PARLIAMENT OF WESTERN AUSTRALIA

UNIFORM LEGISLATION AND STATUTES REVIEW COMMITTEE – PUBLIC HEARINGS ON SUBMISSIONS

QUESTIONS ON D MCLEOD SUBMISSION

Response to Question 1:

'... 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 a DAP are not disadvantaged?'

1.1 It may for practical reasons be necessary to establish a general third party right of appeal. 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.

1.2 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 if it can be seen as an attempt to protect the community from the excessive ambitions of developers which have the potential to impact on local amenity.

1.3 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.

1.4 An examination of third party appeal rights throughout Australia was carried out by Judge Christine Trenorden, Senior Judge of the Environment, Resources & Development Court, South Australia in a paper dated 18 November 2009 presented at a conference to mark 80 years of town planning law in WA (*Third-party appeal rights: Past and future*; Judge Christine Trenorden, 18.11.2009). I can provide a copy of that paper.

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

1.5 With the greatest respect, 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?

1.6 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.

1.7 If there was a practical and reliable method of evaluating the outcomes of planning decisions, 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 which shape the structures and land use activities within their community.

2 Comments on Question 2:

2.1 The fact that the DAPs have made determinations consistent with the recommendations in the RARs which they have received, in approximately 95% 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 planning officers, acting under delegated authority. They are technical experts, the same as the majority membership of the DAPs, but 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.

2.2 However this 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 have been recommended.

2.3 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.

3 Comment on Question 3:

3.1 It is not ideal that the task of providing for Third Party rights of appeal in DAP appeals should be left to local governments in their planning schemes. Unless the principle is established in the DAP legislation (Part 11A of the *Planning and Development Act 2005* (WA)), or in the DAP Regulations, local governments may not adopt a uniform approach in providing for appeals in their own schemes, and some local governments may not do so in any event.

3.2 Considering that the WAPC and more particularly, the Minister for Planning are essential participants in the process of amending local planning schemes, if they were not required by the P & D Act, or the DAP Regulations, to acknowledge a Third Party right of appeal, then it is highly unlikely that they would allow local governments to insert Third Party appeal provisions in their schemes, particularly if they attempted to allow a right of appeal only in respect of DAP determinations.

3.3 To contemplate that local governments could, or would, insert Third Party appeal rights into their own schemes is not realistic. If it was a realistic proposal, then the words could be found to provide for such a right of appeal, but to the extent that the provisions of a local planning scheme were inconsistent with the appeal provisions in the DAP Regulations, the provisions in the scheme may give way to the provisions in the Regulations, considering that the P & D Act specifically provides for regulations to deal with the review of a determination of a DAP application (s.171A(2)(h)).

3.4 If there is to be a Third Party right of appeal, it would need to be provided for in the DAP Regulations, or in the P & D Act.

4 Comments on Question 4:

4.1 It is correct that local governments are generally required under their planning schemes, when considering an application for planning approval, to have due regard to certain matters including 'the preservation of the amenity of the locality'. Such a requirement is set out in cl.10.2(n) of the Model Scheme Text in Appendix B of the *Town Planning Regulations 1967* (WA). Likewise, a local government determining a development application for the purpose of the MRS (under delegated authority from the WAPC) is required by cl.30(1) of the MRS to have regard to the preservation of the amenities of the locality. But the problem of concern is not that local governments in determining planning applications under their LPS or under the MRS, are not required to have due regard to the preservation of the amenity of the locality.

4.2 Nor is the point of concern that a JDAP (or LDAP) in determining a development application is not required to have due regard to the preservation of the amenity of the locality. The same obligation to have due regard to the preservation of the amenity of the locality applies to DAPs making decisions under an LPS or the MRS. The problem is in the identity of the decision-maker, and the extent to which the decision-maker can manifestly be seen to be responsible to the community whose amenity is under consideration.

4.3 In the case of local governments, the ultimate decision-maker is the Council, and Councils are elected by the local community. They have a responsibility to the local community, and in various ways can be required by the local community respect their views.

4.4 It seems to be desirable that there be a strong connection between a local community and the nature and form of development of physical structures in that community. In a study tour in May/June this year of Liveable Cities in Denmark, Sweden, Germany, France and Holland, a consistent common theme in the most Liveable Cities was the extent of

ownership of planning by the relevant local communities. The most successful European cities so far as liveability and sustainability are concerned, are those where there is a strong connection between the community and the planning processes within their community.

4.5 While decisions on planning applications are made by elected local government Council members, there is a greater prospect of connection between the community and the decision-makers than where the decisions are made by DAPs with majority independent planner membership.

4.6 Most of the responsiveness of a community to the planning decisions affecting the community have to do with appearances and perceptions. The establishment of the DAPs with their non-representative majority membership is likely to result in a perception that the DAPs are less responsible to the local community than an elected Council decision-maker.

5 Response to Question 5:

5.1 I made an error in my submission in the reference to reg.14 in regard to appeal rights. Earlier in the submission, reg.18 was correctly identified. The reference to reg.14 was a careless confusion with the fact that review rights are dealt with generally in Part 14 of the P & D Act.

Role of local councillors

6 Response to Question 6:

6.1 My initial response is that the local government representatives on DAPs are nominees, and not delegates of their respective local governments.

6.2 As a member of a deliberative body, making decisions on issues that affect the rights and property of Applicants, the representative local Council members should make their decisions on the basis of the merits of each Application coming before them, and having regard to the materials presented to them through the decision-making process.

7 Comment on Question 7:

7.1 With respect, the point made by the Committee in this question is well made.

7.2 I believe that if reg.25 of the DAP Regulations was interpreted by a Court, the Court would be likely to hold that the term 'representatives' in reg.25(1)(a) is intended in the sense of 'nominees' rather than in the sense of 'delegates'.

7.3 In my opinion, it would be very odd if Council nominees on a deliberative body dealing with the rights of Applicants, were free to make their decisions as members of the panel otherwise than on the merits of the Application as they have been presented to the panel.

7.4 If it is relevant, I should make the point that in my opinion, the same obligation would apply to Council members making decisions on planning applications as members of their Council. Notwithstanding that they are elected by their local community, they have an obligation to make their determinations in accordance with the merits of the case as they have been presented to the Council, and the decision should be made consistently with planning and legal principle, and the wishes of the community must give way to the more judicially correct principles.

7.5 That however does not alter the fact that popularly elected Council members are likely to be perceived by the community to be more conscious of and responsive to their interests than a panel dominated by independent experts. Furthermore, the sense of community ownership of planning decisions is likely to be increased by the sense of the community that they can seek an explanation of an unpopular planning decision from the elected representatives, and can demonstrate their response at the ballot box. That is all part and parcel of the notion of community responsibility, and community ownership of the planning process.

DAP decisions in secret

8 Comments on Question 8:

8.1 I make the following points regarding Council consideration of matters arising out of SAT mediation:

(a) Under the *Local Government Act 1995* (WA) (**LG Act**), a Council is required to hold its meetings in public (LG Act s.5.23).

(b) A Council can go behind closed doors to consider matters which, for instance, arise from legal advice relating to SAT mediation proceedings.

(c) However a Council can only go behind closed doors if a motion is moved by a Council member to that effect, and is supported by a majority of the Council. Consequently, the SAT cannot expect that a Council will always discuss matters arising in mediation, behind closed doors.

(d) Although I cannot at this time refer to the source of this information, it is my understanding that the SAT has recognised that a local government Council, acting properly, may not be able to discuss mediation related matters behind closed doors. To that extent, the local government Council would not be necessarily held to the obligation of confidentiality.

8.3 So far as DAP meetings are concerned, reg.40(2) provides that any DAP meeting to determine a development application is to be open to the public. There is an exception to that in reg.40(4), where the DAP is determining an application under reg.17. Otherwise, the CEO may issue practice notes about the practice and procedure of DAPs, pursuant to reg.40(5). I do not at the time of making these comments have available to me the CEO's practice notes, but they may provide for the DAP to go behind closed doors in certain

circumstances. If they do, that would place a DAP on all fours with a local government Council in that regard.

8.4 Quite apart from the above comments, as a matter of general comment, in my view it would assist the deliberations of a planning decision-making body, and would be consistent with the normal practice of the SAT, if the decision-making body was able to consider matters related to SAT mediations, behind closed doors.

8.5 At the same time however, I recognise the desirability of local government Councils, and DAPs exercising the powers of local government Councils in planning decision-making, should undertake their deliberations and make their decisions in public, so as to foster the element of community ownership of the planning processes in their community.

DAP members representing developers

9 Response on Question 9:

9.1 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.

9.2 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, 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.

9.3 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.

9.4 The problem in relation to subsequent representation of Applicants for DAP approvals is much more difficult. But it is a matter which can seriously affect community perceptions, and the community's trust in the DAP process. If a person who made a decision on a controversial DAP Application is later seen by the community to be in any way acting for or in the interest of the proponent of the controversial Application, then the community's faith in the DAP system is likely to be severely damaged, as would the credibility of the DAP regime itself.

9.5 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.

Valuing of applications to achieve DAP threshold

10 Response on Question 10:

10.1 I have no doubt that the valuing of Applications is subject to manipulations by Applicants. However that has always been the case. Considering that the Application fee for any Development Application depends on the value of the Application, there has always been a strong tendency for Applicants to devalue their proposals.

10.2 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, 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.

10.3 There would be clear advantages in having an independent valuation of Applications, but it would be expensive, troublesome and time-consuming, and I don't 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/engineer.

11 Comments on Question 11:

11.1 It wouldn't be surprising if an Applicant did stage a development process to avoid going to a DAP, considering that Applications dealt with by DAPs are subject to higher fees.

11.2 Although I do not know of any specific case of this occurring, it would not be surprising if an Applicant who is confident that the responsible local government would deal with his Application on its merits, would divide an Application into stages and thereby avoid the extra expense of DAP application fees. However I don't see that as being a manipulation of the system. If an application can be presented in stages, there is no reason why a developer should not do so. In many cases, developers don't have any practical alternative other than to present their developments in stages, consistent with the financial arrangements they are able to make with their bankers.

Lack of reasons for failing to follow RAR recommendation/deemed-to-comply provisions

12 Response on Question 12:

12.1 It is reprehensible for a DAP to fail to give reasons for its decision, whether they be for approval or refusal.

12.2 It is particularly inappropriate for a DAP to fail to give reasons for its decisions where it fails to decide in accordance with the recommendations in an RAR.

12.3 A local government Council in making a decision on an application is required to give reasons if it does not follow the recommendations of its reporting officers. I have not had time to check the DAP Regulations or any directions given by the CEO as to the required practice of DAPs. However there is no reason why a DAP should be excused from giving full and clear reasons for its decision where it fails to follow the recommendation of the RAR.

12.4 The possibility of this occurring is a strong reason for supporting third party appeals, whether they be related only to DAP decisions, or whether they be more generally applied to the decisions of all planning decision-makers.

13 Response on Question 13:

13.1 For practical purposes, reasons for decision are of particular importance where there is a refusal of an Application, as the refusal may be taken on appeal, or may be the subject of judicial review, and the absence of reasons in those circumstances will be noted and will reflect unfavourably on the decision-maker. Where an Application is approved however, there can presently be no application for review to the SAT, and the absence of reasons is only likely to have consequences if the decision is taken on review to the Supreme Court by a concerned objector.

13.2 It is not clear to me however that a DAP's decision-making process are unfettered or without justification or scrutiny. Under reg.16(1), it is provided –

> 'The provisions of the Act and the planning instrument under which a DAP application is made apply to the making and notification of a determination by a DAP to which the application is given under regulation 11 as if the DAP were the responsible authority in relation to the planning instrument.'

That suggests to me that the DAP would be required to comply with any provision of a planning scheme which deal with the intended procedures of the responsible local government.

Exercise of discretionary powers

14 Comments on Question 14:

14.1 If there are to be DAPs, to have limitation on the jurisdiction of the DAP may be artificial and lead to complications.

14.2 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.

15 Comments on Question 15:

15.1 I can't see that it would be open to a DAP to ignore the zoning of subject land under the relevant local planning scheme, or a region planning scheme. The provisions of a local planning scheme have the same effect as if enacted in the P & D Act (see s.87(4) of the P & D Act). The zoning provisions under an LPS are provisions of the scheme, and consequently are binding on a DAP. If a DAP was to make a decision in effect purporting to rezone land, that decision would be subject to correction in the SAT if it was a decision to refuse an Application, or in the Supreme Court if the decision was to approve, and if there was any objector with sufficient resources and interest to take the matter to the Supreme Court.

Delays in the process

16 Response on Question 16:

16.1 I believe that I know of at least one case where an Application was made to the SAT for review of a JDAP decision based on a deemed refusal. Due to the short time that I have had to consider these questions, I have not been able to confirm the circumstances of that review. However if there were cases of appeals against deemed refusals by a DAP, that would not be surprising, and would not necessarily involve a condemnation of the DAP. Some Applications are particularly complex, and the time allowed under a planning scheme for determination will often not be adequate.

16.2 It would not be surprising if there were greater delays in the DAP process than where decision-making is by the local government. That is partly due to the fact that the great majority of planning decisions by the majority of local governments are made under delegated authority by officers, and within the shortest possible timeframe. One of the greatest criticisms of the DAP regime is that it removes the tremendous convenience of planning decision-making by officers of a local government under delegated authority. An extremely high proportion of planning decisions by local governments are made by its responsible officers under delegated authority.

16.3 I have no comment to make on the issue of delay by DAPs, other than that the deemed refusal process is probably adequate. A broadening of the deemed refusal process may be

necessary if there were to be Third Party appeals, as a deemed refusal would not provide a basis for a Third Party to appeal.

16.4 The point does however raise the issue of representation in SAT reviews. If Third Party appeal rights were recognised, then the circumstances in which the SAT could allow Third Party intervention would need to be significantly widened. The SAT at the present time takes a very restrictive approach to the acceptance of Third Party interveners in SAT reviews.

Level of DAP thresholds

17 Response on Question 17:

17.1 In an era when a modest office development of approximately 500m^2 in net lettable area is likely to exceed the present JDAP opt in threshold of $2m, the threshold in my view is too low, and involves an unnecessary complication of the planning process in respect of developments which are not significant.

18 Response on Question 18:

18.1 Given that I have difficulty in seeing any justification for the introduction of the DAP regime in WA, my inclination would be to suggest a very high threshold for a DAP 'opt in'.

Amendment of DAP Regulations 2015

19 Response on Question 19:

19.1 For reasons which must be apparent from the preceding comments, the lowering of the 'opt in' threshold to $2m was unnecessary, and is likely to encumber the processes in WA for determination of planning applications. There is a potential for the work of DAPs to increase beyond the capacity of the planning community to provide appropriate independent experts.

19.2 The disbanding of the short-list working group may have the consequence that the primary responsibility for the choice of DAP members falls upon the Minister and those closely advising him. That will result in a reduction in the transparency of the system and could give rise to a perception that the DAP regime was established for the development industry and is maintained for the benefit of the development industry, and is excessively subject to the patronage of the development industry through, amongst other things, the significant contributions to political party funds made by the development industry.

19.3 The change to the minimum quorum requirement, allowing for the possibility of DAPs being constituted by only the three 'independent' 'experts' is likely to increase the public perception of a clear disconnection between the DAP decision-making processes and concern for community interests.

19.4 A 'stop the clock' mechanism would be useful in all circumstances of planning decision-making, as local governments frequently have insufficient time to make a responsible decision within 60 days after receiving an application, or 90 days where advertising is required. The time limits in reg.12(3) can be equally unrealistic, particularly in cases where a local government has adopted a practice of requiring that the RAR be approved by the Council, consistent with the description of the role of the Council in s.2.7 of the LG Act –

> '2.7(1) The Council –
>
> (a) ...
>
> (b) is responsible for the performance of the local government's functions.'

I believe it is clear that it is the Council which should provide the RAR to a DAP, and if a local government adopts that approach, then the time limits for the local government role are unrealistic.

19.5 The point made in the final dot point to question 24 is very pertinent. It is not reasonable for the consent of the Applicant to be required in those circumstances, for the presiding member to extend time.

20 Comments on Question 20:

20.1 I am providing to the Committee:

(a) A copy of my paper 'Development Assessment Panels in WA: Developing Land – Whose Advantage – A Shift from Community Responsibility' presented to an LGPA forum I believe in 2010;

(b) Copy of pp.1, 2 and 3, and Chapter 3 of my text 'WA Planning Law Handbook', 2015. Chapter 3 contains comments relative to my views on the reduction of community responsibility in planning decision-making, and planning control generally, since the end of 1980s;

(c) Copy of article on third party appeals by Judge Christine Trenorden, Senior Judge of the Environment, Resources & Development Court, South Australia, delivered to a WA conference on 18 November 2009.

Denis McLeod

29 June 2015