

29 July 2011

Hon John Day MLA
Minister for Planning
13th Floor, Dumas House
2 Havelock Street
WEST PERTH WA 6005

Dear Minister

SUGGESTED AMENDMENTS TO SECTION 136(1) OF THE PLANNING AND DEVELOPMENT ACT 2005 ("THE PD ACT")

The Law Society of Western Australia requests your consideration of the following proposals for amendment to the *Planning and Development Act 2005* ("the PD Act").

Background

Although s.3 of the PD Act states an intention to, relevantly, consolidate the provisions of the *Town Planning and Development Act 1928* ("the Repealed Act"), it appears that the clear effect of s.136(1) of the PD Act has been to change the law.

Considerable uncertainty has been created by that change in the law, which is compounded by the refusal of the WAPC to give effect to the changes which have been made, by refusing to approve agreements to sell land which is to be subdivided before settlement as required by the current s.140 of the PD Act, read with s.136(1).

The purpose of this letter is to suggest amendments to s.136(1) of the PD Act to give that provision the same effect as s.20(1) of the Repealed Act had under the applicable case law in force at the time the PD Act commenced.

The suggested amendments are set out below, followed by a brief submission explaining the need for those amendments.

Suggested Amendments to s.136(1):

- a) in paragraph (c), delete "or agree to sell";
- b) delete paragraph (d); and
- c) in the postlude (concluding words), delete ", agreement or option of purchase" and replace with "or sale".

Submissions

1. Section 20(1)(a) of the Repealed Act was a confusing provision, which was subject to considerable litigation and statutory amendment.

2. In its original form, s.20(1) simply provided:-

"No person shall lay out, grant or convey a street, road or way, or subdivide or sell land as lots until a plan of subdivision has been approved by the [predecessor of WAPC]".

3. In *Glass v Ralph* [1966] WAR 91, a single judge of the Supreme Court held that the section prohibited, without approval of the predecessor of the WAPC, not only completion of a sale by conveying part of a lot, but also an agreement to convey a lot after subdivision where the lot did not actually exist at the date of the agreement. That decision was applied again by a single judge in *Reid Murray Developments (WA) Pty Ltd v Hall* [1968] WAR 3.
4. Various amendments were made as a result of those decisions, including insertion of s.20B in the Repealed Act, which permitted the making of an agreement subject to WAPC approval of the subdivision of the land being sought and obtained within stipulated periods of time.
5. In 1979, the Full Court of the Supreme Court, in *Landall Construction & Development Co Pty Ltd v Bogaers* [1980] WAR 33 ("*Landall*") overruled both of the decisions of single judges in the 1960s referred to in para 3 above. The Full Court held that an agreement to sell an area of land which, at settlement, will be a lot (because the contract is conditional on approval and completion of a subdivision to create the lot before settlement) never infringed s.20 of the Repealed Act because it was not an agreement to sell land other than as a lot.
6. The decision in *Landall* represented the law until commencement of the PD Act – ie an agreement to sell land which was not a lot at the date of the agreement but which was conditional on the land sold being a lot at settlement did not infringe the prohibition in s.20 on selling land otherwise than as a lot.
7. The language of ss.136(1) and 140 of the PD Act has rendered the reasoning in *Landall* inapplicable to those provisions because:-
 - 7.1 *Landall* decided that the word "sell" in s.20 of the Repealed Act did not include an agreement to sell conditional on WAPC approval of a subdivision. However, s.136(1) now relevantly provides that a person must not "sell **or agree to sell** land... without the approval of the Commission unless the land is dealt with by way of such... agreement... as a lot or lots";
 - 7.2 although s.20B of the Repealed Act allowed an agreement conditional on subdivision to be made, s.140 of the PD Act only protects an agreement to sell un-subdivided land if the agreement itself is subject to approval of WAPC and an application for approval of WAPC is made within three months after the date of the agreement and approval is given.

8. In the result, the effect of ss.136(1)(c) and (d) is that an agreement to sell land (or the grant of an option to purchase – which is merely one form of conditional agreement to sell land) without consent of the WAPC is prohibited by s.136(1) of the PD Act, unless the agreement or option is conditional on approval of WAPC under s.140.
9. Despite the state of the legislation, the experience of our members is that WAPC invariably refuses outright to approve agreements which are made conditional so as to comply with s.140 of the PD Act on the (erroneous) basis that approval is not required.
10. The amendment made to s.136 of the PD Act in 2010 by including s.136(3A) excluded strata subdivisions and strata re-subdivisions from s.136(1). However, that amendment did nothing to cure the problem created by the drafting of ss.136(1) and 140 with respect to the many broadacres subdivisions which are not to create survey-strata lots.
11. There are two possible solutions to the problem: either the legislation should remain in its present form and WAPC must be required to perform its function under s.140, or the legislation should be amended as suggested above. The Society submits that the suggested amendment is the appropriate solution, given that the intention expressed in s.3 of the PD Act to merely consolidate and not modify the existing law has clearly miscarried in the drafting of ss.136 and 140 of the PD Act.

I look forward to your response in due course.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Hylton Quail', with a stylized flourish at the end.

Hylton Quail
President