



New South Wales

Land and Environment Court Amendment Act 2002 No 76

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Land and Environment Court Amendment Act 2002 No 76

Act No 76, 2002

*An Act to amend the *Land and Environment Court Act 1979* with respect to the appointment and functions of Commissioners; to amend the *Environmental Planning and Assessment Act 1979* and the *Statutory and Other Offices Remuneration Act 1975*; and for other purposes. [Assented to 2 October 2002]*

The Legislature of New South Wales enacts:**1 Name of Act**

This Act is the *Land and Environment Court Amendment Act 2002*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Land and Environment Court Act 1979 No 204

The *Land and Environment Court Act 1979* is amended as set out in Schedule 1.

4 Amendment of Environmental Planning and Assessment Act 1979 No 203

The *Environmental Planning and Assessment Act 1979* is amended as set out in Schedule 2.

5 Amendment of Statutory and Other Offices Remuneration Act 1975 (1976 No 4)

The *Statutory and Other Offices Remuneration Act 1975* is amended as set out in Schedule 3.

Schedule 1 Amendment of Land and Environment Court Act 1979

(Section 3)

[1] Section 4 Definitions

Insert in section 4 (1) in appropriate order:

court hearing matter—see section 34A (5).

on-site hearing matter—see section 34A (3).

[2] Section 12 Commissioners

Insert at the end of section 12 (2) (g):

, or

(h) special knowledge of and experience in urban design or heritage.

[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.

[4] Section 12 (2A) and (2B)

Insert after section 12 (2):

(2A) A person may be appointed as a full-time Commissioner or a part-time Commissioner.

(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 acts as the representative of any party, in proceedings before the Court.

[5] Section 12 (3)

Insert “full-time” before “Commissioners”.

[6] Section 17 Class 1—environmental planning and protection appeals

Insert “96AA,” after “96,” in section 17 (d).

[7] Section 34 Preliminary conferences

Insert “(other than proceedings in Class 1 that are brought under section 97 of the *Environmental Planning and Assessment Act 1979*)” after “jurisdiction” in section 34 (1).

[8] Sections 34A–34D

Insert after section 34:

34A Class 1 proceedings under sec 97 of Environmental Planning and Assessment Act 1979

- (1) This section applies to proceedings in Class 1 of the Court’s jurisdiction that are brought under section 97 of the *Environmental Planning and Assessment Act 1979*.
- (2) If, in relation to proceedings to which this section applies, the parties agree, or, in the absence of any such agreement, the Registrar at the first or a subsequent callover determines, that the proceedings involve proposed development that:
 - (a) has an estimated value that is less than half the median sale price for the previous quarter for all dwellings in the local government area in which the development is proposed to be carried out, and
 - (b) if carried out, would have little or no impact beyond neighbouring properties, and
 - (c) does not involve any significant issue of public interest beyond any impact on neighbouring properties,the proceedings are to be dealt with under section 34B, subject to subsection (6).
- (3) Proceedings that are dealt with under section 34B are referred to in this Act as *on-site hearing matters*.
- (4) Proceedings to which this section applies, other than those referred to in subsection (2), are to be dealt with under section 34C.

- (5) Proceedings that are dealt with under section 34C are referred to in this Act as *court hearing matters*.
- (6) At any time before proceedings to which this section applies commence to be dealt with under section 34B or 34C, the Court, on the application of a party or of its own motion, may determine that the proceedings are to be dealt with:
 - (a) under section 34C instead of under section 34B, or
 - (b) under section 34B instead of under section 34C.

34B Arrangements for dealing with on-site hearing matters

- (1) Proceedings that are dealt with under this section are to be dealt with by means of a conference presided over by a single Commissioner.
- (2) The conference is to be held on the site of the proposed development, unless the Commissioner is of the opinion that:
 - (a) it would be unfair to the interests of one or more of the parties to hold the conference there, or
 - (b) the lack of facilities at that site make it impractical to hold the conference there.
- (3) The Commissioner may dispose of the proceedings with or without further hearing, at any time after the conclusion of the conference.
- (4) The Commissioner is to give reasons for his or her decision by means of:
 - (a) a written statement issued at the conclusion of the hearing, or
 - (b) an oral statement given at the conclusion of the hearing and recorded by means that can be reproduced.
- (5) The provisions of section 36 (2), (3), (5), (6) and (7) apply to the hearing and disposal of proceedings under this section in the same way as those provisions apply to the hearing and disposal of proceedings under that section by a single Commissioner.

34C Arrangements for dealing with court hearing matters

- (1) Proceedings that are dealt with under this section are to be dealt with, at the direction of the Chief Judge:
 - (a) by a Judge, or
 - (b) by a single Commissioner, or
 - (c) if, in the opinion of the Chief Judge, the hearing of the proceedings is likely to be lengthy, or if the proceedings involve a publicly controversial site, or a publicly controversial development, or if the proceedings involve a substantial number of issues, or if the Chief Judge is of the opinion that it is otherwise appropriate to do so, by a panel consisting of:
 - (i) two or more Commissioners, or
 - (ii) a Judge and one or more Commissioners.
- (2) The appointment of a person to a panel is to be made having regard to the relevance of the person's expertise and experience to the subject of the proceedings.
- (3) If a panel consists of two or more Commissioners, the provisions of section 36 (2)–(7) apply to the proceedings before the panel in the same way as those provisions apply to proceedings under section 36.
- (4) If a panel consists of a Judge and one or more Commissioners:
 - (a) subject to this Act and the rules, the panel has and may exercise the functions of the Court, and
 - (b) the Judge is to preside at the hearing of the proceedings before the panel, and
 - (c) the Commissioner or Commissioners may advise and assist the Judge but are not to adjudicate on any matter before the panel, and
 - (d) the provisions of section 37 (4) apply to the Judge who is a member of the panel in the same way as those provisions apply to a Judge before whom proceedings referred to in section 37 (1) or (2) are pending, and
 - (e) the decision of the panel is taken to be the decision of the Court.

- (5) The provisions of section 36 (2), (3), (5), (6) and (7) apply to the hearing and disposal of proceedings under this section by a single Commissioner in the same way as those provisions apply to the hearing and disposal of proceedings under that section by a single Commissioner.

34D Site inspections in court hearing matters

Before disposing of a court hearing matter, the Court (or the persons exercising the functions of the Court) must make an inspection of the site of the proposed development, unless all the parties agree to dispense with an inspection.

[9] Section 36 Delegation to Commissioners

Insert “(other than proceedings in Class 1 that are brought under section 97 of the *Environmental Planning and Assessment Act 1979*)” after “jurisdiction” in section 36 (1).

[10] Section 37 Commissioners sitting with a Judge

Insert “(other than proceedings in Class 1 that are brought under section 97 of the *Environmental Planning and Assessment Act 1979*)” after “Judge” in section 37 (1).

[11] Section 39A

Insert after section 39:

39A Joinder of parties in certain appeals

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.

[12] Section 40

Omit the section. Insert instead:

40 Additional powers of Court—provision of easements

- (1) If the Court has determined to grant development consent on an appeal under section 97 of the *Environmental Planning and Assessment Act 1979*, the appellant may apply to the Court for an order imposing an easement over land.
- (2) The Court, on application under subsection (1), may make an order imposing an easement over land if it is satisfied that:
 - (a) the easement is reasonably necessary for the development to have effect in accordance with the consent, and
 - (b) use of the land having the benefit of the easement will not be inconsistent with the public interest, and
 - (c) the owner of the land to be burdened by the easement can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and
 - (d) all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful.
- (3) The jurisdiction of the Court to make an order under this section is exercisable only by a Judge, whether or not sitting alone.
- (4) Before making an order under this section, the Court must notify the owner of the land affected by the proposed easement (other than an owner who is a party to the proceedings before the Court), and the owner of any land on which it may be necessary for works to be carried out in connection with the easement (other than such a party), of the proposed easement or works, or both.

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- (5) An owner of land affected by the proposed easement and an owner of land on which it may be necessary for works to be carried out in connection with the easement:
- (a) may object to the proposed easement or works, and
 - (b) is entitled to appear before the Court in support of the objection.

The Court must consider each objection.

- (6) The Court:
- (a) is to specify in the order the nature and terms of the easement and such of the particulars referred to in section 88 (1) (a)–(d) of the *Conveyancing Act 1919* as are appropriate, and
 - (b) is to identify its site by reference to a plan that is, or is capable of being, registered or recorded under Division 3 of Part 23 of the *Conveyancing Act 1919*.

The terms may limit the times at which the easement applies.

- (7) The Court is to provide in the order for payment by the applicant for the order to such persons as the Court specifies of such compensation as the Court considers appropriate, unless the Court determines that compensation is not payable because of the special circumstances of the case.
- (8) The costs of the proceedings, in so far as they relate to an order sought or made under this section, are payable by the applicant for the order, subject to any order of the Court to the contrary.
- (9) An easement imposed under this section:
- (a) may be released by the owner of the land having the benefit of it, or
 - (b) may be modified by a deed made between the owner of the land having the benefit of it and the persons for the time being having the burden of it (or in the case of land under the provisions of the *Real Property Act 1900*) by a dealing in the form approved under that Act giving effect to the modification.
- (10) An easement imposed under this section, a release of such an easement or any modification of such an easement by a deed or dealing takes effect:

- (a) if the land burdened is under the *Real Property Act 1900*, when the Registrar-General registers a dealing in the form approved under that Act setting out particulars of the easement, or of the release or modification, by making such recordings in the Register kept under that Act as the Registrar-General considers appropriate, or
 - (b) in any other case, when a minute of the order imposing the easement, or the deed of release or modification, is registered in the General Register of Deeds.
- (11) An easement imposed under this section has effect (for the purposes of the *Conveyancing Act 1919* and the *Real Property Act 1900*) as if it were contained in a deed.
 - (12) Nothing in this section prevents such an easement from being extinguished or modified under section 89 of the *Conveyancing Act 1919*.
 - (13) In this section, **owner** of land includes a person having an estate or interest in the land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the *Real Property Act 1900*.

[13] Schedule 1 The Commissioners

Insert “full-time” before “Commissioner” in clause 1 (2).

[14] Schedule 1, clause 2

Insert “full-time” before “Commissioner” wherever occurring.

[15] Schedule 1, clause 2 (2)

Insert at the end of clause 2:

- (2) A part-time Commissioner is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the Commissioner.

[16] Schedule 1, clause 8

Insert “full-time” before “Commissioner” where firstly and secondly occurring in clause 8 (2).

[17] Schedule 1, clause 9

Insert “a full-time” before “Commissioner” wherever occurring in clause 9 (1).

[18] Schedule 1, clause 9

Insert “full-time” before “Commissioner” where firstly and secondly occurring in clause 9 (2).

[19] Schedule 3 Savings, transitional and other provisions

Insert after clause 3:

4 Provision consequent on enactment of Land and Environment Court Amendment Act 2002

Section 40, as substituted by the *Land and Environment Court Amendment Act 2002*, extends to proceedings before the Court at the time the section, as substituted, commences.

Schedule 2 Amendment of Environmental Planning and Assessment Act 1979

(Section 4)

[1] Section 72 Development control plans

Insert after section 72 (1) (c) (i):

- (ia) a request for the review of a determination of a development application where, in requesting the review, the applicant makes amendments to the development described in the original development application,

[2] Section 82A Review of determination

Omit section 82A (2). Insert instead:

- (2) A request for a review may be made at any time, subject to subsection (2A).
- (2A) A determination cannot be reviewed:
 - (a) after the time limited for the making of an appeal under section 97 expires, if no such appeal is made against the determination, or
 - (b) after an appeal under section 97 against the determination is disposed of by the Court, if such an appeal is made against the determination.

[3] Section 82A (3A)

Insert after section 82A (3):

- (3A) In requesting a review, the applicant may make amendments to the development described in the original application, subject to subsection (4) (c).

[4] Section 82A (4) and (4A)

Omit section 82A (4). Insert instead:

- (4) The council may review the determination if:

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- (a) it has notified the request for review in accordance with:
 - (i) the regulations, if the regulations so require, or
 - (ii) a development control plan, if the council has made a development control plan under section 72 that requires the notification or advertising of requests for the review of its determinations, and
 - (b) it has considered any submissions made concerning the request for review within any period prescribed by the regulations or provided by the development control plan, as the case may be, and
 - (c) in the event that the applicant has made amendments to the development described in the original application, the consent authority is satisfied that the development, as amended, is substantially the same development as the development described in the original application.
- (4A) As a consequence of its review, the council may confirm or change the determination.

[5] Section 96 Modification of consents—generally

Insert after section 96 (7):

(8) Modifications by the Court

The provisions of this section extend, subject to the regulations, to enable the Court to modify a consent granted by it but, in the extension of those provisions, the functions imposed on a consent authority under subsection (1A) (c) or subsection (2) (b) and (c) are to be exercised by the relevant council.

[6] Section 96AA

Insert after section 96:

96AA Modification by councils of consents granted by the Court

- (1) A council may, on application being made by the applicant or any other person entitled to act on a consent granted by the Court and subject to and in accordance with the regulations, modify the development consent if:

- (a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all) under this section, and
 - (b) it has notified the application in accordance with:
 - (i) the regulations, if the regulations so require, and
 - (ii) a development control plan, if the consent authority is a council that has made a development control plan under section 72 that requires the notification or advertising of applications for modification of a development consent, and
 - (c) it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last address known to the council of the objector or other person, and
 - (d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.
- (2) After determining an application for modification of a consent under this section, the council must send a notice of its determination to each person who made a submission in respect of the application for modification.
 - (3) An applicant who is dissatisfied with the determination of the application or the failure of the council to determine the application within 40 days after the application is made may appeal to the Court and the Court may determine the appeal.
 - (4) A person who made a submission in respect of the application for modification and who is dissatisfied with the determination of the application by the council may, in accordance with rules of court, apply to the Court for leave to appeal against the determination within 28 days after the date on which notice of the determination was given to the person and the Court may grant or refuse leave to appeal.

Land and Environment Court Amendment Act 2002 No 76

Amendment of Environmental Planning and Assessment Act 1979

Schedule 2

[7] Schedule 6 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Land and Environment Court Amendment Act 2002

Schedule 3 Amendment of Statutory and Other Offices Remuneration Act 1975

(Section 5)

Schedule 2 Public offices

Omit from Part 1:

Senior assessor (under the *Land and Environment Court Act 1979*)

Assessor (under the *Land and Environment Court Act 1979*)

Insert instead:

Senior Commissioner (under the *Land and Environment Court Act 1979*)

Full-time Commissioner (under the *Land and Environment Court Act 1979*)

[Second reading speech made in—

Legislative Assembly on 28 May 2002

Legislative Council on 4 September 2002]

BY AUTHORITY