

23 March 2023

**Reform Delivery Team
Western Australian Department of Planning, Lands and Heritage
140 William Street
Perth WA 6001
Via email to planningreform@dplh.wa.gov.au**

To whom it may concern,

**RE: USE AND APPLICATION OF DISCRETION ON DEVELOPMENT APPLICATIONS –
CONSULTATION**

The Australian Institute of Architects the (Institute) is the peak body for the architecture profession in Australia. It is an independent, national member organisation representing over 13,300 members across Australia and overseas. Almost 1,200 of our members are based in Western Australia and are supported by and professionally participate in our Western Australia Chapter.

The Institute notes that this consultation is about proposed changes to the Planning and Development (Local Planning Schemes) Regulations 2015 and improved guidance to provide greater consistency for general discretionary clauses across all Local Planning Schemes, and more clear and consistent guidance for the use and application of discretion.

The Institute supports the government's Action Plan for Planning Reform and understands that the proposed changes align to the following initiatives of the action plan:

- Local Planning Schemes are more consistent (C1).
- Development assessment processes are streamlined, and outcome focused (C7).
- Clear and concise guidance is readily available (B5).

We have corresponded with Cassandra Barrow, Stakeholder Engagement Coordinator at the Department of Planning, Lands and Heritage to discuss our preference to provide this submission via this letter as we wished to include responses which did not fit well into the feedback form fields.

As per the advice received in our correspondence, our response below follows the broad format of the template with respect to the substantive matters of the proposed regulatory changes (Part A) and the principles set out in the draft guidelines (Part B). Our responses are provided for each of the proposals and principles stating our overall position of support then providing further commentary for each.

We have also answered selected ancillary questions regarding further inclusions or feedback as well as the Part C question.

PART A – PROPOSED REGULATORY CHANGES

Proposal No. 1 – Explore ways to provide greater clarity of the meaning of ‘due regard’.

This could involve the inclusion of a definition in the LPS Regulations which aligns to the established case law position (see *City of South Perth v ALH Group Property Holdings Pty Ltd* [2016] WASC 141 at [46]).)

The Institute supports this proposal. “Due regard” should be an explained term in the same way as ‘duty of care’, “reasonable person” or “informed consent” have explanations that give rise to a commonly understood meaning.

We suggest that this explanation includes that “due regard” does not mean that each matter taken into consideration has to be applied to the decision, but it has to have been considered. This is consistent with the rationale in Appendix 1 which includes, “It would not be appropriate to mandate what weight ought to be given to each relevant consideration...”

Due regard should include demonstrated respect for the views of relevant affected parties and the implications for them.

For practical purposes an explanation could also define what “due regard” does not include.

Once a definition is defined or clarified, it will be important to provide guidance material and sector education sessions to effectively address the current broad range of interpretations and understandings.

Proposal No. 2 – Provide a clear statement for when discretion can be or ought to be applied.

This could be based on the ‘clear and cogent’ test reference (see *Marshall v Metropolitan Redevelopment Authority* [2015] WASC 226 at [182]) and could be inserted into the preamble of a provision like clause 67(2) within Schedule 2.

The Institute supports this proposal. A statement could be accompanied by a flow chart, and some examples to aid clarity and understanding for the general public and the design/development community with clarity. One example is *Figure 1 - ‘Development approval decision tree’ (DPLH 2021, 53)* shown in the Recommendations Report¹ where further information and breakdown of the flow map should be developed from the second last box (“*Should the proposed development be approved?*”). Another example is the flow map which appears towards the top of Development WA’s *Development Approval Process* webpage².

¹ Page number not provided, but corresponds with p 40 on a pdf reader.

² <https://developmentwa.com.au/planning-and-approvals/development-application-process>

Proposal No. 3 – Consolidate fragmented references to variations (to development standards) and relevant considerations throughout the Regulations, to ensure they are consistent across local planning frameworks.

This could include relocating clause 34 within Schedule 1 to clause 67 within Schedule 2, in some capacity. This would also ensure that all Local Planning Schemes reflect the need to give regard to the same set of relevant considerations, noting of course that not every consideration will be relevant in every circumstance

The Institute supports this proposal.

The explanation provided in the Appendix 1 consultation document for this proposal is that stakeholder engagement revealed that clause 67(1) and (2) of the Deemed Provisions³ are most commonly referred to in informing discretion.

We understand that by relocating clause 34 from Schedule 1 (Model Provisions) to Schedule 2 (Deemed Provisions) this would then make the provisions of Clause 34 provisions mandatory,

Appendix A of the consultation material explains that moving Clause 34 from Schedule 1 to Schedule 2 would then ensure that all Local Planning Schemes reflect the need to give regard to the same set of considerations that are relevant to the given circumstance.

This appears to make sense as Schedule 1 Clause 34 provisions are dependent on Schedule 2 Clause 67 provisions, noting that under Schedule 1 subclause 34(5):

The local government may only approve an application for development approval under this clause if the local government is

satisfied that –

(a) approval of the proposed development would be appropriate

having regard to the matters that the local government is to

have regard to in considering an application for development

approval as set out in clause 67(2) of the deemed provisions;

and...

However it is important to note that Schedule 1 Clause 34 also references itself to Schedule 1 Clauses 32 and 33 regarding additional site and development requirements. Clause 34 as the succeeding clause then principally deals with matters relating to those additional site and development requirements set out in Clauses 32 and 33.

If Clause 34 is relocated to Schedule 2 it would be important for Clauses 32 and 33 to be amended to ensure that they reference Schedule 2 Clause 67 and are properly read down or interpreted with regard to the matters currently set out in Clause 34. Similarly, the relocated Clause 34 provisions would still need to retain subclause 34(1) which set

³ Planning and Development (Local Planning Schemes) Regulations 2015

out the meaning of “additional site and development requirements” as per Clauses 32 and 33. In Schedule 1.

Proposal No. 4 – Provide for the localised limitation of discretionary powers in specific scenarios or locations through the inclusion of appendices/schedules in the Model Provisions.

This intention is to provide a clear and consistent mechanism for local authorities to create specific exclusions or limits to the exercise of discretion in localised, strategic areas or circumstances to respond to site specific or issue based planning. It is not intended that this mechanism would remove discretion from frameworks entirely. As with any site specific or issue based planning issue, limitations must be informed by a proper evidence based planning process with supporting justification and rationale.

The Institute supports this proposal. The limitation itself will require definition or a set of terms.

We note that excluded from the scope of the project is,

“The provision of any universal numerical limit to discretion. Any limits on discretion should be devised through a detailed, evidence based planning exercise at a local level”.

The limits of discretion need to be clearly defined and expressed to ensure consistency and transparency and gain confidence of the community and the development sector.

As an example, approval for a 25 storey building, where a local planning framework notes a 6 storey limit, does not instil confidence in the planning framework from the community or surety from the development sector. Classifying certain strategic precincts targeted for increased density, particularly where local planning frameworks have not been updated to reflect this, can only be successful with local authority engagement and buy-in.

Engagement will be key in ensuring this is successful.

The Institute offers to provide support in assisting the Department of Lands Planning and Heritage to define these exclusion or limits through future engagement, research and/or stakeholder opportunities.

Proposal No. 5 – Review prescribed forms for decision making and create a universal set to be relied upon by all forms of planning decision makers for improved transparency.

The intention of revision of the current prescribed forms would be to provide greater direction on how best to communicate decision making processes both at determination meetings and in written decisions. This would include direction on explaining what variations to the standards were granted and why.

The Institute supports this proposal. It will also be helpful in future audits undertaken by the DPLH and the Department of Local Government, Sport and Cultural Industries (DLGSC) monitors under the Local Government Act reforms. This will improve legibility and consistency across all jurisdictions, in particular smaller councils with limited resources.

PART B – DRAFT GUIDANCE – Guiding Principles for the Exercise of Discretion

Principle No. 1 – There should be a properly constructed planning framework

The Institute supports this principal. The principal is fundamental to a working planning system and Institute members consider that, overall, there is a coherent framework in Western Australia.

However, there is a need to ensure that there is consistency of decision making and considered assignment of weighting. There is varying due regard for local planning policies to the extent that at times they may appear to be applied more as guidelines rather than providing specified settings to appraise development applications and make decisions.

Notwithstanding this, Western Australia benefits from its system of Development Assessment Panels to escalate decision making.

Principle No. 2 – Look for guidance within the framework

The Institute supports this principle. The principle's successful implementation is subject to guidance being available in the framework. Over the last 10-15 years, the state government has removed prescribed requirements and planning settings have moved into local structure plans.

When the desired outcomes for parameters such as height, setback and plot area are not well defined in local structure plans it can be more difficult to make decisions.

However, an advantage resulting from the lack of hard settings is a flexibility that can lead to design outcomes that meet or exceed the overall intent.

Providing flexibility also leaves planning decision makers with a means to achieve more desired outcomes by incentivising settings – for example, returning some of the plot area to the public realm but permitting greater uplift.

The process of discretion in decision making is one around the interpretation of which parameter(s) lead to the greatest benefit. The Institute notes that more recent State Planning Policies are focussed on performance based outcomes.

At the same time that guidance in the framework should deliver sufficient performance based reference points and define minimum baseline outcomes for individual parameters so that negative impacts of development are prevented or minimised.

Community abreactions to negative impacts of development are often about the way a development detracts from neighbourliness. Key matters of height, overshadowing,

building mass and setbacks as well as impacts on local traffic and parking are often points of tension for local communities.

Good outcomes should be actively pursued (e.g. opportunities to create appropriate density around transport hubs and activity precincts).

It is also important that structure plans are progressive over time and are based on tested assumptions about variables such as population. The risk otherwise, as evident from Western Australia's last boom, is an episodic over-development leading to vacant premises, and not achieving the desired level of social and economic vibrancy as an outcome of good planning.

Principle No. 3 – There must be clear and logical (cogent) reasons to depart from the standard

The Institute supports this principle. Not only must there be clear and logical reasons, but the reasoning should be transparent and concise. When departing from the standard, reasons should include what is to be achieved in doing so - with reference to better achieving performance based standard(s).

The Appendix B draft guidelines notes that where a development application proposes to depart from a baseline control or standard within the planning framework, the decision maker must first ascertain what it is that the control is trying to achieve and then if there are clear and logical reasons to vary that standard. Proposed reasons are put forward.

Our comments on three of the selected reasons put forward under Principle 3 in the draft Guidelines are as follows:

- *The standard no longer aligns with the strategic vision for the site / area as expressed in higher order documents.*

If the standard no longer aligns, then it makes good sense to review that standard through a process of local engagement and collaboration so that desired outcomes, capable of being applied locally are achieved in relation to the vision of higher order documents. Of note is that one of the two referenced cases in the discussion paper, Marshall -v- Metropolitan Redevelopment Authority [2015]⁴ WASC 226 also highlights that,

The objectives are expressed at a very high level of generality and their content is best described as aspirational in nature. As I have already observed, it is not at all apparent that any of the objectives in reg 14 are capable of application in relation to the proposed Development⁵

“Reg 14” in the referred to in the decision were the six objectives for the Central Perth Redevelopment Area (and others within the MRA's responsibility) referred to in s 66(1) of the MRA Act and which are set out in reg 14 of the MRA Regulations.

⁴Supreme Court of Western Australia

⁵ See 150 in the decision.

- *Previous decisions on other properties in the same locality and planning context have been granted the same or similar discretion.*

This reason is highly dependent on the assumption that the previous decisions were the most appropriate decisions and resulted in desired outcomes.

- *There is a net 'greater good' that can be achieved through this departure. The greater good may apply to the development itself (e.g. where parking standards are varied to facilitate tree retention where the value of retention of the trees is greater than any potential resultant off-site parking issues), or on a broader level where asocial, environmental or economic benefit will occur as a direct result of the discretion being exercised. Note the 'greater good' rationale is not to be confused with the principle of 'community benefit', which should only be used to justify a variation when it is specifically contemplated and defined in the planning framework.*

Despite the note about 'community benefit' not equating to the greater good, it is preferable in the longer term that engagement/collaboration across jurisdictions enables "greater good" and "community benefit" to be well aligned.

Language needs to be considered carefully in communicating decisions and their reasons. Terms such as "deviated from the standard" might have connotations for some stakeholders that the development application is somehow doing the wrong thing or the rules are being bent or gamed. More neutral terms such as "varies" or "differs" could be preferable.

It is useful to the public if the reasons for variations are clearly spelt out. The guidelines could include examples of decisions and accompanying clear logical reasons.

Similarly it is also useful for decision-makers at all levels to know that they will have to explain the reason for the variation. For example, Development Assessments Panels are already required to spell out their reasons for their decisions in the minutes of DAP meetings⁶.

Greater transparency helps to educate the broader community.

Principle No. 4 – Public / community input has a legitimate role in the planning process

The Institute supports this principle. Effective community consultation can improve outcomes. Planning policies should articulate the right for a community to be consulted. This is even more important given that Western Australia does not have third party appeal rights like other Australian states and territories.

⁶ See: Details of each decision made at the meeting and the reasons given for each decision must be included in the minutes of the DAP meeting as per 5.6.1 of the DAP Procedures Manual and subclause 44 (1A) of the Planning and Development (Development Assessment Panels) Regulations 2011

The consultation should focus on the needs of the community and those community members most likely to be impacted, in preference to external interests.

Effective consultation needs to be comprehensive. It should take communities on a journey and be educative for them. There is a risk that consultation done poorly, and using insufficient methods may result in only the most loudest voices being heard.

Inadequate consultation may only tap into the initial emotional response. Communities need time to think matters through. Rather than just gaining a temperature test of the initial emotional response, communities should be engaged in a more inclusive and longitudinal process to co-design the planning settings that lead to good outcomes.

For example, it is not uncommon for communities to make a “not in my back yard” response to a proposal to develop affordable housing, aged care or disability accommodation in their neighbourhood.

People need time to consider the benefits of enabling essential workers such as nurses, teachers and police officers who care for, teach or protect *their* community having access to affordable housing close to where they work.

Communities also need time to understand the benefits for their own families if aged care or disability accommodation is locally available, as a result of good planning. Most importantly people who are aged or living with a disability themselves and may use these facilities should also have their views actively sought.

It is important to note that community consultation submissions must be appropriately weighted against other factors.

Principle No. 5 – Genuine and proper consideration

The Institute supports this principle. Importantly, if the application has been referred to a development assessment panel, or a design review panel, the composition of the panel including specialists from disciplines such as architecture, urban design, engineering, landscape design, environment and local councillors should be considered as a means to ensure genuine and proper consideration.

Discretionary decision making needs to be apolitical, objective and informed or undertaken by a panel with expertise in design, planning and/or development.

Councillors should be removed from the ability to be decision makers when it comes to application of discretion.

Councillors already have an important role to represent the interests of their constituent communities and to oversight that genuine and proper consideration has been given as a matter of good governance. However these important functions are not the same as making the decision. This task requires a breadth or expertise from multiple disciplines

Please outline any additional principles you think should be included in the Draft Guidelines.

Timeliness is an additional principle that could be considered. Timeliness helps to improve certainty which both communities and development proponents seek. More timely decisions can also reduce the holding costs of land and ultimately bring forward the timely delivery of needed housing, retail facilities, health care, childcare and recreational facilities that deliver important social, economic and wellbeing benefits.

Ensuring confidence in the planning system is an additional principle that might also be considered. The objects of this principle include both the development sector and the general public. As noted elsewhere in this submission, genuine engagement, consultation, and transparency will help to promote confidence.

Further comments on the Draft Guidelines

Overall these are clear and well drafted. Accompanying diagrams, flow charts and case studies. similar to the SPP7.3 document set would enhance the Draft Guidelines

Application beyond development applications, assessed and determined under Local Planning Schemes, would require further articulation. We suggest a staged approach to reform and application of discretion, based on performance evaluation.

The glossary currently only includes three terms and might be expanded to include terms such as “local planning policies”, “structure plans” and “local development plans”.

PART C – further comments or suggestions

We underscore that neighbourliness is an important concept. Consultation and engagement processes and discretionary decisions need to review impacts from the lens of neighbourliness prior to making determinations.

Education sessions should be set up for local councils, and design/development professionals.

Public education is of key importance in this reform and limitations of ‘discretion’. On face-value this is a topic that incites uncertainty within the community. Education will also help provide clarity and transparency which in turn will promote greater confidence in the planning framework.

Thank you for the opportunity to provide feedback and we look forward to future engagement regarding ongoing Planning Reform.

Yours sincerely,

Sandy Anghie RAIA – State President, Western Australia Chapter, Australian Institute of Architects