



Third Party Appeal Rights in Planning **Discussion Paper**

Contents

1.0	In Brief.....	3
2.0	Background	3
2.1	Background to WALGA Policy Position	3
2.2	Changes to the Planning Framework	4
3.0	Current Third Party Appeal Rights in Australia.....	5
3.1	Development Assessment Forum (DAF)	5
3.2	Third Party Appeal Rights by State and Territory	6
3.3	Western Australia State Government Position	7
3.4	Judicial Review	8
4.0	Arguments For and Against Third Party Appeal Rights.....	8
4.1	Arguments Against Third Party Appeals.....	8
4.2	Arguments For Third Party Appeals	10
4.3	Competing Viewpoints	10
5.0	Issues to Consider.....	11
5.1	Criteria for Third Party Appeal Rights in other States	11
5.2	Implications for Local Government.....	12
6.0	Conclusion – What is right for Western Australia?	12
6.1	Feedback Sought.....	12
7.0	References.....	14

1.0 In Brief

At its December 2016 meeting, State Council requested a review of the WALGA Policy position in relation to Third Party Appeal Rights for planning decisions. The decision making environment has changed since the WALGA made its policy position in 2008, and therefore a review of the current position is warranted.

This paper provides background on the development of WALGA's current policy position and a review of the arguments both for and against third party appeals. A literature review was carried out to establish the basis of each argument.

2.0 Background

2.1 Background to WALGA Policy Position

Unlike most of the other jurisdictions in Australia, Western Australia is unique in that no Third Party Appeal Rights exist under the *Planning and Development Act 2005*, although in the past some Local Government planning schemes allowed them. The last Local Government to allow Third Party Appeals was the City of Albany, however with the introduction of the City's new local planning scheme in 2014, which removed Third Party Appeal Rights, there is no longer any Third Party Appeal Rights for planning in Western Australia.

The introduction of Third Party Appeal Rights has been considered by member Councils on several occasions over the last few decades. For instance, Third Party Appeal Rights were considered in 2001 during debate on the new planning appeal system and again the following year during the State Government's consolidation and development of the new *Planning and Development Legislation*.

In 2007, a Private Member's Bill was proposed by Dr Janet Woollard, MLA Member for Alfred Cove, which was modeled on Victoria's *Planning and Development Act 1987*. The justification for the introduction of the Bill was primarily based on Western Australia being the only state without third party appeals and failed to acknowledge that significant differences exist between the Victorian and Western Australian planning system.

At the February 2008 meeting of State Council, WALGA formed a Policy position against the introduction of Third Party Appeal Rights. The report noted that the main arguments against the proposal were:

1. The current strategic and statutory planning processes, and consideration of applications by Councils, already takes into account the views of affected parties and the community generally;
2. Third party appeals could be lodged because of vexatious or commercial interests, not because of genuine planning matters;
3. Such appeals would cause significant delays and additional costs for development, as even lodgment of an appeal would put a development on hold;

4. Additional planning appeals would place a further burden on already stretched Local Government resources. Local Governments would incur additional costs for new administrative steps in processing development applications, preparing for and responding to appeals lodged with the State Administrative Appeals Tribunal (SAT) and legal representation. This is particularly the case since the establishment of the State Administrative Tribunal which has seen planning appeals become more legalistic, costly and resource intensive for Local Governments.

Additionally, the existing State Administrative Tribunal (SAT) system was considered efficient at reconsidering the merits of planning applications and there are currently four ways in which a third party may participate in a planning matter being considered by SAT. These are:

- Being called as a witness by the respondent;
- Making a submission under section 242 of the *Planning and Development Act 2005*;
- Intervening under section 37(3) of the State Administrative Tribunal Act 2004, whereby the third party acquires rights and responsibilities as a party a party under the act; and
- Possible participation in mediation.
(SAT)

Subsequently, State Council resolved in February 2008 (326.1/2008), the following position:

That:

1. the member for Alfred Cove, Dr Janet Woollard MLA and the Minister for Planning and Development, Hon Alannah MacTiernan be advised of the inaccuracies and duplications contained in the proposed Planning and Development Amendment (Third Party Appeals) Bill 2007; and
2. as there is no justification for the proposed legislation and there are significant negative implications for Local Government, industry and the community, Local Government continues to be opposed to the introduction of third party appeal rights in Western Australia.

While the above arguments for WALGA's position remain, the decision making environment in WA has changed since the formation of the position in 2008 with changes to legislation arising from the State's planning reform 'Planning Makes it Happen: Phases 1 and 2', and the introduction of Development Assessment Panels (DAPs).

2.2 Changes to the Planning Framework

Historically Local Government in Western Australia has been the main authority tasked with decision-making for development applications, under delegation arrangements from the Western Australian Planning Commission (WAPC).

Since 2009 a number of changes have been implemented to the planning framework, directly impacting on the decision-making powers of Local Government, including:

- The establishment of the Metropolitan Redevelopment Authority (MRA);
- Changes to Structure Planning processes;
- Changes to section 76 of the *Planning and Development Act 2005* to give the Minister for Planning the power to order a Local Government to prepare or adopt an amendment to a local planning scheme;
- The introduction of Improvement Schemes and Plans; and
- The introduction Development Assessment Panels (DAPs).
- The introduction of 'Deemed Provisions' for local planning schemes in the *Planning and Development (Local Planning Schemes) Regulations 2015*;

Given the substantial changes that have occurred within the decision-making environment in Western Australia, and the recent community concerns over the creation of the DAP system to determine development applications in place of Local Governments, it is appropriate to initiate a discussion on the possible role of Third Party Appeal Rights in the Western Australian planning system.

3.0 Current Third Party Appeal Rights in Australia

Third party appeal rights vary by state, with no common 'best practice'. Nationally, the Development Assessment Forum (DAF) a federal government advisory body, provides a Leading Practice Model, which sets out 'tracks' for different development assessment processes.

3.1 Development Assessment Forum (DAF)

The Development Assessment Forum (DAF) was formed in 1998 to bring key stakeholders together to reach agreement on ways to streamline the processes used for development approval while preserving high quality decision making. The DAF published its *Leading Practice Model for Development Assessment* in March 2005, which aims to provide a blueprint for jurisdictions to create a simpler, more effective approach to development assessment. The practice model achieves this by defining ten leading practices that a development assessment system should exhibit, and applying the ten leading practices to six development assessment pathways or tracks.

With regards to Third Party Appeal Rights, DAF's Leading Practice Model states that "*opportunities for third-party appeals should not be provided where applications are wholly assessed against objective rules and tests*", and that "*opportunities for third-party appeals may be provided in limited other cases*". In this way, the DAF model hopes to avoid unnecessary review where objective criteria has already been established by a consultative process. Elements of DAF's *Leading Practice Model for Development Assessment* are used in some jurisdictions.

3.2 Third Party Appeal Rights by State and Territory

State/Territory	Scope of Third Party Appeal Rights	Number & effects of Third Party Appeal Rights (cost, timeframes, etc.)
New South Wales	Appeal rights limited to uses such as major developments where the development is high impact and possibly of state significance ⁱ . A third party objector can bring a merit based appeal in the Land and Environmental Court against a decision to grant development consent only if the development is designated development (development listed as such in the EP & A Regulation).	Third parties have 28 days to lodge an appeal. Court cases can last several days, or weeks for complex cases.
South Australia	Appeal rights limited to 'Category 3' ⁱⁱ developments. A third party who makes a written representation on a proposed Category 3 development has a right to appeal against that decision or any conditions attached to it. A person who disagrees with a decision of a relevant authority, but is a third party who has not taken the opportunity to lodge a written representation during the public comment period is not entitled to appeal.	The number of all appeals lodge with the ERD Court trends between 191-200 appeals per year, with 78% of appeals lodged withdrawn or resolved without going to a full hearing. (LGA SA 2014).
Queensland	DAF based - Appeal rights limited to 'impact assessable' ⁱⁱⁱ developments. The person making the third party appeal must have lodged a 'properly made submission' with the local council within the public notification period for the development application.	No information available.
Tasmania	Broad appeal rights, but third parties can only object to a planning application if it is a 'discretionary' application, which must be advertised. To appeal the third party must have lodged a representation (objection) to an application within the 14-day advertising period, and may lodge an appeal with the tribunal within 14-days of receiving notice of the council decision.	For the 2013-2014 year 117 appeals in total were lodged under the Land Use Planning and Approvals Act (RMPAT 2014) Cost to lodge an appeal with the Resource Management and Planning Appeal Tribunal is \$350, but if appeal proceeds to full hearing, cost for lawyers and expert witnesses may be incurred (RMPAT). RMPAT has 90 days to complete an appeal (RMPAT 2014).
Northern Territory	Appeal rights limited to developments in residential zones, unless the land is adjacent to or opposite a residential zone, in limited circumstances. Third party appeal rights apply only to those persons who made submissions on a Development Application.	No information available
Australian Capital Territory	DAF based - Appeal rights limited to available for those merit or impact track ^{iv} development applications that went through the major notification process, unless exempt by regulation.	Third party appellants must lodge appeals no later than four weeks after the decision was made.

		For the 2015-2016 year 22 applications were received in total for administrative review under Planning and Development. The cost to apply for review is \$325 and cases are subject to 120 day limit (ACAT 2016)
Victoria	Broad appeal rights. Provision of third party appeal rights cover most developments in Victoria. To appeal the third party must have lodged an objection to an application within the advertising period. Anyone who may be affected can make an objection, objectors do not have to show they will be personally affected and may object on broad public interest issues. If, for good reason, a person was unable to lodge an objection, may be able to apply for a review of the decision if VCAT ^v gives permission.	For the 2014/2015 year 4% (2,292) of development applications had a review lodged with VCAT. Hurley et al (2013) found appeals from third parties accounted for 19% of VCAT cases. An objector who lodged an objection in writing must make an application for review (appeal) within 21 days of decision to grant a permit.

i – Examples include chemical factories, large-scale breweries, resource projects such as coal mines and quarries, and turf farms.

ii - In *Category 3* development applications, notice must be given to adjacent owners and occupiers as well as those considered by the relevant authority to be significantly affected by the proposed development. Also, the general public must be notified by publication of a notice in a local or state-wide newspaper.

iii – Act or local planning instruments will dictate the category of a development.

iv – Assessment tracks which are to be followed for the assessment of different kinds of development proposals include; 'merit track' for development proposals that can be assessed using rules and criteria in the code that applies to the proposals, and 'impact track' for development proposals that can be assessed using rules and criteria in the code that to the proposals, relevant environmental impact statements and the statement of strategic directions.

v- Victoria Civil and Administrative Tribunal

3.3 Western Australia State Government Position

In its 2015 report on the review of the *Planning and Development (Development Assessment Panels) Regulations 2011*, the Western Australia Legislative Council noted that the State's position on Third Party Appeal Rights was set out on 3 June 2009, by the then Minister for Child Protection, representing the Minister for Planning, who advised the Legislative Council of the Government's position on third party appeals:

The Government does not currently have any plans to introduce third party appeal rights in Western Australia.

The Government does not believe that the introduction of third party appeal rights in Western Australia is consistent with current attempts to simplify and streamline the planning approvals process. The Planning and Development Act 2005 requires public consultation in relation to the planning framework established in local and regional areas, with public consultation mandated for local and region planning scheme amendments, as well as State Planning Policies, local planning policies and structure plans. As such, the Government believes that the current planning process provides sufficient opportunity for the local community to have a say in what happens in their neighbourhoods. (p.31)

The report states that this remains the Government's policy.

3.4 Judicial Review

The ability for third parties to appeal the process behind an administrative planning decision via judicial review is open in each jurisdiction in Australia, even where merit based Third Party Appeal Rights are present. Judicial reviews are heard by a Judge in a Court of Law, and are a review of the legality of the decisions under challenge, not a review of the merits of a development. This process has a much narrower focus than a planning review, in that the question that the Court is concerned with is about the process and manner in which the decision was made, as opposed to was the decision the correct or best outcome.

To date, the recourse for an affected party in Western Australia has been to pursue the matter through the Supreme Court as a matter of Judicial Review. Over the past two years, there appears to have been an increase in the number of individuals and Councils applying for Judicial Review, most notably *Nairn v Metro-Central JDAP* where the approval of a mixed use tower was disallowed. The continual perusal of such Judicial Reviews may not be in the long term best interest of communities, as they are prohibitively expensive and is focused on the decision making process, rather than the outcome.

4.0 Arguments For and Against Third Party Appeal Rights

A literature review was conducted to establish the most common arguments both for and against third party appeals as well as examine the issues and benefits that may arise from their use. Victoria has the broadest third party appeal rights, and therefore much of the current literature examining third party appeals is focused on that state's experience.

4.1 Arguments Against Third Party Appeals

Legitimate interest and third party appeals – Many authors note that the traditional view of appeal rights holds that the only parties with a direct interest in a development application are the applicant and the responsible authority; meaning property owners are the only ones who should have the right to appeal over their land and that they should be able to use their property with minimal external interference. Therefore, Third Party Appeal Rights, if not clearly defined, may allow individuals to take part in planning decisions in which they have no direct interest. This can lead to opposition on non planning grounds, rather than because of an issue with the merit or substance of the proposal (Ellis2006) (Willey 2006) (Hurley et al 2011).

Loss of representation – This arguments states that the appeals process shifts decision making for development applications away from Local Government and therefore away from the locally elected representation. This shift may reduce accountability and transparency in the planning decisions process for the local community. A large amount of decision making power has been removed from Local Government with the introduction of DAPs. It is argued that Third Party Appeal Rights further weaken the representative nature of Local Government decision making (Ellis 2006) (Willey 2006) (Hurley et al 2011).

Current planning processes provide opportunities to participate – A strong argument against Third Party Appeal Rights is that proactive public engagement, participation and collaboration in policy formation and strategic planning is preferable as these processes focus on higher order engagement which leads to better policy and greater certainty in the process and outcome. Third party appeals tend to encourage adversarial rather than collaborative debate on planning issues. The effect of Third Party Appeal Rights may be to promote short-term decision making and could create planning outcomes that are not in the longer term interest of the community (Ellis 2006) (Willey 2006) (Hurley et al 2011) (Cook et al 2012) (Hurley et al 2013).

Not representative of the broader community- The idea of equity of access to planning decisions is often cited in the literature as a justification for third party appeal rights, however some research reviewed found that the majority of people lodging third party appeals come from a well-organised, well-connected and well-resourced segment of the community, which raises the question of how representative these objections are of the wider community's views (Ellis 2006) (Willey 2006) (Cook et al 2012) (Hurley et al 2013). For example, in their review of Third Party Appeals against multi-unit developments in Victoria, Hurley et al (2013) found that the number of objections against applications increase in more socio-economically advantaged areas, which indicates that developments in these areas are facing more organised community resistance, either by greater propensity for individuals to object, or by effective resident mobilisation (Hurley et al (2013) p.4).

Impact on the decision making process – Researchers argue that the introduction of Third Party Appeal Rights will lead to increased cost and delays, and the possibility of appeals being lodged because of vexatious or commercial interests, not because of genuine planning matters. As a result, the planning approval processes will experience delays which will create inefficiency, uncertainty, increased costs, and could ultimately act as a brake on investment and economic growth (Ellis 2006) (Willey 2006) (Hurley et al 2011).

Failure to determine/Deemed Refusal – While researching multi-unit development in Victoria, Cook et al (2012) found that as the volume of objections to a development application increases, so too does the likelihood of appeal to VCAT. Additionally, failure to determine (where council fails to render a decision within the prescribed timeframes, equivalent to deemed refusal in Western Australia) cases are strongly related to high objection numbers. Therefore, applications which receive the highest number of objections are also the applications which are most likely to be appealed, and are also most likely to be the applications which Council fails to determine. While failures to determine may be instances where the local authority is unable to process applications due to resource constraints, the results and anecdotal evidence suggest that often these cases involve the authority declining to make a decision where there is significant resident opposition (Cook et al (2012) p.39).

Turning planning into a 'numbers game' – Some researchers noted the existence of third party appeals may lead members of the community to believe that the number of objections in and of itself is a way of engaging in the planning process and prevent developments they do not support (Planning Institute of Australia (NSW Division) 2012) (Hurley et al 2013). However, in order to be considered by the responsible authority, an objection needs to be about a valid planning concern. As a result the community's expectations about how it can influence the planning system may not be met.

4.2 Arguments For Third Party Appeals

Legitimate interest – A strong argument is made that neighbouring landowners, occupiers and members of the community often have a very legitimate interest in whether development occurs and the form of that development, as any new development has impacts on existing neighbourhood character, amenity, infrastructure and property values. Equity in the development process is also important, if an applicant has rights of appeal, the argument is that a third party should also have right of appeal to maintain equity. Without Third Party Appeal Rights the wider community is removed as a stakeholder (Ellis 2006) (Willey 2006) (Trenorden 2009).

Improved participation and decision making – It is often noted that planning is a communicative process which needs to embrace the public in meaningful ways. Third party appeals would have the potential to increase avenues for public engagement with planning, and may deliver better planning decisions as an empowered public, with increased opportunities for participation, can result in improved planning outcomes. Therefore, Third Party Appeal Rights affords the combination of a broader base of input, increased debate and the ability for 'local knowledge' to inform planning approvals which can lead to improved outcomes (Morris 2005) (Ellis 2006) (Willey 2006). As an example, Willey (2006) notes that it is comparatively rare in Victoria for an objector to completely succeed in overturning a decision, but often their involvement is considered to lead to a better planning decision.

Improved consultation – Third party appeal rights may encourage developers to deal with the local community in a more engaging manner and places pressure to concede or improve design elements where appropriate and reasonable to do so (Willey 2006).

Improved transparency – Applicant appeals are a means by which decision-making can be checked and provide property owners a recourse to an independent review body as a safeguard against inconsistent decisions. An argument for Third Party Appeal Rights is that they provide the same opportunity for third parties to scrutinise and challenge decision-making, thus keeping decision-makers accountable. Additionally, Third Party Appeal Rights are purported to discourage corrupt behaviour between developers and local government (Morris 2005) (Willey 2006) (Trenorden 2009).

4.3 Competing Viewpoints

There are strong arguments both for and against third party appeals. The research notes that which side of the argument one lands on often has a great deal to do with the planning culture in which they are operating (Willey 2006) (Trenorden 2009). In Victoria, where third party appeals have become an embedded practice, most stakeholders are supportive of the practice, even while acknowledging negative aspects may be associated with them.

In contrast in places such as Western Australia where third party appeal rights are not a part of the planning culture, views tend to focus predominately on the negative aspects of Third Party Appeal Rights. For example, a concern often expressed is that allowing third party appeals would lead to a 'flood' of appeals, however evidence from Victoria shows that Third Party Appeals account for only 19% of VCAT cases (Hurley et al 2013). So while allowing Third Party Appeals would lead to an increase in appeals, the effect may be overemphasized.

In a 2009 paper, Judge Christine Trenorden, Senior Judge of the Environment, Resources & Development Court in South Australia, argued that the issue of whether Third Party Appeal Rights are necessary may be resolved by the answers to the following questions:

1. *Does the community have confidence that the policy document for a particular area sufficiently describes the desired future character, and contains a comprehensive set of objectives and principles for development in the area, relevant to the local context including the environment?*
2. *Does the community have confidence in the decision-makers to make a decision in the best interests of the community now and in the future?*
3. *Is there a transparency about the decision-making?*
4. *Is there a guarantee that the decision-makers will assess the development in the context of the desired future character, objectives and principles of development for the area (assuming the adequacy of these policy statements)?*
(Trenorden, 2009 p. 13)

The questions put forward by Judge Trenorden speak not to the capability of the decision maker to determine an application, but the “community’s confidence” in their ability. These are not necessarily the same thing. When the decision-maker is appointed by an external body, the community’s confidence in them to make a decision in the best interests of the community now and in the future is diminished. Any lack of transparency around the decision-making process further erodes confidence.

5.0 Issues to Consider

5.1 Criteria for Third Party Appeal Rights in other States

After considering the arguments for and against Third Party Appeal Rights, as well as Judge Trenorden’s questions on determining the necessity of such rights, there may be further debate on what limitations, if any, should be placed on Third Party Appeal Rights were they to be introduced. For instance, it may be that Third Party Appeals be limited to only certain types of applications involving the use of discretionary powers, or instances where the decision-maker has advertised the development. If this were to be the case, then Third Party Appeal Rights would apply to determinations made by both Local Government and DAPs.

Based on the summary of Third Party Appeals processes that exist in other jurisdictions, the primary criteria for allowing Third Party Appeal Rights include:

- Excluding vexatious or commercial interests appeals, and any appeals made on none-genuine planning matters,
- Excluding appeals by those parties who did not previously make a submission.
- Excluding appeals where an application meets ‘deem-to-comply’ requirements, and no discretion has been excised.
- Excluding appeals for some cases of minor development.
- Having a short window in which to appeal (example 14 days).

5.2 Implications for Local Government

Whilst the introduction of third party appeal rights would give the community the ability to appeal decisions made by DAPs, it would also result in the majority of appeals being lodged against decisions made by Local Government. Staff would be impacted as officers would require additional time to prepare for and attend third party appeals, which would likely have an effect on the ability of Local Government officers to complete development application assessment within the required statutory timeframes.

Additional resources would likely be required to administer, resource and potentially engage legal counsel to defend these decisions and this would most likely create an additional financial burden for Local Government. Without proper resources, such a situation could lead to delays in making planning decisions, which in turn, would create inefficiency, uncertainty, increased costs, and could ultimately act as a brake on investment and economic growth.

While limitations could be placed on the type and scope of Third Party Appeal Rights, it is likely that any system which allows Third Party Appeals would result in increased workload and cost for Local Government.

6.0 Conclusion – What is right for Western Australia?

Since WALGA formulated its policy position on Third Party Appeal Rights in 2008, there have been significant changes to the planning system, including the introduction of DAPs as the decision-making body for a range of development applications. By removing the decision-making abilities of democratically elected Local Government representatives and placing it in the hands of appointed panel members, the general public's confidence that planning decisions are being made that are in the best interests of the community has been substantially reduced. This loss of confidence coincides with increased anxiety amongst the community over the changing amenity of suburbs due to increasing density and population pressures.

Third Party Appeal Rights are a complex issue, with strong arguments both for and against their implementation. Property rights must be balanced against the community's rights of participation, and the desire for transparency and accountability in government and decision-making bodies. Local Government must also consider the likely impacts in terms of cost, resourcing and the timely delivery of services.

6.1 Feedback Sought

In order to help WALGA review its position, feedback from the Local Government planning community and Elected members is sought. In light of the information presented, and considering the possible implications for Local Government if some form of Third Party Appeal Rights were to be adopted, WALGA welcomes any feedback or comments on the topic including:

- Would you be in favour of the introduction of some form of Third Party Appeal Rights in Western Australia? Why or Why not?
- Do you feel your Council is likely to support some form of Third Party Appeal Rights?
- Any other comments relating to Third Party Appeal Rights.

Feedback can be sent to planning@walga.asn.au or on 9213 2000 to discuss with one of the Planning and Development Team.

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