



Department of **Planning,**
Lands and Heritage



Development Application Exercise of Discretion Guidelines

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1. PURPOSE OF THESE GUIDELINES

These Guidelines have been prepared to assist planning practitioners by providing a consistent and transparent approach to the use and application of discretion in assessing and determining applications for development approval. The objective is to improve the quality of discretionary decisions, and to make the process of arriving at those decisions more apparent to a casual observer.

Practitioners and decision-makers should read the Guidelines together with the Deemed Provisions for Local Planning Schemes set out in Schedule 2 of the Planning and Development (Local Planning Schemes) Regulations 2015 (Regulations), as well as any other applicable planning instruments such as local planning policies, structure plans and local development plans.

Clause 67(2) of the Deemed Provisions requires the decision-maker to have due regard to several factors when considering an application for development approval, including (but not limited to) the:

- planning framework that applies to the proposed development;
- surrounding land use and development context;
- social, environmental and economic components;
- suitability of the land for development;
- site servicing requirements; and
- likely impacts of the proposed development on the community.

The Guidelines provide five key principles to guide decision-making when considering applications for development approval against the matters set out in clause 67(2) of the Deemed Provisions.

2. APPLICATION OF THE GUIDELINES

The Guidelines should be applied or referred to during an assessment or act of decision-making, where 'due regard' consideration is required by a decision-maker in the assessment of an application for development approval. This includes a discretionary decision to approve or refuse an application, as well as a decision to apply any necessary conditions.

3. LIMITATION OF THE GUIDELINES

The Guidelines form part of the State Planning Framework, as set out in State Planning Policy 1 – State Planning Framework. The scope of the Guidelines applies only in the context of the exercise of discretion in the assessment and determination of applications for development approval.

The Guidelines are not intended to codify or prescribe discretion, as this would be contrary to the very principle of discretion in decision-making. Nor do the Guidelines attempt to instruct the decision-maker on how to weight competing considerations in making planning decisions. To do so would undermine the expertise and experience required to undertake balanced assessment and determination of applications for development approval.

4. GUIDING PRINCIPLES FOR THE EXERCISE OF DISCRETION

This section sets out five guiding principles for the exercise of discretion in the planning decision-making process. The principles have been derived from a number of sources including [Making Good Planning Decisions](#) (DPLH 2021), the [Guidelines on Decision Making](#) (Ombudsman WA 2021), and the Supreme Court's decision of *Marshall v Metropolitan Redevelopment Authority* [2015] [WASC 226](#). This decision articulates a clear expectation that for the exercise of discretion to be orderly and proper, it must be –

- i. methodical and logical;
- ii. informed by proper planning instruments as well as relevant contextual matters;
- iii. objective in nature; and
- iv. only exercised when there is a sound or cogent reason to depart from the baseline or standard.

The principles below broadly reflect the *Marshall* principles and are further expanded upon in the following sections:

Principle 1 – There should be a properly constructed planning framework.

Principle 2 – Look for guidance within the framework.

Principle 3 – There must be clear and logical (cogent) reasons to depart from the standard.

Principle 4 – Public/community input has a legitimate role in the planning process.

Principle 5 – Genuine and proper consideration.



4.1 Principle 1 – There should be a properly constructed planning framework

A current and properly constructed planning framework is more likely to enable transparent and consistent planning decisions. In considering whether a planning instrument or framework is properly constructed, the decision-maker should consider the following:

- (a) *Has the planning framework been prepared and adopted in accordance with the relevant legislative requirements?*
- (b) *Does the planning framework provide a clear standard/ baseline and/or clear performance criteria?*
- (c) *Does the planning framework provide criteria for when it may be appropriate to depart from the standard or baseline?*
- (d) *Is the planning framework consistent with higher-order planning instruments (e.g., State Planning Policies)?*
- (e) *Are there any applicable draft planning instruments that can be considered to be 'seriously entertained'? If so, how likely and imminent is its approval, and how does it relate to any existing planning instrument?*
- (f) *Has there been a shift in the planning intent for the land or locality that is not captured in the framework?*
- (g) *Does the development represent a form of development that is unique and/or is not anticipated by the relevant planning instrument?*
- (h) *Is there an economic or community need for the development that is not anticipated by the relevant planning instrument?*
- (i) *Are assumptions made in the planning framework outdated or superseded by subsequent research, data or adopted positions?*

It is ultimately the responsibility of the planning authority to ensure there is a robust, clear and well-informed framework that is current, fit-for-purpose and has been prepared in accordance with the applicable legislation. Where there is a properly constructed planning instrument in place, the prescribed standards or development controls in that instrument are the baseline for determining the proposal.

It may not always be possible to ensure the planning framework is contemporary and up-to-date. Inadequate resourcing and competing priorities can result in planning frameworks (particularly local planning policies) that are outdated and do not necessarily reflect best practice.

Provided a planning instrument has been prepared lawfully, the age of the planning instrument is not in and of itself a reason to dismiss it when making planning decisions. A planning instrument that is out of date but properly adopted and clear in its provisions should be given due regard in determining applications for development approval unless there are clear and logical reasons to depart from its provisions (refer Principle 3). Where legislation makes specific provision for a decision to be made in a manner that is otherwise inconsistent with the planning instrument, the decision-maker should carefully consider any specific legislative requirements and any relevant Principles in these Guidelines before making a decision.

If there is no planning framework in place, will the planning decision prejudice a future planning framework?

In some circumstances, an application for development approval may be lodged before the higher-order planning framework is in place. This frequently occurs in designated activity centres, activity corridors or other precincts that require a consolidated plan to determine the desired future character and built form.

The decision-maker must consider whether it is orderly and proper to approve an application for development approval ahead of the higher-order planning framework, and whether such an approval will unreasonably influence a future framework. This is particularly relevant with respect to matters such as building height and scale, and determining the 'desired future character' of an area for infill projects.

In these circumstances, the decision-maker should exercise discretion only to approve a development when it is certain approval will not prejudice or pre-determine the future character of the area.

It is rarely appropriate for an application for development approval that proposes a significant change to the existing character of the area (usually by way of height, bulk and scale) to be approved ahead of a more comprehensive plan for the area being progressed.

Where the need for a standard/precinct structure plan or similar is foreshadowed by the zoning of the land or through the strategic planning framework, and such a plan has not yet been prepared, the starting point for any major discretionary decision should be refusal.



4.2 Principle 2 – Look for guidance

Are there provisions within the planning framework that allow development standards to be varied?

The starting point for all discretionary decision-making is to determine whether a standard or provision is capable of being varied. Typically, local planning schemes will include a clause (such as clause 34 in the Model Provisions) that provides a head of power for the decision-maker to vary standards or requirements contained elsewhere in the scheme.

Instruments such as structure plans, policies (State and local) and local development plans are not binding on a decision-maker. Therefore, there is scope to vary provisions or standards, provided the instrument and the provision are given due regard in the decision-making process.

Is there guidance within the planning framework to inform the extent of the departure from the provision or standard?

The decision-maker must gain a clear understanding of any limits on the extent of discretion before deciding.

Often, the planning framework will enable the decision-maker to vary a provision or standard, subject to meeting certain criteria or principles. The most common example of this is clause 34(5) of the Model Provisions, which refers to the principles in clause 67(2) of the Deemed Provisions.

In some instances, a planning framework will go further and will provide an upper limit to the extent of a variation that can be approved. For example, some planning frameworks allow building height limits to be varied/

increased, subject to meeting other built form criteria, such as energy efficiency, design excellence and/or by providing defined community benefits.

In considering proposals, it is imperative the decision-maker acknowledges and addresses all the relevant criteria and/or limits, and clearly articulates how these have been considered.

Can guidance be taken from other areas outside of the planning framework?

As well as the guidance set out within the planning framework, decision-makers should also seek guidance elsewhere. A thorough understanding of the physical site and the local context is essential. In-person site inspections should be completed as part of the assessment (wherever practicable). It may also be appropriate to view the site from adjoining properties to gain a clearer understanding of a development's impact on them.

Guidance may also be found in other areas such as:

- previous planning decisions that relate to the site/ surrounding area provided they were orderly and proper decisions
- through any public submissions received
- policies or guidance statements prepared under separate legislation where they guide and inform planning considerations (for example, the Environmental Protection Authority Guidance Statement 3 Separation Distances between Industrial and Sensitive Land Uses sets out recommended buffer distances between various industrial uses and sensitive land uses)

- Court or State Administrative Tribunal decisions
- the overall objectives of the *Planning and Development Act 2005* and subsidiary legislation.

4.3 Principle 3 – There must be clear and logical reasons to depart from the standard

What is the provision or standard trying to achieve and are there clear and logical reasons to depart from that provision or standard?

As noted in the *Marshall* decision (WASC 226 [2015]):
*While the exercise of discretion will involve a judgment about what is suitable, appropriate, or apt or correct in a particular case, that judgment must (if it is to be 'orderly') be an objective one. If the exercise of discretion is to be an orderly one, the planning principles identified as relevant to an application **should not be lightly departed from without the demonstration of a sound basis for doing so**, which basis is itself grounded in planning law or principle.*

In almost all instances, the provision or standard is the 'default' position of the local authority and should not be varied without strong planning reasons. In instances where an application for development approval proposes to vary a provision or standard within the planning framework, the decision-maker must first ascertain what the standard is trying to achieve. Having established this, the decision-maker should then determine if there are *clear* and *logical* reasons to vary that standard.

Clear and logical reasons may include that:

- the planning framework expressly allows for a provision or standard to be varied and provides a context for it to occur (refer Principle 2);



- the provision or standard no longer aligns with the strategic vision for the site/area as expressed in higher-order planning documents;
- the provision or standard is clearly not intended to be applied in this manner and the proposal is consistent with the overall objectives of the planning framework;
- previous decisions on other properties in the same locality and planning context have been granted the same or similar discretion, and these decisions are orderly and proper;
- there is a net 'greater good' that can be achieved through this departure. The greater good may apply to the development itself (e.g., where parking standards are varied to facilitate the retention of a significant tree), or on a broader level where an unanticipated social, environmental or economic benefit will occur as a direct result of the discretion being exercised.

Note: The 'greater good' rationale is not to be confused with the principle of 'community benefit', which should only be used to justify a variation when it is specifically contemplated and defined in the planning framework.

Whatever the *clear* and *logical* reasons are, they must be communicated by the decision-maker so that the rationale for the discretionary decision is clear and logical to the casual observer.

In performance-based policies such as State Planning Policy 7.3 Volumes I and II (R-Codes and Apartment Codes) the *deemed to comply/acceptable outcomes* criteria are not to be considered a baseline standard. In these instances, the exercise of discretion must be guided by the corresponding *design principles/element objectives*, and the matters set out in clause 67(2) of the Deemed Provisions.

Is there a cumulative impact of approving multiple 'minor' departures from a provision or standard?

In some instances, an application for development approval may propose several minor departures from a standard or standards which, when considered in isolation, may be acceptable, however the cumulative impact may be far greater. The decision to vary a specific standard should therefore not be made in isolation but in the context of the overall development.

4.4 Principle 4 – Public/community input has a legitimate role in the planning process

Is the level of consultation and engagement appropriate to the nature of the proposal?

Decision-makers should be informed of the way the public was consulted and ensure that the public was provided with a fair opportunity to provide input before a decision was made.

Are any public submissions duly considered and addressed?

The role of community consultation in the planning and decision-making process is vital. Often, community members are left feeling unheard and disenfranchised by the planning decision-making process, particularly when the reasons behind a discretionary decision are not clear.

Clause 67(2)(y) of the Deemed Provisions requires the decision-maker to have due regard to any submissions received on the application. This does not mean the court of public opinion should determine applications

for development approval. Equally, it does not mean the decision-maker should dismiss, ignore or simply 'note' any submissions received without first giving them due regard.

Do public submissions raise planning considerations that would otherwise not be assessed?

Where public submissions raise substantive planning considerations, these matters should generally be given greater weight in the decision-making process than those that raise issues outside the realm of planning, such as impacts on property values.

Substantive planning matters raised in submissions should be carefully considered in the assessment and any recommended decision for an application. Often, but not always, public submissions will raise planning matters such as traffic impacts, visual privacy, or height, bulk and scale, which need to be considered and given due regard in the decision-making process. In these instances, the input received from the community may add weight to a key planning consideration and provide specific acknowledgement to the decision-maker of matters of particular importance and relevance in the local context. Any input from the community, however, should be balanced against other competing factors in the planning framework.

Public submissions may assist further in the determination process when the decision-maker is called on to form a view about the *compatibility of a development with its setting* and the *desired future character* [clause 67(2)(m)(i)], the *likely effect of height, bulk and scale, orientation and appearance* [clause 67(2)(m)(ii)], or the *amenity of the locality* [clause 67(2)(n)].



Where a 'relevant planning consideration' is raised by a member of the community, an objective response or justification is required by the assessor or decision-maker. This should be in the spirit and interests of consistency and transparency and add robustness to the act of discretionary decision-making.

4.5 Principle 5 – Genuine and proper consideration

Has the decision-maker been objective in their assessment?

An objective assessment will start with the established planning baseline (refer Principle 3) and will then impartially work through the relevant planning principles to determine whether a departure from the baseline is justified. Personal views and values are not to form a basis for exercising discretion unless supported by the planning framework.

Has the decision-maker shown their workings and has the decision been clearly communicated?

Clear and transparent decisions protect the integrity of the planning system. The correct exercise of discretion should result in a casual observer being able to clearly understand how a decision was reached, even if they do not agree with it.

It is not enough to simply issue a planning decision. Decision-makers must be able to demonstrate evidence of the thought process used to reach the decision. In other words, decision-makers must be able to "show their workings".

The ability for the decision-maker to show their workings becomes even more pertinent when a decision is contrary to the technical officer's recommendation. This is not to say decision-makers should always align with the technical recommendation. When a contrary decision is made, an explanation must be clearly and transparently articulated – both at the time of the decision (in the case of local Council or Development Assessment Panel meetings) and in the formal recording of the decision. This is because the decision-maker cannot simply rely on the justification set out in the technical assessment to support the decision.

Clause 67(2) of the Deemed Provisions calls on a broad range of matters to be given due regard in making a planning decision. The question of how or why to weight some matters more than others is the very essence of discretion in decision-making. Where there are competing or contrary considerations (such as housing density and traffic generation) the decision-maker should be able to articulate why they have chosen to prioritise one consideration over another. Use of terms such as 'on balance' are helpful in justifying a preference for one consideration over another and/or highlighting where a decision is marginal and could just as easily have favoured the other objective.

Example:

- (a) *"Whilst it is accepted that the additional traffic generated by the proposal will result in some adverse impacts to the level of service and capacity of the road system [cl67(2)(t)], the need for additional housing density in this location is clearly articulated in the endorsed Local Planning Strategy [cl67(2)(fa)] and the precinct structure plan [cl67(2)(h)].*

The applicant's justification that the increased traffic will not exceed the functional capacity of the network is accepted, and on balance, the proposed density is considered to be suitable for this location."

Or

- (b) *"Whilst the need for increased density in this location is clearly articulated in the endorsed Local Planning Strategy [cl67(2)(fa)] and the precinct structure plan [cl67(2)(h)], the impacts to the functional capacity of the road network are considered to be excessive [cl67(2)(t)] having regard to the technical assessment of the traffic engineer, and will adversely impact traffic flow and safety in the locality. On balance, it is considered appropriate to require the proponent to undertake upgrades to the existing intersection in order to ensure that the capacity of the network is not exceeded."*

In these examples, the decision-maker has clearly weighed up the competing objectives, and while others may not agree with the decision, the thought process that the decision-maker has followed (in both instances) is clear and defensible.



GLOSSARY OF TERMS

Casual observer – an unrelated party to a planning decision who:

- a) may not have been present when the decision was made; and/or
- b) may not have any planning experience/expertise.

Due regard – means that while the decision-maker is not legally bound by the provision, the decision-maker is to have more than just mere consideration, and is required to give proper, genuine and realistic consideration of the relevant matter.

Relevant planning consideration – Those matters set out under clause 67(2) of the Deemed Provisions.



APPENDIX 1 – CHECKLIST TO GUIDE DISCRETIONARY DECISION-MAKING

	Key considerations	Decision-maker's assessment
Principle 1 <u>There should be a properly constructed planning framework</u>	Has the planning framework been prepared and adopted in accordance with the relevant legislative requirements?	
	Does the planning framework provide a clear standard/baseline and/or clear performance criteria?	
	Does the planning framework provide criteria for when it may be appropriate to depart from the standard or baseline?	
	Is the planning framework consistent with higher-order planning instruments (e.g., State Planning Policies)?	
	Are there any applicable draft planning instruments that may be considered <i>Seriously Entertained Planning Proposals</i> ¹ ?	
	Has there been a shift in the planning intent for the land or locality that is not captured in the framework?	
	Does the development represent a form of development that is unique and/or is not anticipated by the relevant planning instrument?	
	Is there an economic or community need for the development that is not anticipated by the relevant planning instrument?	
	Are assumptions made in the planning framework that are outdated or have been superseded by subsequent research, data or adopted positions?	
	If there is no properly constructed planning framework, will the planning decision prejudice a future planning framework?	
Principle 2 <u>Look for guidance within the framework</u>	Are there provisions within the Scheme that allow standards to be varied?	
	Is there guidance or established parameters within the planning framework to inform the nature/extent of the departure from the baseline provision being varied?	
	Can guidance be taken from other areas outside of the planning framework (e.g., previous planning decisions)? ²	
Principle 3 <u>There must be clear and logical reasons to depart from the standard</u>	What is the baseline development control trying to achieve and are there clear and logical reasons to depart from that control?	
	Is there a cumulative impact of approving multiple 'minor' departures from a provision or standard?	



	Key considerations	Decision-maker's assessment
Principle 4 <u>Public/community input has a legitimate role in the planning process</u>	Is the level of consultation and engagement appropriate to the nature of the proposal?	
	Have any public submissions been duly considered and addressed?	
	Do public submissions raise planning considerations that would otherwise not be assessed?	
Principle 5 <u>Genuine and proper consideration</u>	Has the decision maker been objective in their assessment?	
	Has the decision maker 'shown their workings' i.e., demonstrated how they have reached the decision to exercise discretion (or not) and has the decision and rationale been clearly communicated?	

Notes:

¹ In determining whether a draft planning instrument is a seriously entertained planning proposal, the decision-maker should apply the principles established via case law including:

- *Tang v City of Stirling* (1981) 5 APA 161
- *Nicholls and Western Australian Planning Commission (WAPC)* [2005] WASAT 40
- *Waddell & Anor and WAPC* [2007] WASAT 82
- *Permanent Trustee Australia Ltd v City of Wanneroo* (1994) 11 SR (WA) 1

The four principal criteria to determine the weight accorded to a draft (seriously entertained) planning instrument as established in *Nicholls* are:

- *The degree to which the draft addresses the specific application.*
- *The degree to which the draft is based on sound town planning principles.*
- *The degree to which its ultimate approval could be regarded as certain.*
- *The degree to which its ultimate approval could be regarded as imminent.*

² Note that where weight is given to previous planning decisions, those previous decisions must also be orderly and proper.



APPENDIX 2 – VALIDITY OF PLANNING CONDITIONS

The WAPC's [Model Subdivision Conditions Schedule](#) sets out the baseline test for the validity of subdivision conditions. The same test or tests apply to conditions on development approvals.

In short, the State Administrative Tribunal (SAT), and other appeal bodies in Australia, have adopted the approach taken in *Newbury DC v Secretary of State for the Environment* (1981) AC578 when considering the validity of specific conditions. That decision held that, to be valid, a condition must be:

- imposed for a planning purpose;
- fairly and reasonably related to the development for which permission is given; and
- reasonable, that is, be a condition which a reasonable planning authority properly advised and might impose.

The principles considered by the High Court have been adopted and generally applied in relation to development and subdivision approval in Western Australia: see *Renstone Nominees Pty Ltd v the Metropolitan Region Planning Authority* (TPAT 32/84 and 57/84).

The application of a condition(s) to a development approval is in itself a discretionary decision, and all conditions should meet the criteria described above.

For further information or clarification on the three criteria described above, refer to the [Model Subdivision Conditions Schedule](#).