

Our Ref: 853/5/21/4
 Your Ref: LP.LEG.1 / LT1150602
 Enquiries: Mark Jendrzejczak (9892 7306)



22 November 2011

City of Albany Records
 Doc No. ICR1255595
 File: LP.LEG.1
 Date: 03 JAN 2012
 Officer: EDPDS

Chief Executive Officer
 City of Albany
 PO Box 484
 ALBANY WA 6331

Attach:
 Box
 Vol
 Box+Vol

Dear Madam

LOCAL PLANNING SCHEME No 1

I refer to your letter of 21 September 2000 and advise that the Minister for Planning has given consent for the above scheme to be advertised for public inspection subject to the following modification being effected prior to advertising:

1. Modification of Clause 10.10 'Appeals' by deleting reference to 'Any person' and replacing with 'An applicant'.

In accordance with the provisions of regulation 14(4) of the *Town Planning Regulations, 1967 (as amended)*, Council is required to return the modified documents to the Commission within 42 days, or any longer period approved by the Minister, of being notified of the modifications, if Council resolves to proceed with the scheme.

Upon return of the scheme documents to the Commission, modified in accordance with the above requirements, the scheme will be advertised for a period of not less than three months.

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When returning the documents to the Commission, please forward them directly to our Albany Regional Office. This will alleviate any delays in the processing of the scheme.

Yours faithfully



Neil Thomson
Acting Secretary
Western Australian Planning Commission

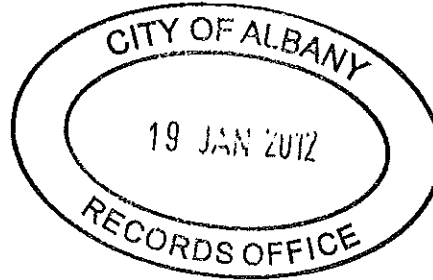


City of Albany Records
Doc No: ICR1256853
File: LP.LEG.1
Date: 19 JAN 2012
Officer: EDPDS

Our Ref: 853/5/21/4P
Your Ref: LP.LEG.1/LT1254136
Enquiries: Stephen Petersen

Attach:
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Chief Executive Officer
City of Albany
PO Box 484
ALBANY WA 6331



Attention: Graeme Bride

Dear Sir/Madam

MINISTER'S APPROVAL TO ADVERTISE CITY OF ALBANY DRAFT LOCAL PLANNING SCHEME No. 1

I refer to your letter of 5 January 2012 regarding the above.

As you are aware the Western Australian Planning Commission's previous advice on this matter was wrongly dated 22 November 2011, effectively preceding the Minister's consideration on this matter which occurred in December 2011.

Therefore please accept the City's receipt of this letter as the date from which the City has 42 days to comply with the procedural matters identified in my previous correspondence. This period of time will effectively allow Council's consideration of this matter as indicated by you at their meeting of 21 February 2011, with sufficient time following that meeting to provide subsequent advice to the Commission.

Please contact the Department of Planning's Regional Manager, Mr Stephen Petersen (9892 7300) should you have any queries in this regard.

Yours faithfully

Neil Thomson
Secretary
Western Australian Planning Commission

17 January 2012



PREVIOUSLY
SENT EMAIL



Our Ref DFN:ALBA-29694
Your Ref

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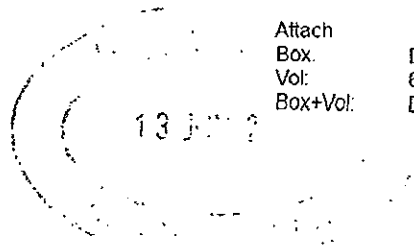
7 June 2011

Mr Graeme Bride
Executive Director
Planning and Development Services
City of Albany
PO Box 484
ALBANY WA 6331



City of Albany Records
Doc No: ICR1138479
File: LS.ADC.1
Date: 13 JUN 2011
Officer: EOPDS

Attach
Box: D3
Vol: 6
Box+Vol: D3*6



Dear Mr Bride

Third Party Appeals

We refer to your e-mail correspondence dated 18 May 2011 to Craig Slarke of this office.

You have requested our advice in relation to the retention of third party appeal rights in the draft local planning scheme that shortly will be considered by Council.

We understand that Council has previously on a number of occasions expressed its view that third party appeal rights should be retained in the new scheme. Nonetheless, the City is aware that the Department of Planning and the WAPC are unlikely to support the retention of such rights.

In light of this, you have requested that we prepare a summary of reasons that support the retention of third party appeal rights in the City's new planning scheme. In the summary set out below we have addressed a number of important benefits associated with third party appeal rights and also provided a brief critique of some of the most common arguments against third party appeal rights.

1. Justification for third party appeal rights

1.1 Improved public participation in decision making

Where a local planning scheme permits third party appeal rights to be exercised, members of the public may participate more directly in the planning decision making process. This permits the community to play a more meaningful role in the decision-making process than would otherwise be permitted where participation is limited to consultation. In this way, third-party appeals allow multiple views to be advanced concerning what constitutes good planning in any particular situation.

1.2 Better decision making

By facilitating improved public participation and the expression of a more diverse range of views in a planning context, third party appeal rights are likely to improve the quality of planning decisions by ensuring that those decisions are informed by the views of a wider range of stakeholders than would otherwise be the case.

As academic Stephen Willey writes:

*"Local planning officers may be well versed in the language of policy but, put simply, they usually do not live in the street and do not often enjoy the same intimate local knowledge that some residents might. Third-party appeals recognise the fact that parties other than the Council and the developer have an interest in, and can make a contribution towards, reaching the preferred land use outcome. Third-party appeals provide a means by which the planning system can more readily access local knowledge or, put differently, by which local knowledge can access the planning system."*¹

The value of third party appeals to the quality of planning decisions in Victoria was recognised by Justice Stuart Morris, the President of the Victorian Civil and Administrative Tribunal, who observed:

*"... third-party rights often lead to better planning decisions. It is true that it is comparatively rare for an objector to completely succeed in overturning a decision of the Council in favour of development. But in more than half the matters brought before the tribunal objectors are at least partly successful, in the sense that the form of the development is changed or additional conditions are imposed. Third-party appeals enable development proposals to be evaluated in more detail and, although this comes at a cost, the most common outcome is a refinement of the development."*²

1.3 Good governance

By increasing public participation in and the scrutiny of planning decision making, third party appeal rights contribute to greater transparency in decision-making and facilitate good governance within local planning authorities. The existence of a third party right of appeal to an independent tribunal also provides an important disincentive to the potential for collusive behaviour between developers and local government.

In this respect, the limited scope of third party appeal rights in New South Wales has been identified as a contributing factor to the incidence of corruption in the context of land use development. In a discussion paper entitled *Taking the Devil Out of Development: Recommendations for Statutory Reform*, the New South Wales Independent Commission

¹ Stephen Willey, "Planning Appeals: Are Third Party Rights Legitimate? The Case Study of Victoria, Australia", *Urban Policy and Research*, Vol. 24, No. 3, September 2006, p369-389

² Justice Stuart Morris, *Third Party Participation in the Planning Permit Process*, a paper presented at a conference on "Environmental Sustainability, the Community and Legal Advocacy" conducted by Victoria University, Melbourne on 4 March 2005.

Against Corruption identified the fact that third parties generally cannot challenge decisions of councils in relation to development proposals as a factor which makes the New South Wales system highly susceptible to corrupt practice.³

1.4 Legitimacy of third party interests

Many forms of development may have significant impacts beyond the development site itself, whether those impacts are visual, environmental, social or economic in nature. It follows that the applicant is far from the only stakeholder in the development approval process. Members of the surrounding community also have a legitimate interest in the planning decision making process, particularly where a proposed development will directly affect the environment in which they live.

If this is the case, then why should the planning appeal process only be open to applicants? As academic Stuart Willey writes:

"... the debate surrounding third party rights asks fundamental questions of the overarching role of planning appeals. Are they just about protecting property rights and preventing anti-development councils from frustrating developers or do planning appeals exist to serve other legitimate functions such as, for example, protecting the character of local areas and moreover, the natural environment? If one accepts that the function of planning appeals is not confined to protecting a dogmatic property rights regime, then the argument that participants other than developers need to be able to access the appeal system starts to hold more weight."

1.5 Experience of the City of Albany with third party appeals

Besides the general justifications for third party appeal rights outlined above, we consider it would be of assistance if the City were to refer to its own experience with third party appeal rights under its existing planning scheme and provide some examples of the benefits that have resulted from the availability and use of such rights. Examples might include applications where third-party appeals resulted in the variation of a development application in a manner that mitigated or prevented certain adverse impacts arising from the development.

³ Morris, *Ibid*, p7

2. Arguments against third party appeal rights

2.1 Whether third party appeals "open the floodgates"

It is sometimes argued that the introduction of third party appeal rights would "open the floodgates" to an unmanageable number of planning appeals, many of which might be lacking in merit or vexatious. If this was not the experience of the City under its previous planning scheme, it would be of assistance to make this point in the City's submission to the Department of Planning and to perhaps include relevant statistics on the number of third-party appeals undertaken under the previous scheme.

Once again the empirical evidence does not indicate that this fear has been realised in practice, in states where third party rights of appeal are available. Following a review of third-party appeals undertaken in South Australia and Victoria Judge Christine Trenorden concluded:

*"... the evidence shows that the right to appeal on the part of third parties has not opened the floodgates. The prospect of an appeal will not deter investment in quality projects; namely those that accord with planning policy for the area and have been designed to have minimal impact on neighbours and the surrounding community."*⁴

2.2 Delays and cost

It is recognised that the exercise of third party appeal rights may result in some delays and costs being incurred by developers. However, the delays and costs that may be incurred from third-party appeals are likely to be minimised by the informal, no-costs jurisdiction in which those appeals will be heard: namely, the State Administrative Tribunal, which resolves a large percentage of appeals brought before it through mediation.

Moreover, the costs associated with third-party appeals, such as they are, must be weighed against the significant, community benefits, which have been discussed above. The interests of the applicant should not necessarily be elevated above fundamental values such as community participation, improved quality of planning decision making, transparency in governance and the interests of other stakeholders in the community affected by the development.

2.3 Abuse of third party rights

It is sometimes also argued that the availability of third-party rights is prone to abuse by "meddlers" who may initiate appeals to frustrate a proposed development, even where there is no apparent public interest or legitimate planning question to be addressed.

However, the experience with third-party appeals to date does not bear this out. In Victoria, the Civil and Administrative Tribunal upholds approximately 60 percent of third-party appeals

⁴ Judge Christine Trenorden, "Third-Party Appeal Rights: Past and Future", a paper presented at the Town Planning Law – Past, Present and Future Conference to mark 80 years of town planning law in Western Australia, 18 November 2009, at p12

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either outright or in part, which indicates the majority of appeals had sufficient planning merit to obtain at least some alterations to the proposed development.

Moreover, the State Administrative Tribunal has the legislative power (under section 47 of the *State Administrative Tribunal Act 2004*) to strike out any proceeding that it believes to be:

- (a) frivolous, vexatious, misconceived or lacking in substance;
- (b) being used for an improper purpose; or
- (c) otherwise an abuse of process.

Accordingly, there is an existing legislative mechanism to protect against the abuse of third-party appeal rights.

The City may also be able to provide some information to the Department of Planning in relation to the number and nature of third-party appeals that have been undertaken under its existing planning scheme, and whether its experience with third-party appeal rights does anything to dispel some of the concerns in relation to such rights as outlined above. Presumably, if Council is minded to retain third party appeal rights, then the experience of the City has been on the whole a positive one.

We trust this advice satisfies your requirements. Please contact David Nicholson of this office if you have any queries in respect of this matter.

Yours faithfully



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Email: dnicholson@mcleods.com.au
Partner responsible: Craig Starke (9424 6215)