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Planning Bulletin 106/2011

- New legislative provisions for development assessment panels

1. Introduction

As part of the Government's commitment to streamlining and improving the planning approvals process in Western Australia, the WA Parliament passed the *Approvals and Related Reforms (No. 4) (Planning) Act 2010* (the '2010 Amendment Act'). The provisions of the 2010 Amendment Act, except part three, commenced on 22 November 2010.

The 2010 Amendment Act contains a number of amendments to the *Planning and Development Act 2005* (the 'PD Act') that are designed to improve the planning system. Part 3 of the 2010 Amendment Act contains the heads of powers required to introduce development assessment panels ('DAPs') in this State, through the making of regulations by the Governor. The details on how these panels will be established, administered and operated are set out in the new *Planning and Development (Development Assessment Panels) Regulations 2011* ('DAP regulations').

2. What are DAPs?

DAPs are panels comprising a mix of technical experts and local government representatives with the power to determine applications for development approvals in place of the relevant decision-making authority. The introduction of DAPs is one of the fundamental principles of the national Development Assessment Forum's ('DAF') leading practice model for development assessment. This model also promotes limiting referrals to agencies with a relevant role for advice only, avoiding the need for separate approval processes. South Australia and New South Wales have already introduced development assessment panels into their planning systems in accordance with the DAF model. Victoria has also recently passed legislation to implement development assessment commissions to perform the role of development assessment panels.

The introduction of DAPs in Western Australia will have significant benefits for local governments, the development industry, landowners, the general community and other stakeholders. They aim to help to improve the planning system by providing more transparency, consistency and reliability in decision-making on complex development applications. As regulations prepared under this part will clearly identify what classes of development applications are to be determined by development assessment panels, applicants will be well aware of who will be determining their application, regardless of the location of the development. The determination of complex applications will also be improved by the involvement of experts with technical knowledge on the panel.

The involvement of independent experts will also help to strike an appropriate balance between local representation and professional advice in decision-making by ensuring that decisions made by the panel are based on the planning merits of an application. Finally, the use of development assessment panels will help to address issues with dual approvals by making the relevant panel the single decision-making authority under both local and region planning schemes.

Following the gazetting of the DAP regulations the Minister will establish fifteen different DAPs on 2 May 2011, however, these will not start to consider new applications until 60 days after their establishment. Therefore, DAPs will commence operation on 1 July 2011.

3. Purpose

The purpose of this planning bulletin is to provide an overview of new provisions that take effect under part 11A of the *Planning and Development Act 2005* and the DAP regulations. Where appropriate, the relevant section or regulation is quoted in brackets. Please note this document is only a guide and not intended otherwise to have any legal effect.

Please note a range of manuals will also be available for local governments, DAP members and applicants. These documents will provide further details on the procedures outlined in this bulletin, and will be available on the DAP website at www.daps.planning.wa.gov.au

4. Glossary

In this planning bulletin:

Administrative officers means members of the DAP Secretariat.

2010 Amendment Act means the *Approvals and Related Reforms (No. 4) (Planning) Act 2010*, which amended the PD Act.

DAP means a Development Assessment Panel.

DAP regulations means the *Planning and Development (Development Assessment Panels) Regulations 2011*.

DAP secretariat means officers of the Department assisting DAPs, defined in the DAP regulations as administrative officers.

CEO means the Director General of the Department of Planning.

The Department means the Department of Planning.

JDAP means a Joint Development Assessment Panel.

LDAP means a Local Development Assessment Panel.

Minister means the Minister for Planning.

PD Act means the *Planning and Development Act 2005*.

PDR means the *Planning and Development Regulations 2009*.

TPR means the *Town Planning Regulations 1967*, including the *Model Scheme Text*, and its equivalent as amended from time-to-time.

WAPC means the Western Australian Planning Commission.

The above definitions are for guidance purposes only. Readers are otherwise

directed to the various definitions found in the PD Act and DAP regulations. To the extent of any inconsistency, the definitions in the PD Act and DAP regulations prevail.

5. Summary of new sections in the PD Act

Part 3 of the 2010 Amendment Act introduces a new Part 11A - Development Assessment Panels into the PD Act. In summary, the new sections contain the following:

- The Governor may prescribe mandatory classes or kinds of development applications that must be determined by a DAP, as if the DAP was the responsible authority (either the relevant local government and/or WAPC), under the relevant local or region scheme, or interim development order (s.171A(2)(a)). A determination of (or failure to determine) a prescribed development application by a DAP is to be regarded, and take effect, as if was made by the relevant local government or the Western Australian Planning Commission.
- The Governor may also prescribe opt-in classes or kinds of development applications that must be determined by a DAP, where an applicant has elected such an application to be determined by the DAP (s.171A(2)(b)).
- The Governor may also prescribe regulations allowing additional functions to be delegated to the relevant DAP by the responsible authority (s.171B). It is intended that small local governments, and the WAPC if relevant, will use this section to delegate to the relevant DAP the power to determine development applications that are not of a class prescribed under section 171A.
- The Minister will establish a development assessment panel for each local government area, by the publication of an Order in the *Gazette* (s.171C). Two different types of development assessment panels will be established by the Minister:
 - *Local development assessment panels*, which will be established to service a single local government, where that local government is deemed to be a high-growth local government with enough development to support its

own panel, by determining applications made under the local planning scheme (and if applicable, the relevant region planning scheme); and

- *Joint development assessment panels*, which will be established to service two or more local governments that are not high-growth local governments, by determining applications made under each local planning scheme (and if applicable, the relevant region planning scheme).
- The Governor may prescribe regulations concerning the constitution, procedures and conduct of DAPs (s.171D).
- The Governor may prescribe regulations concerning the administration and costs of DAPs (s.171E).
- The DAP regulations are to be reviewed as soon as practicable after the expiry of 2 years from the day on which regulations made under this Part first come into operation (s.171F).

6. Summary of the new DAP regulations

To give effect to these new provisions in the PD Act, the *Planning and Development (Development Assessment Panels) Regulations 2011* ('DAP regulations') have been introduced. The DAP regulations contain six Parts, with three additional schedules.

This planning bulletin will now summarise the contents of each part and schedule. For details of the provisions summarised in this Planning Bulletin, please refer to the full regulations, which are available from the State Law Publisher.

6.1 Part 1 – Preliminary

This part states that regulations one and two come into operation on the day of gazettal and that the rest of the DAP regulations come into operation on the day on which section 43 of the 2010 Amendment Act comes into operation.

This part also contains the terms used in the DAP regulations (r.3). Readers should note that many terms used in the DAP regulations, such as the 'Development Assessment Panel' itself, are defined in section 4 of the PD Act rather than the DAP regulations.

The following definitions in the DAP regulations are of particular note:

- "DAP application", which includes mandatory applications (r.5) and opt-in applications (r.7). Importantly, delegated applications (r.19) are not technically "DAP applications", however, for the most part are practically treated as if they were DAP applications (r.21(2)(b));
- "DAP member" means both a specialist member and a local government member, and also includes an alternate member;
- "excluded development application", which makes it clear that even where a development application falls within the financial thresholds of a DAP application, certain types of applications, such as the construction of a single house, cannot be determined by DAPs. Furthermore, subsection (d) makes it clear that even when the DAP regulations commence operation, DAPs will not begin considering development applications until 60 days after they are established by the Minister.

6.2 Part 2 – Development applications and determinations

This part sets out what types of development applications will be determined by DAPs, and the process to be followed in the lodgement, assessment and determination of such applications.

The DAP regulations reflect the policy direction set out in the Policy Statement regarding mandatory DAP applications and applications that will be subject to the "opt-in" process. These applications are defined as follows:

- *Mandatory DAP Applications* (r.5): An application for development where the estimated cost of development is \$7 million or more (and \$15 or more in the City of Perth), and which is not an excluded development application. Such an application must be determined by a DAP (s.171A(2)(a) of the PD Act).
- *Optional DAP Applications* (r.6 & r.7): An application for development of a total value of more than \$3 million but less than \$7 million (more than \$10 million but less than \$15 million in the City of Perth) which is not an excluded development application and has not been delegated to the DAP by the relevant local government. Such

an application must be determined by a DAP when the applicant has elected to have the DAP determine the application (s.171A(2)(ba) of the PD Act).

This part also sets out the processes to be followed in relation to the making and assessment of DAP applications, including the role of local governments and the WAPC, as well as the role of the Department of Planning and the DAP. In summary, the process is as follows:

- The applicant lodges a DAP application (r.7(2)(a)) with the relevant local government (Form 1, sch.3, r.10(1)(a)), together with the new DAP determination fee (r.10(1)(b), sch.1). It should be noted that the DAP application and DAP fee is an addition, not a replacement, to the ordinary development application form prescribed under any planning scheme(s) (r.10(2)) and fee prescribed under the PDR (r.10(3)). Thus, an applicant will in many cases submit two forms and pay two fees, one for the DAP and one for the local government.
- The local government notifies the Department of the receipt of the DAP application and confirmation that the applicant has paid the DAP fee, within seven days of receipt (r.11). The local government also remits the DAP fee to the Department within 30 days (r.10(5)).
- The responsible authority (the local government or the Western Australian Planning Commission (WAPC)) assesses the application in the usual way, in accordance with the relevant local or region planning scheme. Local governments and/or the WAPC will undertake the same advertising and referrals for DAP applications as currently apply under their schemes (r.9(b)).
- The responsible authority prepares a report containing its recommendations on how the DAP application should be determined (r.12).
- The DAP Secretariat, comprising officers of the Department (r.49), organises the DAP meeting where that application will be determined. This may involve administrative tasks not included in the regulations, such as notifying DAP members, organising deputy members to attend if required, and liaising with the local government in organising the venue for the DAP meeting. Local governments will

also usually assist in providing a venue, electronic equipment and catering for DAP members as required (r.50).

- At least 5 days before a DAP meeting the Department puts the agenda for the meeting on the DAP website, along with details of the time, date and location of the meeting (r.39(1)). It also provides this information to the applicant (r.15) and relevant local government (r.39(2)).
- The DAP conducts a public meeting (r.40) to determine the application(s) (r.16). The meeting procedures under Division two of part four of the DAP regulations are to be followed, as well as the procedures set out in any Practice Notes (i.e. Standing Orders) issued by the CEO. The DAP is otherwise required to determine a DAP application in accordance with the provisions of the relevant planning instrument (r.16(1)). Any determination made by a DAP will be taken to be a determination made by the responsible authority (r.8(1)(a)).
- The Department sends notification of the decision made by the DAP to the applicant in accordance with the relevant planning instrument (r.16(1)) and also gives a copy to the responsible authority (r.16(2)).
- Where a decision has been granted, an applicant may also make a minor application seeking to amend or cancel the approval or any conditions imposed (r.17). A minor amendment application is made by submitting the prescribed form (Form 2, sch.3) to the relevant local government with the prescribed minor fee.
- By contrast to other applications, the DAP will usually meet to determine any r.17 minor amendment application through means of instantaneous communication r.40(4)(a).
- If an applicant is dissatisfied with a decision of either a DAP application or r.17 minor amendment application, he or she can seek a review from the State Administrative Tribunal (r.18(2)). In any such review, the application will be defended by the DAP (r.18(3)).

6.3 Part 3 – Delegation to DAPs

This Part allows local governments and the WAPC to delegate the power to determine development applications that (s.171B & r.19):

- fall within the optional DAP application thresholds, being more than \$3 million but less than \$7 million (more than \$10 million but less than \$15 million in the City of Perth) and where the application is not an excluded development application; but
- where an applicant has decided not to opt-in to have the matter determined by a DAP; and
- where the responsible authority nevertheless decides that the application is of a class of development that should be delegated to a DAP for determination.

It is intended that local governments (and the Western Australian Planning Commission if relevant) will more likely use this section to delegate to the relevant DAP the power to determine development applications that are not of a mandatory class prescribed under section 171A.

All delegations made under this part will be published in the *Government Gazette* (r.20). In providing clarity about what types of applications have been delegated to a DAP, the Department will ensure that all delegation instruments relating to DAPs are listed on the DAP website (r.20(3)).

The fact that a local government has decided to delegate certain matters to a DAP does not preclude that local government from nonetheless making a determination on a delegated development application (r.21(1)). Furthermore, although delegated applications do not technically fall within the definition of a 'DAP application', the procedures mostly otherwise apply as if they were DAP applications (r.21(2)(b)).

Finally, it is important to note that an applicant is not required to pay a DAP fee for a delegated application, although the relevant local government fee under the Planning and Development Regulations 2009 will still be payable in the usual manner. Subject to any agreement with the CEO, if a local government chooses to delegate any matter to a DAP, the local government must pay the DAP fee (r.22). This is to ensure applicants are not imposed with an additional fee for an application they

did not choose to have determined by a DAP, whilst ensuring DAPs are still provided with the prescribed fee necessary to resource a DAP decision. It will remain wholly a matter for local governments whether they exercise their discretions in delegating any classes of applications to DAPs (r.23).

6.4 Part 4 – Development assessment panels

This part comprises of four divisions:

Division one – DAP members

Division two – Specialist members

Division three – Meetings

Division four – Conduct of DAP members.

Division one – DAP members

This Division concerns DAP members more generally, and sets out:

- the composition of DAPs (r.23 & r.25);
- the process by which local government members are nominated and appointed (r.23 & r.25);
- how alternate members will be appointed and used (r.28);
- the term of office for DAP members (r.29);
- the requirement for all DAP members to attend training before sitting on a DAP (r.30);
- fees and allowances that DAP members will be paid (sch.2, r.31); and
- the circumstances in which a DAP member's office becomes vacant or a member may be removed from office (r.32);
- leaves of absence for DAP members (r.33); and
- extension of terms of office during vacancy in membership (r.34).

All DAPs will comprise of the following membership (r.23(1) and r.25(1)):

- Two local government representatives; and
- Three specialist members – one of whom is the presiding member (with a planning qualification and experience), one of whom is the deputy presiding member

(also with a planning qualification and experience), and one who will otherwise possess relevant qualifications and/or expertise.

This division also sets out the process by which local government members are nominated and appointed to a DAP. Local government representatives are nominated by the relevant local government, and appointed by the Minister (r.24 and r.25).

All DAP members, with some exceptions, are paid sitting fees under Schedule two (r.31). DAP members who are already considered on the 'public payroll' will not ordinarily be entitled to sitting fees, including: all Commonwealth, State and Local Government employees, current and retired judicial officers and employees of public academic institutions (r.31(6)). However, there is scope for the Minister to give written consent on a case-by-case basis to allow such persons to be paid.

Alternate members will be appointed in the same way, and will sit on the DAP when a DAP member is unable to perform the functions of the member by reason of illness, absence or other cause. Obviously, only a local government alternate can sit in for a local government member (r.28(4)), as can a specialist alternate for a specialist member (r.28(5)).

The Minister is required to appoint one of the three specialist members as the presiding member of the DAP. The presiding member must be a planning expert. At all DAP meetings that the presiding member attends, that person will preside over the meeting. The Minister is also required to appoint a Deputy Presiding Member, to preside when the presiding member is absent. The Deputy Presiding Member must also be a planning expert (r.27).

All DAP members are appointed for two years (r.29(2)). The regulations allow for DAP members to continue sitting on a DAP for up to three months once their term has expired, or until the vacancy is filled (r.34). DAP members can be reappointed to the same DAP following the expiry of their term, or may be replaced by another person (r.29(3)).

This division also sets out the circumstances in which the Minister can remove a DAP member from office (r.32(3)). This includes:

- neglect of duty
- misconduct or incompetence

- mental or physical incapacity to carry out duties in a satisfactory manner; or
- absence from 3 DAP meetings without leave first being obtained.

Finally, this division states that a DAP member's office becomes vacant if the DAP member's situation changes in any of the following ways (r.32(1)):

- the DAP member dies, resigns or is removed from office by the Minister;
- the DAP member becomes a bankrupt or a person whose affairs are under insolvency laws;
- the DAP member is convicted of an offence punishable by imprisonment for more than 12 months; or
- the DAP member is convicted of an offence under section 266 of the PD Act which deals with failing to act honestly, failing to declare a conflict of interest, disclosing information or making improper use of information.

Division two – Specialist members

This Division set outs how specialist members and alternate specialist members are appointed. Specialist members with the required qualifications and experience are listed on a register (r.35). The register is then reviewed by a special short-list working group, which compiles a list of nominees for the Minister to consider (r.36 & r.38). Specialist members are then appointed by the Minister (r.37).

Division three – Meetings

This Division sets out the meeting procedures to be followed by all DAPs, including the taking of minutes. Meetings are to be conducted in accordance with this Division, as well as the Standing Orders published by the Department (referred to in the DAP regulations as practice notes, r.40(5)).

All DAP meetings will be open to the public (r.30(2)). The presiding member has the power to invite a person to make a presentation to the DAP on a DAP application (r.40(3)). The presiding member also has the power to allow a person to attend a DAP meeting by telephone or other means of instantaneous communication (r.43). The circumstances in which these powers will be exercised will be set out in the Standing Orders.

The quorum for a DAP is the presiding member (or deputy presiding member), one other specialist member and one local government member. Each DAP member has one vote. In the event of a deadlocked vote, the Presiding Member has the deciding vote (r.42).

Finally, this division also requires minutes of the DAP meeting to be kept by an officer of the local government hosting the DAP meeting, or another person approved by the CEO of the Department. Minutes will be provided to the Department within 5 days of the meeting, and put on the DAP website within 10 days after the meeting, after they have been confirmed by the DAP (r.44).

Division four – Conduct of DAP members

This division requires all DAP members to abide by certain rules of conduct (r.45). These requirements are in addition to the requirements regarding conflict of interest and use of information that are set out in section 266 of the PD Act.

This division requires the CEO of the Department to prepare a Code of Conduct (r.45(1)), which must be complied with by all DAP members (r.45(2)). The Minister can remove a member from a DAP for breaching the Code of Conduct (r.32(4)).

This division also sets out what rules apply regarding the acceptance of gifts (r.46). These requirements are similar to those currently in place under the *Local Government Act 1995* and the *Local Government (Rules of Conduct) Regulations 2007*. There are two types of gifts addressed in this Division:

- **Prohibited gifts** which are gifts worth \$300 or more, or two or more gifts that are in total worth \$300 or more; and
- **Notifiable gifts** which are gifts worth between \$50 and \$300, or two or more gifts that are in total worth between \$50 and \$300.

DAP members are not permitted to accept a prohibited gift from a known applicant, or a person "who it is reasonable to believe" may be intending to undertake development that the DAP will be required to determine (r.46(2)). However, DAP members are permitted to accept notifiable gifts as long as they notify the CEO of the Department that they have accepted such a gift (r.46(3)). Failure to notify the Department may result in the Minister removing that DAP member from the DAP (r.32(4)).

Finally, this Division also emphasises the professional behaviour expected of DAP members. DAP members are not to make statements about the competency or honesty of local government officers or public sector officers, or use offensive or objectionable expressions regarding those officers (r.47). Only the presiding member is permitted to publicly comment on determinations made by the DAP (r.48).

6.5 Part 5 – Administration

This part will set out how administrative support will be provided to each DAP. Most support will be provided by the DAP Secretariat, such as organising agendas, organising meetings, booking travel for DAP members and paying the sitting fees of DAP members (r.49). However, each local government will also be required to undertake some administrative tasks on behalf of the DAP, including taking minutes at DAP meetings, provide a venue for DAP meetings, organise catering and provide electronic equipment if required (r.50). The DAP Secretariat is also required to establish and maintain a DAP website, which will have information about each DAP created (r.51).

This part also contains the primary enforcement provisions for the successful operation of the DAP system (r.52). Where necessary, the Minister can order a DAP, a local government, the WAPC, or the Department to provide any necessary information or document to him or her (r.52(3) and s.18 PD Act). The Minister can also order that such information be provided to the DAP (r.52(2)(d)), or make use of the Western Australian Planning Commission's and local government's staff to obtain such information (r.52(3)(d)).

Finally, this division requires the CEO of the Department to prepare an annual report on the performance of DAPs (r.53).

6.6 Part 6 – Miscellaneous

This Part contains transitional provisions dealing with what happens to a DAP application if the Order establishing the DAP is amended or revoked before the application is determined (r.54). For example, if a DAP application has been forwarded to the DAP but not determined when the Order creating the DAP is revoked, then that application is to be forwarded to the new Local Development

Assessment Panel (LDAP) or Joint Development Assessment Panel (JDAP) created to serve that local government. The new LDAP or JDAP will determine the application. The provisions support section 171I of the PD Act.

In addition, this Part requires the Department to conduct an annual review of the new DAP fee (r.55). The Department will provide the information collected during each annual review to the Standing Committee of the Legislative Council that will review the DAP regulations after two years of operation, under new section 171F of the PD Act.

6.7 Schedule 1 – Fees for applications

Schedule 1 contains the item of fees payable by an applicant when submitting a DAP application (r.10 & r.17). The relevant fee is calculated on estimated cost of development. It is important to note the following:

- The DAP fee is in addition to any local government development application fee payable under the Planning and Development Regulations 2009 (PDR) (r.10(3)). Therefore, DAP applications may in effect require two fees be paid – one for the DAP under this schedule and one for the local government under the PDR.
- The fee for an r.17 minor amendment application is prescribed under item 2 (currently only \$150), as distinct from other ordinary DAP applications under item 1 (currently ranging from \$3,376 to \$6,320).

A delegated application (r.19) is not technically a DAP application, although in many other respects the application is treated the same way. Thus, an application is not required to pay the DAP fee under schedule one is required. The DAP fee will instead be paid by local government (r.22).

6.8 Schedule 2 – Fees for DAP members

Schedule two sets out the relevant sitting fees for DAP members (r.31). It is important to distinguish the relevant fees for:

- presiding members, compared with other members, where presiding members are entitled to a slightly higher fee to reflect additional responsibilities imposed under the regulations;

- ordinary DAP applications, compared with r.17 minor amendment applications, to reflect the scale and complexity of ordinary DAP applications, as well as to reflect that ordinary applications are open to the public whilst r.17 applications are determined through instantaneous means;
- fees for determining an applications, compared to attending a proceeding before the State Administrative Tribunal, where the fees are otherwise the same; and
- training fees, where both prospective presiding members and all other members are entitled to the same fee, and only at the satisfactory completion of the training.
- most DAP members, compared with those considered on the 'public payroll', who without the written consent of the Minister will not be entitled to sitting fees, including: all Commonwealth, State and Local Government employees, current and retired judicial officers and employees of public academic institutions (r.30(6) & r.31(6)).

6.9 Schedule 3 – Forms

Finally, Schedule 3 contains the relevant DAP forms. Again, it is important to distinguish between:

- DAP application forms compared with local government development application forms. As noted above, DAP application forms are submitted in addition to, not a replacement of, local government development application forms prescribed under each relevant local planning schemes (r.10(2)).
- An ordinary DAP application form, which is intended to cover mandatory (r.5), opt-in (r.6 & r.7) and delegated (r.19) applications, compared with minor amendment applications (r.17).

7. Further information

Legislation, including copies of the DAP regulations, the 2010 Amendment Act and amended PD Act can be obtained from the State Law Publisher at:

10 William Street
Perth WA 6000
Phone: (08) 9321 7688
Fax: (08) 9321 7536
Email: sales@dpc.wa.gov.au
Website: www.slp.wa.gov.au

Copies can also be obtained from the DAP website at
www.daps.planning.wa.gov.au

Please note a range of manuals will also be available for local governments, DAP members and applicants. These documents will provide further details on the procedures outlined in this bulletin, and will be available on the DAP website.

For further information, please refer to the DAP website or contact the Department of Planning at:

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Disclaimer

This planning bulletin is intended as a guide only. It is not intended to be comprehensive or to cover particular circumstances.

Readers are advised to refer to the legislation which is available from the State Law Publisher, and to seek professional legal advice should they have specific legal questions in relation to their particular circumstances.

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