STANDING COMMITTEE ON
UNIFORM LEGISLATION AND STATUTES REVIEW

PLANNING AND DEVELOPMENT
(DEVELOPMENT ASSESSMENT PANELS) REGULATIONS 2011

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 4 MAY 2015

Members

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

Hearing commenced at 10.46 am

Ms GAIL McGOWAN
Director General, Department of Planning, sworn and examined:

Mr STEPHEN FERGUSON
Senior Solicitor, Department of Planning, sworn and examined:

The CHAIR: On behalf of the committee, I thank both of you for coming in to talk to us today. Before we start, I will just introduce the members of the committee because I am not sure whether you have met with us before. I have Hon Amber-Jade Sanderson, Hon Brian Ellis, Hon Mark Lewis and Mr Alex Hickman, who is our research officer. I will just go through the formalities and see how we go with that. First of all, I would like to welcome both of you to the meeting. Before we start, would you like to take the oath or the affirmation?

[Witnesses took the oath or affirmation.]

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

The Witnesses: Yes.

The CHAIR: The proceedings will be recorded by Hansard and a transcript of your evidence will be provided to you. To assist both the committee and Hansard, could you please quote the full title of any document you refer to during the course of the hearing for the record, and could you just be aware of the microphones and try to talk into them and ensure that you do not cover them with papers or make noise near them. Although this is a private hearing, you should note that the committee may make some or all of your evidence public when it reports to the Legislative Council. If the committee decides to make your evidence public, we will endeavour to first inform you of this decision, and the Legislative Council may also authorise publication. Please note that you should not publish or disclose any private evidence to any other person at any time unless the committee or the Legislative Council has already publicly released the evidence.

I will start by explaining why we have asked you to come in today. A referral was made to us by the upper house minister Hon Helen Morton, who represents John Day in that chamber. On behalf of John Day, she asked if our committee would conduct a review into the regulations for DAPs. That review, as I understand it, was more than a year overdue. It had been required and it was in the legislation that had been agreed to at the time of the passage of the bill back in 2011. This committee commenced its work on the inquiry. We really ramped it up over the Christmas period with submissions, and we are due to commence our first round of hearings today, and we have hearings scheduled pretty much through until the end of June. It is an area of review that has obviously attracted quite a lot of interest, and we have had a reasonable number of submissions.

[10.50 am]

We were of the understanding that we were going to have a significant look at the regulations that have been in place now for a couple of years. Then in the last couple of weeks we noted that there had been a significant change and that new regulations had been gazetted in this area that we were not aware of. Now the committee is at the point of thinking that we are not really too sure what we are doing, given that we are about to conduct this review and these regulations that have been gazetted are the outcome of an internal departmental review, obviously, so we just want to go through some questions with you so that we can work out how we are going to manage this

and what we need to do as a committee. I do not know whether you have been provided with the questions.

Ms McGowan: We have.

The CHAIR: You have; great. I will go through and read each question out. and if you then want to provide us with a response, that would be very helpful. It may be that other members of the committee have additional questions as we work through each response, if that is all right.

The first question is fairly straightforward. Can you give us an overview of the changes that have been introduced by the Planning and Development (Development Assessment Panels) Amendment Regulations 2015, including the rationale for those changes?

Ms McGowan: If I could just preface the comments that I make by saying that the actual changes to the regulations that were gazetted on Friday, 1 May are the result of a period of consultation under the government's planning reform process and were fairly widely canvassed in the discussion paper that went out in late 2013, I think, Stephen—Stephen is going to have to correct me on all the technical dates—and culminated in the release of a summary submissions paper late last year that outlined the sorts of changes. For fear of overwhelming you with paperwork, we have given you copies of all that documentation. We are very happy to provide it for you in electronic format as well, which might make it a little bit easier.

Broadly speaking, the changes fall into a couple of broad areas. One is some changes to the optional thresholds—a lowering of the starting point for optional thresholds, but a significant increase at the upper end of the scale. That is aimed at giving people more flexibility and choice as to what they go through. There is also a capacity for the relevant authority, generally the local government, to refer what might have been an excluded multiple unit development into the DAP process provided it fits within those monetary thresholds. We have also changed some of the regional groupings, so we have reduced the number of overall groupings to allow for some administrative efficiency. We have included a stop-the-clock mechanism—that will come up in one of the questions in more detail there anyway—and some changes to quorums, and primarily the rest of the changes are tidying up or administrative procedures that deal with some of the ambiguities we have come across. I think also, probably just by way of background, up until the financial year ended June last year, there were 321 applications dealt with through the development assessment panel process, totalling almost $4 billion worth of development, and to date, the most recent figures I have at this year—I do not have a monetary value of the combined total—I think we have received about 319 applications. With the opt-in provisions as they stand at the moment, roughly one-third of applicants are opting into the DAP process where that option is available to them. Stephen, did I miss anything out there?

Mr Ferguson: No.

The CHAIR: Are you able to provide to the committee a copy of the explanatory memorandum to the amendment regulations?

Ms McGowan: Yes, that is included in your package that we have provided to you.

The CHAIR: Thank you for that. For the committee, given that submissions had already been made by a number of witnesses on the DAP regulations as they were at the date that the inquiry was referred to our committee by the Legislative Council, on 21 October last year, why were the amendment regulations introduced during the committee's inquiry into the DAP regulations and not beforehand or afterwards?

Ms McGowan: That is probably a matter that I would need you to address to the minister, in terms of why the government chose to proceed at a particular point in time, but broadly speaking, as indicated, the proposal to deal with some of the issues we have canvassed as part of the broader planning reform process and the minister, in announcing those in August 2014, signalled his

intention to move with those changes as quickly as possible, so that is the process we have been going through there.

The CHAIR: When would that new set of regulations have been signed off on by the minister?

Ms McGowan: It would have gone through the cabinet process, I think, earlier this year. From memory, approval to draft was either late last year or earlier this year, but I have not got the exact date and I might clarify that for you.

The CHAIR: Could you please find the exact date for us and perhaps provide that information to the committee at the earliest opportunity? That would be very helpful.

Ms McGowan: Yes, absolutely.

The CHAIR: Just a follow on from that is: What is the government's position on the scope of this committee's inquiry into the DAP regulations? Is it of the view that it encompasses the changes introduced by the amendment regulations? The position we are in currently is that when this was referred to us, we were fully aware that we would be looking at the regulations as they stood at that time. Now we are not too sure whether we are looking at an old set of regulations, which are probably irrelevant now, or whether we look at the new regulations, so we need to have some clarity on what we are meant to be doing. We were hoping that you would be able to provide that for us.

Ms McGowan: In terms of addressing the question I might also turn to Stephen, but, broadly speaking, it is up to government to state whether they are happy or not with the scope, but the scope is actually prescribed in section 171F, whatever the subsection is, of the act. My sense would be that because the substantive proposals—not the administrative sort of tidy-ups, as I would refer to them—were canvassed as part of the planning reform agenda, and being out in the public arena, it is open to the committee within that scope under section 171 to determine how narrow or how broadly it wishes to pursue. If the committee comes up with further recommendations for change or issues with them, then that is something that I am sure we would be quite comfortable to look at.

Hon BRIAN ELLIS: It is a little hard for the committee, though, is it not? If I understand you correctly, you have done a review on those new regulations that you have just brought in on 1 May.

Ms McGowan: Look, it is not a review on the regulations per se; I think that is probably the distinction. The review is very much predicated as part of the overall phase 2 of the planning reform process, so since 2008 there has been quite a concerted planning reform process. It is about streamlining the whole of the decision-making processes. As part of that, government has, as I say, done that in two tranches. The second tranche included some issues relevant to development assessment panel operation and the thresholds et cetera that I have just outlined, because they were issues that had come to our attention as sort of forming part of, potentially, those issues that either enhanced or limited the capacity of the whole system per se. So, that was in train. In an ideal world, had the review prescribed under section 171 happened when it was due to happen, it would have fallen nicely into sequence. I acknowledge the difficulty that it has not; but, having said that, the focus of what has been done to date has been part of looking at the system as a whole, not simply the operation of the DAPs.

[11.00 am]

Hon BRIAN ELLIS: I am concerned that there is not much point looking at the old regulations. The new ones have only just come in, so we can ask at different hearings what people think about those new regulations, but they will not have been in long enough to get an idea whether they are positive or negative.

Ms McGowan: Possibly one way of approaching it—obviously, it is not my place to direct your work in any sense—because the substantive changes were canvassed in the public discussion document and we have subsequently had a number of submissions and hearings is, in fact, the

committee may choose to look at whether the changes that have been made adequately address the sorts of issues that have come in the submissions and whether there is anything that in a sense has not been dealt with. That may be the tidiest way for the committee to do it, because I think it is certainly open to the committee to do that.

The CHAIR: Perhaps the tidiest way might have been for the government to have waited until after this inquiry was finished to see what it came up with before it rolled out the new regulations. That might have been the tidiest way and might not have caused this dilemma for us. It is going to be an interesting process. Given this tranche of regulations has just come through, are there any more changes planned for the rest of the year?

Ms McGowan: No. The only thing that has not come into effect as at 1 May is the actual signing of the orders to amalgamate those regional DAPs. There are no issues that we are aware of. Obviously, as we go through a whole raft of reform processes, if anything comes to light I would not rule out that the committee would include it, but there is certainly nothing on the agenda at this point in time.

Hon MARK LEWIS: I am just wondering, given the regulations have hit the deck now, who was consulted prior to that with those particular regulations in the drafting process?

Ms McGowan: In general terms, phase 2 of the planning reform process was put out for public discussion; that is, the key concepts were put out for public discussion for a period of some months in 2013. From memory, we had about 215 submissions broadly from local government, industry associations and members of the community. Of the submissions we had, around half commented specifically on the proposals around the DAP reform. We put those in your package as well, so you have that summary. Broadly speaking, they quite significantly supported the changes, either strongly or were neutral. That document would be at item 6 in your agenda, "The review of the development assessment panels: summary of submissions and outcomes of review."

The CHAIR: You might want to give a name to this document for us so that we can table it and make it public.

Ms McGowan: Absolutely; we can call it the suite of documents pertaining to the amendments to the development assessment regulations. Stephen, will you remember that name that I have just given? It was simply that I thought it was easier to give the committee the set.

The CHAIR: We appreciate getting all that information. Just moving to the next question, which is where this stop-the-clock issue comes up. Regarding the introduction of new regulation 12(4A), why does the new stop-the-clock mechanism not apply to applications subject to regulation 12(3)(b)—namely, those required to be advertised or when the scheme or order deems an application to be refused if not determined within 90 days, especially when the presiding officer can extend the time within which a report on a DAP application can be given for all applications under regulation 12(3)? It is a long question.

Ms McGowan: This is where I am going to have to turn to Stephen. The answer is primarily very technical in that most of the other parts of the regulation already have a similar provision and this is fixing that up.

Stephen, do you want to try to explain it, apart from it is also part of the way parliamentary counsel drafts and advises on its drafting as well?

Mr Ferguson: Yes, thank you. It is probably best to go to the package where I think there is a copy of the new finalised gazetted regulations, which the committee probably did not have before because it was just published on 1 May. It is number 1 or 2.

The CHAIR: It has the yellow tag.

Mr Ferguson: Members should go straight to regulation 12. Members have my mea culpa in advance for attempting to explain what is, as Gail said, a very technical issue. I am happy to give a written response after this as well if that assists, because it is quite technical.

The CHAIR: That would be very helpful.

Mr Ferguson: The short answer is that the extension of time provision, the stop-the-clock mechanism, will still apply to regulation 12(3)(b). The difference is 12(3)(b) already has a reference to the deemed refusal period. If members look at 12(3)(b), it finishes with "10 days before the day on which the application will be deemed to be refused." As a result, parliamentary counsel would not have allowed provision to be covered by the new provision because that new provision under 12(4A) is not needed in relation to 12(3)(b), which is because the extension of deemed refusal period under 16(2)(ba) already covers 12(3)(b); therefore, the reference to 12(4A) is superfluous. We cannot have a provision that is superfluous, because legislation always has to speak once. It is one of those peculiar drafting principles. So, in a nutshell, it is actually covered. I understand that when you first read 12(4A), it looks like an omission, but it is not an omission; it is because of the way 12(3)(b) was already drafted with that inherent reference to a deemed refusal period.

Ms McGowan: Would I characterise it as a quirk of drafting rather than as a substantive change?

Mr Ferguson: That is right.

The CHAIR: Is that clarified in the explanatory memorandum? Is that matter covered adequately in the EM?

Ms McGowan: If I go to section 4 of the explanatory memorandum, I think it tries to specify what we have done in lay terms quite nicely. To try to go through the way the regulations read, in that sense, would probably be a little difficult. In your pack you also have practice notes that have now been issued, or are about to be issued, to all of the development assessment panels and are public as well. That is practice note 10, which also sets out in more detail how the stop-the-clock mechanisms operate.

Mr Ferguson: With some of these types of provisions, if we tried to put in the explanatory memorandum this level of detail there is a danger of confusing things. The key principle here is that the stop-the-clock notice under regulation 11A will apply to all of those three types of applications.

The CHAIR: You know, you should not feel shy about putting this information into an EM. It is actually more desirable to have this level of information, because it provides better clarity to what we are dealing with. To have a dumbed down EM is not necessarily beneficial because it raises more questions than perhaps it needs to. It might actually delay legislation going through the house if we do not have that level of detail in there and the minister does not have it in his hands readily to provide it. Never feel shy about putting that level of detail in an EM; in fact, we have had significant complaint in the house of recent times about the fact that we do not have appropriate information provided in the EMs. They are becoming quite simplistic and not providing a proper explanation of the intent and purpose of a change. Although I understand what you are trying to say, I will give you the heads-up that members around the table, and certainly those in the chamber when we are dealing with a bill, would appreciate a much higher and better explanation of a change and what its purpose is for.

I actually think what you have got in your practice notes is quite useful, and we would take that into account. I understand why people try and get these out in plain English, but for our purposes in the chamber, we want to be able to use the EM more appropriately to better inform us about the technical aspects of a change as well. I just say that for future changes, do not feel shy or do not hold back from providing that additional information. It is a lot more helpful to us to have that there.

Moving on to new regulation 16(2)(a), if you could perhaps provide the rationale behind its introduction?

[11.10 am]

Ms McGowan: I think in this instance this is actually clarifying what has historically been the practice but making sure that it is not ambiguous. The development assessment panel stands in the shoes of the local, or the decision-maker in any of these situations, and must apply the relevant local planning scheme and rules et cetera. I will get Stephen to explain the mechanics of it, but there was some potential confusion over what had precedence in the hierarchy of decision-making. The practice has always been as the new 16(2)(a) is now articulated, but we just wanted to make sure that that was made clear, I think. Stephen, is there anything you want to add?

Mr Ferguson: Yes. Probably the easiest way to explain this is by an example. What happens is under the regulations—and this is the key point—the DAP has to make its decision, standing in the shoes of the responsible authority. There are numbers of regulations, 8, 9 and 16, and the DAP regs that say that. When DAP makes the decision, it is making a decision under, say, the local planning scheme and the local planning policies. Where it gets a bit confusing procedurally is that some local planning schemes prescribe certain procedural aspects—so, voting for example. So they might say in a particular application that you have to have an absolute majority on a particular decision. The DAP regs by contrast say that all decisions are by simple majority. In that sort of circumstance we have had confusion; people have written in or questioned: which prevails? Should it be by an absolute majority, or should it be by a simple majority? Our position has always been on that procedural aspect, in terms of the running of the DAP, that the DAP regs should prevail. It is very important that we understand we are not talking about the merits of the decision. The merits of the decision always have to be based on the local planning scheme, the local planning policies; the DAP just stands in the shoes of them. We are only talking about a procedural aspect, say, such as voting. That is why that provision was inserted.

The CHAIR: So, for the purpose of the DAP, when you talk about a simple majority, it is really one plus 50 per cent, is it not?

Mr Ferguson: That is right, yes.

The CHAIR: One plus half.

Mr Ferguson: That is right.

The CHAIR: Okay; that is fine.

The next question around this is: would the regulations not override a provision in the local planning scheme as a matter of ordinary construction? But I think you have pretty much just answered that really, have you not?

Mr Ferguson: That is right, yes.

The CHAIR: Why was this provision not in the original DAP regulations?

Ms McGowan: Probably more oversight than anything else. Like a number of these ones that we would call the administrative tidy ups, it is things that become apparent as the process starts to work its way through and mature. I think that is —

The CHAIR: Given the bit of confusion about which one worked in that situation, has this been a significant point of consternation amongst either the council participants or the DAP's members?

Mr Ferguson: To be honest, it is not a significant point of concern; it is just one of those, again, small administrative things that you do not perceive when you draft the legislation initially. It is just important that you pick it up and you resolve that confusion. It is not a question of significant concern; we have not really altered anything, because that has always been our view. I guess we are just trying to do the right thing and make sure the legislation reflects what we think is the correct and proper approach.

The CHAIR: Okay. Given its potentially wide application, was it foreshadowed in the department's review of the DAPs' regs or at any other time?

Ms McGowan: I think the answer is no because it is the way—it is longstanding practice and, again, it was not seen necessary to highlight it because we did not see it as a substantive change to the procedures.

The CHAIR: I think I know what the answer is going to be.

Ms McGowan: Yes.

The CHAIR: Does the government plan to introduce any further amendments to the regulations which are intended to override the provisions of planning instruments in addition to the new regulation 16(2)(b); and, if so, can you provide any details?

Ms McGowan: No. Certainly, at this point in time there is nothing planned in terms of the regulations, other than, as I said, giving effect to that amalgamation, which is already in the regs as came into effect on Friday, but, of course, it is just giving actual practical effects of that.

The CHAIR: Regarding the amendment to regulation 18, by making the presiding member the decision-maker for the purposes of the State Administrative Tribunal Act 2004, why was this changed from the DAP itself being the decision-maker, and can you also detail all practical consequences of this amendment?

Ms McGowan: I will let Stephen detail anything from the technical point, but, again, it does not alter the practical position and the position between the development assessment panels and SSO's interpretation, but, Stephen, you might be able to make that clearer.

Mr Ferguson: Thank you, Gail. Again, this is one of the ones where there was perhaps an oversight when we first drafted the legislation. Again, we are not altering anything; we are just confirming what is already the longstanding position. What happens is—the original regs did foresee this—that when you have a matter go to SAT, obviously the State Solicitor's Office are engaged, and the presiding member normally goes to the actual hearing—say, to a mediation. The problem is: who is authorised to give instructions to the State Solicitor's Office? Again, we are talking about primarily procedural matters to say something as simple as, say, if they are at a hearing, also a mediation, the question is: can we adjourn the matter, for example? It is impractical to expect all five DAP members to go to every single SAT meeting. In those circumstances the presiding member goes. The presiding member can give these sort of instructions to the State Solicitor's Office, but the important point to emphasise is it is almost always the practice that the SAT will refer the matter back to the DAP for another substantial reconsideration, and that is why we have made it very clear in the new regulations that in terms of those reconsiderations, those re-merit decisions, again, it is the whole DAP. The legislation is drafted in such a sense, just to again close that, it has almost been a legal fiction, to be honest, that has been operating, where the presiding member has been giving these instructions—these small procedural, administrative instructions—to the State Solicitor's Office, but without technically having the authority to do so.

Hon BRIAN ELLIS: What happens if the presiding member cannot go to the SAT?

Mr Ferguson: The deputy will go.

Hon BRIAN ELLIS: So his nominee will go.

Mr Ferguson: That is right.

The CHAIR: Regarding new regulation 19.1, why were the ceilings of $15 million for the City of Perth and $7 million outside the City of Perth removed for delegations to DAPs by local governments and the Western Australian Planning Commission?

Ms McGowan: Again, that is fairly administrative in nature. The reality is that they have only been removed because they are the mandatory thresholds where things have to be considered by the

DAP, so therefore there is no delegation of something that is mandatory, so we are only clarifying that the delegation applies to the optional, or the opt-in, thresholds.

Mr Ferguson: Yes, that is exactly right. Under the old system, to be honest, the drafting was a bit confusing because it only reflects the optional thresholds, but, as Gail said, with the mandatory thresholds, if it is mandatory, it has to go to the DAP, so there is no point having a power of delegation for mandatory, and I think this is just another quirk of drafting—parliamentary counsel just decided to draft it. Instead of just referring to the optional thresholds, they have just referred to everything within the optional threshold and above. Nothing really has changed in that. There has not been any sort of reason to—anything in the mandatory threshold has to go to the DAP anyway, so there is no point worrying too much about that part; it is just to clarify and make it easier for readers to understand that anything above $2 million can be delegated.

The CHAIR: I would imagine that those types of constructions over 15 or over seven would be predominantly commercial in nature.

Ms McGowan: Predominantly, I think, but not exclusively.

Mr Ferguson: No, not exclusively. I think you could have some large apartment complexes.

The CHAIR: Why can an applicant not opt to have a DAP determine an application for a development of the types set out in the new regulation 19(b)(ii) and (iii)?

Ms McGowan: I think the intent has always been to work with local government and for local government to have the power or the ability to refer something that might be controversial, or for whatever reason the local government felt, into the process. Local government, of course, acts as the elected representatives of their community, so then to have an applicant or somebody else demand that something go into the DAP process, to us, works against the intent of working in that collaborative spirit, I think, too.

[11.20 am]

Mr Ferguson: The only thing I could add to that, Gail, is: if you look at part 3 of the regulations, that whole part is about local governments and the commission delegating, so it would subvert, or be contrary to, the purpose and intent of that part if we suddenly allowed applicants to start making that decision. It is a question for the local government and it is a question for the commission whether to delegate; it is not a question, really, for an applicant whether to delegate.

Hon MARK LEWIS: I understand that, but the question still remains: even if it is outside or in an appropriate part where it may make sense in terms of the structure of the regs, you still do not think that that is an option outside the local government process?

Ms McGowan: It is where optional thresholds—where they have the choice as to whether they want something dealt with by a DAP or whether they want to go through the local government process, so they have that ability outside that now. It is only those provisions that are aimed at empowering the local government; we have kept that fairly sacrosanct.

The CHAIR: Should a consequential amendment be made to the definition of "excluded development" application in the DAP regulations, given this amendment brings within its scope an application that is currently within the definition of "excluded development application"—development types set out in new regulation 19(b)(ii) and (iii)?

Ms McGowan: I would describe this as another quirk of drafting, and certainly the intent is not to alter the definition of "excluded development"; it was simply the advice of parliamentary counsel in terms of the clarification of it. Stephen, do you want to attempt to explain it?

Mr Ferguson: All I would say is that it links to the previous question. Again, it is drafted this way to ensure that it is local government or the commission that makes this decision. If we altered the definition of "excluded development", then that would really allow applicants to determine whether

these particular applications, which are excluded development, should or should not go to the DAP, and that is not the intent.

The CHAIR: So that I understand more clearly, what is an "excluded development"?

Mr Ferguson: "Excluded development" is defined, if you go to the very beginning of the DAP regs, at page 2.

Ms McGowan: Of the 1 May 2015 version

Mr Ferguson: It defines a number of things that are—for example, the construction of a single house. Even for a house that is $10 million, which is over the mandatory threshold, it is still excluded because the DAP system does not capture single houses. As you can see there, there are also the 10 group dwellings, the 10 multiple dwellings, areas within an improvement scheme area, and development by local government or the commission, and (b) really just captures the developments that existed prior to the commencement of these regulations.

The CHAIR: There is another term on that 19(b)(iii) that talks about "outbuilding" and "incidental development". I know what an outbuilding is, but what is an incidental development for the purpose of this reg?

Mr Ferguson: I think with any sort of incidental development, the best way to explain it in general planning terms—when I give the training to the new councillors, it is best to think of a vet. Think of a vet or a hospital—think of a hospital. You have a hospital; you get approval to build a hospital. Do you need to get separate approval to build the office component where the doctor has to carry out his paperwork? Most people would realise that, no, because you are not getting approval for an office; you are just getting approval for a hospital, and an area where you can do your paperwork is incidental to that predominant use. So, in planning terms, there will always be incidental development and uses to the primary use. In terms of this type of thing, if you look at the list of things, they are all really incidental developments. So a carport—you would not have to get separate approval for a carport because everyone would understand that a carport was sort of incidental to the building of a house. It is the same with a patio; the same with an outbuilding. That incidental development, really, is just to capture any other types of incidental development.

The CHAIR: Even though local governments do require people to get permits to construct carports, patios and any outbuildings?

Mr Ferguson: It depends what you mean by the word "permit".

The CHAIR: You are required to put in plans; you are required to seek approval to actually construct those types of buildings, I suppose. "Building" is probably a loose word for a carport, but there are quite rigid rules in various local governments about what you can actually put up.

Mr Ferguson: That is fine in terms of—again, with the planning system, it is important to remember that planning can be distinct also from separate approval regimes—we do not have any say over, say, building permits—but in terms of planning terms, we would not see much use in requiring a separate approval for something that is incidental to a predominant use.

The CHAIR: Okay. I was just curious; that is all.

The change introduced by new regulation 19(6), removing the need for a local government or the Western Australian Planning Commission to obtain the prior consent of the director general of the Department of Planning to them delegating an application to a DAP, does not appear to have been canvassed by the department in its review of the DAP regulations. Was this amendment raised with any stakeholders or otherwise canvassed publicly, and why has the need for the director general's consent been removed?

Ms McGowan: Broadly speaking, the need has been removed because it was cumbersome and unnecessary and against the intent of the regulations by the time—you know, this is a section that is

about empowering the local government to do something. To require them to come to the director general and go through the paperwork necessary to gain that served no purpose, particularly when the department's role is really just to assist the minister in the administration of the DAP legislation. It was about removing an unnecessary step in the process. To date the provision of seeking that delegation has not been used, and our understanding is that there may be occasions when a council may wish to refer something that might otherwise be controversial into the DAP, but by the time they actually pass that motion, do the referral, go through that, then it would be a deemed refusal, so it is just making it simpler for the council to work within that system. Is that right?

Mr Ferguson: That is exactly correct, yes.

The CHAIR: The next question deals with new regulation 20. The addition of the new regulation 20, which removes the requirement for the director general to cause notice of the instrument of delegation to be published in the *Government Gazette* and on the DAP website, does not appear to have been canvassed by the department in its review of the DAP regulations. Was this amendment raised with any stakeholders or otherwise canvassed publically? Why have these publication requirements been removed?

Ms McGowan: I think in the overall planning reform discussion paper we talked about local government delegations, but not in this particular context. I think it was subsequently, as we were going through the drafting, that this was identified as something that would actually administratively need to be dealt with. Stephen, have you got anything else to add to that?

Mr Ferguson: No. I think it just ties into the previous point. The previous process was so cumbersome that by the time, as Gail said, several local governments investigated with us taking this option—once the time lines and the administration had been worked out, by the time they had actually gone through the process of delegation, the application itself would become deemed refused. As part of the government's commitment to streamline the process, we made some of these changes, but it is important to realise as well that in terms of the actual DAP application itself, of course it will still be advertised under the regulations, the agenda will still be put on the DAP website and there will still be a public meeting. All we have done is actually removed these cumbersome processes just for a local government to delegate a controversial matter to a DAP.

Ms McGowan: Effectively, things added an additional layer, where there was already the ability to have public input et cetera. We have taken that additional layer out.

The CHAIR: Regarding the disbanding of the short-list working group provided by the removal of regulations 36, 37(1) and 38, given that former regulation 37(1) which required the minister to have regard to the short list submitted under former regulation 36 when appointing a person as a specialist member to a DAP, and the short-list working group comprised persons nominated by various stakeholders, including the Housing Industry Association and the Real Estate Institute of Western Australia, can you expand upon the following statement in the department's review: "removing references to the shortlist working group to reflect an administrative need for this process to be less regulated"?

[11.30 am]

Ms McGowan: I think, again, this was a part of the streamlining of the overall processes but not taking away from the intent that the stakeholders will be consulted, in fact, it is what we do in practice. All of the appointments to DAPs still have to go through the cabinet appointment process and are still subject to notification on the register of boards and committees et cetera, so it was seen as an unnecessary step. That said, we rely quite heavily on the input from those stakeholder groups. We advertise for, obviously, appointments to DAPs and in practice we actually do include them, but we did not see that there was a need for it to be regulated.

Hon AMBER-JADE SANDERSON: What is the process for those stakeholders to input?

Ms McGowan: Generally, we invite local government to nominate, and that is a requirement under the act—Stephen can correct me where I get things wrong there. We then actually seek to have representatives, or we write to the main stakeholder groups—the Planning Institute of Australia, the Property Council, the Urban Development Institute et cetera—and invite them to put forward names to help us work on a shortlist and then we collectively meet. That just allows there to be a spread of knowledge about the appropriate mix of skills and experience. But we just did not see the need to regulate that.

Mr Ferguson: Added to that, again, is the stakeholders cannot just put forward any old name. The regulations are quite prescriptive as to who is allowed to be on or not on the list anyway and it has reference to certain tertiary qualifications. So of course we have to consult with stakeholders because of the prescriptive nature of that list, but in terms of having a cumbersome, formalised process, that did not really add much value and in some cases just hindered, I guess, the expeditious nature of appointing people.

Ms McGowan: I think the other point to add there is, in fact, when we have local government nominees, the minister does not have the capacity to dictate that they will or will not, you know, be suitable. So they are sort of a given, and then most of the other appointed positions are, as Stephen said, very prescriptive so they require certain qualifications and experience.

The CHAIR: Is that ever an issue where local government appointees are participating in a DAP and, perhaps, they are found to be wanting in skills or experience?

Ms McGowan: I think it always comes down to the training and certainly—Stephen might be able to add—I have not been aware of any particular issues that have been raised. I think one of the things we are very conscious of, particularly with the revised regulations, is the need to have a continual process of training. They must attend initial training before, and that is quite comprehensive training. Stephen subjects them to the DAP training manual at length and they are actually provided with quite a suite of information. But I think what is apparent to us is that there is a need for ongoing training and refresher training as well, and that is something that we have got on the agenda to do.

Mr Ferguson: The only thing I would add is that one of the advantages of the DAP system is this cross-pollination, if you will, between the specialists and the councillors. My personal—and it is only anecdotal—observation is often the councillors are much more confident in terms of procedures of running a meeting because they have been involved in the council, whereas the specialists are much more confident in the planning merits. So often in an application a specialist will feel quite confident to, you could say, cross-examine the proposal, cross-examine the developer or cross-examine the local government representative in a way that a councillor may feel a little bit less inclined to do so. So, I think it is actually a really good system in that both of these two different components come together with their own respective strengths. Now, because it has been operating for a number of years, there has been enough, I think, years' worth that both sides of the equation, so to speak, have really benefited from that exposure. That is how I see it anyway.

Ms McGowan: It is probably worth remembering, also, that as members of the DAP they are not there to represent their sectoral interests. They are there as a member, as with most of those decision-making processes.

The CHAIR: Just coming back to Amber's question about stakeholder input, there is no thought given to changing that process; they will continue to have input into the selection of who goes onto a DAP?

Ms McGowan: Look, from a practical point of view, I think it adds value from just a purely administrative point of view of having that knowledge. So there is certainly nothing intended and as a matter of practice it is something that I would continue to do. That is probably a personal reflection rather than a requirement as such.

Hon MARK LEWIS: I just want a bit of clarification. I thought when council members were appointed to the DAP, they are not there as councillors, they are there as individuals. So they are actually able to express their own opinion, and not that of —

Mr Ferguson: I can answer that. It is in the code of conduct; that is exactly right. The DAP code of conduct explicitly requires that all DAP members, regardless of their backgrounds, have to come to the decision with independent judgement and they are not permitted to just be conduits, I guess we could say, for their stakeholders or their constituents or whatever. So, each decision has to be made on the merits with independent judgement.

Hon MARK LEWIS: Right. Sorry, I just —

Ms McGowan: That is what I—sorry, I did not explain it very well.

Mr Ferguson: That will actually tie in to a later question you had as well about quorums—that point.

The CHAIR: Which is our next question—good segue! Regarding new regulation 41, which adjusts the quorum requirements so that a quorum can now comprise any three members of the DAP, including the presiding officer, does the department believe that this may result in less local government representation on DAPs given that their need for inclusion in a quorum has now been removed?

Ms McGowan: No, is the short answer. Because we have two specialists and two alternative local government nominees from each local government instrumentality, we believe there should not be an issue. Certainly, again, as a matter of practice, our DAP secretariat works hard to ensure local government representation. There may be occasions where, in fact, the councillors prefer not to have a representative there. They are probably in the minority, but I think we have had a couple of instances where something is, you know, quite controversial, quite divided at the local level, and they have actually felt it useful to put it up into the development assessment panel process, which is an effective way of that running. We have not had an issue but what we have had an issue with when we are being fairly prescriptive about the quorum requirement is meetings being cancelled at the last minute because of the unavailability of one of the cluster of members. So again, it is intended to give us much more flexibility to ensure that the meeting can go ahead. When you have people that have done their preparation and all of the relevant parties are all geared up, ready to go, it is often a frustration when something has to be cancelled.

Mr Ferguson: Just again, to repeat, each local government has four people nominated—two primary members, two alternatives—so the chances that all four cannot attend the meeting are quite rare. Further to what Gail said, in terms of meetings being cancelled at the last minute, it is just as likely, if not more likely, in my experience that that occurs because the two specialists are conflicted out because of conflicts of interest, so you actually may well end up with scenarios where there will be one presiding member and two local government members and no other specialists. In terms of quorum requirements, we have taken the approach, per the previous answer, that when you get appointed to the DAP you are an independent person, and there really should not be the "us" or "them" mentality of prescribing that specialist or a local government member attend.

Hon MARK LEWIS: Just to follow up: What happens if a council member actually is quite contrary to a decision already made at council? How does the council then —

Ms McGowan: Reconcile.

Hon MARK LEWIS: — reconcile that?

Mr Ferguson: Well, that is exactly what should happen, to be honest.

Hon MARK LEWIS: Right.

Mr Ferguson: What happens is it can go to council. DAP applications can go to council; they often do. Council is certainly allowed to make a decision on that, give its recommendation, but when you get to the chamber—when you get to the DAP meeting—each DAP member must come with an independent mind. So, if, say, there was new evidence presented at the DAP meeting, then those local government DAP members should have an open mind to be willing to have their own view, even if that view is contrary to council's previous view. That is how the system is designed.

Hon BRIAN ELLIS: Has that worked that way in practice?

Mr Ferguson: Well, I think so. That is really a political-type question, so I guess I am not really qualified to answer that, but often council will not always be united with every single member on a particular application, for a start. That is the first point. The second point is that council does not always have the full range of information when it makes its recommendation. And then, even when it comes to a decision, a local government DAP member might be against the idea as a general concept. If, say, it is a majority vote that, no, it is going to go ahead, that member certainly has a real role in again making sure that there are conditions and other things put in place that would be necessarily what the local constituents want.

[11.40 am]

Hon MARK LEWIS: But there have been instances where there has been a unanimous decision made in council and an independent member, even though in council they have made that unanimous decision, then went into DAP and made a contrary statement. That is the issue that is highlighted a number of times. In terms of procedural, obviously in council there was nothing wrong with the issue procedurally, but there was a view, I guess—maybe it is an ideological view or philosophical view or whatever—and then made a contrary decision.

Mr Ferguson: There is an entire practice note on this, which I can give you, that goes into this sort of form issue. Our preference was at the beginning that the local government DAP member not attend that council meeting because of that —

Hon MARK LEWIS: That conflict.

Mr Ferguson: — conflict, but some do not do that. It is actually under the Local Government Act that we cannot prevent them from doing that. So all we can do is emphasise that if you attend a council meeting, if you come to the DAP meeting, you have to come with an independent mind and open mind; you cannot just be slavishly following the previous. But our preference as the department—this is in the practice note—is that they do not attend those council meetings to avoid those perceived conflicts of interest.

Hon BRIAN ELLIS: I suppose, really, if that situation arose, that indicates that the process is working, because obviously that councillor was better informed in the DAP meeting than he was in the council meeting.

Ms McGowan: Potentially, they may have been presented with additional information or different information that causes them to change their view, and I would assume that that is what the council electoral process is designed to do. If someone consistently operates that way, that is the choice of the electors in that particular local government area.

The CHAIR: I suppose there is one final question just coming back to where we started in terms of what we are doing as a committee with this review. Given there was a fairly good lead-up time from October until now, and whilst the regulations were obviously going through their processes of cabinet and then being moved forward to be gazetted, was there any discussion between the minister and the department about the potential impact of putting these new regulations out on this committee's inquiry?

Ms McGowan: Not specifically to my recollection other than the minister had signalled that he intended, and in his public comments when he released the phase 2 planning reform agenda he was

quite specific about, moving quickly with those. But, as I said, I do not see that that is necessarily inconsistent with you being able to look at whether how we have responded is appropriate. It is one of those difficult areas, but I would make the general observation that the requirement to have a statutory review of the operation of the development assessment panels was introduced by the minister in 2011, and I think for good purpose—to make sure we had that review process. But it should not preclude always being able to make sure that our legislation or our regulations are as contemporary as they can be.

The CHAIR: Up until a few weeks ago, when we actually extended our reporting date, I think we were actually scheduled to report sometime in the next fortnight. So if we had not extended that, we would have been providing a report on a set of obsolete regulations, which would have been a complete waste of this committee's time, given that new regulations are being put in place. Now we will report in early September, and I agree with my colleagues that perhaps the difficulty will be that the new regulations will not have been bedded down with a decent amount of time, so we will just have to work through and see how we go with that.

Hon AMBER-JADE SANDERSON: The other aspect is that we have to operate within our terms of reference, and our terms of reference do not require us to investigate the department's response to the regulations.

Ms McGowan: No; true.

Hon AMBER-JADE SANDERSON: So that is not an option at this point.

Ms McGowan: I think—Stephen will correct me—when Stephen and Susan Burrows gave evidence in November 2014, these proposed changes were flagged at that stage, were they, Stephen?

Mr Ferguson: That is my recollection. Page 7 of my transcript —

The CHAIR: But no date.

Hon MARK LEWIS: Page 7?

Mr Ferguson: Page 7 of my transcript on 17 November 2014.

The CHAIR: At that point in time, we were tabling in May and there was no indication on that occasion that these regulations would come in prior to that reporting date, so we have proceeded on the basis that we were looking at what was the status quo at that point in time.

Ms McGowan: It is probably a matter for the minister.

The CHAIR: I think so.

Thank you very much for your time today and thank you for providing responses. Stephen, if you are able to provide that written information —

Mr Ferguson: Yes; that is fine.

The CHAIR: — that you have talked about—the technical information—we will appreciate it and we will read it. Also, if you are able to provide that information we talked about earlier about when these new regulations went through the process and were signed off by cabinet for their introduction and gazettal, that would be very useful for us as well.

Ms McGowan: To the extent we are able to in terms of cabinet confidentiality.

The CHAIR: Yes, absolutely. I understand that.

Hearing concluded at 11.45 am

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