# URBAN AND REGIONAL PLANNING BILL 2000

# DRAFT

## *SUBMISSION*

PREPARED BY THE WESTERN AUSTRALIAN MUNICIPAL ASSOCIATION

FEBRUARY 2001

## INTRODUCTION

WAMA commends the Minister/ Legislative Advisory Group for releasing the Bill as a "green paper" enabling ready access and open discussion by government and the community prior to consideration of the Bill in Parliament.

The Bill raises a number of issues that warrant critical comment and several others that have generated queries from Local Government as outlined in this submission. Some of the criticism is levelled at provisions in the Bill that have originated from existing legislation, however given the scope of changes proposed in the Bill, such criticism reflects Local Government's desire to see these elements in the new legislation removed or amended.

The main points included in this submission are as follows:

- ***WAMA is concerned that the legislative changes proposed in the Bill go well beyond consolidation and minor improvements to the current legislation particularly in light of the limited consultation on issues prior to preparation of the Bill;***
- ***WAMA objects strongly to the extent of "call in" powers provided to the Minister in the planning application assessment and determination process;***
- ***WAMA objects to the strengthening of Ministerial Directions with respect to the preparation or amendment of local planning schemes;***
- ***WAMA objects to the preoccupation throughout the legislation in imposing strict and impractical time limitations on Local Government's procedures in the planning process without any corresponding time limitations on other parties in the process;***
- ***WAMA is concerned that the legislation is ambiguous as to the extent to which the Crown is bound by the Act;***
- ***WAMA objects to the deemed approval of works associated with conditions of subdivision approval;***
- ***WAMA is concerned that the Act does not provide sufficient or appropriate powers for enforcement of local planning schemes.***

WAMA is also disappointed that each of these issues were included in WAMA's submission on the December 1998 Discussion Paper but have not been addressed in the legislation.

This submission represents the views of Local Government in Western Australia and has been compiled with the assistance of a representative group of Local Government technical officers with endorsement from the WAMA executive, including CUCA, LGA and CSCA.

Detailed comments on the Bill are set out below in the sequential order of the legislation.

## WAMA'S COMMENTS ON THE URBAN AND REGIONAL PLANNING BILL 2000

### Part 1 Preliminary

**Clause 3 (1) (b) - Purpose of this Act**

WAMA queries the consistency of this provision with the statements made in the previously released Discussion Paper that the intent of the legislation is simply to *"bring together the existing planning legislation into a single Act and not to undertake a fundamental review."*

If the purpose is to *"provide efficient and effective urban and regional planning"*, widespread comment should have been sought on the need for improvements and options to achieve that aim prior to the Bill being drafted. In this way operational difficulties with the existing legislation being experienced by all key players in the planning and development industry could have been identified and evaluated.

WAMA is not aware that there has been any evaluation of the changes proposed in the Bill against the objective to achieve efficiency and effectiveness in urban and regional planning in Western Australia. It is inappropriate to include this purpose in the Act without such an evaluation.

**Clauses 5 - Crown bound; Clause 6 - Act does not interfere with public works**

Cl. 5 requires the Crown to be bound by the legislation but exempts the Crown for *"public works"* in Cl. 6. Given the broad definition applied to *"public works"* under the Public Works Act this appears to be a contradiction and is likely to result in on-going confusion over the extent to which the Crown is bound by the legislation. There is a need to examine and clarify what Crown works should reasonably be subjected to the planning assessment and approval processes of region and local planning schemes, in the interests of equity, fair competition and community awareness. WAMA supports the Crown being bound by the Act but accepts that some minor works could be exempt, for practical reasons.

### Part 2 Western Australian Planning Commission

**Division 1 Establishment and management**
**Clause 10 Members of board**

Membership of the board lacks specific representation by State Government community facilities infrastructure and service providers such as health, education, housing and the arts despite their important role in securing the liveability and robustness of urban and rural areas throughout the state.

**Clause (1) (c)**

Query the need for representation on the board by both the Commissioner of Main Roads and the Director General of Transport, given that the Department of Transport's jurisdiction embraces road transport planning as well as transport by other modes.

**Division 2 Functions and Powers**

**Clause 18 Directions by Minister**

**Clause 18 (1)**

This subclause should be amended to prevent the Minister providing directions to the Commission as to how an application should be determined, particularly given that the Minister may ultimately determine an application at appeal. The opportunity should never arise where there is the perception that the Minister can direct the outcome of the planning application and assessment process.

## Part 3 Statements of Planning Policy

### Division 1 Making of statements of planning policy

### Clause 26 Consultation

**Clause 26 (1) (b)**

This clause should be reworded to specifically require that WAMA is consulted during the preparation of all statements of planning policy to ensure that Local Government has the opportunity for input on all such significant planning matters. As presently drafted, consultation with WAMA is only required where a statement of planning policy is unlikely to affect a district and the relevant Local Government/s has not been consulted. WAMA plays a key role in advocating the interests of Local Government and coordinating actions and responses on behalf of Local Government as issues arise and this should be acknowledged in the legislation.

**Clause 26 (3) – (5)**

WAMA supports broad consultation in the preparation of statements of planning policy however transparency of the process is considerably enhanced when a detailed report on submissions and how issues raised have been addressed is made publicly available. This clause should be expanded to require this step to be taken at the time that a statement of planning policy is finalised.

### Clause 29 Amendment or repeal of statement of planning policy

**Clause 29 (1), 29 (3)**

This clause enables a statement of planning policy to be amended *"on a direction of the Minister"* and specifies that the preparation and consultation processes set out in the preceding subclauses also apply. It is imperative that such amendments follow due process and that planning processes where the Minister has direct involvement remain open and accountable.

### Division 2 Ministerial notice

### Clause 31 Minister may require local government to prepare or amend a scheme to be consistent with a statement of planning policy

This clause enables the Minister to issue a notice requiring a Local Government or Local Governments to prepare a local planning scheme or amendment that is consistent with a statement of planning policy. While recognising and accepting the intent of this provision, a more effective and efficient means of implementing a statement of planning policy would be to draft the legislation in such a way as to enable automatic application of the policy to local schemes and superseding any inconsistencies. Requiring the preparation of a local planning scheme or amendment to a scheme for implementation is not time effective and the costs are unnecessarily borne by the relevant Local Governments. It also makes the public consultation process required in the scheme and scheme amendment preparation process ineffective, as the Local Government has no control of the content of the scheme or amendment because it is at the direction of the Minister.

### Clause 35 Minster may require development applications to be determined by the Commission

The need for this clause and the associated following clauses is unclear, particularly given the "call in" powers of the Minister provided by other provisions in the legislation. WAMA is deeply concerned at the centralised regime being established by this legislation. It is contrary to the objective of efficient and effective planning, undermines and devalues Local Government's role in the planning process and restricts democratic input to decision making.

**Clause 37 Duties of Local Government**

WAMA is concerned at the high-handed nature of this clause, its implied lack of trust in Local Government and complete disregard for the assessment capabilities and democratic decision procedures of Local Government. This clause, if it is to be included, should be completely rewritten.

Subclause (2) (b) is inappropriate as the documents required by the Commission from the Local Government for determination of the application should be limited to those documents submitted with the application and any submissions made by the public on the application.

Subclauses (3) and (4) do not make any sense because the preceding subclauses (1)(a) and (b) prevent the Local Government from dealing with the application once a notice has been issued under Section 35 and subclause (2) requires the application and any associated documents to be referred to the Commission within 7 days.

If Clause 35 is to remain, it is important that Local Government has the opportunity to make a recommendation to the Commission on the application, however the legislation needs to be redrafted to provide Local Government with the authority and the appropriate timeframe to provide a fully informed recommendation. A 30 day time period is totally inadequate for the types of major or complex proposals that this part of the legislation is possibly aimed at.

**Clause 38 Commission may approve or refuse application**

If this clause is to be included in association with Clause 35, the matters required of the Commission to have regard for in determining a development application should include the full list of matters set out in the Model Scheme Text for the purposes of consistency and transparency. Importantly, it should also specifically include the Local Government's recommendations.

**Part 5 Local Planning Schemes**

**Division 1 Continuation and formulation of local planning schemes**

**Clause 77 General objects of local planning scheme**

In recognition of contemporary planning aims and principles and the scope of environmental management issues dealt with in many local planning schemes throughout the state, sub clause (1) should also include the words *"the conservation and management"* of land.

**Clause 79 Prohibition on making local planning scheme in redevelopment areas**

This clause should be redrafted so that it is a generic, enabling clause allowing reference to new Acts to be listed in a Regulation as they occur rather than requiring an amendment to the legislation each time a new redevelopment area and corresponding Act is put in place.

**Division 2 Minister's powers in relation to local planning schemes**

**Clause 84 Minister may order local government to prepare, adopt or amend local planning scheme**

Local Government objects strongly to this clause because it is, in effect, a right of appeal on rezoning. Local Government has consistently and vehemently opposed this issue over many years. Use of the words *"on any representation"* in subclause (1) demonstrates the undefined nature of the circumstances in which this clause can apply and sets no limitations or criteria upon which a Minister's decision to implement the clause will be taken.

**Division 5 Review of local planning schemes**

**Clause 96 Local government to prepare consolidation**

Subclause (5) requires the Minister to consult the relevant Local Government before giving a direction to consolidate a scheme. This subclause should be expanded to explain how the Minister is to consult with the Local Government.

It is noted that the provisions in this Division set time limits for procedures required to be undertaken by Local Government, but with no corresponding limits for other agencies involved in the process.

**Part 7 Planning Control Areas**

**Clause 121 Application for approval of development in planning control areas**

Local Government is concerned that the Bill continues the bias of existing legislation towards the application of deadlines for Local Government to each of the steps in which Local Government is involved in the planning approval process. If efficiency is to be a key purpose of the legislation (as stated in Part 1) then time limitations need to also apply to the decision making procedures of the Commission in the planning process.

As referred to above, it is important that Local Government has the opportunity to make a recommendation on applications within its area, however the legislation needs to be redrafted to provide Local Government with an appropriate timeframe to provide a fully informed and considered recommendation. A 30 day time period is totally inadequate for the types of major or complex proposals that may form part of a planning control area.

**Clause 122 Commission may approve or refuse application**

Subclause (1) (b) should also specifically include the Local Government's recommendation that is required under Clause 121 (3).

**Clause 123 Commission may revoke approval**

Despite the powers given to the Commission by this clause, in the event that a development is not carried out in accordance with its approval, the legislation remains unclear as to who is responsible for monitoring enforcement. The legislation could make specific provision for Local Government to undertake this role and to recoup costs accordingly.

**Part 8 Improvement Plans**

**Clause 125 Commission may recommend improvement plan**

This clause should include a requirement that the Commission consults with the relevant Local Government/s prior to making its recommendation to the Minister.

**Part 9 Relationship between Region planning schemes, local planning schemes, planning control areas and written laws.**

**Clause 133 Minister may direct Local Government to adopt scheme or amendment**

WAMA reiterates its earlier concerns in regard to Clause 32 and 33 associated with this clause.

**Part 10 Subdivision and Developmental Control**

**Clause 138 Application to Crown land**

WAMA reiterates its earlier concerns about the lack of clarity provided in the legislation on its application to the Crown. This clause confuses the issue further.

**Clause 147 How Commission is to deal with plans of subdivision**

Local Government objects to the use of the words in subclause (2) wherein the Commission is *"to try"* to deal with the plan of subdivision within the specified period. The use of such a term is inappropriate in a statutory document because it is unable to be interpreted with any degree of certainty or uniformity. It is also inconsistent with the stated purpose of the Act to *"provide for efficient and effective urban and regional planning"* and shows a complete lack of sensitivity to the strict time limitations imposed on Local Government throughout the Bill.

**Clause 159 When approval of subdivision is deemed to be approval under planning scheme**

Local Government objects to subclause (2) because it implies that adequate detail will be supplied on subdivision applications for the assessment of associated subdivision works. This is most often not the case. While it may be appropriate in limited circumstances to issue deemed approval, details such as the height of retaining walls between lots and the design of estate entry treatments, require considered assessment and development control to ensure that they comply with local planning scheme and policy objectives for neighbourhood amenity and urban design.

**Division 6 Powers of Minister in relation to development applications and determinations**

**Clause 168 Referral where Governor declares application to be of State significance**

Local Government reiterates its strong objection to this provision, as there is no definition in the proposed legislation as to the term *"state significance"*. While ever this is lacking in the legislation there is the potential for the development approval process on any major or sensitive development to be called in by a Minister and thereby limiting the input of Local Government in the approval process. Of further concern is that the legislation does not specify any public consultation procedure for the determination of such an application.

It is also unclear as to the need for this clause given the powers for "call in" to the Commission provided by Clause 35 and the powers to be made available to the Minister under Clause 219 to have an application dealt with under the Planning Appeals Act 2000 after being approved by a Local Government.

If a development proposal is so exceptional as to warrant direct determination by the Minister without the normal application assessment, consultation and approval procedures, it is considered that the decision to process the application in this way should be put before Parliament rather than simply being notified in the Gazette to ensure that there is full public awareness and knowledge of the application and the process proposed to be used to deal with the application before the application is determined.

**Clause 169 Responsible authority must assist Minister**

Local Government also objects to the use of the term *"any document"* under part (a) of this Clause for the same reasons provided in the comments under Clause 37. The documents required by the Minister from the Local Government for determination of the application should be limited to those documents submitted with the application and any submissions made by the public on the application.

Clarification is sought as to whether the State Government will be responsible for any or all of the assessment and processing costs associated with such applications of state significance, including environmental assessment if relevant. This is of particular concern given the undefined nature of *"assistance"* in part (b) of this Clause. Clarification is also required as to the receipt of planning application fees on applications that are called in by the Minister under these provisions.

**Part 13 Enforcement and Legal Proceedings**

**Division 1 Enforcement**

**Clause 218 Minister may order local government to enforce observance of local planning scheme, execute works or amend or revoke development approval**

Local Government objects strongly to this clause on the grounds that:

- the latter part of Subclause (1) (a), which enables a person aggrieved by any of the provisions of a local planning scheme, is inappropriate and should be deleted because it has nothing to do with enforcement of a local planning scheme;
- subclause (1) (a) and (b) shifts Local Government's responsibility for interpretation and enforcement of its planning scheme directly to the Minister and indirectly to the Appeals process;
- this part requires the Appeals body to consider matters well beyond the scope of that provided for in the *Planning Appeals Act 2000,* consequently requiring it to consider and possibly deal with the matter without any corresponding legislative guidance;
- subclause (1) states that the Minister *"may"* refer the matter to be dealt with under the Section 31A of the *Planning Appeals Act 2000,* leaving it open for an application referred to under part (c ) to be redetermined directly by the Minister;
- subclause (1) (c) is unnecessary as any determination made by a Local Government which contravened the statutory provisions of a planning scheme is an invalid determination in any event;
- subclause (1) (c) introduces an opportunity for third party appeal, without any consideration to or evaluation of the cost to Local Government, landowners and the development industry; it is likely to substantially undermine certainty and confidence in the planning approval process and would be a major impediment to achieving confidence in the planning process overall;
- a proponent or a Local Government, having an approval circumvented through this provision, may seek to challenge the validity of the Minister's actions through the Supreme Court, adding litigation, costs and uncertainty to the planning application assessment and approval process;
- the provision would lengthen the application approval turn around time as any approval issued by a Local Government would not be "cleared" until it is known that the approval is not going to be referred to the Minister for further action. This timeframe is unknown as there is no time limitations set out in the legislation for a matter to be referred to the Minister.

If this clause is necessary in the interests of equity or for other reasons, clarification is sought as to why the provisions do not extend to decisions made by the Western Australian Planning Commission under region schemes.

**Clause 223 Responsible authority may direct cessation, removal etc of unauthorised development**

This clause should be expanded so as to enable a Local Government to -

- apply on the spot fines for infringements;
- seek court orders to cease work immediately, order compliance and / or require reinstatement of the land to its condition prior to the commencement of unauthorised work, as per environmental and heritage legislation.

Penalty provisions should also be strengthened to include provision for prevention of further development of land for a period of time as per the heritage legislation.

**Schedule 7 Matters which may be dealt with by local planning scheme**

This schedule should include enforcement as a matter to be included in planning schemes. Although enforcement provisions are included in the Act, these provisions are often repeated in schemes for public awareness.