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30 January 2015

Ms Samantha Parsons
Committee Clerk
Standing Committee on Uniform Legislation and Statutes Review
Legislative Council
Parliament House
PERTH WA 6000

By email: unileg@parliament.wa.gov.au

Dear Ms Parsons

Submission on Operation and Effectiveness of the Development Assessment Panels Regulations 2011

I wrote by letter dated 23 January 2015 on behalf of the Law Society of WA's Committee on Environment, Town Planning and Local Government, seeking an extension of time for the making of a submission by the Law Society on the above matter. You have subsequently indicated that the request for an extension of time will be considered by your Committee, and I look forward to your response in due course. Please note however that this is not a submission which purports to be made on behalf of the Law Society, and is not the submission which it is contemplated that the Law Society will make in due course if an extension of time is granted for that purpose. This is a submission by myself (Denis McLeod) personally, and deals with one aspect of the Regulations only.

Submission in regard to right of review

1 In reg.18 of the *Planning and Development (Development Assessment Panels) Regulations 2011* (**Regulations**), provision is made (reg.18(2)) for a person who has made a DAP application or an application under reg.17, to apply to the State Administrative Tribunal (**SAT**) for a review, in accordance with Part 14 of the *Planning and Development Act 2005* (WA) (**P & D Act**).

2 The point of concern for this submission is that the right of review is given only to an applicant. In my submission, special circumstances which have arisen in connection with the Development Assessment Panel (**DAP**) determination of development applications, justify the right of review being extended not only to applicants, but also to other persons aggrieved by the determination of an application. The intent of such an extension of the right of review is to allow a third party right of review in recognition of the fact that the establishment of the DAP regime has significantly reduced the element of community representation which has been fundamental in statutory planning in WA since its commencement in 1928 (with the *Town Planning and Development Act 1928* (**TP & D Act 1928**)).

3 The establishment of the DAP regime was a conscious reform intended to place decision-making on substantial development applications in the hands of independent planning experts, rather than leaving decision-making on significant development applications in the hands of local government Councils. The DAPs of course have a majority membership of independent experts (3 out of 5) and a minority membership from the relevant local government Council (2 out of 5).

4 The effect of that change in the decision-making process for significant development applications is that the representatives of the community no longer control the decision-making process.

5 When the TP & D Act 1928 was passed, Part III of that Act gave control of subdivision to a State Government agency (then the Town Planning Board). However in regard to other elements of planning control, the TP & D Act 1928 contemplated that the control would be exercised through planning schemes, and ss.6 and 7 in particular of the TP & D Act 1928 contemplated that the planning schemes through which detailed (non subdivision) development control would be exercised, would be schemes made and administered by local governments.

6 From 1928 onwards, and particularly from the 1960s onwards under the influence of the coming into operation of the Metropolitan Region Scheme (**MRS**), local governments did make local planning schemes, and eventually, by the early 1980s, every metropolitan local government had a local planning scheme dealing with land classification and development control. Decision-making on development applications from the 1960s until the DAP regime came into operation in 2012, was fundamentally by local governments. Even the majority of decisions on development applications under the MRS (principally excluding developments on region scheme reserves) were made by local governments under delegated authority, and as a result of deeming provisions in the region scheme (eg. cl.26 of the MRS).

7 It is not surprising that detailed development control was placed in the hands of local governments. The same had previously occurred in relation to the detailed administration of the health control laws, and also building control.

8 The TP & D Act 1928 for Western Australia was based essentially on the *Building Town Planning Act Etc Act 1909* of the UK, which had focused on development control through town planning schemes, with an emphasis on the protection of amenity and convenience. Amenity is essentially a matter of community interest, and there is a fundamental logic in allowing elected local government councillors the responsibility for protecting community amenity through the decision-making process on development applications.

9 As acknowledged above, the establishment of the DAPs was a deliberate measure to place the decision-making responsibility on the more significant development

applications into the hands of DAPs which have majority membership of independent experts. A clear consequence of that change, whether intended or not, is that the experts would not be expected to act, and would generally not be perceived as acting, in a way which responds to community concerns in relation to development proposals.

10 While the interests of the community received a high level of recognition and protection by the fact that development applications were determined by councillors who are elected community representatives, there was some justification in restricting the right of review to an applicant aggrieved by a Council decision. The same justification no longer exists under the DAP regime where DAPs are clearly not intended to function as community representatives.

11 Under the present regime, where the right of review is given only to an aggrieved applicant, proper opportunity is given to a developer to seek a SAT review of the refusal of a development proposal, but a neighbour, whose interests might be very severely damaged by a development on a neighbouring property, is given no right to apply to review the decision which causes or is perceived to cause the damage. Nor is the satisfaction given to the aggrieved neighbour of being able to call Council members to account for a decision perceived to be given against the community interest.

12 In my respectful submission, reg.14 of the Regulations should be amended so as to allow a right of review to any aggrieved person who has a special interest. I accept that it would be appropriate to incorporate some restriction on the right of review, so as to ensure that only persons who would be accepted in the Supreme Court, or in the SAT, as having a special interest so as to give standing, should receive the right to apply to review a DAP decision.

13 The principal justification for the amendment I have recommended above is that it would be fair in the community interest, and a reasonable balancing of the change in community focus which the establishment of the DAP regime represents.

At the time of preparing this submission, I have not been able to find the papers which explain the format for making submissions, and I apologise if I have failed to adopt the appropriate form. Hopefully that will not have the consequence that my submission will be rejected by reason of informality.

Yours faithfully

Denis McLeod

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