

## Planning and Development (Local Planning Schemes) Regulations 2014

### Amending *Town Planning Regulations 1967* and associated Model Scheme Text

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## Introduction

The Law Society of Western Australia appreciates the opportunity to comment on the draft Planning and Development (Local Planning Schemes) Regulations 2014, amending the *Town Planning Regulations 1967* and associated Model Scheme Text.

The Society is the peak professional association for lawyers in Western Australia and is widely acknowledged by the legal profession, government and community as the "Voice" of the legal profession in Western Australia. The Society has a number of sub-committees dealing with specialist legal issues, including planning and development.

The following comments make reference to the existing *Town Planning Regulations 1967* (existing Regulations) and the draft *Planning and Development (Local Planning Schemes) Regulations 2014* (draft Regulations), using the Discussion Paper's 'Proposed changes to *Town Planning Regulations 1967*' as a guide for responses.

### 1 New format and deemed provisions

Introducing a new overall format, consisting of regulations for the preparation of new, amended and consolidated schemes (equivalent to the current *Town Planning Regulations 1967*); model provisions that provide a template for when a local government next updates its scheme but allows for local variation (equivalent to the current Model Scheme Text); and new deemed provisions, which introduce a range of standardised processes that apply automatically across all local government areas.

#### Comment:

- 1.1 The new format appears clearer and more systematic than the existing Regulations and is supported.
- 1.2 It is noted that the new Model Scheme Text (MST) set out in Schedule 1 of the draft Regulations is shorter than the existing MST. The obvious explanation is that the vast majority of the formality and procedural provisions have gone into the deemed provisions. The Society supports the inclusion of a MST in the Regulations but queries whether the separation of the standard provisions into MST provisions and deemed provisions will ultimately be advantageous.
- 1.3 If it is intended that deemed provisions will be incorporated into and printed as part of every local planning scheme (LPS), then the Society supports that initiative. The deemed provisions could as easily have been incorporated in the MST, but one way or the other, all operative provisions should appear in every local planning scheme, so that reference to the scheme provisions can be a one step or one reference process.
- 1.4 If it is proposed that deemed provisions will stand on their own in Schedule 2 of the draft Regulations, and will not be reproduced in every LPS, then the Society considers that arrangement will complicate the use of local planning schemes. It should be possible for a person to read the provisions operating in any LPS as continuous provisions in one single document. If it is necessary for a person to cross-reference between Schedule 2 of the Regulations and any given LPS in order to understand the full text of a scheme, then that is not supported. In that case, it is considered preferable for the deemed provisions to continue as provisions in the MST.

- 1.5 If it is desired that certain provisions which are not ordinarily included in some older schemes should be deemed so as to achieve a higher level of uniformity, then that should only apply to schemes which have not been prepared since 1999, based on the MST.

## **2 Overall review and rewriting of existing provisions**

Incorporating an overall professional review and rewrite of existing provisions by Parliamentary Counsel.

### **Comment:**

The Society does not comment on this proposal, other than to acknowledge that the format and drafting of the draft Regulations is for the most part an improvement on the format and drafting of the existing Regulations.

## **3 Streamlined processes for the preparation of a scheme**

Streamlining processes for the preparation of new schemes with the aim of removing some of the existing regulatory burden, including removing the requirement for a local government to inform the Western Australian Planning Commission when it first resolves to prepare a new scheme, and simplifying the advertising and consultation requirements.

### **Comment:**

- 3.1 The Society supports in principle any changes which would result in streamlining and user-friendly improvements.
- 3.2 The avoidance of the need for a local government to inform the Western Australian Planning Commission (the WAPC) when it first resolves to prepare a new scheme (reg 21) is welcomed. The same simplification applies to 'complex amendments', though there remains an obligation for a local government to provide to the WAPC a copy of its resolution if it resolves not to proceed with a complex amendment (reg 36(3)). There continues to be an obligation under reg 44 in relation to standard amendments, for a local government to prepare a notice in a form approved by the WAPC and to advertise the standard amendment for public inspection. It may not be productive in all cases for a local government to be bound to proceed to public inspection as an inevitable step after resolving to prepare the amendment without the opportunity for the Council to consider the prepared amendment before the public inspection stage, as applies in the case of a planning scheme and a complex amendment. The Council should have the opportunity to see what it is to be taken to be responsible for.
- 3.3 Similar comment might be made in regard to a basic amendment. It is assumed that the intent of the draft Regulations is that in the case of both standard amendments and basic amendments, the local government having considered the matter to the extent of resolving to prepare the amendment should not be given the opportunity to consider the amendment as prepared before moving on to public inspection. There must be a real question as to whether it is reasonable to expect a local government Council to commit itself to a standard amendment or a basic amendment simply by resolving to

prepare the amendment, and without having the opportunity to see the amendment as prepared.

#### **4 Simplified amendment processes**

Simplifying current scheme amendment processes, including seeking to have the scheme amendment process set out in full, simplifying confusing wording and simplifying the advertising and consultation requirements.

##### **Comment:**

The Society supports this as a statement of general principle.

#### **5 New risk-based amendment tracks**

Allowing a more nuanced risk-based approach to scheme amendments, distinguishing 'complex', 'standard' and 'basic' procedural requirements.

##### **Comment:**

Subject to the comments on principle 3 above, the Society supports in principle this approach to scheme amendments.

#### **6 Single decision-maker**

Reducing the existing procedural and regulatory burden, by reducing the number of planning decision-makers where possible, down to a single decision-maker (either the WAPC or the local government as delegate).

##### **Comment:**

The Society does not support the notion that there should be a single decision-maker on planning proposals wherever possible.

The Society's reasons for holding this view are as follows:

- (a) In the case of a regional structure plan, it is appropriate that the WAPC should be the approving/adopting authority.
- (b) In the case of a district structure plan or local structure plan, the responsible local government should be the body with responsibility to adopt the structure plan, as the structure plan is likely to deal with local strategic planning issues which are the proper province of the local government. Matters such as the proposed pattern of zones within the structure plan are matters depending on the planning knowledge and expertise of the local government.
- (c) It is accepted that where a structure plan involves the subdivision of land, unless the WAPC is prepared to delegate to local governments its responsibility in that regard, then the WAPC inevitably must be involved in the process of approval of the structure plan.
- (d) It is made clear in the explanation of the Planning Reform programme, and in the Discussion Papers, that the WAPC has resourcing limitations, and it is also made clear that the WAPC should be primarily concerned with broad

strategic planning issues. The WAPC has never, even under region planning schemes, concerned itself with the detail of local land use and zoning provisions. There is no reason in principle why that approach should be changed, simply in the interest of streamlining and attempting to simplify procedures.

- (e) If the simplification of the procedures is likely to result in the complication of having the WAPC concern itself with local strategic planning issues which it has not traditionally been concerned with, then it would be inappropriate for there to be a change solely for the purpose of attempting to simplify and streamline procedures. If procedures do not lend themselves to sensible and effective streamlining, then it should not be attempted. It may be necessary for the local government to continue as the adopting authority, and for the WAPC to endorse a LPS which contemplates subdivision.
- (f) For a LPS or district structure plan which does not contemplate subdivision, the local government should continue as the sole approving authority.
- (g) For a LPS or district structure plan which does contemplate subdivision, the local government approval should be limited as the sole decision-maker to the non-subdivision element, and the WAPC should be the sole decision-maker for approval of any subdivision proposal.

## **7 New five year interim review of schemes**

Introducing a five year interim review of all schemes, in conjunction with forecasted changes to the consolidation procedures under the *Planning and Development Act 2005 (WA)*, so as to promote improved reporting and strategic planning by local governments.

### **Comment:**

The Society supports the introduction of a five year interim review of schemes as an improvement on the present requirement in s 88 of the *Planning and Development Act 2005 (WA)* (the P&D Act), for a consolidation of a local planning scheme to be prepared every five years (subject to the Minister granting exemption).

## **8 New provisions concerning development contribution plans**

Standardising processes and implementation provisions concerning development contribution plans, giving legal effect to *State Planning Policy 3.6 (SPP 3.6)* and associated model provisions (note that a review of SPP 3.6 is being undertaken by the Department of Planning concurrently with preparation of the Local Planning Schemes Regulations. Outcomes of the review will be incorporated in the final version of the regulations).

### **Comment:**

- 8.1 The Society does not consider that standardising the provisions for development contribution plans beyond what already exists in the MST is going to solve present problems which are being encountered with such plans. Issues associated with development contribution plans need to be addressed in a much more comprehensive way.

- 8.2 The preparation of a development contribution plan (DCP) is complicated by the need first of all to obtain a consensus as to which items of infrastructure should be the subject of contribution; reliably costing those items of shared infrastructure, and keeping the cost estimates up to date; and establishing an acceptable formula for the sharing of costs of those infrastructure items. It is a simple process to describe, but an extremely complex and difficult process to establish and manage.
- 8.3 While it may be useful to establish a general template for the general headings which arise for most DCPs, it is essential that there be allowance for flexibility in the adoption of the broad headings for individual DCPs.
- 8.4 At the least, any pro forma established for a DCP should allow for special provisions/conditions, and for variations to suit the circumstances of particular cases.

## **9 Additional uses for local reserves**

Introducing the ability to include additional uses for local reserves, similar to the way additional uses have long been used in relation to land zoned under a scheme.

### **Comment:**

- 9.1 The Society is of the opinion that under existing local planning schemes, a wide potential for discretion in alternative uses for local reserves already exists.
- 9.2 The provisions in the existing MST allow a very wide discretion for approving specific uses and developments on local reserves. It is desirable in the interests of orderly and proper planning that the wide discretion be retained. The provisions in the existing MST should be retained as preferable to those proposed under the draft Regulations.
- 9.3 The flexibility and the wide discretion which exists in relation to approval of developments on local reserves gives an opportunity to local governments to give balanced consideration to any development proposal, the refusal of which may lead to a substantial claim for compensation for injurious affection. It may be preferable in the interests of orderly and proper planning for a local government to approve a proposed development on local reserved land rather than burden the local community with the cost of a very substantial compensation claim. The City of Canning in recent years faced a potential claim in excess of \$20M in circumstances where a private developer happened to own land reserved for a public purpose, and proposed residential development on that land. Allowing the local government the maximum possible flexibility in dealing with such applications may be beneficial in the public interest.

## **10 Reintroduction of 'I' incidental uses**

Reintroducing 'I' incidental uses in zoning tables.

### **Comment:**

- 10.1 The Society supports the reintroduction of the possibility of 'I' incidental uses in zoning schemes.



- 10.2 In the interest of simplicity and certainty, the identification of an 'I' use should be restricted to uses which are incidental to the predominant use, and should not be extended to the notion of uses which are ancillary or subordinate. The term 'incidental' has been the subject of numerous judicial interpretations, and its meaning and significance are well known to planners. To introduce the terms 'ancillary', and 'subordinate', is likely to lead to dispute, litigation, and as a consequence delay and unnecessary expense in the decision-making process.

## **11 New optional local government register of non-conforming uses**

Introducing new optional provisions that allow a local government to prepare a register of nonconforming uses, to help monitor and enforce the discontinuance of non-conforming uses.

### **Comment:**

- 11.1 The Society submits that to allow for a register is not sufficient. The register will need to have some significance, such as prima facie or perhaps conclusive evidence of the existence of the non-conforming use.
- 11.2 The proposed provision is silent as to how a non-conforming use gets on to the register. A local government could take the initiative to record a place on the register, but perhaps provision should be made for an application by an owner seeking the protection of non-conforming use rights.
- 11.3 If that is done, the provisions will need to allow for the possibility of an inquiry being held into the justification for the non-conforming use claim, if required by the local government.
- 11.4 If there is to be a decision by the local government after the inquiry, there should be a right of review. However cl 53 of the deemed provisions does not cover an application of that kind. An aggrieved applicant may need to rely on a right of review under the appeal provisions of the P&D Act. It would be more appropriate for there to be a right of review provided for in the register provisions, or for cl 53 of the deemed provisions to be amended so as to include such an application.
- 11.5 If all that is intended is for the register to record the land in respect of which non-conforming use rights are claimed, then the register will need to make clear the fact that the entry of an item in the register records a claim to non-conforming use rights but is not evidence of the existence of such rights. There may also be some justification for the register recording both non-conforming use rights which are claimed but not confirmed, and non-conforming use rights which are accepted by the local government.

## **12 Expanding local government powers regarding restrictive covenants**

Changing existing provisions concerning restrictive covenants, including expanding the circumstances whereby a local government can, with the approval of the WAPC, discharge or modify a restrictive covenant, beyond one relating just to density; and clarifying that notwithstanding the local government's discharge or modification, the landowner must still formally apply to Landgate under the *Transfer of Land Act 1893* (WA) to give legal effect to such a decision.

**Comment:**

- 12.1 It is submitted that the provisions in relation to restrictive covenants are inadequate, even though cl 27 does expand the scope of the restrictive covenant provision beyond the previously limited scope of residential covenants.
- 12.2 What remains unclear is, who would be able to apply for the discharge or modification of a restrictive covenant. Would it be only the owner of the servient tenement? In the case of an estate covenant, would it be every owner of land within the estate to which the covenant applies? Could it be a third party who is not directly affected by a restrictive covenant? This could impact on appeal rights, as a person applying to the local government for the local government to discharge or modify a restrictive covenant would be an applicant aggrieved who would perhaps have a right of review under the appeal provisions of the P&D Act.
- 12.3 It is doubtful that cl 27 in its present form is within power. Cl 11 of Schedule 7 of the P&D Act allows for a local government to make provision in a scheme for the extinguishment or variation of any restrictive covenant. What cl 27(1) contemplates is the local government by administrative action, under the authority of cl 27(1) discharging or modifying a restrictive covenant. That is not what cl 11(1) empowers. It is submitted that the extinguishment or variation of a restrictive covenant must be done by a provision in the local planning scheme, and that would require a scheme amendment.
- 12.4 In any event, it is necessary to move from the point of the extinguishment or variation of a restrictive covenant under a scheme to the point of having the extinguishment or variation recorded on the servient and dominant titles. Notification to Landgate is necessary, and that should be provided for in the empowering clause.
- 12.5 If a local government is to contemplate the extinguishment or variation of a restrictive covenant and presumably that action is precipitated by a servient owner, then the dominant owner, and anyone else who might have an interest in the retention of the restrictive covenant, should be given notice, and an opportunity to make submissions. The MST provisions should allow for any proposal to extinguish or vary a restrictive covenant to be notified to all owners and occupiers of land which might be affected by the extinguishment or variation.
- 12.6 There should also be recognition of the fact that the extinguishment or variation of a restrictive covenant has the potential to precipitate a claim for compensation for injurious affection. As submitted above, in order to comply with cl 11(1) of Schedule 7 of the P&D Act, the extinguishment or variation of a restrictive covenant will need to be achieved by a scheme amendment. Whether there is a scheme amendment or not, it is likely that the owner of the dominant tenement will be injuriously affected by the extinguishment or variation of the restrictive covenant, but under the provisions of s 174 of the P&D Act as they now stand, there would be no right to claim compensation for injurious affection. It seems unreasonable that an owner who may have paid a substantial consideration for the imposition of a restrictive covenant on neighbouring servient land, could have the restrictive covenant extinguished,

perhaps greatly benefiting the servient owner, without any recompense to the dispossessed dominant owner.

- 12.7 The note at the end of cl 27 is unsatisfactory. It says that the '... owner of land affected by a restrictive covenant' must apply under the *Transfer of Land Act 1893* (WA) (the TLA) for a memorandum of the discharge or modification of the restrictive covenant to be entered on the certificate of title for the land. It is highly unlikely that the owner of the dominant tenement (the land benefited by the restrictive covenant) will be bothered to make any application to the Registrar of Titles which would extinguish the restrictive covenant from his title. Somehow the City, or the owner of the servient land, must persuade or find some basis to compel the owner of the dominant tenement to provide the certificate of title of the dominant land to the Office of Titles to record the extinguishment of the restrictive covenant.
- 12.8 The subject of extinguishment and variation of restrictive covenants is complex and will need far more consideration and detail than is evident presently in cl 27. Cl 5.4 in the existing Residential Design Codes is also inadequate.
- 12.9 The Note at the end of the proposed cl 27 is also inappropriate. It purports to require the owner of land affected by a restrictive covenant to make an application under the TLA. There will be at least two owners affected by a restrictive covenant, namely the owner of the servient tenement and the owner of the dominant tenement. It is difficult to mention any case where the owner of the dominant tenement will be prepared to cooperate in the extinguishment of the restrictive covenant benefiting the dominant tenement. If ultimately a form of words relating to the extinguishment or variation of a restrictive covenant is found for inclusion in the MST, it will probably need to include an obligation for the owners of each the servient and the dominant tenement to do what is necessary at Landgate to have the extinguishment or variation of the restrictive covenant appropriately recorded on the titles. The matter is going to be infinitely more complicated in the case of an estate covenant.

### **13 Clarification regarding development as works and use**

Clarifying the definition of development, currently set out in an ambiguous manner by the P&D Act, to better illustrate the two sub-components of works (physical development) and use.

#### **Comment:**

- 13.1 Any clarification that can be achieved in terminology would be welcome, but care will need to be taken to ensure that the result of any redrafting does not cause more problems than it solves.
- 13.2 There is presently a well-recognised explanation of the meanings of the terms 'use' and 'development' in the definition of 'development' in the planning legislation. The decision of Burt CJ in the case *University of Western Australia v City of Subiaco* (1980) 52 LGRA 360 has been well-recognised for more than three decades as containing a sensible and useful definition of those terms. If all the legislation does is to incorporate the explanations of the terms in the *University of WA* case, then that would be seen as an advantage.

## **14 Clarification regarding variations to development requirements**

Clarifying and expanding local governments' ability to consider applications that vary development requirements and clarifying the process to be followed when applying such discretion.

### **Comment:**

- 14.1 Again as a general principle, the Society would welcome the incorporation in local planning schemes of provisions which clarify the process by which the responsible authority can exercise discretion to vary standards or requirements.
- 14.2 Notwithstanding general support for the clarification of the process, there should be proper regard to the fact that not all local government districts, and not all areas in any given local government district, respond in the same way to discretionary decisions to vary standards and requirements.
- 14.3 A primary purpose of local planning schemes is to ensure that the planning for development in the local government district is consistent with orderly and proper planning, and gives appropriate protection to local amenity. There can be no doubt that some local government districts, and some parts of any given local government district, are more sensitive than others to variations from a standard or common development format.
- 14.4 In order to reflect the legitimate expectations of particular areas, it may be appropriate that there be greater or less flexibility in the application of development standards and requirements, in any given local planning scheme.
- 14.5 Careful consideration should be given to the possible need for different levels of flexibility in the variation of development standards and requirements.

## **15 Clarification regarding Special Control Areas**

Clarifying the operation of Special Control Areas, especially the concept that the provisions of Special Control Areas are in addition to the provisions that apply to any underlying zone or reserve.

### **Comment:**

The Society makes no comment on this issue.

## **16 New standardised provisions concerning structure plans**

Introducing new standardised deemed provisions concerning the application, procedure and legal effect of structure plans, including triggers for when a structure plan may be prepared; who can prepare a structure plan; how a structure plan is prepared; the local government's ability to reject a structure plan at the outset as an incomplete application (as opposed to a later refusal on the merits); advertising of a structure plan; a local government's role in preparing a report for the WAPC on the proposed structure plan; the role of the WAPC (or local government as delegate) in determining the application; rights of review; and provisions governing the duration of an approved structure plan (a default period of ten years, which can be renewed or varied).

**Comment:**

- 16.1 The Society supports in principle any measures which would simplify the planning processes, and which would produce an outcome which better promotes the public interest.
- 16.2 Care must however be taken in regard to the provisions for structure plans in that there are potentially significant conflicting interests including:
- (a) the interest of the local government representing the community in ensuring that a structure plan (as a de facto and preliminary scheme amendment) effectively represents orderly and proper planning calculated to promote the amenity and the general long term interests of the affected community; and
  - (b) on the other hand, a structure plan is generally seen by developers as a blueprint for subdivisional development of their land, and as a troublesome necessary step before a subdivision application can be presented to the WAPC.
- 16.3 As it is contemplated that there will be a single decision-making authority on the approval/adoption of a local structure plan, careful consideration must be given to the question whether the local government or the WAPC is the appropriate body to determine the detailed land use and zoning patterns for a particular locality.
- 16.4 The planning reform documents at various places, including the discussion papers, have made clear the concern that the WAPC's resources should not be overtaxed, and that the WAPC should focus on broad strategic planning issues. The WAPC and the Department of Planning do not have the resources to give fair and balanced consideration to local strategic planning decisions.
- 16.5 While it is clearly desirable that, if possible, there be one decision-making authority on any particular planning proposal, it is well accepted in planning in WA that some issues require a multiplicity of determinations. For instance the making of a region scheme or a region scheme amendment involves decisions at different levels by the WAPC, the Minister, the government, and the Parliament. The planning instrument in that case requires different levels of consideration, and it may be that local and district structure plans also, in the interest of orderly and proper planning, require decisions at different levels.
- 16.6 If it is truly desired that there be one decision-making authority for local and district structure plans, careful consideration should be given to the possibility of the WAPC delegating to local governments the responsibility for the subdivisional element involved in any given district or local structure plan.

**17 New standardised provisions concerning local development plans**

Introducing new standardised deemed provisions concerning the application, procedure, content and effect of local development plans; and providing an exemption from future development approval where a local development plan has been approved.

**Comment:**

- 17.1 If 'deemed provisions' are contemplated to deal with local development plans, then reference is made to previous comment to the effect that the deemed provisions ought to be incorporated in every local planning scheme.
- 17.2 It is not considered desirable for a person seeking to use a local planning scheme to have to cross-reference between the provisions of the local planning scheme on the one hand, and the deemed provisions in Schedule 2 of the Regulations on the other hand.

**18 New and amended land use and planning definitions**

Introducing a range of new and amended land use and planning definitions.

**Comment:**

- 18.1 The Society accepts the desirability in principle for definitions for local planning schemes to be updated. Many of the definitions in the existing Regulations (under the existing MST) have been in use without proper review for nearly 50 years.
- 18.2 The Society cannot however give support to all of the definitions now proposed. Some definitions including: 'commercial vehicle'; 'incidental use'; 'industry - service'; 'residential building'; 'rural home business'; 'rural pursuit'; and 'shop', and perhaps many others, need further consideration. The time allowed for the Society to consider the draft Regulations has not permitted a detailed consideration of all of the definitions.
- 18.3 As a general principle, where there are judicial interpretations of any definitions, departure from those definitions in the new Regulations should not be attempted unless the new definitions are consistent with the judicial interpretation, or on some other basis are fully justified.
- 18.4 One area of particular difficulty in scheme definitions has to do with the uses capable of falling within the 'shop' definition on the one hand, and showrooms and warehouses on the other. There is a pressing need for a complete and comprehensive review of definitions of use classes to deal with the difficult cases of shopping centres, department stores, Bunnings-type hardware warehouses, Red Dot and other large format retailers. The review of definitions of use classes should be included with the Regulations and MST revision.

**19 New standardised legend**

Introducing new standardised reserve and zoned classifications, prepared in consultation with the Department of Planning's GeoSpatial Planning Support team.

**Comment:**

The Society makes no comment on this principle.

## 20 Clarifications regarding local planning policies

Clarifying what legal effect and weight local planning policies have, the procedure for making them, and the ability to revoke such a policy.

### Comment:

Any provisions relating to local planning policies should reflect the judicial pronouncements on policies, particularly *Falc Pty Ltd & Ors v State Planning Commission* (1991) 5 WAR 522.

## 21 Clarification regarding local heritage and municipal inventories

Clarifying the operation of local heritage, including clarification that municipal inventories are deemed to be local heritage lists.

### Comment:

- 21.1 If it is proposed to treat a local heritage inventory as the local heritage list for a local planning scheme, then careful note should be taken of the fact that the compiling and maintaining of a local heritage inventory is a statutory requirement imposed by s 45(1) of the *Heritage of Western Australia Act 1990* (WA).
- 21.2 The heritage inventory constitutes an important part of the database of the Heritage Council, which it refers to from time to time for the maintenance of the Register of Heritage Places.
- 21.3 While it is normal for local governments to refer to the heritage inventory as a database also for its heritage list in its local planning scheme, the two schedules may in any given case be quite different in their content and intended purpose. Care should be taken not to obscure the potentially significant difference between the two types of schedule.

## 22 Heritage conservation notices

Introducing 'best practice' provisions concerning heritage already found in some local planning schemes.

### Comment:

- 22.1 The Society recognises two very important considerations when dealing with heritage, namely:
  - (a) the community interest in preserving heritage places; and
  - (b) the maintenance of private property rights.
- 22.2 To the extent that any provision in a local planning scheme, whether it be in the MST or a deemed provision or otherwise, should observe a fair balance between the conservation of heritage places on the one hand, and the proper respect for private property rights on the other hand.
- 22.3 If in the community interest it may be appropriate to protect heritage places, it may be necessary in the interest of private property rights to ensure that

those rights are respected, and if they are to give way in any case to the community interest in heritage conservation, then appropriate compensation should be considered.

- 22.4 The compensation provided for under the *Heritage of Western Australia Act 1990* is not necessarily accepted as fair and reasonable compensation.

## **23 Expansion of circumstances where development does not require approval**

Expanding and clarifying the circumstances where development does not require approval, including but not limited to where development is in accordance with a local development plan; developments involving a single dwelling that meet the deemed to comply provisions of the Residential Design Codes; temporary works or uses less than 48 hours; temporary advertisements relating to elections; certain other advertisements; and as required or not required pursuant to new bushfire regulations.

### **Comment:**

- 23.1 The Society gives general support to any initiative which would simplify the planning processes, without sacrificing the community interest in the protection of amenity, and the preservation of the interests of orderly and proper planning.
- 23.2 To remove the requirement for planning assessment and planning approval for a single dwelling, provided that single dwelling meets the 'deemed to comply' provisions of the Residential Design Codes, does not necessarily involve an economy in the planning process. It is likely that a local government's planners will need to examine any particular single dwelling proposal to ensure that there is compliance with the deemed to comply provisions of the Residential Design Codes. If there is not an equivocal compliance with the deemed to comply provisions, in those circumstances any single dwelling proposal may need to undergo the normal development approval processes, so as to ensure that the planning authority is able to give appropriate protection to the community interest in the preservation of amenity and orderly and proper planning.
- 23.3 It is difficult for the Society to deal effectively with all of the proposals which are contemplated in this item, and the Society does not purport to make any detailed submission on the issues covered by this item.

## **24 Expansion of local government powers to amend or revoke development approval**

Expanding certain local government powers, including expanding the circumstances where a local government can amend or revoke development approval, to bring scheme provisions into line with what is found under reg 17 of the *Planning and Development (Development Assessment Panels) Regulations 2011*; and the ability of a local government to waive or vary requirements concerning minor amendments to existing development approval.

### **Comment:**

- 24.1 The Society supports as a general principle the intention to expand the powers of planning authorities which will facilitate planning and development processes to the extent that it does not sacrifice the interests of the



community in the preservation of amenity and the interests of orderly and proper planning.

- 24.2 The provisions allowing for applications to revoke or amend conditions could lead to uncertainty, as could the provisions allowing for a planning approval to allow for subsequent provision of detail. Uncertainty and lack of finality are ordinarily grounds for a challenge to the validity of an approval, and that principle should not be changed.

## **25 Clarification regarding who is an 'owner' for signing a development application**

Clarifying who is an 'owner' for the purposes of signing a development application form, to bring scheme provisions into line with similar provisions found within the building permit framework.

### **Comment:**

- 25.1 Clarification on this point is desirable and supported by the Society in principle, but it is considered that the detailed proposals are likely to lead to complications.
- 25.2 The proposal in cl 38(d) of the deemed provisions to define the term 'owner' as including 'an agent of a person referred to in paragraph (A)' is fraught with problems. That will enable the planner, architect, real estate agent, accountant, lawyer, or the next door neighbour of the owner of land to be treated as the owner for the purposes of the application of scheme provisions. That is highly undesirable. While it may be desirable to allow an agent to submit an application, the relevant provision should make it quite clear that the agent is not the owner, and it is the owner of the land who should be treated as owner, and effectively as the developer with the obligation to comply with a planning approval and conditions of planning approval. It is absurd to suggest that the planner who made an application for planning approval, or the real estate agent or architect, should have the obligation to comply with a planning approval, and the conditions of planning approval.

## **26 Expansion of local government powers and discretion concerning advertising**

Expanding when and how local governments require advertising for a development application, including expanding a local government's discretion when advertising requirements are required or may otherwise be waived or varied; and introduction of multiple alternative methods of advertising.

### **Comment:**

The Society will support any initiative which would simplify or otherwise improve the procedures associated with the development approval process, but does not otherwise comment on this item.

## **27 Clarification regarding applications under local schemes deemed to be decisions approved under a region scheme in some circumstances**

Clarifying a current 'legal fiction' whereby local governments make development decisions under a local scheme without acknowledgment that such decisions are also a concurrent but distinct application under the relevant region scheme, where local governments act as delegates of the WAPC.

**Comment:**

- 27.1 CI 26 of the Metropolitan Region Scheme (MRS) presently performs that function.
- 27.2 The Society supports an initiative which will improve and clarify the function that cl 26 of the MRS presently performs. However there must be doubt as to whether a provision (deemed) in a LPS can amend the provisions of a region planning scheme which prevails over a LPS to the extent of the inconsistency.

**28 Clarification regarding the circumstances when approval may be subject to later details**

Clarifying, given planning principles require a decision to be final and certain, that a local government can only impose a condition subject to later details being agreed, in circumstances where these details would not substantially change the development approved.

**Comment:**

- 28.1 The Society supports an initiative which would give greater flexibility to the planning decision-making process.
- 28.2 Care must be taken however to avoid the creation of further uncertainty. There is likely to be uncertainty as to the question whether a change in any case is 'substantial', so as to ascertain whether or not the 'later details' would 'substantially change' the development approved.

**29 Removal of duplicate provisions concerning injurious affection**

Deleting most provisions concerning injurious affection, in light of detailed provisions now being enshrined in Part 11 of the P&D Act itself, together with clarification of local government powers when dealing with such land.

**Comment:**

The only provision which needs to remain in local planning schemes in relation to injurious affection is the provision setting the time limit for claims for compensation for injurious affection falling within s 174(1)(c) of the P&D Act. The provisions in the P&D Act for injurious affection are otherwise adequate.

**30 Clarification regarding repair orders for signs**

Clarifying that an order to repair a sign should be made to the owner and not the advertiser.

**Comment:**

If a landowner grants a lease or a licence to an advertiser allowing the advertiser to erect signage on the owner's land, the owner may have no control over the state of repair of the sign. For an order to go only to the landowner in those circumstances may not only be ineffective, but may be oppressive of the rights and interests of the landowner.

### 31 New standardised development application forms

Introducing new standardised forms, with clarifications distinguishing owners from applicants; and development for works from development for use, or development for both works and use.

#### **Comment:**

- 31.1 As it is the applicant who is given the right to apply to review a planning decision of which the applicant is aggrieved, it is preferable in most if not all cases that the applicant be the owner.
- 31.2 As a general principle, the practice of planners, architects, real estate agents or others who are not the owners of the land, the subject of the planning application, should not be encouraged or facilitated. Even if flexibility is allowed as to the person who lodges an application for planning approval, the most desirable course in most circumstances if not all, is for the owner to also be the person nominated in the application as the applicant. That course would simplify the terms of planning approvals, and in particular will simplify the form of conditions. In many cases, conditions of planning approval expressed as requiring the applicant to undertake some obligation will result in complications where the applicant is a planner or architect or the like.



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