Land And Environment Court Amendment Bill

Second Reading
In Committee

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LAND AND ENVIRONMENT COURT AMENDMENT BILL

Second Reading

The Hon. HENRY TSANG (Parliamentary Secretary) [3.45 p.m.]: I move:

That this bill be now read a second time.

I seek leave to incorporate the second reading speech in *Hansard*.

Leave granted.

The *Land and Environment Court Amendment Bill 2002* seeks to amend the *Land and Environment Court Act 1979* and the *Environmental Planning and Assessment Act 1979*, to implement reforms arising out of the report of the Land and Environment Court Working Party which was released in September of last year.

This report was prepared by an independent working party, chaired by the Hon J. S. Cripps QC, which was asked to examine the legislative basis upon which decisions in relation to development applications are currently reviewed by the Land and Environment Court, including:

- the most appropriate manner in which to review the decisions of local councils in relation to development applications;
- the constitution of the Land and Environment Court in reviewing the decisions of local councils, including whether the Court should be constituted by more than one Judge or Commissioner or by Commissioners possessing specified qualifications or expertise;
- whether the Court should have regard to any additional matters in reviewing a council decision in relation to a development application;
- ways in which to streamline the manner in which development applications are processed by councils and the Department of Planning, so as to reduce the incidence of appeals; and
- whether greater reliance could be placed upon alternative dispute resolution mechanisms in resolving disputes in relation to development applications.

In conducting its review, the working party received over 300 submissions from interested parties, as well as comments and advice from a range of relevant experts and stakeholders.

The Report of the Land and Environment Court Working Party noted that less than 1% of development applications are determined by the Land and Environment Court, and these are generally dealt with in a timely way. However, litigating a matter in the Court is still an expensive, which may cost parties tens of thousands

of dollars.

For this reason, the report recommended there be a new, streamlined, less formal process for matters that involve relatively inexpensive developments which do not raise wider issues of public interest.
The Land and Environment Court Amendment Bill 2002 will amend the *Land and Environment Court Act 1979* to provide two new procedures for dealing with appeals relating to development applications, brought under section 97 of the *Environmental Planning and Assessment Act 1979*.

The first of these will see certain appeals-termed "on-site hearing matters"-being heard and disposed of by way of a conference held on the site of the proposed development, and presided over by a Commissioner of the Court. Appeals to be dealt with by this procedure will be those involving developments that are valued at less than half the median sale price for dwellings in the local government area, where the developments would have little or no impact beyond neighbouring properties and which do not involve any significant issue of public interest.

The new on-site conference procedure is expected to take in a large proportion of the Court's work. 63% of appeals against council decisions involve projects valued between $50,000 and $500,000. In other words, mostly minor extensions and new homes. The new procedure is designed to help minimise formality and the role of lawyers, and to bring the Court closer to the communities affected by its decisions. It also has the potential to make the Court process more accessible by reducing costs and disposal times.

The second new procedure to be introduced by this Bill will apply to appeals brought under section 97 of the *Environmental Planning and Assessment Act 1979*, which are not on site hearing matters. These are termed "court hearing matters" in the Bill. Court hearing matters may be determined by a Judge, a Commissioner or a multi-member panel, at the direction of the Chief Judge. Panels will be convened if the Chief Judge considers that the hearing of a matter is likely to be lengthy, that there are a substantial number of issues in dispute, or that the site of the proposed development, or the development itself, is publicly controversial; or if the Chief Judge otherwise considers that a panel should be convened. Panels will be comprised of two or more Commissioners, or a Judge and one or more Commissioners, and in choosing panel members, the Chief Judge will be required to have regard to the relevance of individuals' expertise and experience to the subject matter of the appeal.

In dealing with court hearing matters, the Court will be required to inspect the site of the proposed development, unless the parties to the appeal agree otherwise.

The new court hearing procedure will cater for appeals involving important public interests and/or developments of substantial monetary value. It will allow the Court to focus appropriate expertise on these appeals and ensure its decisions are, and are seen to be, of the highest possible quality.

In a nutshell, these reforms are designed to make the Court less legalistic and less daunting for the average family or small business wanting to appeal against a council decision rejecting a minor extension, for a example to a home, a shopfront or a carport, while improving the checks and balances for major and publicly controversial developments.

The Bill will also amend the *Land and Environment Court Act 1979* to add "urban design" and "heritage" to the list of fields of expertise that may qualify a person for appointment as a Commissioner, and provide for Commissioners to be appointed on a part-time basis, in the same way as part-time Magistrates. The purpose of these amendments is to widen the pool of available candidates for appointment, enhance the opportunities for suitably qualified men and women who wish to work part-time, and ultimately to broaden the expertise available to the Court.

The Bill will also give the Court the power to impose easements over land in certain circumstances, similar to the power vested in the Supreme Court by section 88K of the *Conveyancing Act 1919*. It is anticipated that the Land and Environment Court will adopt much the same approach to applications for easements as the Supreme Court. However, a person will only be able to apply to the Land and Environment Court for an order imposing an easement over land in proceedings where that person has been granted a development consent on appeal, and the Court is satisfied, in addition to the types of matters set out in section 88K, that the easement is reasonably necessary for the person's development to be carried out in accordance with the consent.

The Bill will also make several amendments to the *Environmental Planning and Assessment Act 1979*.

First, it will extend the period of time within which a local council may review its determination of a development application under section 82A of that Act, from 28 days up to one year or, if the application is the subject of an appeal, up to the time when the Court hands down its decision. The proposed amendments will also clarify that an applicant may make minor modifications to the application for the purposes of the review. The Bill provides that, if any modifications are made, they should be publicly notified in the same way as an application for the modification of a development consent.

These amendments are designed to encourage councils to take advantage of the power to review determinations, and to remove the need for appeals to the Land and Environment Court (or for consent orders) where a negotiated settlement is reached between the council and the applicant after an initial determination has been made.

The Bill will also give local councils the power to modify development consents granted by the Land and Environment Court. However, the exercise of this power will be subject to important safeguards. In addition to fulfilling any other advertising or notification requirements, the council will be required to make reasonable attempts to notify any person who made a submission in respect of the original development application that an application to modify the consent has been received. If the council determines to grant the modification, any person who lodged an objection to it may seek leave to appeal to the Land and Environment Court against the determination.

This amendment is intended to streamline the modification process provided by section 96 by removing the need for an applicant who obtained development consent on appeal to go back to the Court to have the consent modified. It is also expected to reduce the Court's workload.

All in all, this Bill will improve the appeals process for development applications by further adapting the procedures of the Land and Environment Court to suit the subject matter of planning appeals, and it will improve council processes by providing greater flexibility in relation to reviews of council determinations and the modification of consents granted by the Court.
'These reforms represent another stage in the State Government's program to improve the quality of planning decisions. In addition to the reforms set out in the Land and Environment Court Amendment Bill 2002, the Government has commissioned a taskforce, made up of the Chief Executive Officers of the Department of Local Government, the Department of Planning and the Attorney General's Department, to prepare a strategy for the implementation of a wide range of non-legislative reforms proposed by the Land and Environment Court Working Party. These reforms are of a practical and procedural nature, and relate to both local councils' development assessment processes, and the way in which appeals are dealt with by the Land and Environment Court. For example, the Working Party recommended training for local councillors, as well as Judges and Commissioners of the Land and Environment Court, a change to the Court's practice in awarding costs, and greater use of alternative dispute resolution at all stages of the development assessment process.

I commend the Bill to the House.

The Hon. JAMES SAMIOS [3.46 p.m.]: This bill will amend the Land and Environment Court Act 1979 with respect to the appointment and functions of commissioners and will amend the Environmental Planning and Assessment Act 1979 by extending the period of time in which a local council can determine a development application. By way of background, the bill aims to introduce reforms that have arisen from recommendations of the Land and Environment Court working party that were released in September 2001. The bill creates two new procedures relating to development applications brought under section 97 of the Environmental Planning and Assessment Act. The first relates to matters heard and disposed of by way of conference held on the site of the proposed development and presided over by a commissioner of the court for developments valued at less than half the median sale price for dwellings in the local government area. It also includes appeals which are not of great public interest. Second, court hearing matters may be determined by a judge, a commissioner or a multimember panel at the direction of the chief judge for appeals which are likely to be lengthy, complicated, or of great public interest.

The bill also provides for the appointment of part-time and full-time commissioners in much the same way as part-time magistrates are appointed. It also broadens qualifications for appointment as commissioner. For example, urban design and heritage is added to the list of fields of expertise that qualify a person for appointment as a commissioner. The bill allows for the granting of easements similar to the power given to the Supreme Court in the Conveyancing Act. Further, the bill extends the length of time from 28 days to one year within which a local council may review its determination of a development application and, if the application is the subject of an appeal, up to the time when the court hands down its decision. The bill provides for a streamlined process, which is less formal and less costly for relatively inexpensive developments. On the other hand, it creates uncertainty about a development as a council may review its decision up to one year later. The Opposition does not oppose the

bill.

Ms LEE RHIANNON [3.50 p.m.]: Reforms to the Land and Environment Court are urgently needed. Amongst local communities fending off the ravages of developer onslaught the court's record is so bad that it is known almost universally as the land and development court. That is clearly an insult, and from my experience moving around New South Wales working with many community organisations that are battling bad decisions of this court, it is a term that is used more and more. Unfortunately, the reputation of that court is well earned. Around New South Wales there are spectacular monuments to the bias of the court and the laws that it enforces.

The bill was conceived from the public outrage that has arisen from a growing perception that the court is developer-friendly, unskilled in dealing with heritage and urban-amenity issues and hostile to local communities seeking to preserve the public assets of open-space heritage and high-quality streetscapes. As the outrage gave birth to increasing media attention the Government knew that it had to act unless it was to suffer the inevitable electoral damage. Essentially, the Government is hoping that this bill will help it over the line come 22 March. The New South Wales Labor Party has been hamstrung by the necessity to keep the developer lobby happy so that the crucial campaign donations will continue to flow into its coffers.

In the four years that I have been a member of this House, time and again I have seen this taint democracy in this State. The Carr Government has fallen back on that time-honoured first law of politics: When in doubt conduct an inquiry. The results of that inquiry are, in part, expressed in this bill, which contains a number of minor provisions to change the way in which appeals on development applications to the Land and Environment Court operate. Although some of the changes might redress in a minor way some of the inbuilt bias of the court and the laws surrounding development assessment in New South Wales, it is clear that these go nowhere near the changes needed to bring balance and fairness to the urban environment.

For example, let us consider the change to add urban design or heritage to the list of fields of expertise that may qualify a person for appointment as a commissioner. This raises two obvious issues. First, it makes no sense to appoint to the court a commissioner who does not have both those qualifications. The current change requires expertise in only one or other of those fields in a long list of possible qualifications. Second, the fact that in the past these have not been part of the mandatory expertise of the court is perhaps why the court has such a lousy track record. The minor nature of this amendment exemplifies the failure of the bill to seriously address the urban and regional planning crisis that now faces New South Wales. I do not use that term lightly because we believe there is a real crisis in the processing of development applications across New South Wales because of the weakness in the law.

The Greens strongly oppose other aspects of the bill. We do not support the appointment of part-time commissioners unless they are prohibited from working in another development-related profession during their tenure. The Labor Party should have immediately picked up on this. How could a person serve as a commissioner while working in another field of development? The Greens are deeply concerned that the appointment of part-time commissioners will open the floodgates to conflicts of interest, which always favour developers. This is a problem for the community but it may be seen as a virtue by the Government, which is busy seeking favour from its long list of potential donors in the development industry.

Part-time commissioners may seek work from developers whose matters are brought before them. Even if that is not the case, without conscious efforts they may be constrained to display their disposition towards developers. It is bad enough that consultants are commercially obliged to give advice and evidence that favours the developer. To place commissioners in the grip of the same set of perverse incentives would leave the community with both biased evidence and systematically biased adjudication.

The provisions that allow for on-site hearings for small matters may be of some assistance in the efficient administration of the court, but will not necessarily enhance the ability of communities to protect themselves from inappropriate development. There has already been some experience of this with hearings on site for which written judgments are not provided, as can be the case for the new on-site hearing matters. The Greens have received reports of a number of cases in which ludicrous propositions from developers have been accepted. Because the matters were resolved without written record, these propositions are not open to subsequent challenge. One example was a developer who was able to persuade a commissioner that a 1.5 metre driveway entrance could be used as a passing lane, thus justifying a development that added significant volumes of traffic to a narrow laneway.

By approving this development the commissioner has created traffic chaos. This problem was entirely foreseeable but without a written record of the commissioner's reasons for accepting the additional traffic burden there is little action that the affected community can take. Such problems arise because of the absence of the discipline on commissioners that would come from providing written records. In summary, there is little in this bill that will comfort the communities of New South Wales that are struggling desperately against the avarice of developers in a system that is biased and most unfair. The Government lost, or perhaps more correctly I should say gave away, an opportunity to bring real reforms to this area of environmental protection and to bring fairness and justice to communities across New South Wales.

In 2000 Sydney City Council published its "Unwanted Legacies of the Land and Environment Court of NSW". This publication outlined in some detail 35 separate approvals by the court, each of which had massive adverse consequences for the local community. This document makes a compelling case for reform of the court. No-one could look through this document without being horrified by the insensitivity of the court and its failure to express the public interest. The document also suggests six reforms. First, the court should review decisions of consent authorities on the basis of reasonableness. It should not be an alternative decision maker or parallel forum. Second, the court should comply with the democratically adopted planning policies of councils, not make its own policy decisions.

Third, the court should allow merit appeals only for deemed refusals, that is, where a consent authority has not made a decision on a proposal. Fourth, each consent authority should have a local appeals panel that is less legalistic, quicker and cheaper for small matters. Fifth, there should be a mechanism which utilises better expertise and a broader perspective for large and complex applications, that is, applications over $10 million in value. Sixth, court approvals should be streamlined to improve efficiency, reduce costs and prevent amended proposals being lodged with the court which the consent authority has not considered.

These are sensible and easily implemented recommendations. While the Greens would like to see more far-reaching reforms, Sydney City Council's suggestions would be an appropriate starting place. Not one of these recommendations was implemented in the Government's reform package. Time and again we hear how close the Government is to Lord Mayor Mr Frank Sartor. A previous representative of the Sydney City Council, the Hon. Henry Tsang, is a member of this Chamber. But despite that closeness, when it comes to real action the Government is seen to be lacking. The Government is not prepared to entertain even the most basic of real changes to the court, because it is not interested in offering the slightest brake on developers.

The Greens will continue to pursue the issue of developer donations. Donations from that sector of the business community are deeply corrupting the democratic process in this State. The March 2003 election will see these issues put before the people of New South Wales. Every day we see the physical evidence of the Government's addiction to developer campaign donations. Every day we see the results of the Government's failure, of its refusal to create a fair and just development assessment system. It will be for all of us to judge.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS [4.03 p.m.]: When the Land and Environment Court was established in 1979 it was thought of as a very significant and bold concept: creating a specialist court with an integrated jurisdiction, both criminal and civil, comprising a judge and non-lawyers with technical expertise in planning, and with exclusive jurisdiction to interpret the Environmental Planning and Assessment Act 1979. On the twentieth anniversary of the court in September 2000 Justice Bignold said in a presentation to the Nineteenth National Environmental Lawyers Association Annual Conference that the establishment of the court had profoundly influenced two important aspects in the development of environmental laws in New South Wales:

> Firstly, it is now firmly established that successful environmentalism ultimately depends upon effective enforcement such as is readily available via the Court's civil and criminal enforcement jurisdiction, considerably enhanced by the open standing to invoke that jurisdiction.
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> Secondly, the character and pattern of the Court's comprehensive and integrated environmental jurisdiction has inspired similar organic integration of environmentalism with other statutory regulatory regimes, especially in the field of planning control.

The Democrats acknowledge the significance of a court dealing with planning issues that has the same status as the Supreme Court in the hierarchy of courts in New South Wales, but the Land and Environment Court has certainly not been immune from controversy. Its numerous critics have dubbed the Land and Environment Court as "the developers' court", citing the merit appeal option frequently used by developers. This was highlighted in a publication titled "Unwanted Legacies of the Land and Environment Court of NSW", by the Sydney City Council. Although I do not always agree with Councillor Frank Sartor's ideas on how the city should be run, I think his foreword summed up the current situation very well indeed:

After 20 years of operation it has become clear that a system whereby the Land and Environment Court acts as a parallel approval process to councils is flawed. A great many people do not realise that if an applicant proposing a development does not like the decision of the consent authority-which will usually be their local council-they can simply go to the Court and a whole development application process starts over again except without public input.

The Court does not review Council's decisions to ensure their actions were based on an adherence to Council's own policies and regulations, but hears the Development Application afresh in what is known as a merit appeal.

Further, under the current legislation the Court is not bound to ensure that consent authorities' policies are implemented. The Court can make its own autonomous decisions, override council policy and applicants can even introduce evidence to the Court and make changes to their original D. A. that Council (or the relevant consent authority) has never considered or sighted.

I believe that this is quite unsatisfactory and that the court has been a big problem. In fact, in my more cynical moments I think that it is part of the Carr Government's blunt strategy of urban consolidation. That strategy is twofold: Firstly, because of land tax people with valuable land cannot afford to live on it. They have to have it developed because land tax is such a powerful disincentive to the status quo. Secondly, the Land and Environment Court overrules council planning. Thus, effectively, the Carr Government has achieved the necessity for development and the developers can overcome council plans. This produces urban consolidation but without good planning.

The Carr Government has effectively dismantled council planning, because any planning that councils may attempt can be dismantled in each application by the Land and Environment Court. Planning NSW has not had alternative plans. So, effectively, Sydney is being urban consolidated without an overall plan. That is very convenient if one is trying to help developers but in terms of a real vision for the future of Sydney it is a non-vision. It is part of the hypocrisy of the Carr Government, which talks big about architecture, planning, development, controls and so on; yet the two basic drivers of development of Sydney have nothing much to do with planning or controls. Quite the converse: they are about giving developers victory in a very ad hoc fashion.

In response to the criticisms of people such as Frank Sartor, in early 2000 the Land and Environment Court working party was created to examine the way in which the court currently reviews decisions about development applications. The working party released a report in September 2001. The amendment bill will implement 10 of the report's 37 recommendations and amend the Land and Environment Court Act 1979, the Environmental Planning and Assessment Act 1979, and the Statutory and Other Offices Remuneration Act 1975. Submissions made to the working party reviewing the court's role in the State planning system contained a wide variety of opinions on the operations of the court.
Issues of main concern were the merit review appeal against a council's refusal of a development application and the need for reform of the planning system. The majority of the working party considered that the court's jurisdiction to determine development applications on merit should be retained. Recommendation 8 relates to the modification of consents granted by the court. The Environmental Planning and Assessment Act and regulations should be amended to give councils the power to modify development consents granted by the court. Schedule 2 [6] enables a council to modify a development consent granted by the court.

Recommendation 10 addresses councils' power to review their determinations. The Environmental Planning and Assessment Act should be amended to allow councils to refute their decisions in relation to development applications at any time until the expiration of the period within which an applicant may appeal or the application is determined by the court. Schedule 2 [2] provides that a council may not review its determination of a development application after the time for making an appeal expires. Effectively that is the same, but is expressed the other way around.

Recommendation 14 addresses merit reviews. The majority of the members of the working party considered that the court's jurisdiction to determine development applications on the merits should be retained. I confess I believe that recommendation ought to be modified, because it is the nub of non-planning in a more global sense, apart from evaluating each development application. Recommendation 15 addresses qualifications for appointment. The list of qualifications for appointment as a commissioner should include special knowledge of, and experience in, urban design or heritage. Schedule 1 [2] extends the list of qualifications to include those two areas.

Recommendation 17 addresses the use of panels. Where appropriate, major matters should be decided by panels comprised of commissioners, or a judge and commissioners with relevant expertise. Schedule 1 [7] stipulates that court hearing matters are to be dealt with by the court or by a panel consisting of either two or more

commissioners or a judge and one or more commissioners. Recommendation 18 addresses part-time commissioners. The court should have the power to appoint part-time commissioners. Schedule 1 [3] enables the appointment of full-time and part-time commissioners. I note that recommendation 18 also suggests that part-time commissioners should not act as expert witnesses or advocates before the court during their tenure. That provision is not included in the bill, but it should be. We do not want advocates to be judges, and vice versa.

Recommendation 25 defines minor matters. Schedule 1 [7] makes a distinction between on-site, or minor, hearing matters and court, or major, hearing matters. Recommendation 26 addresses conferences for minor matters. Conferences should be compulsory for minor matters. The commissioner presiding over such a conference should have the power to make a binding decision. Schedule 1 [7] stipulates that on-site hearing matters are to be dealt with by means of a conference presided over by a single commissioner, who may dispose of the matter at the conclusion of the conference.

Recommendation 27 relates to major matters. Major matters should be dealt with by formal hearings unless the parties reach a settlement by way of alternative dispute resolution facilitated by the court. Matters that are not on-site hearing matters are court hearing matters to be dealt with by the court or by a panel. Recommendation 37 relates to ancillary orders. The court should be given a broad power to grant easements as ancillary orders to a grant of developmental consent. Schedule 1 [10] enables the court to grant such an easement. I refer now to schedule 1, which relates to hearings of class 1 proceedings brought under section 97 of the Environmental Planning and Assessment Act. Class 1 court proceedings are appeals against a council's refusal of a development application.

Schedule 1 to the bill amends the Land and Environment Court Act by providing two new procedures for such appeals relating to development applications brought before the court under section 97 of the Environmental Planning and Assessment Act. Item [7] of schedule 1 inserts new sections 34A to 34D into the Land and Environment Court Act. Under that item, class 1 proceedings for developments that are of no significant interest to the public or neighbouring properties and/or those valued at less than half the median sale price for that area can be dealt with on site. Developments that are not determined on site are court hearing matters. They will focus on appeals involving important public interest and/or developments of substantial monetary value.

I refer now to the granting of easements. Item] 10] of schedule 1 deletes section 40 and inserts a new section that will give the court broad powers to grant easements as ancillary orders to a grant of development consent under circumstances outlined in subsection (2). Such a ruling can be made only by a judge. Under subsection 5, the court must consider the objections of landowners who may be affected by works in connection with the easement. Under subsection (7) the court can order payments of compensation to those affected by the easement if it sees fit. However, under subsection (8) the costs of proceedings under section 40 are to be borne by the applicant.

I refer now to the appointment of commissioners. Items [11] to [16] of schedule 1 provide for the appointment of full-time and part-time commissioners. This implements recommendation 18 of the working party's report, on which a number of honourable members have commented. Item [2] of schedule 1 extends the list of qualifications for appointment of commissioners, adding the qualification of special knowledge of, and experience in, urban design or heritage. Schedule 2 makes amendments to the Environmental Planning and Assessment Act 1979 and refers to applications for review of council determinations. Item [2] of schedule 2 inserts a new section 82A (2), which allows councils to review development application decisions at any time up until the expiration of the period within which an applicant may appeal or before an appeal against the determination is disposed of by the court.

Item [5] of schedule 2 covers modifications of consents. The council must notify the applicant of modifications involving minimal environmental impact or modifications that fall under subsection (2) of section 97. Item [6] allows applicants to amend original development applications if the council is satisfied that the amended development application is substantially the same development as that in the original application. It will also apply to the modification by councils of consent granted by the court. Schedule 3 amends schedule 2 of the Statutory and Other Offices Remuneration Act 1975 to remove obsolete references to a senior assessor or assessor, under the Land and Environment Court Act 1979, and to replace them with references to a senior commissioner or full-time commissioner.

I have received a number of comments from other groups about this bill. The bill incorporates the appointment of full-time and part-time commissioners, as suggested by the report. However, the report stipulated that part-time commissioners should not act as expert witnesses or advocates before the court during the period of part-time tenure. New South Wales Young Lawyers noted that there is nothing in the bill to prevent this potential conflict of interest. The part-time commissioners

remuneration will be set by regulation, but was pro rata payment based on full-time commissioners salary considered by the Government?

The extension of the list of qualifications required for the appointment of commissioners is to be encouraged: it will strengthen their knowledge base. At the same time suggestions have been made by the Nature Conservation Council, the Greens and the Hon. Richard Jones that commissioners should hold qualifications across a range of areas, as set out in section 12 of the Land and Environment Court Act rather than just one or two qualifications. Both New South Wales Young Lawyers and the Nature Conservation Council raised concerns about public participation. With development applications being amended on the way to court, neighbours may not be afforded an opportunity to comment on the revised application.

The Nature Conservation Council suggested that the Environmental Planning and Assessment Act should be amended to provide that each person who objected to the initial grant of the consent should be notified in writing and that the period within which the public may make a submission on an advertised modification application should be 28 days. It is suggested that the time limit for commencement of appeals against decisions of a consent authority under section 98 of the Environmental Planning and Assessment Act be increased from 28 days to two months. Obviously if someone is on holidays they may miss the notification, and it may take some time for them to respond. Additionally, the Act should be amended to provide that in appeals brought under subsections 97 and 98 of the Act, the court has the power to order that third parties be joined as parties to the proceedings where those third parties are seeking to raise issues that would otherwise not be adequately addressed.

Except for objectors to designated development, there is no automatic right for third parties to be joined to class 1 proceedings where they seek to oppose a development. The Democrats support that provision because public participation in those decisions is absolutely vital. The idea that merely because someone owns some land they can do what they like with it, without regard to the community in which the development exists, is a complete nonsense. The working party made numerous recommendations regarding the importance of alternative dispute resolutions at all stages of the development assessment process. I do not know why the bill has not implemented any such recommendations. In general, the bill goes some way towards implementing the reforms suggested by the report of the working party. The question is, as always: Is the glass half full or half empty, or, in this case, is it ten-thirty sevenths full or twenty-seven thirty sevenths empty?

Prior to the last election the Environmental Planning and Assessment Act was amended to favour developers. One could not help but wonder whether it was a political attempt to please them and attract donations, which have been highly forthcoming, if one is to believe the electoral returns. In this case, after a huge outcry, there is some movement of the Acts-but not too much-towards the people. One could take the line: We had to do something so we did as little as possible. It is a harsh judgment. The Government is quick to respond to any concerns by sections of the community about law and order, but it has been far less willing to respond to concerns about overdevelopment. The capacity of Sydney to accommodate an increasing population is controversial. We must balance higher urban densities with concerns about their environmental impact.

The Democrats approach is to identify areas that must be conserved and areas that could sustain higher-density developments if transport infrastructure, such as railways, were available. Areas such as the north-west sector fall into that category. We should devise a way to capture the increased value provided by a transport corridor and use it to build public transport links. We could then produce an overall plan rather than rely on higgledy-piggledy development based on whatever the developer can buy and whatever can be rammed through council or the Land and Environment Court. We would have a desired corridor, the value of which would increase. Perhaps tax on the corridor would be higher, which would reflect increased land values. When people sold they would recoup some, but not all, of that money. The money that the Government took out would build the corridor.

We would have a city of systematic urban consolidation rather than future transport problems. Groups such as the Environmental Defender's Office have suggested that it is not the court that is the problem but rather the legislative context in which it operates. We must rethink planning policy in New South Wales along the lines I have suggested. The development of the Brisbane to Melbourne railway inland would help to develop inland areas. A serious decentralisation policy for New South Wales would ensure that Sydney does not keep growing as people in towns west of the ranges abandon their houses. They are suffering from the relative changes in agricultural products on the world market. We support the bill, but we believe the Government could have done more. We are disappointed that it did not.

The Hon. RICHARD JONES [4.25 p.m.]: The Land and Environment Court Amendment Bill amends the Land and Environment Court Act and the Environmental Planning and Assessment Act to implement reforms arising out of the Land and Environment Court working party review of the way the court deals with development applications. Although the bill implements a number of the recommendations proposed by the working party-modification of consent granted by the court, the council's

power to review determinations, qualifications for appointment, use of panels, part-time commissioners, minor matters, conferences for minor matters, major matters and ancillary orders-it does not implement all of the recommendations, or even the majority of them. The bill could, therefore, be improved and strengthened in a number of ways. For example, it could require the Minister to ensure that commissioners, as a group, hold qualifications across the range of areas set out in section 12 of the Land and Environment Court Act, and ensure that part-time commissioners cannot act as expert witnesses or advocates before the court during their tenure as commissioners.

Although new section 12 (2) (h) seeks to extend the breadth of qualifications that commissioners may hold to special knowledge of and experience in urban design or heritage, it raises the breadth of expertise currently held by commissioners. None of the commissioners presently has special knowledge of or experience in environmental science, or matters relating to the protection of the environment and environmental assessment. This lack of expertise must be addressed sooner rather than later. Potential conflicts of interest regarding part-time commissioners acting as expert witnesses or advocates before the court during their tenure as commissioners also needs to be resolved. The bill could also extend the time for objector appeals, expand the rights of third parties to be joined, extend the notification requirements for the modification of consents and build the public interest into alternative dispute resolution mechanisms.

Under section 98 of the Environmental Planning and Assessment Act objectors to designated development have 28 days in which to appeal against a decision to grant consent to designated development. For complex developments this time frame is often too short for third parties to review the necessary evidence and determine whether to commence proceedings. If the logic of the bill were followed in relation to extending the period by which developers can seek a section 82A review this time limit would also be increased. Although the Land and Environment Court has permitted third parties to participate in proceedings when those parties wish to raise issues that would not otherwise be raised, the third parties have not been given a right of appeal against the decision of the court. Third parties who were not objectors to designated development have not been permitted to call expert evidence.

These oversights need to be rectified. Although the bill makes further provision for the modification of consent in certain circumstances, in schedule 2, the procedure for notification of applications for modifying development consent remains inadequate, so much so that the court may not be fully informed of objector concerns when considering a modification application. Under clause 72A of the Environmental Planning and Assessment Regulation the notification of modified applications extends only to the publication of details in a newspaper. Persons subjected to the original development applications are not required to be notified and may not, therefore, be aware of any proposed modification or be able to notify the court of the concerns. The period provided for comment in relation to modification of designated development is potentially less than half the period provided for public comment on the initial proposal. This is unacceptable, as a designated development has potentially greater and more complex environmental impacts, and even minor changes may result in significantly increased harm to the local community or the environment.

The public exhibition provisions under part 5 of the Environmental Planning and Assessment Act where modifications to a development are made are also flawed and must be amended. It is important that alternative dispute resolution mechanisms used in connection with class 1 proceedings in the court recognise the importance of public involvement and adequately take into account the interests of third parties. Statutory force should therefore be given to an existing practice direction of the court, clause 9 of the Practice Direction 1993, as amended by the Practice Direction 1998. The need to recognise the public interest in court-annexed dispute resolution mechanisms also applies to section 34 conferences and court-annexed mediation. At present, commissioners are able to dispose of proceedings following a section 34 conference despite the fact that there is no requirement for notification of objectors or provision for objectors to participate in such a conference.

Providing increased opportunity for public participation in the development assessment process is, after all, one of the objects under section 5 (c) of the Environmental Planning and Assessment Act. I will therefore move amendments in Committee to ensure that the Land and Environment Court Act provides that the Minister has a duty to ensure that commissioners of the court, as a group, hold qualifications across the range of areas set out in section 12 of the Act; part-time commissioners cannot act as expert witnesses or advocates before the court during their tenure as commissioners; the time period for commencement of objector appeals under the Environmental Planning and Assessment Act is increased; and in applicant and objector appeals the court can order the third parties seeking to raise issues that would not otherwise be adequately addressed joined as parties in proceedings.

I will also move amendments to ensure that the Environmental Planning and Assessment Act provides that each objector must be notified in writing of any proposed modification of consent; the public has 28 days in which to make submissions on any advertised modification application; determining authorities cannot approve development with modifications that have a significant impact upon environment or citizens unaffected by the proposed development, unless those modifications have

been exhibited for public comment; consent authorities must demonstrate to the court that all relevant persons have been notified of proposed orders, the content of those orders and their rights to seek to be heard by the court; persons objecting to a proposal must be notified of the usual practice of the court in awarding costs, their rights to apply to be legally represented and to lead evidence; and in preliminary conferences or mediation matters, consent authorities must demonstrate to the court that all relevant persons have been notified of proposed orders, the content of those orders and their rights to seek to be heard by the court.

These amendments will increase the breadth of expertise of commissioners, remove possible conflicts of interest, enable evidence to be adequately reviewed before proceedings are undertaken, allow all parties to appeal court decisions and court expert evidence, and ensure adequate notification of proposed modifications and increase public involvement in alternative dispute resolution. I understand that the Government will accept the amendments relating to the Land and Environment Court commissioners qualifications, part-time commissioners acting as expert witnesses or advocates, joiner of third parties in appeals, and written notification of objectors of modifications of consent. While these amendments do not address all the issues of concern I have raised, I commend the Government for accepting them. In particular, I thank the Minister's adviser Alistair McConnachiea.

Reverend the Hon. FRED NILE [4.30 p.m.]: The Christian Democratic Party supports the Land and Environment Court Amendment Bill. This bill will amend the Land and Environment Court Act 1979 and the Environmental Planning and Assessment Act 1979 to implement reforms arising out of the recent independent working party review of the Land and Environment Court and the State planning system. As honourable members would know, the independent working party, chaired by the Hon. J. S. Cripps, QC, was asked to examine the legislative basis upon which decisions in relation to development applications are currently reviewed by the Land and Environment Court, including the most appropriate manner in which to review the decisions of local councils in relation to development applications. The working party was also to inquire into the constitution of the Land and Environment Court in reviewing the decisions of local councils, including whether the court should be constituted by more than one judge or commissioner or by commissioners possessing specified qualifications or expertise; whether the court should have regard to any additional matters in reviewing a council decision in relation to a development application; ways in which to streamline the manner in which development applications are processed by councils and PlanningNSW, so as to reduce the incidence of appeals; and whether greater reliance could be placed upon alternative dispute resolution mechanisms in resolving disputes in relation to development applications.

The Christian Democratic Party believes that this bill deals with the matters that were referred to the working party. The working party, as it conducted its review, received more than 300 submissions from interested parties, as well as comments and advice from a range of relevant experts and stakeholders. The report of the Land and Environment Court working party made a very important observation that less than 1 per cent of development applications are determined by the Land and Environment Court and that these are generally dealt with in an expeditious way and without undue delay. However, litigating a matter in court is expensive and may cost parties tens of thousands of dollars. There needs to be a more streamlined, less formal process. As we have done in other areas, we must try to reduce the legalese and minimise the role of lawyers in cases where they are not necessary. We hope that the process of on-site hearings will produce speedy decisions that do not involve a great deal of expense for the parties concerned.

The bill will introduce two new procedures for dealing with appeals brought under section 97 of the Environmental Planning and Assessment Act 1979. Appeals relating to small-scale developments will be dealt with by way of a conference held on the site of the proposed development and presided over by a commissioner of the court. It is anticipated that this process will help minimise formality and the role of lawyers and reduce costs and disposal times. Appeals relating to large-scale developments will be dealt with in the court room, with a discretion in the Chief Judge to convene a panel of commissioners, or a judge and commissioners, to determine the matter. Before disposing of any such appeal, the court will be required to visit the site of the proposed development. I believe that is an important requirement. The procedure for appeals relating to large-scale development will allow the court to focus appropriate expertise on these appeals and ensure that its decisions are of the highest possible quality.

The bill will also add urban design and heritage to the fields of expertise capable of qualifying a person for appointment as a commissioner of the court. I believe that provision is sufficient. Further, the bill will provide for commissioners to be appointed on a part-time basis and give the court the power to impose easements over the land in certain circumstances. It will also expand the period of time within which local councils may review their determinations of development applications, with the aim of reducing the number of appeals to the Land and Environment Court, and give councils the power to modify concerns granted by the court, with enhanced consultation requirements and a special right of appeal for objectors as a safeguard. I note that the Greens and the Hon. Richard Jones intend to move a large number of amendments to the bill. The Christian Democratic Party is concerned about the introduction of third party objections because, it is argued, it would give a better result. Such a provision

would also allow for manipulation by vested interests, which include the Greens and affiliated organisations and groups associated with the Hon. Richard Jones. A third party objection can be a delay mechanism to try to stop or even wreck a project that, in some cases, could be of great benefit to society.

The Hon. HENRY TSANG (Parliamentary Secretary) [4.35 p.m.], in reply: I thank all honourable members who contributed to this debate. I have worked with the Hon. James Samios on the Ethnic Communities Council of New South Wales for 21 years. Gentleman Jim Sir James, as I refer to him, has always been a gentleman and is always reasonable. I thank him for his contribution in support of the bill. In addressing the contributions of the Hon. Dr Arthur Chesterfield-Evans and Ms Lee Rhiannon it is important to note that the Land and Environment Court working party heard various allegations that the court is biased, that certain members of the court are biased and that there is a systemic bias inherent in the appeals process for development applications. The working party investigated those allegations and found every one of them to be unsubstantiated. None of the accusers pointed to a single case where a reasonable apprehension of bias could be shown on the part of any member of the Land and Environment Court.

Ms Lee Rhiannon is correct when she says that I was Deputy Lord Mayor of Sydney from 1991 to 1999 and that I am aware that the Council of the City of Sydney presented to the working party a glossy publication entitled "Unwanted Legacies". That publication purports to identify poor or incorrect decisions of the court. As well, a statistical review of court decisions purports to show a systemic bias in favour of applicants for development. The working party found that both submissions were noteworthy for the amount of ratepayers money that was clearly expended in their production and their entirely selective treatment of the truth. "Unwanted Legacies" contained a range of misleading statements and inaccuracies, while the statistical review examined only a select sample of court decisions. In the circumstances, the various allegations of bias appear to be nothing more than a scurrilous attack on the court, motivated by discontent in certain quarters of local government that councils do not always get their way in planning appeals. I have no sympathy with the sore loser mentality that these allegations clearly demonstrate. I thank the Hon. Dr Arthur Chesterfield-Evans for supporting the bill. I thank the Hon. Richard Jones for his contribution, in which he made some excellent suggestions. The Government will consider supporting some of his amendments. I thank Reverend the Hon. Fred Nile for his contribution and support. I commend the bill to the House.

Motion agreed to.

Bill read a second time.

In Committee

Clauses 1 to 5 agreed to.

Schedules 1 and 2

Ms LEE RHIANNON [4.40 p.m.], by leave: I move Greens amendments Nos 1 and 6 in globo:

No. 1 Page 3, schedule 1, lines 9-12. Omit all words on those lines. Insert instead:

Insert ", special knowledge of and experience in urban design, heritage, community consultation and ecologically sustainable development and" after "Minister" in section 12 (2).

No. 6 Page 10, schedule 1. Insert after line 22:

5 Existing Commissioners

(1) A Commissioner who held office immediately before the commencement of this clause, and who, in the opinion of the Minister, does not have special knowledge of urban design, heritage, community consultation and ecologically sustainable development may not exercise the functions of a Commissioner until the Commissioner has obtained that knowledge.

(2) For that purpose, the Minister may grant the Commissioner paid part-time leave.

The bill as presented to Parliament requires the new commissioners to have only one of a range of special expertise, which does not include either community consultation or ecologically sustainable development. The Greens believe absolutely that such expertise is required of any person assuming this role. The amendments will ensure that any new and existing commissioners of the Land and Environment Court have special knowledge of, and expertise in, four specific areas: urban design, heritage, community consultation and ecologically sustainable development. The Greens believe it is important that all commissioners, both new and existing, have this expertise so that they may perform their duties to the benefit of the entire community. Under these amendments, existing commissioners who do not have these skills will be given paid part-time study leave in order to undertake the appropriate retraining.

I urge honourable members to consider these amendments carefully. We believe they will go some way to fixing this bill. As I said during the second reading debate, we have been short-changed with this legislation. I hope that Government members will remember the words of former Prime Minister Keating about development in New South Wales. He has shown considerable leadership and commonsense regarding the development chaos reigning in New South Wales and his comments highlight the considerable lack of moral leadership on the part of State Labor. This is legalistic tinkering when the horse has already bolted. Sometimes it is possible to ride the horse and pick up some goodies along the way, but the rider could be thrown and could fall rather heavily. When Labor plays with the big end of town it often gets its fingers burnt. I urge honourable members to consider the amendments carefully as they will strengthen this bill.

The Hon. HENRY TSANG (Parliamentary Secretary) [4.44 p.m.]: The bill will add the words "special knowledge of and experience in urban design or heritage" to the list of qualifications set out in section 12 of the Land and Environment Court Act 1979. Greens amendment No. 1 seeks to make expertise in urban design, heritage, community consultation and ecologically sustainable development prerequisites for appointment as a commissioner in addition to one of the other fields of expertise listed in the Act. This would be completely unworkable: It would drastically reduce the pool of available candidates and could mean that no-one would be eligible for appointment as a commissioner of the court.

Further, ecologically sustainable development is already covered in section 12 by a number of the fields listed, including "environmental science" and "matters relating to the protection of the environment and environmental assessment". It is also worth noting that the court is already required to take account of the principles of ecologically sustainable development in planning appeals. This is provided for by section 79C of the Environmental Planning and Assessment Act 1979 coupled with the objects of the Act, which also include providing increased opportunities for public involvement and participation in environmental planning and assessment. Lastly, the Government has asked the court to provide additional training for judges and commissioners in ecologically sustainable development, total catchment management, and better urban and building design. Greens amendment No. 6 raises the question of who would hear an appeal while the commissioners were taking study leave. The Government opposes the amendments.

Amendments negatived.

The Hon. RICHARD JONES [4.46 p.m.], by leave: I move my amendments Nos 1, 2, 4 and 10 in globo:

No. 1 Page 3, schedule 1. Insert after line 12:

[3] Section 12 (2)

Insert at the end of section 12 (2):

In appointing Commissioners, the Minister should ensure, as far as practicable, that the Court is comprised of persons who hold qualifications across the range of areas specified in this subsection.

No. 2 Page 3, schedule 1 [3]. Insert after line 16:

(2B) A person appointed as a part-time Commissioner is guilty of misbehaviour if, during the term of his or her appointment, the person appears as

an expert witness, or act as the representative of any party, in proceedings before the Court.

No. 4 Page 7, schedule 1. Insert after line 8:

[10] Section 39A

Insert after section 39:

39A Joinder of parties in certain appeals

(1) On an appeal under section 97 or 98 of the *Environmental Planning and Assessment Act 1979*, the Court may, at any time, on the application of a person or of its own motion, order the joinder of a person as a party to the appeal if the Court is of the opinion:

(a) that the person is able to raise an issue that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if the person were not joined as a party, or

(b) that:

(i) it is in the interests of justice, or

(ii) it is in the public interest,

that the person be joined as a party to the appeal.

No. 10 Page 13, schedule 2 [6], line 18. Insert "by sending written notice to the last address known to the council of the objector or other person" after "modification".

Amendment No. 1 guarantees that the Minister ensures that commissioners of the Land and Environment Court, as a group, hold qualifications across the range of areas set out in section 12 of the Act. Amendment No. 2 ensures that part-time commissioners cannot act as expert witnesses or advocates before the court during their tenure as commissioners. Amendment No. 4 ensures that in applicant and objector appeals the court can join as parties to the proceedings persons who can raise issues-including issues in the public interest or in the interests of justice-that would not otherwise be addressed adequately. Amendment No. 10 ensures that councils are given specific obligations regarding notifying objectors in writing of any proposed modification of development consents.

The Hon. HENRY TSANG (Parliamentary Secretary) [4.47 p.m.]: The Government supports amendments Nos 1, 2, 4 and 10 moved by the Hon. Richard Jones. Amendment No. 1 will ensure that as many as possible of the fields of expertise set out in section 12 of the Land and Environment Court Act 1979 are represented among the commissioners. This will simply direct the Attorney General's attention when considering new appointments to the desirability of appointing a wide range of expert commissioners to the court.

The Hon. JAMES SAMIOS [4.48 p.m.]: The Opposition supports the amendments.

Amendments agreed to.

The Hon. RICHARD JONES [4.48 p.m.], by leave: I move my amendments Nos 3, 5, 6, 7, 8, 11, 12, 13 and 14 in globo:

No. 3 Page 3, schedule 1. Insert after line 24:

[7] Section 34 (4A)

Insert after section 34 (4):

(4A) A Commissioner must not dispose of proceedings relating to the determination of a development application under the *Environmental Planning and Assessment Act 1979* in accordance with an agreement reached between the parties or their representatives unless the consent authority is able to satisfy the Commissioner that it has notified, or has made all reasonable efforts to notify, the proposed orders by which it is intended to dispose of the proceedings:

(a) to all persons to whom notice of the relevant development application was, or was required to be, given, and

(b) to all persons who lodged an objection to the development.

Each such person is entitled to be heard by the Commissioner as to the proposed means of disposal of the proceedings.

No. 5 Page 7, schedule 1. Insert before line 9:

[10] Section 39B

Insert before section 40:

39B Making of certain orders by consent

(1) This section applies to an appeal under section 97 or 98 of the *Environmental Planning and Assessment Act 1979*.

(2) The Court must not make an order by consent of the parties to dispose of an appeal to which this section applies unless the consent authority is able to satisfy the Court that it has notified, or has made all reasonable efforts to notify, the terms of the proposed order:

(a) to all persons to whom notice of the relevant development application was, or was required to be, given, and

(b) to all persons who lodged an objection to the development.

No. 6 Page 11, schedule 2. Insert after line 10:

[2] Section 79AA

Insert after section 79A:

79AA Public participation-all notified development

(1) This section applies if:

(a) notice of a development application is given under section 79 or 79A, or

(b) notice of the determination of a development application is given under section 81.

(2) The notice of the development application, or the determination of the development application, must include the following information:

(a) that a person who makes a submission may be able to be joined as a party to, or be given leave to appeal in, proceedings before the Court with respect to the proposed development,

(b) that a person who is joined as a party to, or given leave to appeal in, such proceedings is able to be legally represented and to adduce evidence, including expert evidence,

(c) that the practice of the Court is that no order for costs is made in planning and building appeals unless the circumstances are exceptional.

No. 7 Page 12, schedule 2. Insert after line 17:

[5] Section 96 Modification of consents-generally

Insert after section 96 (1A) (b):

(b1) it has notified the application to each objector to the original development application by sending written notice to the last address known to the consent authority of the objector, and

[6] Section 96 (1A) (c)

Insert "otherwise" before "notified".

[7] Section 96 (1A) (d)

Omit "any period".

Insert instead "the period of 28 days after the date on which it notified the application as required by this section or such longer period as may be".

[8] Section 96 (1B)

Insert after section 96 (1A):

(1B) A consent authority must notify the application under subsection (1A) (c) if the modification will have a significant impact on persons different from those affected by the original development application.

[9] Section 96 (2) (b1)

Insert after section 96 (2) (b):

(b1) it has notified the application to each objector to the original development application by sending written notice to the last address known to the consent authority of the objector, and

[10] Section 96 (2) (c)

Insert "otherwise" before "notified".

[11] Section 96 (2) (d)

Insert "of 28 days after the date on which it notified the application as required by this section or such longer period as may be" after "the period".

[12] Section 96 (2A)

Insert after section 96 (2):

(2A) A consent authority must notify the application under subsection (2) (c) if the modification will have a significant impact upon:

(a) the environment, or

(b) persons different from those affected by the original development application.

No. 8 Page 12, schedule 2 [5], lines 24 and 25. Omit "subsection (1A) (c) or subsection (2) (b) and (c)". Insert instead "subsection (1A) (b1) and (c) or subsection (2) (b), (b1) and (c)".

No. 11 Page 13, schedule 2 [6], line 20. Omit "any period". Insert instead "the period of 28 days after the date on which it notified the application as required by this section or such longer period as may be".

No. 12 Page 13, schedule 2 [6]. Insert after line 22:

(2) The council must notify the application under subsection (1) (c) if the modification will have a significant impact upon:

(a) the environment, or

(b) persons different from those affected by the original development application.

No. 13 Page 13, schedule 2 [6], line 31. Omit "A person". Insert instead "An objector or other person".

No. 14 Page 14, schedule 2. Insert before line 1:

[7] Section 98 Appeal by an objector

Omit "28 days" from section 98 (1). Insert instead "2 months".

[8] Section 112 Decision of determining authority in relation to certain activities

Insert after section 112 (1):

(1AA) If notice has been given pursuant to section 113 in respect of an activity (the ***original activity***) a determining authority must not grant an approval in relation to an activity referred to in subsection (1) that is a modification of the original activity if the modified activity will have a significant impact upon:

(a) the environment, or

(b) persons different from those affected by the original activity,

unless a complete description of those modifications has been publicly exhibited for public comment. Section 113 applies to and in respect of such a complete description in the same way as it applies to and in respect of an environmental impact statement, subject to such modifications as may be prescribed by the regulations

Amendment No. 3 ensures that in preliminary conferences consent authorities must demonstrate to the court that all relevant persons have been notified of proposed orders, the content of those orders and their rights to seek to be heard by the court. Amendment No. 5 ensures that in applicant and objector appeals, consent authorities must demonstrate to the court that all relevant persons have been notified of proposed orders. Amendment No. 6 ensures that notices for development applications or the determination of development applications inform readers of the usual practice of the court in awarding costs, the right to apply to be legally represented and to lead

evidence.

Amendment Nos 7 and 8 ensure that consent authorities are given specific obligations regarding notifying objectors in writing of any proposed modification of consents. The public has 28 days in which to make submissions on advertised modification applications and that determining authorities cannot approve developments with modifications that have a significant impact upon the environment or citizens unaffected by the proposed development unless those modifications have been exhibited for public comment.

Amendment Nos 11, 12 and 13 ensure that the public has 28 days in which to make submissions on council advertised modification applications and that determining authorities cannot approve developments with modifications that have a significant impact upon the environment or citizens unaffected by the proposed development unless those modifications have been exhibited for public comment. Amendment No. 14 ensures that the time period for commencement of objector appeals under the Environmental Planning and Assessment Act is increased from 28 days to two months. It ensures that examining authorities cannot approve developments with modifications that have a significant impact upon the environment or citizens unaffected by the proposed development unless those modifications have been exhibited for public comment.

These amendments will increase the breadth of the expertise of commissioners, remove possible conflicts of interest, enable evidence to be adequately reviewed before proceedings are undertaken, allow all parties to appeal court decisions and call expert evidence, ensure adequate notification of proposed modifications and increase public involvement in alternative dispute resolution.

The Hon. HENRY TSANG (Parliamentary Secretary) [4.52 p.m.]: The Government does not support these amendments because they would make the court unworkable.

The Hon. JAMES SAMIOS [4.52 p.m.]: The Opposition does not support the amendments.

Amendments negatived.

Ms LEE RHIANNON [4.53 p.m.]: I move Greens amendment No. 2:

No. 2 Page 5, schedule 1, lines 14-19. Omit all words on those lines. Insert instead:

(4) The Commissioner is to give reasons for his or her decision by means of a written statement issued at the conclusion of the hearing.

This amendment would require written decisions for all on-site hearing matters. We have been told that the Government will not support this measure, and that is disappointing. It argues that an audio tape will be kept as a verbal report in a similar manner as a written report is kept. However, the Greens argue that a verbal report is not as rigorous as a written report and that is why I have moved the amendment. The absence of written decisions, as permitted by the bill as it stands, in some cases would remove an important discipline on the commissioners. Being required to justify decisions in writing will make the court accountable for the standard of its decision making. In essence, that is the reason for the amendment. It will strengthen the operation of the court and requires more scrutiny of decisions. Existing Land and Environment Court hearings that do not require written records of decisions in some cases have produced results that have been unsupported by evidence produced at such hearings. I emphasise that having to prepare a written report after a site inspection will require more vigorous application. I commend the amendment to the Committee.

The Hon. HENRY TSANG (Parliamentary Secretary) [4.54 p.m.]: This amendment is unnecessary. The reason for a decision must be made available as a matter of procedural fairness, and the bill makes it clear that reasons will be recorded in every case. However, in order to remove the need for the transcription of on-site conferences, the bill provides for reasons to be recorded in writing or by other means, such as on dictaphone. The registrar has indicated that to maximise efficiency the court plans to keep records of dictaphone recordings of reasons on tape, to be either copied or reduced to writing only at the request of a party. This is the same process as presently used by the Reporting Services Branch for extemporaneous decisions made in courtrooms in most jurisdictions. The Government does not support the

amendment.

Amendment negatived.

Ms LEE RHIANNON [4.55 p.m.]: I move Greens amendment No. 3:

No. 3 Page 7, schedule 1. Insert after line 8:

[10] Section 39 Powers of Court on appeals

Insert after section 39 (6A):

(6B) Despite any other provision of this section, if an appeal relates to a development application made to a council within the meaning of the *Environmental Planning and Assessment Act 1979*, the application concerned may not be amended for the purposes of the appeal unless the council consents to the amendment.

This amendment addresses the worrying and increasing practice of developers modifying applications before appeal. It would put an end to developers substantially changing a development application between council refusal and commencement of an appeal in the court. This practice severely disadvantages communities and councils that are trying to do the right thing by the communities in deciding whether a development application is appropriate. However, often the development has been changed, and sometimes changed quite substantially. The amendment will ensure that developers appealing against the refusal of the development consent by a local council cannot change their development applications on appeal to the court without the agreement of council. The Greens believe this is a sensible amendment and that it will go a small way towards strengthening the bill.

The Hon. HENRY TSANG (Parliamentary Secretary) [4.57 p.m.]: It is not lawful for the court to consider an application that has been substantially amended since it was considered by the council. The court is concerned to ensure that procedural fairness is observed and for this reason has formulated rule 16 (b1) of part 13 of the Land and Environment Court Rules 1996, which states that, except with the consent of the respondent or by leave of the court, the applicant at a hearing shall not be entitled to rely upon any amended plan of the development which the applicant initiated. However, local councils and others have continued to express concern about amendments to plans on appeal.

Therefore, the Government has resolved to call on the court to further tighten its rules so that amended plans cannot be relied upon in planning appeals, irrespective of the nature and extent of the changes, unless and until the council or other consent authority has had a reasonable opportunity to consider the changed proposal. This will mean there is no latitude at all for the courts to consider amendments if local council has not been given a chance to look at them first. Amending the Land and Environment Court Rules 1996 is an initiative on which the Government's implementation task force will be working closely with the court. While the intention of the proposal is broadly consistent with the Government's position, this matter shall be dealt with in the rules of the court. The Government does not support the amendment.

Amendment negatived.

Ms LEE RHIANNON [4.58 p.m.]: I move Greens amendment No. 4:

No. 4 Page 7, schedule 1. Insert after line 8:

[10] Section 39 Powers of Court on appeals

Insert after section 39 (7):

(7A) Despite any other provision of this section, if an appeal relates to a development application made to a council within the meaning of the *Environmental Planning and Assessment Act 1979*, the court must determine the appeal in accordance with any applicable environmental planning instruments and must have regard to any applicable development control plans of the consent authority.

This amendment gives emphasis to the local environment plan in assessing a development application. It will ensure that in assessing a development application the court is bound by the provisions of the relevant local environment plan. It will also ensure that the court has the same regard as council to the relevant control plans. Too often the court ignores LEDs and DCPs in granting approvals for proposals that clearly do not conform with those instruments, even though they have been democratically adopted by the local council after consultation with the community and, in the case of LEPs, approved by the Minister for Planning.

The Hon. HENRY TSANG (Parliamentary Secretary) [5.00 p.m.]: This amendment is unnecessary. Under merits review the court, like the council, can only determine an application that is permissible under the Environmental Planning and Assessment Act 1979 and the applicable environmental planning instruments, including local environmental plans. Development control plans do not have the force of law, but section 79C of the Environmental Planning and Assessment Act 1979 already requires them to be taken into account by both councils and the court. In short, the amendment precisely reflects the existing law. The Government does not support the amendment.

Amendment negatived.

Ms LEE RHIANNON [5.01 p.m.]: I move Greens amendment No. 5:

No. 5 Page10, schedule 1. Insert after line 6:

[14] Schedule 1, clause 4

Insert after clause 3:

4 Restrictions on appointment of part-time Commissioners

A person is not eligible to be appointed as a part-time Commissioner if the person is, and must immediately resign office as a part time-Commissioner if the person becomes:

(a) an officer or employee of a council, or

(b) an employee of a developer, an architect or a designer involved in the building or land development industry, or

(c) an employee of a builder or building contractor (whether the builder or contractor is an individual, partnership, firm or corporation), or

(d) a consultant who works for a developer or for any other individual, partnership, firm or corporation who or which works for a developer or on development proposals in the building or land development industry.

This amendment goes some way to addressing the entrenched structural corruption that there is in so many areas of the development process in this State. What we are taking up here is the whole issue of part-time commissioners. We believe that they have no role in the development industry. Our amendment would ensure that part-time commissioners do not work at all in the development industry. The Greens are concerned that the appointment of such commissioners would, without this amendment, create the opportunity for unacceptable conflicts of interest and perverse incentives. Commissioners who work in the development industry as, for example, urban design or planning consultants would be in the untenable position of adjudicating matters that could involve potential future clients. The credibility of the court depends on the independence of its commissioners, and that can only be secured by removing both the reality and perception of conflicts of interest. I put to members that the conflict of interest can only be removed by eliminating part-time positions for commissioners. The Greens feel very strongly about this amendment. It would not address all the problems we have with the development industry in this State, but it would certainly go some way toward cleaning up the big problem at present.

The Hon. HENRY TSANG (Parliamentary Secretary) [5.03 p.m.]: The Greens are suggesting that part-time commissioners should not be permitted to work in the development industry during their period of tenure. It is intended that part-time commissioners will be forbidden to act as advocates or expert witnesses before the court during the period of tenure. The court has expressed the view that the conditions of employment for part-time commissioners should prohibit any secondary employment, except by permission of the chief judge in a given case. It will be very important to avoid any possibility of conflicts of interest, but this may be done by imposing appropriate conditions of employment. The amendment is opposed by the Government.

Amendment negatived.

Ms LEE RHIANNON [5.04 p.m.]: I move Greens amendment No. 7:

No. 7 Page 11, schedule 2. Insert after line 10:

[2] Section 82 Circumstances in which consent is taken to be refused

Omit "the relevant period, prescribed by the regulations, applicable to the development the subject of the development application" from section 82 (1).

Insert instead "100 days of the application being made".

[3] Section 82 (2)

Omit "relevant".

This amendment deals with the issue of deemed refusals. The amendment would extend to 100 days the period of time available to a local consent authority to determine a development application before deemed refusal. Under the current laws deemed refusal occurs after 40 days. This places councils under pressure to rapidly process applications, sometimes without allowing due time to assess the full range of the impacts of the application. Some developers ruthlessly exploit this provision in order to remove the application from the local council. Why can we not grant this extension of time? It is just a small provision but something that would bring greater fairness into how the current system operates. One has to wonder why, by not supporting the amendment, the Government supports a system that so much favours the developers.

The Hon. HENRY TSANG (Parliamentary Secretary) [5.05 p.m.]: The working party considered the duration of assessment periods in detail, and concluded that the existing 40 day period-60 for designated development-should be retained. Councils need to make appropriate use of the "stop the clock" provisions of the Environmental Planning and Assessment Regulation 2000. Clause 54 provides that the council may request an applicant to provide such additional information about the proposed development as it considers necessary to its proper consideration of the application, and may specify such reasonable period within which the information must be provided. Clause 109 provides that so long as the council's request was made within 25 days after the date the application was submitted, the days occurring between the date of the request and the date on which the information is provided-or the applicant notifies the council that it will not be provided-are not counted in calculating the number of days in the assessment period. In other words, the clock stops. Extending the deemed refusal period as the Greens suggest would result in longer delays for minor developments such as house extensions. The Government opposes the amendment.

Amendment negatived.

Ms LEE RHIANNON [5.06 p.m.]: I move Greens amendment No. 8:

No. 8 Page 13, schedule 2. Insert after line 37:

[7] Section 97 Appeal by an applicant-development applications

Omit "for consent to carry out designated development" from section 97 (4).

[8] Section 98 Appeal by an objector

Insert after section 98 (1):

(1A) An objector who is dissatisfied with the determination of a consent authority to grant consent to a development application (other than a development application referred to in subsection (1)) may appeal to the Court within 28 days after the determination of the application or the date on which the application is taken to have been determined under section 82 (1).

This amendment would grant objectors to a development application the right to appeal against a development consent granted by a council. The amendment would put developers and the community on a more equal footing. The amendment would restore balance to the development assessment process to some extent.

The Hon. HENRY TSANG (Parliamentary Secretary) [5.07 p.m.]: Currently, only objectors to designated development can appeal to the court against a development consent issued by a council. Designated developments include aircraft facilities, breweries, cement works, coalmines, electricity generating stations, marinas and so on. They are not the normal residential and commercial developments. The Government is not prepared to extend third party appeal rights. It would need careful consideration and consultation with councils, industry and the community. Public interest arguments would need to be balanced against certainty or efficiency arguments. The Greens amendment opens up the possibility that someone who lives six blocks away from a person wishing to erect a new carport could force that person into court, even though the council considered the development application complied with all the relevant development controls. This could create considerable anxiety and hardship for people. Likewise, third party appeals could be used by businesses to head off competition, such as by delaying and adding to the cost of opening a new shop. Significant economic consequences would need to be considered as any general extension of third party appeal rights could considerably slow down economic development. It is also necessary to consider who should be allowed to appeal, and whether the extent of public participation prior to decision making should regulate such an entitlement. The Government opposes the amendment.

Amendment negatived.

Ms LEE RHIANNON [5.09 p.m.]: I move Greens amendment No. 9:

No. 9 Page 13, schedule 2. Insert after line 37:

[7] Section 99A

Insert after section 99:

99A Limits on appeals

Despite any other provision of this Part, an applicant who is dissatisfied with the determination of a consent authority with respect to the applicant's development application may not appeal to the Court if the site to which the application relates or any part of the site has, within the preceding 24 months, been the subject of an unsuccessful appeal to the Court by the applicant or a related entity of the applicant (whether or not the application involved the same kind of development).

This amendment would ensure that where an appeal has been refused on a site the court is not to hear a matter in respect of an application from the developer or a related entity on that site or any part of that site for a period of 24 months from the date of refusal. The Greens have brought this amendment forward because of the current unsavory situation that allows developers to go to the Land and Environment Court time and time again until they get the result they seek. That is one of the most common complaints that we get from the many community groups who beat a path to the door of the Greens seeking our support. Many people perceive the court system as a form of Russian roulette, and say that it is unfair to councils and communities. Developers know that eventually they will strike it lucky and have their matter heard before a sympathetic commissioner. That is no way to run a court. That is an absolute abrogation by the Government of its responsibility to present a fair legal system.

The Greens are very disappointed with this bill, considering the Government's power. It goes only some way towards tackling the big questions. The bill has not tackled the development chaos that rules in New South Wales and will in no way rein in Government members and Australian Labor Party head office officials who use their position to lobby local councillors to give their support to damaging and alienating developments. The bill in no way will change the Labor culture that favours fast-tracking most developments. The bill in no way will change the system under which Labor councillors, members of Parliament-in fact all Labor members-can win kudos inside the Labor Party by pulling in donations from developers. Those two issues, development donations and shoddy development processes, are absolutely linked, and until we break that link we will run into more and more problems, such as the Obeid disaster that is plaguing this Government every day.

The CHAIRMAN: Order! Ms Lee Rhiannon will address the schedule under consideration.

The Hon. HENRY TSANG (Parliamentary Secretary) [5.11. p.m.]: The Greens claim that developers repeatedly appeal essentially the same application until some commissioner in the court grants consent. However, stripping applicants who have appealed unsuccessfully of the right to do so again for two years, irrespective of the nature of any development proposal, would be a very heavy-handed response and could operate extremely unfairly. The working party suggested that repeated appeals may be discouraged by imposing costs under the proposed rule that costs are awarded where it is fair and reasonable to do so. Costs orders would be a much more appropriate mechanism for dealing with repeated appeals. The Government does not support the amendment.

Amendment negatived.

Schedule 1 as amended agreed to.

Schedule 2 as amended agreed to.

Schedule 3 agreed to.

Title agreed to.

Bill reported from Committee with amendments and passed through remaining stages.

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