearing[42]. The NSWLEC compared very favourably with courts in other jurisdictions in terms of procedural integration; substantive integration; speed and delay; incorporating expertise; encouraging informality; and Alternative Dispute Resolution (ADR)[43]. Furthermore, the NSWLEC has established a Consultative Committee (the Court Users Group) aimed at improving the services of the Court. Also, an Annual Report; an explanatory pamphlet; and a web-site are offered to improve access to and understanding of the Court. The Court also has a strong emphasis on mediation that has also been successful[44].

NSW Attorney-General's Working Party on the Court

In 2001, the NSW Attorney General announced a Working Party to examine the State's planning laws and the role of the Court in relation to merit planning appeals. The review was in large part brought about by vocal criticisms by local councils on the Court's merit review of councils' planning decisions.

Submissions were received from a number of interested parties. Some examples are the City of Sydney[45], the NSW Law Society[46] and the Nature Conservation Council of NSW[47]. The main areas of objection included: the Court approving poor and inferior developments; undermining the authority of the councils; contravention of planning policies; and setting undesirable planning prices.

However, such criticisms may be in part be explained by local councils' attempting to abandon independent merit review, in which case this is "entirely repugnant to the administration of the State's planning system for the past 50 years"[48]. Others suggest that reform should focus on improving the beneficial components of the Court, such as ADR[49].

WA Lessons

It is submitted that despite the criticisms which the Attorney-General's Working Party might have unearthed, that the NSW Land and Environment Court's operation, status and services offers the best available model for reform for WA. This is not to say that caution should be thrown to the wind. Care must be taken to avoid the pitfalls of excessive cost, adequate provision of ADR services, and problems related to third party appeal rights, which have caused some contention about the jurisdiction and practice of the NSW Court[50]. Careful studies of the courts in other jurisdictions should also be factored into the development of the WA model.

Conclusion

While the *Planning Appeals Amendment Bill 2001* (West Australia) represents a significant step in bringing West Australian planning appeals into line with other Australian jurisdictions, there is future scope for improving the planning appeal process and procedure in WA. It is suggested that a WA Land and Environment Court would be beneficial for planning and environmental appeals in WA. Benefits include: the creation of a more integrated system; the development of a body of jurisprudence and encouraging compliance with the relevant legislation. The questions raised by the NSW Attorney General's Working Party and other pre-existing concerns regarding the Land and Environment Court can be circumvented in West Australia with proper planning and preparation.

**The author is a final year Arts / Law student at the University of Western Australia.* *The author wishes to thank Dr. John Hockley, Charmian Barton, Daniel Stepniak and Alex Gardner for their assistance and comments with this article.*

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18. *Planning Appeals Amendment Bill* 2001 s.38 (5).
19. *Planning Appeals Amendment Bill* 2001 s.40 (3)(i).
20. *Planning Appeals Amendment Billl* 2001 s.40 (3)(ii).
21. *Planning Appeals Amendment Bill* 2001 s.40 (3)(iii).

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24. WA Parliament *Hansard* (HR), Legislative Council – Receipt and First Reading, 28 August 2001 3070 at 3073 (http://www.parliament.wa.gov.au/hansard).

25. RAPI, "RAPI Comments on the draft Planning Appeals Amendment Bill 2001" op. cit. n 15, p 13.

26. *Planning Appeals Amendment Bill* 2001 s.59.

27. *Planning Appeals Amendment Bill* 2001 s.58.

28. *Planning Appeals Amendment Bill* 2001 s.51 (1)(a).

29. *Planning Appeals Amendment Bill* 2001 s.53.

30. *Planning Appeals Amendment Bill* 2001 s.53 (4) – the appellant may elect that no party be represented by a legal practitioner (s.53 (3)), unless (a) the President gives a direction in respect of the appeal; (b) the President, having regard to whether the appeal involves a question of law, directs that the parties may be so represented; (c) the appellant is a legal practitioner; (d) the appellant withdraws the election.

31. *Planning Appeals Amendment Bill* 2001 – Explanatory Notes, op. cit. n 10, p 3.

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