

Submission

Inquiry into Planning and Development (Development Assessment Panels) Regulations 2011

To

The Hon Kate Doust MLC
Chair, Standing Committee on Uniform Legislation and Statutes Review
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Introduction

The Law Society of Western Australia appreciates the opportunity to contribute to the inquiry into the Planning and Development (Development Assessment Panels) Regulations 2011.

The Society is the peak professional association for lawyers in Western Australia and is widely acknowledged by the legal profession, government and community as the "Voice" of the legal profession in Western Australia. The Society has a number of sub-committees dealing with specialist legal issues, including planning and development.

The Society makes the following submissions on the operation and effectiveness of the Planning and Development (Development Assessment Panels) Regulations 2011 (the DAP Regulations).

1 Forum shopping

- 1.1 In planning, it is well established in Western Australia that there is no *res judicata* in regard to planning proposals. Every application for planning approval is a fresh matter which is required to be dealt with on its merits. That applies to consideration of a development application by the original responsible planning authority (eg. a local government, or the WAPC) as well as to a review body such as the State Administrative Tribunal (the SAT).
- 1.2 If an application for planning approval is made in regard to a specific development proposal, and if that is refused by the responsible planning authority, an application in identical terms can be made subsequently, and the responsible planning authority is required to deal with the subsequent application on its merits. It can be reasonably anticipated that a planning authority having determined an application in respect of a specific development proposal will make the same decision on the application if the proposal comes forward six or 12 months later, without there being any change in the relevant planning law. Consequently, applicants very seldom bother to make repeated applications to the same planning authority, without making at least reasonably significant changes to the development proposal.
- 1.3 The situation is quite different where there is an option for an applicant to choose between two different planning decision-makers. For development proposals having a value in the range \$3M to \$7M (other than in the City of Perth), there is an option for a proponent to lodge the application for planning approval with either the local government or the relevant Joint Development Assessment Panel (JDAP). In those circumstances, there is a temptation for the proponent to attempt to have 'two bob each way', attempting an application to the local government, and if that fails, immediately attempting the same application with the JDAP.
- 1.4 It is not apparent that the provisions in Part 11A of the *Planning and Development Act 2005* (WA) (the P&D Act), or that the provisions in the DAP Regulations, were intended to be used in that opportunistic way. The offering of an option was intended as an option, and was not intended to give an applicant 'two bites of the cherry'.
- 1.5 **Recommendation**

It is recommended that a provision be inserted into the DAP Regulations to ensure that, in the case of a development proposal within the optional range, where an application for a development proposal is made to either the local government or the relevant DAP, and if the application is refused, or approved

subject to conditions, the same application must not be made to the other authority within 12 months after the determination of the first application.

- 1.6 The Committee may see merit in this recommendation, but may consider that a different delay period should be stipulated. The period of delay should be sufficient to discourage blatant abuse of the process.

2 Third party right of review

- 2.1 In reg 18 of the DAP 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 SAT for a review, in accordance with Part 14 of the P&D Act.
- 2.2 The point the Society is concerned about in this submission is that the right of review is given only to an Applicant. The provision of the DAPs as an alternative decision-maker gives rise to special circumstances which justify the right of review being extended not only to Applicants, but also to other persons aggrieved by the determination of an application.
- 2.3 The right of review ought to be extended to third parties in the case of DAP determinations, 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 through the *Town Planning and Development Act 1928* (the TP&D Act).
- 2.4 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 in the hands of local government Councils. The DAPs of course have a majority membership of independent experts (three out of five) and a minority membership from the relevant local government Council (two out of five).
- 2.5 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.
- 2.6 When the TP&D Act 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 contemplated that control would be exercised through planning schemes, and ss.6 and 7 in particular of the TP&D Act contemplated that the planning schemes through which detailed (non-subdivision) development control would be exercised, would be schemes made and administered by local governments.
- 2.7 From 1928 onwards, and particularly from the 1960s onwards under the influence of the coming into operation of the Metropolitan Region Scheme (the 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).

- 2.8 It is not difficult to understand why detailed development control was placed in the hands of local governments. Local governments had previously been charged with the responsibility of control in regard to the sanitation of new building development, and generally in regard to building construction. Control of planning was a natural progression from those other important levels of control entrusted to local governments.
- 2.9 The TP&D Act 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.
- 2.10 It seems apparent that the establishment of the DAPs was a deliberate measure to place the decision-making responsibility on the more substantial development proposals into the hands of a decision-making body which has a 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.
- 2.11 Over the years, the community has received a high level of recognition and protection through the requirement that development applications be determined by Council members who are elected community representatives. Consequently, there was some justification in restricting the right of review in respect of Council decisions 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.
- 2.12 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.
- 2.13 The Society submits that reg 14 of the DAP Regulations should be amended so as to allow a right of review to any aggrieved person who has a special interest. It is 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 for review of a DAP decision.
- 2.14 The Society considers that the principal justification for the amendment it has recommended above, is that the amendment would fairly represent the community interest, and would reasonably reflect the change in community focus which the establishment of the DAP regime represents.

2.15 **Recommendation:**

The Law Society recommends that reg 14 of the DAP Regulations should be amended so as to allow a right of review to any aggrieved person who has a special interest.



Matthew Keogh
President

27 February 2015