Environmental Defenders Office

The Planning Framework in Western Australia

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While every effort has been made to ensure the information is accurate, the EDO does not accept any responsibility for any loss or damage resulting from any error in this factsheet or use of this work.

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N.B. The Planning and Development Amendment Bill 2020 will likely impact the information contained within this factsheet. The EDO will provide information on the effects of this Bill and proposed amendments when further information becomes available

Overview

This factsheet examines Western Australia's planning laws – explaining what the planning laws are, who administers those laws, as well as outlining the broader framework of these laws encompassing policies and other statutory instruments which impact planning decisions in Western Australia.

In 2017, the Western Australian government commissioned an independent review of the Western Australian planning system. Following public consultation, major changes to improve transparency and consistency across the system have been made.

Visit: The WA Department of Planning, Lands and Heritage page on Planning Reform for more information

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Planning and Development Act 2005 (WA)

The *Planning and Development Act 2005* (WA) (**PD Act**) is the main piece of legislation governing planning in Western Australia.

The PD Act:

- establishes the Western Australian Planning Commission (**WAPC**);
- grants the WAPC power to make State Planning Policies, Region Planning Schemes, Regional Interim Development Orders, Planning Control Areas, Improvement Plan Areas and Improvement Schemes;
- imposes the requirement to obtain WAPC approval when subdividing land;
- gives power to Local Government Authorities (**LGAs**) to make Local Planning Schemes (**LPSs**) for their LGA area, and;
- sets out a regime for the payment of compensation for injurious affection though making of local, regional or State planning schemes.

Additionally, the PD Act enables the following subsidiary legislation:

- *Planning and Development (Local Planning Schemes) Regulations 2015*;
- *Planning and Development (Development Assessment Panels) Regulations 2011*, and the;
- *Planning and Development Regulations 2009*.

Part 5 of the PD Act provides for LGAs to prepare LPSs, which establish a regime of planning control for the LGA area. LPSs are approved by the Minister for Planning (**the Minister**) and published in the Government Gazette.

Visit: The WA Legislation Register to read Government Gazettes

Redevelopment Acts

There are a number of exceptions to planning schemes which apply to specific locations. Planning in these areas is governed by Redevelopment Acts. The Redevelopment Acts address specific locations for redevelopment by creating special LPSs which give effect to re-development objectives and override the existing LPS for the relevant area.

The main piece of re-development legislation is the *Metropolitan Redevelopment Authority Act 2011* (WA) (**MRA Act**) which allows any area declared in the *Metropolitan*

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Redevelopment Authority Regulations 2011 (**MRA Regulations**) to come under the planning control of the Metropolitan Redevelopment Authority (**MRA**).

There are also other Redevelopment Acts, which rely upon the WAPC and West Australian Lands Authority (**Landcorp**) to administer planning control powers in the relevant areas. These include:

- *Hope Valley-Wattleup Redevelopment Act 2000;* and
- *Perry Lakes Redevelopment Act 2005.*

Once an area is deemed redeveloped, the land is 'normalised' and planning control returns to the LGA.

Legislation that impacts the planning processes

Environmental Protection Act 1986 (WA)

If a development proposal is lodged with a LGA, and it appears that the proposal is likely to have a significant effect on the environment, the LGA must refer the proposal to the Environmental Protection Authority (**EPA**) for an environmental impact assessment. The proponent or a member of the public can also refer a proposal. If the EPA decides to assess the proposal, the relevant LGA is prevented from making a decision on the development application until the EPA assessment process has concluded.

Where an LPS has been formally assessed by the EPA, development proposals arising under such a scheme do not have to be referred to the EPA unless the environmental issues raised by the proposal were not assessed during the assessment of the scheme, or the proposal does not comply with the scheme or the conditions to which the scheme is subject.

LGAs and the WAPC also have broad discretion to include conditions as part of a development approval, including environmental protection provisions.

Contaminated Sites Act 2003 (WA)

The *Contaminated Sites Act 2003* (WA) sets out a regime of classifications for land affected or potentially affected by contamination, by considering the condition of the land (or contamination) and the use of that land.

Both the WAPC and LGAs are required to seek and take into account the advice of the CEO of the Department of Water and Environmental Regulation as to the suitability of land for the purpose for which approval is sought.

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Heritage of Western Australia Act 1990 (WA)

The *Heritage of Western Australia Act 1990* (WA) established a registry for heritage places, which informs planning, development and subdivision approvals. Currently, any decision-making authority must request advice from the Heritage Council before determining planning applications.

A new Bill proposing reforms to the *Heritage Act* was considered in detail by the Legislative Assembly on 10 May 2018. The Bill repealed the existing Heritage Act and replaced it with the *Heritage Act 2018* (WA). It provides that a staged proclamation will be necessary to allow time for the drafting and approval of an extensive set of new regulations, required to give effect to its many provisions.

Mining Act 1978 (WA)

Certain legislation contains provisions which override planning legislation. The main example is the *Mining Act 1978* (WA) (**Mining Act**). Whilst relevant decision makers under the Mining Act must take into account any planning scheme whilst considering applications for tenure, no planning instruments prohibit or affect the grant of the tenement.

Who administers planning laws?

There are a number of entities responsible for planning decisions in Western Australia. They include:

Western Australia Planning Commission

As noted above, the WAPC is established under the PD Act. One of its primary purposes is to give greater emphasis to State-wide regional planning. The WAPC's responsibilities include:

- creating planning policies;
- preparing and administering Region Planning Schemes;
- ensuring LPSs are consistent with State policies;
- advising the Minister for Planning whether LPSs should be approved;
- approving Structure Plans; and determining subdivision applications.

Visit: The WA Government page on the Western Australian Planning Commission to read more about their role

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Department of Planning, Lands and Heritage

In contrast to the WAPC, the Department has no statutory power. Its role is to assist the WAPC, through research and preparing statutory planning documents, within its functions. It also provides advice to the State Government.

Visit: The WA Department of Planning, Lands and Heritage website

Minister for Planning

The Minister has various responsibilities under the PD Act including:

- administration of the legislation;
- approving planning schemes and amendments;
- approving improvement schemes and amendments;
- approving minor amendments to the Metropolitan and other Region Planning Schemes;
- recommending statements of planning policy for approval by the Governor;
- nominating members for appointment to the WAPC;
- undertaking inquiries into enforcement of LPSs by LGAs;
- directing the preparation of new or amendments to existing LPSs, and;
- 'calling in' and determining applications for review lodged with the State Administrative tribunal

Local Government Authorities

Local government authorities undertake the majority of the functions required to control development of land in the State. This is primarily done through the creation, amendment and administration of LPSs. Other functions include:

- Preparing LPSs and policies;
- Determining development applications and broader administration of LPSs;
- Providing advice to the WAPC when it considers subdivision applications and planning issues within its district generally.

Metropolitan Redevelopment Authority

As noted above, the MRA is has a similar role to a LGA but only in specific areas targeted for re-development under the MRA Regulations. In these areas, the MRA replaces the role of the LGA in determining development applications.

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Development Assessment Panels

Development Assessment Panels (**DAPs**) are decision making bodies which are responsible for determining larger development applications in accordance with the existing planning frameworks. They are not responsible for or involved with the preparation of LPSs or planning policy.

Visit: The WA Government page on Development Assessment Panels

State Administrative Tribunal

The State Administrative Tribunal (**SAT**) is an independent body that reviews decisions made by government where it is empowered to do so under enabling State legislation. The PD Act and LPSs give the SAT power to review decisions made by planning decision-makers. If a decision is referred to the SAT, the SAT will review the decision, having regard to the applicable planning framework and procedural fairness.

Visit: The WA State Administrative Tribunal website

The broader planning framework

In addition to providing a mechanism for the creation of local and region planning schemes, planning legislation permits the making of policy instruments. These instruments do not have legal force, but are required to be taken into account when local and region planning schemes are being developed and when planning decisions are being made, subject to specific legislation (as outlined above).

Notwithstanding these exceptions, the broader planning framework includes:

State Planning Policies

State Planning Policies (**SPPs**) are prepared by the WAPC under Part 3 of the PD Act to provide for any matter which may be the subject of a local planning scheme. The primary focus of SPPs is facilitating the coordination of planning throughout the State. The WAPC is required to have regard to conservation of natural resources for social, economic, environmental, ecological and scientific purposes as well as other factors.

In preparing or amending the local planning scheme, a LGA must have regard to all relevant SPPs. Submissions can be made regarding proposed SPPs as the WAPC is required to make reasonable endeavours to consult those public authorities and persons likely to be affected by the SPP.

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SPPs are not binding on decision makers, however the LGA is required to have due regard to them. In practice most LPSs either refer to or incorporate by reference one or more SPPs.

Visit: The WA Government page on State Planning Policies to see in-force SPPs

Planning statements

If the Minister consents to public submissions regarding a scheme, the WAPC must prepare a written statement, setting out the purpose and planning objectives of a region scheme or amendment. LGAs must give due regard to these statements when amending a local planning scheme – see Which matters can be the subject of an RPS? below.

Local planning policies

Local planning policies are created by LGAs under their LPSs, to guide decision making in relation to the applications for development approval.

Statutory Instruments

The PD Act also provides a number of means by which statutory planning instruments can be created for specific purposes. These include:

Region Planning Schemes

Region Planning Schemes (**RPSs**) are a high level zoning of land which focuses on providing strategic direction to the LGA, largely around how and where land is released for urban development. They also reserve land for public purposes which severely restricts what development may occur on that land. See Region Planning Schemes below for more information.

Local Planning Schemes

Local Planning Schemes (**LPSs**) are also created by the LGA as primary instruments for controlling the way land is used and developed. Unlike RPSs, LPS require approval from the Minister. See Local Planning Schemes below for more information.

Local Planning Strategies

This document is prepared by the LGA for Ministerial approval as a precursor to preparing the LPS. It sets out the objectives for future planning, which is then incorporated into the LPS.

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Deemed Provisions

In addition to the provisions of LPSs, the regulations also provide for provisions deemed to be included in the text of all LPS.

Local Interim Development Orders (outside the metropolitan area)

The Minister may make local interim development orders (**LIDOs**) for LPSs approved or pending approval. For existing planning schemes, the Minister must consider the LIDO is necessary in the public interest.

A LIDO may require a person to meet certain conditions prior to commencing development. LIDOs must be advertised, and will cease to have effect when revoked, when an LPS comes into force or after a period of three years. Failure to comply with a LIDO is an offence under the PD Act, and is subject to the same penalties applicable to a breach of a local planning scheme.

Regional Interim Development Orders

Where the WAPC has resolved to prepare an RPS for an area, it may (with the approval of the Minister) issue a regional interim development order, as necessary, to regulate, restrict or prohibit a development that might prejudicially affect preparation of the scheme. Such an order will last until it is revoked or until the region scheme comes into operation or after the expiration of three years (whichever is sooner). Contravention of a regional interim order is an offence.

Planning Control Areas

If land subject to a RPS is required for a certain purpose or use (e.g. a hospital, car park, railway, school), the WAPC may declare that land as a planning control area for a period of up to five years. The Peel Region Scheme for example introduces a planning control area to protect water catchments within the Peel region.

A person who wishes to commence development in a planning control area may apply to the relevant LGA which will then refer the matter to the WAPC for determination. The WAPC may refuse consent or give conditional approval to a development. If the development is not carried out in accordance with the specified conditions, the WAPC may revoke that approval.

If a person commences, continues or carries out development in a planning control area without approval, they will commit an offence.

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Improvement Plans and Schemes

Improvement plan and schemes are made by the Minister upon the recommendation of the WAPC. They allow the WAPC to operate as a developer so as to advance the development of an area in accordance with an improvement plan. This includes the ability for the WAPC to actively seek redevelopment opportunities (compared to just preparing a framework to facilitate development).

Planning laws as development control

Whilst there are many components to development control, this section examines some of the more common processes in detail.

Planning laws and development

The purpose of planning laws is to control the use and development of land. This is generally done by reference to a particular district or region. 'Development' is defined to include erection, demolition or alterations to any building or other structure as well as excavation or other works affecting the land itself. A 'use' of land in this context means use for a particular purpose, such as a dwelling house, car yard or caravan-park.

Local Planning Schemes

LPSs are the key mechanism for controlling development of land. LPSs are administered by LGAs. These schemes provide a basic template for the development of land in a local area by controlling what types of development can occur where, and imposing other restrictions on development such as height and density controls.

An LPS may regulate a wide variety of land uses and developments in the district (e.g. streets and roads; parks and open spaces; and places and objects of cultural heritage significance). An LGA must have due regard to any State planning policies that may affect its district when drafting LPSs. LPSs must also be consistent with RPSs.

How do Local Planning Schemes control development?

Most LPSs use a zoning system to classify different classes of land. A zoning table (found in each LPS) lists the zones and specifies which land uses can be carried out in those zones. The following designations are an example of the kind of controls that might apply:

- Permitted use (**P**) – use permitted if it complies with the relevant development standards of the scheme;
- Discretionary use (**D**) – use requires planning approval from the LGA;

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- Discretionary use subject to public consultation (**A**) – use requires planning approval from the LGA and the proposal must be advertised for public comment; or
- Prohibited use (**X**) – not permitted by the scheme.

Government departments and LGAs undertaking public works are not required to obtain approval under an LPS, although the works should conform with the scheme where possible, and the LGA must be consulted before the work is undertaken.

Penalty for not obtaining approval or breaching a condition

Approval must be obtained where a planning scheme or interim development order requires. An approval must be in force and development must be carried out in accordance with any conditions; a person contravening an LPS commits an offence. In addition to being ordered to remove any illegal development, the person may also be subject to fines.

If a development has been undertaken in contravention of an LPS, the LGA may direct the owner to deconstruct or alter the development and restore the land to its condition immediately before the start of the development started.

Failure to comply with a direction from the LGA is an offence, punishable by a maximum fine for individuals of $200,000 with an additional maximum daily penalty of $25,000. Where an offender is a company, more substantial penalties may be imposed. If the person responsible for the development does not restore the land, the LGA may undertake the works and recover the cost from that person.

Exempt development

Certain forms of development are exempt from the need for approval. These exemptions are not uniform across all LPSs. Consequently, it is necessary to look at each scheme to identify what constitutes an exempt development.

It is common for the following types of developments not to require development approval under an LPS:

- Erection of dividing fences;
- Replacement, maintenance or repair by a government entity of equipment used to provide public services;
- Maintenance or repair of any building where there are no structural works or changes to physical appearance, and;
- Works associated with a subdivision approval

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Assessment of development applications

A person wishing to undertake a development will need to lodge the appropriate application forms and plans with the relevant LGA.

Development applications are generally assessed by planning officers employed by the LGA, however some larger applications are considered by Development Assessment Panels.

They may also be considered by a special planning committee of the relevant LGA in areas which have specific legislation. Unless the planning committee or the relevant officer has delegated authority to make a decision about the proposed development, that decision can only be made at a full LGA meeting.

Advertisement of development applications

The LPS will describe the circumstances (if any) in which a development proposal needs to be advertised. This will usually be for developments that are likely to have a significant impact on the amenity of the area.

LGAs also include details of most development applications in their meeting agendas. This provides a limited notice of development proposals being considered by the LGA. Members of the public are entitled to attend LGA meetings and ask questions about development applications.

How are LPSs created or amended?

An LPS or an amendment to a scheme may be made by an LGA at any time. LGAs within the Perth Metropolitan area, Greater Bunbury area and the Peel Region must have an LPS that is consistent with the Metropolitan Region Scheme, Greater Bunbury Region Scheme or Peel Region Scheme respectively. The Minister may order an LGA to prepare or adopt an LPS if the Minister is satisfied that an LPS ought to be prepared for the area and the LGA has not done so. The Minister may also order an LGA to amend their LPS where it is inconsistent with a region planning scheme. The process for amending is different to creating an LPS and there are variables not considered for purpose of this fact sheet.

For that reason the process outlined below is limited to key stages of the process that are relevant to both amending and creating an LPS.

LGA resolution

The first step in creating or amending an LPS is for the LGA to pass a resolution to that effect. This resolution must be referred to the WAPC, which is responsible for providing advice to the Minister on the scheme or proposed amendment to the scheme. For amendments, the resolution must state, in the LGA's opinion, the amendment's

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level ('complex', 'standard' or 'basic') and the reasons for that opinion. The different 'levels' of amendment effect the need to have it undergo environmental assessment.

Referral of scheme to the Environment Protection Authority

The proposal to create or amend an LPS may be required to be referred to the EPA to allow it the opportunity to decide whether or not to assess the environmental implications of the scheme. The EPA may decide that the scheme is either acceptable and does not require assessment, acceptable but requires assessment, or incapable of being made environmentally acceptable and no assessment is required.

If it determines that the scheme is incapable of being made environmentally acceptable, the EPA must inform both the Minister for Environment and the LGA within 28 days. The Minister for Environment may direct the EPA to assess the scheme notwithstanding the findings of the EPA. Alternatively, the Minister for Environment may consult the Minister and advise the EPA and the LGA that the scheme is not able to be approved.

If assessment of the scheme is required, the LGA may be required to undertake an environmental review of the scheme and provide a contaminated sites auditor's report. The EPA may also independently investigate the scheme and consider existing information on the scheme or the area surrounding the scheme. If a report on the scheme is compiled, the EPA may require the LGA to publish the report for public review.

Advertising and public submissions

Before submitting a LPS or amendment to the Minister, an LGA must make reasonable endeavours to consult with persons likely to be affected by the LPS or amendment.

Once the LGA has referred the scheme or amendment to the EPA and an environmental review has been conducted and reviewed by the EPA, the LGA is required to advertise that the proposed scheme or amendment is available for public inspection.

Any person may make a written submission on the proposed scheme. All submissions that deal with environmental issues must be provided to the EPA along with the LGA's views on and response to the issues identified. The LGA must take into account any submissions received before compiling a report and recommending to the Minister that the proposed scheme be approved.

The Minister then decides whether or not to approve the scheme or amendment. In making this decision, the Minister is required to take into account the opinion of the EPA. The Minister may require further amendments to the LPS text and maps which

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the Minister may, or may not, require to be readvertised. The scheme has full force and effect once it is published in the Government Gazette.

Region Planning Schemes

What is a Region Planning Scheme?

A Region Planning Scheme (**RPS**) is a planning scheme that applies to a particular region due to particular development pressure. There are currently nine designated planning regions in Western Australia but only three operational region schemes: the Metropolitan Region Scheme, the Peel Region Scheme and the Greater Bunbury Region Scheme.

Creating or amending a Regional Planning Scheme

RPSs prepared by the WAPC and approved by the Minister. They may be prepared or amended for the effective planning and coordination of land use and development of any part of the State.

There is only one procedure for preparing an RPS but two processes for amendments. These processes are as follows:

- normal procedure – the standard process which is similar to the procedure for making an RPS; and
- simplified procedure – which applies to amendments the WAPC deems 'minor'

The procedure for creating or amending a typical RPS generally includes the following:

- The WAPC or the Minister must decide that matters of state or regional importance require the creation of or amendment to an RPS. The WAPC then resolves to prepare an RPS or amendment.
- The proposed RPS or amendment is referred to the EPA for environmental review.
- The Minister provides consent to the WAPC to publicise the amendment or scheme.
- If consent is granted, public submissions are sought and impacted land owners and public authorities notified.
- The WAPC is required to consider all submissions and each person who made a submission be given the opportunity to be heard.
- The WAPC submits a copy of the scheme or amendment, a copy of each submission and a report to the Minister for consideration.
- The Minister can either approve or withdraw the scheme or amendment. Approval requires the Minister to be satisfied any environmental conditions have been incorporated. The Minister may also require a scheme or amendment to be re-

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publicised if it has been modified to an extent that the Minister considers it necessary.

- The Governor approves the scheme or amendment subject to any conditions recommended by the Minister.
- The scheme or amendment is published again in the *Gazette*, excluding any maps or plans which are made available at such a time and place as the Minister determines.
- The RPS or amendment and the WAPC report on submissions are laid before each House of Parliament within 6 days of Gazettal. If no motion of disallowance is introduced the scheme or amendment succeeds and takes effect.

A simplified amendment process follows most of the above steps, however, the key difference is it does not require environmental review nor tabling at each House or Parliament. For amendments that apply to land in the Swan Valley, the WAPC must refer the scheme or amendment to the Swan Valley Planning Committee.

Which matters can be the subject of an RPS?

A RPS can deal with the same matters that can be dealt with under an LPS. This may include planning controls for the whole or any part of the region. The WAPC can also prepare a RPS to deal specifically with a matter of State or regional importance. The WAPC must prepare a statement setting out the purpose and planning objectives of a region scheme or amendment and ensure that it is made publicly available.

LPS versus RPS

An LPS is not to be approved by the Minister unless the provisions of the LPS are consistent with each relevant RPS. Where an LPS is inconsistent with an RPS:

- The RPS is to prevail over the LGA scheme to the extent of that inconsistency; and
- The LGA must (within 90 days of the RPS coming into effect) resolve to prepare a new planning scheme, or amend its existing local planning scheme, to make it consistent with the RPS.

If the LGA does not amend the LPS as required, the Minister may direct the LGA to prepare or amend the LPS to ensure it is consistent with an RPS. If the LGA fails to follow such a direction the Minister also has the power to create amendments or approve a scheme and cause either to be published in the Government Gazette as if it was adopted by the LGA. A person who contravenes an RPS commits an offence.

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Subdivision of land

What is subdivision?

Subdivision of land occurs where a single lot is divided into two or more smaller freehold lots or where a lot is amalgamated with another lot. Subdivision may include the provision of amenities such as roads, reserves and public services.

Subdivision frequently occurs where rural, agricultural or industrial land is no longer used for that purpose and is rezoned for residential purposes. Generally the State Government does not need approval under the *Act* to subdivide Crown land, however, approval is required for Crown land to be subdivided into freehold lots.

What controls apply to subdivisions?

Subdivision of land requires the approval of the WAPC. LGAs do not have approval powers with respect to subdivision. The WAPC may approve or refuse the subdivision or may approve the subdivision with conditions. There is a two part approval process:

- The proponent lodges a plan of subdivision with the WAPC. The WAPC may then refer the plan to an LGA or public authority for objections and recommendations.
- If the plan is approved, the proponent has three years (or four years in the case of a subdivision creating more than 5 lots) to meet any conditions placed on the approval before seeking final endorsement from the WAPC. This will allow the land to be divided into separate titles by Landgate, subject to certain preconditions. The process must be recommenced if the final plan is not submitted within five years (for a plan approved by the WAPC prior to 2005) or 24 months (for a plan approved by the WAPC after 2005).

A person who commences, continues or carries out works for the purpose of enabling the subdivision of land, otherwise than as shown on a plan of subdivision approved by the WAPC, or as required by the WAPC to be carried out as a condition of approval of the plan of subdivision, commits an offence.

Is the WAPC required to consult other persons or bodies when considering a subdivision application?

Where the WAPC believes that a subdivision proposal may affect the powers or functions of an LGA or other authority, they must refer the proposal to those bodies and invite their comment. These bodies must respond within 42 days with a written memorandum containing any objections or recommendations. In the case of an LGA, advise of any relevant environmental condition(s) to which the assessed scheme is subject.

The WAPC is not bound by the submissions made by these authorities. Additionally, there is no general requirement for public participation in the subdivision approval process.

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However, if the proposal is assessed by the EPA, there are opportunities for input into that process.

What matters can be the subject of a RPS?

When considering a subdivision application, the WAPC must have regard to all relevant matters. This includes things such as the provision of services to each lot, drainage of the land, the amount of public open space to be provided and any relevant LPSs, planning regulations or local laws. While the WAPC is required to take into account the terms of a local planning scheme, the WAPC may approve a subdivision that is inconsistent with the LPS in certain situations, including where the LGA has not made an objection to the subdivision. A subdivision must however comply with any environmental conditions in the relevant local planning scheme.

Subdivision proposals are also exempt from the clearing permit system under the *Environmental Protection Act 1986* (WA). Clearing of native vegetation consistent with a subdivision approval will not require approval of the Department of Water and Environmental Regulation. The WAPC is not required to take into account the clearing principles that apply to other clearing proposals.

What conditions can be placed on subdivisions?

The WAPC has a broad discretion to impose conditions on subdivision approvals. For example, the WAPC may make it a condition of a subdivision approval that parts of the land be vested in the Crown for the conservation or protection of the environment. It may also require that parts of the land be set aside for recreation, roads and waterways or that required works be carried out. The owner of the land may be required to pay an amount to the LGA in lieu of a portion of the land being set aside for these purposes.

When the WAPC is satisfied that the proponent has met all conditions imposed on the approval, it may endorse the proposal. Once the proposal is endorsed, the proponent may apply to Landgate to issue certificates of title for the new lots. The Registrar cannot create or register a certificate of title for a new subdivision unless a diagram or plan of survey of the subdivision has been endorsed with the approval of the WAPC.

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Subdivisions and native vegetation clearing

Proponents planning to begin clearing in accordance with a subdivision approval under the PD Act do not need a clearing permit in certain circumstances, as per Schedule 6 of the *Environmental Protection Act 1986* (WA).

Item 2 of the Schedule provides that clearing that is done in the implementation of a proposal made under an assessed scheme in accordance with a subdivision approval, development approval or planning approval given by the WAPC or other relevant authority does not require a clearing permit.

Item 9 of the Schedule provides that clearing done in accordance with a subdivision approval given by the WAPC or other relevant authority, including clearing necessary to implement the subdivision on land governed by a planning scheme that has been taken to be approved by the EPA under s 157(1) of the PD Act, does not require a clearing permit.

Clearing under an assessed scheme

The *Environment Protection Act 1986* (WA) defines an "assessed scheme" to mean a scheme that has been assessed under Part IV Division 3 of that Act and for which, the Environment Minister has issued a statement setting out conditions applicable to the scheme. Assessed schemes can include local and regional planning schemes.

Clearing proposed in connection with a planning approval or development approval under a planning scheme that is *not* an assessed scheme (i.e. which either was not referred to the EPA or was referred to the EPA but not assessed) will not fall within the exemption in item 2 of the Schedule. Therefore, a clearing permit will generally still be required for clearing in those circumstances. Clearing proposed in connection with a subdivision approval may still fall within the exemption in item 9 of the Schedule.

Limitations on the scope of exemptions

The two exemptions noted above require clearing to be done in accordance with either (in the case of the item 2 exemption), a planning approval or development approval, or (in the case of the both exemptions) a subdivision approval. If the clearing is not covered by the authorisations provided under or conditions imposed on the relevant approval, it cannot be considered to be in accordance with the approval, and thus is not exempt. Often a subdivision approval will offer explicit authorisation to clear native vegetation in order to construct roads for or provide water services to the subdivision, but do not provide authorisation to clear for any other purpose.

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The wording of the *Environment Protection Act 1986* (WA) exempts clearing for "necessary works" for approved subdivision on land to which a planning scheme relates taken to be approved by the EPA under the *Planning and Development Act* (s 157(1)). Approval is taken to mean approval by the relevant authority (in this case, the EPA) under that section when subdivision is approved by the WAPC on land governed by a planning scheme. These works must be shown on the plan of subdivision or else abide by conditions imposed by the WAPC to be taken as approved. However, the WAPC also has discretion to decide that the subdivision approval does not mean the EPA has approved any further necessary works to give effect to the subdivision, which would require a proponent to apply to the EPA separately for clearing approval.

Additionally, when subdivision clearing proposed under an assessed scheme seems likely to have a significant effect on the environment, the WAPC must decide whether or not these environmental effects were assessed during the assessment of the scheme, and if the clearing complies with the scheme and any conditions imposed on it, under s 48I(1) of the *Environmental Protection Act*. If the WAPC finds the effects have been assessed and the clearing complies with any conditions, they do not need to refer the clearing proposal. If they find the opposite, then the WAPC is required to refer the proposal to the EPA and refuse to approve said proposal pending the EPA's assessment.

Decision Making and Reviews

LGAs, Special Committees, the WAPC and DAPs (relevant authorities) must exercise their powers in accordance with the legislative and policy framework. This section outlines some of this framework which guides decisions under planning laws.

The appropriateness of a proposed development can be determined by whether the *use* and *development* can be approved with or without modifications. Approval of the application is at the decision maker's discretion; a 'good' decision will depend on several competing factors. Here we outline some of the factors which may be relevant in the exercise of that discretion. These factors are not addressed in any priority.

Model and Deemed Provisions

Decisions are largely made by reference to the relevant statutory planning instrument, however, one of the features of the *Planning and Development (Local Planning Scheme) Regulations 2015* (**PD Regulations**) is model and deemed provisions.

Model provisions are those which are likely to vary between LGA districts. They cover a broad range of functions and are not binding on the relevant LPSs.

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Deemed provisions, however, are considered to be included in an LPS even if the actually text is omitted from the LPS itself. Clause 67 of the deemed provisions is relevant to the purpose of decision making as it outlines the factors a LGA must have 'due regard' to when considering a development application.

'Due Regard' weight will be given to

The weight to be given to these factors varies. For example, policies will be determined by reference to whether:

- it is based on sound planning principles;
- it is a public or private policy;
- for public policies:
    - if there was significant public engagement when preparing that policy,
    - the length of time the policy has been in operation and
    - if that policy has been continually applied

Some examples include:

- any approved State Planning Policy
- any local planning policy for the Scheme area
- the amenity of locality including both environmental and social impacts of the development, and;
- any submissions received on the application

Conditions

Imposing conditions on the approval of development applications gives a decision-maker opportunity to:

- Modify the physical form of the development; and
- Maintain control of development operations.

Any conditions imposed apply to the land (compared with the individual applicant) apply to any future owners. Determining validity of conditions is done by reference to the following test. A condition is valid if:

- It has a planning purpose;
- It fairly and reasonable relates to the development;
- It is not so unreasonable that no reasonable planning authority could have imposed it
- The condition is certain and final.

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Applications for review – the State Administrative Tribunal

An applicant who has been refused approval to develop, or is unhappy with the conditions of approval may apply to the State Administrative Tribunal (**SAT**) for review of the decision. The PD Act gives the SAT jurisdiction over the matter; and where the planning scheme, either expressly or impliedly, confers a right to appeal against a decision and the matter involves the exercise of a discretionary power by the particular authority.

There is generally no right of appeal against an LGA planning decision by third parties (i.e. a neighbour or conservation group), unless a right of appeal is provided in the local planning scheme.

The Minister may 'call in' and determine an application currently before the SAT, where the application concerns issues of State or regional importance. The Minister can take public interest concerns into account, as well as planning considerations. The Minister's decision is final.

Objectors to development have no right of appeal to the SAT. Additionally, there are no rights to be joined as a party to an appeal lodged by someone else. On public interest issues, intervener status may be obtained on application to the SAT. It is also possible to make an application to be heard as a submitter where SAT is of the opinion that the person has a sufficient interest in the matter. A submitter is not a party and is not involved in mediations (unless the parties agree).

Development Assessment Panels

DAPs are decision making bodies which are responsible for determining certain high value development applications in accordance with the existing planning frame works: LPSs, RPSs and relevant planning policies. They are not responsible or involved with the preparation of LPSs or planning policy.

DAPs comprise a mix of representatives from LGA and technical experts (often planners) who determine development applications in place of the relevant decision-making authority (previously the LGA).There are two types of DAPs:

- Local development assessment panels (LDAPs), which service a single LGA area; and
- Joint development assessment panels (JDAPs) which service two or more LGA areas.

There are five metropolitan JDAPs and three regional JDAPS. At time of writing there is only once LDAP which services the City of Perth.

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DAPs consist of a panel of five members:

- The presiding member (a specialist member with relevant expertise)
- Two Specialist members (one of which is the deputy presiding member)
- Two LGA members (nominated by LGA and appointed by the Minister)

What does a DAP do?

Certain development applications are exempt from assessment by DAPs, specifically:

- construction of —
  - a single house and any associated carport, patio, outbuilding and incidental development;
  - less than 10 grouped dwellings and any associated carport, patio, outbuilding and incidental development;
  - less than 10 multiple dwellings and any associated carport, patio, outbuilding and incidental development; or
- development in an improvement scheme area; or
- development by a LGA or the Commission; or
- development in a district for which —
  - a DAP is not established at the time the application is made; or
  - a DAP has been established for less than 60 days at the time the application is made.

Provided these exemptions do not apply, there are three types of applications that the DAP assess:

Mandatory DAP applications

- development outside the City of Perth with value of $10 million or more; or
- development within the City of Perth with a value of $20 million or more.

Optional DAP applications

- development outside city of Perth with value of more than $2 Million and less than $10 million
- development within the City of Perth with a value of more than $2 million and less than $10 million
- development of a warehouse in any district that has an estimated cost of $2 million of more.

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Delegated DAP applications

- The application is for approval for a development for which the estimated cost is $2 million or more; and
- The application is one of the following:
    - Not an excluded development application
    - For approval to construct less than 10 grouped dwellings, and any associated carport, patio, outbuilding and incidental development
    - For construction of less than 10 multiple dwellings and associated carport, patio, outbuilding and incidental development

Review of DAP decisions?

Only a person who has made a DAP application has the right to commence an application for review of the DAP decision with the SAT. This is consistent with review rights when the LGA determines development applications.

The other option and the only one available for third parties, is by way or judicial review. This is a costly process which has a narrow frame of reference, namely if there was legal error in the decision (as opposed to issues of merit).

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