DEVELOPMENT ASSESSMENT PANEL PRACTICE NOTES:

MAKING GOOD PLANNING DECISIONS

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Part 1 - Planning Framework

1. Introduction

There are a number of pieces of legislation which together control how our State is developed.

These include Acts that control how approvals for subdivision and development are to be given and how planning schemes are to be made.

Other legislation controls how buildings are to be constructed and impose particular specifications regarding the method of construction.

In addition to the traditional planning controls, there are other pieces of legislation that can directly affect what development and activities that can be undertaken on land, for example environmental protection and heritage legislation.

Part 1 discusses the primary pieces of legislation that govern planning and development in Western Australia and provides a summary of how these pieces of legislation fit within the planning framework.

2. Legislation

2.1 Planning Legislation

2.1.1 A bit of history to start off with ...

There was a time in Western Australia when there was no formal planning control. Before the Town Planning and Development Act 1928 ('TPD Act') came into operation in November 1929, there was no requirement to obtain approval for subdivision – all a landowner needed to do was to get a licensed land surveyor to draw up the plan and register it with the Office of Land Titles (the early predecessor to the current Landgate). The development and use of land was not controlled by statute at all.

The TPD Act heralded the commencement of town planning in a statutory sense in Western Australia. It set in place two important concepts that endure to this day:

- the requirement for Municipalities and Road Boards (now called local governments) to make and administer local planning schemes; and

- the requirement for the subdivision of land to be approved by the State Government by way of the Town Planning Board (now the Western Australian Planning Commission), an instrumentality established by the TPD Act itself.

The TPD Act was in place for just over 76 years and was amended and added to a number of times throughout its life. It was also augmented by two other significant Acts during that time. These were the:

- Metropolitan Region Town Planning Scheme Act 1959, which set in place the power to make a region scheme over the whole of the metropolitan area; and

2.1.2 Planning and Development Act 2005

The Planning and Development Act 2005 ('PD Act') came into operation on 9 April 2006.

The PD Act amalgamated the:

- Town Planning and Development Act 1928;
- Metropolitan Region Town Planning Scheme Act 1959; and
- Western Australian Planning Commission Act 1985.

The PD Act is the primary piece of legislation governing development and subdivision in Western Australia. The PD Act:

- establishes the Western Australian Planning Commission ('WAPC');

- gives power to the WAPC to make State Planning Policies, Region Planning Schemes, Regional Interim Development Orders, Planning Control Areas, Improvement Plan Areas and Improvement Schemes;

- establishes the requirement to obtain approval from the WAPC before subdividing land;

- gives power to local governments to make local planning schemes for their local government area; and

- sets out a regime for the payment of compensation for injurious affection caused by the making of a local or region planning scheme.

Further information regarding the PD Act and the planning regime it establishes, is set out under 'Planning Framework' below.

2.2 Other planning legislation that applies in specific cases

The PD Act provides the 'default' position for planning control in Western Australia. This is because the PD Act gives power to local governments to prepare local planning schemes, which, once approved by the Minister and published in the Government Gazette, establish a regime of planning control within their local government area.

There are, however, a number of pieces of legislation that set up separate planning regimes for location-specific areas. These are discussed below.

2.2.1 Redevelopment Acts

Redevelopment Acts are special Acts of Parliament dealing with a location-specific area. They have been used successfully in Western Australia since 1991. Typically, they have been used for the redevelopment of brown field sites with particular strategic importance and difficult existing planning conditions (for example, land contamination, fragmented land ownership, their identification as locations for major infrastructure, and unworkable road networks and cadastral boundaries).

These Acts allow for the making of special town planning schemes to give effect to the redevelopment objectives of the legislation. The Redevelopment Area is excised from its local government area for the purpose of planning control so that the otherwise relevant local planning scheme no longer applies.

Some historically, Redevelopment Acts established a Redevelopment Authority to administer planning control within the designated area. These included the following Redevelopment Acts:

- *East Perth Redevelopment Act 1991;*
- *Subiaco Redevelopment Act 1994;*
- *Midland Redevelopment Act 1999; and*
- *Armadale Redevelopment Act 2001.*

2.2.2 Making Good Planning Decisions

In 2011 the abovementioned Acts were repealed and were replaced by the Metropolitan Redevelopment Authority Act 2011 ('MRA Act').

The MRA Act allows for land in the metropolitan area of Perth to be declared by Regulation to be a redevelopment area. Once so declared, they come within the planning control of the Metropolitan Redevelopment Authority.

This is the mechanism which was used to bring the Scarborough beachfront and the Elizabeth Quay areas under State Government planning control.

There are other Redevelopment Acts which do not rely upon the Metropolitan Redevelopment Authority. There are two Redevelopment Acts which rely upon the WAPC and the Western Australian Land Authority, otherwise known as LandCorp (established under the Western Australian Land Authority Act 1992) to administer planning control powers. These are the:

- Hope Valley-Wattleup Redevelopment Act 2000; and
- Perry Lakes *Redevelopment* Act 2005.

Once a Redevelopment Area is redeveloped, the land is 'normalised', meaning that ongoing planning control returns to the local government.

2.2.3 Swan and Canning Rivers Management Act 2006

The Swan and Canning Rivers Management Act 2006 ('SCRM Act') came into effect in September 2007, replacing the Swan River Trust Act 1988 and the Environmental Protection (Swan and Canning Rivers) Policy 1997.

The SCRM Act establishes the Swan River Trust, which has planning, management and protection responsibility for the area around the Swan and Canning Rivers.

In relation to development control, the SCRM Act sets out the situations where development approval is to be granted by the Minister for Environment rather than the relevant local government.

Section 69 of the SCRM Act provides that where development is proposed on a lot, which is wholly within the development control area prescribed under the SCRM Act, then approval is to be granted by the Minister for Environment, or from the Swan River Trust where the Minister has delegated his or her power to it.

The Act, when read with clause 30A of the MRS, effectively brings the development of all land within and abutting waters covered by defined management areas of the Swan River under the ultimate control of the Minister for Waterways.

Depending on the location of the development vis-à-vis the Swan River, different decision-making authorities will be involved.

2.3 Legislation that influences planning legislation

There are a number of pieces of legislation which impact upon the power to approve applications for development and subdivision. They do this in a number of ways:

- some stop a planning decision-making authority from making a decision until the application has been assessed by another entity (for example the Environmental Protection Act 1986);
- some require input from another entity before a planning decision-making authority can determine the matter (for example the Heritage Act 2018); and
- others require referral to another entity for their comment.

The following is by no means an exhaustive list of some other pieces of legislation that work in conjunction with planning legislation.

2.3.1 Environmental Protection Act 1986

The Environmental Protection Act 1986 ('EP Act') sets out a regime which requires the environmental assessment of proposals where there is likely to be a significant effect on the environment. Where it is found that a proposal will have such an effect, the proposal may be assessed and the Minister for the Environment will ultimately determine whether the proposal can be implemented, and if so, what conditions are to be imposed.

In practice, there are not many development or subdivision applications which require referral, and even fewer that require assessment. This is because the EP Act does not require referral where the planning scheme pursuant to which a proposal is to be implemented, has itself been assessed.

In relation to land use, development and subdivision, common reasons for an application to be assessed are where the proposal requires the removal of vegetation, or where the proposal will affect wetlands or watercourses, or where the proposal generates an emission of some sort.

Pursuant to the EP Act, where a proposal has been referred to the Environmental Protection Authority ('EPA') and the EPA has decided to assess the proposal, the planning decision-making authority shall not make a decision until it has been assessed and determined by the Minister for Environment.

2.3.2 Contaminated Sites Act 2003

The Contaminated Sites Act 2003 ('CS Act') sets out a regime for classifying land that is contaminated. It classifies sites in accordance with the risk to human health that is posed by the condition of the land and the use to which it is being put.

Pursuant to section 58 of the CS Act, where a land is classified as:

- contaminated – remediation required;
- contaminated – restricted use;
- remediated for restricted use; or
- possibly contaminated, investigation required;

the WAPC must not approve subdivision of that land, and a local government is not to approve development on that land, without seeking and taking into account the advice of the Chief Executive Officer of the Department of Environment Regulation as to the suitability of the land for the purpose for which approval is sought.

2.3.3 Heritage Act 2018

The Heritage Act 2018 ('Heritage Act') encourages the conservation of places of cultural heritage significance. 'Cultural heritage significance' is defined in section 5 of the Heritage Act as "aesthetic, historic, scientific, social or spiritual value for individuals or groups within Western Australia".

The Heritage Act establishes the State Register of Heritage Places, with the objective that this is "a comprehensive register of places of cultural heritage significance that make an important contribution to understanding the heritage of Western Australia". The Heritage Act does not set up a separate approval regime for places listed on the State Register but requires decision-making authorities to refer planning applications and other proposals to the Heritage Council for advice before determining the application.

The decision-making authority must determine the application or proposal in a way that is consistent with Heritage Council advice, unless it finds that there is no feasible and prudent alternative to making that determination.

The Heritage Act provides for the identification of local heritage places through a local heritage survey, which is to be undertaken by each local government. One of the identified purposes of the survey is to inform the adoption of a heritage list and consideration of heritage areas under the local planning scheme.

2.3.4 Swan and Canning Rivers Management Act 2006

The SCRM Act proposes a separate planning approval process for development on lots that are wholly within the development control area as prescribed by the SCRM Act (see: [2.2.2]).

In addition, the SCRM Act, together with the Metropolitan Region Scheme, requires the referral of applications for development approval, which are on lots that are partially within the development control area under the SCRM Act, or which abut the waters thereto.

The WAPC must have regard to the Trust's recommendations when determining an application.

Where the WAPC disagrees with the Trust's advice, the matter is to be resolved between the Minister for Planning and the Minister for the Environment, and the Minister for Planning is then to direct the WAPC to determine the application as resolved.

2.4 Legislation which overrides planning legislation

2.4.1 Mining Act 1978

Section 120 of the Mining Act 1978 provides that while the Minister for Minerals and Petroleum Resources, the warden or the mining registrar will take into account any planning scheme made under the PD Act in considering an application for a mining tenement, such an instrument shall not operate to prohibit or affect the grant of such tenement.

This was considered by the State Administrative Tribunal ('SAT') in the decision of Panoramic Resources Limited and Lanfranchi Nickel Mines Pty Ltd and Shire of Coolgardie [2010] WASAT 159, where the Deputy President, Sharp J, found that a mining accommodation village located on a mining lease did not require approval under the Shire's local planning scheme by virtue of section 120 of the Mining Act.

It should be noted that there are some areas in the State where the Mining Act has limited application. This is because where land was converted to freehold from Crown land prior to 1899, the State Government only retained ownership of precious metals (for example, gold and silver). The ownership of non-precious metals remains with the landowner.

In this situation, a mining lease is not required to mine for non-precious metals. It therefore follows that section 120 of the Mining Act has no application.

The result of this is that in relation to development on land:

- which was converted to freehold before 1899; and
- involves either the mining of a non-precious metal or other works or uses which support such operation,

the Mining Act does not apply, and planning approvals under the relevant planning scheme are still required.

2.4.2 State Agreement Acts

State Agreement Acts have also been used by the State to effect planning outcomes. State Agreement Acts are project specific statutes, which adopt agreements between the Government and a developer. They are often used for major resource or infrastructure projects.

Agreement Acts involve the signing of a deed of agreement between the State and the proponent, setting out their contractual rights and obligations. The deed of agreement is then attached as an appendix to an Act, which is passed through Parliament in the usual way. Such a system gives greater security to proponents of large and complex ventures, the development of which take longer than the four-year political cycle.

One of the functions Agreement Acts purport is the prevention of local governments from rezoning land to be used for the proposed development, and in some of the older Agreement Acts often there is a provision included which expressly exempts the proponent from requiring development and environmental approvals. Some of the more recent State Agreement Acts provide that the local planning scheme ceases to apply in relation to the area subject of the agreement.

Some mineral project examples include the Western Mining Corporation Ltd (Throssell Range) Agreement Act 1985 and the Iron Ore (Hope Downs) Agreement Act 1992.

Other non-mineral project examples include the Casino (Burswood Island) Agreement Act 1985, the Forrest Place and City Station Development Act 1985 and the Port Kennedy Development Agreement Act 1992.

3. Who is responsible for planning?

There are a number of different governmental bodies who together administer the planning system in Western Australia. They do this through the making of planning policy, the making and approval of subordinate legislation like planning schemes, and by determining applications for subdivision and development.

Each of these entities is described in this section.

3.1 The WAPC and the Department

3.1.1 WAPC

The WAPC is a statutory authority, established pursuant to the PD Act. Under the PD Act the WAPC has a broad range of responsibilities, including:

- advising the Minister for Planning on strategic land use planning and development, legislation and planning schemes
- maintaining the State Planning Strategy to provide a vision for the future development of Western Australia
- developing integrated land use planning strategies and policies for the coordination of transport, infrastructure and development
- preparing and reviewing region schemes to cater for anticipated growth
- researching and developing planning methods and models relating to land use planning, land development and associated matters
- reserving and acquiring land for public purposes in region planning scheme areas

- making statutory decisions on a range of planning application types including applications to subdivide land and significant development

One of the primary reasons for creating the WAPC was to give greater emphasis to state-wide regional planning.

Its powers and membership reflect that objective. In accordance with Part two division one clause 10 of the PD Act, the WAPC Board is to consist of seven to nine members and is required to include a chairperson with extensive knowledge, expertise and experience in urban and regional planning, at least one member with extensive experience in local government administration and at least one member with extensive experience of living and working in the regions.

In recent years, with major growth due to mining and oil and gas projects in the North-West of the State, the importance of the WAPC's role in regional planning has come to the fore.

The WAPC has power to prepare Region Schemes, but it is also involved in the preparation of other statutory and policy instruments, which shape planning in the regions, including the preparation of SPPs and regional structure plans.

The WAPC does not, however, undertake all its statutory responsibilities alone – it is supported in its work by a committee structure of strategic and statutory committees, of which some have delegated authority to make decisions on behalf of the WAPC.

The Statutory Committees are those that are set out in Schedule 2 of the PD Act, and include:

- Executive, Finance and Property Committee;
- Statutory Planning Committee;
- Swan Valley Statutory Planning Committee
- Capital City Planning Committee
- State Design Review Panel
- Future of Fremantle Planning Committee

3.1.3 Department of Planning, Lands and Heritage

In contrast, the Department of Planning, Lands and Heritage has no statutory power of itself. Its primary role is to support the WAPC and provide advice to the State Government (including other supporting departments and agencies).

It does so by undertaking research, preparing strategic planning documents, and advising and making recommendations to the WAPC and its committees in relation to the WAPC's statutory powers and responsibilities.

In practice, the WAPC delegates a number of its decision-making functions to the Department. This is especially so in relation to smaller subdivision applications.

3.2 Minister for Planning

The Minister responsible for planning legislation is the Minister for Planning. The statutory responsibilities may be summarised as follows:

- administration and ongoing review of planning legislation;
- approval of local planning schemes and amendments;
- approval of improvement schemes and amendments;
- approval of minor amendments to the MRS and Region Schemes;
- recommending statements of planning policy for approval by the Governor;
- nomination of members for appointment to the WAPC;
- undertaking inquiries into the enforcement of local planning schemes by local governments;
- directing the preparation of new, or amendment of existing, local planning schemes; and
- calling in, and determination of applications for review lodged with the State Administrative Tribunal where issues of State or regional importance are raised.

3.3 Local Governments

Local governments carry out the majority of day- to-day planning controls relating to development in Western Australia by the PD Act. Pursuant to the PD Act, they are given power to make local planning schemes, which may deal with any of the matters listed in Schedule 7 of the PD Act.

Through the making of a local planning scheme dealing with the matters set out in Schedule 7 of the PD Act, local governments' statutory responsibilities may be summarized as follows:

- the preparation of a local planning strategy, which is a document which informs the making of a local planning scheme;
- the preparation of a local planning scheme for approval by the Minister for Planning upon recommendation of the WAPC;
- administering development control pursuant to its local planning scheme;
- the preparation of planning policy to augment and support its role as decision-maker under its local planning scheme;
- providing advice to the WAPC in relation to subdivision applications within its local government area; and
- providing advice and comments generally to the WAPC on planning issues within its local government area or district generally.

3.4 DevelopmentWA

DevelopmentWA is the result of consolidating the operations of LandCorp and the Metropolitan Region Authority and operates under the Western Australian Land Authority Act 1992, Metropolitan Redevelopment Authority Act 2011 and Hope Valley-Wattleup Redevelopment legislation.

DevelopmentWA's role is to develop land for living and land for working and central to this work is the identification, design and implementation of major land and infrastructure projects.

3.5 Development Assessment Panels

Development Assessment Panels ('DAPs') are decision-making bodies. They are not involved with, or responsible for, the preparation of planning schemes or planning policy. Their decision-making powers are constrained by the existing planning framework for the local government area subject of the application.

A number of DAPs have been established throughout the State to determine DAP applications. The PD Act together with the Planning and Development (Development Assessment Panels) Regulations 2011 set out the applications which a DAP is to determine.

3.6 State Administrative Tribunal ('SAT')

The SAT is a body that reviews decisions made by government where it is empowered to do so by State legislation.

The PD Act and local planning schemes give power to the SAT to review decisions made by planning decision-making authorities pursuant to the PD Act, local and region planning schemes, and Redevelopment Acts.

The SAT's role in reviewing a planning decision- making authority is to remake the decision having regard to the applicable planning framework. That is, its powers do not extend to making decisions that do not comply with the constraints imposed by the relevant planning scheme and policies.

4. The planning framework

4.1 Introduction

As noted above, there are a number of different pieces of legislation that either govern or influence planning decisions in Western Australia.

In the main, notwithstanding location (i.e. Swan Valley or Swan and Canning River) or subject (i.e. heritage) specific legislation, the planning framework is relatively consistent throughout the State.

In this section, we look more closely at the planning framework – that is, the documents that are made under the enabling legislation discussed above. These documents provide the actual guidance and control of planning outcomes.

The framework comprises a rich mix of both policy documents (such as State Planning Policies and Local Planning Policies) and statutory instruments (such as planning schemes and planning control areas). The policy documents not only shape the preparation of the statutory instruments, but also provide guidance to decision-makers in determining applications pursuant to those instruments.

The statutory instruments include region planning schemes, local planning schemes, regional interim development orders, local interim development orders, planning control areas, improvement plans and improvement schemes. The primary purpose of these instruments is to control development to achieve the relevant planning outcomes and objectives.

The most important types of planning documentation in Western Australia include:

- SPPs made under section 26 of the PD Act;
- region planning schemes;
- Schedule 2: Deemed provisions for local planning schemes in the Planning and Development (Local Planning Schemes) Regulations 2015 ('Deemed Provisions');
- local planning schemes and documents made pursuant to local planning schemes (for example, structure plans and local planning policies); and
- policies and guidance notices of the WAPC.

4.2 Policy

4.2.1 State Planning Policies

Introduction

The PD Act gives the WAPC power to prepare State Planning Policies ('SPPs'). SPPs have been prepared for many different subject matters, and areas within Western Australia – they can be subject or location specific.

Historically, SPPs have been used for two main purposes:

- to assist the WAPC in its decision-making with respect to development approval under region schemes and subdivision of land; and
- to provide guidance to local government as to particular matters they need to take into account in preparing local planning schemes.

A SPP may make provision for any matter that may be the subject of a local planning scheme but it is required, by section 26(2) of the PD Act to "be directed primarily towards broad general planning and facilitating the coordination of planning throughout the State by all local governments".

> ***A note on terms:***
> ***Under the TPD Act, State Planning Policies were called 'Statements of Planning Policy'. The PD Act, which commenced operation in 2006, changed the term to 'State Planning Policy'.***
> ***Many local planning schemes and policies still use the term 'Statement of Planning Policy', but these are to be read as if they were references to State Planning Policy.***

Application of SPPs

SPPs do not have a binding effect, but under Part 5 of the PD Act every local government is required to have due regard to SPPs in preparing or amending a local planning scheme. Under this Part such statements may be incorporated by reference into local planning schemes.
In addition, section 241(1)(a) requires the SAT to have due regard to any relevant SPP which affects the subject matter of the application for review under consideration.

SPPs and local planning schemes

In practice most local governments not only have due regard to SPPs in preparing their local planning scheme.

Most local planning schemes in the State either refer to or incorporate by reference one or more SPPs.

The most common of these is SPP3.1 Residential Design Codes. Most local planning schemes incorporate SPP3.1 by reference as a set of development standards, which must be adhered to in developing land for residential purposes.

In this way, SPP3.1 has direct application and statutory force and effect.

> ***Example of a scheme provision which incorporates a SPP by reference: clause 5.2.2 Model Scheme Text***
>
> ***"Unless otherwise provided for in the Scheme, the development of land for any of the residential purposes dealt with by the Residential Planning Codes is to conform with the provisions of those Codes".***

Other local planning schemes will require the council to consider the consistency of a development application with SPPs, in a general sense, by listing 'consistency with SPPs' as a relevant consideration in the list of considerations to which the council must have regard in their local planning scheme. This does not mean that there must be slavish compliance with particular clauses of an SPP – this is particularly so given the general nature of the wording of some SPPs – what it does require is that weight is given to the objectives of any relevant SPP in considering an application for development approval.

> ***Example of scheme provision which requires consideration to be given to a SPP: clause 10.2 Model Scheme Text***
>
> ***"Matters to be considered by local government***
> ***The local government in considering an application for planning approval is to have due regard to such of the following matters as are in the opinion of the local government relevant to the use or development the subject of the application -***
> ***(c) any approved statement of planning policy of the Commission."***

List of SPPs

There are a number of SPPs in existence. As at May 2020 they were:
SPP 1: State Planning Framework (Variation No 2), November 2017
SPP 2: Environment and Natural Resources, June 2003
SPP 2.1: The Peel-Harvey Coastal Plain Catchment, February 1992
SPP 2.2: Gnangara Groundwater Protection, August 2005
SPP 2.3: Jandakot Groundwater Protection Policy, June 2017
SPP 2.4: Planning for Basic Raw Materials, July 2021
SPP 2.5: Rural Planning Policy, December 2016
SPP 2.6: State Coastal Planning Policy, July 2013
SPP 2.7: Public Drinking Water Source Policy, June 2003
SPP 2.8: Bushland Policy for the Perth Metropolitan Region, June 2010
SPP 2.9: Water Resources, December 2006
SPP 2.10: Swan-Canning River System, December 2006
SPP 3.0: Urban Growth and Settlement, March 2006
SPP 3.2: Aboriginal Settlements, May 2011
SPP 3.4: Natural Hazards and Disasters, April 2006
SPP 3.5: Historic Heritage Conservation, May 2007
SPP 3.6: Infrastructure contributions, April 2021
SPP 3.7: Planning in Bushfire Prone Areas, December 2015
SPP 4.1: Industrial Interface, July 2022
SPP 4.2: Activity Centres for Perth and Peel, June 2023
SPP 5.1: Land Use Planning in the Vicinity of Perth Airport, July 2015
SPP 5.2: Telecommunications Infrastructure, September 2015
SPP 5.3: Land use planning in the vicinity of Jandakot Airport, January 2017
SPP 5.4: Road and rail noise, September 2019
SPP 6.1: Leeuwin-Naturaliste Ridge Policy, January 2003
SPP 6.3: Ningaloo Coast, August 2004.
SPP 7.0: Design of the Built Environment, May 2019
SPP 7.2: Precinct Design, February 2021
Residential Design Codes Volume 1, April 2024
Residential Design Codes Volume 2 , April 2024

4.2.2 State Policy (other than SPPs)

Classification and hierarchy of State policy

Apart from its power to make SPPs, the WAPC also has a general power to make policy under the PD Act. These policies include Development Control Policies and structure plans, corridor plans and the like.

These do not have any statutory status; however, they are given some standing by being incorporated into SPP1: State Planning Framework. The relevance of these policies varies according to their age and subject matter.

The more relevant they are to the application at hand, and the more recent they are, the more weight they must carry in the making of planning decisions.

The WAPC, by way of SPP1: State Planning Framework has provided a framework and hierarchy to these policies.

Clause 2.4 of SPP1 provides:

> "The Framework informs the Commission, local government and others involved in the planning process on State level planning policy which is to be taken into consideration, and given effect to, in order to ensure integrated decision-making across all spheres of planning."

SPP1 divides policies into a number of hierarchical categories:

- State Planning Policies;
- Regional and Sub-regional Strategies;
- Operational Policies;
- Position Statements; and
- Guidelines.

In addition, the WAPC and local governments have regard to the policies of other agencies, including policies made by servicing authorities and government departments responsible for providing infrastructure such as roads and rail, and policies made by the Environmental Protection Authority.

4.2.3 Local Planning Policies

How made

Local planning policies ('LPPs') have historically been made pursuant to a LPS. Nearly all LPSs include provisions as to how a LPP is to be made, and what effect an LPP has.

The process for creating a LPP is now contained in the Deemed Provisions of the Planning and Development (Local Planning Schemes) Regulations 2015 ('LPS Regulations') which came into effect on 19 October 2015.

Purpose

As with all policy, the purpose of a LPP is to assist the guidance of discretion. For example, where a use is a 'discretionary' use in a particular zone, a LPP provides the decision-maker (that is, the local government/Development Assessment Panel/State Administrative Tribunal) with the circumstances where that use could be approved.

Clause 3(5) of the Deemed Provisions provides that:

> "In making a determination under this Scheme the local government must have regard to each relevant local planning policy to the extent that the policy is consistent with the Scheme."

Example:

- ***City of Gosnells LPP2.3: Lodging Houses and Bed & Breakfast Accommodation – where a bed & breakfast can be considered if it can accommodate car parking on site.***
- ***City of South Perth Policy 307: Family Day Care Centres and Child Day Care Centres – where a child day care centre can be considered if by design of the centre, the noise impact on adjoining residences is minimised.***

It should be noted, however, that LPPs in some local government areas go far beyond guiding the exercise of discretion and impose separate planning regimes by varying development standards and requirements as set out in the local planning scheme, or by imposing further restrictions on the design of buildings or the finishes to be used.

Example:

- ***Town of Vincent Precinct Policies – which impose additional standards such as the requirement for awnings over streets in particular precincts and impose setbacks which are different from those set out in the local planning scheme.***
- ***City of Subiaco Residential Car Parking Policy – which imposes limits on the location and design of car ports and garages.***

4.2.4 Local Planning Strategies

A Local Planning Strategy ('LP Strategy') is required as a precursor to the preparation of a local planning scheme, pursuant to the LPS Regulations. It is prepared by the local government.

A LP Strategy sets out the local government's objectives for the future planning and development of its local government area, and usually includes a broad framework by which to pursue those objectives.

The objectives in the LP Strategy are codified and implemented through the local planning scheme.

While a LP Strategy is not an LPP, it does provide useful extrinsic guidance where there is a question as to whether a use or form of development should be approved, where such guidance is not provided by the local planning scheme itself.

4.3 Statutory planning instruments

4.3.1 Legal status as 'subsidiary legislation'

As section 5 of the Interpretation Act 1984 makes it clear, planning schemes have the status of 'subsidiary legislation':

> "subsidiary legislation" means any proclamation, regulation, rule, local law, by-law, order, notice, rule of court, local or region planning scheme, resolution, or other instrument, made under any written law and having legislative effect" (emphasis added).

Planning schemes have a similar legal status to regulations and other types of subsidiary legislation. Thus, unlike policies and other instruments, schemes have legislative effect and must be treated as 'law'. As noted in Caltex Australia Petroleum Pty Ltd v Town of Vincent [2010] WASAT 79 at 33, this means that the rules of statutory interpretation also apply to planning schemes:

> "…the MRS is treated as subsidiary legislation made under the PD Act. The MRS also falls within the definition of 'subsidiary legislation' in s.5 of the Interpretation Act 1984 (WA) which includes any region planning scheme. Accordingly, the ordinary principles relating to the interpretation of legislation which apply to the interpretation of subsidiary legislation are also applicable to the MRS."

What this means is that planning schemes take precedence and weight over policy instruments.

4.3.2 Region planning schemes

What is a region planning scheme?

There are three region planning schemes in operation in Western Australia:

- Metropolitan Region Scheme ('MRS') - which includes 29 local government authorities from Rockingham in the south, to Wanneroo in the north, and east to Serpentine-Jarrahdale, Armadale, Mundaring, Kalamunda and Swan;
- Peel Region Scheme ('PRS'); and
- Greater Bunbury Region Scheme ('GBRS').

Region planning schemes are broad-brush planning documents. While they do zone land, there are no development standards (for example car parking standards, plot ratios, height restrictions, etc.) that you would find in a local government planning scheme. They are focussed on providing strategic direction as to what land can be used for in a general sense.

They have the most impact in terms of how they release land for urban development. Because a local planning scheme must be consistent with a region scheme, a local government cannot rezone land from say, rural to residential, unless the region scheme shows that land as having an urban zoning.

Region schemes are also used for preserving and acquiring land for public purposes. They do this by designating land as 'reserves' under the region scheme. This is a little confusing, because the term 'reserve' has a different meaning from that usually used in property law (where a 'reserve' is Crown land, which has been reserved, to a public authority for a particular purpose).

When land is 'reserved' under a region planning scheme, it is akin to zoning in that the title of the land does not change hands, but the land has severe restrictions as to what can be done with it – and this gives rise to a right to claim compensation for injurious affection.

Development approval under region planning schemes

Metropolitan Region Scheme

Where both the MRS and local planning scheme is in place, in theory there is a legal requirement to obtain separate approvals under each of the schemes, as one does not override the other.

In practice, however, in most cases only one approval is issued. This is because the WAPC delegates its power under the MRS to the relevant local governments.

Therefore, an approval is issued by the local government, but it is an approval under both the MRS and the relevant local planning scheme.

There are important exceptions to this default position, which occur mostly in one of two ways:

- The first is that the WAPC's delegation under the MRS where development is proposed on or abutting some types of reserved land is conditional. That is, the delegation only remains if the local government intends on determining the application in a way that is consistent with the designated referral authority listed in the Notice of Delegation, or where the local government intends on refusing the development application. If the local government intends making a determination which is at odds with the views of the designated referral authority, then it is required to send the application to the WAPC for its determination under the MRS. The WAPC periodically issues a Notice of Delegation and publishes it in the Government Gazette. This Notice sets out the circumstances where the WAPC does and does not delegate its power generally.

- The second is that there is a specific call-in power in clause 32 of the MRS. This clause allows the WAPC, by resolution published in the Government Gazette, to designate particular classes of development applications that the WAPC wishes to retain power to determine.

  Examples:

  - ***extensions to shopping centres where there is no Activity Centre Structure Plan in place pursuant to SPP4.2 Activity Centres for Perth and Peel;***

  - ***the development of new poultry farms, or extension of existing poultry farms which exceed 100m2, in the Rural, Urban, or Urban Deferred zones under the MRS; and***

  - ***the construction of buildings close to the coastline which exceed the height limits listed in the clause 32 resolution.***

Greater Bunbury Region Scheme and Peel Region Scheme

The GBRS and PRS work differently. Under both of these schemes, there is no requirement for development approval under the region scheme unless:

the land is reserved under the region scheme; or

- development is of a kind or class specified by the WAPC by resolution published in the Government Gazette.

It should be noted however that in at least some of these cases where development approval is required, that the power to determine is delegated to local government by way of a Notice of Delegation.

4.3.3 Local planning schemes and the Planning and Development (Local Planning Schemes) Regulations 2015

What is a local planning scheme?

Under the PD Act a local government may prepare or adopt a local planning scheme with reference to any land in its district but needs the Minister's approval to do so.

Most local planning schemes in Western Australia are zoning schemes. These schemes classify land within the scheme area by way of different zones. Within each zone, the permissibility of different use classes will be designated. This is usually done by way of a zoning table, with the name of each zone listed on the top horizontal row, and a list of use classes along the left hand vertical column. At the point that these two meet, a use

permissibility is listed. While zoning schemes are the most common form of planning control, the use of precinct-based planning schemes has gained popularity in Western Australia, particularly for land controlled by the Redevelopment Acts.

These schemes, rather than zoning particular parcels of land, and stipulating which uses are permissible within that zone, classify land into precincts.

In relation to each precinct, the scheme sets out those uses that are preferred. While such schemes lack the certainty of a zoning scheme, they do provide a greater degree of flexibility for innovative and sensitive planning solutions.

Geographical application of a local planning scheme

In the main, local planning schemes tend to cover the whole of the district of the local government to which they apply. However, it should be noted that the PD Act contemplates a number of different ways a local planning scheme may be applied.

This section provides a brief explanation of these possibilities.

Local governments with townsite local planning schemes

In rural and regional areas, it is not uncommon for local planning schemes to be made in respect of the townsites only. This is often driven by the land tenure of the land outside the townsites, which might be Crown land, the subject of pastoral leases, or may be the subject of mining leases.

In other circumstances, where land is used predominantly for broad acre grazing, there is little benefit in seeking to control development over the land, as any 'development' of that land is unlikely.

Examples of townsite local planning schemes:

- ***Shire of Derby – West Kimberley Town Planning Scheme No.5 – Derby***
- ***Shire of Kent Town Planning Scheme No.2 – Nyabing and Pingrup townsites***

Local governments with more than one local planning scheme

In the metropolitan region and in the south west, some local governments have more than one local planning scheme, although this is becoming less common. Usually the purpose of having a stand-alone local planning scheme is to provide a site-specific set of development provisions where a particular built outcome is required. This type of 'mini' local planning scheme has become less common since the advent of site-specific planning controls within local planning schemes, for example, special control areas, structure plan areas and development contribution areas.

Examples of location specific local planning schemes:

- ***City of Perth City Planning Scheme No.24 – Panorama Apartments***
- ***Town of Kwinana Town Planning Scheme No.3 – Town Centre.***

Concurrent local planning schemes

Section 70 of the PD Act confirms that more than one local planning scheme can apply in any one location. In this circumstance, section 70(2) states that only one of the local planning schemes may designate zoning.

In a practical sense, a concurrent planning scheme is usually found in two circumstances.

The first, as outlined above, is where a local government is pursuing a more specialised set of development control provisions for a particular area.

The second is where a local government wishes to put in place a scheme requiring the landowners to contribute financially to the further development of the area.

Historically, such a scheme was known as a Guided Development Scheme. These schemes impose requirements for the contribution to local infrastructure such as roads, drainage, sewer and public open space.

The requirement for payment is usually triggered by the development or subdivision of land. These schemes do not control development nor zone land, and instead work in conjunction with the zoning local planning scheme.

Example of guided development schemes:

- ***City of Canning Town Planning Scheme No.17A – Cannington Lakes Guided Development Scheme***
- ***Shire of Capel Town Planning Scheme No.3 – Gelorup.***

Guided Development Schemes as stand-alone local planning schemes are becoming less common. This is because the trend now is to include powers within the zoning local planning scheme for the preparation of structure plan and development-contribution plan areas. These two plans work together to achieve a similar outcome to the old Guided Development Scheme.

Note that some of these Guided Development Schemes are still in operation. It may be listed on the local government's website, otherwise consider directly contacting the local government to find these documents.

Local planning schemes which include land outside the local government district

Section 72 of the PD Act confirms that a local government may make a local planning scheme solely for land within its own district, or with reference to land within its own district and other land within any adjacent district.

Local planning scheme vs town planning scheme

You will note that there is a wide variety of names given to planning schemes in Western Australia. The reason for these differences is largely historical. Under the old TPD Act, the term used was 'town planning scheme', and therefore, most local government planning schemes made before 2006 have 'town planning scheme' in their title.

The PD Act, when it came into effect in 2006 used the term 'local planning scheme'. Therefore, most schemes made after the commencement of the PD Act have 'local planning scheme' in their title.

There are other variations. In some regional areas, the term 'district planning scheme' was coined to confirm that the scheme covered the whole of the local government area, and not just the townsites.

The City of Perth uses the term 'City planning scheme' for their main scheme. The City of Melville's scheme was entitled 'Community Planning Scheme'.

Regardless of the title, all planning schemes made by a local government are either made as a local planning scheme pursuant to the PD Act, or were made under the equivalent provisions in the now repealed TPD Act, and continue to have the force of law under the PD Act.

Major provisions of a local planning scheme
Matters which may be the subject of local planning schemes are contained in section 69 and Schedule 7 of the PD Act.

Deemed Provisions

A major shift in the way LPSs operate occurred on 19 October 2015 when the LPS Regulations became operative.

Section 257B of the PD Act allows for regulations to be made which are 'deemed provisions' meaning that they have direct effect and are to be read as if they formed part of a LPS.

Schedule 2 of the LPS Regulations are Deemed Provisions, and therefore have direct application, and prevail over existing provisions to the extent of any inconsistency.

> ***The Deemed Provisions include the following parts:***
>
> ***Part 1: Preliminary***
> ***Part 2: Local planning framework Part 3: Heritage protection***
> ***Part 4: Structure plans***
> ***Part 5: Activity centre plans***
> ***Part 6: Local development plans***
> ***Part 7: Requirement for development approval***
> ***Part 8: Applications for development approval***
> ***Part 9: Procedure for dealing with applications for development approval***
> ***Part 10: Enforcement and administrative Part 11: Forms referred to in this Scheme***

Model Provisions

Section 256 of the PD Act allows for the making of regulations to prescribe the general provisions for carrying out the general objects of a local planning scheme.

Up until the commencement of the new LPS Regulations, those general provisions were prescribed in Appendix B of the Town Planning Regulations 1967 ('TP Regulations') in the form of the Model Scheme Text ('MST').

The equivalent in the new LPS Regulations is Schedule 1: Model provisions for local planning schemes. The Model Provisions form a template which a local government should use in preparing their new LPS.

Ultimately it is intended that the Model Provisions and the Deemed Provisions will dovetail together to cover all of those matters which must be included in an LPS.

The purpose of having a template is of course to achieve more consistency in the legal and administrative provisions of local planning schemes. This has been somewhat successful, although many local variations still occur. Despite the array of local variations, most local planning schemes follow a predictable format.

> ***The Model Provisions include the following parts:***
>
> ***Part 1: Preliminary***
> ***Part 2: Reserves***
> ***Part 3: Zones and use of land***
> ***Part 4: General development requirements Part 5: Special control areas***
> ***Part 6: Terms referred to in Scheme***

4.3.4 Interim development orders

Interim development orders are made pursuant to Part 6 of the PD Act. They are used to maintain the status quo while a new region planning scheme or local planning scheme is being prepared and there is a concern that development may occur prior to the commencement of that scheme that might 'materially affect' its implementation.

In accordance with their name, interim development orders have a finite life – section 107 of the PD Act provides that an interim development order ceases to have effect on the sooner of:

- the date when the relevant region planning scheme or local planning scheme becomes operational; when it is revoked; and
- on the expiry of 3 years from the date that it became operational.

There is a right to extend the operation of an interim development order for further periods not exceeding 12 months at a time.

Regional interim development orders

Regional Interim Development Orders ('RIDOs') are made by the WAPC, with the approval of the Minister.

They can be imposed by the WAPC in relation to areas outside the metropolitan region, in areas where the WAPC has resolved to prepare a region scheme.

Because of this threshold requirement that a RIDO may only be made where there has been a resolution to prepare a region planning scheme, they are seldom used.

The only RIDO, which has been made, is the Ningaloo Coast Regional Interim Development Order (Ningaloo RIDO) 2004, published in the Government Gazette on 18 August 2004.

Local interim development orders

Local interim development orders ('LIDOs') are made by the Minister for Planning.

A LIDO can be made in any area outside the metropolitan region, pending the consideration by the Minister of a proposed local planning scheme.

LIDOs can be made pending the making of a local planning scheme:

- where no local planning scheme currently exists; or
- where a local planning scheme does exist and the Minister is of the opinion that it is in the public interest to do so.

LIDOs are most commonly found in regional local government areas, outside that local government's townsites.

4.3.5 Planning control areas

A Planning Control Area ('PCA') is an instrument made by the WAPC with the approval of the Minister, pursuant to Part 7 of the PD Act. Section 112 of the PD Act confirms that a PCA can be made for any of the purposes specified in Schedule 6 of the PD Act.

Schedule 6 lists 19 purposes, ranging from car parks, hospitals, railways, schools and water catchments.

PCAs are used where the WAPC wants to ensure that no development occurs which might prejudice the use of particular land for one of the listed purpose in Schedule 6, usually pending the reservation of the land under the relevant region planning scheme.

In this way, they operate in a similar fashion to RIDOs, except that they can be made where a region planning scheme is already in place, rather than where there has been a resolution to prepare.

It should be noted, however, that PCAs are not limited to areas where a region planning scheme is in place.

> ***Example: Planning Control Area 117 – City of Melville (Government Gazette, 18 September 2015):***
>
> ***"The purpose of the Planning Control Area is to protect the land required for future road upgrading of Canning Highway to ensure that Canning Highway would operate effectively in the long term and continue to provide the regional road functionality that is needed to support the overall development and viability of the centres that it connects such as Fremantle, Perth and Canning Bridge.***
>
> ***The WAPC considers that the planning control area is required to ensure that no development occurs on this land which might prejudice this purpose until it may be reserved for regional roads in the Metropolitan Region Scheme."***

Where a PCA is in place, approval for development is required from the WAPC as well as under any relevant planning scheme, unless the PCA imposes requirements to the contrary.

Section 130 of the PD Act confirms that a PCA prevails over every other provision of the PD Act, and any region planning scheme and local planning scheme, to the extent of any inconsistency.

This is a reflection of the importance of PCAs in securing land for public purposes and strategic regional infrastructure.

4.3.6 Improvement Plans and Schemes

Improvement plans and schemes are governed by Part 8 of the PD Act. In short:

- An improvement plan gives power to the WAPC to operate as a developer to advance the development of the area subject to the improvement plan.
- An improvement scheme provides the development control framework for an improvement plan area.

Improvement plans

Improvement plans are made by the Minister for Planning upon the recommendation of the WAPC. The purpose of an improvement plan, as set out in section 119 of the PD Act is to advance the planning, development and use of land.

Improvement plans are powerful instruments, because once an improvement plan comes into force, the WAPC has the power to proactively pursue redevelopment of the land, rather than just preparing a statutory framework within which development can occur (like a region planning scheme or local planning scheme).

The WAPC has power to construct and repair buildings, enter into financial arrangements such as leasing, disposing or entering into exchanges of land. These powers are set out in section 121 of the PD Act.

> ***Examples of Improvement Plans:***
>
> ***Improvement Plan No.35 – Perth Waterfront (Government Gazette, 19 November 2010):***
>
> ***"It is hereby notified for public information that the Western Australian Planning Commission (WAPC) acting pursuant to Part 8 of the Planning and Development Act 2005 has certified and recommended that for the purpose of advancing the planning, development and use of the land described below, that the land should be made the subject of an improvement plan."***
>
> ***"The purpose of this improvement plan is to establish the strategic planning and development intent for the Perth Waterfront, outline the procedural steps and program for obtaining statutory approvals, provide guidance to the preparation of and consideration of statutory plans, statutory referral documentation and policy instruments and provide for a strategic planning framework endorsed by the WAPC, Minister for Planning and the Governor."***

Improvement schemes

A new addition to the PD Act is Division 2 of Part 8. This division was inserted into the PD Act in November 2010.

An improvement scheme can be made in respect of land, the subject of an improvement plan. It is made as if it were a local planning scheme, except that any reference to a local government is to be read as a reference to the WAPC.

An improvement scheme, like a local planning scheme, is primarily concerned with development control. In this case, however, the decision maker is the WAPC rather than the local government.

Once an improvement scheme is operative, any other planning scheme (either regional or local) ceases to apply, and any local or region planning scheme or amendment made after an improvement plan comes into operation does not apply.

There are currently no improvement schemes in existence, however there has been several Improvement Plan areas designated in the last 12 months which foreshadow the making of an Improvement Scheme. These include:

- Improvement Plan No.37: Browse Liquefied Natural Gas Precinct
- Improvement Plan No.41: Ashburton North Strategic Industrial Area
- Improvement Plan No.43: Shenton Park Rehabilitation Hospital.

4.3.7 How do these documents all fit together?

The planning framework in Western Australia is complex and is complicated by the variation amongst local governments.

In summary:

- Policies cannot override explicit provisions in statutory instruments unless they are incorporated by reference in that instrument.
- Local planning schemes must be consistent with region schemes.
- RIDOs prevail to the extent of any inconsistency with a local planning scheme.
- LIDOs prevail to the extent of any inconsistency with a local planning scheme.
- PCAs prevail to the extent of any inconsistency with a local planning scheme and region planning scheme and every other provision of the PD Act.
- Local planning schemes and region planning schemes cease to have effect where an improvement scheme or redevelopment scheme is operative.

Part 2 - Development Control

1. Introduction

Development control in Western Australia is mainly governed by local planning schemes, and where applicable region planning schemes.

In this Part, we look at what 'development' is, the circumstances where development approval is required, and the permissibility of uses under local planning schemes.

2. Definition of 'development'

The definition of development in the PD Act is somewhat confusing, in that it includes the concept of physical development and the use of land.

> ***"development means the development or use of any land, including –***
>
> ***(a) any demolition, erection, construction, alteration of or addition to any building or structure on the land;***
>
> ***(b) the carrying out on the land of any excavation or other works;***
>
> ***(c) in the case of a place to which a Conservation Order made under section 59 of the Heritage of Western Australia Act 1990 applies, any act or thing that —***
>
> ***(i) is likely to change the character of that place or the external appearance of any building; or***
>
> ***(ii) would constitute an irreversible alteration of the fabric of any building."***

Therefore, any turning of the soil or minor alteration of a building is considered to be development, as is the use of any land or building, even where it is not accompanied by any physical works.

3. What development requires approval?

Development requires approval if a region or local planning scheme (through the Deemed Provisions) says that it does. Development in areas of the State where there is no region or local planning scheme does not require planning approval, although other approvals (such as a building permit under Building Act 2011 and Building Regulations 2012) may be required.

3.1 The requirement for approval under region planning schemes

The MRS requires all development on zoned land to obtain development approval except for specific exclusions, which are listed in clause 24(2).

In relation to land reserved under the MRS, whether approval is required will depend upon whether the land is owned by a public authority or is in private ownership, and the type of development proposed. See clauses 13, 16 and 18 of the MRS.

The PRS and the GBRS work slightly differently in relation to zoned land, in that development on zoned land does not require approval under these schemes unless, by resolution, the WAPC requires particular designated areas or particular classes of development to obtain approval.

In relation to each of the region planning schemes, the WAPC has in certain circumstances, delegated its decision-making power to the relevant local government. These delegations are published in the Government Gazette and change from time to time. They are often use or location specific or relate to the subject matter in particular SPPs.

Because of the multitude of variations and permutations of these delegations, there is little benefit in explaining them further in this paper.

What should be noted, however, that in many cases, the WAPC delegates its decision-making authority to local government.

3.2 The requirement for approval under local planning schemes

Local planning schemes usually work on the premise that all development requires approval. The scheme then lists a number of exemptions from this requirement. This list varies greatly from local government to local government and from planning scheme to planning scheme.

Since the commencement of the LPS Regulations, what 'development' requires approval is now standardised throughout the State.

Clause 60 of the Deemed Provisions states:

> *"A person must not commence or carry out any works on, or use, land in the Scheme area unless –*
>
> *(a) the person has obtained the development approval of the local government under Part 8; or*
>
> *(b) the development is of a type referred to in clause 61."*

Clause 61 then sets out all of the exemptions from the requirement for development approval, separated into 'works' and 'uses'.

Exemptions include:

- the construction and use of land for a single house on a lot with a residential zoning, where the proposed house complies with the acceptable development standards of SPP3.1 Residential Design Codes;
- the construction of a boundary fence which is not more than 1.8 metres in height;
- the use of a single house for a 'home office'; and
- temporary uses in place for less than 48 hours.

4. How to determine whether a use can be approved

As discussed previously, region planning schemes provide no use permissibility nor do they impose particular development standards or requirements – they provide only broad-brush indications as to preferred land uses.

This section discusses the permissibility of uses under local planning schemes, and the limits and conditions imposed in relation to physical development.

4.1 Zoning tables

The starting point to determine whether a use can be approved is looking at the zoning table, where the relevant scheme is a zoning scheme.

4.1.1 Use permissibility

Different local planning schemes use different nomenclature, but most schemes will use a variation of the following:

P The use is permitted (that is, an application for development approval cannot be refused because the use itself is inappropriate).

D The use can be approved, but at the discretion of the local government (in some older schemes, the symbol 'AA' is used rather than 'D').

A The use can be approved, but at the discretion of the local government after advertising and public consultation has been undertaken (in some older schemes, the symbol 'SA' is used rather than 'A').

X The use cannot be approved. That is, the local government has no power to approve the use, even if it wanted to. Sometimes, instead of the X, a prohibited use is one where the square is left blank (in some older schemes, the cell in the zoning table is left blank rather than 'X'). Under the table is an annotation explaining that where the cell is blank, the use is prohibited in the zone.

4.1.2 How to read a zoning table

Most zoning tables work in the same way, although there are some minor variations. Usually, the uses are listed vertically down the left hand column of the page, while the zones are listed horizontally across the top row of the page. The symbols of 'P', 'A' etc. are then assigned to the cells where the horizontal and vertical headings meet.

Some local planning schemes simply list each of the uses alphabetically down the left hand column of the table.

Others group the uses into use-categories, for example:

- residential uses
- commercial uses
- industrial uses
- rural uses

Example: excerpt from City of Cockburn Town Planning Scheme No. 3

	Residential	Regional Centre	District Centre	Local Centre	Mixed Business	Business	Light and Service Industry	Industry	Rural Living	Rural
Single House	P	D	D	D	D	A	X	X	P	P
Bank	A	P	P	P	P	P	P	P	X	X
Office	A	P	P	D	P	P	P	P	X	X
Showroom	X	P	D	X	P	X	P	P	X	X
Restaurant	A	P	P	A	P	D	D	X	A	A
Shop	X	P	P	P	P	X	X	X	X	X
Night Club	X	D	X	X	X	D	D	D	X	X
Warehouse	X	D	D	X	P	X	P	P	X	X
Veterinary Hospital	X	A	A	X	D	X	P	P	X	A

4.1.3 General v specific use classes

It is important to note that where a specific use is listed in a zoning table, it is excluded from a more general use class, where it might otherwise be able to fit. Therefore, for example, while a 'liquor store' is also a type of 'shop', where it is separately designated within a zoning table, the more specific use class is to apply.

4.1.4 Uses not listed

A reference to a 'use not listed' usually means a use that is not specifically listed in the zoning table.

A use that is not listed in the zoning table has no use permissibility assigned to it. Most schemes require a two-step process to be undertaken to determine whether the use is capable of approval.

The first step is to determine whether the use can be characterised as falling within a use category that is listed.

If it cannot, then the next step is to determine whether it is consistent with the objectives of that zone.

If so, then a development application for such a use is to be determined as if it is an 'A' use (or equivalent). That is, the development application is advertised and public comments sought, before being determined.

4.1.5 Incidental/ancillary uses

A question that often arises is where a use has been approved, whether it is possible to also have other uses on the same lot, which under the zoning table might not otherwise be permitted, or not be a use which is preferred in that location.

As an example, under the City of Cockburn Town Planning Scheme No.3, a veterinary hospital in the rural zone can be approved, but an office is prohibited. There could be some argument on a literal reading of the zoning table, that there would be no capacity to approve the office component of the veterinary hospital.

The zoning tables of some local planning schemes include a symbol of 'I' for incidental use. In this case, the use can only be approved where it is incidental to the predominant use. See, for example the City of Melville Community Planning Scheme No.5.

In other local planning schemes, a provision is included which confirms that where a use is listed in the zoning table, it is deemed to include any incidental uses.

4.2 Precinct based local planning schemes

As discussed previously, most local planning schemes in Western Australia are zoning schemes.

There are, however, an increasing number of local planning schemes which identify particular precincts rather than designating land by way of zone.

Where a local planning scheme is precinct-based, it will often not have a zoning table. Instead, it provides a set of objectives for each precinct, and then lists the 'preferred' uses within the precinct. It will also often list those uses that are 'contemplated' but not preferred. Mostly, precinct based local planning schemes do not expressly prohibit any use, and therefore provide a greater degree of flexibility to approve uses which fit within the general objectives of the precinct.

> ***Example: Excerpt from City of Armadale Town***
>
> ***Planning Scheme No.4:***
>
> ***"clause 4.4.4***
>
> ***Where a use is mentioned in the Zoning Table, it is deemed to include activities incidental to that use.***
>
> ***"incidental use" means a use of premises which is ancillary and subordinate to the predominant use."***

It should be noted that the absence of such a provision is not fatal, because a common sense approach is taken as to what is properly part of the predominant use that is being applied for. In addition, there is a large body of case law from the Western Australian higher courts on this issue, which can provide guidance in particular cases.

> ***Examples of precinct based local planning schemes:***
>
> - ***City of Perth City Planning Scheme No.2***
> - ***East Perth Redevelopment Scheme No.2.***

Some local planning schemes are a hybrid, in that they both zone land and identify precincts. In these hybrid schemes, there is usually a zoning table, and the purpose of identifying land by way of precinct is to assign different development standards and requirements (discussed further below).

Examples of 'hybrid' precinct based local planning schemes:

- ***City of Melville Community Planning Scheme No.5***
- ***Town of Vincent Town Planning Scheme No.1.***

4.3 Use definitions

Careful consideration should be given to the actual definition of the use being applied for. Most local planning schemes include definitions either at the front of the scheme, or as a schedule to the scheme.

4.3.1 Variations between local planning schemes

Definitions of the same or similar terms differ widely amongst local governments. Sometimes definitions do not accord with the common or modern day understanding of a term.

A good example of this is the definition of 'showroom', which is the class of use pursuant to which most bulky goods showrooms are approved. Here are some examples from metropolitan local planning schemes:

Scheme	***Definition***
Cockburn	***Means premises used to display, sell by wholesale or retail, or hire, automotive parts and accessories, camping equipment, electrical light fittings, equestrian supplies, floor coverings, furnishings, furniture, household appliances, party supplies, swimming pools or goods of a bulky nature.***
Rockingham	***Means a building or part of a building wherein goods are displayed and offered for sale by wholesale or by retail, excluding the sale of foodstuffs, liquor or beverages; items of clothing or apparel, fabrics, footwear, magazines, newspapers, books and paper products; china, glassware or domestic hardware; items of personal adornment, small electrical goods of a domestic nature; toys and generally items of a cash and carry nature related to daily household and recreation needs and consumption***

The same definition in the Rockingham local planning scheme is much more restrictive than that of Cockburn's.

Care needs to be taken in determining whether a particular proposal falls within a use definition under a local planning scheme. Again, there is an endless number of local variations on the simplest of use definitions. Some scheme definitions specifically exclude some subsets of that use. A good example of this is from the City of Melville Community Planning Scheme No.5 ('CPS5').

Example of definitional exclusions:

"shop means any building wherein goods are kept, exposed or offered for sale by retail, or within which services of a personal nature are provided (including a hairdresser, beauty therapist or manicurist) but does not include a showroom, fast food outlet or any other premises specifically defined elsewhere in this part. (emphasis added)"

"liquor store means any land or buildings the subject of a Store Licence granted under the provisions of the Liquor Licensing Act 1988 (as amended)."

In this case, even though 'liquor store' does not appear in the zoning table, the fact that it has been separately defined in Schedule 1 of CPS5 means that it is excluded from the definition of 'shop' and must therefore be dealt with as a use not listed.

4.3.2 Definitions which impose limits on the use

Some definitions include development standards within the definition itself. For example, in the City of Joondalup's District Planning Scheme No.2, a 'convenience store' shall not exceed 200m2 net leasable area. These are discussed in further detail below.

4.4 Use permissibility derived from other than zoning

4.4.1 Additional and restricted uses

It is not enough to consider the permissibility of uses by reference to the zoning table. Zoning schemes usually include tables of additional and restricted uses to which identified parcels of land may be put.

They are implemented in situations where a scheme amendment to allow a particular use is warranted, but there is no zoning which will appropriately limit the type of development proposed.

Additional and restricted uses offer two ways to achieve the same end. For example:

- a residential zoned lot might be given an additional use to allow it to be used for a local shop, rather than rezoning it to a commercial zone, where a number of higher intensity commercial uses would also be allowed; or

- a lot might be rezoned to a commercial zone, but with a use that is restricted to local shop.

It should also be noted that often additional and restricted uses are imposed with conditions regarding:

- the intensity and operations of the use; and

- the form any physical development which accompanies the use must take.

4.4.2 Special use zones

Special use zones are actually 'zones' under the local planning scheme, but in practice operate in a way that is more akin to an additional or restricted use.

Special use zones are often used as a 'catch-all' zoning, which has no consistent use permissibility or development standards. Instead of assigning use permissibility through the zoning table, a table in the local planning scheme identifies each lot separately, and assigns use permissibility, and in some circumstances development standards on a lot-by-lot basis.

4.4.3 Special control areas

A special control area is another form of overlay to zoning.

Some special control areas are put in place to impose a particular development assessment process (for example, requiring particular environmental impact reports to be prepared when developing within a groundwater resource area).

However, some also impose restrictions on the use of land or the form of physical development, which can be approved.

4.4.4 Structure plans

Pursuant to section 79 of the LPS Regulations, all structure plans made under the PD Act before 'commencement day' (that is, 19 October 2015) and in accordance with the Town Planning Regulations 1967 (WA) continue in force as if the structure plans made under the PD Act in accordance with the LPS Regulations.

The Deemed Provisions in the LPS Regulations change the effect of a structure plan. Clause 27(1) of the Deemed Provisions states:

> *'A decision-maker for an application for development approval or subdivision approval in an area that is covered by a structure plan that has been approved by the Commission is to have due regard to, but is not bound by, the structure plan when deciding the application.'*

In the decision of Terra Spei Pty Ltd and Shire of Kalamunda [2015] WASAT 134, the Tribunal found that a provision of the applicable local planning scheme that purported to require that the proposed development be 'generally.. in accordance with' a structure plan is inconsistent with clause 27 of the Deemed Provisions, therefore, any existing provisions under the local planning scheme which purport to vary the legal effect of a structure plan will have no effect.

> *In short, when deciding the development application, the Tribunal is required to have due regard to, but is not bound by the LSP, and the Scheme does not require that the proposed development be generally in accordance with the LSP.*

4.4.5 Non-conforming use rights

Non-conforming uses operate as an exception to the statutory use permissibility imposed by way of zoning tables and overlays thereto.

A non-conforming use is a use which was lawfully in operation (either by way of an explicit approval, or because approval of that particular use was not required) until a planning scheme or amendment made the use non-conforming to the planning scheme. In practice, this usually means that the use permissibility is changed so that approval can no longer be given (i.e. the use is now a prohibited use).

Most local planning schemes specifically provide that such a use continues to be lawfully operative, notwithstanding the local planning scheme now prohibits the use in the zone. Most schemes will allow further development approvals to be issued in respect of a non-conforming use, where certain conditions are met. Some local planning schemes will allow a change of use from one non-conforming use to another, where the proposed use more closely accords with the objectives of the zone.

4.4.6 Restrictive covenants

Restrictive covenants can limit the capacity for the redevelopment of land, apart from the requirements of a statutory planning instrument.

A restrictive covenant cannot affect the ability to obtain development approval under a statutory planning instrument. This is because a restrictive covenant is a private obligation and not linked in any way to the planning framework. In a practical sense, however, it does affect the capacity to actually implement the approval.

A restrictive covenant, in its traditional form, requires that there be a lot that is 'benefited', and a lot that is 'burdened' by the covenant.

There is ability for a local government to lift such restrictions where its local planning scheme gives it power to do so. Item 11(1) of Schedule 7 of the PD Act gives local governments such a power in their scheme.

Local governments are reluctant to lift restrictive covenants (despite their effect on local planning) because of the private contractual nature of the 'benefit' and 'burden' elements of such covenants.

4.4.7 Estate restrictive covenants

Estate covenants are created by land developers when they are developing large residential housing estates. The restrictive covenant usually imposes conditions regarding the quality and style of single residential development that can be undertaken, in order to maintain control of the quality of development that can occur. They usually restrict either the type of materials that can be used or the form of development (for example, restricting development to single storey, or limiting the capacity to construct a front fence).

They are used by land developers for several reasons:

- as a marketing tool – to assure prospective purchasers that the quality of urban design represented in the marketing brochures will be a reality; and

- as a form of development control – to ensure that earlier stages of an estate are developed in a way which can be used as a 'show case' for later stages, thereby ensuring that sale prices are not affected by undesirable development.

The problem with estate covenants is that over time, the need to closely regulate the form of development diminishes, while the restrictive covenant remains.

Because the lots benefited by the covenant might now be in several different ownerships, they are almost impossible to remove. In this case, the local government may invoke its powers under its local planning scheme (if it has such powers) to lift the restrictive covenant.

Estate covenants are becoming less popular as more effective forms of development control become available.

These include the use of local development plans or special control areas, designated under the local planning scheme.

4.4.8 Individual restrictive covenants

Most individual restrictive covenants relate to limits on height, residential density or use of land.

They are often imposed by a landowner in circumstances where they have subdivided a parcel of land from the parent lot for the purpose of sale, but want to ensure that their amenity or livelihood is not impacted upon if the land is redeveloped by the new owners.

A good example of this is a person who subdivides their lot overlooking the beach, and imposes a restrictive covenant on the block to be disposed of, to ensure that views are maintained by restricting the height of any development.

Restrictive covenants, which restrict use, are usually imposed either to protect the amenity of the benefited land, or to protect business interests carried on the benefited land, by restricting competition.

Covenants where there is no 'benefited' land

Some restrictive covenants do not require a piece of land to be benefited. These restrictive covenants are usually in favour of a statutory body, and limit the use of land to achieve conservation outcomes, or to restrict development to certain locations, for example:

- Section 21A of the National Trust of Australia (WA) Act 1964 for restrictive covenants in favour of the National Trust; and

- Section 129 BA Transfer of Land Act 1893, for restrictive covenants in favour of local governments and public authorities.

5. How to determine whether physical development can be approved

5.1 Introduction

Determining whether the particular use of an area can be approved is only the first step in determining whether a development can be approved.

The next step is to determine:

- whether the development can comply with any development standards or requirements set out in the local planning scheme; and if not

- whether:
  - there is power to vary that development standard or requirement; and
  - it should be varied, having regard to orderly and proper planning.

Local planning schemes set out the standards that apply to development. These standards include:

- particular construction standards such as limits on heights and setbacks of buildings; and

- the imposition of minimum requirements in relation to the number of car parking bays required for particular uses, the provision of end-of-trip facilities, and locations of refuse areas.

Development standards vary widely amongst local planning schemes. The one relatively consistent set of standards is SPP3.1: Residential Design Codes, which most local governments incorporate as a basis for providing minimum standards with respect to residential development.

It should be noted, however, that some local governments vary the Residential Design Codes by express variation within their local planning scheme text, or in some circumstances, by way of local planning policy.

5.2 Where development standards and requirements are found

Unfortunately, the lack of consistency between local planning schemes throughout the State means that there is no simple answer to this question. Some of the main ways are listed below.

5.2.1 Development standards and requirements for residential uses

As discussed above, most local planning schemes incorporate SPP3.1 Residential Design Codes as a basis for the standards, which are applicable to residential development on residential zoned land.

The types of standards that the Residential Design Codes cover include setbacks, heights and car parking.

It should be noted that some local planning schemes expressly vary the standards and requirements in the Residential Design Codes, by express variation within the local planning scheme text, or by reference to a Local Planning Policy.

This is often done to achieve particular built outcomes for infill development in older, established areas, to maintain streetscape or local character.

5.2.2 Development standards for non-residential uses

Development standards for non-residential uses are usually identified on a use-by-use basis. The most common and universally applied development standard is that of the requirement for car parking spaces.

Most local planning schemes will have a table setting out the ratio of car parking spaces required for particular uses, based upon a relevant measurement – for example, per m2, number of patrons, number of consulting rooms, etc.

Example: excerpt from Table 3 from City of Geraldton Town Planning Scheme No.5 Table No.3 – Car Parking Guidelines

Use (other than city centre)	***Minimum parking spaces required***
Amusement Parlour	***1 / 4 patrons***
Consulting Rooms	***5 / practitioner***
Day / Family Care Centre	***1 / staff member + 4***
Laundromat	***1 / 2 machines installed***
Nigh Club	***1 / 4 patrons***
Office	***1 / 40m2 GFA***
Recreation Active - Bowling Alley	***3 / lane***

There are a wide array of different development standards. These include fencing heights and standards, landscaping requirements, the requirement for particular noise reduction standards for development close to highways or railway lines or in mixed-use developments, limitations on the type of signage able to be approved, the requirement for bicycle parking and end-of-trip facilities (such as lockers and showers).

5.2.3 Development standards by zone, precinct or location

In addition to identifying some development standards by way of ‘use’, local planning schemes will also, where appropriate, impose development standards by way of zone, precinct, special control area or specific location.

Imposing development requirements by way of precinct or location allows a local planning scheme to achieve particular built outcomes in an identified area.

An example of this is a local planning scheme that sets out a different carparking ratio for areas where public transport and pedestrian access is to be encouraged. Another example is a local planning scheme that imposes the requirement for awning over the footpath, or other architectural features to create a cohesive streetscape.

5.2.4 Development standards in additional or restrictive use provisions

Some additional and restrictive uses impose particular development standards upon the use. For example, an additional use may permit the use of land for a 'shop' where such a use would normally be prohibited by the local planning scheme, but provided the net lettable floor area does not exceed 100m^2.

Example: Excerpt from Schedule 2 'Special Use Zones' in Shire of Ravensthorpe Town Planning Scheme No.5

No.11	***Description of land*** ***279 Hopetoun-Ravensthorpe Road, Hopetown (Lot 6381 on Diagram 94334)***
	Special use ***Park Home and/or Caravan Park with the following incidental uses and level of permissibility as provided by Clause 4.3.2 of this scheme:*** ***Convenience store (D)*** ***Restaurant (D)*** ***Fast Food Outlet (A)*** ***Reception Centre (A)*** ***Tavern (A)***
	Conditions ***All incidental uses are to be held in a combined single tenancy and the maximum combined commercial net lettable area is to be 400m^2.***

5.2.5 Development standards embedded in definitions

Some definitions provide limits on the use within the definition itself, particularly by limiting the floor area of particular uses.

Example: Excerpt from Schedule 1, City of Joondalup District Planning Scheme No.2:

"convenience store means any land and or buildings used for the retail sale of convenience goods being those goods commonly sold in supermarkets, delicatessens and newsagents and may include the sale of petrol and operated during hours which may extend beyond normal trading hours. The buildings associated with a convenience store shall not exceed 200m2 net leasable area."

5.2.6 Development standards in plans made under the local planning scheme

As discussed above in relation to use permissibility that is imposed by plans made under local planning schemes, development standards can similarly be imposed. These can be imposed by way of a structure plan, and/or a local development plan. These plans are sometimes called 'outline development plans' or 'detailed area plans' depending upon the local planning scheme.

Detailed Area Plans have become popular with residential estate developers in requiring a particular form of development. They may allow reduced setbacks, or require that garages be constructed at the rear of properties.

These Detailed Area Plans have largely taken the place of restrictive covenants, discussed above.

Detailed Area Plans, Centre Plans and Activity Centre Structure Plans made in accordance with the requirements set out in SPP4.2 Activity Centres for Perth and Peel are used to achieve desirable urban design outcomes in town centres. The types of standards that might be imposed include requirements regarding awnings, entrance points and the sleeving of buildings.

The Deemed Provisions in the new LPS Regulations characterise a 'detailed area plan' as a 'local development plan' and an 'activity centre structure plan' as an 'activity centre plan'.

5.2.7 Development standards in LPPs

Some local governments incorporate development standards contained in their local planning policies, rather than planning schemes, in much the same way as is done with Residential Design Codes.

The reason for this is to provide a greater degree of flexibility in applying the standards. Therefore, if the local government believes that a use should be approved notwithstanding the fact it cannot meet a development standard, it has a greater scope to vary a requirement in a local planning policy rather than in the local planning scheme itself.

Detractors of this practice say that the incorporation of standards or requirements by way of an external document avoids the scrutiny and review that these standards would face had they been included into a local planning scheme.

5.3 Varying development standards and requirements

The physical development of land is required to comply with any standards and requirements imposed in the scheme.

So, a building cannot be approved if it exceeds the height or plot ratio restrictions imposed by the local planning scheme.

Most local planning schemes have capacity to vary development standards imposed by the local planning scheme. The one limitation on this power is that most local planning schemes do not provide a power to vary any requirements set out in the Residential Design Codes. The Model Provisions in the LPS Regulations continue this limitation.

The question arises as to what constitutes a 'standard or requirement prescribed under the Scheme', and in particular, whether such a clause extends to allow the variation of a standard contained within a use definition.

In the decision of Spectator Investments Pty Ltd and City of Joondalup [2005] WASAT 299, the Tribunal cast some doubt on whether a definition which contained a numerical maximum (such as the definition of convenience store above) could be characterised as a standard which regulated an aspect of the permitted use, but rather form part of the definition itself. If this were the case, then the power to vary a development standard or requirement would not apply.

In the decision of Marshall and City of Rockingham [2006] WASAT 249, the Tribunal allowed the variation of a numerical definition. The definition in question was 'home business', where the first limb of that definition stated:

> *"(a) does not employ more than 2 people not members of the Occupier's household."*

It should be noted that this was agonised over by the Tribunal, and at paragraph [37] acknowledged that the resolution of this matter had not been easy.

This issue does not arise particularly often, but care must be taken to consider whether there is power to vary on a case-by-case basis.

6. Statutory interpretation of planning instruments

As noted previously a LPS is subsidiary legislation, and has legal effect as if enacted.
You will note however that in some circumstances, local planning schemes can be difficult to read, and in a legal sense are ambiguous or unclear.

This is because LPSs and associated policies and plans that support them are not prepared by lawyers, but are prepared by town planners. This can make it difficult to ascertain the true meaning of the provisions and intention of the drafters.

The following is a rather unkind assessment of planning schemes by the Tasmanian Supreme Court in AAD Nominees Pty Ltd v Resource Management and Planning Tribunal and Kingborough Council and Ors [2011] TASFC 5, per Blow J:

'[1] I have read the reasons for judgment of Tennent J in draft form, and agree that this appeal should be dismissed, for the reasons stated by her. I would like to add some comments, mainly concerning the Kingborough Planning Scheme 2000.

The full text of each of the relevant mind- numbing clauses is set out in her Honour's reasons for judgment, and I am very grateful for that.

[2] The planning scheme is very complex, and exceedingly and unnecessarily difficult to comprehend or interpret. Most ordinary people would not have a chance. Most sensible people, or people with a life, would not attempt the task unless they had absolutely no choice. In order to determine how the scheme operates in relation to the appellant's proposed development, it is practically essential to have a law degree, decades of experience in interpreting legal documents, a talent for understanding gobbledygook and misused words, a lot of time, and a very strong capacity for perseverance.'

In Western Australia, the State Administrative Tribunal has adopted the reasoning in the decision of Chiefari v Brisbane City Council [2005] QPEC 9, a decision of the Queensland Planning and Environment Court. That decision advocated for the use of a purposive approach to the interpretation of planning instruments:

'[502] [The definitions under review] are included in [sic] to provide an explanation of the meaning of terms used in the Scheme. They are obviously of general application and intended to cover a variety of circumstances. They will ordinarily be construed in a manner which acknowledges that planning schemes are largely the work of town planners, not parliamentary counsel; ergo, they should be read as a whole and applied in a practical and common sense, and not an overly technical way, and in a fashion which will best achieve their evident purpose.'

Part 3 - Making decisions

1. Introduction

As a DAP member, you are responsible for making important determinations which will have an impact upon the owner of the land, the subject of the application and the community at large. It is important that you take your role seriously and exercise your powers in accordance with the legislative and policy framework.

In this Part, we look at how a good decision is made.

2. Know your power

2.1 Threshold questions

The starting point in making a good decision is determining whether you have power to make the decision for which an application has been lodged. Relevant threshold questions that need to be answered are:

- Does it fall within the monetary jurisdiction of the decision-maker?
- Is it something that requires approval under the relevant statutory planning instrument, or is it exempt from this requirement?

2.2 Understanding the planning framework

Once it is ascertained that approval is required, and there is power to make the decision, the next set of questions that must be answered are:

- Can the use be approved with or without modifications imposed through conditions?
- Can the development be approved with or without modifications imposed through conditions?
- Should the application be approved?

In previous sections, we have considered whether a use can be permitted, and what development standards and requirements apply. In this section, we consider how to assess whether an application should be approved.

Put another way, the first two questions are largely quantitative – is the use a ‘P’, ‘D’, ‘A’ or ‘X’ use in the zone? Is the height or setback consistent with the standards set out in the local planning scheme?

The final question is qualitative. That is, it is the part of the decision that requires the decision-maker to exercise discretion as to whether approval should be given.

Guidance as to how discretion is to be exercised is provided by the local planning scheme itself. Each local planning scheme sets out the matters to consider in determining an application. These matters range from the detailed to the general.

Clause 67 of the Deemed Provisions:

In considering an application for development approval the local government is to have due regard to the following matters to the extent that, in the opinion of the local government, those matters are relevant to the development the subject of the application —

- ***(a) the aims and provisions of this Scheme and any other local planning scheme operating within the Scheme area;***
- ***(b) the requirements of orderly and proper planning including any proposed local planning scheme or amendment to this Scheme that has been advertised under the Planning and Development (Local Planning Schemes) Regulations 2015 or any other proposed planning instrument that the local government is seriously considering adopting or approving;***
- ***(c) any approved State planning policy;***
- ***(d) any environmental protection policy approved under the Environmental Protection Act 1986 section 31(d);***
- ***(e) any policy of the Commission;***
- ***(f) any policy of the State;***
- ***(g) any local planning policy for the Scheme area;***
- ***(h) any structure plan, activity centre plan or local development plan that relates to the development;***
- ***(i) any report of the review of the local planning scheme that has been published under the Planning and Development (Local Planning Schemes) Regulations 2015;***
- ***(j) in the case of land reserved under this Scheme, the objectives for the reserve and the additional and permitted uses identified in this Scheme for the reserve;***
- ***(k) the built heritage conservation of any place that is of cultural significance;***
- ***(l) the effect of the proposal on the cultural heritage significance of the area in which the development is located;***
- ***(m) the compatibility of the development with its setting including the relationship of the development to development on adjoining land or on other land in the locality including, but not limited to, the likely effect of the height, bulk, scale, orientation and appearance of the development;***
- ***(n) the amenity of the locality including the following —***
- ***(i) environmental impacts of the development;***
- ***(ii) the character of the locality;***
- ***(iii) social impacts of the development;***
- ***(o) the likely effect of the development on the natural environment or water resources and any means that are proposed to protect or to mitigate impacts on the natural environment or the water resource;***
- ***(p) whether adequate provision has been made for the landscaping of the land to which the application relates and whether any trees or other vegetation on the land should be preserved;***
- ***(q) the suitability of the land for the development taking into account the possible risk of flooding, tidal inundation, subsidence, landslip, bush fire, soil erosion, land degradation or any other risk;***
- ***(r) the suitability of the land for the development taking into account the possible risk to human health or safety;***
- ***(s) the adequacy of —***
- ***(i) the proposed means of access to and egress from the site; and***
- ***(ii) arrangements for the loading, unloading, manoeuvring and parking of vehicles;***
- ***(t) the amount of traffic likely to be generated by the development, particularly in relation to the capacity of the road system in the locality and the probable effect on traffic flow and safety;***
- ***(u) the availability and adequacy for the development of the following —***
- ***(i) public transport services;***
- ***(ii) public utility services;***
- ***(iii) storage, management and collection of waste;***
- ***(iv) access for pedestrians and cyclists (including end of trip storage, toilet and shower facilities);***
- ***(v) access by older people and people with disability;***
- ***(v) the potential loss of any community service or benefit resulting from the development other than potential loss that may result from economic competition between new and existing businesses;***
- ***(w) the history of the site where the development is to be located;***
- ***(x) the impact of the development on the community as a whole notwithstanding the impact of the development on particular individuals;***

(y) any submissions received on the application;
(za) the comments or submissions received from any authority consulted under clause 66;
(zb) any other planning consideration the local government considers appropriate.

3 Relevant (and irrelevant) planning considerations

The section looks at how some of the considerations, which are listed in a local planning scheme's equivalent of clause 67 of the Deemed Provision (set out above), are to be considered and the weight to be given to them.

3.1 Policy (Deemed Provisions clause 67 (c), (d),(e), (f) and (g))

3.1.1 Weight to be given

In the decision of Permanent Trustee Australia Ltd v City of Wanneroo (1994) 11 SR(WA) 1, the Tribunal enunciated the test to be applied to determine the weight to be given to any particular policy:

- whether it is based on sound town planning principles;
- whether it is a public, rather than a secret, policy;
- whether it is a public policy conceived after considerable public discussion;
- the length of time that a policy has been in operation; and
- whether it has been continuously applied.

This is an important test designed to ensure that ad-hoc, reactive policies prepared solely to deal with an application that has been lodged or is shortly to be lodged, do not override other well- founded planning considerations.

3.1.2 How policy is to be applied

It is important that policy is not applied inflexibly – it is a tool to assist with decision-making, not a document requiring slavish compliance regardless of other competing planning considerations.

In the decision of Clive Elliott Jennings & Co Pty Ltd v Western Australian Planning Commission [2002] 122 LGERA 433 at [24], Justice Barker held:

> *"The existence of a policy cannot replace the discretion of the decision-maker in the sense that it is to be inflexibly applied regardless of the merits of the particular case. However, the relevant consideration in many applications will be why the 'policy' should not be applied; why the planning principles that find expression in the 'policy' are not relevant to the particular application."*

How a policy is to be applied will also depend upon how the local planning scheme incorporates it into its decision-making regime.

3.2 Draft policies and scheme amendments (Deemed Provisions clause 67(b))

Draft scheme amendments and policies can still be given weight even though they are not operative. This is the basis of the much-cited case Coty (England) Pty Ltd v Sydney City Council (1957) 2 LGRA 117. This case provides that weight can be given to a draft-planning instrument once it becomes 'seriously entertained'. In Western Australia, this usually occurs after advertising is completed – the further towards approval the document is, the more 'seriously entertained' it is considered to be.

The leading case in the State Administrative Tribunal is Nicholls and Western Australian Planning Commission [2005] WASAT 40, which provides at paragraph [45] a useful analysis of how a draft policy is to be treated by setting out a four-stage enquiry:

> ***"(1) In jurisdictions where there is no requirement to take into consideration a draft planning instrument or policy or a draft amendment to a planning instrument or policy once it has reached a certain specified stage, the authority or tribunal must consider whether the draft constitutes a seriously-entertained planning proposal. If it determines that it is a seriously entertained planning proposal, it is a relevant matter for consideration in relation to the planning assessment.***
>
> ***(2) If the draft is a relevant matter for consideration, the authority or tribunal must consider the extent to which the application before it is consistent with the planning objective or planning approach embodied or reflected in the draft. In particular, the authority or tribunal must consider whether the approval of the application is likely to impair the effective achievement of the planning objective or planning approach embodied or reflected in the draft or is likely to render more difficult the ultimate decision as to whether the draft should be made or its ultimate form.***
>
> ***(3) The authority or tribunal must consider the weight to be accorded to the consistency or otherwise between the application and the draft.***
>
> ***(4) The authority or tribunal must weigh its conclusions in relation to the foregoing matters in the balance along with all other relevant considerations relating to the application, and determine whether, in light of all relevant considerations, it is appropriate in the exercise of planning discretion to grant approval to the application and, if so, subject to what conditions." (emphasis added)***

3.3 Orderly and proper planning (Deemed Provision clause 67(b))

You will note that the term 'orderly and proper planning' is one that is used often by town planners as a test to determine whether approval of an application should be given.

The term takes on different meanings depending upon the factual scenario at hand. In broad terms, it requires the consideration of whether an application is consistent with the objectives that are set out in the local planning scheme, and any relevant policy, for the area in question.

3.4 Amenity and compatibility (Deemed Provisions 67(m), (n))

'Amenity' is defined in the Model Scheme Text, as:

> *"... all those factors which combine to form the character of an area and include the present and likely future amenity;"*

One of the considerations that must be made is whether the amenity of a locality will be adversely affected by a development proposal.

In the decision of *St Patrick's Community Support Centre and City of Fremantle* [2007] WASAT 318, the Tribunal considered how amenity was to be measured. The first step, according to the Tribunal, is to undertake an objective inquiry as to the existing character of the area. Once that character is ascertained, the next step is to consider how the proposal might affect that amenity, having regard to its impacts – for example, car parking and traffic, noise, etc.

3.5 Compliance with development standards

It should be noted that compliance with development standards and requirements (for example, the Residential Design Codes) does not create the presumption that issues such as amenity and compatibility are satisfied.

This was made clear in the decision of *Tangelo Design Consultants and Town of Vincent* [2005] WASAT 67 at [42] where the Tribunal stated:

> *"In most planning assessments, the fact that a development conforms to a relevant provision of the R–Codes is likely to be significant in relation to a related required matter for consideration under a town planning scheme, although it cannot be in itself determinative of such a consideration." (See also Robert Baccala and City of Fremantle [2005] WASAT 55 at [24]).*"

3.6 A better proposal…

It is not a relevant planning consideration that another proposal might provide a better planning outcome. The job of the decision-maker is to determine the application before it – not to second guess what could be achieved.

This position was confirmed in the decision of the *Town Planning Appeal Tribunal in SPB (Australia) Pty Ltd and Ors v Town of Claremont* [2003] WATPAT 138, at [90], where the Tribunal noted:

> *"...The function for the Tribunal is not, of course, to determine whether a proposed development is the best possible development, having regard to all issues that might conceivably be placed on the subject site. What the Tribunal must do is to assess whether, in the interests of all orderly and proper planning, and the amenity of the area, and having regard to all applicable planning instruments, a development should be approved. Thus, unless it can be said that a proposed development is contrary to any of those considerations, it should be approved notwithstanding that some may think that a better development of the site might be possible."*

3.7 Economic Competition

The threat of competition to existing businesses is not a relevant planning consideration. It only becomes a relevant planning consideration if there is a prospect that there will be a reduction in the facilities available to the community.

This was made clear in the High Court decision of *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675. In that case, Barwick CJ at [681] said that:

> *"economic competition feared or expected from a proposed use is not a planning consideration within the terms of the planning ordinance governing this matter".*

Stephen J at [687] noted that:

> *"...the mere threat of competition to existing businesses, if not accompanied by a prospect of a resultant overall adverse effect upon the extent and adequacy of facilities available to the local community if the development be proceeded with, will not be a relevant town planning consideration."*

3.8 Moral consideration

Moral considerations are irrelevant unless they manifest in a physical impact on amenity. If a use is permitted under the scheme, and is not illegal in a general sense, then there are no grounds to refuse it on that basis alone. That said, a development application can be refused provided the decision is made on proper planning grounds. As stated in *Snashall v Sydney City Council (*1981) 46 LGRA 88 at [96]:

> *"A planning authority is not a custodian of morals. However, that does not mean that, under the guise of tolerance, it should turn its back on considerations of urban amenity and aesthetics."*
>
> ***Examples:***
>
> ***In several planning decisions of other states, where brothels are legalised by Parliament, planning authorities have stressed that the morality of such a use is not a relevant planning consideration. However, applications for brothels have been reasonably refused on proper planning grounds. For example in Norton v City of St Kilda (1985) 19 APA 229 at [231] it was observed:***
>
> ***"…the basic thing that emerges clearly from the criteria relating to brothels is an underlying philosophy that they should not be located where people live, or where they might have an influence on children."***

3.9 Illegal uses

An illegal use is one that is a criminal offence to carry on.

The capacity to approve an illegal use was considered by the Tribunal in the decision of Pearce and the City of Wanneroo [2010] WASAT 77. In this case, the Tribunal confirmed an earlier decision of the Town Planning Appeal Tribunal in Builtwell Corporation Pty Ltd v Town of Port Hedland [2000] WATPAT 13, which stated that it is not in the public interest to approve a use which is illegal.

In the Builtwell case, the use applied for was 'therapeutic massage', whereas in evidence before the Tribunal, it became clear that the intended use of premises was a brothel.

In the Pearce decision, the Tribunal noted at [35]:

> *"Having regard to the evidence as to what activity is, in reality, proposed by a development application, it is for the planning authority to characterise the proposed land use and then determine the application on its planning merits. As it would be contrary to orderly and proper planning to grant development approval for an illegal activity, a sham development application that, in reality, proposes an illegal activity will generally be refused development approval."*

The decision-maker needs to obtain as much information that it can in order to be satisfied that the application is actually a sham for an illegal use.

3.10 Objective and testable expert evidence

Objective and testable expert evidence is generally preferred to generalised anecdotal evidence. As stated in Vinson v Randwick Council (2005) 141 LGERA 27 at [30]:

> *"Evidence of anti-social behaviour at or linked to the premises taken from records such as the police COPS system and/or other police records and/or diaries kept by local residents is preferable to generalised anecdotal evidence that cannot be tested by the applicant against any records kept by the operator of the premises."*

Where an application hinges on a particular planning consideration, it is preferable to make that decision on the basis of objective evidence. It is not enough, for example, to refuse an application because "it will cause traffic congestion", without supporting this submission with evidence.

> ***Example:***
>
> ***In the case of Birmingham Properties Pty Ltd and City of Melville [2010] WASAT 155, the Tribunal was required to consider an application to change a use from a shop to a liquor store. The City of Melville raised concerns that undesirable behaviour in the area might get worse if the development was allowed. However, the Tribunal allowed the application, noting:***
>
> ***[35] "While there have been a number of studies that have attempted to objectively understand the relationship between liquor outlets and harm in their neighbourhood, this is an inherently difficult research question and few studies have addressed it in a convincing manner.***
>
> ***[36] In essence, this issue is largely driven by what people perceive the impacts of a use might be, but the Tribunal must be satisfied that there is a factual or realistic basis for those fears.***
>
> ***[37] In the present case the Tribunal is not so satisfied, particularly in light of the evidence of the proposed management of the store, as outlined by Mr Martin Smith, the General Manager for Dan Murphy's stores in Australia."***

3.11 Petitions

3.11.1 Community concerns

It is common to receive a number of submissions from the community when particular uses are proposed. As noted in Arnold and Town of Claremont [2009] 231, the views of residents can be considered relevant, especially when supplementing the objective evidence of experts:

> *[73] "The view of residents, as well as the opinions of experts are considered to be relevant in assessing amenity as outlined in Sunbay Developments Pty Ltd and Shire of Kalamunda [2006] WASAT 74, where Barker J at [21] considered that:*
>
> *"... Indeed, residents of a locality are often wellplaced to identify the particular qualities and characteristics which contribute to their residential amenity."'*

These submissions should not be accepted blindly on the basis that there is a perceived but not substantiated concern that the proposed use will affect adversely on the amenity of the locality.

3.11.2 Petitions

In particular, decision-makers should consider community concerns with proper discernment, especially when presented by way of petition. As observed in Tempora Pty Ltd v Shire of Kalamunda (1994) 10 SR(WA) 296 at [303]:

> *"It is of concern that the views of those coming forward could not be typical and a proper survey might reveal a different cumulative view. It is possible that opinions have been distorted by an emotional issue … or the most vocal residents are more sensitive to their environment and the process of choosing the neighbourhood champions is self-selecting. There are other factors that give the Tribunal cause for concern, such as the unarticulated social pressure of neighbours, ignorance of the full implications of the use, and unwarranted fears arising from a repugnance to the particular use because it might promote socially unacceptable behaviour."*

As also stated in *Knott v City of St Kilda* (1986) 20 APA 222 at [223]:

> *"There is no indication as to what information was given to the signatory which induced the signing of the petition. One may assume that the person soliciting the signature presented the case with strong bias and possibly inaccurately described what was involved."*

That said, Tempora confirms the views of residents can be especially valuable where they refine other objective evidence, and where not already covered by experts:

> *"The views of residents that refine and explain the objective analysis of amenity or which raise new matters of amenity, not canvassed by the experts, must be given great weight."*
>
> ***Example***
>
> ***The case of Woolworths Ltd and City of Joondalup [2009] WASAT 41 involved an application for a large format liquor store. In this case, local residents gave evidence that the use would cause serious problems with respect to teenage drinking, and would encourage large groups to loiter in the area.***
>
> ***At paragraphs [76] and [77] the Tribunal stated:***
>
> ***"In Self Help Addiction Resource Centre Inc v Glen Eira City Council (2005) 145 LGERA 124, the Victorian Civil and Administrative Tribunal in dealing with a proposed alcohol and drug resource centre and neighbourhood residents' objections stated at [56]:***
>
> > ***'While we can appreciate the concern expressed by the resident objectors on these matters, in any assessment of the amenity impacts of this proposal, a distinction must be drawn between what people perceive the impacts of this use will be, and the reality of those impacts. It is perfectly reasonable for the residents to hold the fears that they do, but from the Tribunal's perspective we must be satisfied that there is a factual or realistic basis to those fears in order for us to conclude that this use will result in the amenity impacts alleged by the residents.'***
> >
> > ***In the present case, the Tribunal is not on the evidence before it able to conclude that there is a factual or realistic basis to the fears of the residents."***

3.12 Competing consideration

Finally, it is important to recognise that there will usually be competing relevant considerations, which will pose significant challenges for decision- makers to weigh. As noted above, a decision- maker should consider all considerations, especially those set out in policy, with a degree of flexibility.

In some circumstances, a decision-maker will be left with the difficult task of giving primacy to one relevant consideration over another, or against a multitude of considerations. A decision-maker should never simply engage in a simplistic and rigid determination, such as weighing the number of ratepayers or stakeholders for a project, against the number of ratepayers or stakeholders in opposition. Planning decisions should never be a 'numbers game'.

In some circumstances, one overriding relevant consideration may even outweigh a number of other relevant considerations.

Importantly, decision-makers must always turn their minds in a logical and considered manner to all the relevant facts and evidence, making sure to determine each application on the merits.

> ***Example:***
>
> ***In Sharpev Townof Vincent [2010] WASC 391, the Supreme Court observed that the conservation of places of cultural heritage significance had a prominent, but perhaps not an overriding or insurmountable relevance, and was a question of fact for the SAT as original decision-maker to make:***
>
> ***[94] "The planning framework clearly puts the emphasis on the conservation of places of cultural heritage significance. Whether this was such a place was primarily a question of fact for SAT to decide. However, assuming that the cost and inconvenience of conservation to a property owner were relevant matters to be taken into account in making a decision of this nature, there was no evidence before SAT of 'grave hardship' to Mr and Mrs Sharpe or of any particular hardship to Mr and Mrs Sharpe in respect of these issues that would have been a significant factor in the decision-making process in this case."***

4 Condition setting

4.1 Purpose

The imposition of conditions on the approval of development applications gives a decision-maker an opportunity to:

- modify the form of the physical development applied for; and
- maintain control of the operations of the activity over time.

Planning conditions run with the land, not with any individual applicant: *Phillips and Shire of Mundaring* [2009] WASAT 193. Thus, it is important that all conditions be clear and concise as to be comprehensible to any future owner.

4.2 Test of validity

The test of validity of a condition of planning approval is well known: Newbury District Council v Secretary of State for the Environment [1981] AC 578. This test was recently endorsed by the High Court of Australia in Western Australian Planning Commission v Temwood Holdings Pty Ltd (2004) 221 CLR 30 at [57].

A condition is valid if:

1. it has a planning purpose;

2. it fairly and reasonably relates to the development; and

3. it is not so unreasonable that no reasonable planning authority could have imposed it.

To this, we add a fourth limb, which is:

4. the condition is certain and final.

In this section, we look at each of these four limbs to consider the types that are valid.

4.2.1 Limb 1: Must have a planning purpose

A planning condition must not be imposed for an ulterior purpose. This is difficult to understand, because most conditions can be characterised as having a planning purpose. This is especially so, given the wide range of matters in clause 10.2 of the Model Text Scheme ('MST') which must be regarded in considering an application for approval.

4.2.1.1 Notations on certificate of title

As a rule, conditions requiring a notification on title which merely advise of the need for compliance with a condition of development or subdivision approval are not considered to be for a planning purpose. However, they are justified in certain circumstances.

> ***Example:***
>
> ***Antonas v Town of Vincent [2006] WASAT 303 involved an application for a grouped dwelling which could not comply with the requirements for minimum lot area under the Residential Design Codes in circumstances where there was already a single residence on the lot in question. Under the relevant local planning scheme, there was power to reduce the minimum lot sizes where an existing dwelling which contributed to the streetscape was retained.***
>
> ***In this case, the Tribunal noted at paragraph [40]:***
>
> > ***"In circumstances where a condition of development approval imposes a continuing obligation on the owner or occupier for the time being of the land, which affects the use or enjoyment of the land, and is unusual, it may be appropriate to impose a further condition requiring the proponent to provide written consent to the local government to the notification of the terms of the condition on the title under s 70A of the TL Act."***

4.2.1.2 Should relate to planning, not matters covered by other legislation

It is clear from the body of case law generated by courts and tribunals around Australia over the years that conditions that seek to require compliance with a separate and distinct statutory regime are not imposed for a planning purpose.

> ***Example:***
>
> ***In the Tribunal decision of Mann and City of Rockingham [2006] WASAT 115, the condition imposed was:***
>
> ***"Compliance with the provisions of the City of Rockingham's Town Planning Scheme No.2, Health Regulations, Building Regulations 1989, and Fire and Emergency Services Authority of WA Regulations and all other relevant Acts, Regulations and By-Laws. (NB. This Planning Approval does not confer Building or Health Approval which may require separate application(s) and Approval(s). It is the responsibility of the landowner(s) to make separate application as required)."***

This condition was found by the Tribunal to be inappropriate for 4 reasons:

"[33] First, insofar as it refers to TPS 2, the consent authority must be satisfied that the proposed development is capable of approval and is appropriately the subject of approval under the applicable planning instrument before the grant of consent.

[34] Second, to adapt the words of Morris J, the President of the Victorian Civil and Administrative Tribunal, and Rae M in Hasan v Moreland City Council [2005] VCAT 1931 at [20], 'if the planning system is to be used to impose the same requirements as those imposed by the [health, building and fire] control [systems], one may ask: what is the point?' It is generally inappropriate to impose conditions which have no utility.

Insofar as the condition seeks to impose a requirement of compliance with otherwise applicable legislative provisions, it appears to have no utility.

[35] Third, it is generally inappropriate to convert a non-compliance with an otherwise applicable legislative obligation into a breach of planning law. To do so might well involve altering the penalty which was considered appropriate by the legislature.

[36] Fourth, it appears from the words in parentheses that the intent of the condition is to advise the developer that separate health and building approvals may be required. It is generally inappropriate for conditions to be imposed which are merely declaratory or advisory of other legal obligations."

4.2.1.3 Must not be beyond power

A condition may be considered without a proper planning purpose if the condition was made for an improper purpose, in bad faith, for an ulterior motive, or where the condition amounts to an abuse of process.

Examples where decision-makers have acted beyond their broad scope of legal powers include:

Ex parte SF Bowser & Co; Re Randwick Municipal Council (1927) 27 SR (NSW) 209, where a local government had power to give approval for the erection of a structure on a public place. However, whilst the council approved the plan, it did so on the condition that the structure be Australian-made, as was reflected in a relevant policy. Given the national-nature of the decision, the condition and the policy were held to be beyond the scope of a local government's functions.

In order to guard against the possibility of improper purpose or an ulterior motive, a decision-maker should attempt to keep any proper planning purpose in mind. Often this will require a focus on the proper intent, as set out in any relevant scheme, strategy, and objective or other policy document.

4.2.2 Limb 2: Must reasonably relate to the development applied for

4.2.2.1 Subject of condition must relate to the development

The condition must relate to the development which was applied for, although it is not an impediment if it also benefits other land or the public at large.

Example 1:

In Perrymead Investments Pty Ltd v Western Australian Planning Commission (1996) 16 SR (WA) 181, a case concerning the review of a condition of subdivision approval which required that an existing unsealed road be upgraded and sealed, the Town Planning Appeal Tribunal held at [186]:

> *"The test of the validity and scope of a condition in this State is whether it fairly and reasonably relates to the development. The decision of [Cardwell Shire Council v King Ranch Australia Pty Ltd (1984) 58 ALJR 386], although in the context of Queensland legislation, stands for the proposition that should have application in Western Australia: the condition can be said to reasonably relate if it arises from changes precipitated by the development or subdivision. If it does reasonably relate, then it is not fatal if the condition also benefits the public at large to a greater or lesser degree."*

Example 2:

In the case of Empire Securities Pty Ltd and Ors and Western Australian Planning Commission [2005] WASAT 98, the WAPC imposed the following condition on a residential subdivision approval:

> *"11. Satisfactory arrangements being made with the Western Australian Planning Commission for the upgrading of Chamberlain Street and Southern River Road to an urban standard where it abuts the application area. (LG)"*

The Commission argued that people purchasing the land would expect an 'urban standard' rather than a 'rural standard'.

No evidence was provided to show that the roads needed any upgrading, nor that the subdivision would impact upon the existing standards of the roads. The Tribunal in this case determined that there was no nexus between the subdivision and the condition.

4.2.2.2 Conditions must support that which has been applied for, not significantly change it

Conditions of planning approval should not be used to constrain significantly either the design of a development, or the operation of a use.

Example 1:

In the decision of Land Alliance Pty Ltd and City of Belmont [2005] WASAT 100 the Tribunal quoted Kipa Freeholds Pty Ltd v Development Assessment Commission (1999) LGERA 414 at 423, where Debelle J made the following observations in relation to the imposition of conditions:

> *"The power to impose conditions is vested in a planning authority for the purpose of enabling it to regulate incidental aspects of the development so that it does not have an adverse effect upon the amenity of the neighbourhood of the development, either in the course of construction or when the development is completed. … The power to impose conditions is not provided to enable a planning authority to alter the nature of the proposal and hedge it about with conditions which are unworkable, unenforceable, and seek to confine the development from being used in the ordinary way. Resort to the use of such conditions is tantamount to an acknowledgement that the proposed development is inappropriate for the subject land. If a planning authority imposes this latter kind of condition, it is using the power to impose conditions for a purpose which was not intended because it goes beyond incidental aspects of the intended land use and strikes directly at the intended land use."*

Example 2:

In the decision of Allsure Pty Ltd and Western Australian Planning Commission [2006] WASAT 145, an application was lodged for approval of six lots fronting the South Western Highway in Capel. The application was approved with the following the condition imposed:

> *"The land required for the proposed Waroona Bypass … being shown as a separate lot … for future acquisition … and the balance of proposed Lots 2, 3, 5, 6 and the cul-de- sac being redistributed and/or relocated in order to ensure a suitable industrial lot configuration to the satisfaction of the WAPC."*

The Tribunal held that such a condition amounted to a refusal, because it approved a significantly different subdivision.

4.2.2.3 Temporal relationship

Care must be taken in imposing conditions that the condition relates temporarily to the development. That is, that it relates to the development currently applied for or is imminent – rather than a proposal, which may not eventuate.

In certain circumstances it is appropriate to look beyond what is currently being applied for, but unless it is likely that further development or subdivision is imminent, it is safer to avoid a condition of this nature.

Example 1:
Since the High Court decision of Western Australian Planning Commission v Temwood Holdings Pty Ltd (2004) 221 CLR 30, there has been a much greater acceptance of imposing conditions on subdivision approvals, at least which relate to further subdivision stages.

In Western Australian Planning Commission v Temwood Holdings Pty Ltd, McHugh J observed, at [72] that:

> ***"The condition need not relate to the subdivision in question, if the subdivision is one of a series of subdivisions of a larger parcel of land, and the condition relates to the larger parcel of land as a whole. In Lloyd v Robinson, this Court held that the Commission may impose a condition on a grant of subdivision approval that requires the giving up of another area of land for purposes relevant to the subdivision of the first. That condition must be 'imposed in good faith and not with a view of achieving ends or objects extraneous the purposes for which the discretion exists'. The Court also held that the condition need not relate to the subdivision in question, if the subdivision is one of a series of subdivisions of a larger parcel of land, and the condition relates to the larger parcel of land as a whole. Even if the condition approved by the Tribunal did not relate to the land the subject of the subdivision applications, Lloyd v Robinson supports the proposition that the condition reasonably and fairly related to the approved development. This is because the condition clearly related to the Land as a whole."***

Example 2:
The Tribunal relied upon the decision in Temwood in the decision of Sin-Aus-Bel Pty Ltd and Western Australian Planning Commission [2006] WASAT 266. In this case, a condition was imposed requiring the ceding of foreshore land on an amalgamation of 4 lots and the subdivision of that land into 4 lots. That is, the application proposed no intensification of development that might give rise to the need for the foreshore land.

The evidence showed that the land was being subdivided to allow for further development of the land for higher density residential uses. The Tribunal held in this case that a condition could be reasonably related if it constituted a step towards the intensification of development:
"…it is my view, appropriate to have regard to "the changes that the subdivision is likely to produce", not by looking no further than the creation of the new lot boundaries, but by looking at the proposal in its full context".

4.2.3. Limb 3: Must not be unreasonable

A condition will be unreasonable where if assessed objectively, it would not have been imposed by any reasonable planning authority lawfully carrying out its duty. Whether a condition is unreasonable really infers to whether what is imposed is proportional to what has been applied for.

So, in a circumstance where a development of a 10-lot subdivision gives rise to the need for upgrading a road, and the condition requires the construction of a 4-lane highway, this would be considered so unreasonable that no reasonable planning authority could impose it.

Example 1:
An example of such a condition can be found in the decision of Western Australian Planning Commission v Erujin Pty Ltd (2001) 115 LGERA 24.

Erujin sought approval to subdivide a 132 hectare lot containing the Wungong Brook, and an area reserved under the Metropolitan Region Scheme for Parks and Recreation, into 2 lots. The proposed smaller lot comprised solely the Brook and the P&R Reservation.

The Commission imposed a condition which required the whole of one lot to be ceded free of cost.

On appeal to the Town Planning Appeal Tribunal, the condition was deleted because "the imposition of condition 1 was not supported by relevant planning considerations". The Tribunal also observed that the evidence before it did not satisfy it that the management and maintenance of the reserved land demanded that it be ceded to and owned by the Crown.

The Tribunal's decision was appealed by the Commission to the Supreme Court. In the Supreme Court, Miller J found in favour of Erujin that:

(a) the two lot subdivision (i.e. a 'superlot' subdivision) generated no requirement for public open space at all; and
(b) nothing in the subdivision guideplan or any statement of planning policy required or supported the ceding of one of the two subdivided lots.

Example 2:

In the decision of LWP Property Group Pty Ltd and City of Swan [2006] WASAT 308, it was found that requiring a subdivider to maintain landscaping for five years was unreasonable, where the industry practice and the City's planning scheme specified two years.

4.2.4 Limb 4: Be certain and final

4.2.4.1 A condition must not lack finality (i.e. be ambulatory in nature)

A condition is considered to lack finality when it leaves open a requirement to obtain a further approval, particularly in instances where the approval might change important aspects of the approval.

It is sometimes difficult to avoid having conditions of development approval that lack finality, particularly when the decision-maker is relying upon the technical expertise of another agency, such as Main Roads WA or the Water Corporation.

Example:

The leading case in this area is Hill v State Planning Commission (Appeal No.5 of 1994–16 August 1994). The conditions in question were in the following terms:

> ***"8. The land being filled and/or drained at the subdivider's cost to the satisfaction and specifications of the Local Authority, and any easements and/or reserves necessary for the implementation thereof, being provided free of cost to the Council and in accordance with its requirements. (LA).***
>
> ***9. Satisfactory arrangements being made with the Local Authority for the upgrading of Bullfinch Street (LA)."***

The Tribunal in this case stated:

"A condition which purports to leave a matter to the satisfaction of another authority is not ipso facto invalid. When the determination of an essential element of what is sought in the application is left for future consideration by another authority which could, when it comes to be determined, alter the proposed development significantly, the condition will be invalid."

The Tribunal was of the view that a condition of subdivision approval which leaves for a later decision important aspect of the development such as roads, which could have the effect of altering the development in a fundamental respect, was invalid, stating:

> ***"The Tribunal finds as a general principle that landowners cannot reasonably be expected to comply with conditions in respect of subdivision approvals when such conditions are expressed to be subject to the satisfaction of a local government authority or other third party. The imposition of such ambulatory conditions are the antithesis of valid contractual arrangements between an applicant for approval and the approval authority. It is the Tribunal's view that planning conditions should have a high degree of certainty to enable appellants to comply with such conditions and enable the Respondent to ensure reasonable compliance with such conditions. The Tribunal therefore finds that conditions which leave matters to the discretion of a local authority or other third party lack the appropriate finality as a determination of subdivision approval, or for that matter, planning consent. The Tribunal is of the view that it is important for the Respondent to express with some degree of precision the conditions attaching to subdivision approval and the requirements which will be deemed to be final compliance with such conditions.'***

4.2.4.2 Condition must not uncertain

A condition will be uncertain where no meaning or sensible meaning can be found: *Hill v State Planning Commission.*

Example:

In the decision of Randall and Town of Vincent [2005] WASAT 129, the Tribunal discussed the certainty of conditions imposed on the approval of an extension to an existing tavern. The conditions were:

> ***"(a) CONDITIONAL INCREASE of seventy (70) additional patrons to the existing 400 to a maximum of 470, subject to review and support from the Chief Executive Officer, a two week consultation period and a report to Council after six months and 12 months performance assessment of the number of formal complaints and other relevant information regarding community impact;***
>
> ***(b) compliance with the Management Plans detailed under clause (iv); and***
>
> ***(d) ongoing compliance with all relevant Environmental Health, Engineering and Building requirements."***

In the related decision, Randall and Town of Vincent [2005] WASAT 147, the Tribunal noted:

> ***"[14] Before making the orders set out at [9] above, I indicated to Mr Bain that conditions (a), (b) and (d), as imposed by the respondent, appeared to have had the effect that the development approval lacked finality and/or certainty, such that the Tribunal could not, irrespective of the merits of the argument between the parties, lawfully impose conditions in that form. I had in mind the decision of the New South Wales Court of Appeal in Mison v Randwick Municipal Council (1991) 23 NSWLR 734 ('Mison'). In Mison, Clarke JA (with whom Meagher JA agreed) held at 740 as follows:***
>
> ***"The principle that a valid consent must be final and certain is established and was accepted by the parties. The point was expressed by Wells J in terms which, with respect, I find persuasive in Corporation of the City of Unley v Claude Neon Ltd (1983) 32 SASR 329 at 332; 49 LGRA 65 at 68.***

His Honour said:

> ***'For this purpose it is essential to bear in mind that the granting of a consent is an act in law that is final in the disposition of the application: the consent must be either refused, or granted unconditionally, or granted subject to conditions. A condition which imparts to a consent a quality in virtue of which it ceases to be final is not one, in my judgment, that falls within the structure of the Act. A condition so annexed ought to be directed, and directed only, to circumscribing, with reasonable particularity, the acts of land use to which the authority or tribunal has given its consent, which would otherwise be unlimited in its generality and effect. Where a consent has been granted in terms which leave open for later decision a particular aspect of the planned development the question may arise whether the consent is final.***
>
> ***Where a consent leaves for later decision an important aspect of the development and the decision on that aspect could alter the proposed development in a fundamental respect it is difficult to see how that consent could be regarded as final.'"***
>
> ***[15] In relation to this latter principle, Priestley JA (with whom Meagher JA also agreed) said at 737 as follows:***
>
> ***'Certainly, in my opinion, if the fulfilment of a condition imposed upon a consent will significantly alter the development in respect of which the application was made, there has been no consent to the application. Further however, if the effect of an imposed condition is to leave open the possibility that development carried out in accordance with the consent and the condition will be significantly different from the development for which the application was made, then again, it seems to me that the Council has not granted consent to the application made.'***

> ***[19] Condition (d), which required "ongoing compliance with all relevant Environmental Health, Engineering and Building requirements", was uncertain in both meaning and scope. It did not circumscribe "with reasonable particularity the acts of land use to which the authority or tribunal has given its consent" (to borrow Wells J's words in the passage quoted at [14] above). Moreover, given that use of land otherwise than in compliance with any condition imposed on the grant of development approval constitutes a criminal offence (TPS1 cl 53; Metropolitan Region Town Planning Scheme Act 1959 (WA) s 42), it is essential that conditions of development approval are stated with particularity so that those who act on them do not inadvertently commit an offence"***

4.2.5 Use of management plans and legal agreements

While there are yet to be any decisions of the Tribunal on this matter, it is questionable whether management plans and legal agreements are endowed with the requisite finality to comply with the requirements of Hill.

There are some situations where it is beneficial to allow the applicant and the decision-maker to keep open for discussion certain operational aspects of the development, rather than impose a rigid condition of approval, which allows for no flexibility.

However, significant aspects of a development should not be left to be dealt with through documents of this type. The question should always be asked – can this be dealt with by condition rather than by a further document.

4.2.6 Advice notes

The Tribunal has determined in a recent case that advice notes are not legally enforceable and will not be contemplated by the Tribunal in issuing an approval: Empire Securities Pty Ltd and Ors and Western Australian Planning Commission [2005] WASAT 98.

As the Tribunal is effectively remaking the decision in accordance with power of the decision-maker at first instance, it follows that neither a local government nor the Commission has power to impose advice notes that are legally enforceable.

Furthermore, where the advice notes seek clarification on the meaning of a condition of the approval, it is questionable what weight that advice note would be given if challenged. It is therefore imperative that a condition of approval include within its text the means of satisfying the condition, rather than leaving those details for a separate document.

5. Refusing a development application

There are times when development applications cannot be approved as proposed and cannot be conditioned to make them acceptable.

The question then is how best to refuse a development application. The short answer is that reasons for a refusal must be given, and those reasons must relate to a failure to comply with relevant planning considerations.

Decision-makers have an obligation to exercise their statutory responsibilities properly. Making a decision based upon irrelevant considerations undermines confidence in the planning system, and exposes a decision-maker to an order for costs, if the applicant is successful upon a review of that decision at the SAT. Therefore, it is important that reasons be seen as based on sound planning principles, and not be seen as catering to the views of an individual or select group of individuals.

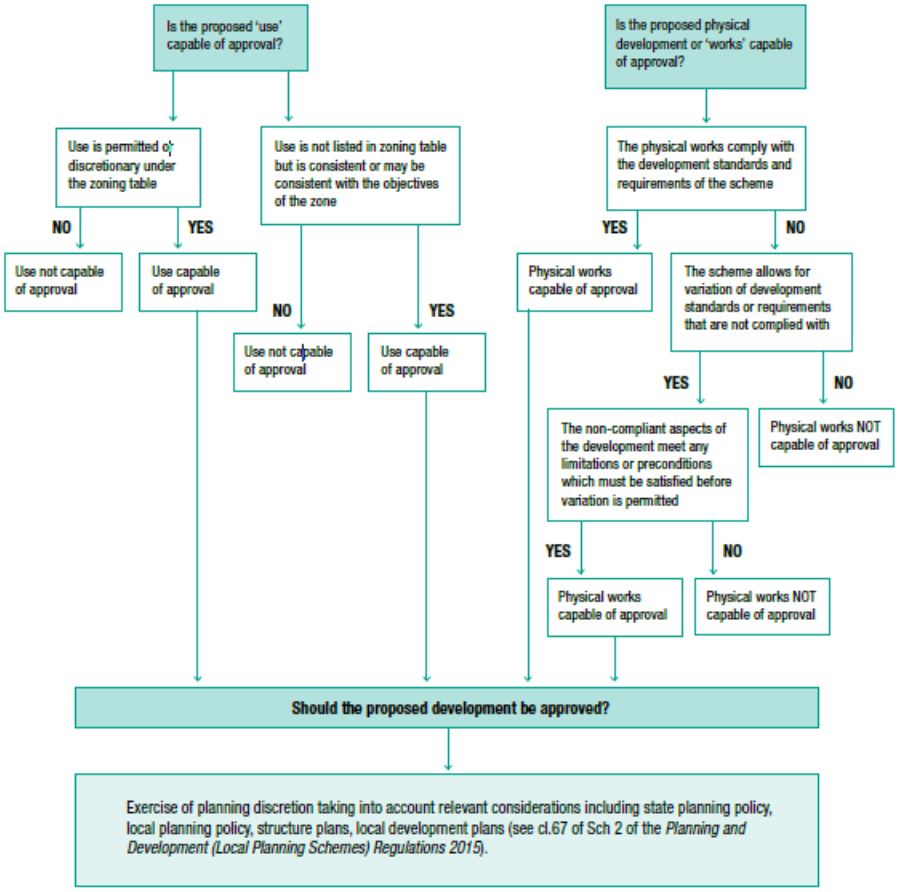
A decision to refuse an application should provide the specific reasons for refusal, with reference to the particular scheme provision or policy that the application offends. One should keep in mind that if the applicant seeks a review of the refusal, the reasons may be subject to a high level of external scrutiny. Thus, broad generalised statements should be avoided.

It is also important that all reasons be stated, as there may otherwise be an assumption that decision-makers are satisfied with other specified grounds. This is especially important when decision-makers choose to depart from any prior recommendation prepared by assisting staff.

Example:

In the decision of Pelliccione and Town of East Fremantle [2009] WASAT 143, the Town refused to give planning approval for a proposed loft, which was a variation of a previous approval negotiated in 2006 by way of mediation. The refusal was made against the recommendation of its own town planner. However, the only reason the Town gave for its decision was the "concessions already granted in the mediated outcome", and no reasons were given as to why it departed from its town planner's recommendation. The Tribunal described these reasons for refusal as "inapposite" or unsuitable.

Development approval decision tree



6. Applications for review

6.1 Review body

Decisions made in relation to applications for development approval or subdivision approval can be reviewed by the SAT.

The SAT commenced operation on 1 January 2005 and abolished the Town Planning Appeal Tribunal.

One important change in terminology since the commencement of the SAT is the term 'review'. This term replaces the term 'appeal', which was used under the previous tribunal.

The SAT's jurisdiction, powers and procedures are set out in the State Administrative Tribunal Act 2004 ('SAT Act'), the State Administrative Tribunal Regulations 2004 and the State Administrative Tribunal Rules 2004.

Section 9 of the SAT Act requires the SAT to determine matters with as little formality and technicality as possible. This provision drives the way in which the SAT operates.

Unlike courts of law, the SAT is not bound by the rules of evidence and does not institute the same types of protocols (for example, standing when addressing the bench, and bowing when leaving the room).

The President of the SAT is a Supreme Court judge, and the two deputy presidents are District Court judges. Their role is to ensure the effective functioning and independence of the Tribunal, and to resolve difficult questions of fact and law. They appear on cases where a senior legal presence is required.

In addition to the judicial members, there are a number of non-judicial members, who are employed by the SAT in either a permanent or sessional (i.e. part time) capacity.

Non-judicial members have a broad range of qualifications and experience, depending upon their specialisation at the SAT. In the Development and Resources ('DR') stream, there are qualified lawyers, town planners, architects and surveyors, who conduct directions hearings, mediation, and hearings alone or in panels of up
to three.

6.2 Categorisation of proceedings

The SAT deals with a wide range of matters, from planning issues, vocational regulation and licensing to guardianship matters. The SAT divides these varied areas into four separate streams. Planning and building matters are dealt with by the DR stream. This is why the SAT review number is prefixed with the letters 'DR'.

Planning matters are further separated into two categories - Class 1 and Class 2 proceedings. A Class 1 proceeding is defined by section 237A of the PD Act as one dealing with an application for review of the determination of, or conditions imposed in respect to:

- a development with a value of less than $250,000;
- the development of a single house on a single lot with a value of less than $500,000; and
- the subdivision of a lot into not more than three lots.

These categories are relevant because the procedures for Class 1 and Class 2 matters differ. For Class 1 matters, the Applicant can elect that neither party be legally represented. The idea behind this is to keep the costs of the proceedings to a minimum for smaller developments.

6.3 Right to apply for review

Section 13(1) of the SAT Act limits the SAT's jurisdiction to that conferred on it by an 'enabling Act'. The PD Act is an enabling Act for the purpose of the SAT Act, as is all subsidiary legislation made under the PD Act (that is, local planning schemes and region planning schemes).

Therefore, a right to review exists if expressly provided for in any of the planning legislation, or any local planning scheme made by local government.

If a right to a review of a decision is not provided for in a local planning scheme, then section 252 of the PD Act operates to give applicants that right in circumstances where the decision made involves an exercise of discretion. As noted above, there are no third-party appeal rights, unless specifically granted in a planning scheme. There is however limited scope under the SAT Act for third-party involvement, including a right to make a submission.

The right to commence proceedings is available to:

- a person who applied for development or subdivision approval (the applicant); and

- where the application for development or subdivision approval was:
  - refused;
  - approved subject to conditions which are not satisfactory to the applicant; or
  - where the decision-maker has failed to make a decision within the statutory time period, and the relevant scheme provides that such a failure amounts to a 'deemed refusal'.

At the SAT, the person who lodges the application for review is called the 'Applicant', and the decision- maker who made the decision (usually in the DR stream a local government or the WAPC) is called the 'Respondent'.

The right of review is available to the Applicant for approval only. Unlike other jurisdictions, there is no right of review to a third party (for example, a neighbour) if they are unhappy with the approval of an application.

6.4 Nature of review

A review at the SAT is a hearing de novo, where the Tribunal 'stands in the shoes' of the original decision-maker. That means that the Tribunal is hearing the matter afresh, taking into account the legal and policy framework and relevant planning considerations that apply. Section 27 of the SAT Act confirms that a hearing in relation to a review is not limited or confined to matters considered by the original decision-maker and may include the consideration of new material.

It should be noted that a review to SAT is not a form of judicial review. That is, there is no place for considering whether the decision-maker has acted appropriately, and whether it has performed its responsibilities adequately. Reviews to the SAT are based upon the merits of the matter only.

6.5 Procedure

6.5.1 How to commence review proceedings

Review proceedings at the SAT are commenced by the lodging of an application for review. This document must also be served on the decision- maker within seven days of lodging with SAT.

6.5.2 Directions hearing

Once the application for review is lodged, the first thing that happens in Class 2 proceedings is that the matter is listed for a directions hearing. This first directions hearing is usually held within 10–14 days of the application for review being lodged.

At the first directions hearing, the SAT asks the parties how they wish to proceed. The SAT has a firm view that mediation should be encouraged, and in some cases will list a matter for mediation even where parties do not believe the matter will be resolved in that way.

Where there is no prospect of mediation, the matter will be listed directly for a hearing (discussed in further detail below).

In relation to Class 1 proceedings, a similar process is followed – the difference is that the directions hearing is held as a round-table discussion with the parties and a member of the Tribunal, who is there not only to make programming orders, but to assist the parties to understand the SAT's procedures and requirements for preparation for mediation and/ or hearing.

6.5.3 Mediation

The purpose of mediation is to allow parties an opportunity to resolve a matter without the need for a full hearing. This avoids the expense involved in a contested hearing, and allows parties to come to an agreement, and allow the development or subdivision to proceed.
Mediation before the SAT is confidential and without prejudice. This means:

- the mediator (who is a member of the SAT) will not be involved in a final hearing if the parties were unable to agree to a mediated outcome;
- no documentation or notes regarding the mediation are put on the SAT's files;
- all parties present at the mediation are bound to maintain the confidentiality of discussions occuring at the mediation; and
- any reports or documents created in the mediation process are confidential and cannot be used at a final hearing without the consent of the author(s).

Usually, where mediation is ordered by the SAT, it will be listed for 2–3 weeks from the date of the directions hearing.

On occasions, and particularly where the decision or condition under review was imposed by the council of a local government, the SAT will invite the Mayor and Councillors to attend the mediation, against the recommendation of its planning officers.

It is uncommon for a matter to actually settle at the mediation itself. This is quite unlike most commercial mediations, where the parties come with full authority to broker a deal. The reason for this is that the planning officers who represent the Respondent at mediation almost inevitably do not have authority to make a decision on behalf of the Respondent.

The best a mediation can achieve is that the planning officer recommends the matter be approved by the Respondent. The planning officer then prepares its report to the Respondent, to this effect, and the governing body (whether the council of a local government or the WAPC) formally considers whether or not to agree to the mediated outcome.

This process can be time consuming, as time needs to be given to the Respondent for the matter to be put on the next meeting's agenda, and then considered at the next meeting with the Respondent. It is also not uncommon for the Respondent to maintain its original position, notwithstanding the planning officer's recommendation to agree to the mediated outcome.

Where agreement in principle is reached at mediation, the mediator will usually list the matter on for further mediation in approximately 6-8 weeks, so that the Applicant can provide any material necessary (i.e. amended plans or justification reports) and the Respondent has time to consider it within its meeting schedule.

Where the parties have reached agreement in principle, usually at the end of the mediation (and before it goes back to a meeting with the Respondent), the mediator will make an order inviting the Respondent to reconsider its decision pursuant to section 31(1) of the SAT Act.

The effect of making a decision under section 31(1) is that:

- if the applicant is happy with the varied or substituted decision and withdraws the proceedings, the varied or substituted decision has legal effect; or

- if the applicant is not happy with the varied or substituted decision, the proceedings are deemed to be for the review of the decision as varied or for the substituted decision.

Where it is clear that there will be no mediated outcome, the mediator will usually list the matter for a further directions hearing, where it will be programmed for a full hearing. In some cases, the mediator will make the programming orders at the mediation, although this is less common.

Even if mediation is not entirely successful, it can sometimes resolve some of the issues that proceed to hearing. For example, if an application for development approval is refused for reasons which include car parking and the height of a building, it might be possible to reach agreement on the height issue at mediation, so that only the dispute proceeds to hearing.

The benefit in this case is that the hearing will require fewer witnesses, be less expensive for the parties and take less time to present. However, as mediations can take several months, it may not be in an applicant's best interest to pursue mediation if it appears unlikely that agreement will be reached.

6.5.4 Preparation for hearing

If a matter is listed for hearing, the SAT will make a number of programming orders for the filing of documents before the hearing.

The Respondent first files and serves a document called the 'Statement of Issues, Facts and Contentions' (SIFC):

- The 'Issues' are usually couched as questions, and are the matters that the Respondent thinks the SAT needs to determine for a decision to be given.

- The 'Facts' are usually a brief description of the development application, and an outline of the relevant statutory and planning policy framework.

- The 'Contentions' are the arguments that the Respondent wants to pursue having regard to the Issues and the Facts.

The Applicant then has an opportunity to file a SIFC in reply.

While the SIFCs are filed, the parties are ordered to provide additional documents which are relevant to determination of the matter. This process avoids the need for formal discovery, an integral part of most court proceedings.

The SAT will then order the parties to file and serve witness statements. Expert witnesses are required to meet, confer and provide a joint witness statement.

This concept of conferral is unique to SAT. The purpose is to assist the SAT in reducing the matters in issue between the expert witnesses before the day of the hearing. It is very useful when the evidence to be led is technical, so for example, acoustic or traffic modelling.

The experts are required by the SAT's orders to meet without their legal representatives, the Applicant or Respondent, and determine the matters they agree/or disagree upon, and why.

For example, traffic engineers may agree upon the methodology for preparing a traffic modelling exercise, but disagree upon the correct dataset for the model.

Sometimes, where the evidence is highly technical or where there are a number of experts involved, the SAT will order that the conferral be held as a Compulsory Conference, where a SAT member facilitates the conferral and the drafting of the joint witness statement.

The timing and sequence of these preparatory orders are usually as follows:

- Respondent's SIFC (two weeks from the date of the directions hearing);
- Applicant's SIFC (two weeks from the date of the Respondent's SIFC);
- Expert witness statements (2-4 weeks after the date of the Applicant's SIFC and at least two weeks from the date of the hearing);
- Respondent to file a list of conditions it would impose if the SAT decides to approve the application. This is applicable to reviews against refusals and deemed refusals only (filed at the same time as the witness statements);
- conferral of the experts (at least seven days from the hearing);
- experts' joint witness statements (at least five days before the hearing); and
- Applicant's response to the Respondent's proposed conditions (at least five days before the hearing).

It is seen from these times that the usual period between a matter being listed for hearing, and the hearing date is 8-10 weeks. This can be expedited in certain circumstances, but only where the SAT accepts a party's reasons for doing so.

6.5.5 Hearing

Depending upon the subject matter of the hearing, the SAT will constitute between one and three members. The members cover a range of area of expertise, and an attempt is usually made to ensure that members' expertise reflects the subject matter of the review.

The way in which a hearing itself is conducted will depend upon the member(s) hearing the matter. As noted above, the hallmark of the SAT is its flexible approach to procedure.

The hearing usually commences with the member taking into evidence of all documents filed in the matter, starting with the application for review.

This is quite unusual for lawyers who work in the court system, because the Tribunal accepts all 'evidence' such as witness statements, without requiring the parties to qualify the experts or tender the statements. In addition, documents such as the SIFC are also given an exhibit number, although they are not strictly evidence but documents containing submissions.

Site visits are common in DR matters, and often they will be convened at the commencement of a matter before the proper hearing commences.

The actual hearing usually commences with each party giving their opening address.

After the opening address, witnesses are called. The order of the witnesses will depend upon the member hearing the matter. An unusual aspect regarding the giving of expert evidence at the SAT is the concept of giving evidence concurrently.

This practice is known colloquially as 'hot tubbing'. Where concurrent evidence is given, the equivalent experts for both the Applicant and the Respondent give evidence together.

Finally, the parties give their closing submissions. It is usual for the Respondent to go first and the Applicant next.

The SAT has up to 90 days to hand down its decision after the hearing.

6.6 Appeal from a decision of the SAT

Depending on who made the decision at the SAT, there is one of two appeal options available. Both are available only upon a question of law, and not a question of fact.

The first is an internal right of review pursuant to section 244 of the PD Act. This is available where the SAT member making the decision was not legally qualified. The right of review is given to the President of the SAT.

The second is a right to seek leave to appeal to the Supreme Court pursuant to section 105 of the SAT Act. The appeal is to the Supreme Court if the SAT decision was made by a non-judicial member, and to the Court of Appeal if the decision was made by a judicial member, or constituted by members including a judicial member.

6.7 Judicial Review

Reviews to the SAT are in the form of an 'administrative review' or a 'review on the merits'. As discussed above, a right to such a review in relation to planning matters in Western Australia is almost exclusively available to the person who applied for the development or subdivision approval in question.

Judicial review is different. Rather than a consideration as to whether a decision-maker has made the correct decision on the merits of the application, the court considers whether the decision-maker has made the correct legal reasoning and followed the correct legal procedures in making a decision.

Where a court determines that a decision-maker has made an error in coming to a decision, then usually the court's power extends only to declare that the decision was made incorrectly, and then to remit the matter back to the decision-maker to make its decision again – this time without the error.

In Western Australia, judicial review is administered by the Supreme Court of Western Australia through the granting of writs of prerogative relief (certiorari, mandamus and prohibition).

Applications for prerogative relief in relation to planning matters are rare. When this type of relief is invoked, it is usually by a third party who has been aggrieved by the decision of a local government to approve development which they think should not have been approved.

This course of action is taken because of the absence of a right to commence an application for review under the SAT Act.

Examples include:

Re Western Australian Planning Commission; ex parte South Fremantle/Hamilton Hill Residents' Association [2005] WASC 50. In this case, the Resident's Association applied for a writ of certiorari to quash the decision of the Western Australian Planning Commission in relation to an application by Stockland to develop former industrial land for residential development.

Re City of Joondalup; Ex Parte Mullaloo Progress Association [2003] WASCA 293. In this case, the Mullaloo Progress Association applied for a writ of certiorari to quash the decision of the City of Joondalup to allow the redevelopment of the Mullaloo Tavern.

Part 4 - Development Assessment Panels

1. Introduction

DAPs are decision-making bodies. They are not involved with, or responsible for, the preparation of planning schemes or planning policy. Their decision-making powers are constrained by the existing planning framework for the local government area the subject of the application.

DAPs comprise a mix of technical experts and local government DAP members with the power to determine applications for development approvals in place of the relevant decision-making authority.

2. Establishment

A number of DAPs were established throughout the State and commenced operation on 1 July 2011. The PD Act together with the *Planning and Development (Development Assessment Panels) Regulations 2011* (DAP Regulations) set out how DAPs are established and the applications which a DAP is to determine.

There are two metropolitan DAPs and one regional DAPs.

The Metro DAPs are:

Name	Local Governments
Metro Inner DAP	Bassendean, Bayswater, Belmont, Cambridge, Canning, Claremont, Cottesloe, East Fremantle, Fremantle, Melville, Mosman Park, Nedlands, Peppermint Grove, Perth, South Perth, Stirling, Subiaco, Victoria Park, Vincent
Metro Outer DAP	Armadale, Cockburn, Gosnells, Joondalup, Kalamunda, Kwinana, Mandurah, Mundaring, Murray, Rockingham, Serpentine-Jarrahdale, Swan, Wanneroo, Waroona.

The Regional DAP:

Albany	Dalwallinu	Koorda	Quairading
Ashburton	Dandaragan	Kulin	Ravensthorpe
Augusta-Margaret River	Dardanup	Lake Grace	Sandstone
Beverley	Denmark	Laverton	Shark Bay
Boddington	Derby-West Kimberley	Leonora	Tammin
Boyup Brook	Donnybrook-Balingup	Manjimup	Three Springs
Bridgetown-Greenbushes	Dowering	Meekatharra	Toodyay
Brookton	Dumbleyung	Menzies	Trayning
Broome	Dundas	Merredin	Upper Gascoyne
Broomehill-Tambellup	East Pilbara	Mingenew	Victoria Plains
Bruce Rock	Esperance	Moora	Wagin
Bunbury	Exmouth	Morawa	Wandering
Busselton	Gingin	Mount Magnet	West Arthur
Capel	Gnowangerup	Mount Marshall	Westonia
Carnamah	Goomalling	Mukinbudin	Wickepin
Carnarvon	Greater Geraldton	Murchison	Williams
Chapman Valley	Halls Creek	Nannup	Wiluna
Chittering	Harvey	Narembeen	Wongan-Ballidu
Collie	Irwin	Narrogin	Woodanilling
Coolgardie	Jerramungup	Ngaanyatjarraku	Wyalkatchem
Coorow	Kalgoorlie- Boulder	Northam	Wyndham-East Kimberley
Corrigin	Karratha	Northampton	Yalgoo
Cranbrook	Katanning	Nungarin	Yilgarn
Cuballing	Kellerberrin	Perenjori	York
Cue	Kent	Pingelly	
Cunderdin	Kojonup	Plantagenet	
	Kondinin	Port Hedland	

3. Members

3.1 Membership

The DAP Regulations set out the membership requirements for DAPs. Each DAP consists of five panel members:

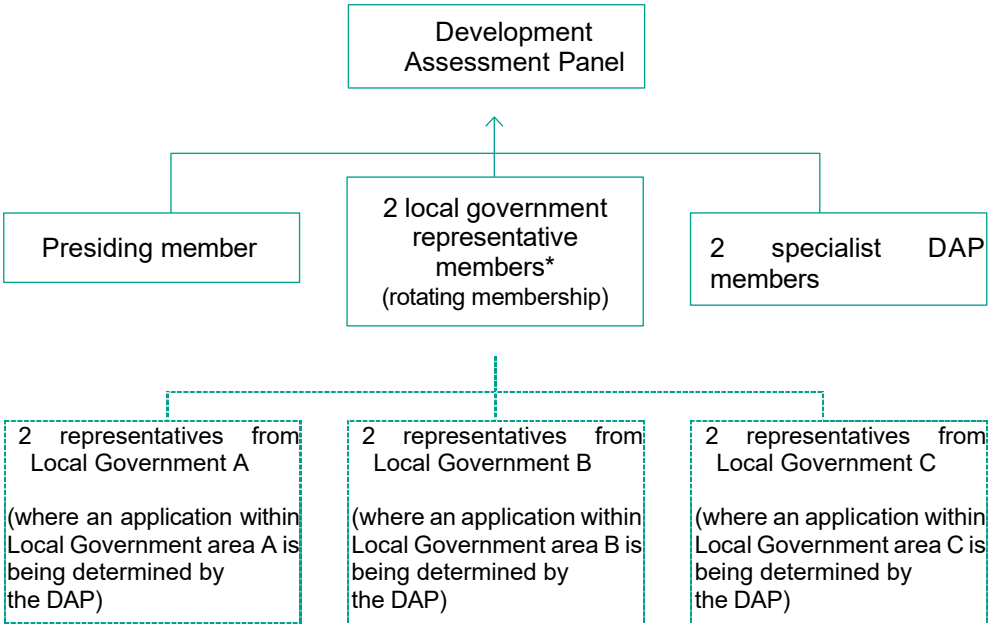
- three specialist DAP members (ap); and
- two local government DAP members.

3.2 Quorum

Pursuant to regulation 41, three of the five members are required to make up a quorum, which must include a presiding member, and any two DAP members in attendance (irrespective of whether they are specialist DAP members or local government DAP members).

3.3 Nomination of members

Specialist DAP Members are appointed by the Minister and Local government DAP members are nominated by the relevant local government and appointed by the Minister.



* The local government membership of DAPs will depend on the location of the development applications being determined at the time. Local government DAP members will rotate on and off the panel, ensuring that local knowledge relevant to each development application is present on the panel. As such, the two members from each individual local government will join the three specialist DAP members to comprise the development assessment panel when an application within that particular local government area is being considered.

Specialist DAP members with the required qualifications and experience are listed on a register. A working group, reviews and recommends nominees to the Minister. Specialist DAP members are appointed by the Minister. All members must complete the required training before they can sit on a DAP.

The DAP executive director is required to appoint one of the three specialist DAP members as the presiding member of the DAP for that meeting. The DAP executive director is also required to appoint a deputy presiding member to preside if the presiding member becomes absent.

All Specialist DAP members can be appointed for a maximum term of up to five years. The regulations allow for DAP members to continue sitting on a DAP for up to three months once their term has expired or until the vacancy is filled.

4. Jurisdiction

4.1 Limited to areas covered by particular statutory instruments

The power of a DAP is limited to areas where there is a local planning scheme, region planning scheme or interim development order in place. A DAP will not determine applications in areas where no scheme or interim development order is in place to regulate development control.

As discussed above, there are many local government districts where the local planning scheme covers a townsite only. A development application outside of a townsite area, even if it fell within the monetary limits, would not be determined by a DAP.

It should also be noted that DAPs have no power to determine applications under redevelopment or improvement schemes.

4.2 Limited to particular types of development application

There are two types of development applications which a DAP may determine, provided that they are not an 'excluded development application':

1. An applicant can elect to have their application determined by a DAP if the development

    - has an estimated development cost of $2 million or more; or

    - is or includes community housing that is to be provided by a registered community housing provider.

2 The following development applications, where the local government or WAPC have delegated their power are called delegated DAP applications, which means that a DAP must determine them:

    - the application is for approval for a development that has an estimated cost of $2 million or more, or

    - is or includes community housing that is to be provided by a registered community housing provider; and

    - the application is one of the following –

        (i) an application that is not an excluded development application or made under Part 11B or 17 of the Act.

A DAP cannot determine a development application which is an Excluded Development Application. An Excluded Development Application is defined in the regulations, and includes the construction of a single house, development in an improvement scheme, a public work or a development wholly within an area identified as a regional reserve under a region planning scheme.

4.3 In practice

In practice, the WAPC has delegated its power under region planning schemes to DAPs, as it has power to do so in regulation 19(4). This means that an application for development approval which meets the monetary thresholds will receive its approvals under the local planning and region planning schemes from the DAP. This process significantly streamlines the development approval process.

The types of development that require approval from the WAPC under region planning schemes can include:

- development on or abutting land which is reserved under the relevant region planning scheme; and

- development for which a clause 32 of the MRS resolution has been made (for example, new shopping centres or extensions to existing shopping centres, development of new poultry farms in particular zones, etc.).

5. Decision-making

5.1 Relevant planning instrument applies

A DAP's role is to determine a DAP application in accordance with the provisions of the PD Act and the planning instrument under which the DAP application is made.

Regulation 16(1) states:

> *"The provisions of the Act and the planning instrument under which a DAP application is made apply to the making and notification of a determination by a DAP to whom the application is given under regulation 11 as if the DAP were the responsible authority in relation to the planning instrument."*

This means that the DAP could not, for example, approve a use which was listed as an 'X' use in the zoning table. Nor could it approve a built form that exceeded any non-flexible standards within the local planning scheme.

5.2 Role of policy

There is no strict requirement for a DAP to adhere to any Local Planning Policy or State Planning Policy. For example, if a local planning scheme has a similar provision to that found in clause 67 of the Deemed Provisions, which requires that a local government give due regard to any Local Planning Policy, then DAP must do so as well.

In a practical sense, it is likely that a DAP will have regard to policy in any event, regardless of a strict legal obligation to do so.

It should be noted, however, that a DAP should consider the weight that the policy should be afforded in accordance with the test outlined in *Permanent Trustee Australia Ltd v City of Wanneroo* (1994) 11 SR(WA) 1 (discussed above).

5.2.1 Meaning of 'due regard'

The words 'due regard' are used throughout the planning framework, from sections 77(1) and 241(a) of the PD Act to a range of scheme and policy provisions. Further, clause 67 of the Deemed Provisions requires the relevant local government to have 'due regard' to a list of planning factors when considering a development application.

It is worth noting that it was only recently that the Supreme Court of Western Australia, in the decision of *South Perth v ALH Group Property Holdings Pty Ltd* [2016] WASC 141, had explicitly addressed the question of what constitute 'due regard' in a planning context, and the relevant planning authority's obligations in this regard.

Justice Martino determined that that 'to have due regard' is to require the relevant matters be given 'proper, genuine and realistic' consideration when considering an application for development approval. As a DAP member, a mere declaration that you have duly considered the meeting documents may not necessarily mean, in determining a development application,

you have given due regard to the relevant policies. It is important to give proper consideration to the relevant materials before you and the terms of the relevant policy to ensure that your decision could withstand a legal challenge on this basis. Such consideration should also be articulated in your statement of reasons.

His Honour preferred the phrase 'proper, genuine and realistic consideration' to the phrase 'active and positive consideration' because the words 'positive consideration' might suggest that the planning scheme created an obligation to reach a decision that should be consistent with the relevant policy. His Honour reinforced the principle that a planning authority may make decision which could conflict with the relevant policies.

5.3 Role of relevant local government/WAPC

5.3.1 Lodgement of DAP application

A DAP application is to be lodged with the relevant local government. Pursuant to regulation 11, the local government with whom a DAP application has been lodged must within seven days of lodgement provide to the DAP a copy of the DAP application and confirmation that other procedural requirements have been met.

The local government could issue a notice under Clause 63 of the deemed provisions requiring the applicant to provide further information or documents to support their DAP application ('Notice'). Once the Notice is issued, the prescribed timeframe is 'paused' until the applicant complies with the notice.

5.3.2 DAP application report

In accordance with regulation 12, the responsible authority is to provide the DAP Executive director with a report on the application in the approved form . The format of the approved form requires the planning officer to provide details similar to a planning report prepared for a local government council meeting.

Regulation 12(5) sets out the matters that must be covered in the report, including:

- a recommendation as to how the application should be determined;
- copies of any advice received by the responsible authority from any other statutory or public authority consulted by the responsible authority in respect of the application; and
- any other information that the responsible authority considers is relevant to determining the application.

It should be noted that the views of Council may be incorporated in the appropriate section of the responsible authority report to the DAP.

If the local government also wishes to make a statement regarding an application before a DAP, it may do so by making a submission.

5.3.3 DAP application report

The report is to be given in accordance with regulation 12(3) which states:

- the report must be given at least 12 days before the day on which the application would be taken to be refused under the relevant planning instrument.

Regulation 12(4A) makes clear than an excluded da or period is not to be counted for the purpose of calculating the period within which the report must be given.

5.3.4 Ongoing assistance

The DAP may require further assistance from a responsible authority with a DAP application after the report is provided. Where this further information is required, the DAP Executive director will issue a direction pursuant to regulation 13 in writing specifying what information is needed and the timeframe within which it is to be provided.

5.4 Capacity to amend or cancel a DAP development approval by a DAP or a responsible authority

Where a DAP has granted its approval to a DAP application, the owner of the land can apply to one of the following decision-maker to amend or cancel that development approval:

- the relevant DAP pursuant to regulation 17; or
- the relevant responsible authority pursuant to regulation 17A.

Pursuant to regulation 17 of the DAP Regulations, where a DAP has granted its approval to a DAP application, the owner of the land can apply to the DAP to do any of the following:

- amend the approval to extend the period within which any development approved must be substantially commenced;
- amend or delete any condition to which the approval is subject;
- amend an aspect of the development approved which, if amended, would not substantially change the development approved; and
- cancel the approval.

This power is now mirrored in clause 77 of the Deemed Provisions, which will assist the developers of larger projects that might require amendments to be made, as more detailed construction drawings are prepared.

The applicant may apply to the relevant responsible authority (rather than the DAP) to amend or cancel a DAP approval under regulation 17A. Such an application is to be made under the relevant planning instrument and the process outlined in the Deemed Provisions.

5.5 Role at SAT

A person who has made a DAP application has a right to commence an application for a review of the DAP's decision at the SAT, as if the decision had been made by the responsible authority pursuant to the relevant planning instrument.

For the purposes of SAT proceedings only, the DAP Executive director is the decision-maker and respondent in any application for review of the determination of a DAP application.

For the purposes of reconsideration of a decision under section 31 of the State Administrative Tribunal Act 2004, the entire panel of a DAP will be the decision maker.

6 Conduct (Code of Conduct)

The role of a DAP member is an important one – DAPs will determine all major development throughout Western Australia. They will deal with applications for development which may be controversial and which will affect upon the amenity of communities – both in a positive or a negative way. They will deal with applications that have taken landowners many months, if not years to prepare, which may be lost if a development approval is not issued.

Given the gravity of a DAP's role, it is important that the community have confidence in the process and the quality of decision-making. It is therefore crucial that DAP members act in a way that avoids the perception that they have been influenced in their decision-making.

The DAP Regulations require the Director General of the Department make and maintain a Code of Conduct. Pursuant to regulation 45(1), all DAP members are required to comply with the DAP Code of Conduct.

The Code of Conduct sets out standards that are to be adhered to based on four main areas, discussed next.

6.1 Standard 1: Personal behaviour

6.1.1 General behaviour

A DAP member must act ethically, competently and with care and diligence.

A DAP member should not make any statements that are critical of the Minister, Director General of the Department, a local government, a local government or departmental employee, a DAP or another DAP member.

6.1.2 Local government DAP member

The role of a local government DAP member is made difficult by their dual roles of local government Councillor and DAP member.

The Code of Conduct acknowledges this difficulty in clause 2.1.2. A local government may make a decision in relation to a DAP application as a basis for providing a DAP with a recommendation, as it is required to do in accordance with regulation 12.

Clause 2.1.2 provides that a local government DAP member is not precluded from voting in relation to a DAP application where it has also been involved with the decision or recommendation made by the local government.

Clause 2.1.2 requires only that local government DAP member exercise independent judgment and consider the application on its planning merits.

6.2 Standard 2: Communication

6.2.1 Communication with local government and department staff

A DAP member (other than a local government DAP member performing its functions as a Councillor) should, in relation to a DAP application which has been lodged, or which will be lodged in the future:

- have no contact with local government or departmental staff; and
- have no role in its preparation.

6.2.2 DAP applications

It is important to note that a DAP is not a local government, and a DAP member is not a Councillor. Unlike Councillors at local government, a DAP member is a decision-maker and not a representative of their constituents.

DAP members should avoid speaking to anyone (affected landowners or the applicant), regarding a current DAP application or one that the member is aware is to be lodged in the future.

In particular, this means:

- A DAP member should only undertake a site visit where one is consented and arranged in a formal sense by the presiding member of the DAP.
- A DAP member should not speak with affected landowners.
- A DAP member should not speak to an applicant of a DAP application.
- A DAP member should not attend a public meeting for or against a particular proposal.

These requirements do not affect a local government DAP member from undertaking their normal functions as a Councillor.

6.2.3 Speaking on behalf of the DAP

A DAP member must not publicly comment, either orally or in writhing, on any action or determination of a DAP.

6.3 Standard 3: Conflicts of Interest*

*Prepared with the assistance of the Corruption and Crime Commission's 'Dealing with Conflicts of Interest: A Practical Guide for the Western Australian Public Sector – Facilitator's Guide'.

6.3.1 Requirements

Part 3 of the Code of Conduct requires DAP members to identify:

- any direct or indirect pecuniary interest;
- impartiality interest that they have or may reasonably be perceived to have; or
- any proximity interest that they have, in relation to a development application that is before the DAP, or which the member is aware may come before the DAP in the future.

It is not wrong to have an interest – conflicts arise, particularly in the DAP forum, because the members who have been appointed are involved in the planning process as professional planners, architects or the like, or involved in their local communities as Councillors. It is wrong however, not to disclose it.

6.3.2 Identification of interest

The first step is to identify the interest. In the Code of Conduct, these interests are described as follows:

Conflict of Interest

> ***Definition from Code of Conduct:***
>
> ***For the purposes of this part, a DAP member has an interest in a matter if either -***
> ***(a) that DAP member; or***
>
> ***(b) a close associate of that DAP member, has -***
> ***(i) a direct pecuniary interest or indirect pecuniary interest in the matter; or***
> ***(ii) a proximity interest in the matter;***
> ***(iii) an impartiality interest in the matter.***
>
> ***direct pecuniary interest means a person's interest in a development application where a financial relationship exists between that person and the applicant.***
>
> ***indirect pecuniary interest means a person's interest in a development application where it is reasonable to expect that the application, if dealt with by a DAP, will result in a financial gain, loss, benefit or detriment for the person.***

As a general principle, a conflict of interest exists when a person has a private interest that could corrupt or undermine their performance of a public duty. As a decision maker must bring an open mind to deliberation required by a particular statute, they cannot be affected by an improper influence.

A direct pecuniary interest arises where a DAP member could generate a financial interest or disadvantage from their official duties either for themselves or for someone with whom they are closely associated. It is important to note that an indirect pecuniary interest could also arise where it is reasonable to expect that the DAP member could generate a financial interest or disadvantage from determining the DAP application.

This means that the DAP member does not need to personally receive the financial benefit or loss for the interest to exist. If a family member, spouse or close associate is the one that receives the benefit or loss then the DAP member is considered to have an indirect financial interest in the development application interest, for example, that they are in a position where they could be motivated to act in a way that benefits family or friends instead of acting to benefit the public generally or in the public interest.

The benefit also does not need to be an immediate one but can involve a future financial gain. Money need not change hands for a financial interest to exist; it can involve anything that equates to having a financial value (for example, increased or decrease in property values, shares or gifts, as these things have a commercial or market value).

A DAP member should notify the DAP secretariat of any direct or indirect pecuniary interest. The presiding member will make a determination on the matter.

Examples include:

- ***You are an equity holder of a planning consultancy which has lodged, on behalf of a client, a development application which is before your DAP.***
- ***You are a landscape architect who has been promised the contract to design the outdoor areas of a development application before your DAP, should it be approved.***
- ***You own shares in a development company whose application for development approval is currently before your DAP.***
- ***A developer whose development application is before a DAP, or will imminently be before a DAP, sends DAP members on a 'study tour' to the USA.***

It is not enough that DAP members who are also consultants create what is colloquially known as a 'Chinese wall'. If their consultancy is representing a landowner whose development application is before a DAP, then it is inappropriate for that DAP member to be involved in the decision.

Impartiality interest

Definition from Code of Conduct:

impartiality interest means an interest that could, or could reasonably be perceived to, adversely affect the impartiality of a member with such an interest and includes an interest arising from kinship, friendship, partnership, or membership of an association, that is connected to a development application that is before the relevant DAP or which may come before that DAP in future.

An impartiality interest does not have a financial component or value. Generally speaking, these interests involve situations where a DAP member has a tendency toward favour or prejudice arising from a personal involvement, relationship, obligation, value or attitude that could affect how they carry out their job.

DAP members are expected to set aside these types of private interests when performing official duties and if they cannot, or it is likely these personal relationships and commitments may impact on the impartial performance of our public duty, then these too can lead to a conflict of interest.

Impartiality interests can arise from family relationships, cultural and religious obligations or a desire to obtain or wield power and influence.

Local government DAP members who participated in a Council decision in relation to a DAP application may amount to an impartiality interest but does not necessarily preclude that local DAP government member from participating in the subsequent DAP decision.

A full explanation of the processes and procedures in dealing with local government member who may have an impartiality interest could be found in DAP Practice Note 5.

Examples include:

- ***You are a member of a community environmental group lobbying against a development application before your DAP.***
- ***Your son plays junior soccer and the club has applied for a development approval for a new stadium and other facilities.***
- ***Your daughter's ex-fiancé, who left her for another woman, and coincidentally runs the largest planning consultancy in Perth, lodges a development application on behalf of his client.***

- *You are the president of the Art-Deco Society, and an application is received by your DAP for the redevelopment of a landmark quality art deco style building.*

Proximity Interest

Definition from Code of Conduct:

In relation to a DAP member, means an interest of the member, or of a close associate of the member, in a development application if the application concerns land:

(a) adjacent the person's land; or

(b) across a thoroughfare from the person's land.

6.3.3 Requirement for constant assessment

These 'interest' categories (that is, direct or indirect pecuniary interest, an impartiality interest, or a proximity interest) can also be split into different categories depending on their status or currency. These categories are:

a. **Actual interest** are those where the conflict is directly present in immediate or current circumstances. The conflict exists in the here and now; it is present and could impact on the DAP member's role. The identification depends on the elements giving rise to the conflict being present – not whether the person has acted on that conflict and allowed it to influence or not influence their actions. The actual situation and the possibility of influence exist independently of how the person subsequently acts to deal with it. The situation is being categorised, not the person's actions.

b. **Perceived interest** are those where there is an appearance of a conflict, or when it would be reasonable for someone to believe a conflict exists when in fact it may not. Perceived conflicts generally occur when all the facts about the apparent conflict are not publicly known.

c. **Potential interest** situations are those where a person's private interest might interfere with their official duties in the future but are not doing so currently. Potential conflicts are not those present in the immediate situation but rather relate to a future possibility.

Understanding the differences between these three types of conflict situations is important because it helps to identify when a conflict exists and to make decisions about the most appropriate management strategy. It is also important to be aware that the status of a conflict of interest can also change.

A matter that might be assessed as a potential conflict today can become an actual conflict if the circumstances change. Assessment of interests is not a one-off static decision but rather a fluid and changeable process that might involve a number of different decisions about the same matter over time. These three types of conflicts are not in any order of seriousness; the potential impact of unmanaged perceived conflicts of interest can be just as great as for an actual conflict.

6.3.4 Disclosure and result of disclosure

There is a requirement in clause 3.3 of the Code of Conduct to disclose interests, if possible, before the meeting and at the very least during the meeting as soon the interest becomes apparent to the DAP member.

In relation to a direct or indirect pecuniary interest or a proximity interest, once an interest has been disclosed, a DAP member must not be present during any consideration or discussion of the matter or vote on the matter. This is set out in the Code of Conduct and also in section 266(3) of the PD Act.

In relation to an actual or potential impartiality interest, the DAP member is entitled to continue to perform their functions unless the interest is sufficient to give rise to a reasonable perception that the member's decision may not be made impartially.

6.4 Standard 4: Gifts

6.4.1 Definition

A 'gift' is defined in the DAP Regulations by reference to section 5.82(4) of the Local Government Act 1995, which provides:

> *"gift means any disposition of property, or the conferral of any other financial benefit, made by one person in favour of another otherwise than by will (whether with or without an instrument in writing), without consideration in money or money's worth passing from the person in whose favour it is made to the other, or with such consideration so passing if the consideration is not fully adequate, but does not include any financial or other contribution to travel."*

Excluded from the definition is a gift from a 'relative', which is defined by reference to section 5.74(1) of the Local Government Act 1995:

> "relative, in relation to a relevant person, means any of the following —
>
> a. a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant of the relevant person or of the relevant person's spouse or de facto partner;
>
> b. the relevant person's spouse or de facto partner or the spouse or de facto partner of any relative specified in paragraph (a).

6.4.2 Categories of gifts and their relevance

The DAP Regulations, in regulation 46, set out three types of gifts which both categorise the gift and explain how the gift is to be treated.

Notifiable gifts

A notifiable gift is a gift worth more than $50 and less than $300. The definition is cumulative, so that gifts that together equal this monetary amount over a six month period also fall within the definition.

A DAP member who accepts a notifiable gift from a person who:

a. has received an approval from the DAP;

b. is currently seeking an approval from the DAP; or

c. is intending to seek an approval from the DAP (where it is reasonable to believe that this intention exists).

must notify the DAP Executive director of the Department as soon as practicable after the DAP member becomes aware that the person has made or is intending to make the application for approval.

The DAP Executive director must keep a register of gifts accepted.

Prohibited gifts
A prohibited gift is a gift worth more than $300. The definition is cumulative, so that gifts that together equal this amount over a six month period also fall within the definition.

Prohibited gifts must NOT be accepted by a DAP member from a person who:

a. has received an approval from the DAP;

b. is currently seeking an approval from the DAP.

Other gifts
Gifts worth $50 or less are not specifically defined. In these notes, they are referred to as 'low-cost gifts'. Remember that if a series of low-cost gifts given within a six-month period reach the $50 threshold, they are then to be categorised as a notifiable gift.

There is no obligation to notify the acceptance of a low-cost gift.

6.4.3 'A person'
The DAP Regulations refer to gifts from 'a person' who has received an approval from a DAP or is currently or is likely to lodge an application for development approval with a DAP.

It therefore limits the restriction to gifts given by applicants.

Note however, that the Code of Conduct broadens the reach of the DAP Regulations in clause 4.2 of the Code of Conduct by providing that a DAP member must not accept any gift "from a person in connection with the exercise of the member's functions ... ".

This is a broader concept and does not limit the restriction on the acceptance of gifts from a person who is the applicant. The wording of the Code of Conduct is somewhat ambiguous; however, in order to err on the side of caution, care should also be exercised when accepting gifts from consultants of an applicant.

6.5 Sanctions

6.5.1 Planning and Development Act 2005
Pursuant to section 266(3) of the PD Act, it is an offence, punishable by a penalty of $5,000, for a DAP member to:

- act dishonestly in the performance of their functions;
- fail to disclose a conflict of interest;
- disclose information acquired as a DAP member (except in circumstances where required by law); and
- make improper use of information obtained as a DAP member.

6.5.2 Removal from office

Mandatory

Pursuant to regulations 32(1) a DAP member is immediately and automatically removed from office if, among other things, they are convicted of an offence punishable by imprisonment for more than 12 months, or guilty of an offence against section 266 of the PD Act.

Pursuant to regulations 32(5A) and (5B), a local government of a DAP nominated by their local government will also ceased to be a DAP member if that person cease to be a member of the local government council.

Discretionary

Pursuant to regulation 32(3), a DAP member may be removed from office for one of the following grounds:

- neglect of duty;
- misconduct or incompetence;
- mental or physical incapacity to carry out the duties of a DAP member in a satisfactory manner;
- absence without leave being granted under regulation 33 from three consecutive meetings;
- unreasonable failure to undertake the training for DAP members referred in regulation 30(1).

Misconduct, in regulation 32(4), can be constituted by:

- Regulation 45(2) – non-compliance with the Code of Conduct;
- Regulation 46(2) – accepting a prohibited gift in the circumstances set out in that sub-regulation.
- Regulation 46(3) and 46(3A) – accepting a notifiable gift and not notifying the DAP Executive director, in the circumstances set out in that sub-regulation.
- Regulation 47 – making statements that a local government or public sector employee is incompetent or dishonest, or using offensive or objectionable expressions in reference to a local government or public sector employee.
- Regulation 48 –making public comment regarding an action or determination of the DAP.

4.6.5(c) Investigation by the Corruption and Crime Commission

A DAP member is a public officer for the purposes of the Corruption and Crime Commission Act 2003 (CCC Act) and therefore falls within the Act's jurisdiction.

One of the main functions of the Corruption and Crime Commission (CCC) is to help public authorities to deal effectively and appropriately with misconduct while retaining power to itself investigate cases of misconduct, particularly serious misconduct.

The CCC has far-reaching powers to investigate possible misconduct, triggered by an allegation made by a member of the public, a referral by the relevant government department, or of its own volition.

As is well known, investigatory powers of the CCC extend to phone-tapping and the power to require the release of documents.

Misconduct is defined in section 4 of the CCC Act, and is quite broad:

> ***"Misconduct occurs if —***
>
> ***a. a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer's office or employment;***
>
> ***b. a public officer corruptly takes advantage of the public officer's office or employment as a public officer to obtain a benefit for himself or herself or for another person or to cause a detriment to any person;***
>
> ***c. a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years' imprisonment; or***
>
> ***d. a public officer engages in conduct that —***
> ***(i) adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct;***
> ***(ii) constitutes or involves the performance of his or her functions in a manner that is not honest or impartial;***
> ***(iii) constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer; or***
> ***(iv) involves the misuse of information or material that the public officer has acquired involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or the benefit or detriment of another person.***
>
> ***and constitutes or could constitute —***
>
> ***[(v) deleted]***
>
> ***(vi) a disciplinary offence providing reasonable grounds for the termination of a person's office or employment as a public service officer under the Public Sector Management Act 1994 (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct).***

Committing an offence pursuant to section 266(3) of the PD Act, or a failure to comply with the requirements as set out in regulation 32(4) of the DAP Regulations would be likely to amount to misconduct in section 4 of the CCC Act.

Pursuant to section 28 of the CCC Act, the Director General of the Department has a positive obligation to notify the CCC where he suspects on reasonable grounds that misconduct has occurred, and where this is of relevance or concern in his official capacity.

The CCC will decide whether further investigation is required.

While the outcome of the CCC's investigations can be only a report and recommendation regarding whether misconduct has occurred, that process alone can last for years, and can be professionally and personally damaging, even if the person is eventually cleared.

7. Decision-making process (Standing Orders)*

*Prepared with the assistance of the Western Australian Local Government Association ('WALGA').

It is not enough that a decision be the correct one on the planning merits – a decision must also be made in a fair manner, and most importantly, be seen to have been made fairly. At every level, the hallmarks of good government include consistent, transparent and accountable decision-making. DAP members should be conscious that their decisions may benefit some whilst disadvantaging others.

Therefore, they have a duty to ensure they are fully informed, scrupulously fair, highly objective and above all, just.

7.1 Overall concept of a 'fair hearing'

The right to a 'fair hearing' has been a hallmark of our Westminster system of government for centuries, existing as part of the 'common law'.

These principles of fairness are often called 'natural justice', 'procedural fairness' or 'due process', although the terms are often used interchangeably. These principles generally require:

- any interested party be given sufficient prior notice of a pending decision;
- any interested party be given adequate information about the nature of the pending decision being considered;
- any interested party be given adequate opportunity to make a submission (although this does not necessarily have to be by way of an oral hearing or with representation, where the opportunity to make a written submission will usually suffice);
- any decision be made within a reasonable timeframe (which in planning matters is usually covered by 'deemed refusal' provisions); and
- any decision only be made upon 'logically probative evidence' (meaning not by mere speculation or suspicion), although the strict rules of evidence that courts apply are not required.

These requirements have now in large part been enshrined in the DAP regulations and the DAP Standing Orders (as they are already enshrined in most local planning schemes for local government decisions). For example, as set out in the DAP regulations:

- regulation 15 requires a notification be sent to an applicant of the date of any local government recommendation report is received, together with the date of the DAP meeting;
- regulation 39 requires notice of any meeting be published on the DAP website at least seven days before any meeting;
- regulation 40(2) requires any DAP meeting be open to the public;

- regulation 40(3) allows the presiding member of the DAP to invite public submissions;
- regulation 16(5) requires the DAP Executive director give the responsible authority a copy of any determination; and
- regulation 44(4) requires any minutes of meeting be published on the DAP website within 10 days of a meeting.

Finally, in relation to planning decisions, courts have emphasised that merely providing a fair hearing does not excuse or absolve decision-makers from having to apply all the other principles of planning and administrative law. For example, in Falc Pty Ltd v State Planning Commission (1991) 5 WAR 522 at [526]–[527], cited with approval in Tah Land Pty Ltd v Western Australian Planning Commission [2009] WASC 196 at [43]:

> *"It seems to me these Australian authorities make clear that the mere according of a hearing will not avoid an error of law in the exercise of discretion which will occur where there is not in a real sense, in a proper case, a readiness to depart from the applicable policy."*

Therefore, the guidelines in this part should be read in conjunction with all other parts, pertaining to making good planning decisions.

7.2 Overview of DAP decision- making process

Refer to the DAP Application Process flowchart on the next page.

7.3 Introduction to Standing Orders

Regulation 40(5) states the DAP Executive director may issue practice notes about the practice and procedure of DAPs, and each DAP member must comply with those practice notes. The DAP Executive director has carried out this function by issuing the DAP Standing Orders.

The Standing Orders purpose is to:

a. standardise certain DAP secretariat procedures;

b. increase community and industry understanding of DAP meeting procedures;

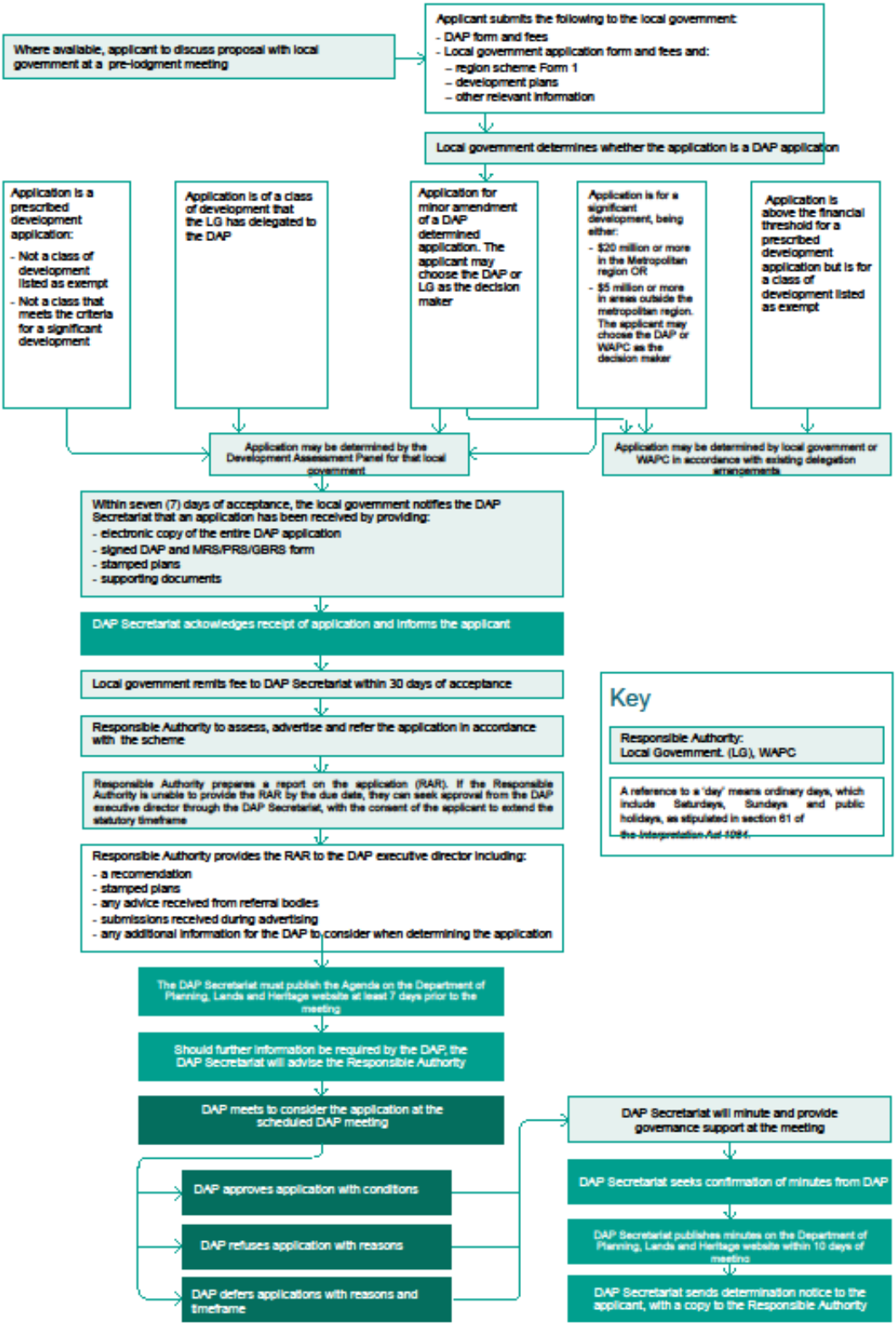
c. facilitate the orderly and efficient conduct of DAP meetings; and

d. clarify DAP members' responsibilities in relation to the conduct of DAP meetings.

These training notes will briefly discuss each of the main parts of the Standing Orders. In most cases, each provision of the Standing Order is relatively self-explanatory, with a reference to any relevant DAP regulation stated where appropriate. Therefore, these guidance notes will refrain from simply requoting the Standing Orders, unless necessary and relevant.

Finally, most DAP members will already have had some or much experience with committees. Therefore, for many DAP members, these guidelines may admittedly offer limited additional insights. However, for those DAP members with no or little experience, these guidelines should provide a practical resource.

DAP Application Flow Chart



7.4 Order 1: Preliminary

Part 1 of the Standing Orders provides basic information, including key definitions. Other key terms and concepts are also outlined in the glossary at the back of this document.

- some of which expand on the meaning of a term already defined in the Standing Orders. This part also makes it clear that all DAP members are required to follow both the Standing Orders and the Code of Conduct.

7.5 Order 2: Attendance at DAP meetings

Part 2 of the Standing Orders prescribes rules and procedures for attending DAP meetings. Some of the chief requirements DAP members should be especially aware of are:

- A DAP member with a direct or indirect pecuniary interest or a proximity interest in relation to a DAP application is not ordinarily entitled to vote on that application.

- For a DAP meeting to lawfully operate, a minimum number of DAP members must be present – known as a 'quorum'. The quorum is achieved when a presiding member, and any two DAP members are in attendance.

- If a DAP member is unable to attend a meeting, they have a duty to inform the DAP secretariat as soon as possible of this fact. Where a DAP member is unable to attend two or more consecutive meetings, the member must seek a leave of absence from the Minister.

In terms of public attendance at a DAP meeting, it should also be remembered that the Standing Orders require the following:

- the DAP must invite the responsible authority officer who prepared the report for a development application to attend the meeting; and

- all DAP meetings are in any event open to the public.

7.6 Order 3: Arrangements to be made before DAP meetings

Part 3 of the Standing Orders concern arrangements to be made for DAP meetings.

7.6.1 DAP meeting agenda

Each DAP member will be sent an agenda at least seven days before the meeting. Both the DAP secretariat and each relevant local government will be required to publish the agenda on their websites.

7.6.2 Responsible authority report

As already discussed at 4.7.6(b) above, regulation 12 requires the responsible authority to provide a report to the DAP. Regulation 12(5) sets out the matters that must be covered in the report, including:

- a recommendation as to how the application should be determined;
- copies of any advice received by the responsible authority from any other statutory or public authority consulted in respect of the application; and
- any other information that the responsible authority considers is relevant to determining the application.

7.6.3 Tips for considering reports

Clause 3.4.1 of the Standing Orders require a DAP member to review the report and material submitted by the responsible authority.

Decision-makers are called to review numerous reports on a wide range of related topics – local government Councillors are well acquainted with this situation. Reports can include issues relating to town planning, engineering services, financial reports and major projects of the responsible authority.

To this end, when reviewing a report, it is essential that DAP members adopt an objective, critical and neutral approach. Each member should then ask the following questions:

- Does the report contain enough information?
- Does the report cover all the issues?
- Have alternative courses of action or options been covered?
- Are different viewpoints presented?
- Does the report have sound findings?
- Does the report contain evidence to support the statements made in the officer comments section?
- Do any recommended conditions appear satisfactory?
- Is the recommendation sufficient?
- Does the conclusion follow from the date presented?
- Does the recommendation seem appropriate and reasonable?

7.6.4 Tips for considering recommendations

When considering a recommendation of a report, it is important that each member assess all the evidence and material before coming to an independent conclusion. A member should never blindly accept a recommendation, or any information for that matter, without exercising sound independent judgment.

Often, a recommendation will provide a good starting point upon which the matter can be considered further. Therefore, it is important that the recommendation be formally discussed and dealt with by the DAP when determining an application.

7.6.5 Tips for dealing with submissions and verbal presentations

Clause 3.6.1 of the Standing Orders allows the presiding member to invite a person present at a DAP meeting to advise, inform or make a submission to the DAP. Any person who wishes to make a verbal submission must submit a formal presentation request using the prescribed process set out at clause 3.6.2 of the Standing Orders.

Although clause 3.6.7 allows the presiding member to refuse a presentation request, caution should be exercised in doing so. Unless there are clear and reasonable reasons, denying an interested party a right to speak may adversely affect perceptions of transparency and consistency of decision-making. This is especially the case given all DAP meetings are open to the public.

Clear and reasonable reasons why a presentation request might be refused include, but are not limited to:

- The presentation request was not made in time in accordance with the prescribed process set out in the Standing Orders (i.e. it is important to ensure everyone follows the same 'rules', addressing any perceptions of actual or perceived bias).

- The person or persons making the request belong to an interested group, where there is already a representative of that group making a verbal submission (i.e. it is legitimate for the DAP to limit a submission to only one representative of the whole group, rather than allow a dozen similar submissions).

- Based upon the information set out in the presentation request, it is reasonable to conclude that the submission will have no relevance to the planning merits of the DAP application, or is otherwise likely to be vexatious.

7.7 Order 4: Order of business during DAP meetings

Part 4 of the Standing Orders prescribe provisions relating to the order of business during a DAP meeting. As discussed above, the proposed order of business is usually set out in the agenda sent to each DAP member in advance of a meeting.

Clause 4.1.1 states:

> "Unless otherwise decided by informal resolution of the DAP members present, the order of business is to be conducted as follows:
>
> a. declaration of opening;
> b. apologies;
> c. members in leave of absence;
> d. noting of minutes;
> e. declaration of due consideration in accordance with 4.5
> f. disclosures of interest in accordance with Part 6;
> g. submissions and presentations by persons invited to advise, inform, or make a submission to a DAP in accordance with 3.6;
> h. consideration of responsible authorities' reports and determination of DAP applications;
> i. report of the DAP executive director on SAT reviews;
> j. general business including consideration of any correspondence;
> k. closure."

7.8 Order 5: Conduct of business during DAP meetings

7.8.1 Minutes

The minutes are a document containing a written summary of the proceedings to a meeting, and as outlined in the Standing Orders, includes information such as: the names of the DAP members present at the meeting; the time of entry and departure of any DAP member; details of each motion moved at the meeting, the mover and the outcome of the motion; details of each decision made at the meeting and the reasons given for each decision; and any other matter that these practice notes state is to be recorded in the minutes of a meeting.

The minutes are recorded by an officer of the DAP Secretariat. As set out in regulation 44(2), the minutes must be given to the DAP executive director within five days after the meeting. Pursuant to regulation 44(3), the presiding member then confirms and signs the minutes as an accurate recording of the meeting. Finally, under regulation 44(4), the minutes must be posted on the DAP website within 10 days after the meeting.

As set out in clause 4.1(d) and 4.5 of the Standing Orders, at the next DAP meeting, the panel also notes the minutes of the previous meeting as the fourth item of business.

7.8.2 Tips for adopting a position

A DAP is required to make a decision in one of three ways:

1. approve the application without conditions;
2. approve the application with conditions; or
3. refuse the application.

The DAP can and often comes to this decision by adopting a recommendation contained in the responsible authority's report, by either:

- adopting the recommendation without amendment;
- adopting the recommendation with amendments; or
- adopting something different from the recommendation.

A position is adopted when a DAP member moves a motion,. As set out in clause 5.5.1 of the Standing Orders, where a DAP member moves a motion that is a significant departure from the recommendation, the presiding member may require that DAP member put that motion in writing.

A DAP member will not be able to participate fully and effectively in adopting a position unless they have made sufficient preparation beforehand. Tips for critically reviewing a responsible authority's report are outlined at 7.6.3above, as are tips for considering recommendations at 7.6.4

7.8.3 Tips for giving reasons for decisions

All minutes must now contain a record of the determination, and reasons for the determination pursuant to regulation 44(1A).

Where the DAP adopts the responsible authority's recommendation contained within the RAR, the minutes of the meeting simply need to provide that the reasons for decision are as per the report.

If the DAP's decision differs from the recommendation contained within the RAR, the DAPs reasons in the minutes of the meeting should explain the proposal's compliance (or non-compliance in the case of a refusal) with the relevant planning framework. The reasons should consider:

- Whether the proposal complies with all of the relevant objectives, development standards and requirements of the scheme;

- If the proposal does not comply with all of the relevant objectives, development standards and requirements of the scheme, whether the scheme allows for the exercise of planning discretion to vary those development standards or requirements. It is important to identify the issues requiring the exercise of planning discretion and identify the scope of the discretion available. The reasons should include why the exercise of discretion is considered appropriate and cite elements of the planning framework that support that position.

- Whether the proposal comply with other relevant planning instruments including, but not limited to:
  - State and local planning strategies;
  - State planning policies;
  - Local planning policies;
  - R-codes (where applicable)
  - Draft planning instruments that are 'seriously entertained.'

7.8.4 Tips for understanding meeting terminology

The most important thing a DAP member unfamiliar with committee decision-making can do is become acquainted with the main terminology used in meetings. For example, each DAP member should be familiar with the following basic terms (see the Standing Orders for the official definitions, rather than the plain-English explanations below):

- **Absolute majority** means more than half the actual number of positions on the council or panel (whether vacant or not). DAPs do not use or require an absolute majority for voting on any decisions but instead use a simple majority.

- **Amending motion** means a motion that proposes to amend a primary motion. There are special rules governing when and how an amending motion can be made, as set out in the Standing Orders.

- **Casting vote** means where there is a tie between votes, the presiding member has an additional vote. This is designed to break a deadlock to ensure that decisions are made.

- **External party** means a third party, who has been invited by the DAP to advise, inform, or make submissions to a DAP.

- **Motion** is a formal proposal for consideration at a meeting. It is the starting point for decision- making. The motion is a statement of what is to be done and where it is to happen. Frequently it also includes statements about the expected time within which that matter is to occur. The motion moved and seconded on any matter is called the primary motion (also known as the original or substantive motion). Every other motion other than an amending or procedural motion is a primary motion. The words motion and resolution are not synonymous.

- **Mover means**, in relation to a primary or amending motion, the DAP member who first moved the motion.

- **Primary motion** means the original or substantive motion, compared with any amending or procedural motion – see definition of 'motion'.

- **Point of order** describes the ability of any member to interrupt a speaker and interject as to why the member speaking is not purportedly complying with prescribed procedures set out in the Standing Orders. The presiding member then rules on the point of order – either to allow the member to continue speaking unimpeded, or with directions to the member to alter their conduct.

- **Presentation request** means a request by a person, or a group of persons, to make a verbal submission at a DAP meeting. Such a request must be made in writing to the DAP secretariat at least 72 hours before the commencement of the meeting.

- **Procedural motion** means a motion addressing a procedural aspect of the meeting. Procedural motions take precedence over the original motion being debated. The Standing Orders recognise a number of possible procedural motions, including: a proposal that a primary motion be deferred; that a meeting be adjourned; that debate be closed; that a primary motion be put to a vote; that the meeting proceed to the next item of business; or that a member no longer be heard. There are also special rules set out in the Standing Orders governing how a procedural motion can be made.

- **Quorum** means the minimum number of persons required to be present in order for the business of the meeting to proceed. For DAPs, a quorum is 3 DAP members, including the presiding member.

- **Resolution** is the name used to describe the formal adoption of a motion – i.e. a motion becomes a resolution. Most resolutions are formal adoptions of formal motions. However, the Standing Orders also recognise the possibility of informal resolutions, which are decisions made informally on matters such as the order of business for a meeting.

- **Right of reply** means before a vote on a motion is taken, the mover of the motion has the right to reply to the arguments brought forward against the motion during the debate. New subject matters must not be introduced at this point.

  The right of reply is the opportunity to rebut any points that have been made to oppose the motion.

- **Seconding** (a motion) means indicating that a second person (by voice or raised hand) supports the proposal to the extent that it should be debated. In most situations, no motion or amendment is to be open to debate until it has been seconded. If there is no seconder, the presiding member will declare the motion has 'lapsed'. In some situations, a member will second a motion 'pro forma' to indicate that whilst they do not support the proposal, they are willing to see it debated. This process should be used sparingly, as it may take up time unnecessarily.

- **Seconder** means the person seconding a motion.

- **Simple majority** means more than half the number of members present who are entitled to vote (provided a quorum has been achieved). All DAP votes require a simple majority.

For example, for a meeting with five DAP members present, a simple majority is three votes. For four DAP members, a simply majority is two votes plus the presiding member's vote (remembering the presiding member has a casting vote). For three DAP members (provided there are at least two specialist members and one local government member), a simple majority is two votes.

- **Written motion** means a motion that in the opinion of the presiding member represents a significant departure from the relevant recommendation of a responsible authority's report. In order to ensure other DAP members understand what is being proposed, and in order to give proper reasons for the decision, the presiding member may require the motion be put in writing.

7.8.5 Tips for understanding motions and other basic procedures

Clauses 5.5–5.10 of the Standing Orders contain provisions regarding motions. Key concepts that DAP members should familiarise themselves are:

- a position is adopted by a DAP member moving a motion. This may literally involve words to the effect of "I move that the report recommendation be adopted", or something similar. Only one motion can be debated at any one time.

- Depending upon the nature and substance of the motion, the presiding member may then ask the DAP member making the motion to put it in writing, if it involves a significant departure from the relevant recommendation of a responsible authority's report. The presiding member may also ask a complex motion be broken down into a series of smaller motions.

- The motion now put has to be seconded if any debate is to occur. Only one other DAP member is required to second the motion, and usually does so either by raising their hand, or by voicing support.

- The presiding member may then ask if anyone opposes the motion. If no one opposes the motion, the presiding member may declare it carried without debate or voting. If another DAP member opposes the motion, it is then to be debated. The minutes record the identity of the members opposing the motion and any reasons they give for opposition.

- The DAP member making the motion can also withdraw the motion, with the consent of the seconder.

- During the course of debate, a member may also move an amending motion.

- It is also always open to a member to make a procedural motion during the course of debate.

- After there has been sufficient debate, the presiding member or another member through a procedural motion, may call for the motion to be put to a vote. The original DAP member who moved the motion is given a last right of reply, and the matter is then put to the vote without further discussion.

- The DAP members then vote and the resolution is recorded in the minutes.

7.8.6 Tips for debating

Debating can pose challenges for DAP members, especially for first-time members not experienced in public speaking or committees. Effective communication is usually best achieved by keeping to a few basic principles:

- Be prepared. It will be extremely difficult to contribute in a meaningful way without proper prior preparation. Lack of preparation will probably be obvious to other members.
- Remember, meetings are aimed at reaching a decision, not just debating.
- Participants are there to contribute to proceedings. As this includes all members, be confident enough to speak up if you have something valuable to contribute.
- Show respect for others and their views, even if someone disagrees with those views (i.e. never engage in a personal attack and refrain from raising your voice). Also respect the diversity of the community as all DAP meetings are open to the public.
- Try to refrain from negative language. Rather than expressing your opposition negatively, it is far better to suggest an alternative in a positive tone.
- Make sure to listen to others and their points of view. Often this involves observing the rhythm of a speaker and knowing when to enter into a discussion without directly interrupting someone.
- Take notes but try to refrain from simply reading them. Dot points are usually better than a prepared speech.
- Stay on the message, otherwise, listeners will soon lose interest. It is critical that one knows what they want to say before they say it. Do not go off on tangents, which are likely to confuse or bore other listeners.
- When making a point, make sure you clearly summarise your argument before presenting detailed reasons – otherwise members will be unsure what your actual point is. The best presentations are usually achieved by a ‘reasons sandwich’, consisting of a very short summary or thesis, followed by detailed relevant reasons, and concluding with a restatement of your original point.
- Obviously, discussions can sometimes take on a degree of informality depending on the circumstances. Therefore, it is important to remain flexible.

7.8.7 Tips for voting

Clauses 5.11 of the Standing Orders prescribe procedures for voting at DAP meetings. The key points to note are as follows:

- A DAP member must exercise their vote independently, based on the information provided and merits of the individual application (i.e. a local government DAP member should not just vote on the views of the local council they otherwise represent).
- Voting is done by a show of hands.
- Voting is counted by a simple majority.
- In the event of a tie, the presiding member has the casting vote.

7.8.8 Additional tips for Presiding Members

Both the DAP Regulations and Standing Orders prescribe certain rights, duties and functions for the presiding member. In exercising those responsibilities, a presiding member (or deputy presiding member where required) should consider the following principles of successfully chairing a meeting:

- Make sure you know the rules, especially as they relate to procedures.

- Keep the order and set the tone of the meeting. Ensure that:
  - the meeting is not just fair, but seen to be fair;
  - all speakers are given a fair and reasonable chance to state their views; and
  - control any member who tries to unreasonably interrupt another speaker through heckling or interjecting.

- Act as the servant of the meeting. Aim to be a facilitator for participants, rather than trying to dominate the debate. Although not strictly required under the Standing Orders, a presiding member should make a short announcement when they intend to enter the debate.

- Be impartial. This includes doing relatively simple things such as looking around the room, to ensure all speakers are given a reasonable opportunity to contribute.

- Put the question. Once a reasonable amount of debate has occurred, the presiding member should seek to put the motion to a vote without any unnecessary delay (i.e. to prevent any 'grandstanding' or 'talkfest'). A presiding member should consider warning other members that they soon intend to put the question to a vote. The presiding member must then offer a right of reply to the originator of the motion.

- Use the casting vote. In some committees, the chairperson is bound to use a casting vote only in the negative, to defeat a motion. However, DAP meetings are similar to local government councils, in that there are no barriers to the presiding member making a deliberative vote as they think best.

7.9 Order 6: Disclosure of conflicts of interest

Part 6 of the Standing Orders outlines DAP members to disclose any conflicts of interest which will be managed as per the DAP Code of Conduct. DAP members should observe:

- that a DAP member who identifies a conflict of interest, an impartiality interest or a proximity interest, relating to any DAP application to be determined at a DAP meeting, must notify the DAP executive director as soon as possible, and in writing, as to the existence and nature of the conflict.
- that a DAP member who notifies the DAP executive director of a conflict of interest or a proximity interest, is not entitled to be present during the consideration or discussion of the application, or to vote on the application.

- a DAP member who identifies a conflict of interest during a meeting is to disclose that interest as soon as possible.

7.10 Order 7: Administrative matters

Finally, Part 7 of the Standing Orders prescribe administrative procedures. These largely pertain to the work of the DAP secretariat and the presiding member after a determination, and include the following:

- ensuring the appropriate persons are notified of the decision, including the applicant and responsible authority;
- confirming and signing the minutes of meeting;
- allowing the applicant to make a regulation 17 application for a minor amendment to the decision; and
- ensuring other overall duties of the presiding member are satisfied.

Finally, all other DAP members should be aware of clause 7.3 of the Standing Orders, which prohibit any DAP member from publicly commenting on the operation or determination of a DAP.

Further Information

Legislation, including copies of the Planning and Development Act 2005 and the Planning and Development (Development Assessment Panels) Regulations 2011 can be obtained from:

State Law Publisher 10 William Street
Perth WA 6000
Phone: (08) 9321 7688
Fax: (08) 9321 7536
Email: sales@dpc.wa.gov.au
Website: www.slp.wa.gov.au

Copies can also be obtained from the DAP website at www.dplh.wa.gov.au/daps

Please note a range of other manuals and helpful policy material can be downloaded from the DAP website or by contacting the Department of Planning, Lands and Heritage at:

Department of Planning, Lands and Heritage 140 William Street
Perth WA 6000
Website: www.dplh.wa.gov.au
Email: info@dplh.wa.gov.au
Tel: 08 6551 8002
Fax: 08 6551 9001