STANDING COMMITTEE ON
UNIFORM LEGISLATION AND STATUTES REVIEW

PLANNING AND DEVELOPMENT
(DEVELOPMENT ASSESSMENT PANELS) REGULATIONS 2011

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 29 JUNE 2015

SESSION THREE

Members

Hon Kate Doust (Chair)
Hon Brian Ellis (Deputy Chair)
Hon Mark Lewis
Hon Amber-Jade Sanderson

Hearing commenced at 3.39 pm

Mr NEIL FOLEY
Professor, Urban and Regional Planning, School of Earth and Environment, University of Western Australia, sworn and examined:

The CHAIR: Welcome to our committee hearings this afternoon.

Mr Foley: Thank you.

The CHAIR: Before we start, I will introduce the committee to you: Hon Amber-Jade Sanderson, Hon Brian Ellis, I am Kate Doust. This is Mr Alex Hickman, our research officer, and our fourth member is unfortunately unavailable today, Hon Mark Lewis. Before we start our questions, we are required to go through some formalities.

[Witness took the affirmation.]

The CHAIR: Please state the capacity in which you appear before the committee today?

Mr Foley: My capacity is as a teacher in the urban planning program at the University of Western Australia.

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

Mr Foley: 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 hearing for the record and please be aware of the microphones and try to talk into them and ensure you do not cover them with papers or make noise near 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 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 a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Those are the formalities out of the way.

Mr Foley: Thank you.

The CHAIR: We certainly appreciate you coming in. Since we have had this referral to the committee to inquire into the regulations for the DAPs, we have heard from a range of people involved, be they community members or participants on DAPs or various local governments, and we thought it would be really useful to have you come and talk to us as an expert or specialist in the planning area and that is why we have asked you here today. We have provided you with a list of questions. Perhaps we might work our way through those questions and if you are able to respond to those questions, that would be very helpful.

Mr Foley: Just as background, I think I might have explained before that between 2011 and 2013, I was a presiding member of the Metro South-West JDAP and the south west region JDAP in the first two teething years when they were being started.

The CHAIR: We might ask a couple of particular questions once we have got through these about your experience doing that. In terms of DAPs, generally, are you able to give your view on the operation and effectiveness of the Planning and Development (Development Assessment Panels) Regulations 2011, both generally and from your perspective as a former presiding member of two JDAPs?

Mr Foley: I did not renominate after the two years because I did not think I was adding much value. On the two panels that I was involved in, I think I was involved in 25 meetings—I had a look on the website last night—and maybe about 35 applications were determined. We made hardly any changes to the RARs that the officers had written and the council members on them very rarely voted in the opposite direction. The main thing we did was to fix up conditions that were poorly worded. I think we went against the officers once when they proposed a deferral and we said, "Well, we've got to make a decision", so we approved it. Based on my experience, I could not see the need for them. I always had a feeling that we were delaying things that otherwise would have been done by officers under delegation quite often or by the council more expeditiously. I was only on there to make a difference and was not making much of a difference, so I did not bother to renominate. My two deputies on both of them did not renominate either for the same reason. Maybe it was the committees that we were on, although we did have the south west metropolitan, which had Fremantle down to Rockingham on it, but there were never any issues on it. Of all those meetings, we only had members of the public turn up once and that was only five members turned up and asked two questions and we determined the application. Nothing was controversial. We had one item worth $400 million. It was basically a big shed in the Kwinana industrial area, which had the environmental approvals all in place. I think the officer said, "Well, we might have even done this under delegation in a quicker time than what we dealt with it, or the council would have dealt with it more quickly." I had that feeling and I did not think we made a great deal of difference, except as I said, we might have improved some of the wording of the conditions, but no great difference. I guess that kind of sets the flavour of what I might say today.

The CHAIR: I think so. Do we move on and start to talk about the role of local councillors?

Mr Foley: Yes.

The CHAIR: Do you believe the role of elected councillors on DAPs has been clearly articulated, given they are required to make their own independent decision on the planning merits of an application as well as be representatives of the local government?

Mr Foley: I think it was very clear in the training because when we were first appointed, the 27 or 28 specialist members that were appointed had training sessions with the local government members as well. They were sometimes combined. I think there were 500-odd councillors who had to be trained because you had the two councillors, plus their deputies. They were trained. I am pretty sure I remember the point being made very clear that when you are on the DAP, you are a member of the DAP. You are wearing a DAP hat; you are not wearing a local government hat; you are not representing your constituents, you have got a different hat on in doing that. That was the philosophy and that was the whole point of the DAPs in the first place. Technical decision-making. The local government representatives were supposed input the local knowledge, not wearing a political hat. That is the idea; that was the concept of them. Whether that works, I guess it is pretty hard when you are a local member to wear that hat and also, even though you are not supposed to be, knowing that people will not like some of the decisions that you might be involved in. When you are on the DAP, if you have DAPs in the first place, they should be DAP members and the regulations probably need to be fixed up. There is a conflict. One says they are representatives of the local government, which could be read a number of ways.

The CHAIR: So, just tighten up the language?

Mr Foley: Tighten up the language I think. That is how they should be if you have DAPs but further down the line I might make some more comments about that.

The CHAIR: That is all right. The next area is looking at DAPs' decisions in secret. It has been put to our committee concerns about how the SAT processes are undertaken on a confidential basis and decision-making being undertaken by DAPs in closed meetings. Were there any decisions made in a closed meeting on the two JDAPs you presided over?

Mr Foley: There was a closed meeting. There were three SAT appeals in Cockburn by the same applicant regarding the same condition, which was to do with developer contributions. They did not particularly want to pay them. This was in October 2012. This was one of the first appeals that had come up, I guess, and I think it was regulation 18, if I recall correctly, that said that the respondent to a SAT appeal or review was the DAP itself. When it came up, I discussed this with the Department of Planning because they were keen that I give instructions to the State Solicitor's Office about certain things. I said, "Where's my power to do that, shouldn't it be the whole DAP, shouldn't we go back to a formal DAP meeting?" There was some resistance to having a DAP meeting to do that. In the end, I dealt directly with the State Solicitor's Office—the person dealing with the matter—and invited the City of Cockburn planning officers along to the mediation, so they were involved in the mediation and the State Solicitor's Office had not said that they could not be. The State Solicitor's Office came along with the planning officer from the Department of Planning, who would normally defend the appeal on behalf of the DAP and the City of Cockburn's planner came along with their lawyer, who happened to be Mr McLeod, who was just sitting here, and we did the mediation. Cockburn formally asked if they could intervene in the matter, which is a legal procedure. That had to be then determined so it went to a meeting because I insisted on it.

[3.50 pm]

The CHAIR: Was that a local government meeting or a DAP meeting?

Mr Foley: No, I insisted on having another DAP meeting so that we could formally make a decision because I did not think there was any delegation or ability of the presiding member to do that, so that decision was made. But those minutes are still confidential. I think subsequent to that, as I understand, the appellant withdrew, and so I cannot see why, after the confidentiality of it is over if there was any in the first place, that that could not be made a public document. That was my experience. In terms of when there is mediation and SAT refers a matter back to, normally, the local government or the WAPC, or in this case the DAP, I think that there is a requirement sometimes to have some confidentiality in terms of legal advice and in terms of what was said at the mediation, but it really needs to be open. If there is some proposed change to what was originally approved or determined by the DAP, it should be public. I was interested to hear Mr McLeod's comments earlier that the SAT had some recognition of that in terms of this confidentiality in mediation.

The CHAIR: So your view is that it should be open, regardless of whether it is a DAP meeting or a local government meeting?

Mr Foley: For both cases, or a WAPC —

The CHAIR: The mediation decision.

Mr Foley: When it is referred back under section 31, it should become open at that point.

The CHAIR: Thank you for that.

Another matter that has been raised with our committee is this issue around DAP members representing developers. We have been given evidence from some areas that DAP members have represented developers in applications for DAPs on which they sit, having been excused on that occasion from sitting on the DAP due to having a conflict of interest. It has been argued that this creates a negative community perception and that there should be a blanket ban on doing so in the area of the DAP they are appointed to. Have you got a view on that?

Mr Foley: I tend to agree that there should be some level of prohibition. Whether it is if you have acted for someone in the previous two years or some other time limit, perhaps you should not be on

the DAP. In 2009 I left government and became a planning consultant. I do not do work for private developers; I do work mainly for government and local government, so I never had the issue of that sort of conflict. But some others on the JDAPs I was involved in worked for planning consultancies and their firm might have had a previous involvement but they might not have had it. So should it be applied just to the person or should it apply to the firm? I think it should be the firm. That person on my JDAP did always declare an interest and did not participate or left the meeting or whatever.

The CHAIR: So what—on those occasions you would have had to get the proxy in for that person?

Mr Foley: Yes, or we just ran with four people. With all my panels the numbers did not matter because decisions were taken very collegiately.

The CHAIR: Have you any other questions?

Hon BRIAN ELLIS: It has come up on a number of times, but if you go through the normal process of declaring interest then there is no problem.

Mr Foley: No, although there is still that perception and people think: He has worked for him before —

Hon BRIAN ELLIS: It is a perception, yes, but legally no problem.

Mr Foley: Yes. The comment was made before that there is a very small pool of people to put on these, and it is true. One of my comments, which I might just mention now, which is not really in the questions, was about who can go on these. Regulation 36, which has just been deleted in the latest amendments, said that a local government employee for a district where the DAP is established could not go on a DAP, which I think was a good idea, but it has been taken out. But I know there have been local government employees who have been on DAPs—in fact, one is still on the DAP although he has finished with the local government now. There is nothing wrong with that. Regulation 31(6) says that local government and departmental members are not to be paid unless consented to by the minister. As I understand, the minister has taken advice from Premier and Cabinet or somewhere that it is not the right policy to pay local government employees or departmental members, although it is a disincentive, especially if meetings are at night. I think if they are after-hours—it is a matter for the minister, I guess, the way he administers the regulations—I would say it would be appropriate for local government employees to be paid. If they have to travel or it is on at night-time and they are on these DAPs, they should be paid. It would be great to have a lot more local government planners who have all this expertise. One might work in Kalamunda, but I do not see why they cannot be on a DAP that covers the Mandurah area. There is a huge amount of experience out there who deal with applications under delegation all the time. I took my students up to Joondalup council to watch a council meeting and meet the CEO and the senior planners two weeks ago, and they do a very high 90s per cent of applications under delegation, and most councils do. There are a few councils that give their officers less delegation. It is the same thing in the Department of Planning. I spent nearly 30 years there, I suppose, and I had the delegation to do lots of things, as many officers do. There is a lot of experience in there that is currently prohibited because regulation 35(2) says that, basically, an officer of DoP cannot be on them. I do not see a problem if there is an officer from the Department of Planning being on these things if it is not in the area they work; even if it is, I am not even sure that it matters because the officers at the DoP are determining these anyway under delegated authority, most of these. Before the DAPs came in, we were using the stamp to approve many things worth hundreds of millions of dollars sometimes. Very few things go to the Statutory Planning Committee of the commission; again, it is in the 90s per cent that are done under delegation. Departmental officers from the Department of Planning also sit on the statutory planning committees—the Statutory Planning Committee, the Peel Region Planning Committee and the South-West Region Planning Committee—that make statutory decisions under delegation from the WAPC, and they make the most important decisions. There are officers who sit on them and make decisions anyway; their officers are making decisions. There is no reason why they should not be on DAPs as well. If that

was all opened up, that would give a much bigger pool and, I think, a wider range of experience. If you look at the pool of people who are on the DAPs, they are mostly people with consultancy developer–type advocacy roles with developers. That is not always the case, there are a few that are not, but I think the majority are or used to be. So you do not have that what I would call the government or local government experience, enough of it anyway, that could be put in to widen it. That would be a suggestion—to change those particular regulations; to at least consider it.

Hon BRIAN ELLIS: It has been put to us also that some planning officers in local government are quite happy to see the development referred to DAPs because they have been overruled by their council and their advice.

Mr Foley: That is probably true. In the case of all the ones I have dealt with—35-odd—I think there are only a few exceptions where the councillor members of the DAPs went against the RAR recommendation. They might have helped us fiddle with some of the conditions to improve them, but nothing more than that. But I know there will be others who are in different areas on different DAPs where local communities want to be more involved or the issues, even if they are relatively small, might become controversial. My view is from experience in those two DAPs.

The CHAIR: Most of the DAPs meetings are held during the day?

Mr Foley: Most of them are. I think it was really left to the council to some extent. We tried to mimic the council, so Fremantle was always at six o'clock or seven o'clock in the evening because that is when they had theirs; in Cockburn quite often it was during the day. As I said, no-one ever turned up; no-one seemed to be interested, and we only had five people turn up to one meeting.

The CHAIR: I just ask because I have had discussions with some councillors and said, "Have you participated on the DAP?" They have said, "Oh no; we work full time and they are held during the week"—on a weekday during work hours—so they cannot do it. So it limits the number of councillors, even, who may be able to participate.

Mr Foley: There is no reason why they could not be in the evening. It was just deemed more convenient. I would have gone in the evening. There was a DAP secretary who tended to negotiate with the council, and then they set the time. It was what the council, I think, felt more comfortable with. That is my recollection.

[4.00 pm]

The CHAIR: Another area that has been raised with us has been around the DAP threshold. It has been put to us that some applicants artificially increase the amount for their application, simply to bypass the local government and go straight to the DAP. Do you have a view on that or have you seen that happen?

Mr Foley: I am pretty confident it happens. I remember seeing one for about $7.1 million, or was it $7 million? Anyway, it just met the threshold and I thought, "Well, that is a coincidence." I am sure it happens. I used to send a lot of emails and ask a lot of questions to the Department of Planning when they first started up because of my experience of having worked there for a long time and understanding the legislation, and legislation generally. One of the questions I asked was about that. I was advised to take it at face value; whatever is said, take it at face value. With all the other things I had to worry about, trying to work out how these new committees—they were brand-new committees and we were trying to work out how the regulations worked—I just left it at that. But I always had my doubts that sometimes the amounts given were probably not what the actual cost was. One way around it, and I know the developers would not like it, would be to say they have to provide a certificate from a quantity surveyor or an architect or something, saying that is their estimate of the value. It would still be an estimate, but it is an estimate from a professional. That might be a certificate that might cost the developer a couple of hundred dollars, or whatever it costs to get. The architects design the building; presumably they have looked up the quantities and whatever, so they must have a bit of an idea. Where they have to certify, that could be an option.

The CHAIR: Thank you for that. You have just answered the next question; that was very helpful. People have actually raised the idea of having an independent valuation done. There is also another issue around lack of reasons for failing to follow a responsible authority report. I think this probably comes back a little bit to the issues around information and communication. It has been put to the committee that there is not enough information for reasons being provided about why a refusal may have happened or, as we have heard earlier today, even for an approval. I do not know whether you have a view on those sorts of matters?

Mr Foley: Last night I looked up on the internet the minutes of the 20 meetings that I have been involved with for the Metro South-West JDAP, which involved about 25 applications and the five meetings that I have been involved in for the south west region. For all of them, I think, we had put reasons mentioning when we changed conditions, because all we did was fiddle with conditions on all of them except one. For all of them where we fiddled with conditions, we put the reasons. At that time there was no template for minutes. I am not sure if there is now, but if there is not there should be. We did not have a template back then, so the minutes were kind of made up the way the councils did them. If there is a template, it should have "Put reasons here" for whenever you amend a condition in the RAR report, or whether a refusal or an approval against an officer's recommendation is made. So I am not sure if there is, but —

The CHAIR: I think the regulations are quite clear about minutes. I am not too sure if there is a template provided, but we will have a look at that.

Mr Foley: That would be a way. There was only one for which, as I think I mentioned before, we did not put a reason and that was because we probably were overwhelmed because the officers had recommended a deferral. We had driven all the way down to Bunbury and we expected that they would have an alternate approval recommendation. In hindsight, I wish I had asked them to do it the day before to prepare them. We did not have conditions, so we spent a lot of the day preparing conditions. We spent about six hours in the meeting so I think at the end of it we must have been exhausted and we did not put reasons down. Although, it was an open, public meeting and I think anyone who had attended would have known what was going on. It would have been very clear. But I agree that for natural justice reasons there should be reasons given. If there are not any in the minutes, then it is possible for the presiding member to make a statement and explain the decision to the public afterwards and can put that out as a media release, or whatever, and that would probably be the right thing to do in that case. If anyone had asked, and the minutes had been already signed off, because they have to be signed off within 10 days by the presiding member, and it was too late to implement them, that would have been a way to achieve that transparency goal.

The CHAIR: Those meetings are not recorded, are they?

Mr Foley: I think they might be recorded for minute-taking purposes, but I do not think the recordings are kept. I am not 100 per cent sure on that.

Hon BRIAN ELLIS: It does look like it has moved on; I am just having a quick look at that regulation 44. The minute-taking is fairly comprehensively set out in a form —

Mr Foley: Does it say that reasons must be given?

Hon BRIAN ELLIS: Not so much on reasons, but the detail is in a form approved by the director general, but I suppose it is an interpretation by the chair as to how much detail.

Mr Foley: Yes. I would hope the director general has come up with a model layout for the minutes because I spent so much time correcting minutes, which was one of my bugbears about the whole process: because you went to different councils and you had a poor minute taker who had never done it before or might only go occasionally, the minute taker would forget what they did last time because it was three months later or something and there was not a template for them to do it in. We got it in all different forms. I think because local government was used to writing down reasons,

then they went in the minutes. So it was really local-government driven, because the local government minute taker was used to doing it for the council.

Hon AMBER-JADE SANDERSON: The JDAP does not have its own minute taker, or its own secretariat, if you like?

Mr Foley: The secretariat—there are half a dozen people who have got plenty to do, but they organise all the councils and the councils have to take the minutes. The council gets one of their officers—their minute takers—to take the minutes. Sometimes the minutes were poorly taken; sometimes they were brilliant. It depended on who did them. I remember once I spent four hours fixing up the minutes because I had to sign them off as presiding member. If there is not a template, hopefully the director general has created one that includes reasons, that would be —

Hon BRIAN ELLIS: It is five days now, too, that you have to get the minutes back.

Mr Foley: It is five days that the minutes have to come back. The council officer who takes the minutes has only five days to write up the minutes.

Hon BRIAN ELLIS: It should be fresh in their mind though.

Mr Foley: It should be, even with the tape, but it would send me crazy, sometimes; sometimes there were brilliant, as I say. So then I had five days to check them and sign them off. If I had to go back and forwards editing them, it was pretty tight. There is also the question that it is a bit unusual for the presiding member to sign off the minutes. I always found it curious that it did not go back to the next meeting to confirm the minutes. They just went back to the next meeting to note them. It could have been because they anticipated that the time lines between the various meetings might be quite long and therefore you wanted the minutes to be finalised pretty quickly.

The CHAIR: In case it had to be referred on to somewhere else?

Mr Foley: Yes. If it was a council meeting or a committee meeting, then normally they have it for two weeks or a month, so you know the regular times, but some of these DAPs might have met only once a year.

Hon BRIAN ELLIS: In your time, did you get any feedback about complaints about your minutes from your meetings?

Mr Foley: No, I did not get any. I am not saying they were perfect because they varied a little bit. I did put the point to the department that they needed to come up with a template. As I said, I hope they have got one now because they did not.

Hon BRIAN ELLIS: Maybe other Chairs are not as conscientious as you are?

Mr Foley: I had been in government for a long time. I knew that you had to do these things right.

The CHAIR: The next area that has been raised with us is about the exercise of discretionary powers. It has been put to the committee that people are concerned about the exercise of discretionary powers by DAPs, which have been described as being unfettered and without justification or scrutiny. A recommendation has been made to the committee that any exercise of discretion should be limited to variations of no greater than one R-code above that of the site in question, and that the DAP give reasons for its decision. Do you have a view on that generally?

[4.10 pm]

Mr Foley: It was always designed that the DAPs stand in the shoes of the decision-maker, being mostly the local government, but sometimes also the WAPC. So they stand in the shoes. They are subject to all of the legal requirements—the planning scheme requirements, whether they are discretionary or not; they are subject to all the policy framework; all the planning studies; they have to take all that into account. I cannot see that there is any reason to require DAPs to be restricted in any way, but it is really up to the DAPs to make sure that they have full regard to all the policies. One of the issues that I used to think to myself when I was doing this was that they are curious

animals, the DAPs, because they are all care and no responsibility. Normally, the WAPC or the local government that makes the decisions prepares the plans, the planning scheme, the policies that guide it and all of the other studies and background to it. They have been part of doing that. Once the decision is made, the WAPC and the local council also have to make sure the conditions are implemented properly and that the scheme is enforced. But the DAP just comes in, does not have any participation in making the planning documents or enforcing it later, and just makes the decision. This means that DAP members are probably not as well-informed; they do not have that feeling as much as those who have prepared them. Whether it is officers in the Department of Planning or in the local council who are doing these under delegated authority, or whether it is the councillors, that same connection with all the information, or understanding the information, is not going to be as great unless they are dealing with that local government scheme and policies all the time—very regularly. Then they may gain some expertise and feeling for it, but they are still not part of the preparation or the implementation, if you understand what I mean. So they are really curious in that regard, that other decision-makers are part of those processes at the beginning, before and after, where DAPs just come in and make the decision, and then are off.

The CHAIR: I was just thinking of the analogy of a teenage boy—all care and no responsibility. Concerns have also been raised with us that having DAPs in place may have actually caused some delays in planning processes. Given your experience, do you have a view on whether that is the case or not?

Mr Foley: From the applications I dealt with, that is one of the reasons, as I said, I did not renominate because I felt we were holding applicants up and their applications did not really need to go to a DAP. They would have been done under delegation by a WAPC officer if they were a WAPC decision, or probably a local council officer or, quickly anyway, by the committees of the WAPC or the local council. Quite often, I felt that we were taking longer than they would have taken if they had been done under the normal process.

The CHAIR: We have also had it put to us that some people have talked to us about incomplete applications being lodged by applicants as well as late plans being submitted close to the deadline for submission of the RAR, and also instances of applicants submitting new information at DAP meetings, copies of which have not been previously provided to the relevant local government. It has been stated that such practices place undue pressure on local government staff, resulting in delays in the process. Have you come across those types of examples when you were participating on the DAP?

Mr Foley: I always felt the 50 days was—that is in the regulations; in regulation 12, I think—very short. In most schemes, the region schemes and the local schemes, after 60 days, if the application is not determined, it is deemed to be refused. If the applicant wishes, they can take the matter to a review to the State Administrative Tribunal. That is the trigger, but they do not have to do that. They can still sit there and wait after the 60 days for the application to be determined; it is at their discretion if they want to wait longer. The 60 days should be designed for an average application but these are supposed to be more complicated, so the 60 days is a pretty tight time frame I think. But the regulations, which are independent of what is in the schemes, say that the RAR has to be presented within 50 days unless there is an extension. At the moment, regulation 12(4) says that to extend the period has to be done with the consent of the applicant, which to me should be deleted. It should be the presiding member who makes that judgement whether it needs to be extended or not. On a number of applications, because the RAR would be prepared—we would get it at day 50 or even day 55 or something—one of the regulations said there are five days in which to give notice of a meeting, so the five days' notice meant that we rarely got anything before the five days. So we only had five days to look at it and sometimes they were like 300 or 400 pages—so the members had that amount of time to look at them. I almost felt like at the meeting we will defer it or refuse it because there was not enough information or it was too rushed. Sometimes the applicant did agree and quite a few times I signed off. I would just generally agree to the extension if the applicant

agreed, but I do not think it should be at the applicant's consent. They should not be controlling that process. It should be taken out and a presiding member should make a judgement based on a letter or a report that the council officers would send in saying "these are the reasons we need this, this and this" and then the presiding member would make the decision without the consent of the applicant being required. So those words should be deleted in my view.

The CHAIR: We will take that on board.

Mr Foley: I think the stop the clock —

The CHAIR: That is one of the new regulations that have come in as of 1 May so we are interested in your view about that as well.

Mr Foley: I think it is a good idea because of the very short time frames, as I said. At the moment, the change that has been made allows more information to be asked for by the council officers within the first seven days because that is the way it looks like it reads to me. Maybe I am reading it wrong, but it seems to be only in the first seven days that they can ask for the—I cannot remember the regulation —

The CHAIR: Is this one of the new ones?

Mr Foley: Yes, one of the new ones that was put in. It reads when you read the regulations that it is only within that first seven days—when they receive it, they have seven days to refer it to the Department of Planning.

Hon BRIAN ELLIS: That is more than a week to do it.

Mr Foley: It just appears to be. If it is within that first seven days, that is the only chance they have to ask for the extra information. They have to put a lot of effort into looking at it —

The CHAIR: Is that too early?

Mr Foley: It is too early, yes. They should have the chance later on with —

The CHAIR: So perhaps have the chance at any stage during the process?

Mr Foley: I think so. With the agreement of the presiding members perhaps, because at day 30 or day 40 when they are really into assessing it, they realise they need more information and they cannot ask for it.

The CHAIR: So perhaps some more flexibility in that time —

Mr Foley: I think a bit more flexibility would be useful. The other thing about this is because they are given the 50 days, the pressure is on the council officers to—all of these DAP ones that come in have to be done in the 50 days. I wonder what it does to all the other applications that the council has to deal with. They probably get put on the backburner. They get less priority so it does impact on other applications that they have to deal with because they are spending all that time doing this. They are in such a hurry when, normally, you might say we will get to the other one first as that is as important or more important, but it is not in the DAP category so that has to go on the backburner while they deal with these ones in the 50 days. That is a bit of an issue I think. Anyway, the 50 days is very tight. It is obviously determined to try to meet that 60-day statutory requirement so that when you report on it, it looks like as many applications as possible have been dealt with within the 60-day target. There are performance standards and if you can do them within 60 days, you have met what the scheme says and therefore you have met your target or your benchmark that you should be aiming for.

The CHAIR: Have you got a view on the lowering of the opt-in threshold to $2 million?

[4.20 pm]

Mr Foley: I think it is way too low and I do not agree with opt-ins or opt-outs at all. If you have DAPs, the level should be increased to $20 million or maybe $30 million because they are the ones

that have real state significance and that the state should maybe be intervening in, if it needs to at all. With the opt-in or opt-out, from a public policy point of view, it seems a bit strange that we are handing the power over to the developer to choose a decision-maker. It is like shopping for who is going to approve your development. It just does not make sense to me. It should be all in and we should have a much higher threshold—$20 million or probably $30 million; pick a figure out of the air—but I think it is capturing way too many things at the moment. Local governments are capable of making these sorts of decisions. Some make not so good decisions but there is an appeal right to the tribunal and that normally sorts councils out pretty quickly if they do not deal with things properly or quickly enough.

The CHAIR: One of the other changes that has come in is the adjustment to the quorum requirement. The quorum has now been dropped to three members as long as one of those three members is a presiding officer, the chair, which means it can have a range of variations, of course. Do you have a view on that change?

Mr Foley: Yes. My immediate reaction is that it is not a good idea, but thinking about it, since there are two council reps and they both have backups, then councillors might actually be able to outnumber the specialists, because sometimes we could not get an alternate member to back us up, so we ran with two members anyway. Although the presiding member does have the casting vote, so I guess if there is two and two, the presiding member can override. I do not think it is as great an issue as I originally thought it would be. It would make the meetings more easily organisable, I suppose—if there is such a word. I am not as opposed to that on thinking about it.

I think there is a question you had about the shortlist working group?

The CHAIR: Yes, I did.

Mr Foley: Do you want to ask me?

The CHAIR: I am happy to ask you that. I have not asked everyone about that, but you probably would be able to provide us with a response. I understand that they have disbanded the shortlist working group, which was established to submit to the Minister for Planning shortlists of persons recommended for appointment as specialist members of DAPs. Is that a sensible decision to have made?

Mr Foley: I think the ministers and the government appoint various people to statutory boards and that normally happens once every two, three or four years and it is usually only a few, half a dozen members at most. These DAPs require a lot of members and there is quite often people coming in and going out, or a reasonable number anyway, and it is based on quite specific qualifications. So I think the shortlist working group was a good idea and I think it should be put back in because it does put some rigour into selecting members.

The CHAIR: If it does not exist, how will they select members now?

Mr Foley: The way that members of boards normally are, I suppose. Most of the time they ask for expressions of interest and then the ministers decide and take whatever advice is required. I think that is the normal way, because the legislation just says that the minister shall appoint or the Governor shall appoint in the case of other types of boards. I do not know why it was taken out. I think was quite a good idea to have it. All those people would have been subject to some confidentiality requirements, so I thought it was a good idea. There might be a reason that I do not know that was a good idea to take it out.

The CHAIR: Just reaching the conclusion to our questions, is there anything else that you can think of that you would recommend to change the regulations for DAPs?

Mr Foley: I think you asked me at question 15 about the comment in the paper that I wrote with Dr Paul Maginn in 2014 entitled "From a centralised to a diffused centralised planning system: planning reforms in Western Australia" in *Australian Planner*. We said in that paper that WA

already had pre-existing structures in the WA Statutory Planning Committee and the South-West Region Planning Committee that met the tests of being technical, consistent and reliable in their decision-making. Those committees could easily morph into DAPs by simply adding two local council representatives into proceedings either in person or by teleconference. I still think that should be the way of the reform of the DAPs if you are going to keep them at all.

I think you have asked me to give a quick outline; I will make it real quick. As the paper really said, WA is different from the rest of Australia; we already had a very centralised planning system. Going back to 1929, we had the Town Planning Board with centralised subdivision control and it recommended local planning schemes to the minister. In 1959–63, region schemes were introduced where a department within the state dealt with planning and development control at the state level. We have committees at the moment—those committees I just mentioned: the Statutory Planning Committee, the Peel Region Planning Committee and the South-West Region Planning Committee—which if you look at them, they are DAPs. The membership is made up of technical decision-making bodies' members and they have local government representation on them. They have everything in them. Having one body or a few bodies making these decisions, rather than the number they have got now, that would consider these applications all the time, they would become much more expert in them. Those people already understand how to make planning decisions and what the planning policies are, because most of them have been on those committees for a while. They include planners who are public servants as well. Members of the Department of Planning are on there and local government reps—if you look at the representatives on the website. They would have a lot of advantages because—I have some comments somewhere. As I said, they would gather that knowledge.

One of the things that really concerned me about the whole introduction of the DAPs was that they wiped out the WAPC's decision-making. So the state has handed over its powers to the 15 DAPs. And even if they are reduced, they are still DAPs, they are not part of the state. That would basically bring the control back to the state. I had a quick look at Part 11A which is the DAPs provision in the act and I think that the DAPs could be reformed into what I have just described, those committees with two council members at the end of them, either by teleconference and then the meeting would be opened up to the public. The beauty would be that the administration could all be centralised with the Department of Planning and the minute taking would all be totally consistent because they are geared up for it and it would be happening all the time. If you increase the threshold to a higher level, you would not get the 300-odd that you are starting to get now per year. You might get 100 per year if you increased it to $20 million, and they could be done at the end of each meeting and it would be a much better system.

But my preferred model would be to delete Part 11A totally and insert a new section enabling the WAPC to call in development applications that were of state or regional significance or it was in the public interest for the WAPC to determine it considered it was. That is a delegation that is in under the metropolitan region scheme, the greater Bunbury region scheme and the Peel region scheme. Those delegations are in place anyway because on zoned land, the WAPC has delegated most powers to the local councils, but it can call certain classes of applications in if it wants to. There are general delegations that say that; that the WAPC can call in applications of state or regional significance or where it considers it is in the public interest to do so to call them in. Local governments can also refer the decisions under the region schemes to the WAPC, because in that situation there are two decisions. There is one under the local government scheme on zoned land in region schemes and there is one under the region scheme. Normally, when you get a letter from the council saying that on zoned land that there has been an approval, it is actually a decision under both schemes, but usually it does not say that.

[4.30 pm]

When land is reserved in those schemes, for say future regional public open space or for a major road or a new railway line, the WAPC makes the sole decision. One of the issues that makes for me is that the DAPs are making decisions for the WAPC on reserved land and for councils if it is reserved land under schemes. When there is reserved land, if there is a refusal or conditions are put on that the applicant is not happy with and they prove injurious affection, the WAPC or the local government have to pay compensation. Really, another change, which has just come to mind, would be wherever land is reserved in a scheme, be it a local planning scheme or a region planning scheme, then the DAPs do not make the decision. They should be excluded from making those decisions where land is reserved. Does that make sense?

The CHAIR: Sure. Would that apply in the case of land that Homeswest has reserved?

Mr Foley: No. By reserve, I mean it is a planning reserve. There is a crown reserve, which is a form of land tenure, and there is a planning reserve. So, planning schemes reserve lands for a future public purpose or zone land for, basically, mainly private development. Where land is reserved in a region scheme, it is automatically reserved in the local scheme and the WAPC has total 100 per cent development control. Where land is zoned, then there are two decisions: one under the region scheme and one under the local planning scheme. The WAPC has delegated most of those decisions to the local council, so when they make the decision on zoned land, it is actually a decision under two schemes. But, I think, for the DAPs to be making decisions on reserved land is inappropriate. An example of that is in December 2011, with the JDAP that deals with Subiaco. There is a bit of land at the corner of Bagot Road and Railway Road, next to King Edward hospital. It was reserved since 1963 in the original metropolitan region scheme, which went through the Parliament and was not disallowed, so the Parliament agreed to that being reserved for a future expansion; it was reserved for public purposes–hospital, in the metropolitan region scheme. The JDAP said no because it was reserved and you needed to go through a rezoning process to urban in the metropolitan region scheme. It went to the tribunal and they must have mediated it out and, in the end, the JDAP approved an office block on this reserved land; it covers the whole lot—if you drive past, you can see it.

The CHAIR: Yes, I know it.

Mr Foley: That was approved, but the land has been reserved. Parliament effectively agreed to it being reserved and I would have thought it should have gone through a scheme amendment first. It is not just for a process reason, but I think the local people missed out on the opportunity to comment on what sort of uses should go on that land, because the council opposed that, but it was still approved. That should have gone through the urban rezoning process, because when it is rezoned from a reserve to urban zone, then the Planning and Development Act says that the local scheme has to be brought into consistency. So they are bound to, within 90 days, initiate an amendment to their scheme; so they would have had to then rezone it. It would have been up to them to decide what they wanted to put on that. Was office the right use? I do not know, and possibly residential would have been a better use. So, the local community missed out on the opportunity to make a comment on that because the decision was made. Now, the WAPC may have made the same decision; I do not know. The point was it was not the WAPC making it either, I guess. That was another reason why I think WAPC should be making those decisions, because if it had been refused, there might have been a compensation claim against the WAPC by the DAP. And, really, for the WAPC to be refusing those sorts of things, it then should be taking on that responsibility. If the WAPC has the call-in ability you might get, where it is of state or region significance, 20 a year that are truly of state or regional significance—when they do, they have to publish their decisions. Each year, they would write a report and part of that annual report would include all the ones that were called in and the reasons why they were called in and the outcomes, so there would be that sort of public transparency and also reporting to Parliament, in effect. That would be the best model for me, and combined with that, though, would be a lot of training for councils and council planning officers to improve the standard overall. Some councils are really

good and some council officers are really good, but it does vary a lot. One of the best things that came out of this DAP process was the training manual, which is very, very good. It shows how to write a planning condition and how to apply policy. That sort of training should be done with all councillors and all planning officers as well. When I used to have my meetings, I used to always emphasise when the conditions that were not done that well came in, I would say, "Well, do you want to read those particular sections of the DAP training manual again?" As I said earlier, one of the things that came out of this whole process, for me, was making conditions better. That is about the only added value that I can see we had. We might have improved conditions. It did not make a great deal of difference to the world, but at least the conditions were worded better, were binding and were properly worded and that, hopefully, they made the application work a little bit better. I did suggest to the former director general of the Department of Planning in about January 2012, about six months after DAPs had started, that that was my main finding, and a good idea from the department's point of view would be to come up with some model conditions, get one officer set aside for three months to go and talk to all the councils, ask them to send in all their standard conditions—councils have lots of different standard conditions; they are all differently worded and sometimes they make up their own—get all those conditions, put them together, pick out the top hundred, group them together in little themes and then get them checked by the internal lawyer, send them off to the State Solicitor's Office and get them rechecked. Then put it out as a planning bulletin and send it out electronically and say, "If you wish, councils, we encourage you to use these conditions wherever they suit your purposes." That would have resolved quite a bit of the problem with poor conditions. To me, probably one of the few benefits of having the JDAPs was if that was done. I do not know if that has been taken up; I hope it has. I was talking to a local council a couple of weeks ago that said that they have been coming up with five standard conditions on a particular subject; they had written them themselves and sent them off to the lawyer and they got a bill for thousands of dollars. If that was done centrally, it would save councils money, too, and would result in better decisions, so that is something that is outside the regulations process, but it is something that could be done.

The CHAIR: Thank you very much for giving us your time. You have come up with some really interesting ideas, and we certainly appreciate your feedback on your experience, having participated in those two JDAPs as well. It has been very useful for us to hear firsthand experience. Thank you very much for your time.

Mr Foley: You are welcome.

Hearing concluded at 4.37 pm

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