



# DEVELOPMENT ASSESSMENT PANEL PRACTICE NOTES

Under the *Planning and Development (Development Assessment Panels) Regulations 2011*



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## What is this document?

This document contains practice notes issued by the DAP executive director under regulation 40(5) of the *Planning and Development (Development Assessment Panels) Regulations 2011* ('DAP Regulations').

If you need help in understanding this document please contact the DAP secretariat, comprising officers of the Department of Planning, Lands and Heritage, at [daps@dplh.wa.gov.au](mailto:daps@dplh.wa.gov.au) and (08) 6551 9919.

## Updating or revoking these practice notes

In accordance with the commitment to continual improvement, the DAP executive director will endeavour to ensure these practice notes are updated or revoked as circumstances arise.

2 January 2025



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## Practice Note 1

### Regulation 39 Notice of Meetings and Publication on Websites

#### Background

1. Regulation 39 of the DAP Regulations prescribes the following in relation to the notice of meetings and publication on websites:

#### *39. Notice of meetings*

- (1) *The time, date and location of each DAP meeting, and the agenda for the meeting, must be published at least 7 days before the meeting -*

- (a) *on the DAP website; and*

- (b) *by each local government of a district in which development under a development application will be considered at the meeting –*

- (i) *on its website; or*

- (ii) *if the local government does not have an operating website, by means approved by the DAP executive director.*

- (1A) *The local government must, at least 7 days before the day of the DAP meeting, give written notice of the time, date and location of the DAP meeting, and the agenda for the meeting, to each person who made a written submission to the local government in relation to a DAP application to be considered at the meeting.*

- (2) *The DAP executive director must notify local governments of the details necessary to enable the local governments to comply with subregulation (1)(b).*

2. Questions have been raised in relation to the practical operation of r.39, including the following:
  - a. Should the notice material under r.39(1) also include the r.12 responsible authority report ('RAR')?
  - b. What should a local government do if its website temporarily ceases working due to technical difficulties?

#### **Should the notice material under r.39(1) also include the r.12 responsible authority report ('RAR')?**

3. Yes, the notice material under r.39(1) should include the r.12 responsible authority report ('RAR') . As reflected in r.40, the intent of the new DAPs framework is to encourage open, transparent and accountable decision-making.
4. In cases where a RAR is not received, the DAP may determine a DAP application in the absence of the report under r.12(7).



**What should a local government do if its website temporarily ceases working due to technical difficulties?**

5. Regulation 39(1)(b)(ii) enables the Director General DAP executive director to approve alternative methods of publication where a local government website 'does not have an operating website'. Obviously, if a website ceases working due to technical difficulties, it cannot be said to be an 'operating website'.
6. In accordance with the powers provided to the DAP executive director, and as communicated through this practice note, the following course of action is deemed an acceptable alternative method of publication of the notice material for the purposes of r.39(1)(b)(ii):
  - (a) The notice material shall be made available for public inspection from the office of the relevant local government, in a form or medium held by the local government.
  - (b) The notice material shall be made available free of charge, except where in the opinion of the local government it would divert a substantial and unreasonable portion of the local government's resources away from its other functions.
  - (c) The local government shall inform any person who attends for inspection, that the material is also available electronically on the DAP website pursuant to r.39(1)(a).
  - (d) The local government shall make reasonable endeavours to consult with persons as the local government considers most likely to be affected by the DAP application. The local government shall inform any such person of the availability of the notice material, either for inspection at the local government office, or electronically on the DAP website.





## Practice Note 2

### Regulation 13 Direction for further information

#### What is a regulation 13 direction for further information?

1. Regulation 13 of the DAP regulations allows the DAP executive director to direct a responsible authority to provide further information to an application as follows:

#### *13. Further services from responsible authority*

- (1) *The DAP executive director may, at any time after the DAP is notified of a DAP application made to a responsible authority, direct the responsible authority to provide either or both of the following services in connection with the application —*
    - (a) *technical advice and assistance;*
    - (b) *information in writing.*
  - (2) *The direction must be in writing and must specify —*
    - (a) *the services required; and*
    - (b) *the time within which the responsible authority must comply with the direction.*
  - (3) *A responsible authority must comply with a direction given to it under this regulation.*
2. Questions have been raised as to the practical operation of r.13, including the following:
  - (a) Can r.13 directions relate to administrative matters, or only issues of planning merit as relating to a RAR?
  - (b) After reviewing a RAR, can the DAP seek further information from an applicant directly, or should requests go through the responsible authority?
  - (c) Can a local government recoup the costs involved in providing further information or assistance in response to an r.13 direction?
  - (d) What may occur where an applicant does not provide further information as directed?
  - (e) Can the DAP determine the application in the absence of a response to an r.13 direction?
  - (f) Will the details of an r.13 direction be made publicly available?
  - (g) Advice from the State Design Review Panel (SDRP) is needed, how can I ask for this?



**Can r.13 directions relate to administrative matters, or only issues of planning merit as relating to a RAR?**

3. The focus and implicit limitation of an r.13 direction is to seek further information pertaining to issues of planning merit, relating to a RAR, not to provide administrative instructions to a local government. Where issues of administration arise, these are to be dealt with by the DAP secretariat, being the administrative officers under the DAP Regulation, at the direction of the DAP executive director.

In the case that a RAR is not received, a R.13 direction may be issued to the responsible authority seeking a copy all relevant information received to assist with the determination of the application.

**After reviewing a RAR, can the DAP seek further information from an applicant directly, or should requests be made through the responsible authority?**

4. Directions for further information from an applicant should be made through the responsible authority, not made to the applicant directly. As evidence of this:
  - (a) Regulation 13 is designed to allow further information be obtained by a direction made through the responsible authority; and
  - (b) Clause 2.4 of the DAP Code of Conduct prohibits DAP members from directly communicating with applicants.

**Can a local government recoup the costs involved in providing further information or assistance in response to an r.13 direction?**

5. Yes, the relevant local government can recoup any costs involved in providing further information or assistance in response to an r.13, including pursuant to regulations 48 and 49 of the Planning and Development Regulations 2009 ('PDR'). However, as noted in r.14, any additional costs not recouped under the PDR are borne by the local government.
6. Although not determinative, and although the presiding member retains a wide discretion as to what can be sought under r.13, the fact as to whether the additional service is recoverable by the local government under the PDR may be relevant as to whether the r.13 direction is reasonable in the circumstances.

**What may occur where the applicant does not provide further information as requested?**

7. Where the responsible authority requests further information, either on its own initiative or on behalf of a DAP through a r.13 direction, and where the applicant does not provide such information as requested, the DAP may determine to:
  - (a) defer a decision on the application until such time as the information is furnished; or
  - (b) refuse the application, citing the precautionary principle or other planning reasons.



**Can the DAP determine the application in the absence of a response to an r.13 direction?**

8. Yes, the DAP can determine the DAP application in the absence of a service required under this regulation if the service is not provided.

**Will the details of an r.13 direction be made publicly available?**

9. Yes, the r.13 request and response by the responsible authority will be published on the DAP website as part of the Agenda. The Presiding Member will announce the receipt of any information in response to an r.13 request as part of the meeting. It should be noted that any legal advice received from the Department or State Solicitors Office, it will be exempt from publication.

**Advice from the State Design Review Panel (SDRP) is needed, how can I ask for this?**

10. The SDRP is a committee of the WAPC, which provides design advice on significant or strategic public works, infrastructure projects and other major development proposals. It is chaired by the Government Architect and established to provide independent design advice and review of such proposals. If the DAP members consider they need more information or advice from the SDRP in order to properly consider a DAP application, then Regulation 13 of the DAP Regulations can be used to seek such information.

A request to the SDRP may be appropriate if the proposal has not already been reviewed by a local government's design review panel (DRP). If a local government's DRP has already provided advice, it is unlikely that the SDRP would also offer advice.

The same principles apply to requesting advice from the Office of the Government Architect.

Requests for advice from the SDRP (or Government Architect) can be made through the responsible authority, not to the SDRP directly. The responsible authority will arrange for the request to be put to the SDRP and then deliver any advice received. DAP members are asked to, as far as possible, identify the elements of the proposal they require advice on. For example, members may wish to receive advice on the landscaping element, or the façade quality, or the apartment amenity. Alternatively, there may be a particular requirement in the local planning scheme that requires design advice.



## Practice Note 3

### Form 2, Regulation 17, Minor Amendments

#### What is a Form 2, regulation 17, minor amendment application?

1. A person may submit an application under r.17(1) of the DAP Regulations to request any development currently approved by a DAP, and any conditions of approval, to be amended or cancelled:

#### *17. Amending or cancelling development approval by DAP*

- (1) *An owner of land in respect of which a development approval has been granted by a DAP pursuant to a DAP application may apply for the relevant DAP to do any or all of the following —*
    - (a) *to amend the approval so as to extend the period within which any development approved must be substantially commenced;*
    - (b) *to amend or delete any condition to which the approval is subject;*
    - (c) *to amend an aspect of the development approved which, if amended, would not substantially change the development approved;*
    - (d) *to cancel the approval.*
2. Pursuant to r.17(2), a minor amendment application is lodged using Form 2 application form and attracts a fee in accordance with Schedule 1 of the DAP Regulations. Pursuant to r.17(3), a minor amendment application is otherwise lodged with the relevant local government and dealt with in much the same way as an ordinary Form 1 DAP application.

#### **Can the relevant responsible authority determine an application to amend a DAP approval?**

3. Yes, a landowner can apply to the responsible authority, rather than the DAP, to determine a Form 2 application to amend or cancel a DAP approval under r.17A of the DAP Regulations.

If the landowner elects for the relevant local government to determine such an application then the application is to be made and determined in accordance with Schedule 2 clause 77 of the Planning and Development (Local Planning Schemes) Regulations 2015.

As soon as practicable after the application has been determined, the responsible authority must give the DAP executive director written notification of the determination which must include the following –

- (a) The date of determination;
- (b) The determination;



- (c) The terms of any condition to which the approval of the application is subject;
- (d) Reasons for any refusal of the application.

**Can a Form 2 application be made to vary a current decision of local government or the Western Australian Planning Commission?**

- 4. No. A Form 2 application can only be made to vary the current decision of a DAP. A Form 2 application cannot be submitted to amend the current decision of a local government or the Western Australian Planning Commission.

**Does the DAP have the jurisdiction to determine a Form 2 application made under Regulation 17 where SAT granted the original development approval?**

- 5. Yes. In accordance with Section 29(5)(a) of the *State Administrative Tribunal Act 2004*, when the SAT makes a decision, it is regarded and given effect as a decision of the decision maker. Therefore, a decision by SAT in effect becomes the DAP's decision and provides the DAP with jurisdiction to determine a Form 2 application, as if the DAP had made the original decision.

**What if an applicant submits a Form 2 application but it appears to substantially change the development currently approved by the DAP?**

- 6. Regulation 17(1)(c) makes clear that an application to amend an aspect of development approved is limited to situations where 'it would not substantially change the development approved.' Therefore, a DAP may refuse a Form 2 application if it determines that the proposed changes are not 'minor' but rather 'substantial' in nature.
- 7. In such a case, it may be suggested that an applicant resubmit an ordinary Form 1 DAP application. It is inappropriate to use a Form 2 application as an abuse of process with the aim of seeking the payment of a lesser fee or a closed meeting of determination.

**Is the question of whether a Form 2 application can be considered different from whether that application should be approved on its planning merits?**

- 8. Yes. In effect, DAPs have two questions to consider when determining a Form 2 application:
  - (a) First, as a preliminary question, being a condition precedent to the exercise of discretion and jurisdictional fact, is the Form 2 application one that the DAP can consider under r.17?
  - (b) Second, if it is determined that the DAP does have the jurisdictional authority to consider the application, should the DAP approve the proposal, approve with conditions or refuse the Form 2 application, taking into account all relevant planning considerations, including factors listed under the relevant planning scheme, policy, amenity and proper and orderly planning?
- 9. When preparing a responsible authority report ('RAR') under r.12 for a Form 2 application, responsible authorities should consider and provide recommendations in relation to both of these questions. The Form 2 RAR template slightly differs from the Form 1 template to incorporate these considerations.



As a matter of administrative process, can the relevant local government or DAP secretariat, as opposed to the DAP committee itself, reject a Form 2 if it appears to substantially change the development approved?

10. No. However, similar processes have been in existence in other jurisdictions for some time.
11. Comparisons in other states suggest that the jurisdictional fact of whether or not an application would substantially change the development approved, is ultimately a question relevant to the exercise of a decision-maker's discretion – it is not merely a matter of administrative process. Therefore, it is ultimately a question for the DAP committee itself, exercising its discretion and planning expertise, to determine whether or not a Form 2 application is capable of being considered.

**Who formally decides whether a Form 2 application should be rejected as lacking jurisdictional capacity under r.17?**

12. The only body capable with formally deciding whether a Form 2 application should be rejected as lacking jurisdictional capacity under r.17 is the DAP committee, sitting with appropriate authority as a quorum. For the avoidance of any doubt, neither the relevant local government, nor the Presiding Member, nor the DAP secretariat can determine this question.

**Can the relevant local government advise the applicant whether the Form 2 application is appropriate as a jurisdictional fact?**

13. Yes. Local governments especially play an important role in providing advice as to whether a Form 2 application is appropriate as a jurisdictional fact, or whether an ordinary Form 1 application should be submitted instead.
14. Local governments should aim to provide advice to an applicant at the moment of lodgement or as soon as possible thereafter. Furthermore, a local government is expected to provide advice as part of its RAR, including whether the application can be considered as jurisdictionally appropriate and whether the application should be approved on its merits.

If the local government or DAP secretariat advise an ordinary Form 1 application is more appropriate, can the applicant still insist that the Form 2 application proceed to be determined by the DAP?

15. Yes. If the relevant local government advises an ordinary Form 1 application is more appropriate, the applicant can still insist that the Form 2 application proceed to be determined by the DAP. As noted above, the preliminary question of jurisdictional fact under r.17 is ultimately one that only the DAP, as decision-maker, can determine.
16. However, applicants should take heed of local government advice, including any advice to withdraw a Form 2 application and instead submit an ordinary Form 1 application. If the DAP exercises its discretion to reject the Form 2 application as jurisdictionally inappropriate, an ordinary Form 1 process may need to start again anew, which is likely to result in further substantial delays.





17. What principles should decision-makers consider when considering a Form 2 application? See Annex A.

## Practice Note 3 – ANNEX A

### Decision-Making Principles for Form 2, Regulation 17, Minor Amendments

1. A person may submit an application under regulation 17(1) of the *Planning and Development (Development Assessment Panels) Regulations 2011* ('DAP Regulations') to request any development currently approved by a Development Assessment Panel ('DAP'), and any conditions of approval, to be amended or cancelled:
  17. Amending or cancelling development approval
    - (1) An owner of land in respect of which a development approval has been granted by a DAP pursuant to a DAP application may apply for the DAP to do any or all of the following —
      - (a) to amend the approval so as to extend the period within which any development approved must be substantially commenced;
      - (b) to amend or delete any condition to which the approval is subject;
      - (c) to amend an aspect of the development approved which, if amended, would not substantially change the development approved;
      - (d) to cancel the approval.
2. Therefore, Form 2 applications in effect can encompass an application to amend or delete, from an original development approval currently approved by a DAP:
  - (a) the date by which development must substantially commence;
  - (b) any condition of approval;
  - (c) any aspect of development, including any use approved, together with any aspect of the physical form of the development, ancillary or associated works;
  - (d) the approval itself through cancellation; or
  - (e) a combination of the above.
3. Pursuant to r.17(2), a minor amendment application is lodged using a Form 2 from Schedule 3 of the DAP Regulations. Pursuant to r.17(3), a minor amendment application is lodged with the relevant local government and dealt with in much the same way as an ordinary Form 1 DAP application.
4. In effect, a decision-maker has two questions to consider when determining a Form 2 application:



- (a) First, as a preliminary question, being a condition precedent to the exercise of discretion and jurisdictional fact, is the Form 2 application one that the DAP can consider under r.17?
  - (b) Second, if it is determined that the DAP does have the jurisdictional authority to consider the application, should the DAP approve the proposal, approve with conditions or refuse the Form 2 application, taking into account all relevant planning considerations, including factors listed under the relevant planning scheme, policy, amenity and proper and orderly planning?
5. As to both of these questions, a DAP must have due regard to the advice of local government, as set out in its responsible authority report ('RAR').
6. As to the first preliminary question of jurisdictional fact:
  - (a) The question is one going to the exercise of a decision-maker's discretion. For example, it is not merely a procedural matter of practical administration.
  - (b) A decision-maker must consider whether the proposed development is essentially or materially the same as currently approved. For example, a decision-maker must ask whether the changes would alter the essence of the design and results as currently approved.
  - (c) The comparison is not merely one of comparing physical features or components of development; rather, it involves both a qualitative and quantitative assessment. For example, a seemingly minor alteration may be a substantial change on the basis of qualitative assessment, whilst a seemingly significant qualitative alteration to the proposed physical form of the development or works, may not in fact be substantial.
  - (d) The question calls for an ultimate fact finding, requiring a comparison between the development, as currently approved, and the development as proposed to be modified. For example, the circumstances and rationale behind why the development was originally approved will be relevant.
  - (e) As the assessment calls for an ultimate finding of fact on the primary facts of the case, only illustrative assistance is to be gained from consideration of other cases involving their own findings. For example, what may be a substantial change in one circumstance, time setting and location, may not be substantial in another scenario.
7. As to the second question of planning merits of the application, all other planning considerations that would be relevant to an 'ordinary' Form 1 application, including factors listed under the relevant planning scheme, policy, amenity and proper and orderly planning, should be given due regard.
8. Where a Form 2 application is made in accordance with r.17(1)(a) 'to amend the approval so as to extend the period within which any development approved must be substantially commenced' the relevant planning considerations should include:
  - (a) whether the planning framework has changed substantially since the development approval was granted;





- (b) whether the development would likely receive approval now; and
- (c) whether the holder of the development approval has actively and relatively conscientiously pursued the implementation of the development approval.



## Practice Note 4

### Regulation 12 Responsible Authority Reports

#### What is a regulation 12 responsible authority report ('RAR')?

1. Regulation 12 of the DAP Regulations require each responsible authority, , to provide a responsible authority report ('RAR'). The RAR is to include an assessment and provide a recommendation, with sufficient information to enable the DAP to determine the application:  
  
*12. Responsible authority must report to DAP*
2. A responsible authority to which a DAP application is made must give the DAP executive director that will determine the application a report on the application in the approved form.
3. The report must be given at least 12 days before the date on which the application would be taken to be refused under the relevant planning instrument.
4. Despite subregulation (3), the DAP executive director may, by notice in writing given to the responsible authority and with the consent of the applicant, extend the period within which the report on a DAP application must be given.
- 4(a) Consistent with points 10 and 16 below, extensions of time to allow additional time for RAR's to be considered by Council will not be considered favourably and may not be supported.
- 5.. The report must provide sufficient information to enable the DAP to determine the DAP application, including —
  - (a) a recommendation as to how the application should be determined; and
  - (b) 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
  - (c) any other information that the responsible authority considers is relevant to determining the application.
  - (i) If these documents are publicly available, for example previous DAP meeting agendas and minutes or council minutes, etc, it would be appropriate to include these as a link to the document available on the website, instead of providing the complete document within the attachments
6. A DAP, in determining a DAP application, must have regard to, but is not bound to give effect to, the recommendations in a report under subregulation (2);
7. A DAP may determine a DAP application in the absence of a report under subregulation (2) if a report is not given in accordance with this regulation.



### **What issues surround the publication of r.12 responsible authority reports?**

8. The issue of r.12 responsible authority reports has recently been raised. In particular, questions include:
  - a. Who is to submit RAR?
  - b. Should the responsible authority take steps to ensure a RAR is submitted within the prescribed timeframes under r.12(3)?
  - c. Can an extension of time request under r.12(4) also extend the deemed refusal period under a relevant planning instrument?
  - d. What may occur if a responsible authority fails to provide a RAR within the prescribed timeframe?
  - e. Does a RAR need to be published on the DAP website at all, or should it be deferred for publication, given r.39 requires agendas to be published 7 days before a DAP meeting?

### **Who is to submit the RAR?**

9. Ultimately, it is a matter for each responsible authority, being the relevant local government and/or the WAPC, to decide who is to submit the RAR.
10. It was the original intention of the DAP Regulations that the report be provided by a local government planning officer, not necessarily by Council. However, it has been suggested that in the absence of any delegation arrangements, Councils may or shall endorse a RAR prepared by the planning officer. Whenever possible, Councils are encouraged to have sufficient delegation arrangements in place to facilitate a timely approvals process.
11. Under r.12(2) the RAR is to be prepared on the approved form. The RAR template is available on the DAP website.
12. From the perspective and role of DAP secretariat, provided the RAR:
  - (a) contains sufficient information to enable the DAP to determine the matter, as prescribed under r.12(5);
  - (b) is submitted within the timeframe prescribed under r.12(3);
  - (c) is in the approved format prescribed under r.12(2); and
  - (d) is submitted by a person purporting to act on behalf of the responsible authority under r.12(2), the DAP secretariat will presume the report is the duly authorised RAR for the purposes of complying with the DAP Regulations.
13. The legal and administrative responsibility resides with the responsible authority to ensure it submits a RAR that conforms to the requirements of the DAP Regulations.



14. If the application falls between two DAP and/or LG boundaries:
- (a) Under r.12(2), both LG's are required to provide a RAR; and
  - (b) Under r.8(2), the application will be determined by the DAP established for the district in which the greater land area of the development is proposed.

**Should the responsible authority take steps to ensure a RAR is submitted within the prescribed timeframes under r.12(3)?**

15. Yes, the responsible authority should take steps to ensure a RAR is submitted within the prescribed timeframes under r.12(3).
16. A responsible authority should take necessary steps to ensure the RAR is submitted within the mandated timeframes. This may include issuing appropriate instruments of delegation or the holding of special Council meetings if required. However, it is a matter for each responsible authority to decide how it will proceed to submit a RAR, which must comply with the requirements of the DAP Regulations.
17. Given the presiding member and other DAP members have a very limited period to review a RAR, including the possibility of requesting further information under r.13, it is important that the responsible authority complies with the prescribed timeframes, wherever possible.

**Can an extension of time request under r.12(4) also extend the deemed refusal period under a relevant planning instrument?**

18. Yes. In accordance with regulation 16(3), any period of extension given under regulation 12(4) is excluded when calculating the period between when the application is made and when the application is determined. The deemed refusal date is therefore extended when an extension of time request is granted. Where a responsible authority seeks an extension of time for the RAR submission, the applicant's consent is also required.

**What may occur if a responsible authority fails to provide a RAR within the prescribed timeframe?**

19. If a responsible authority fails to provide a RAR within the prescribed timeframe, at least two possibilities may occur:
- (a) The delay may result in the application being considered a deemed refusal period under r.18 and the relevant planning instrument, affording the applicant a right of review to the State Administrative Tribunal ('SAT'). It should be observed that where this occurs, the responsible authority may in effect be abrogating its influential role

in participating in the decision-making process. In effect, the decision will be made by one specialist – the SAT member.

- (b) The DAP may determine the application in the absence of the RAR.



- (c) The Minister may intervene by issuing a direction under r.52, requesting documents or information from a responsible authority. It should be observed that this includes a Ministerial power to use local government staff and facilities directly, for the purpose of furnishing the requested information.
- 20. If it appears that a responsible authority may not be able to provide the RAR within the prescribed timeframe, it should contact the DAP secretariat as soon as practicably convenient. This will provide the best opportunity to determine appropriate courses of action, including the possibility of an extension of time.

**Does a RAR need to be published on the DAP website at all, or should it be deferred for publication, given regulation 39 requires agendas to be published 7 days before a DAP meeting?**

- 21. Unless there are unusual circumstances (e.g. confidential matters such as trade secrets), a RAR should be published on the DAP website as part of the agenda 7 ordinary days before each DAP meeting.



## Practice Note 5

### Conduct of Local Government DAP Members

#### Who are local government DAP members?

1. Each of the DAPs comprise independent decision makers, including technical experts (defined in the DAP Regulations as 'specialist members') and elected local government representatives (defined in the DAP Regulations as 'local government members'). This mix of expertise and knowledge will help balance the technical aspects of development with local concerns and interests.
2. Questions have been raised as to the conduct of Local Government DAP members, including the following:
  - (a) Does being a local government DAP member prohibit that person from discussing matters with applicants and ratepayers, conducting site visits, or voting in prior Council decisions, in relation to a DAP application?
  - (b) Will participating in a prior Council decision in relation to a DAP application amount to an impartiality interest, and will this preclude that Councillor from participating in the subsequent DAP decision?
  - (c) What should local government DAP member practically do if they participate in both a prior Council decision and a subsequent DAP decision in relation to a DAP application?
  - (d) If Council wishes to make its own representation at a DAP meeting, but the mayor or shire president is already a local government DAP member, who should do this?
  - (e) Are local government DAP members still entitled to vote on matters determined entirely under a region planning scheme and not under a local planning scheme? Who represents the WAPC on the DAP?
  - (f) Are there any other measures to address this issue practically, such as delegation arrangements with local government staff?

#### **Does being a local government DAP member prohibit that person from discussing matters with applicants and ratepayers, conducting site visits, or voting in prior Council decisions, in relation to a DAP application?**

3. Division 2 of the DAP Code of Conduct prescribes a range of things DAP members should and should not do regarding communication. For example, clause 2.4.5 says:

*2.4.5 A DAP member must not participate in:*

- (a) *a discussion with an applicant, formally or informally, in person or otherwise; and*



- (b) *a site visit, private meeting, briefing, discussion or similar event with any other DAP member in respect to a development application that is before the relevant DAP or which the member is aware may come before that DAP in future, UNLESS the discussion, visit, meeting or similar event has been consented to by the DAP executive director and arranged by the DAP secretariat.*
4. However, local government DAP members are excluded from these requirements to the extent that a local government member is required to perform functions as a member of a local government:

*2.4.9 Nothing in this clause prevents a local government member from performing functions as a member of a local government.*

**Will participating and voting in a prior Council decision in relation to a DAP application amount to an impartiality interest, and will this preclude that Councillor from participating and voting in the subsequent DAP decision?**

5. Participating and voting in a prior Council decision in relation to a DAP application may amount to an impartiality interest. An impartiality interest is defined at cl.3.1.2 of the DAP Code of Conduct and cl.6.1.2 of the DAP Standing Orders to mean the following:

***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 the member is aware may come before that DAP in future.

6. It is arguable that local government DAP members maintain a membership of an association, that is connected to the DAP application, and which could reasonably be perceived as affecting the impartiality of the member. In any event, even if an impartiality interest is said to exist, cl.3.3.2 of the DAP Code of Conduct and cl.6.2.5 of the DAP Standing Orders state that this does not necessarily prohibit a DAP member from participating and voting in a DAP application. However, Councillors are strongly encouraged to avoid participating or voting in a prior Council decision in relation to a DAP application.

**What should local government DAP members practically do if they participate in both a prior Council decision and a subsequent DAP decision in relation to a DAP application?**

7. Where a local government DAP member does participate in a prior Council decision in relation to a DAP application, pursuant r.45(3) and r.40(5) of the DAP Regulations, the Director General directs the following process is to be followed:
- (a) During the item 'disclosure of interests' in the order of business, the presiding member should publicly acknowledge if any local government DAP members have attended a prior Council decision in relation to any DAP application to be considered at that DAP meeting.





**Possible wording for a presiding member:**

*'It should be noted that Councillors [names] have attended a prior Council meeting in relation to DAP application [name of application at item number], which is to be considered today. I will now allow the Councillors to elaborate.'*

- (b) Each and any local DAP member who attended a prior Council decision in relation to any relevant DAP application should make a public declaration that this was in accordance with his or her functions as a member of a local government.

**Possible wording for a local government DAP member:**

*'Under clause 2.4.9 of the DAP Code of Conduct, I participated in the prior Council decision in accordance with my functions as a member of a local government.'*

- (c) Each and any relevant local DAP member should then make a public declaration that he or she will exercise independent judgment in relation to the DAP application.

**Possible wording for a local government DAP member:**

*'However, under clause 2.1.2 of the DAP Code of Conduct, I acknowledge that I am not bound by any previous decision or resolution of the local government. I undertake to exercise independent judgment in relation to any DAP application before me, which I will consider on its planning merits.'*

- (d) Finally, the DAP executive director should take note that (unless there are exceptional circumstances or evidence of other conflicts of interest), there does not appear to be any impartiality interests that would prevent the Councillors from participation or voting in the DAP applications.

**Possible wording for a DAP executive director :**

*'I have considered these matters and determined there are no impartiality interests that would prevent the Councillors from participation or voting in relation to the DAP applications of this meeting.'*

**If Council wishes to make its own representation at a DAP meeting, but the mayor or shire president is already a local government DAP member, who should do this?**

8. Regulation 40 of the DAP Regulations require DAP meetings, other than r.17 minor amendments, to be determined by way of meetings open to the public. In turn, r.40(3) and cl.3.5 of the DAP Standing Orders allow any person, or a group of persons, to make a presentation at a DAP meeting. This would appear to include a further representation on behalf of the relevant Council, if such a representation is requested and judged appropriate under cl.3.5 of the DAP Standing Orders.
9. Section 2.8(d) of the Local Government Act 1995 ('LGA') prescribes that it is the role of the mayor or shire president to speak on behalf of the relevant local government. However, in most DAPs the mayor or shire president is also a local government DAP member.





10. Furthermore, cl.2.1.2 of the DAP Code of Conduct requires local government DAP members to not be mere conduits of their local governments but to exercise independent judgment on the planning merits. Thus, it would be inappropriate for a mayor or president to make a representation on behalf of their Council, in relation to a matter he or she is already considering as a DAP member.
11. Finally, it would also be inappropriate to expect local government staff to speak on behalf Council. Amongst other reasons, this is because such staff would already have drafted the r.12 responsible authority report, provided any further assistance to the DAP as required under r.13, and must in any event be present at the DAP meeting to answer any questions pursuant to cl.2.11 of the DAP Standing Orders. Thus, local government staff may be placed in a very difficult and conflicting position if they are also expected to communicate the position of Council, particularly if Council has views different from the technical planning approach of planning officers.
12. For the above reasons, where a Council wishes to make its own further submission to the DAP, and where the mayor or shire president is already a local government DAP member, the following acceptable courses of action should be considered:
  - (a) A deputy mayor or deputy president should perform the function of communication pursuant to s.5.34 of the LGA;
  - (b) If both the mayor and deputy mayor, or both the president and deputy president are unavailable, an alternative person should be nominated to make the representation under s.5.35 of the LGA; or
  - (c) The Council should appoint an independent planning consultant or other person to make a representation on its behalf.
13. It should be noted that several Councils have already successfully undertaken the last course of action and is the preferred approach.
14. Finally, it should be noted that it is the responsibility of Council, not the DAP secretariat, to ensure that a presentation request is submitted in time and in the correct format, in accordance with cl.3.6 of the DAP Standing Orders. It remains the discretion of the presiding member whether to grant any presentation request pursuant to cl.3.6.5 of the DAP Standing Orders.

**Are local government DAP members still entitled to vote on matters determined entirely under a region planning scheme and not under a local planning scheme? Who represents the WAPC on the DAP?**

15. Yes, local government DAP members are still entitled to vote on matters determined entirely under a region planning scheme and not under a local planning scheme. The Western Australian Planning Commission ('WAPC') has no representatives on the DAP.
16. Regulation 23 of the DAP Regulations make it clear that by definition, a DAP always comprises local government members from the relevant local government. Regulation 23(2) makes it clear that the relevant local government, 'in relation to a development application, means the local government of the district in which the land to which the development application relates is situated.'



17. In this way, DAPs in fact expand the role of local government members in determining major development approval, including decisions that would ordinarily be determined by the WAPC.

**Are there any other measures to address this issue practically, such as delegation arrangements with local government staff?**

18. Yes, given members of Council are already appointed as local government DAP members, a practical method of addressing many of the issues outlined above is to provide a power of delegation to local government staff in relation to DAP applications. The Director General and DAP executive director encourage such a course of action; however, it remains entirely with each responsible authority as to how it may determine its arrangements.



## Practice Note 6

### Tribunal, Court Reviews and Other Legal Proceedings

#### What types of legal proceedings affect DAPs?

1. The two main types of legal proceedings that affect DAPs are merits reviews and judicial reviews of its decisions.
2. Merits review is a re-examination of the merits of a decision. Usually, this is by way of an application to the SAT under regulation 18 of the Planning and Development (Development Assessment Panels) Regulations 2011 ('DAP Regulations') and pursuant to the State Administrative Tribunal Act 2004 ('SAT Act'). The Tribunal's approach is informal, flexible and encourages mediation to resolve disputes by settlement between parties or to narrow the issues in dispute.
3. As noted under section 27(1) of the SAT Act, the SAT carries out a de novo hearing, which means it effectively remakes the decision again, 'standing in the shoes' of the original decision-maker. As described under section 27(2) of the SAT Act, the Tribunal does not merely examine the original decision, but is tasked to produce a new correct and preferable decision, which may include examining any new material or new grounds not considered in the original determination.
4. Judicial review, by contrast, is a much narrower consideration of the process and manner in which the original decision was made. Usually, this is by way of an application to the Supreme Court of Western Australia. Where merits review explores what was determined, aimed at producing the correct and preferable decision, judicial review is primarily concerned with how the original decision was made, as to whether it was consistent with administrative law principles of valid decision-making. The range of remedies in judicial review is also more limited, where the Court does not remake the decision but is merely asked to consider whether the original decision was lawful.
5. Finally, a similar function to judicial review exists under section 244 of the Planning and Development Act 2005 ('PD Act'). This allows a party to apply to the President of the SAT to review a determination involving a question of law, where the determination was made by a non-legally qualified SAT member.

#### Do third party appeal rights exist?

6. Only applicants are usually permitted to apply to SAT for merits review applications, as third-party appeal rights do not generally exist for planning decisions. However, third parties may participate in planning matters by:
  - (a) being called as a witness by the respondent;
  - (b) making submissions under section 242 of the PD Act;
  - (c) intervening under section 37(3) of the SAT Act; and
  - (d) possible participation in mediation.



7. Judicial review applications to the Supreme Court are more commonly made by third parties. Whether third parties can make an application for judicial review largely depends on whether they have sufficient interest or standing in the matter.

**Who is the named respondent for an application of merits review to the State Administrative Tribunal ('SAT')?**

8. Regulation 18(3)(b) of the DAP Regulations makes clear that the respondent in any SAT application for review of a determination or deemed refusal is the DAP.
9. The DAP executive director is the appropriate person to attend SAT proceedings, as per regulation 18(3)

**Who is the named respondent for an application of judicial review to the Supreme Court?**

10. It is a matter for any applicant to name the parties to a judicial review matter challenging a DAP decision. In most cases the relevant DAP is usually named as the respondent, given it is the DAP's decision that is being challenged.
11. The Minister for Planning is also often named as a co-respondent to judicial review applications. Where the Minister is not named, he will usually seek to intervene as a co-respondent. As applications for judicial review often examine the DAP system as a whole, rather than merely the specific planning merits, it is appropriate that the Minister take an active involvement on behalf of the State.

**Are DAP members personally indemnified against claims made in legal proceedings?**

12. Generally, yes.
13. Section 106 of the Public Sector Management Act 1994 makes clear that members of any responsible authority are protected from personal liability in respect of any acts or omissions done in an official capacity. This is also confirmed in regulation 28(8) of the DAP Regulations, which clarifies that the above protections also extend to alternate DAP members.
14. The only circumstances where this protection from personal liability is not extended is where, under section 266 of the PD Act, a member of a DAP acts in a dishonest or improper manner beyond his or her official capacity.

**Are DAP members expected to do any preparation of ongoing work in legal proceedings, such as attend the Tribunal or Court, or to correspond with other solicitors?**

15. In both SAT review applications and Supreme Court matters, the majority of preparation and ongoing work in legal proceedings is carried out by the SSO, supported by officers of the Department and DAP executive director.
16. After being instructed in a new matter, the relevant SSO lawyer will inform the Tribunal or Court, as well as the other parties, that it acts on behalf of the DAP (and where relevant the Minister). Thereafter, in accordance with rule 37(4) of the Legal Profession Conduct Rules 2010, all future correspondence and service of documentation should be between legal representatives.



17. If DAP members do receive correspondence or documentation, they should forward it to the DAP secretariat. DAP members may also inform the sender, where possible, that all future contact should be through the SSO.
18. In SAT review proceedings, the DAP executive director attends mediations and hearings where necessary. In order to minimise personal disruption to DAP members, the Planning Appeals team at the Department assists the DAP members by providing a range of services.

**How are instructions provided to SSO for judicial review claims and other legal proceedings before the Supreme Court?**

19. In judicial review claims and other legal proceedings before the Supreme Court, as noted above, the presiding member will usually prepare a letter of instruction to the SSO, as recommended by the SSO. The letter will advise that the Minister for Planning, represented by the SSO, will seek to take carriage of the matter on behalf of the State. The DAP will usually take no other active part in proceedings, save as to costs. Thereafter, all instructions to the SSO will be made through the Minister for Planning.

**What is the effect of a SAT section 31 reconsideration?**

20. Section 31(1) of the SAT Act enables the Tribunal to invite the original decision maker (i.e. the DAP) to reconsider the decision that is the subject of review proceedings. Section 31 invitations usually arise from mediation, where amendments to proposals have occurred or additional information has been submitted, or where the application under review is a 'deemed refusal'.
21. A meeting of the DAP is required for a section 31 reconsideration because the DAP is making a decision afresh as if it were an original Form 1 application. The DAP is tasked to affirm its original decision, vary the decision, or set aside the decision and substitute a new decision. It is important to note that as in original Form 1 applications, it is open to the DAP to pass a procedural motion, including a motion to defer the application.
22. If the DAP affirms its original decision, then the proceedings continue to resolution before SAT. If the DAP varies its original decision or substitutes a new decision, and if the applicant is satisfied, this substituted decision has legal effect.

**Must the DAP have an open meeting when complying with a Tribunal invitation to reconsider a decision under section 31 of the State Administrative Tribunal Act 2004 ('SAT Act')?**

23. Yes.
24. A meeting of a DAP to consider an invitation to reconsider its decision under section 31 of the SAT Act is effectively a meeting for the DAP to 'reconsider' or 'remake' the application that is before SAT. Therefore, the meeting is subject to regulation 40(2) of the DAP Regulations, which requires a meeting be open to the public.

**Can confidential information discussed at mediation be disclosed at a section 31 decision?**

25. No.



26. Despite a section 31 meeting being an open meeting, parties and decision makers must ensure that any confidential information discussed at mediation is not disclosed at the reconsideration.

**Will there be circumstances where a DAP may be required to have a private meeting?**

27. Yes.
28. There may be circumstances where a DAP may be required to proceed to discuss matters in private without members of the public present. These circumstances may include but are not limited to the following:
- (a) A Form 2 determination under regulation 17 and 40(4).
  - (b) As part of a SAT review, if questions may arise during a section 31 reconsideration relating to confidential material arising from previous SAT mediation. If discussion of such matters is necessary, the DAP should ensure that that portion of the meeting is conducted without members of the public present.
  - (c) As part of a SAT review, an applicant should be prepared, for the sake of achieving settlement by consent, to make concessions by way of amended plans.  
  
If this is not acceptable to the DAP, the applicant may rely on the original plans at a subsequent full hearing.
  - (d) A DAP is to receive legal advice or give instructions to SSO, being necessary for the DAP to fulfil its role as a respondent in particular SAT review applications under regulation 18 where it is identified material must remain confidential.

**What should DAP members practically do if they participate in a SAT mediation process in relation to a reconsideration of a DAP decision?**

29. Where a DAP member participates in a SAT process in relation to the reconsideration of a DAP decision, under section 31 of the State Administrative Tribunal Act 2004, the following process is to be followed:
- (a) During the item 'disclosure of interests' in the order of business, the DAP member should publicly acknowledge if they have attended a SAT process in relation to any DAP application to be considered at that meeting.

**Possible wording for a DAP member:**

*'In accordance with clause 2.4.10 of the DAP Code of Conduct, I participated in a State Administrative Tribunal process in relation to DAP application [name of application at item number], which is to be considered today.*

*However, under clause 2.1.3 of the DAP Code of Conduct, I acknowledge that I am not bound by any confidential discussions that occurred as part of the mediation process. I undertake to exercise independent judgment in relation to any DAP applications before me, which I will consider on its planning merits.'*





## Practice Note 7

### Live Streaming Policy

#### Objective

This policy provides guidance in relation to the recording and live streaming of Development Assessment Panel (DAP) meetings. Live streaming and recording improves accessibility and transparency of DAP meetings for a broader audience.

#### Scope

This policy outlines the guidelines for the live audio and video streaming of DAP meetings on the DAP website, audio and video recording of those meetings and publishing the audio and video recordings of those meetings.

The live streaming will commence at the times that the meetings are due to commence and finish when the presiding member closes or adjourns the meeting for any reason. Meetings shall be live streamed in accordance with this Policy unless a motion to the contrary is passed by simple majority at the beginning or at any other time during the meeting.

The Policy addresses the requirement for the public to be able to observe a DAP meeting using audio-visual communication in accordance with regulation 40(2A).

#### Policy

Meetings to be recorded and live streamed via the DAPs website

All DAP meetings will be live streamed and publicly available via the DAP website.

Confidential items of business in a DAP meeting will not be streamed live or made available later as a recording.

Video recordings of a meeting will be available for viewing on the DAP website within 10 days after the meeting.

The DAP Secretariat will make every reasonable effort to ensure that a live stream and video recording is available. Should technical difficulties arise in relation to live streaming or access to the DAPs website, live streaming may be stopped, and the availability of recordings may be delayed.

#### DAP Members, Officers and DAP Secretariat

It is intended that the standard camera positions will provide live and recorded vision of the room, and live and recorded audio when DAP members, Officers and DAP Secretariat speak, for the duration of the meeting (other than for confidential items or meetings). This Policy recognises that there will be incidental capture of other officers due to the seating arrangements in the room and their role in participating in or attending meetings.



### **Public**

It is intended that standard camera positions will provide live and recorded vision of all members of the public who address a DAP meeting, and live and recorded audio when they speak. By participating in a public DAP meeting, those members of the public in attendance agree to being recorded. As far as practically possible, it is not intended that there be either live or recorded video footage or audio of those members of the public who do not address the meeting, however this Policy recognises that there might be incidental capture.

Signage outside the room, a statement on the Presentation Request Form, and a statement made by the Presiding Member at the commencement of each meeting, will inform the public that audio and video of the meeting will be streamed live on the internet and that the video recording will be made publicly available on the DAP website. Due to this recording, a member of the public will only be required to provide their name when addressing the meeting.

### **Deputations**

The Planning and Development (Development Assessment Panels) Regulations 2011 provides an opportunity at a DAP meeting for a person to make a submission to the DAP in respect of a development application.

At the appropriate point in the meeting the Presiding Member will call on the person to make their submission. Live and recorded vision and audio of all members of the public who address a DAP meeting will be captured.

### **Meetings or Items of Business Closed to the Public**

If the DAP resolves to close a meeting to the public in accordance with Regulation 40(2B), live streaming and recording will cease.

### **Access to Recordings of Meetings**

DAP Meetings that are streamed live on the internet will be processed by the DAP Secretariat and made available for viewing on the DAP website approximately 10 days after the meeting. The three most recent DAP meeting recordings will be accessible on the DAP website at any point in time. Recordings of meetings will be disposed of in accordance with the State Records Act 2000.

### **Risk**

The DAP is not liable for an action for defamation in relation to a matter published on its official website as part of a broadcast, audio recording or video recording of DAP proceedings. DAP members and officers are not liable for defamation for any statements made in good faith. Officers, DAP Members and members of the public are not liable for defamation for any statements to which a defence is available under the Defamation Act 2005.

The Presiding Member may rule at any time prior to or during a meeting that the live streaming and recording be stopped for purposes prescribed under regulation 40(2B). The live streaming and recording will be stopped following such a ruling.





Following any meeting the Presiding Member may exclude all or part of any meeting recording considered inappropriate to be published. Material considered to be inappropriate may include, but is not limited to, material that may –

- (a) Be defamatory;
- (b) Infringe copyright;
- (c) Breach the privacy of an individual or provide unauthorised disclosure of the personal information of an individual;
- (d) Be offensive, abusive, or discriminatory;
- (e) Constitute hatred or vilification of another person; and
- (f) Disclose confidential or privileged information.

#### **Disclaimer**

Endorsed DAP minutes provide the definitive record of DAP resolutions. Opinions and statements made during a DAP meeting should not be relied upon.

#### **Licence and Use of Live Stream**

Access to live streams and recordings of DAP meetings is provided on the DAP website for personal and non-commercial use.

Video, images and audio contained in a live stream or recording must not be altered, reproduced or republished without the permission of the Department. Copyright remains with the Department.

#### **Definitions**

**Recording** means any recording made by an electronic device capable of recording sound and/or video images.

**Confidential/Closed** means meetings that are closed to the public in accordance with Regulation 40 (2B)

**Live Streaming** means to transmit or receive live video and audio coverage of an event over the internet with the content simultaneously recorded and broadcast in real time to the viewer.

**DAP Meeting** means a meeting for the purpose of considering and dealing with the ordinary business of DAP.

#### **Relevant management practices/documents**

*Planning and Development (Development Assessment Panels) Regulations 2011*

*DAP Code of Conduct*

*DAP Standing Orders*