STANDING COMMITTEE ON LEGISLATION

INQUIRY INTO THE JURISDICTION AND OPERATION OF THE STATE ADMINISTRATIVE TRIBUNAL

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
WEDNESDAY, 14 MAY 2008

SESSION TWO

Members

Hon Graham Giffard (Chair)
Hon Giz Watson (Deputy Chair)
Hon Ken Baston
Hon Sally Talbot

Hon George Cash (Substitute member for Hon Peter Collier)

Hearing commenced at 11.07 am

GILOVITZ, MR MOSHE
Secretary, Western Australian Planning Commission,
sworn and examined:

LOGAN, MR MALCOLM
Team Leader, Appeals Unit, Statutory Planning Division,
sworn and examined:

The CHAIR: On behalf of the committee I welcome you to this meeting. Before we begin I am required to ask you to take the oath or affirmation.

[Witnesses took the affirmation.]

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

The WITNESSES: Yes.

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

Would you like to make an opening statement?

Mr Gilovitz: The Chairman of the Western Australian Planning Commission, Jeremy Dawkins, apologises for not being able to attend. He is most embarrassed that he is not able to attend.

The CHAIR: This morning the committee received a document from the commission that is in your name. We have had a brief look at it. Can you clarify whether you want the document to remain confidential? I note that the response does not have the endorsement of the commission.

Mr Gilovitz: I am comfortable for it to be on the public record. It does not need to remain confidential. However, I would appreciate the commission being given another opportunity to make a submission to this committee if it wishes to do so.

The CHAIR: Perhaps the way to proceed is to have you take us through the answers that have been provided. There may be particular things that you would like to highlight.

Mr Gilovitz: Going first to the general right of appeal for third parties, I have endeavoured to understand the commission's views by working through the file notes and consulting with people. As I understand it, the policy around a third party right of appeal has not been explored in any detail in Western Australia. The commission notes that issues could arise by way of people instigating appeals vexatiously or otherwise comprising the normal flow of the development approval process. I mentioned contractual arrangements that developers enter into once they have an approval and the

potential for those contractual arrangement to be complicated. The commission prefers the approach whereby certainty is given to the building and development industry and whereby the applicant need only negotiate with the decision-maker to achieve that level of certainty. If for some reason policy is taken in another direction, the commission would prefer that third party rights of appeal be confined to those circumstances in which it is particularly justified.

Hon GEORGE CASH: I wonder whether Mr Gilovitz could share his knowledge about third party appeals to appeal tribunals in particular in other Australian jurisdictions.

Mr Gilovitz: It is not one of my areas of expertise. However, I do understand that third party appeals are available in other jurisdictions, more so than in Western Australia. They are mostly available in New South Wales and they are available with some constraints in Victoria. The New South Wales system of planning and development approval going through to obtaining a building licence or permit issues, including a certificate of construction, is quite different from systems elsewhere in Australia and should not necessarily be emulated. It may be that the system we have here or the similar system used in Victoria is a better system in terms of efficiency of process and clarity of outcomes for the community and developers.

Hon GEORGE CASH: What about Queensland, South Australia and Tasmania?

Mr Gilovitz: They are in between the two extremes. Tasmania is more similar to Victoria.

The CHAIR: Do you have examples in which third party appeals that are available in other states and territory have been unreasonable or vexatious? I understand that the processes are such that the applications are dismissed fairly quickly.

Mr Gilovitz: No, I do not have examples. In a former job I worked in Victoria in the building control system and I was responsible for dealing with complaints from the public. I was very aware that the balance of difficult people was rather evenly distributed between the community and the developers and builders. There were just as many difficult members of the public complaining about good builders as there were bad builders causing harm to members of the community. I would want to generalise and say that I think the same rule would probably apply to the planning system. I will ask Malcolm Logan to make a comment because he has had more direct experience than I have had.

[11.15 am]

Mr Logan: I do not have very much to add to what has already been said, other than to say that you have a system here that is a fairly tightly controlled system in terms of the third party type rights. If you had a more fully fledged third party right type system, it does open things up. It does make it more democratic to a degree, but I think it is a matter that would have to be very carefully considered and investigated.

The CHAIR: What do you see the disadvantages as being, given that it is arguably more democratic? Thank you for giving me that line!

Mr Logan: I think perhaps one of the disadvantages is that it may result in a longer period to reach finalisation on matters. There might be greater democracy and openness, but there might be a trade-off as well. Certainly, there is considerable pressure at times to try to finalise matters as reasonably quickly as possible.

Mr Gilovitz: I think the point of democracy is an important one. I would submit that the time for the democratic intervention is in the setting of policy and rules by which developers and builders need to behave and to which they must conform. Once those rules are set in place, the building and development industry needs the certainty of knowing that it can work within those rules and produce complying development outcomes. My view would be to discourage third party intervention at the time when a development proposal is being framed. The work should have been

done before then, if possible, and I know it is not always possible. I think a similar view is taken by the WAPC, and I think that is why it argues against a general third party right of appeal.

The CHAIR: I would argue that in other areas of law you have the policy and settings, but you still have the capacity to assess each case on its merits.

Mr Gilovitz: Yes. That capacity is given to the decision maker, rather than to the community in general. There may well be an argument, as I have suggested here, for particular rights of appeal but perhaps not a general right of appeal.

The CHAIR: Just for my clarity, you have described the situation with third party rights of appeal as tight. My understanding is that there is no third party right of appeal with regard to planning decisions in this state.

Mr Gilovitz: Third parties cannot initiate an appeal, but they —

The CHAIR: They can join.

Mr Gilovitz: — they can join, yes.

Hon GEORGE CASH: For my benefit, can I assume that, Mr Gilovitz, you have qualified what you have said about third party rights on the basis that it is a policy decision of government if there is to be a change —

Mr Gilovitz: Yes.

Hon GEORGE CASH: — and; secondly, if there is to be a change, you believe the WAPC would want to be part of any deliberations in that regard?

Mr Gilovitz: Certainly, I am sure that that would be the case.

The CHAIR: I am happy to go to question 2, if you like.

Mr Gilovitz: In relation to question 2, I think the WAPC's concern is that the confidentiality afforded to SAT mediation might impinge or limit the information flows that should be provided to referral agencies, local governments and others that need to know about deliberations and provide input to deliberations.

Hon GEORGE CASH: I am a little unsure of what that actually means, Mr Gilovitz. Could you explain to me how the information flow might be restricted or altered?

Mr Gilovitz: Reflecting on the WAPC's concern, as I understand it, at the beginning of a mediation the decision maker offers an acceptable solution and, presumably, has negotiated with referral agencies and other parties with an interest to be satisfied that that is achievable and can be done. In the course of a mediation, the emerging solution may well be different from that offered initially. The new solution may need to be researched. It may not be achievable because infrastructure may not be available or for other reasons. I think the WAPC has a concern that the confidentiality requirement of the mediation is strict and that it would prevent sufficient communication with the variety of referral agencies and other bodies. It would be unfortunate if a mediated solution in the end was not practical or not suitable for some reason.

The CHAIR: I take you to question 3.

Mr Gilovitz: In relation to question 3, the WAPC's concerns, as I understand them, run along very similar lines. A significantly amended proposal may make demands on infrastructure or other services or impose detriment in relation to the environment or adjoining landowners. The WAPC would be concerned if a mediation did not fully canvass the impacts on external agencies and parties. It would prefer that a substantially amended planning solution went through the normal investigatory process and consultations with the referral agencies.

Hon GEORGE CASH: In respect of question 3(c), you state that, anecdotally, major changes occur in five to 10 per cent of the relevant appeals before SAT. Of those appeals, do you have case

examples in which significant changes were made that may have caused an outcome that the WAPC may not have envisaged, so to speak?

Mr Gilovitz: I might refer to Malcolm Logan, but I understand that there have been appeals that could have resulted in that outcome, but I am not aware that they did. I think, typically, SAT uses powers under section 31, if I remember correctly, to refer those matters to the Department for Planning and Infrastructure, which is then able to bring information into the mediation. Do you want to add to that?

Mr Logan: Not really, except to say that the line has generally been fairly accommodating to fairly significant changes in the course of mediation. It might be that on occasion one should refer back right through the processes of a fresh application.

Hon GEORGE CASH: Who has been accommodating, Mr Logan—SAT or the WAPC? Who were you referring to when you said that generally it appears that there has been an accommodation of these changes? Were you referring to SAT or the WAPC?

Mr Logan: No; I think it is on both sides. SAT has put a lot of emphasis on mediation in the new process and there has been a lot of effort all round to try to resolve matters through the mediation process, as opposed to going to the very adversarial situation in a formal hearing. We have sought to work together to achieve outcomes. There might be, on occasions, a major or a minor change. If the number of subdivisions is amended by one or two, it might not be, but there is a divide point and sometimes it is a value judgement.

The CHAIR: Would you like to go to question 4?

Mr Gilovitz: In relation to SAT forums, I am informed that they were appreciated and SAT is encouraged to continue. The proposal coming from officers who attended is that there would be benefit in a working group situation whereby some of the matters that are being raised now could be raised from time to time as they emerge and resolved at officer level. There was interest in perhaps an annual review report back to users and the community about how SAT is going, what kind of issues are emerging and how the department and other agencies are working with SAT to produce good outcomes.

The CHAIR: Obviously, that is in addition to the annual report, and there is something more specific that you are referring to?

Mr Gilovitz: Yes. In addition to the annual report, we were thinking of an annual seminar to which industry representatives would be invited or members of the public might choose to come. It might just be a breakfast or morning tea for two hours at which we could hear about not just what was happening in the previous year in SAT, as you might get from an annual report, but also emerging trends in dispute resolution or lessons learnt from the SAT process that can be fed back into the community.

The CHAIR: Within the specific streams, I would suggest.

Mr Gilovitz: Yes; sorry.

The CHAIR: That would probably be logical.

Mr Gilovitz: Yes, I did mean that—within the streams.

The CHAIR: I take you to question 5.

[11.30 am]

Mr Gilovitz: In relation to fees, fees are a concern to the administrators in the WAPC, and possibly to the WAPC itself, because the cost of processing an application and reconsidering an application is high. The WAPC is required by policy to engage in full cost recovery.

We are effectively competing with SAT in the reconsideration market. We would like to offer an effective reconsideration service to the community. That would be better all around, especially for some matters, rather than engaging in mediation or resolving a dispute through SAT. At other times the parties might be too entrenched in their views and would need to have the matter resolved by SAT. When we were setting our fees, we departed somewhat from the policy and set the reconsideration fee below full cost recovery to create a situation of equity. However, we could stretch that only so far. I am not advocating that SAT increase its fees. I would prefer another way for the WAPC to offer a reduced reconsideration fee. Perhaps we could work together to consider which matters are best dealt with by reconsideration and which are best dealt with by referral to SAT.

Hon GEORGE CASH: Are you suggesting there would be opportunities for people to bypass the WAPC consideration and go straight to SAT because of the savings in fees? In some cases it is a reasonably significant amount.

Mr Gilovitz: There is certainly that opportunity. The fee structure would put that thought in people's minds.

Hon GEORGE CASH: Do you think that would occur in practice?

Mr Gilovitz: It has been too short a time for us to know. The variability in our rates of application for initial applications and reconsideration is very high and it is very hard for us to see a trend but where there is a dollar there is a motivation for people to do it.

The CHAIR: What is the reconsideration process?

Mr Gilovitz: It is akin to an analysis of the initial application. Our workflow studies have shown that we put more effort into a reconsideration because we do the work that we did previously and we check ourselves to make sure that the decision initially arrived at was either correct or can be amended to reflect the representation given us. To answer the question more correctly, it is an opportunity for an applicant to come back to the commission and say that we might have got it wrong.

The CHAIR: It is like asking for a second opinion.

Mr Gilovitz: Yes.

The CHAIR: Does the second opinion process involve precisely the same people who were involved in the first matter?

Mr Gilovitz: I do not know whether it involves precisely the same people, but I think it might. Mr Logan might know that better than me. It is certainly the same team. From our cost-analysis work I know that the reconsideration is given every opportunity to be independently determined. We certainly do not just rubber-stamp it; we confirm the view that was already taken and ensure it is carefully analysed. As I have said, it generally costs more to do the reconsideration than the initial application.

The CHAIR: Question 6.

Mr Gilovitz: I was not entirely clear about the WAPC's views on the Environmental Protection Act. The way I read the file, I understood that the WAPC was keen to continue the close relationship between the planning and environmental protection administrations. I do not know whether the WAPC fully considered what is now being proposed; that is, that the environmental appeal be considered by SAT. It may be that having considered the matter more fully, the WAPC will support their approach. I know that the WAPC is interested in the current review of the environmental impact assessment process. It would be in a better position to comment once it has had an opportunity to consider that process and how an appeal should sit within it. That answer also applies to question 7.

Question 8 did not relate to the WAPC in terms of part 5 of the Environmental Protection Act. Part 4 does relate to it but it is a similar matter. Question 9, as I recall, relates to part 5 of the Environmental Protection Act.

The CHAIR: I might take you back one step to the issue we were discussing regarding the reconsideration process. Is the reconsideration fee payable when SAT refers an application back to the WAPC under section 31 of the act?

Mr Gilovitz: I do not think so.

Mr Logan: I am sure there is not a fee.

The CHAIR: Are we up to question 10?

Mr Gilovitz: As far as I am aware, the WAPC does not have a view on this matter and I do not think it has considered it. Once again, it is a matter that can be considered in the context of the review.

The CHAIR: Do you know when that review will be completed?

Mr Gilovitz: I do not. I understand that it has commenced. I looked it up on the internet last night and I do not know when it is scheduled to be finished.

The CHAIR: Thank you.

Hearing concluded at 11.36 am

LEGISLATION COMMITTEE

INQUIRY INTO THE JURISDICTION AND OPERATION OF THE STATE ADMINISTRATIVE TRIBUNAL
HEARING WITH THE WESTERN AUSTRALIAN PLANNING COMMISSION
14 MAY 2008

ABBREVIATIONS

SAT = State Administrative Tribunal
SAT Act = *State Administrative Tribunal Act 2004*
SAT Regulations = *State Administrative Tribunal Regulations 2004*
SAT Rules = *State Administrative Tribunal Rules 2004*
WAPC = Western Australian Planning Commission

Proposed Questions regarding the Operation of the SAT	
1.	The WAPC (Submission 93) considers that a general third party right of appeal to the SAT against planning applications would not be desirable or workable. (a) Please explain why. (b) Does the WAPC consider that a limited third party right of appeal to the SAT would be more desirable or workable? Why/why not? (c) If so, what sort of limits should be imposed on third party rights of appeal to the SAT in planning matters?
2.	In its submission (Submission 93), the WAPC suggests that the confidentiality of the SAT's mediations "*may constrain resolution of issues through decision-making processes. Attendance of other parties at mediation may also require consideration.*" Please provide some examples of when mediation has constrained the resolution of issues in a matter before the SAT.
3.	The WAPC suggests (Submission 93) that major changes to a planning proposal, even if that planning proposal is currently before the SAT, "*should be the subject of a new application to the decision maker*".

	(a) Does the WAPC mean that the major changes which are being proposed should be lodged with the original decision-maker as a proposal that is separate from the initial planning proposal or does it mean that the amended initial planning proposal should be lodged with the decision-maker? (b) What is considered to be a major change to a planning proposal? (c) Do major changes to planning proposals happen often? (d) How does the SAT usually deal with major changes to planning proposals which are already before it?
4.	The WAPC suggests (Submission 93) that the SAT convene a "*Court users group*" to discuss operational issues directly with frequent parties and other interested parties. The Committee understands that the SAT puts considerable time and resources into convening consultation forums with the major interested parties in each stream of the SAT. The SAT advised the Committee that representatives of the WAPC have attended several of these forums and that these forums were very productive. (a) Please explain whether the WAPC has found these forums useful. (b) In its suggestion, does the WAPC envisage consultative forums which are differently-run or are more frequent or regular than the forums convened in the past? Why/why not?
5.	The WAPC's submission (Submission 93) notes that: *any disparity between fees for making an application to the decision-maker and lodging a planning appeal may have the unintended consequence of parties pursuing an appeal rather than making a revised application for approval.* Is the WAPC aware of any examples where the initial application fee is higher than the fee associated with the application for review by the SAT? If so, please provide further comment.
6.	In its Annual Report for 2006, the SAT recommends amending section 41 of the *Environmental Protection Act 1986.* The following is an excerpt from the Annual Report 2006, pp42-43:

the DR stream has been constrained in its ability to achieve the objective stated in section 9(a) of the State Administrative Tribunal Act 2004*, to act as speedily as is practicable, by the referral of proposals, which are the subject of review proceedings, by original decision-makers to the Environmental Protection Authority (EPA) for environmental assessment under the* Environmental Protection Act 1986 *or the requirement of the EPA that Tribunal itself refer proposals the subject of review applications to the EPA for environmental assessment.*

Although, where a proposal has been referred for environmental assessment, the DR stream is able to undertake mediations or compulsory conferences and to determine preliminary issues, Tribunal is precluded by section 41 of the Environmental Protection Act 1986 *from making a decision which could have the effect of causing or allowing the proposal to be implemented and it seems, therefore, from making a final decision in relation to the review, until an authority is served on it by the Minister for Environment under section 45(7). As the Tribunal determined in* Burns and Commissioner of Soil and Land Conservation *[2006] WASAT 83 at [27], the word, could, in section 41 of the* Environmental Protection Act 1986 *refers to a potential event or situation. Section 41 does not only apply to a decision which will remove the last impediment to the lawful implementation of a proposal.*

Section 27(3) of the State Administrative Tribunal Act 2004 *states that the purpose of the review is to produce the correct and preferable decision at the time of the decision upon the review. Even if the parties were in agreement, it would not be possible for the Tribunal to list proceedings for final hearing, but limited to determining whether the application should be refused. If the correct and preferable decision is that the review should succeed, the Tribunal is bound to so determine. However, section 41 of the* Environmental Protection Act 1986 *precludes the Tribunal from making a decision that could have the effect of allowing a referred proposal to be implemented.*

The environmental assessment process in relation to referred proposals, while no doubt complex, appears to take a considerable period of time. The result is that a number of applications have had to be repeatedly adjourned from directions hearing to directions hearing, awaiting the result of environmental assessment by the EPA and then any appeal to the Minister for Environment.

…

A possible solution to the problem is the New South Wales position, which was referred to in passing in Burns and Commissioner of Soil and Land Conservation *at [42], under which the Land and Environment Court is authorised to determine an appeal against the decision of a council or consent authority whether or not any concurrence or approval*

	required before the council or consent authority could determine the application has been granted. *A variation on this theme would be to amend section 41 of the* Environmental Protection Act 1986 *to permit the Tribunal to finally determine proceedings involving a referred proposal, but to preclude the implementation of the proposal until the Minister is satisfied that there is no reason why a proposal in respect of which a statement has been published under section 45(5)(b) should not be implemented.* The Committee notes that the WAPC submission (Submission 93) makes reference to the above comments in the SAT Annual Report 2006 and states that "*the present relationship between planning and environment legislation should be retained.*" (a) Was that statement directed at the suggested amendment to section 41 of the *Environmental Protection Act 1986* or was it made with regard to the general interaction between planning and environment legislation? (b) If the former, why does the WAPC not agree with the suggested amendment to section 41?
7.	In its Annual Report 2006 at p43, the SAT made the following observations regarding section 37 of the SAT Act: *It is to be noted that section 37(1) of the* State Administrative Tribunal Act 2004 *confers a right on the Attorney General, on behalf of the State, to intervene in proceedings of the Tribunal at any time and that section 37(3) confers a discretion on the Tribunal to permit any person to intervene in proceedings. Section 37 could be amended to permit the Minister for Environment to intervene in proceedings which concern a proposal which has been referred to the EPA for environmental assessment under the* Environmental Protection Act 1986*. This would enable all environmental planning issues to be determined in a single proceeding.* The Committee notes that the WAPC submission (Submission 93) makes reference to the above comments in the SAT Annual Report 2006 and states that "*the present relationship between planning and environment legislation should be retained.*" (a) Was that statement directed at the suggested amendment to section 37 of the *Environmental Protection Act 1986* or was it made with regard to the general interaction between planning and environment legislation? (b) If the former, why does the WAPC not agree with the suggested amendment to section 37?
Proposed Questions regarding the Jurisdiction of the SAT	

8.	What are the WAPC's views (if any) on the suggestion that the SAT's jurisdiction be expanded to include a merits review of decisions made under Parts IV [environmental impact assessment] and V [environmental regulation] of the *Environmental Protection Act 1986*?
9.	The Committee notes that the *Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal* (May 2002) recommended, for reasons set out at pages 66 and 110 to 112, that pollution control matters under Part V of the *Environmental Protection Act 1986* should be determined by SAT and that all other matters under that Act should remain subject to Ministerial appeal. In particular, the Taskforce said at page 111 that it is "appropriate for an independent and impartial review mechanism to be available in respect of Part V pollution control matters". What are the WAPC's views (if any) on transferring Ministerial appeals under only Part V of the *Environmental Protection Act 1986* to the SAT?
10.	If the SAT's jurisdiction is expanded to include appeals under the *Environmental Protection Act 1986*, what views would the WAPC have (if any) with regard to third party rights of appeal? Specifically, please identify any changes that may occur to current rights of appeal with the transfer of jurisdiction to the SAT.
11.	Are there any other issues/matters relevant to this inquiry which you wish to address? If so, please provide further comment.