STANDING COMMITTEE ON ENVIRONMENT AND PUBLIC AFFAIRS

PETITION NO 35 — METRO CENTRAL JOINT DEVELOPMENT ASSESSMENT PANEL

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 22 OCTOBER 2014

Members

Hon Simon O'Brien (Chairman)
Hon Stephen Dawson (Deputy Chairman)
Hon Brian Ellis
Hon Paul Brown
Hon Samantha Rowe

Hearing commenced at 10.20 am

Mr CHARLES JOHNSON
Presiding Member, Central Joint Development Assessment Panel, examined:

The CHAIRMAN: I will now commence and if I can do so by acknowledging the very many members of the public who are here today. Thanks for being part of our public gallery. When we have such a degree of interest, it reassures us that we are looking into matters that are of genuine interest to our community. As part of that process of attending, that also gives weight to the fact that this is a proceeding of the Parliament, and, to the greatest extent possible, proceedings of the Parliament should be available to be observed by the public. So I firstly thank you for being here. The other responsibility that is carried with your attendance of course is to be present to observe; that the proceedings of the Parliament including these proceedings are not interrupted in any way. Although these are matters of great interest, unfortunately there is not a capacity for general participation so I will ask that members of the public here respect that and allow us to interact with our witnesses. Unfortunately, interjections and spontaneous applause or whatever are not available to you today. With that, I would like to welcome Mr Johnson to our meeting this morning. You will have signed a document entitled "Information for Witnesses".

Mr Johnson: Yes, I have.

The CHAIRMAN: Have you read and understood that document?

Mr Johnson: Yes, I have.

The CHAIRMAN: These proceedings are being recorded by Hansard and a transcript of your evidence will be provided to you. To assist the committee and Hansard, if you could please quote the full title of any document that you might refer to during the course of the hearing, again, for the record. 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 during today's proceedings 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 public evidence is finalised it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute contempt and may mean that the material published or disclosed is not covered by parliamentary privilege.

By way of opening, we are dealing with a petition that was tabled in the Legislative Council relating to the Metro Central Joint Development Assessment Panel decisions and considerations in relation to the development proposals for 94 Kitchener Road, Alfred Cove. That petition asked the Legislative Council to investigate the circumstances of the decision requiring a full and public disclosure of the arguments justifying the decision and generally seeking information as to how the decision came to be made. In general terms, it also pointed out that, without examination, there may be similar other controversial outcomes to the process in other areas which needed to be brought to the Parliament's attention. That is what we are talking about today and in connection with that, can you make an opening statement please?

Mr Johnson: Firstly, by way of introduction, I am town planner with some 32 years of experience. I am currently President of the Planning Institute of Australia, WA division. I am a fellow of the institute and I have had extensive experience in state and local government and private practice. For seven years I was the CEO of the City of Wanneroo, so I know local government and planning very well. I have been a presiding member of the Metro Central Joint Development Assessment Panel since its formation in the middle of 2011 when DAPs were first established, and I have had

that role. There are three specialist DAP members and two elected members on each DAP. There are 15 DAPs, and the central one takes a number of the councils in the central part of Perth. The other members are Mr Ian Hocking, who has more experience than I have—he is a very senior architect and heritage consultant and planner—and Mr Luigi D'Alessandro, who is also a very experienced ex-public servant and architect, and also a consultant in a number of areas. It is probably the most experienced DAP in the whole system. It is very strong and those have been consistent members of this panel. If there are no questions about the issue of DAPs for a start, I will just go through the history of this project very quickly to give you a thumbnail sketch. I have provided you with a one-page brief history of the application.

The site was rezoned finally in October 2012. It is quite a large site, some 6 052 square metres. It was zoned from private recreation to R40 residential. It is a very significant site and there are not many of that size that are zoned R40 anywhere. In February 2013, a development application was lodged for a four-storey residential development on the site with 87 dwellings. That application was subject to the first public consultation process, and you understand of course that the DAP sits in the role of council for applications over $7 million, and I think this one had at least a $10 million value—it is optional from $3 million to $7 million. Assessment work is done and it is looked at, advertised and consulted and a report is prepared as it would be for a council but it is prepared for the DAP. The council, the City of Melville staff, held the first public consultation. They also referred it to their design review panel and their independent peer review. Modifications were made and a second advertising occurred during 2013. On 5 August 2013, the community held a special electors meeting to oppose the development and the council also resolved to oppose the development. Understanding that the role of administration, or called the responsible authority report, is the administration; it is not a report of the council, it is quite separate. The council can have an opinion, but the report or the planning assessment for the DAP is prepared by administration and is to be quite separate from any council resolution. That responsible authority report was put out on 30 August 2013. It recommended refusal of the proposal because of an overdevelopment of the four-storey development with the surrounding R20 area. The Metro Central JDAP met on 10 September 2013 and refused that application based on the recommendation of the administration of the City of Melville.

The CHAIRMAN: Can I just ask you a question to clarify a point you just made that the responsible authority report is prepared by the professional officers in the council regardless of what decision might be made by council as to whether or not we like it.

Mr Johnson: Yes, that is the theory of it; that is what should happen. There is a practice, which is reasonably common, that officers advise councils of what their recommendations are. I have heard of instances where those recommendations put enormous pressure on officers to comply with what the council might like, and that council is often reflecting the community's concerns and issues. So you do get the situation where officers at councils are under extreme pressure to follow what a council might do: under the old system, of course, the council can make the decision whereas the DAP makes that decision for council.

[10.30 am]

The CHAIRMAN: Would it be correct for me then to conclude that the responsible authority report presented to the JDAP was a professional and objective report rather than a subjective political report?

Mr Johnson: My view is that the very professional staff, notwithstanding that pressure, are obviously in any situation aware of what councillors and the community are thinking, and it is quite appropriate that they take on and understand what the issues are and interpret those and make recommendations. The first one was clearly the professional opinion, and JDAP on 10 September supported the recommendations unanimously and refused the development as being an overdevelopment of the site in the context of a lower-density residential area around it.

This application is one that is a discretionary nature; it is not a yes/no answer. Any use of discretion by a JDAP or a council for that matter allows the applicant to lodge an appeal with the State Administrative Tribunal, and that is what happened this this case. That appeal was lodged. The SAT sits and has preliminary hearings, and then there is a process of negotiation or what they call mediation that usually occurs. The first one is a directions hearing, and I attended that along with two officers from the City of Melville. I had requested that those officers attend, as I customarily do, to support the JDAP. The appeal is against JDAP, not the council. Just for a point for the Chair, the normal procedures of the SAT process means that mediation discussions are usually treated in confidence because they may be subject to further SAT hearings, which need to see the things from afresh from the start. If you are saying to me that I should talk about what happened at that mediation, I am happy to do so because it is relevant here, but noting that the normal procedures of SAT would say that I am bound not to talk about those mediation procedures because the following may be used in determining the matter. We have now passed the point and the decision has been made but I am happy to talk if you say that that is appropriate.

The CHAIRMAN: The committee appreciates that the proceedings of mediation at the SAT are conducted in the first instance in camera, and that the deliberations of the discussions that occur in camera are held to be confidential. Are you suggesting now that because of the fluxion of time and subsequent events that that confidentiality does not apply or are you simply deferring to a parliamentary committee?

Mr Johnson: I am not experienced enough in that situation to say whether it does. I am quite happy to give a very quick précis of how the process of mediation worked in this case without necessarily saying who said what if that would be suitable, and I do not think that that would get me in a lot of the trouble with SAT.

The CHAIRMAN: These are privileged proceedings but, at the same time, it was our intention that you could provide us advice along the generalised matter of what you have described.

Mr Johnson: I am happy to do that Chair.

The CHAIRMAN: We are certainly not inquiring at this stage about who said what or any of that sort of deliberation, but if you could help to guide us through because one of the problems identified by some of the many submissions that we have received is the fact that these things are secret and the outcomes unsatisfactory in the minds of many local residents and they do not know how the decisions were arrived at. If you could help us with that it would be appreciated.

Mr Johnson: I am happy to do that. In the mediation process it is just that and it has no sort of standing if the matter then goes to the full hearing of SAT, which would start it again. What SAT usually tries to do is to get a mediated solution and it uses what it calls section 31 of the SAT regulations to have the matter reconsidered by the appropriate decision-making body, whether it is a council or a DAP, if there has been through the mediation process a reconsideration of the matter or a revision of plans. In this instance also attending was the State Solicitor's Office. What happens generally in mediation is that parties agree on what is to be mediated in terms of the key issues. This one was based with the agreement of all those concerned on 11 points that were included in the responsible officer's report from the City of Melville to the September refusal. In refusing it, the city said that this development could be considered further if 11 things were done. The most critical of those—the first one—was that the height and the setback of the upper levels should be reduced. A number of other ones dealt with the design. It was agreed with the officers of the City of Melville in attendance that those 11 points would be the basis of the mediation, and they are in the report. I have not provided them to you but I did bring a thumb drive of all the reports and all that —

The CHAIRMAN: If we need to follow that up separately we will do so. We received evidence from the City of Melville just last week about the 11 points of consideration, so we are familiar with what you are talking about.

Mr Johnson: That was the basis of the discussions at the mediation. The applicant took those on board and I think had already started to redesign the development. I think there were something like three different mediation sessions over December and January. The applicant had proposed changes to the development, which might make it more acceptable. The height was reduced from 13.6 metres down to between 10.05 to 11.1 metres, the plot ratio was reduced from 1.359 to 1.28, and the number of units was slightly reduced from 87 to 84. There was an increased setback of the upper floor levels, and obviously it had gone from being a four-storey building to a three-storey building because they had effectively put parking underground instead of at grade, and that was one of the big issues.

[10.40 am]

There were a number of design issues about how the development would present to the street and how visually it would look from the street. So, in the first point, the city was saying—in the first of the 11 mediation points—that visually from the street it should read as a two-storey building, with the third storey being set back so it was not visible—was in the background. So that is a common thing—to try and mediate. The position of course is that is making it more look like a townhouse form of development, notwithstanding this is a large development on a large site. I am not saying that. Ground-level dwellings were inserted to help address the street and more and better articulation of the building of the forms. These were some of the things in those 11 points.

So that mediation got to the stage where the SAT people, and with my agreement and the acknowledgement of the staff, that the matter could be subject to a section 31 reconsideration. The alternative here would have been to say we are not prepared to mediate, or we do not think this is going to be acceptable. In accepting a section 31, you are not committing yourself to support it. You are just saying this is worth reconsidering. The alternate of course is it goes to a full SAT hearing, and that is of course a situation where it is argued out by lawyers, professional planners and the JDAP is represented. The advantage of having a section 31 is that you can take it back, and again in public have people make submissions. The time frame was not such that the city could readvertise it. But it was an opportunity for the groups who had been very prominent, and I certainly acknowledge that the people who were very concerned—the residents and the action group—had a very professional presentation at the first JDAP meeting in September, and they again presented when this matter went back to the JDAP.

After the hearing, where I was involved with the officers, I received a phone call from the city council's chief planner, who advised me that notwithstanding the mediation process, that they were still going to not support the application. I said to them that that is his right. I was not going to try and dissuade them. and they were free in my view to be able to do that—that notwithstanding the mediation, if they still do not professionally believe that it is appropriate, then I believe that they should be able to make that recommendation.

The CHAIRMAN: But why did they make that recommendation—for what reasons?

Mr Johnson: The reasons given in the report for refusing it was not withstanding—and you need to read the actual RAR report that was released in February and went to the March 10 meeting of the JDAP—that 11 points went through the changes to the plan, talked about the mediation impacts that the proposal had, talked about how it complied with almost all of the provisions of the R code—overlooking, shadows, all of those—but looked at and they argued that there were two issues still to be resolved. Those were the plot ratio and the height. They point out, of course, then you need to understand that in the R codes, there are two ways of doing things. One is called "deemed to comply". Deemed to comply provisions are the standard sort of—that is what is in the R code. But there are also performance ones where an application by its merit is arguing that it can vary the plot ratio and height.

Now, I prepared for you a table. Just firstly, the building heights—it is the last one in the table—deemed to comply were nine metres and the proposal was 10.05 to 11.1. It is built in modules

across the site, and so there is a difference—there are five modules, because they are going to build it in stages, I think. So there was a variation being sought, still, and opposed by the city, in terms of height from nine metres to 10.5, so it is a variation of 1.05 to about 2.1 metres. And the second element, of course, is the significant plot ratio variation, which was .0.6 is the deemed to comply, which would generate about 3 631 metre square versus the proposal, which was 1.28, or a larger 7 000 square metres. The point of this chart is just to express that in all our experience with dealing with R codes—and this is really post the multi-unit residential code changes that came out in 2011. So those multi-unit codes changes really have recalibrated, if you like, because they really did from the R30 zone up remove the traditional way of thinking of 30 dwellings per hectare. In most cases you were getting almost two or more additional dwellings. So if you are dealing with different sites, you would see almost a doubling in the number of dwellings, because the government was looking for to promote multi-unit development, whereas the residents—and this is not just in this case—generally would rather have a grouped housing development at an R40 or an R30. The government's R code amendments were to promote multi-unit development, and indeed they also include provisions which encourage a broader mixture of units, and particularly encouraging percentages of smaller units to meet the future demand, living changes, affordability issues for housing. So what has happened is just about all of the applications that I have seen since then have been on performance basis; in other words, they are seeking variations to the deemed to comply. Many of those variations—and this table is from the City of Melville's applications, and it shows how those have been varied. Usually, or mostly, with one other exception, they were on the recommendation of council administration. So it is not a question of whether, you know, there is a trigger that says that deemed to comply is the legal situation. The practice has become in recent years that this performance base and the variation of the plot ratio and the height is the standard way of doing business, particularly in councils like the City of Melville, which does have general discretionary provisions in their scheme to vary things. Some councils have blanket height controls which would override the R codes. This council does not. This council in bringing in the R40 coding on this area, although I think they did do some concept designs, there were no real strong guidelines, and that is probably a weakness for this particular site, since it is so big. Because of its size, it is able to carry the plot ratio additions and the height variations by setting things back. A small site—R40—is very much harder to do this. This is 6 000 square metres. This is a large site. So that is why that has been looked at. so the argument that the issue is that we should not be varying plot ratios or heights, the evidence is that, yes, that is becoming very much the standard practice, based on the arguments about the quality of the design of the development.

[10.50 am]

The CHAIRMAN: Would it be the case, Mr Johnson, that if you have a deemed-to-comply building height, for example, of nine metres, then that is definite; you are either at or below nine metres or you are not, and it is as clear-cut as that? But if you are looking at alternatives, which you are telling us are becoming commonplace, is that a little bit more subjective?

Mr Johnson: It is certainly subject to professional assessment about quality of design and whether that additional development generates adverse amenity impacts or has benefits that the community could say, at one level, that this number of dwellings here—a unit development—is beneficial to the city. The City of Melville, through a macro plan, did an intergenerational study which said that they need to have a lot more housing choice; they need unit development, and that unit development generally should be in areas where people have had their housing so that they can stay in similar communities. The argument is still: is this site, which is an R40 site with an R20 area, the right place for that? With those sorts of assessments, more and more we are seeing professional design advisory panels and professional peer reviews. This one had been through a couple of design advisory panels and peer reviews. In general, those peer reviews and design advisory panels are advising council that it is really density by design. It is about how you deal with the interface with the street and the interface with the neighbours; it is not just about a numbers game or a height.

That is the debate. It is interesting that in the government's phase 2 planning reforms, they are talking about the role of professional design advisory panels to support the opinions of professional staff in planning. Planners, traditionally, look at the regulations, the professional designing advice people at the urban designers or architects who are looking at the design of the building. The question is: we need to be very careful about how that building fits into its streetscape.

Hon PAUL BROWN: Mr Johnson, what I am gaining from this last bit of the conversation is, for me, what is the point of R-codes and town planning laws if you can use your performance basis for applications and developers can then use that and use SAT as an end run around these? So the JDAP decision is refusal; they move on knowing full well that they will go to SAT. I am not too sure, and you may be able to enlighten us on what the developer's reason was for going to SAT; they would have had to highlight a reason for the appeal. But it seems quite obvious through this discussion we are having that R-codes and town planning by-laws have no relevance or meaning any more. Particularly here with R40, you are looking at 40 residential units per hectare. This is a 6 000 square metres, so 0.6 of a hectare, and here we are allowing 84 units. That is in excess of 100 per cent on top of what the R-codes allow for and the height—nine metres to 11.1 metres—is 23 per cent above what the council deems to comply.

Mr Johnson: Firstly, it is not the council's; it is the R-codes. The council has previously approved a number and support JDAP in variations to R-codes and block ratios. To make a comment about the role of the R-codes, the R-codes were developed in the days when we were still really dealing with suburban development, and they worked fine for single detached residential areas. We are still learning as a society to deal with density. So, it is not surprising when the multi-unit codes came in that they should, in my view, be continually reviewed, and the Planning Institute, which I am president of, has been trying to have this go on. You might notice recently that they have proposed amendments to the R-codes. They were affecting the R30 and R35 coding to introduce site coverage issues again, which would, in effect, provide less of an incentive to do multi-unit development and make it, I think, more interesting for group housing development. They have not proposed changes to the R40 codes. There are at least two councils that I know of who are seeking amendments to their planning schemes to remove multi-unit development from the R40 code. That is the City of Stirling, and I think the City of Vincent is also trying to do that. So there is a need, in my view—and I am talking about my professional views as president of the Planning Institute—to have a serious look at how the multi-unit codes are working. To me, we really have to look at the quality of development and we need to help educate the community and educate local government and ourselves about what is good design, because I am still a believer that it is about the design and its impact, not about strict numbers. Those strict numbers were set at a point. When they amended the R-codes over the years, they deliberately introduced this performance measure. If you wanted to take that back to what it used to be, it was about deem to comply; that was the rule. People then said, "Is that a good design outcome just to do that?" So, you are always dealing with this conflict between flexibility to encourage good design and good planning outcomes versus certainty in planning, and that is the debate. The issue is: how do you deal with design that is challenging what your accepted rules were? But they are not set in stone. There is a requirement under the planning legislation to consider applications on their merits, and it is wrong for DAPs or for a council to say, "Because this doesn't deem to comply, we should refuse it." You have to say, "Is there a reason or a way that that can be considered?" You have to look at the discretion you have, otherwise you are really pre-judging it.

The CHAIRMAN: Mr Johnson, thanks for that. We are all learning a bit more about R-codes. They are a bit different to what we all thought they were.

Mr Johnson: They are changing.

The CHAIRMAN: They are changing. Just for the record, too, the table you were quoting from is headed "Examples of the application of discretion on building height and plot ratios in the City of

Melville". We will take that on board as tabled. When this matter was raised with us by the petitioners and referred from the house, we looked at it at first glance, and what we saw was a proposed development, which seemed to us, as it seemed to the petitioners, to be at least incongruous at face value. You have an R40 zoning, which we thought meant something, though we have learnt more recently that that is evolving into something else. And we looked at the area in Kitchener Road, and contemplated this building. We have even had someone send us an artist's impression of a 3D model. The thing that strikes one about it is its bulk. As you acknowledge, it is a big site and the building takes up a large part of the site. So its issues are its height, its bulk, overshadowing and overlooking and all the rest of it, and a lot of that you have acknowledged. It does at first glance seem out of step, or out of harmony, with the nature of the district that everyone around it has been living in. Could you reflect on that observation?

[11.00 am]

Mr Johnson: Certainly that was the view of the JDAP on the first application. The revised proposals had addressed the issues that the city had asked to address in terms of the amelioration of those impacts.

The CHAIRMAN: But not, I do not think, the height or the plot ratio.

Mr Johnson: They said that the height could be dealt with if the upper level was set back, and that is in their report. Notwithstanding that, and they did not in those 11 points that became mediation really refer to the issue of plot ratio; it was all about design. So, the application that came before the JDAP on 10 March was for a revised application, and it went before the JDAP. It was voted for 4–1 on the basis that it had met the requirements—the design schedules that were sought in the RAR. Also the modified application had a number of conditions, and there were some final adjustments to it. It would not in our view—everyone has a view; this is the black-and-white stuff, this is opinions—and you have three professionals on a panel, two elected members and four of those people, one elected member and three of the specialists, decided that the development, as it was modified, could be supported. So, that is where that got to in terms of its decision-making. The development in my view with the modifications is acceptable. Absolutely it is certainly not desirable from what the community wanted. The community in their verbal evidence to me said that they were understanding and their preference was for more of a group housing development. But I am not there to look at what the preferred might be; I have to decide and the panel has to decide whether this development is acceptable.

The CHAIRMAN: How much weight are you permitted or inclined to give to local opinion in these matters?

Mr Johnson: As a general principle—and the guidelines would say the way we operate—planning is not a referendum, but you have to consider all the evidence before you. The submissions that were made and the reasons for opposing the development were varied from, you know, this will affect our property values to, you know, noise, traffic, visual impacts—a whole lot of reasons—through to issues that have been raised by administration, issues that have been raised by the developer, who also has a right to be heard. And DAP on both occasions heard presentations, very passionate presentations, from the residents, and we also heard from the evidence of the staff, the evidence of the developer. At the end of the day, our role was to make a decision. The alternate was to send it back to SAT and to have it determined by SAT.

The CHAIRMAN: And that process would have led to SAT saying, "Here's what is allowed or what is not allowed"?

Mr Johnson: "This is what we are going to do", and that would have been decided instead of, you know, the public having some more say in this, and it would have been decided by a panel and it would have been decided on the arguments of lawyers and planners. That is how it would be decided. So, you know, I can understand fully that the community does not support this proposal,

and does not think it is appropriate. My lessons from this—I was advising the City of Melville—was that particularly with a site of this size just relying on your R40 coding of the area, without having what I call a detailed area plan, a policy statement, a guideline specifically tied to their scheme, about how that site should be developed, is leaving yourself open to a developer to come and push the boundaries. There is plenty of evidence, as I have given you in this table, of how developers will try to push the boundaries—argue the design. This is where the public particularly needs to focus, I think, on setting the right policy frames for this—for the city to introduce in provisions that deal with this up-front so that everyone understands the ground rules.

The CHAIRMAN: It would appear from what we have observed—I know my colleagues have some questions they want to ask—that the community generally thought they had those certainties with the processes that you have described but are also pointing out that they are now subject to ongoing evolution. I have just got one question before I ask Hon Stephen Dawson to ask some questions. I put to you the prospect that in the interests of flexibility and creative design and so on, which is all very commendable, it seems that the discretion that is available to those approving developments seems to be increasingly, if not exclusively, being exercised in favour of the applicant who, by definition, is trying to maximise their return and the intensity of their development. Is that a fair observation? Could I ask you to comment?

Mr Johnson: I can just talk about my experiences. I have been in SAT on five occasions representing DAP. The most recent one was because I voted in a split vote 3–2. I voted with the local council to refuse a Dan Murphy's on the Como Hotel site based on the evidence about the application, which was issues of traffic, issues of parking, issues of design. So it is not probably fair to say that we are always going with the applicants. But this is an area where I think there needs to be a stronger emphasis on professional design advice through design advisory panels. I am a champion of those. I chair the City of Subiaco's design advisory panel, and I think that design advice is important, particularly where you are looking at the use of discretionary provisions. At the end of the day, I am also a champion of local government and I believe that they should be making decisions on development. I have, however, participated in the DAP process because I have accepted that role because I think it is important that people with experience take on that role. Sometimes it is hard. Yes, on a number of occasions we have made decisions that have upset local communities based on the evidence we have in front of us.

The CHAIRMAN: Do you ever have some feeling for the local councillors who find themselves as members of DAPs, and the conflict that they must encounter in a way?

Mr Johnson: Absolutely. Firstly, it is very hard for an elected member. You have to acknowledge that an elected member has its role as a councillor as well as a quasi-judicial role in determining planning applications—and many councils now have the practice of referring DAP applications to them for consideration or advice, and councils make that. Often councillors find themselves attending those meetings and there is a guideline—I think it is number 6—that sort of tries to give advice to elected members to say to them in the first instance the government's or the Department of Planning's preference is that they do not attend council meetings where they are put into this role of then, you know, having to vote on it at a council meeting and then having to determine it from the DAP point of view.

[11.10 am]

There are clauses or declarations of interest that have been drafted for elected members that try to deal with that situation, and in this case, one of the elected members who was on the panel had been at that council meeting where they considered it. He made the declaration that he would consider this afresh on the merits of the night. When you consider it in council and then you go to a DAP meeting, there are people who would say, "Well, you've already predetermined your position", and the rule in planning is that you have to consider all of the evidence, including what you hear on the night, and not make a decision beforehand. In this case, it was very interesting; one of the

councillors from the City of Melville had not attended the council where they said it, but she did one of the bravest things I think I have ever seen in local government: she stood up for what she believed in as an individual and made her decision on the basis of her beliefs about the application. That got her some abuse at the meeting and got her quite a few emails and various websites and was subject to some discussions with the City of Melville, but that councillor, in my view, did what is required: she made the decision based on how she saw it. People may not agree with that, but that is how the process is supposed to work.

Hon STEPHEN DAWSON: Mr Johnson, obviously many local residents feel frustrated by this project, and I think many local residents, with the benefit of hindsight, would have preferred SAT to look at this issue, and they might have felt that they would have had a better hearing. Some of the concerns I have heard raised in relation to the DAP process are around a perception of a lack of transparency or a lack of accountability. Can I ask you to comment on that?

Mr Johnson: Firstly I will say that I am not convinced that the SAT process would have got any better outcome; I am not convinced. The SAT would have seen that again, and the applicant would have been entitled to push for his original proposal, so the SAT —

Hon STEPHEN DAWSON: Let us park SAT for a moment; that was —

Mr Johnson: Yes, but you made the point, and I am just saying that I am not convinced, and I want you to be aware of that—that I do not think the outcome would have been any better for the community from the SAT process, because you lose control of conditions, the SAT makes it entirely its session, and it just uses purely legal.

Hon STEPHEN DAWSON: Let us park that for a minute, because I do not think many people who have raised this issue with me felt like they had any control over the issue anyway, so whether they would have had less or more control with SAT is a moot point, but let us leave that aside for a second. In relation to concerns about a lack of transparency and a lack of accountability around the DAP process can you comment on those? Is it a transparent process?

Mr Johnson: Yes, it works as a transparent process in terms that the administration of the city, whatever council it is, is responsible for undertaking the normal assessment processes, including consultation with the community, and they have to prepare the reports for the DAP. The DAP sits in the seat of council. So in my view, it is not less transparent than local government. The issues with DAPs, of course, are the time frames, particularly in the situation where there is a need to get through this additional process of getting it through that. I think that sometimes pressures the negotiation process, and I often and always agreed to extensions of time. My preference is for administration to work out these with the applicants before it comes to the DAP. You asked me before why the applicant appealed. The applicant said to me at the meeting where we made the decision that he was glad we had decided to go to appeal because he felt that they could not mediate anymore with council. They had tried; they had been through this mediation process. One of the options originally would have been for us to defer it and send it back to council for more decisions, but we felt that that application sitting before us was not acceptable and should have been refused, and that triggered the appeal. The transparency issue is there; the difference is that, unlike a council, it does not have things like question time. It operates under its own rules, which are quite strict. There are opportunities for deputations; usually they are five minutes, and I make sure always that I give as many of those as possible in order for the panel to hear the views and not just read the reports. That is the system we have. Can it be improved? Perhaps there should be reviews of it, but it has provided a learning curve for everyone involved in the process.

Hon PAUL BROWN: Mr Johnson, if we go back to the process of the development being disallowed by the JDAP, the developers appeal it, and it then goes to SAT. SAT may or may not, depending on the application, determine to go to a full hearing or send it to negotiation or mediation. It then goes back to JDAP. Have you just illustrated the fact that JDAP probably feels a little bit compromised because there is likely to be the ability for that to be taken out of council's

hands or everybody's hands if it goes to SAT for a full hearing? It may well apply the original development application as opposed to a modification that you are considering. Do you feel compromised with that being able to be hung over your head? As you just illustrated, if it was chosen to go to a full decision of SAT, the original development application may stand. Does that not put JDAP in a compromised position?

Mr Johnson: It is no different from any council situation over my many years in local government, where an applicant is always trying to push that. In going to section 31, it does not mean that you have to accept that. It was always open for the JDAP to say, "No, we're still not happy." After the decision of the JDAP, it actually goes back to SAT and is ratified. The applicant can still appeal against that; if he does not like the conditions we have put on it or he is unsatisfied with the approval, he can still opt to take it to full SAT. After making the decision, we notify back to SAT that that is what we have done, and then SAT has another hearing where it decides whether the applicant is prepared to basically cease the process. The applicant has the right of appeal; we do not have in this state third party appeal rights. In a SAT hearing, traditionally there is very limited representation from the public unless it is agreed upon. It is argued out by lawyers, planners and architects in those situations. For that reason, I always prefer that it is a more open process for it to be determined, notwithstanding the decision by a council or a DAP under a section 31 reconsideration—at least that is in the public realm.

[11.20 am]

Hon PAUL BROWN: Can I put it to you that, not necessarily in your role as presiding officer for this JDAP, but in your role as president of planning and other experience that you have, are developers not just going to use these provisions, as we call them, as an end run? Put it this way: I am a developer; I want the development of X, but I know that if I ask for X plus a little bit more, it is going to be refused. It goes off to SAT, comes back to JDAP, and I know that by negotiating with JDAP and SAT, I am actually going to get the original position that I wanted. It will cost me a little bit of time and a little bit of money, but because I have added that little bit extra on for the refusal and have gone through the whole process of mediation, I will still get up what I wanted originally, but I will have used all the processes against everybody—town planning, the R-codes, the government, the local government—and I have still got my result and I am as happy as Larry.

Mr Johnson: That is not just a JDAP experience; that has happened in my local government career, I think, on several occasions, where I have formed the opinion that the developer is deliberately using those tactics. At the end of the day, I have a responsibility to consider the application before me on its merits and to say, "Is this application acceptable?" and to make a decision on that. That is the requirement because that is how the planning system works.

Hon PAUL BROWN: Some of the variations, though, in the percentages, are of between 40 dwellings per hectare and 80-odd dwellings per 0.6 of a hectare, or setbacks, or height, which in this case, in some parts, is 23 per cent. Do you think, as part of the discretionary powers, you should be given a limit as to how much of a discretionary power JDAPs have, whether it is five, 10 or 15 per cent, or do you think it should be open? Should it be up to the JDAP to make any determination it feels like?

Mr Johnson: Well, there certainly are people who would think that; I do not. I believe that it is up to the local governments and the communities to set up their policy frameworks and planning provisions to relate to their community. The fact is that most schemes in Western Australia, particularly in the metro area, are quite out of date and not oriented to really deal with the challenge of multi-unit development. I am a supporter of having multiple unit development in the right locations and with the right designs.

Hon PAUL BROWN: Could it be that the councils and their by-laws are just not up to the challenge of the developers?

Mr Johnson: Yes, I think that there is a need for recourse to things like design advisory panels and getting professional reviews and information and that having good, professional, well-trained staff is critical in this for councils to be able to make sensible decisions. I have seen over my career many councils that have made very poor decisions and have resulted in allowing developers to go through to appeal. On the other side, if councils do not take their responsibilities in planning seriously, then that is also an abuse of the system. When you make a planning decision, you are making it on behalf of the whole local government; it is not only on a ward basis or whatever, you are there to make it against the provisions. So when council refuses an application where it has been recommended for approval, often you are on a hiding to nothing with SAT and you would be better off to work out some decent conditions. One of the projects that we are working on from the planning institute is making bettered planning decisions. We need to work on training both elected members and planners, and working with what we need to show, which is really: what are good examples of inner city and how is it best dealt with, and what are the appropriate policies for local governments?

The CHAIRMAN: We have obtained most of the information we need; we have certainly exhausted our time, Mr Johnson, and we appreciate the benefit of your expertise and advice, but I must ask one more question—not in a hostile way, but as a devil's advocate. We have received correspondence from a number of quarters, including the Minister for Planning, who we asked to comment on this matter, concluding, in effect, that the City of Melville, even though they have opposed in their advice both iterations of the developer's proposal, is said to be at fault because they did not dot all the I's and cross all the t's in their planning by-laws, which has allowed this developer to exploit it. That seems particularly ironic, if the council says, "It's our view and it appears to be our community's view that we don't support this in this form because it's too big, it's too bulky and it's out of step with the local community", that it is in effect being told not only, "Sorry, that's not what's going to happen", but also, "It's your fault." That seems a bit incongruous; can I ask you to just reflect on that?

Mr Johnson: Hindsight is a wonderful thing. For the council, when it was rezoning this, looking at the scale of the site, if I was advising them, I would have said to them, "Don't just produce some concept ideas to show how this could be developed; produce some guidelines, produce some provisions which will deal with the context of this site, and make it clear to the applicant—the owner of the land—what the expectations of the council are", so that that would have been set out. One of the problems for the DAP was the 11 points of negotiation. The applicant knows when, with a fair degree of willingness, to accommodate those. Whether that was a deliberate ploy or not, I will not comment, but they had shown good faith in the negotiation process, in my view.

The CHAIRMAN: Finally, with the processes in connection with 94 Kitchener Road, where to now? Is it about to be developed? Are there other revenues that have to be exhausted by interested parties?

Mr Johnson: A development approval is normally subject to a two-year period. This one they sought and, I think, have got subdivision of it into five components, as I understand it. They intend to stage the development, I think; I do not know. In this process, when you think that there is going to be a situation where you may overturn what an administration is recommending, you ask for an alternative motion to approve it with conditions. Their recommendation, which was accepted under those conditions, was that this application has four years to be commenced. Normally it is two. There has not, to my knowledge, been a legal challenge about the legality of the decision that this development is a legal approval and has four years to be commenced. As a personal comment, I think it is a very difficult development to do and very expensive. Personally, I am not sure if that is going to be the final story here.

The CHAIRMAN: Thank you very much for that. I will just conclude by making an observation that you will be interested in and there may be observers of these proceedings who will be

interested. Yesterday it was accepted by the house on a motion without notice that the Parliament—that is, the Legislative Council—resolved to refer to one of our standing committees, the Standing Committee on Uniform Legislation and Statutes Review, the review into the planning and development assessment panels regulations 2011, required pursuant to section 171F of the Planning and Development Act 2005, with which you will be familiar, and required among other things for that committee to report to the Legislative Council on or before 14 May. In effect, that is, under section 171F, an inquiry, or a review, for a couple of years of the operation of the effectiveness of DAPs. That is coincidental to these proceedings and that is not this committee, but it is an item of interest, I am sure, to you and to those observing.

Mr Johnson: I certainly welcome that; I think it is a good thing and it should be done with all new legislation, obviously; it is in the provisions. I would like to see also another look at the multi-unit codes.

The CHAIRMAN: With that, we will draw these proceedings to a close and I thank you again for your participation and wish you a good day.

Hearing concluded 11.30 am

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