McLEODS LOCAL GOVERNMENT FORUM 8.10.09

DEVELOPMENT ASSESSMENT PANELS IN WA

Developing Land - To Whose Advantage? - A Shift From Community Responsibility

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1 Introductory Observations

1.1 The establishment of Development Assessment Panels (**DAPs**) in WA, as described in the September 2009 Discussion Paper[1] will involve a radical philosophical change in the assessment of development applications in WA. The change is:

(a) **From** a system emphasising decisions by elected councillors responsible to the local community;

(b) **To** a system emphasising decisions by:

- technical specialists, who are:
- appointed by State Government, and are not responsible to the local community.

1.2 The change will be far more radical than what has occurred in either NSW or SA where DAPs have previously been established[2].

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[1] Implementing Development Assessment Panels in Western Australia. Discussion Paper; 11 September 2009. Government of WA, Department of Planning.

[2] 2006 in SA - Development (Panels) Amendment Act 2006; 2008 in NSW - Environmental Planning and Assessment Act 2008.

1.3 The change is palpably not justified by the four "issues" of justification set out in the Questions and Answers Paper[3]. I give arguments to demonstrate that in a later part of my paper. The motivation for the change is more likely:

(a) The fact that development industry bodies have been vocal in their criticism of the development approval process[4];

(b) The government has made commitments for change to the development industry; and

(c) Planners and other specialists serving the development industry are convinced they are better equipped to determine development applications then elected councillors.

1.4 Whether or not it is correct that specialists are better equipped to determine development applications than elected councillors, the Department of Planning has determined that specialists in WA will supplant councillors in the significant development approval processes. This paper deals predominantly with:

- The extent to which the existing planning approval system in WA is responsive to the community;
- The philosophical justification for a community responsive system of land use and development control;
- The sidelining of the community by the proposed DAP system;
- The extreme nature of the proposed DAP system in WA by comparison with other States;
- Inappropriate justification given for the DAP system;

[3] Development Assessment Panels: Questions and Answers; September 2009; Government of WA, Department of Planning.
[4] Discussion Paper, p.11.

- Potential problems in providing suitable specialists for the DAPs;

- The illusion of time saving in the proposed DAP system;

- Increasing burdens on the resources of local governments that would result from the proposed DAP system.

1.5 In order to understand the significance of the changes which will be brought about by the establishment of DAPs in WA, as proposed in the Discussion Paper, it is instructive to consider the origin and historical background of planning control in WA, and the progressive reduction in local government influence in planning decision-making in WA since the 1960s.

2 Origin of Planning Control in WA

2.1 Back in 1928, WA was the leader in Australian planning control legislation. We have been leaders in various areas of planning since then, and it is a pity there is a perception that we need to follow other States into DAPs without careful consideration as to whether the DAPs are really appropriate.

2.2 When the Town Planning and Development Act 1928 (**TP & D Act**) introduced planning control to WA, it provided in s.7 for local governments to prepare and amend planning schemes, and in s.6(1) gave a very wide prescription for the making of planning schemes –

> "... with respect to any land with the general object of improving and developing such land **to the best possible advantage** ... and of making suitable provision for the use of land for building or other purposes." (Emphasis added).

2.3 In providing in s.6 for schemes to be prepared with the general object of improving and developing land **to the best possible advantage**, whose advantage was intended

to be served? Was it intended that schemes would serve the advantage of property developers, or was it intended that schemes would serve the advantage of the community?

2.4 To gain a perspective on that question, it is appropriate to consider briefly the history of legislation leading to the introduction of the first town planning legislation in WA.

3 Historical Background to Planning Control in WA

3.1 WA's TP & D Act was based on the Housing, Town Planning, Etc Act 1909 of the UK[5]. The UK Act of 1909 introduced the notion of planning schemes made by local governments to provide for the convenience and amenity of land in the Scheme Area. That Act was the culmination of a stream of legislation in the UK aimed at improving the living conditions of the underprivileged classes[6].

3.2 The Housing, Town Planning, Etc Act 1909 of the UK was inspired by the New Towns Movement and Garden Cities Movement, and aimed to ensure that towns were planned in a way that was conducive to an acceptable level of local amenity. "Amenity" is the term used in planning to refer to those features of an area which the inhabitants identify as pleasant and desirable.

3.3 Looking at the origin and early development of planning law up to the time of the TP & D Act in WA in 1928, it is plain to see that the interest the planning legislation intended to protect was the public or community interest. Developers from the beginning of time have been in a position to look after their own interests. They did not need planning control laws to promote their interests; they had never wanted them; and the activities and published comments of developers make it clear that they would like to minimise planning controls or eliminate them, or bring them under development industry control to better serve their interests. I don't say that as a criticism of the development industry, simply an observation of the fact that their

[5] See Parliamentary Papers 1928, Vol 11, Report of Select Committee of the Assembly on the Town Planning and Development Bill - 30.10.28.

[6] Eg. Public Health Act 1848; Nuisance Removal and Disease Prevention Act 1848; Sanitary Act 1866; Artisans and Labourers Dwellings Act 1868; Public Health Act 1875; Artisans and Labourers Dwellings Improvement Act 1875 and 1879; Housing of the Working Classes Act 1890; Housing, Town Planning, Etc Act 1909.

interests are and always have been in tension with the community interest. The point I seek to emphasise is that it is because of that tension that development control laws have been established to ensure that there is an appropriate balance to protect the community interest.

3.4 For the time being, even in WA, the ideal for the development industry of the total elimination of planning control laws, and a return to a system of self regulation, is probably unachievable. But by consistent lobbying of governments, and strategic support for political parties, the development industry bodies are progressively bringing the planning control system in WA into a form which better suits their interests. One can understand them wanting to do that. The role of local government councils in the system, with their focus on community interest, represents a stumbling block.

3.5 The laws in WA which govern the activities of local government council members make it particularly difficult for developers to influence councils, other than by planning arguments. Councillors in WA tend not to work through political parties, and there is a very close scrutiny of their individual conduct which makes influence and patronage particularly difficult. State governments and State government politicians on the other hand, with the useful intervention of the political party system, are another matter altogether. Political parties can receive benefits, encouragement and persuasion from lobbyists without infecting individual politicians with significant conflict. The party can form policies in response, and party members, when they are in government, may make decisions that respond.

3.6 The existing planning system in WA involving the preparation and amending of local planning schemes, and the decision-making under local planning schemes, by elected local government councils, has the effect of ensuring that the public or community interest will be an uppermost concern to balance the ambitions, the financial strength, and the influence of developers, and will be a means of ensuring that the community interest will have at least that level of protection from damaging development excesses.

4 Absence of Third Party Appeals

4.1 I have never been an advocate of third party planning appeals in WA. However the absence of third party appeals in WA (unlike other States of Australia) removes a significant opportunity for community involvement in the development approval system. The absence of third party appeals in WA emphasises the greater need in this State for an effective level of community responsibility in the development approval process.

4.2 The protection of the community interest in the planning decision-making process in WA by elected local government councils has special significance in the absence in WA of third party appeals. In WA, neighbours or community groups aggrieved by a planning decision which they perceive will detrimentally affect their interests, are given no right of appeal or review under the planning legislation.

4.3 Understandably, local governments do not favour third party appeals, because appeals add significantly to the cost of planning administration. It is not intended in this paper to argue for third party appeals, but simply to demonstrate the greater need for community responsibility in WA. The absence of third party appeal or review rights in WA is very relevant to the establishment of a decision-making system that will transfer the control of development from community elected representatives (councillors) to specialists independent of the community who will form the majority on the proposed DAPs.

4.4 In WA therefore, if the protection of the community interest is diminished through amendments to the planning system which diminish the role of elected local government councils, then there is no recourse for aggrieved community members.

5 Progressive Reduction of Local Government Influence in Planning Decision-Making in WA

5.1 Between the coming into operation of the TP & D Act of 1928 and the coming into operation of the MRS in 1963, there were few significant changes in WA which affected the balance of influence in planning decision-making. However from 1963

onwards, it is possible to discern a distinct trend of reducing local government council influence. Note the following:

(1) 1963, the MRS came into operation as a dominant scheme, the provisions of which prevailed over any inconsistent provisions in a local planning scheme[7]. The MRPA (now WAPC) was introduced as a predominant planning decision-maker, even though local governments under delegated authority would from the beginning make the vast majority of decisions under the MRS, but subject to the State Planning Authority control through the power of delegation and other measures such as cl.32 resolutions.

(2) 1976, provision was made in the TP & D Act for Statements of Approved Planning Policy to be made by the then Town Planning Board (now WAPC which makes State planning policies) "... for any matter which may be the subject of a town planning scheme under [the TP & D Act] ...". From the beginning, local governments in preparing or amending a town planning scheme were required to have due regard to any approved Statement of Planning Policy.

(3) 1991 onwards, the establishment of Redevelopment Authorities, in whose Scheme Areas local planning schemes are revoked, made a further inroad into local government planning powers in the four or five local governments affected.

(4) 1995/96 - By an amendment first to s.7(2) of the TP & D Act in 1995, and then amendments to the Town Planning Regulations 1967 (**Regulations**) in 1996, local governments lost their previous control in the processes of making and amending planning schemes after the passing of a resolution to prepare the scheme or amendment. This change was made as an accidental consequence of the insertion of a provision in s.7 of the TP & D Act to give statutory recognition of the requirement of public consultation. It was a significant

[7] See the comments of Burt CJ in ***University of WA v. City of Subiaco*** (1980) 52 LGRA at p.??.

change made by the Planning Minister without consultation with local government or the community.

(5) 1999 - Reg.11 of the Regulations obliges local governments to adopt the Model Scheme Text which has been set out in Appendix B of the Regulations. By that simple measure local government lost the opportunity to design schemes to suit the special requirements of their individual districts.

(6) 2002 - Performance Criteria were introduced into the Residential Design Codes which effectively removed development standards for practically every decision in residential development, so that the body responsible for determining applications for planning approval will not be bound by standards attuned to community expectations.

(7) 2009 - Proposal for the introduction of DAPs having a majority of State government appointed members who will decide the majority of significant planning applications under local planning schemes and the MRS.

5.2 Whether or not the progressive reduction of local government influence in planning decision-making in WA was deliberate, and whether or not it was a deliberate attempt to sideline the community, it is apparent that local government responsibility in the process has been progressively reduced since 1963, and the community has indirectly been progressively sidelined.

6 Local Government Protection of the Community Interest

6.1 Whatever else might be said about local government involvement in the planning control process, it is plain to see that local government involvement produced a system that is rooted in community representation. Councillors are elected, and significantly after important planning decisions, will need to consider their re-election by the local community. They are bound by the LG Act to represent the interests of electors, ratepayers and residents of their respective local government districts[8]. They

[8] See Local Government Act 1995, s.2.10(a).

regularly undertake the delicate task of balancing the quasi judicial decision-making duties with their general duty of community representation. Although that difficult balancing task often draws criticism from those impatient of councillor orientation to community responsibility, it creates a tension which gives a significant flavour of community interest to council assessment of development applications, and it is that flavour the Department of Planning has rejected in favour of independent specialist decision-making.

6.2 Local planning schemes all emphasise the need for councils when making decisions on planning applications, to have regard for:

- The interests of orderly and proper planning; and
- The preservation of the amenity of the locality.

Those are consistent and common threads in all local planning schemes, and they are clearly focused on the community interest.

6.3 In an earlier era when the focus in planning control was still on community interest, even the MRS in 1963 stipulated only the following for the responsible authority (in most cases local governments) to have regard to:

- The purpose for which the land is zoned or reserved under the MRS;
- The orderly and proper planning of the locality;
- The preservation of the amenities of the locality.[9]

Of course other matters would generally be considered, but it is instructive to note that community interests were given foremost significance in the written laws of the time.

[9] See MRS cl.30(1).

7 The Source of Expert Representation on Planning Assessment Panels

7.1 The Discussion Paper proposes that local planning schemes will no longer provide uniformly for the local government to be the responsible authority for implementing the scheme[10]. The overriding of local government responsibility will apply to all local planning schemes for development of a class described in the proposed new regulations[11]. Although DAPs will consist of a mix of independent specialists and elected representatives, there will be only two elected representatives, and three "independent" State government appointed specialists on each Panel. Each of the five members of each Panel will be appointed by the Minister for a term of two years with an option for the Minister to extend the appointment for an additional year. Member appointment to the Panel will not exceed three years. The Chairperson will always be an independent member with considerable knowledge of the WA planning and development assessment framework. The Minister will appoint a Deputy Chair from the remaining two specialist members to undertake the role of Presiding Member when the Chair is unavailable[12].

7.2 The range of expertise required of the specialist members may include (but not be limited to) planning, architecture, urban design, engineering, landscape design, environment, law, property development or management. Specialist members will be appointed from a register of appropriately qualified and experienced individuals.[13] The register of specialists will be created and maintained by the Minister following a call for expressions of interest published in local newspapers and appropriate websites.

7.3 There are a number of comments that can be made about the selection of expert panel members including the following:

(1) Since the specialists are supposed to be "independent", the Panel is unlikely to include specialists currently employed by local governments.

[10] Implementing Development Assessment Panels in WA - p.11.
[11] The proposed Planning and Development (Development Assessment Panels) Regulations 2010.
[12] Discussion Paper p.17.
[13] Discussion Paper p.17.

(2) Since the Panels will be called upon to make decisions under region planning schemes, it would seem inappropriate for the "independent" specialists to include specialists currently employed by State government.

(3) Retirees from local government or State government service may provide some members, but long-term retirees may lack current relevant experience, and recent retirees may be intent on implementing their retirement plans.

(4) The likelihood is that the majority of specialist panellists will be engaged in, or recently retired from, private consultancies, and as such will have been predominantly occupied in serving the development industry.

(5) Persons with specialist expertise in the development industry gain their living from land development, and so can be expected to have underlying prejudice in favour of development being promoted, if necessary against the community interest.

(6) Independent specialists tend to see the community in the locality of a proposed development as the traditional opposition, and tend to mistake their lack of planning jargon as a lack of good reasons to oppose developer's legitimate expectations. It is a common experience in SAT reviews to find that specialist consultants value their "objective" assessment of amenity, and correspondingly devalue the "subjective" views of the local community.

(7) There is already in WA a chronic shortage of experienced planners. The assembling of a pool of suitably qualified specialists, sufficient to provide on an ongoing basis the 45 specialists required for the 15 proposed Panels, will necessarily include a majority of planners. Finding that many competent and reliable planners, who are not open to conflict objections, will be interestingly difficult. There is a risk that the stretched resources of the local government sector will be further attenuated, and a risk that the quality of decision-making by DAPs may not be as good as the DAP proponents suppose.

8 Conflicts of Interest

8.1 There will be interesting conflict of interest issues for the specialist panellists. A specialist who is currently in practice would presumably be conflicted out from sitting on a Panel dealing with an application by his current firm. Similar concerns may apply to a specialist dealing with an application made on behalf of a current or former client. There are likely to be other sources of conflict.

8.2 Conflict of interest problems of that kind seldom arise where planning assessment is carried out by a council, or by a local government employed specialist under delegation.

8.3 If specialists on Panels are not astute about disclosing potential or perceived conflicts of interest, they can be quite sure that whenever they are involved in a decision which runs contrary to the local community interest, local community members and perhaps the members of the relevant council, will be very quick to draw attention to facts which suggest a conflict.

8.4 It should not be assumed that the proposed DAPs will function with the same high level of detachment and lack of controversy which characterises the SAT. If it is contemplated that specialist panellists will be practising or recently practising experts serving the development industry, it should be expected that their participation in the assessment of a proposal in which an existing or former client is involved, will attract controversy. Presumably also the independent specialists will be subject to CCC inquiry, and it will be interesting to see how currently practising "independent" specialists survive that level of scrutiny.

9 Public Interest as a Justification for DAPs

9.1 The Department of Planning has not sought to refer to general public interest, or community interest, to justify the introduction of DAPs.

9.2 The proposed significant change in the development approval system is not apparently generated by general public interest.

10 The Inappropriate Justification Given for the DAP System

10.1 The four primary issues which are said to justify the establishment of DAPs in WA are listed at p.2 of the Questions and Answers Paper as follows:

(a) Transparency of decision-making;

(b) Local government resources and technical issues raised by applications;

(c) Appropriate balance between local representation and professional advice in decision-making;

(d) Dual approvals.

None of those justifications stands up to scrutiny.

10.2 Transparency of decision-making

It is suggested that local government delegation arrangements are not readily available for scrutiny. However s.5.46 of the LG Act requires a register to be kept of delegations under the LG Act, and local governments commonly record all delegations including planning delegations, in their registers. The present proposal is for regulations to deal with transparency issues for DAPs, but if transparency was a real concern, provisions could be made by regulations or in the Model Scheme Text ensuring a high level of transparency in local government decision-making. All local government decisions presently are published in minutes and it is only occasionally that the minutes of council deliberations are treated confidentially.

10.3 Local government resources and technical issues raised by applications

The present proposal still requires at least the same level of assessment and reporting by local government officers as the existing system. In fact the burden on local government Administrations is likely to be greater as there will be two levels of

reporting in DAP cases: reporting to the DAP, and reporting to the council, as the council must necessarily retain an interest in DAP assessments not only by reason of their community responsibility, but also because the local government has responsibility to service the DAP, to carry its approvals and conditions into effect, to enforce conditions, and to defend refusals on review at SAT. I dare to say that the DAP system will increase rather than decrease the burdens on local government resources. The obligation to pay at least the specialist panellists will certainly increase the burden on financial resources.

10.4 Appropriate balance between local representation and professional advice in decision-making

The explanation given for this issue is incomprehensible. If it is considered desirable that there be a balance between local representation and professional advice in decision-making, it seems to me that the present council decision-making system provides a better fit on that issue than the DAPs with their majority "independent" membership where there is a risk that community interests will be subordinated to technical considerations, and the possibility that technical specialists on the DAPs will be less respectful of the expert reports and recommendations they receive than council members who are unencumbered by any sense of their own expertise.

10.5 Dual approvals

This is the most commonly touted justification for DAPs, and yet it has the least substance. Taking the metropolitan region as an example, by the operation of cl.26 of the MRS which deems a local government approval under its scheme to be approval for the purpose of MRS, together with the comprehensive delegations of decision-making power by the WAPC to local governments, virtually the only development applications which require WAPC determination are those involving land reserved under the MRS, land within or abutting the Swan River Trust's control area, land

affected by an MRS cl.32 resolution, or land within a planning control area. On the proper law on that subject, only the WAPC approval is required.[14]

There is no problem of dual approvals if the law is applied properly. The supposed requirement of dual approvals is not a justification for the DAPs in WA.

10.6 Time Saving

Saving of time on development assessment is an additional reason given for establishing DAPs. It certainly does not stand up to scrutiny. Many assessments that will go to DAPs are presently carried out by officers under delegated authority. DAP assessment must be much slower than that. But even with applications that go to councils, there is seldom delay in the council assessment process that would be avoidable under the DAP system. There is a strong possibility the DAP process in many cases will involve greater delays than at present, at least with the majority of local governments.

11 Indifferent Record of Panels in Other States

11.1 South Australia

It should be understood that the DAP system in South Australia is significantly less extreme than that proposed for WA. In SA, local governments are required to delegate development approval powers in certain matters to a council officer, a council DAP, or a regional DAP. The council DAPs are appointed by and responsible to the local government, as is the council officer who receives a delegation. The contrast between the SA system to that proposed for WA is stark in the extent to which councillors and the community in WA are sidelined. Notwithstanding that, there has been criticism of the SA system for DAPs including the Paul Leadbeter

[14] See the explanation by Burt CJ in ***University of WA v. City of Subiaco*** (1982) 52 LGRA 360 at 365, and the decision of the WATPAT in ***City and Suburban Properties Pty Ltd v. City of Stirling*** (T/A 37/98 Unreported; dec. 14/8/98).

paper "Development Assessment and Decision-Making in South Australia - Recent Curtailment of the Role of Local Councils"[15].

11.2 New South Wales

The NSW DAP system requires comparatively few matters to be referred to DAPs, with a very high value threshold in most cases of $50M. Nevertheless, the NSW system has attracted criticism including the article by Robert Ghanem - "Amendments to the New South Wales Planning System - Sidelining the Community"[16]. Note the following criticism at p.144:

> "... In particular, the panels are likely to treat development assessment as simply the application of technical expertise. Moreover, experts in planning, architecture and related fields may display an unconscious bias towards development because their jobs usually involve determining *how* a development should proceed, not whether it should proceed at all ... This contrasts with local councils who, while not perfect, are experienced in making difficult decisions that balance the various economic, environmental and social considerations relevant to their local areas. In short, development assessment is not simply an application of planning or engineering principles, but a value-laden decision that must be informed by local expertise. There is a danger therefore that a system focused on panels, rather than local councils, will lead to poorer decisions **and will sideline the community**." (Emphasis added).

11.3 Victoria

The Victorian proposals for a DAP system came under serious scrutiny in the Upper House of Parliament and have been held up there for some time. The DAP proposals for Victoria are less extreme in their community responsibility impact than the proposals for WA. There may be a question as to whether the Upper House in WA will be prepared to give the same scrutiny to the proposals flagged in the Discussion

[15] (2007) 12 LGLJ 155.
[16] (2008) 14 LGLJ 140.

Paper. The opportunities for Parliamentary intervention may be limited if the changes are introduced by regulation.

11.4 Will the Upper House in WA do as was done by the Upper House in Victoria, and block the introduction of the DAP laws, or at least delay their introduction until they have received more mature consideration.

12 Sidelining of the Community by the DAP System

12.1 The commentators on the SA system for DAPs and the NSW system for DAPs have noted the sidelining of community interests resulting from those systems. The impact of DAPs in WA as proposed is likely to have a greater effect on community responsibility than has occurred in other States.

12.2 It is possible that the benefits which the DAP system would produce will outweigh the losses in terms of community responsibility, thought I can't see that at present. However it cannot be denied that the DAP system proposed for WA is from the point of view of principle at least, far less focused on community responsibility than the present system where councils have the primary role in planning decision-making.

12.3 Such a radical change in the balance of community responsibility ought not to have been made without extensive community consultation. The changes are not, and have not been claimed to be responses to community pressure, or the public interest. The changes appear to be primarily serving different interests.

12.4 This ill-thought out and unjustified proposal ought to be taken off the table.

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