STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

PLANNING AND DEVELOPMENT (DEVELOPMENT ASSESSMENT PANELS) REGULATIONS 2011

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 29 JUNE 2015

SESSION TWO

Members

Hon Kate Doust (Chair)
Hon Brian Ellis (Deputy Chair)
Hon Mark Lewis
Hon Amber-Jade Sanderson

Hearing commenced at 2.35 pm

Mr DENIS McLEOD
Partner, McLeods Barristers and Solicitors, sworn and examined:

The CHAIR: First of all, thank you very much for coming along to our committee hearing this afternoon. As you know, the uniform legislation committee was given the task of reviewing the regulations into DAPs late last year and we have had a series of hearings over the last few weeks to get people's views on how the regulations are currently working. Before we start our discussion we have a few formalities we are required to deal with. Before I do that I will introduce you to the committee members: Hon Amber-Jade Sanderson, Hon Brian Ellis, my name is Hon Kate Doust, and this is Mr Alex Hickman, who is our research officer. Unfortunately, Hon Mark Lewis is away today.

First of all, I have to ask whether you would like to take the oath or the affirmation.

[Witness took the oath.]

The CHAIR: Please state the capacity in which you appear before the committee.

Mr McLeod: The capacity I appear here is first of all in my personal capacity, as I made a personal submission; secondly, as the representative of the Law Society on its submission made in regard to this issue.

The CHAIR: You will have signed a document entitled "Information for Witnesses". Have you read and understood the document?

Mr McLeod: Yes, I have.

The CHAIR: These proceedings are being recorded by Hansard and a transcript of your evidence will be provided to you. To assist both the committee and Hansard we ask if you could please quote the full title of any document that you refer to during the course of this hearing for the record, and please be aware of the microphones and talk into them and ensure that you do not cover them with papers or make noise near them. I remind you that your transcript will become a matter for public record and if for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public or media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

That is the formalities out of the way. Before we start the questions, I know you have a number of documents you would like to table for the committee. Are you able to describe these documents and table them?

Mr McLeod: The first document is a paper provided in response to question 20 in your questions to myself personally. It is a paper presented at a local government forum convened by my own firm on 8 October 2009. It is titled "Developing Land — To Whose Advantage? — A Shift From Community Responsibility", and it deals with development assessment panels in WA. The second document, because it deals with a central part of my argument in regard to the third party appeals issue, is chapter 3 from the *WA Planning Law Handbook*, which is a book I published this year. Principally, that contains the argument relating to the change in the responsiveness of the planning legislation to the interests of the community, especially since the beginning of the 1990s. The third

is an article prepared by Judge Christine Trenorden, senior judge of the Environment, Resources and Development Court of South Australia, presented to a conference in Perth to mark 80 years of town planning law in Western Australia. It was presented on 18 November 2009 and is titled "Third-Party Appeal Rights: Past and Future".

The CHAIR: We will start off with a couple of questions that the committee has asked directly of you and then we will move into questions we have asked of the Law Society.

Mr McLeod: I am sorry, should I mention the fact that I have provided you also with written responses to the questions you put to me, but I appreciate what you want to hear from me today is my oral responses. I will to a certain extent be speaking to the written documents I provided.

[2.40 pm]

The CHAIR: Excellent, thank you very much. I have that in front of me now. All right, we will come to that first question we have asked of you, Mr McLeod. Regarding your recommendations that DAP regulations be amended to provide for a right of review by any aggrieved person who has special interest, if this recommendation were implemented, would it not be logical to also provide for a similar right of review of planning decisions by local governments to ensure that those who make applications that must be dealt with by DAP are not disadvantaged?

Mr McLeod: My response there is that it may for practical reasons be necessary to establish a general third party right of appeal. I appreciate that for there to be a third party right of appeal—review—only in respect of DAP approvals could be seen as operating as a significant disincentive for applicants to choose the DAP option. That would probably be sufficient to kill the possibility of having third party rights of appeal, so I would have to accept that the cost of having a third party right of appeal to deal with the DAP issue may very well be the introduction of a third party right of appeal generally, which, incidentally, I do not think would be a particularly bad thing; in fact, it may very well be a very good thing for planning administration in Western Australia. The reason for proposing a third party right of review in respect of DAP determinations is essentially a response to the concern about the diminution of the community ownership and acceptance of the planning processes. The alienation of the community from the planning processes is highly undesirable, considering that the system of planning control is only justifiable, in my view, if it can be seen as an attempt to protect the community from the excessive ambitions of developers that have the potential to impact on local amenity. In my view, the adoption of a general third party right to apply to SAT to review planning decisions would be by far preferable to there being no third party right of review at all. An examination of third party appeal rights throughout Australia was carried out by Judge Christine Trenorden, and I have mentioned the article, which I just tendered.

The CHAIR: Is there any evidence you are aware of that a reduction in the community representation in planning decision-making may lead or has led to worse outcomes for the community compared with decisions that have been made by local governments or their planning officers?

Mr McLeod: I give my answer here with the greatest respect. In my view, that question misses the point of the recommendation for third party appeals. If it could be shown that decisions made by a benevolent dictator would have a better outcome for the community—as Plato clearly argued in his *Republic*—would we choose that method of decision-making over a method consistent with democratic principles and ideals? Or, if decisions made by a computer or some kind of automaton had better community outcomes on some standard of analysis, would we then go over to computer or robot decision-making? I would hope not. Given that the decision-making process we are looking at occurs in a society with a strong democratic foundation and tradition, it is not to the point to look to an analysis of outcomes, except in a very general way. It is more a question of form and process. What is done will generally depend significantly on matters of form, process and compatibility with the culture of the community and community expectations. If there was a practical and reliable method of evaluating the outcomes of planning decisions—I do not think there is at the present

time—those outcomes would need to be evaluated very carefully to ensure that there is a good fit between the targeted outcomes and the expectations of the community, having in mind the importance of ensuring that the community has faith in, and a sense of ownership of, the planning processes that shape the structures and land-use activities within their community.

The CHAIR: Thank you. This is our second question to you: our committee has received evidence that recommendations in responsible authority reports prepared by local government planning officers have been approved by DAPs on approximately 95 per cent of occasions. Bearing in mind this statistic, given that it suggests there may not be a systemic practice of DAPs acting in a way that differs from the recommendations that council staff would make to local governments, does it change your view regarding the need for a right of review?

Mr McLeod: On the contrary. In fact, I think the fact that the DAPs have made determinations consistent with the recommendations in the responsible authority reports which they have received in approximately 95 per cent of occasions is an extremely powerful argument against the existence of DAPs at all. The committee should have no difficulty in ascertaining that in the majority of local governments, the vast majority of planning decisions are in fact made by the local government's own planning experts under delegated authority. They are technical experts, the same as the majority membership of the DAPs. They also have the benefit for the community of being approachable by the community and being in a position where they can be seen as having responsibility to the community for the decision-making, albeit perhaps through the medium of the council; but nevertheless there is that sense of connectedness between the community and the decision-makers.

That statistic comes back again to the matter of form, process and consistency with the culture and traditions of the community within which planning decisions are being made. It is very important for the community to have a sense that they are in some way involved or capable of being involved in the planning decision-making processes, which can radically affect their community and the amenity of their locality. While the connection of local governments to the community is clear, there is not the same connection in the case of DAPs, and for that reason the possibility of third party rights of appeal has been recommended.

It should be pointed out that if third party rights of appeal are introduced, they should be accompanied by a relaxation of the process by which the SAT can determine applications for third party interventions in SAT reviews. So, what I am referring to here is that apart from a third party right of appeal, if an appeal is commenced, say, by a disappointed or an aggrieved applicant, there is often a sense by members of the community that they should be able to present their views on the application to the tribunal at the same time as the aggrieved applicant's views are presented, but it is extremely difficult, with the way the legislation is at the present time and the absence of third party rights of appeal, to persuade the tribunal to grant the right of intervention. So, if there was to be a third party right of appeal, then some consideration ought to be given also to relaxing the requirements that the tribunal needs to have satisfied in order to allow a third party to intervene in an appeal or a review by an aggrieved applicant.

The CHAIR: Are there any other states that permit a third party appeal?

Mr McLeod: Yes, to a greater or lesser extent, the third party appeals, I believe, have been accepted in all of the states. That is the subject of Judge Trenorden's article. I have to confess that I am not completely up to date with what she has analysed there, but I do know that New South Wales, Victoria, Queensland and South Australia have a long history of allowing third party appeals, but I sense that in recent times they have been limited, restricted, to a certain extent. Attempts have been made at all times to ensure that third party appeals do not burden down the system by allowing for, you know, hare-brained appeals that have no particular merit. Methods have been adopted such as, for instance, costs orders being made against an irresponsible third party appellant and things of that kind. So the experience in other states has been much more

receptive of third party appeals than in Western Australia. You are probably aware of the fact that there were up until quite recently, and there may still even be one example of a local government which allowed third party appeals in their planning schemes. It was done rather accidentally, as it turns out, by local governments. It came to the surface around about 1983 in an East Fremantle case where East Fremantle had, I think, without being aware that they had done so, allowed a third party right of appeal by providing in their appeal clause in their scheme that "any person aggrieved" could appeal; whereas the formula used in the legislation has always been "any applicant aggrieved". So in the case of the relatively small number of local governments which had an appeal clause at that time, third party appeals did exist in Western Australia for a period of time. Frankly, I do not think they caused any particular problems. I am not aware that there was any deep concern about them, except for the fact that the local governments do not like them because they think that they are going to burden down the system and make a difficult system even more difficult for them and more expensive. Other decision-makers do not like them for similar reasons. Developers do not like them because of the fact that it is going to make problems for them in the cases where they get a planning approval, and they do not want to have those sorts of problems. Very few people in the community have been prepared to stand up and speak for third party appeals, and probably about the only body that has ever spoken up for them in a forum that I have attended is the Environmental Defender's Office who is, interestingly, responding to the interests of the community. But this issue having come up in regard to the DAPs has sort of pushed me over the edge in my sentiment in regard to third party appeals, and it seems to me that the time has come for third party appeals in Western Australia. The system, in my view, is never going to be completely fair and responsive to community concerns until third party appeals are recognised.

[2.50 pm]

The CHAIR: We have certainly had evidence given to us by a couple of community groups about having that community voice denied and they have certainly put in a lot of effort to put their position to the DAPs about why a development should not proceed in the form that it is on the table for.

Mr McLeod: Yes.

The CHAIR: Thank you very much for that. We will now move on and deal with the questions that we have put to you on behalf of the Law Society. The first one is around a term that we have come across during our hearings, and forgive me if I do not pronounce it correctly, but are you able to provide us with a summary of the principle of res judica —

Mr McLeod: Res judicata.

The CHAIR: — res judicata, thank you very much, and the society's submission in its application to planning law and the DAPs regulations?

Mr McLeod: That comes up in my response to question 1 in the Law Society submission. Just fairly generally there is not a dictionary definition but I hope I can give a helpful indication of the meaning of the principle of res judicata. Where an issue between two parties has been determined by a court when a plaintiff and a defendant go at it hammer and tongs before a judge and that ends up in a decision being made in favour of one party or the other, the applicant is unable to have that application readjudicated. I am sorry, I meant to say that a party unhappy with the decision of the court is prevented by the principle of res judicata from attempting in the same court or a different court to have the matter readjudicated.

The CHAIR: Basically, they cannot get a second bite at the cherry.

Mr McLeod: That is right. Either the successful or the unsuccessful party cannot have that matter readjudicated. In planning practice, if an application for planning approval is refused, the applicant is unable to have that application readjudicated. But if the applicant brings forward the same planning proposal in a fresh application —

The CHAIR: And tweak the plan?

Mr McLeod: They do not have to tweak the plan. It can be precisely the same proposal, but in a fresh application, then the law is such that that application has to be considered and determined by the planning authority.

The CHAIR: As though it was new?

Mr McLeod: As if it was a new one. They cannot say, "Look, we've already dealt with this; forget it." They have an obligation under the statutory provisions to deal with an application that they have received if it is a valid application; and the mere fact that it is the same as a previous one that they have determined does not matter. There may be some provision in a planning scheme which prevents consideration within a certain period of time on the same proposal. I cannot say that I am aware of any such provision in a planning scheme. There may be provisions in local government standing orders which prevent a similar proposal being considered within, say, three months of the proposal having been determined by a council resolution, but I am inclined to think that the standing orders provisions would have to give way to the provisions of the legislation, which require a planning authority to deal with any application that comes before it in accordance with the provisions of the scheme. So, there is not any way that the local government or any planning authority has, generally speaking, of preventing the situation arising where they can be called upon month by month to make a determination on the same application. It could be very expensive to the applicant because, you know, the application fees are not that cheap; so, that could become a bit expensive and that may be a major disincentive for a lot of people to put up the same application time and time again.

The CHAIR: So in one way it would just be a way of wearing down the planning authority that was making the decision; if you were constantly resubmitting the same plan really, would it not?

Mr McLeod: Yes, well that could be. I know of occasions where local governments have been faced with that type of situation. I am not conscious that they have allowed themselves to be worn down. They have generally maintained a consistent position and acted, I believe, according to what they consider to be the principles and the merits of the case.

The CHAIR: Is the society aware of any instances where an application has been made within the optional threshold, pursuant to an election under DAP regulation 7 to a local government or a DAP, and, subsequently, the same or similar application has been made to another authority?

Mr McLeod: Well, I do not know about the society being aware of it, but I can tell you that a case of that kind arose—a case involving the City of Stirling. Now, I took the precaution before I left my office this morning of finding out from a colleague the name of the applicant in that review. Unfortunately, I do not seem to have brought the note of that name with me. I do know that it was a case involving the City of Stirling, and it was a case that was determined in approximately 2013. It was a refusal by the local government, which was taken on review to the SAT and it was embroiled in the mediation process, and the applicant during that process decided that perhaps the better course for him to adopt would be to make an application to the JDAP, which was then done. What has happened after that, in regard to the winding down of the SAT review against the local government's refusal, I do not know, but that was certainly one case that I can confirm occurred where an applicant double dipped. And that is one of the concerns that we have with the present situation; the ability of applicants at this time to double dip. Either to start with the local government, and when they think they are going to get a hard time or they do get a refusal, then having a go at the JDAP or vice versa. Now, in our view, that cherrypicking approach is not appropriate, and there should at the very least be a delay. If an applicant wants to start the application process with the local government, chooses that option, then there should at least be a delay before he can try the other option of an application to the JDAP, otherwise the system allows itself to be manipulated.

The CHAIR: Our third question to the society. The society has recommended that the DAP regulation should be amended to ensure that any application within the optional threshold that is made to either a DAP or a local government cannot be made again to the other authority if it has been refused or approved within 12 months. Does the society believe this should be replicated for other planning applications that are not covered by the regulations, such as excluded applications? Would a failure to do so place applicants subject to the DAPs regulations at a disadvantage, or do the factors set out in paragraph 1.2 of page 1 of the society's submission mitigate this?

Mr McLeod: The Law Society has not suggested in any way that there was a basis for extending the exclusion of forum shopping. The Law Society is not suggesting that the present right of a proponent to reapply for the same proposal to the same decision-maker should be changed or restricted. What the Law Society is saying is that the choice between the two options—in the optional range—should be a considered and committed choice. There should be an option, not a double opportunity. The double opportunity does not exist for proposals firstly of a value below $2 million—or above $10 million in the JDAP case—or in the excluded categories. Why should the double option exist in the other situations? There is no reason in principle why applicants whose proposals are in the optional range should be the only ones who can claim the advantage of trying both the DAP option and the non-DAP option.

The CHAIR: Thank you for that. We now move on to that area of third party right of review, and I know that we have a series of questions around that. I do not know whether you want to just sort of talk more broadly or whether you want to answer the specific questions that we have listed there.

Mr McLeod: Well, I have already touched on third party rights review in my first and second responses on my personal submission.

The CHAIR: So we might move on from there.

Mr McLeod: Yes, I think I have expressed my general views that the third party right of appeal is—in the situation that planning decision-making has reached in Western Australia at the present time, there is a distinct risk of widening the gulf between the decision-makers and the community, which is a highly undesirable thing, and third party rights of appeal, it seems to me, may be the most appropriate way of bridging that gap, especially in the case of DAP reviews.

[3.00 pm]

The CHAIR: And I think we have a sufficient amount, and certainly that additional information you have provided us I think will be very useful. The next area we wanted to have a look at was the role of local councillors. There has been a lot said to this committee about the pros and cons of having local councillors participate in the DAPs process. There have been comments made about standards of training, or lack of training, or the types of training, so we thought we would just talk to you about those areas. First up, does the society believe the role of elected counsellors on DAPs has been clearly articulated given they are required to make their own independent decision on the planning merits of an application, as well as be the representatives of local government?

Mr McLeod: Pardon me if I just identify that question in my list.

The CHAIR: Question 11.

Mr McLeod: Do you intend to skip over the questions in regard to the way in which provision might be made for the implementation of third party rights of appeal, whether it should be through local planning schemes or some other means?

The CHAIR: Probably —

Hon AMBER-JADE SANDERSON: Time is an issue, is it not?

The CHAIR: It is time. You have provided us with written —

Mr McLeod: That response is in my response to question 5 in my Law Society responses, and there is a response to question 6 on a related topic.

The CHAIR: We will utilise the information you have provided to us in writing on those areas. I had skipped over them because we have just had that discussion about third party appeals, so that is why I thought I would move on to the issues around local councillors.

Mr McLeod: Sure. I would commend to you anyway the comments that I have put in to the response to questions 7, 8 and 9. So far as 10 is concerned, I admit there was an error by me in referring to regulation 14, when really I was probably thinking of chapter 14, which is the review chapter in the Planning and Development Act, and I really was intending to refer to regulation 18. That takes us on to —

The CHAIR: Be assured, Mr McLeod, the committee will certainly take into account all of the information you have provided to us on those earlier questions.

Mr McLeod: Thank you. Now, we get to a set of questions where I make the point in every response that the Law Society has not considered the questions that you have put, and so I cannot say what the Law Society's view is. In order for the Law Society to consider an issue like that, it would have to have notice and sufficient time for a committee to deal with it, report to the council, and for the council then to make a determination on the form of the response, and that would take a month or so; they just have not had that time.

The CHAIR: Do you have a personal view on the role of councillors?

Mr McLeod: Yes, I do; I do have a personal view. My view is that local government representatives are nominees and not delegates of their respective local governments. As a member of a deliberative body, the representative local council members should make their decisions on the basis of the merits of each application coming before them, and having ruled out the materials presented to them for the decision-making process. So, the fact of them being nominated by their local government as their representatives to sit on the DAP does not mean to say that they have an obligation to speak for the local government as a delegate would. They are there as a nominee, in effect, and not as a delegate—that is my personal view. I suspect that is the way a court would interpret the provisions if it had to deal with the issue.

Hon BRIAN ELLIS: So that would be the existing arrangement as it is now, that they are expected to make a decision upon its merits at the DAPs meeting, not necessarily as directed by the council?

Mr McLeod: It is consistent with the guidance given to them by the CEO on that point.

The CHAIR: One matter that has continued to arise has been a question around training for councillors who participate on DAPs. We would be interested in your view about the type of training that should be provided or participated in, whether it should be mandatory or optional?

Mr McLeod: I have been giving training to local government councillors for nearly 40 years and invited to speak to councillors very regularly, sometimes with some councils practically every year. I am quite sure that no matter how often council members are told certain things in relation to the quasi-judicial process—which is the peculiar process they are involved in when they are deciding on applications for planning approval—no matter how many times they are told what their role should be, with a certain number of council members the message gets through very quickly; with some others it does not get through. So my view is that council members will generally, where they are responsive to these principles, inform themselves very readily. It is not a bad thing to have training programs available. I am not very keen on the idea of making them compulsory, but it is certainly worthwhile to have the training methods available to those council members who are responsive to the principles that need to be applied.

The CHAIR: The next area is question 13 about the DAP's decisions in secret. Again I appreciate that the Law Society may not have a position on this, but if you have a view we would be interested

in that view, particularly around the confidential basis that meetings and decision-making is being managed and that lack of transparency about the process.

Mr McLeod: There are probably two main issues that I think you are concerned about here: there is the requirement of confidentiality in regard to mediation proceedings, because SAT proceedings are confidential, but that becomes very difficult when it gets into a local government council forum. The other issue that often comes up in conjunction with that is the advice that local governments have to take from their lawyers from time to time in regard to issues that arise in connection with an ongoing appeal. Those two elements quite often generate a sense of a need to have deliberations in private. On the other hand, there are the provisions of section 5.25, I think it is, of the Local Government Act, which says that meetings of councils and committees of councils are to be in public. The Local Government Act does allow for a council or a committee to go behind closed doors—there has to be a reason—but the big problem is there has to be a mover of a motion to go behind closed doors, and that motion has to be carried by the majority. You could have a situation where a council is required to consider issues that have arisen during a mediation on a SAT review, but where nobody is prepared to move they go behind closed doors or they cannot get the necessary majority. The situation could arise where a local government simply cannot discuss issues that have arisen out of a mediation in private. The tribunal, I believe, has recognised that situation; it has been brought to their attention, this difficulty that arises, and although the little time that I have had to prepare my answers to these questions has not allowed me to research just exactly what the source of this was, I am very, very, strong in my recollection that the tribunal has made a pronouncement to the effect that local governments are not going to be held strictly to the requirement of confidentiality when they come to discuss matters arising out of mediation in a SAT review so that I think they have recognised the reality of the situation that local governments are not always able to go behind closed doors or the majority of the council might simply consider the necessities of public interest override the desirability of confidentiality.

The CHAIR: Would that be a fairly recent decision by the tribunal?

Mr McLeod: I know it was brought to the tribunal's attention about six months ago, and the pronouncement on that point would have been, I think, within the last six months.

The CHAIR: Another matter that has been raised with the committee on a number of occasions has been concerns about DAP members representing developers. It has been put to us that perhaps on those occasions those members should not be participating on that particular DAP or, in some cases, they should be banned from participating because of their relationship with a developer or the work they are participating in outside of that DAP. Again I appreciate the society would not have had opportunity to consider this, but would you have?

[3.10 pm]

Mr McLeod: I certainly have, and I am prepared to express my views, Chairman. I might mention that there is a passage—there is a part of this paper, my 2009 paper, on development assessment panels, which deals in advance, because when that paper was presented DAPs had not appeared, but I nevertheless raised the issue of problems associated with conflict of interest in that paper, and there is a rather more detailed discussion of it in that paper than I was able to give here in this response, which states —

> … I have no doubt that many, and probably the great majority of the independent expert members of the DAPs are competent, sincere and responsible people undertaking a difficult task with poor remuneration, to the best of their abilities.
>
> … Notwithstanding that, one of the faults of the DAP regime which I have perceived is the potential for members of the community to lose faith in the DAP process by reason of the fact that many DAP members are not only performing the responsibility of decision-makers on what are often very sensitive community issues —

Pardon me if I appear to be reading, I know I should not be doing this, but it is the quickest way sometimes to get a point over.

The CHAIR: That is fine.

Mr McLeod: It continues —

> but they also from time to time either may have been, or in the future may be, paid consultants to, or even employees, of the proponents of controversial applications coming before the DAPs.
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> … At the very least, no DAP member should be allowed to deal with an application which comes from a person or company which the DAP member at any time has advised, or even in a situation where the DAP member has advised a company or person in a group related to an Applicant for a DAP determination.
>
> … The problem in relation to subsequent representation of Applicants for DAP approvals is much more difficult —

That is to say you have got a DAP member who has been a member of a DAP for a long period of time and has not had any conflict in regard to any of the applicants that have come before the DAP, but then subsequently after a particular determination may have been made in a highly controversial matter that person may then come to be acting for the person who made the application. Now, that is a real problem for public perception. It may well be that the DAP representative has been as pure as Caesar's wife; he may have been acting completely properly in all ways, but the perception is so important in a matter of this kind, in this kind of public interest decision-making, so the fact that a person might be perceived by the public to have some kind of association or alliance with a person who received a favourable decision from them some time in the past is a most undesirable thing. It is one of the less attractive aspects of the DAP regime. I mentioned also —

> … The most appropriate DAP independent expert members are those who have completely retired from planning practice. A number of independent DAP expert members are in that category, and they appear to provide sound and conscientious contributions to the DAP process. However even in those cases, members of the community may be able to trace some history of connection between the independent expert in the past with a proponent for a DAP planning approval. That situation is an almost unavoidable consequence of the requirement for three independent expert members on every JDAP or LDAP panel, and a consequence also of the fact that the population of competent and appropriate independent experts for DAP panels in WA is limited.

The CHAIR: We certainly appreciate that, do we not? The next matter that has been raised with us on a number of occasions has been about the valuing of applications to achieve a DAP threshold. It has been put to the committee that there may be some applicants who increase their threshold of application simply to go straight through to DAP. It has also been put to us that perhaps there needs to be another method of assessing an application before it starts the process. It may be that the local government provides the assessment, makes the assessment. Do you have a view on that?

Mr McLeod: Yes, I do, Chairman. Once again it is not the Law Society's view.

The CHAIR: I appreciate that.

Mr McLeod: I have no doubt that the value of applications is subject to manipulations by applicants; that has always been the case. The fee paid for an application for planning approval depends on the valuation of the subject matter, and I have seen many quite absurd cases where an application that is in the $8, $9 or $10 million range has been valued at, say, $3 million so as to keep the application fee down. Astute local government officers will often say to the applicant, "Now, come on; you're kidding me. There's no question of this being a $3 million application", so often we will get a correction through that process.

There is also no doubt in my mind that there would be cases where proponents for planning approvals would increase the value of their applications so as to fall within the category of a DAP option. I know of one case where an applicant adopted a high valuation for his development proposal so as to ensure that his proposal would be considered by the DAP—or JDAP, in that case—simply because he wished to avoid embarrassment to the councillors of the responsible local government who might be perceived by the public as being friendly towards him. He thought the public might think that there was a potential impropriety because the person had close contacts and friendly relations with council members and the council generally, so that person chose to put the application at the higher side of the range of possibilities so as to make sure the local government would not suffer that embarrassment. There would be other ways, I suppose, of dealing with it, but that was a convenient way in the circumstances of that case.

There would be clear advantages in having an independent valuation of applications, but it would be expensive, troublesome and time consuming, and I do not think the extra trouble and expense would be justified. The better course would be for the responsible local government officers to continue to exercise some control by forming their own judgments on the valuation of an application, and ensuring that blatant cases of manipulation do not occur. I believe it would be open to a local government officer who believes that there has been a blatant undervalue or overvaluing of an application to require that the valuation at least be confirmed by the applicant's architect, designer or engineer.

The CHAIR: Just looking at the time and some of the other questions, we are looking at the issue of the lack of reasons for failing to follow RAR recommendations. It has been put to the committee that there is concern about DAPs not giving reasons for decisions approving applications, and when those go against the recommendations of the responsible authority report and especially the application does not comply with the deemed-to-comply provisions and the exercise of discretion results in a significant variation to the R-code for the area. I appreciate that the society would not have given consideration to this, but I am sure that you would probably —

Mr McLeod: I will try to give a short response, Chair. There are two categories. Where a decision-maker refuses an application, quite often in that case the reasons for that refusal will come to the forefront if there is an application for review, because that is one of the first things that the SAT will require—that the decision-maker provide its reasons for its decision. If it is a local government council and the council is making a decision against the recommendation of its technical officers, there is an obligation for the council to give reasons, so councils will usually struggle to give their reasons at the time they pass their resolution, which is contrary to the officer recommendation. I have not had the time to research to see whether or not the same kind of obligation applies to DAP members; it should. In fact, the DAPs, to the extent that they are exercising quasi-judicial powers, should, in accordance with the principles of natural justice, give reasons for every decision they make.

The CHAIR: You are right; this is a matter that has been raised with us, where people have complained that in some cases there have been nil reasons and in some cases very little, not much detail and also linked it back to minutes of DAPs where minutes may not exist or there are only partial minutes without a lot of detail. Some people that have provided evidence have talked about the frustration of not finding the information that they need.

Mr McLeod: I can understand that. The majority of cases where few or no reasons might be given would be cases where there is an approval. In that case, the DAP members would be fully aware of the fact that there is probably going to be no challenge to that decision because the only way that a member of the community can challenge a decision of that kind is by taking a review to the Supreme Court, and that is very expensive and very troublesome. Whether they are conscious of it or not, there may be a response by the DAP members that if they are going to give an approval, they

do not have to be so concerned about reasons, whereas if they are going to give the refusal, they have to be careful about their reasons.

The CHAIR: I suppose we are seeing examples now where DAP does give an approval and then you have members of the community who do not agree with that approval, and there are no reasons as to why. It might be an approval that goes against earlier decisions of the council or even against advice from specialists. Surely they should be asked to provide reasons in that case as well.

[3.20 pm]

Mr McLeod: Without doubt. There should be a requirement, preferably in the regulations themselves, for reasons to be given for any decision made by a DAP, whether it is an approval or a refusal. My reason for wanting to have reasons in the case of an approval, I have already explained.

The CHAIR: We move on now to the issue around discretionary powers. It has been put to the committee on a couple of occasions that they believe that the DAPs make decisions in some cases that are beyond what they see as their discretionary power currently, and it has been put to us that perhaps that should be reined in, or at least explained when that happens.

Mr McLeod: If this is question 19 —

The CHAIR: Under 19 and 20, yes.

Mr McLeod: If there are going to be DAPs, then to have limitations on the jurisdiction of the DAP may be artificial and lead to complications. Having said that, there seems to be a sound basis for arguing that DAP decisions should be limited to issues which do not cause significant changes in local government planning policies. To have a DAP making a decision on a development application is one thing, but to have the DAP make a decision and in the course of that decision change a well-established and perhaps well-publicised and well-based policy is another thing altogether, so I think perhaps some care should be taken to ensure that situation does not arise. How it will be done I am not quite sure; it might be a bit complicated to do it, but it is a matter of real concern that DAPs, by a casual decision in a single case, should be in a position of upsetting a well worked out and long-held policy of local government.

The CHAIR: Just looking now at question 21 around delays in the process. Given your lengthy experience in this field, you might be in perhaps one of the best positions to tell the committee whether or not having DAPs in place has actually led to delays in decision making in this area.

Mr McLeod: I do not think it has sped up the process. I am aware of some applications dealt with by local governments that have taken months to work through. Usually there is an explanation for that; usually there is a long history of dialogue between the local government representatives and the applicant's representatives, trying to work with the proposal so as to bring it into a more acceptable form and, frequently, where the dialogue goes on at length, my experience is that in most cases that results in a satisfactory decision in the long run. In the case of the DAPs, it is not so easy to achieve that level of liaison to fine-tune an application. However, I would have to say that I do know it does occur; it is just not so easy in the DAP format.

The CHAIR: Do you think that will improve now that the government has put in place new regulations with the stop-the-clock mechanism? That might enable some of that dialogue to happen at the DAP level. If they find there is an issue, they can actually stop the clock on that process and hopefully have that discussion and —

Mr McLeod: That is a related question of the time limit affecting local governments. I think some local governments are concerned about the fact that they often have unrealistic time limits for dealing with their responsible authority report. I know of a case of a local government I act for at the present time which has a very, very significant application which it is dealing with through a JDAP, and they have had to do a second RAR on a reconsideration of the proposal and they have

very limited resources—they are a country local government—and it has been extremely difficult for them to comply with the time limit that the regulations impose. So I think that the concern expressed by local governments in that regard is a realistic one and there should be a greater opportunity for local governments to have an extension of time and it should not depend upon the chairman being able to achieve an agreement from the applicant in order to extend the time.

The CHAIR: Do you have a view on opt-in and mandatory thresholds in the regulations?

Mr McLeod: I have made the comment that in an era where a modest office development of approximately 500 square metres in net lettable area is likely to exceed the present JDAP opt-in threshold of $2 million, the threshold in my view is too low and involves an unnecessary complication of the planning process in respect of developments that are not significant. For developments up to probably $7 million, $8 million or $9 million in this day and age, it would not be inappropriate for those applications to be dealt with under delegated authority by the local government's experts, and that would be a much quicker and, I think in most cases, a more acceptable way of dealing with the majority of applications. For the threshold to have come down in my opinion is a retrograde step. I know it could work both ways. It means that the applicant has the option as to whether they go one or the other. But this is a threshold on the option. Previously, the threshold did not even begin until you reached the figure of $3 million. Now it begins at $2 million. In my opinion, that is far too low.

The CHAIR: I just want to know what your view was on the change to the quorum requirement now being dropped to three, which could be any variation as long as it included the chair.

Mr McLeod: I am not sure where that comes in in my submission.

The CHAIR: It is part of the new regulations, which have been in place since 1 May, where they have changed the quorum requirement.

Mr McLeod: In my view, that is highly undesirable, because it leads to the situation where the DAP can make decisions by the three expert representatives only, and that goes quite contrary to what I consider to be the really big issue in planning administration in Western Australia at the present time, which is the alienation of the community from the planning decision-making process. If you have a situation where not even one local government representative is present on the panel that determines a controversial application and it is done entirely by the independent experts, then that inevitably is going to result in a sense in the community of further alienation from the process, and that is very bad. Pardon me, but I will just take about half a minute to mention that about a month ago, I spent nearly three weeks travelling in Scandinavia, Germany, Holland and France, looking at what are regarded generally as being the most liveable and sustainable cities in the world. We looked at a dozen cities in detail but considered numerous others. One of the things that comes through constantly with those cities that do have a high reputation and a high performance in liveability and sustainability is the close connection between the community and what is done in the planning and the development of their environment and their community. It leads to a sense of belonging, a sense of connectedness and a sense of responsibility for what happens in the community, and that is in my opinion of almost inestimable importance, and it has been lost sight of unfortunately in Western Australia. We really do need to get back to that as much as possible.

The CHAIR: Thank you for that. Given your experience and obviously your ongoing involvement, and having dealt with the regulations in a practical sense, have you got any other recommendations for changes to the regulations that would improve how DAPs operate?

Mr McLeod: I am sorry. I would have liked to have had a few days to think about one. I do not think that was even included in my submission.

The CHAIR: No, it was not. I just thought I would put that to you at the end. We have put that to a couple of people. Perhaps you would like to think about that and provide a response over the next couple of weeks. It might be only one or two things. It might not be anything. I just thought that

given your background it would be useful to get your view on whether you wanted to improve them or wanted to make changes.

[3.30 pm]

Mr McLeod: Can I mention one point? It should be made clear who it is that has to provide the responsible authority report. In my opinion, I do not have any doubt that the proper interpretation of the regulations and the act is that it is the local government council that is the responsible authority that provides the responsible authority report, because under, I think it is section 2(8), of the Local Government Act it is said that the council is responsible for the performance of the functions of the local government. One of the functions of the local government is to provide responsible authority reports. It seems to me to be sophistry to argue that the officers in some way or other become the responsible authority for the purpose of giving a responsible authority report to the DAP. If in fact it is desired that there be no involvement of the local government council between the officers forming their views and passing on their recommendations to the DAP, then it is going to be necessary in my opinion for the regulations to point that out. But I think that would be a retrograde step. Where a local government council wants to be involved in that process and would be the conduit through which the report goes to the DAP, I think that would be a highly desirable thing and should be recognised and permitted under the regulations. So that would be one of my recommendations. But otherwise I will certainly take up your offer and if I think of other things to suggest, I will suggest them. I cannot, however, overlook the fact that my primary recommendation would be that we do not have the DAPs at all. But, apart from that, I will give some thought to other things that might be useful in the event that the DAPs do continue.

The CHAIR: Thank you very much. We appreciate the evidence that you have provided to the committee this afternoon and the responses to the questions that we have put forward, and if you are able to provide that additional bit of information over the next two weeks perhaps that would be very, very helpful to the committee. Thank you very much. We will just take a quick break before we start our last session.

Hearing concluded at 3.32 pm

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