Environmental
Defender's
Office
Western Australia (Inc)

Telephone (08) 9221 3030 Facsimile (08) 9221 3070
Suite 4, 544 Hay St, Perth WA 6000
email: edowa@edowa.org.au www.edowa.org.au



9 May 2008

Standing Committee on Legislation
Parliament House
PERTH WA 6000

Dear Mr Warner

**RESPONSE TO THE TRANSCRIPT OF EVIDENCE OF MR CAMERON POUSTIE, AND RESPONSE TO ADDITIONAL QUESTION; THE INQUIRY INTO THE JURSIDICTION AND OPERATION OF THE STATE ADMINISTRATIVE TRIBUNAL**

I have made changes to typographical errors in the uncorrected copy of the Transcript which is attached to this letter. A small asterisk is placed next to every sentence which has been corrected. There is additional information I also wish to add to my Transcript of Evidence per point 4 of your accompanying letter.

Page 9: Amendments

I wish add further to my statements at page 9. After the Chair, towards the bottom of page 9, comments "There are ways around it", I would like to include the following at the paragraph marked with a number 1:

**"The NSW Independent Commission Against Corruption in the 'Corruption Risks in NSW development approval processes' Position Paper, September 2007 found that "the current practice in the NSW Land and Environment Court allows for the award of costs in appropriate cases, and this capacity should be a disincentive to objectors who may be inclined to lodge frivolous or vexatious appeals that lack merit." The NSW Independent Commission Against Corruption made 24 key recommendations on the appeals process from development approval. The Paper went on to raise the suggestion of Justice Stuart Morris, President of the Victorian Civil and Administrative Tribunal. His honour outlined further ways in which the impact of third-party appeals can be minimised. His suggestions are that the time for appeals be reduced**

**and to introduce special procedures to ensure that, in urgent cases, speedy hearings are held requiring decision-makers to give prompt decisions and avoid the need to "over-service" in relation to reasons in urgent cases. But** yes. Those types of... [return to last para on page 9]"

I also wish to add information at the bottom of page 9. It is indicated with a number 2. I would like to add:

"...[from the last para] the power to make those orders already exists. **For instance, sections 7 and 47 of the *State Administrative Tribunal Act* 2004 (WA) protect against frivolous and vexatious proceedings being brought before the SAT."**

Page 10: NSW Independent Commission Against Corruption

At page 10 of the Transcript I made reference to the NSW Independent Commission Against Corruption Report 2007. The full title of this report is the NSW Independent Commission Against Corruption 'Corruption Risks in NSW development approval processes' Position Paper, September 2007. The key recommendation, which I didn't specifically mention at the hearing, was Recommendation 10. This Recommendation is featured at pages 46 through to 48. These pages are attached to this letter.

I wish to amend the paragraph in the uncorrected Transcript marked with a number 3:

"I apologise, I do not have this document here but I can get it to you later. I ran out of time to actually read the report. I did not want to table it to you unless I had read it, **but the NSW Independent Commission Against Corruption 'Corruption Risks in NSW development approval processes' Position Paper, September 2007 recommended an improvement and expansion of NSW third party appeal rights. Currently in NSW a third-party objector to a development can bring a merit appeal in the Land and Environment Court against a decision to grant development consent only if the development is designated development. The Paper summarised the view that:**

**"Merits-based reviews can provide a safeguard against corrupt decision-making by consent authorities as well as enhancing their accountability. Consequently, *the extension of third-party merit-based appeal rights may act as a disincentive for corrupt decision-making by consent authorities* (emphasis added)'.**

[Then return to balance of second para] It is an additional reason...minimise the extent to which inappropriate decisions can be made."

Explanatory Memorandum on the *Planning and Development (Third Party Appeals) Bill* 2007 Introduced by Dr Janet Woollard MLA

This Explanatory Memorandum of the *Planning and Development (Third Party Appeals) Bill 2007* is attached to the letter. I referred to this Memorandum at page 10 of my Transcript. I would like to replace part of the paragraph marked with a 4 as follows:

"[Third para] I should also note that Dr Janet Woollard in the Legislative Assembly has introduced **the Planning and Development (Third Party Appeals) Bill 2007. In short, this bill recommends the introduction of third party planning rights. The Explanatory Memorandum explains that:**

> **"This bill amends the *Planning and Development Act 2005* to introduce a legislative scheme whereby objectors and third parties can appeal decisions made by a responsible authority to grant a planning permit. Western Australia is the only State that does not have provisions that allow for third parties or an objector to a planning application. Currently, only the applicant for planning development has the ability to apply to the SAT for a review of certain decisions made by the responsible authority...This bill is modelled on Victoria's *Planning and Environment Act* 1987 which provides for third party rights to appeal to the Victorian Civil and Administrative Tribunal regarding the decision of a responsible authority to approve a planning permit."**

[then return to third para] We have made a submission in response to Dr Woollard's Bill and the short version is that we largely support the proposal..."

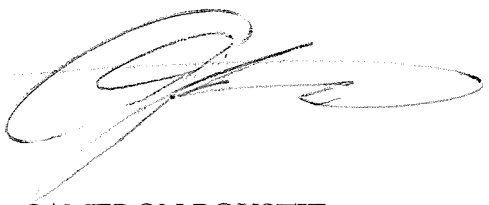
The rest of the paragraph can be left as is. Also attached to this letter is our comment on this Bill dated 10 March 2008 which is referenced above.

I ask that you please forward us a copy of the final version of the Transcript.

"Question without notice;" injurious affection

We have not had the time to consider this issue exhaustively, but we cannot foresee any problems with the suggestion put by the Committee, that all questions of compensation for injurious affection would be determined by SAT rather than by a selection of possible methods.

Yours sincerely



CAMERON POUSTIE
Principal Solicitor

PUBLIC

# Planning and Development Amendment (Third Party Appeals) Bill 2007

## Explanatory Memorandum

*(Introduced by Dr Janet Woollard MLA)*

This bill amends the *Planning and Development Act 2005* to introduce a legislative scheme whereby objectors and third parties can appeal decisions made by a responsible authority to grant a planning permit.

Western Australia is the only State that does not have provisions that allow for third parties or an objector to a planning application to appeal a decision from a responsible authority. Currently, only the applicant for planning development has the ability to apply to the State Administrative Tribunal (**SAT**) for a review of certain decisions made by the responsible authority.

It appears that Victoria provides the broadest framework for third parties and objectors to appeal a decision for planning approval. Other States also have provisions containing some rights for third parties or objectors to appeal a planning decision. However, the scope of the provisions in the other states is limited.

This bill is modelled on Victoria's *Planning and Environment Act 1987* which provides for third party rights to appeal to the Victorian Civil and Administrative Tribunal regarding the decision of a responsible authority to approve a planning permit.

Under the Victorian model, the provisions regarding the process for applications for, and objections to, a permit for a use or development of land are contained in legislation. Presently, under Western Australian law, the process for applying for planning approvals is not legislated, but is a matter left for local councils to regulate through planning schemes or administrative procedures.

The bill introduces a new Part 5A, which provides a process for applying for and objecting to planning permits, and amends Part 14 to introduce appeal rights for objectors and other third parties.

To provide for consistency in the process for applying for and objecting to planning permits, the bill inserts Part 5A. This Part defines the application process for planning permit applications. An important feature of this Part is that the requirement for notice of a planning application to be given to the owners of adjoining land, those who may be detrimentally affected or aggrieved by the grant of a permit, and to the public at large. These notice provisions ensure that interested third parties are informed of applications and provided with the opportunity to object to an application, thereby establishing a right to appeal.

The application process is facilitated by the responsible authority who also determines whether or not a planning permit should be granted. A responsible authority is already defined in section 4 of the Western Australian Act as a local government in relation to a local planning scheme, or the Western Australian Planning Commission (**WAPC**) or a local government exercising the powers of WAPC.

Part 14 of the current Act is amended to introduce rights of appeal to SAT for objectors to an application to appeal a decision to grant a planning permit. Any person who is affected by a decision to grant the permit, but who did not object to the application, may also appeal a decision by a responsible authority if it obtains leave from SAT to do so.

Consistent with the Victorian model, Part 14 also provides additional rights for applicants for a planning application. Developers and others seeking planning approval will be entitled to appeal a decision of a responsible authority to require additional information or additional requirements for notice, or the failure of a responsible authority to grant the permit within the prescribed time.

## Part 1 – Preliminary

### Clause 1 Short Title

Provides for the Act to be cited as the *Planning and Development (Third Party Appeals) Act 2007.*

### Clause 2 Commencement

Provides for this Act to come into operation on a day fixed by proclamation.

### Clause 3 Act to bind the Crown

Provides for the Crown to be bound by this Act as far as legislative power of the Parliament of Western Australia permits.

## Part 2 – Amendments to the *Planning and Development Act 2005*

### Clause 4 The Act amended

Provides that the amendment to this Part is to the *Planning and Development Act 2005.*

### Clause 5 Section 4 amended

Inserts the definition of "permit" and "referral authority".

Sub-section (1) defines a "permit" to mean "any consent, permission, approval or other authorisation on the grant of which is in the discretion of a responsible authority under a local planning scheme or a regional planning scheme".

Sub-section (2) defines a "referral authority" as "any person or body that is specified in the planning scheme as a referral authority". Examples of referral authorities that may be named on a planning scheme include industry or internal bodies such as the Water Corporation or the Swan River Trust, or government bodies such as Main Roads WA. It may also include government departments such as the Department of Environment and Conservation.

### Clause 6 Part 5A inserted

Adds Part 5A – Permits to the *Planning and Development Act 2005.*

**Division 1 – Application for Permits**

The object of this division is to establish a framework for the application for planning permits, to provide public notice of a permit application, and gives third parties the ability to object to such applications.

**Section 97A** provides that an application must be made if a planning scheme requires that a permit is to be obtained for a use or development of the land.

Sub-section (1) states that an application for a permit must be made to the responsible authority, accompanied by the prescribed fee and any relevant information that is required in accordance with the sub-section.

Sub-section (2) provides that the notice requirements under section 97G and the lapse date of application provision under section 97K do not apply in the situation where an application is made to remove a restriction over a piece of land that has been used or developed for more than 2 years before the application was made.

**Section 97B** deals with process of applying for a permit if the applicant is not the owner of the land.

Sub-section (1) requires the application to be signed by the owner of the land and accompanied by a declaration by the applicant that it has notified the owner of the land.

Sub-section (2) states that a person who obtains or attempts to obtain a permit must not wilfully make a false representation or declaration either orally or in writing.

**Section 97C** requires the responsible authority to keep a register of all permit applications.

Sub-section (1) provides that the responsible authority must keep a register of all permit applications as well as all decision and determinations made in regards to those applications.

Sub-section (2) states that the register must be made available at the responsible authority's office during office hours for public inspection.

**Section 97D** allows an applicant to ask the responsible authority to amend an application before giving notice as required under section 97G.

Sub-section (1) states that the applicant may ask the responsible authority to amend the application.

Sub-section (2) outlines what an application can include.

Sub-section (3) requires the application to be accompanied by the prescribed fee, documentation as required under a planning scheme or in regards to restricted registered covenant, and approval from the owner if the applicant is not the owner of the subject land.

Sub-section (4) states that responsible authority must amend the application unless it refuses it in accordance with subsection (5).

Sub-section (5) gives the responsible authority the discretion to refuse to amend the application on the grounds that the amendment is so substantial that a new application should be made.

Sub-section (6) requires the responsible authority to note any amendment made to an application on the register.

Sub-section (7) states that once the amendment has been made, the application is taken as being received on the day that the applicant agreed to the amendment.

**Section 97E** allows the responsible authority to amend the application before notice is given in accordance with section 97G.

Sub-section (1) states the responsible authority can make any amendment necessary to the application with the agreement of the applicant however, notice must first be given to the land owner.

Sub-section (2) outlines what an amendment may include.

Sub-section (3) states that the responsible authority may request that the applicant notify the owner of the land and to make a declaration that it has given such notice.

Sub-section (4) requires the responsible authority to note any amendment of the application on the register.

Sub-section (5) states that once the application is amended, it is considered to be the application for the planning permit and received on the day that the applicant agreed to the amendment.

**Section 97F** requires the responsible authority to make a copy of every application for a planning permit available at its offices for inspection to any member of the public. This applies until the expiry date for making an application for review to SAT has lapsed or when an application for review is determined by SAT.

**Section 97G** establishes the system of notifying the parties to an application for a planning permit.

Sub-section (1) requires the responsible authority or the applicant (as ordered by the responsible authority) to give notice of an application for a planning permit. Those who are entitled to notice include the owners and occupiers of lots adjoining the land to which the application applies; any person that is required to receive notice under a planning scheme; owners or occupiers of land benefited by a registered restrictive covenant if the granting of the permit may breach, remove or vary the covenant; and any other person the responsible authority considers would be detrimentally affected by the grant of the permit.

Sub-section (2) involves an application for a permit to remove or vary a registered restrictive covenant, or where the grant of a permit may breach a registered restrictive covenant. In these situations, notice must be given by placing a sign on the land or by publishing a notice in a local newspaper.

Sub-section (3) states that the responsible authority may refuse an application if it does not comply with subsections (1) and (2).

Sub-section (4) states that sections 97K to 97N will not apply if an application is refused on the basis that the applicant failed to give notice.

Sub-section (5) requires notice to be given to the applicant for a decision to refuse the application under sub-section (3).

Subsection (6) outlines how notice may be given including placing a sign on the subject land and publishing a notice in a local newspaper. Written notice may also be given to those that the responsible authority considers may be detrimentally affected by the grant of the permit. This written notice must be given to the affected person personally, or sent to the person by post.

Sub-section (7) states that the applicant may give notice if the responsible authority has not told the applicant whether it is required to give notice within 10 working days after the responsible authority has received the application.

Sub-section (8) outlines what is considered to be sufficient notice.

Subsection (9) states that the responsible authority may also give additional notice if it considers that the application is likely to be of interest or concern to the community.

Sub-section (10) allows a planning scheme to exempt any class or classes of applications from the requirement to give notice in accordance with sub-section (1).

Sub-section (11) states that the exemption may be made subject to any other notice requirements set out in the planning scheme.

Sub-section (12) requires the notice requirements relating to each class of applications must be complied with if the application falls within more than one class of applications.

**Section 97H** outlines the duties of an applicant to give notice of the permit application.

Sub-section (1) states that the responsible authority may require the applicant to give notice regarding the amendment of an application to a specified person.

Sub-section (2) states that the responsible authority may give notice under section 97G(2).

Sub-section (3) requires the responsible authority to give the applicant written notice if it requires notice to be given to a specified person.

Sub-section (4) states that the applicant must satisfy the responsible authority that it has given sufficient notice.

Sub-section (5) requires the applicant to pay for the cost of the notice.

Sub-section (6) states that where the responsible authority has given notice under sections 97G(1) or (2), the applicant must pay the cost of the notice to the responsible authority.

Sub-section (7) states that if the applicant gives notice to a person specified by the responsible authority, it is not required to give further notice of the application in accordance with sub-section 97G(1).

**Section 97I** gives the responsible authority the ability to seek additional information from the applicant before it deals with the application.

Sub-section (1) states that the responsible authority may require the applicant to provide it or a referral authority with more information. An applicant will be given written notice if it is required to provide further information.

Sub-section (2) requires that written notice must be given to an applicant if more information is required and when it is to be provided.

Sub-section (3) provides that the notice must also state that the application will lapse on the specified date if the additional information is not received by that date.

Sub-section (4) states that the lapse date must not be less than 30 days after the notice date.

Sub-section (5) states that if the responsible authority requires after information after the prescribed time, the time after which an application for review can be made under section 252A is not affected.

**Section 97J** allows the applicant to apply to the responsible authority for an extension of time to provide more information as requested under section 97I.
Sub-section (1) states that the applicant may apply for an extension of time if the requirement was made within the prescribed time under section 97I.

Sub-section (2) requires the application for extension of time to be made before the lapse date specified in the notice.

Sub-section (3) gives the responsible authority the discretion to allow or refuse the extension of time.

Sub-section (4) requires the responsible authority to give the applicant notice of its decision to grant or refuse the extension of time.

Sub-section (5) states that the notice must state the new lapse date if the extension of time is granted.

Sub-section (6) states that a notice must set out a new lapse date if the responsible authority refuses to extend the time and the lapse date has passed at the date of the decision or will occur within 14 days. The new lapse date must be 14 days from the date of the decision.

**Section 97K** states when a permit application will lapse.

Sub-section (1) states that an application will lapse if the applicant does not provide the responsible authority with the further information required under section 97I within the prescribed time.

Sub-section (2) outlines when the final lapse date of an application will occur.

**Section 97L** requires the responsible authority to give a copy of the application to any person or body that is specified as a referral authority under the relevant planning scheme.

Sub-section (1) requires a copy of the application to be given to a referral authority unless the applicant has satisfied the responsible authority that the referral authority has considered the proposal within the past three months and the referral authority states in writing that it does not object to the granting of the permit.

Sub-section (2) states that the referral authority can ask the responsible authority in writing for more information if required.

**Section 97M** requires the referral authority to notify the responsible authority in writing as to whether it objects or does not object to the granting of the permit.

**Section 97N** deals with objections to an application for a permit.

Sub-section (1) gives any person who may be affected by the grant of the permit the right to object to the application.

Sub-section (2) states that if the permit allows the removal, variation or breach of a restrictive covenant, an owner or occupier of any land benefited by the covenant is considered a person affected by the grant of a permit.

Sub-section (3) requires the objection to be made in writing to the responsible authority.

Sub-section (4) gives the responsible authority the discretion to reject an objection if it considers that the objection was made to maintain or secure a direct or indirect commercial advantage.

Sub-section (5) states that if an objection is rejected, the effect will be that the objection was not made.

Sub-section (6) provides that if a number of people make one objection, they may give the responsible authority one person's name and address of whom the responsible authority shall give notice.

Sub-section (7) states that it is sufficient to give notice to the person named in sub-section (6) or to any one of the persons who made the objection if no name is given.

Sub-section (8) requires the responsible authority to make a copy of every objection submitted to the responsible authority available to the public for inspection at its office.

**Section 97O** gives the applicant the opportunity to ask the responsible authority to amend the application after notice.

Sub-section (1) states that the applicant may ask to amend the application after notice has been given in accordance with section 97G.

Sub-section (2) outlines what an amendment may include.

Sub-section (3) requires that a request to amend must be accompanied by the prescribed fee and any information or documentation referred to in section 97A.

Sub-section (4) states the responsible authority must amend the application unless it is refused under sub-section (5).

Sub-section (5) gives a responsibility authority the discretion to refuse an application to amend if the amendment is so substantial that a new permit application should be made.

Sub-section (6) requires the responsible authority to note any amendment to the application in the register.

Sub-section (7) states that the amended application will be the application for the grant of the permit. The application will be considered received on the day the request for amendment was received by the responsible authority.

Sub-section (8) states that if an application is amended, notice under 97G is not required, and there is no need for the amendment application to go to the referral authorities.

**Section 97P** deals with notice of the amended application.

Sub-section (1) specifies that if an application is amended, the responsible authority must determine whether notice is required to be given and by whom it is to be given by.

Sub-section (2) requires the responsible authority to consider whether the person would be detrimentally affected in deciding whether to give notice of the amended application.

Sub-section (3) states that applicants have the same duties to give notice under this section as in section 97H.

**Section 97Q** states that a copy of an amended application must be given to any referral authorities specified in the planning scheme.

Sub-section (1) requires the copy of the amended application to be given without delay unless the referral authority considers that the amendment will not adversely affect its interests.

Sub-section (2) states that the referral authority must give the responsible authority a request in writing if it requires more information regarding the amendment.

**Section 97R** requires a responsible authority to consider all applications for planning permits.

**Section 97S** outlines the time for the decision of the application

Sub-section (1) states that the responsible authority must make a decision regarding the application without delay if there is no requirement for notice.

Sub-section (2) states that a responsible authority may also make a decision as soon as the responsible authority receives the last of the replies from referral authorities.

Sub-section (3) provides that if a decision is not made in the way prescribed under sub-section (1) or (2), a decision must be made by the end of the prescribed period, or 14 days after the giving of the last notice under sections 97G and 97P.

**Section 97T** outlines the matters that the responsible authority must take into account when deciding an application.

Sub-section (1) outlines the matters that responsible authority must consider before deciding an application. These include the relevant planning scheme, Western Australian planning objectives, all objections or submissions that have been received and any decisions or comments from a referral authority. It may also take into account any significant environmental effects that may result from the use and development of the land.

Sub-section (2) sets out other considerations that the responsible authority may consider if required. These considerations include any significant social or economic effects as a result of the use and development of the land and any Western Australian environment protection policy. It may also consider any strategic plan, policy statement, code or guideline that has been adopted by a Minister, government department or public authority.

Sub-section (3) states that the responsible authority must not grant a permit which allows the removal or variation of a restriction unless satisfied by the applicant that it would not cause the owner to suffer financial loss, loss of amenity or any other material detriment.

Sub-section (4) provides that the responsible is not required to consider any objection or submission in deciding the application if no notice is required to be given.

Sub-section (5) states that sub-section (3) will not apply to any restrictions lodged for registration under the *Transfer of Land Act 1893*.

Sub-section (6) precludes the responsible authority from granting a permit that removes or varies a restriction referred to in sub-section (5) unless it is satisfied that there is no detriment suffered by the owner of the land benefited by the restriction, or the owner has objected to the application vexatiously.

**Section 97U** outlines the decisions that a responsible authority can make on an application.

Sub-section (1) states that a responsible authority may choose to grant a permit, grant a permit with conditions, or refuse to grant a permit.

Sub-section (2) provides that the responsible authority must refuse to grant a permit if a referral authority has objected.

Sub-section (3) requires the responsible authority to refuse a permit application if granting the permit would authorise the removal, variation or breach of a registered restrictive covenant. However, the responsible may grant the permit if there was a decision to grant a permit to allow the removal or variation of the covenant.

**Section 97V** outlines various conditions that may be put on a grant of a permit.

Sub-section (1) states that the responsible authority must consider including conditions when deciding to grant a permit.

Sub-section (2) provides that the responsible authority may also impose any other condition that it thinks fit. A condition may be that specified things are to be done to a satisfactory standard or that the permit will not come into effect until another permit is cancelled or amended. A further example of the conditions that may be imposed are conditions relating to compensation payable under Part 11 of the Act.

If the permit was granted for a specified time, it may be a condition that the development must be removed or that the land must be restored to a specified state at the expiry of the permit.

Sub-section (3) states that the responsible authority must not include a condition that is inconsistent with building legislation and regulations.

Sub-section (4) allows the responsible authority to include a condition for certain situations such as requiring that a development contributions plan be implemented. A development contributions plan is where local government require developers to make infrastructure costs contributions for an area. The plan must be incorporated as a schedule of a town planning scheme in order to have effect. It may also make it a condition that certain works, services or facilities are necessary to be provided on or to the land.

Sub-section (5) states that the responsible authority cannot include a condition requiring payment for or provide works, services or facilities unless the planning scheme requires such a condition to be included.

**Section 97W** states that the responsible authority must issue the permit to the applicant if it has decided to approve the application and no objections to the application have been received.

**Section 97X** requires the responsible authority to give notice of a decision to grant the permit.

Sub-section (1) requires the notice of a decision to be given to the applicant and to any person who objected to the application.

Sub-section (2) provides that the notice must set out any conditions on the permit.

Sub-section (3) states that the responsible authority must not issue the permit to the applicant until an application for review is determined.

Sub-section (4) states that a planning scheme may set out classes of applications that are exempt from sub-sections (1) to (3).

Sub-section (5) requires the responsible authority to give a copy of the decision to each objector if a planning scheme exempts a decision from the requirements under sub-sections (1) to (3).

**Section 97Y** deals with the decision to refuse a permit.

Sub-section (1) requires the responsible authority to give notice to the applicant and to all objectors if it has decided to refuse the grant of a permit.

Sub-section (2) must set out the grounds for which the permit is refused.

**Section 97Z** requires the responsible authority to give each referral authority a copy of the permit, and a copy of a notice to grant or refuse the permit.

**Section 97AA** states that a permit begins on the date specified, or on the date that it was issued. If the permit was granted at the direction of SAT, then the permit begins on the date the decision was made by SAT.

**Section 97AB** outlines when a permit expires. The time is generally two years after the issue of the permit unless otherwise stated.

Sub-section (1) states when a permit for the development of land will expire. If a development or stage of development does not start within the specified time, the permit will expire. It will also expire if subdivision approval is required and is not done within the specified period, or if the development is not completed within the specified time.

Sub-section (2) provides when a permit of the use of land will expire. It will expire if the use of the land does not occur within the specified time. If no time was specified in the permit, then it will expire within two years of issuing the permit. A permit may also expire if the use of the land is discontinued for two years.

Sub-section (3) deals with the expiry of a permit for the development and use of land. The permit will expire if the development or a stage of development or use of the land does not commence within the specified period. If there is no specified period, then it will expire within two years after the issue of the permit, or in the case of the use of the land, two years after the development was completed.

Sub-section (4) provides when a permit for the development and/or use of land requires subdivision approval, the use or development of any stage starts when the plan is approved. The permit will expire if the plan for subdivision is not approved within two years of the issue of the permit.

Sub-section (5) states that anything done under the permit before it expired will not be affected by the expiry.

**Section 97AC** allows an owner or occupier of the land to apply to extend the permit.

Sub-section (1) states that the application must be made before the permit expires or within three months afterwards.

Sub-section (2) provides that the responsible authority may extend the time within which the use or development is to be started, completed or where sub-division plan approval is required.

Sub-section (3) states that if the time is extended, the extension commences from the expiry date of the permit.

**Section 97AD** requires the responsible authority to make a copy of every permit issued available at its office for inspection to any member of the public.

**Section 97AE** allows for the correction of mistakes.

Sub-section (1) permits a responsible authority to correct a permit if there is a clerical mistake, an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the permit.

Subsection (2) requires that the correction must be noted in the register.

**Division 2 – Amendment of Permits by Responsible Authority**

**Section 97AF** allows for permits to be amended upon application.

Sub-section (1) provides that a person who is entitled to use or develop land in accordance with a permit may make an application to the responsible authority to amend the permit.

Sub-section (2) states that the section will not apply to permits issued at the direction of SAT.

Sub-section (3) includes plans, drawings or other documents approved under a permit as part of a permit.

**Section 97AG** outlines the procedure for an application to amend a permit.

Sub-section (1) states that the procedure for an application to amend a permit is the same as an application to grant a permit in accordance with sections 97A to 97V.

Sub-section (2) provides that if the amendment is granted subject to conditions, those conditions must relate to the amendment on the permit.

Sub-section (3) states that any conditions to which an amendment is subject to forms part of the permit.

**Section 97AH** states that the permit must be issued to the applicant if the responsible authority decides to grant the amendment and no objections are lodged.

**Section 97AI** requires the responsible authority to give notice of approval of an amendment to the permit to the applicant and any objectors.

**Section 97AJ** provides for notice to be given of a refusal to amend the permit.

Sub-section (1) requires the responsible authority to give notice of refusal of the amendment to the applicant and each objector.

Sub-section (2) states that the notice must set out the grounds for refusal.

**Section 97AK** requires the responsible authority to give each referral authority a copy of an amended permit, and a copy of a notice to grant the permit with or without conditions.

**Section 97AL** states that the amendment to the permit operates from the date specified in the permit, on the day the permit was issued, or on the date of the decision to amend the permit by SAT.

**Section 97AM** applies sections 252, 252A, 252B, 252C, 252D, 252E, 252F, 252G, and 252H (which are the sections relating to review of an application of a permit) to an application for review of an amendment of a permit. The section has the effect of making any necessary changes to those sections to enable them to apply meaningfully to applications to amend a permit.

**Clause 7** **Sections 252A to 252H inserted**

The object of this clause is to create rights for objectors and third parties to apply to SAT for a review of a decision by a responsible authority in regards to planning permits. It also expands the existing rights of an applicant to appeal decisions made by a responsible authority.

**Section 252A** gives the applicant a right to apply to SAT for a review of a decision by the responsible authority to give notice under sections 97G or 97O. The applicant may also apply for a review of a decision of a responsible authority to require the applicant to give more information.

**Section 252B** allows the applicant to apply to SAT if the responsible authority does not grant the permit within the prescribed time.

**Section 252C** provides that any person affected by the application may appeal to SAT in relation to a responsible authority's decision in regards to the extension of time.

Sub-section (1) states that any person affected may appeal to SAT to review a decision by a responsible authority to refuse extend the time, or the failure of a responsible authority to extend the time within one month after which the request was made.

Sub-section (2) allows an applicant to appeal a decision of a responsible authority to refuse to extend the time for the applicant to obtain more information as required under section 97I.

**Section 252D** creates the right for an objector to apply to SAT to appeal a decision to grant a permit. An objector is a person who objected to an application for a planning permit.

Sub-section (1) states that an objector may appeal a decision of a responsible authority to grant a permit.

Sub-section (2) provides that a planning scheme may exempt certain classes of application from such a review. By exempting certain classes of application from review means that SAT will not be burdened by appeals that are trivial or frivolous.

Sub-section (3) states an appeal cannot be made if the decision is exempted under a planning scheme as outlined in sub-section (2).

**Section 252E** creates a right for any person who is affected by the grant of a permit to apply to SAT for leave to appeal the decision by the responsible authority.

Sub-section (1) provides that any person who is affected by the grant of a permit may apply to SAT for leave to review the decision to grant a permit. In order to apply for review under this section, a written objection to the application lodged by any other person must have been received by the responsible authority.

Sub-section (2) requires SAT, before making a decision about granting leave, to give the applicant, the responsible authority and the affected person an opportunity to be heard by way of a hearing.

Sub-section (3) does not require SAT to hold a hearing if the applicant agrees that the affected person should be allowed to appeal.

Sub-section (4) states that SAT may grant leave if it is just and fair to do so in the circumstances.

Sub-section (5) permits the affected person to apply to SAT for review of a decision to grant a permit once leave has been obtained.

Sub-section (6) states that the section does not apply if the decision is exempted from an appeal by an objector under a planning scheme. The section will also not apply where a permit has been issued because no objection was received.

**Section 252F** provides that objectors are entitled to notice of an applicant appealing a decision of the responsible authority to refuse to grant the permit, or the grant of a permit with conditions.

Sub-section (1) states that any person that objected to a permit application is entitled to notice of an application by the applicant for a review of a decision by the responsible authority.

Sub-section (2) states that an objector is not entitled to notice if under a planning scheme, that objector was not entitled to appeal the decision.

**Section 252G** provides for situations where adequate notice of the application to review the responsible authority's decision was not given.

Sub-section (1) states that if SAT is satisfied that notice was adequately provided, it may order that the applicant serve a copy of the application and/or publish notice of the application.

Sub-section (2) provides that an order under sub-section (1) may be given regardless of whether SAT has commenced hearing the appeal.

Sub-section (3) states that the appeal will lapse if the applicant fails to comply with an order given under sub-section (1).

Sub-section (4) specifies the form of the notice.

Sub-section (5) states that the section will not apply if the person who is receiving the notice is not entitled under a planning scheme to appeal to SAT.

**Section 252H** outlines how SAT may determine the appeal.

Sub-section (1) sets out how SAT may determine an application for review. It may decide to direct a permit must not be granted or cancelled. It may also grant the permit with or without conditions and direct the responsible to issue the permit. Where an appeal involves the review of a requirement, SAT may confirm the requirement or change the requirement, or direct that permit must not contain any specified condition. It may also order that an application must be extended where the development or use requires subdivision approval.

Sub-section (2) requires SAT to determine a new lapse date where it makes a direction that more information is required.

Furthermore, maintaining the role of the elected body acts as a counterbalance to arguments about the perceived lack of democratic accountability of IHAP members and the possibility of improper influence being applied to panel members.

**RECOMMENDATION 9**

Where IHAPs have been established, that councils consider referring matters which raise corruption prevention issues to the IHAP for advice, such as:

- entrepreneurial developments where council has a financial interest in the development and is the consent authority
- proposals involving significant departures from development standards.

## 4.5 Enhanced appeal rights for third parties

### SUMMARY OF DISCUSSION PAPER

The discussion paper noted that currently a third-party objector to a development can bring a merit appeal in the Land and Environment Court against a decision to grant development consent only if the development is designated development.[19] For all non-designated development, third-party objectors cannot make merit-based appeals to the Land and Environment Court. This includes most development in urbanised areas, such as residential flat developments and townhouses. On the other hand, merit-based appeals for applicants are available for both designated and non-designated development.

Merit-based reviews can provide a safeguard against corrupt decision-making by consent authorities as well as enhancing their accountability. Consequently, the extension of third-party merit-based appeal rights may act as a disincentive for corrupt decision-making by consent authorities.

The discussion paper asked:

- *Should third-party merit-based appeal rights to the Land and Environment Court be extended?*
- *If so, in what circumstances and how could this be achieved?*

### SUMMARY OF THE SUBMISSIONS RECEIVED

A number of councils did not support extending third-party appeal rights. These councils raised concerns such as the costs associated with defending matters in the Land and Environment Court and the potential for delay and uncertainty. There was particular concern about the prospect of the exercise of third-party rights by commercial competitors or by neighbours embroiled in neighbourhood disputes, and high rates of appeal were anticipated by some councils in areas where legal costs may not be a key consideration for potential litigants.

By contrast, a number of respondents, including members of the public and professional planners, were in favour of extending third-party appeal rights. However, the predominant view was that the circumstances in which appeals could be launched would need to be confined to particula

19 Designated development is development listed as such in the EPA Regulation 2000.

circumstances, and that costs should be awarded against litigants bringing frivolous or vexatious appeals. A number of respondents also floated alternative options such as the introduction of third-party review systems that did not involve the Court.

## ASSESSMENT OF CORRUPTION RISKS

The absence of an appeal right for objectors means that if an approval can be secured by corrupt means, it can be acted on. Conversely, the availability of appeal rights introduces the possibility that a development approval may be overturned by an independent body.

There is a strong argument that the category of designated development should be enlarged to allow third-party objectors the same rights of appeal as are presently available to developers, at least with regard to significant development. The right of appeal given to an aggrieved applicant and an enlarged right of appeal available to an aggrieved objector should inhibit corrupt conduct by local councillors and/or officers.

The Commission recognises that further consideration would need to be given to appropriately defining development that should be regarded as "significant".

A number of respondents had views on what types of development should carry third-party appeal rights. They included:

- developments relying on State Environmental Planning Policy No. 1 (SEPP 1) objections;
- developments where a council has a financial interest in the development and is the consent authority
- major and controversial developments, for example, large residential flat developments.

These suggestions could be considered in the development of a definition of "significant" development. The Commission, however, notes that not all departures from standards are significant. Similarly, councils are responsible for their own operational developments which can be of limited impact, such as roundabouts, seawalls and bus shelters. Some threshold would need to be considered to avoid an unreasonable financial burden on councils and the Land and Environment Court, and unreasonable time delays for applicants.

Consideration should also be given to allowing third-party appeals in the case of developments associated with planning agreements, and developments approved by a council where significant donations have been made to councillors and where those councillors have participated in voting. This may happen because, for example, they would otherwise deprive the council of a quorum. This is further discussed in Chapter 11.

The current practice of the Land and Environment Court allows for the award of costs in appropriate cases, and this capacity should be a disincentive to objectors who may be inclined to lodge frivolous or vexatious appeals or appeals that otherwise lack merit. Justice Stuart Morris, President of the Victorian Civil and Administrative Tribunal, has also raised further ways in which the impact of third-party appeals can be minimised. His suggestions are:

- reducing the time for appeals
- introducing special procedures to ensure that, in urgent cases, speedy hearings are held requiring decision-makers to give prompt decisions and avoid the need to "over service" in relation to reasons in urgent cases.[20]

20 Justice Stuart Morris, "Third Party Participation in the Planning Permit Process", a paper presented at a conference on "Environmental Sustainability, the Community and Legal Advocacy" conducted by Victoria University, Melbourne, 4 March 2005. Accessed at www.vcat.vic.gov.au.

**RECOMMENDATION 10**

That the Minister for Planning considers extending third-party merit appeal rights to certain categories of currently non-designated development, including:

- developments relying on significant SEPP 1 objections
- developments where council is both the applicant and the consent authority, or where an application relates to land owned by a council, subject to exceptions for minor operational developments
- major and controversial developments, for example, large residential flat developments
- developments which are the subject of planning agreements.

## 4.6 Improved councillor training

### SUMMARY OF DISCUSSION PAPER

The discussion paper observed that many individual councils offer some form of training to councillors, although this varies considerably in topics and depth between councils. The discussion paper suggested that training for new councillors could be provided in a more consistent way. In particular, some form of advanced-level training for councillors on planning issues could be appropriate.

The discussion paper asked:

- *Should a more systematic approach be adopted to the provision of training for new councillors?*
- *Should training for new councillors be mandatory?*
- *What options exist for the provision of high-level training to councillors? For example could specialist programs be provided through universities or other institutions?*

### SUMMARY OF THE SUBMISSIONS RECEIVED

Respondents overwhelmingly supported the provision of training to councillors, but there was a divergence of views on whether it should be mandatory. The LGSA called for financial assistance from the NSW State Government to enable councils to meet the costs of additional training.

### ASSESSMENT OF CORRUPTION RISKS

Recent workshops conducted by the Independent Inquiry into the Financial Sustainability of NSW Local Government found that land use planning and control was the area councillors felt least knowledgeable about.[21] The provision of training to local councillors would help improve knowledge of the specific statutory obligations involved in development matters and improv

21 Independent Inquiry into the Financial Sustainability of NSW Local Government (Chair: P. Allan AM) *Final Report: Findings and Recommendations*, May 2006, p. 313.

Environmental Defender's Office
Western Australia (Inc)

Telephone (08) 9221 3030 Facsimile (08) 9221 3070
Suite 4, Woods Building, 544 Hay St, Perth WA 6000
email: edowa@edowa.org.au www.edowa.org.au
Freecall for non-metropolitan callers: 1800 175 542

Our Ref:
Your Ref:

10 March 2008

Dr Janet Woollard MLA
Member for Alfred Cove
1 / 30 Ardross Street
APPLECROSS WA 6153

Dear Dr. Woollard

**RE: Comment on Private Members Bill – Third Party Appeals**

Thank you for seeking feedback from the Environmental Defender's Office WA on the Private Member's Bill regarding third party planning appeals.

It is our view that including third party appeal rights in legislation will be successful to the extent that it results in a number of outcomes. These include:

1. Entrenched appeal rights for all concerned third parties to seek a review by the State Administrative Tribunal of an authority's decision;

2. Entrenched rights of notice for all materially affected third parties regarding permit applications; and

3. Consistent planning schemes. Ensuring that affected third parties have consistent appeal rights throughout Western Australia is important from the perspective of both local governments and residents. From a local government perspective, it should not be unfairly disadvantaged in the property development assessment process simply because the provisions of its planning scheme grant third party appeal rights, while other planning schemes do not. Similarly, third party appeal rights must be consistent state-wide so that residents are not unfairly disadvantaged by the planning scheme governing their particular locale.

On the basis of this view, our comments below are aimed at highlighting the extent to which we believe the proposed amendment to the Planning and Development Act 2005 will successfully generate these outcomes.

Provisions relating to the giving of notice

As you have noted in the Explanatory Memorandum, requiring notice to be given to owners of adjoining land, those who may be detrimentally affected or aggrieved by the grant of a permit, and to the public at large, is an important feature of the proposed Part 5A. We agree that these notice provisions should "ensure that interested third parties are informed of applications and provided with the opportunity to object to an application". To this end, we provide for your consideration the following issues:

1. Section 97A(2) provides that the notice requirement in 97G does not apply "if the land has been used or developed for more than 2 years before the date of the application in a manner which would have been lawful under this Act but for the existence of the restriction".

Does this mean that if the land has been used or developed for 2 years, and then an application is made to use the land in a significantly or substantially different, but still arguably "lawful", manner, no notice needs to be given under 97G? This provision seems only to envisage the circumstance where an application is made to reverse the effect of an existing restriction. Arguably however, notice should still be given where an application is made to use the land in a substantially different manner but that application does not seek to reverse the effect of an existing restriction.

2. Section 97G(10) provides that a "planning scheme may exempt any class or classes of applications from all or any of the requirements of sub-section (1) except paragraphs (d) and (e)". Section 97G(11) provides that an exemption "may be made subject to any other requirements as to notice that are set out in the planning scheme in respect of that class of applications".

It would appear that these sub-sections significantly weaken the requirements of giving notice contained in section 97G(1). Under sub-section (10), it seems that an authority could effectively reduce its responsibility of giving notice to affected parties by exempting all classes of applications from sub-section (1). It would thereby only be required to give notice to owners and occupiers of land benefiting from a registered restrictive covenant where the application would breach that covenant, or sought to remove or vary it.

Under sub-section (11), an authority is also able to reduce its responsibility of giving notice through provisions in the applicable planning scheme. If one outcome of the proposed amendments to the Act is in fact to **ensure** that interested third parties are informed, then it should not be left to the discretion of an authority to release itself from that responsibility.

3. Section 252G provides that the President of the Tribunal may require notice to be given to any specified person either by the applicant or the authority if satisfied that notice was not given or inadequate.

Given that this section allows the Tribunal to review the sufficiency of any notice given to third parties upon appeal, it could be argued that there is a reduced likelihood of an authority amending its planning scheme so as to lessen or eliminate its responsibility of giving notice (the scenario referred to above). However, there are problems with interpreting this section as a safeguard of notice requirements.

Firstly, it depends on a person having the right to seek leave to appeal to the Tribunal under section 252E. If the potential objectors to an application are not in fact notified of the initial

application for a permit, then it is quite unlikely that they will be aware that an application is being considered. Assuming that no objection to the application is registered, the permit may be granted under section 97W. This is despite the fact that no objection to the application may have been made precisely because the affected third parties had no knowledge of that application.

Once the permit is granted without objection, the potential objector will have lost their right to appeal that decision to the Tribunal: section 252E(6)(a). Effectively then, the issue of adequate notice may not be considered by the President because no appeal can be brought.

Secondly, the Tribunal cannot require notice to be given "*if under a planning scheme* the person is not entitled to apply to the Tribunal under section 252D for a review of a decision to grant the permit" (emphasis added). Section 252D(2) grants a local government the power to introduce a planning scheme setting out "classes of applications for permits the decisions on which are exempted" from review under 252D(1). Where this exemption is granted, an application for review of that decision cannot be made: section 252D(3). The effect of this provision is to grant local governments the power to exempt many or all classes of applications from a review by the Tribunal, and thereby preclude the Tribunal from considering whether adequate notice was given in a particular case.

Essentially, reading section 252G alongside the sections discussed above suggests that its potential to safeguard notice requirements is extremely restricted. Moreover, this scope is largely determined by the planning scheme generated at a local authority level. The current drafting of the section suggests that any determination as to the adequacy of notice would be assessed against the extent of notice provided for by the planning scheme, as opposed to an assessment of whether the planning scheme sufficiently provides for the giving of notice.

As we have suggested above, allowing local authorities to exempt any or all classes of applications from a review of whether adequate notice was given diminishes the likelihood that local governments across Western Australia will maintain consistent procedures for notifying third parties. At a more fundamental level, it seems contradictory to ensuring that third parties are informed.

**Provisions relating to objections to applications for permits**

1. Section 97T(4) provides that "if no notice is required to be given under section 97G(1) or 97P or the planning scheme of an application, the responsible authority is not required to consider any objection or submission received in respect of the application before deciding the application".

In our view, this section is particularly concerning. It refers to where an authority, having been granted the power to exempt nearly all classes of applications from having to give notice of a permit application, has in fact exercised that power. In this circumstance, even if third party objections are lodged with regard to the application (and despite no notice being given of that application), the authority is not required to consider that objection. This section is concerning because it clearly undermines the goals of entrenching third party appeal rights. In fact, it actively discourages third parties from objecting to applications, because if they were to lodge any objection to an application of which they had not been required to be notified, there is no requirement for the authority to consider it.

This section does not seek to entrench third party appeal rights, but rather would have the opposite effect of allowing authorities to choose which classes of applications they would

like to consider objections to, and which they need not. If they do not wish to consider objections to a class or all classes of applications, they simply need to exempt having to give notice when applying for a permit under that class or classes.

For these reasons, we would strongly urge that sub-section (4) of section 97T be removed in its entirety.

3. Section 252D states that "an *objector* may apply to the Tribunal for review of a decision of the responsible authority to grant a permit" (emphasis added). Section 252E provides that "any person who is affected may apply ... for leave to apply for review ... in any case in which a written objection to the grant of the permit was received by the responsible authority".

The combined effect of sections 252D(1) and 252E would appear to be that, in addition to an exemption operating under section 252D(2), no third party right of appeal exists if a written objection was not received by the authority during the initial application. Given that authorities under this Bill are able to exempt nearly all classes of applications for which they are required to give notice, and thereby limit the classes of applications for which they are likely to receive objections, we question the appropriateness of limiting third party appeal rights to the circumstance where objections have been received. It is our view that any person affected by the authority's decision to grant the permit should have the right to seek a review of that decision by the Tribunal, regardless of whether or not objections to the permit application were received by the authority.

Another concern regarding these two sections is the different treatment of "objectors" and non-objectors. The use of the word "objector" suggests that the right of third parties to appeal an authority's decision is restricted to those who made a submission objecting to the initial permit application. Affected parties who did not make an initial submission must first seek leave to apply for appeal, and only if an original objection was received by the authority: section 252E. We note that sections 82 and 82B in the Victorian Planning and Environment Act 1987, make a similar differentiation between an initial objector and "any person who is affected" but did not make an initial objection. However, the reason for this differentiation is uncertain and concerning. Effectively, it forces those who did not make an initial objection to go through an additional stage of review by the Tribunal, even where objections were raised to the authority's decision. Arguably the Tribunal could just as easiiy consider the merits of any objection raised, and whether that objection is frivolous and vexatious, as part of a review of the authority's decision.

Our concern is with the practical effect that this different treatment may have – that third parties are essentially discouraged from appealing for a review by the Tribunal by having to justify their objection before any review will be heard. This negative effect must be understood in the context of the other proposed sections discussed above, which grant significant discretion to an authority to exempt itself from giving notice and needing to have regard for objections raised.

For these reasons, we would therefore urge an amendment to sections 252D and 252E which recognises the right, without the need to seek leave, of "any person affected by the decision of the responsible authority to grant the permit" to seek a review by the Tribunal.

4. Section 252D(2) allows a local authority, through its planning scheme, to "set out classes of applications for permits the decisions on which are exempted from [review by the

Tribunal of a decision to grant a permit]". In this circumstance, "an application for review cannot be made under that sub-section in respect of that decision": section 252D(3).

This section effectively grants local authorities the power to exempt applications from being reviewed on appeal. If the third party appeal rights are considered important enough to be worth entrenching in legislation (and we would argue that they certainly are), then there is no validity in devolving the power to exempt such rights to local authorities.

For this reason, we would strongly urge that sub-sections (2) and (3) of section 252D be removed in their entirety.

Yours faithfully

CAMERON POUSTIE
Principal Solicitor