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Defender's
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10 March 2008

Dr Janet Woollard MLA
Member for Alfred Cove
1 / 30 Ardross Street
APPLECROSS WA 6153

Dear Dr. Woollard

RE: Comment on Private Members Bill – Third Party Appeals

Thank you for seeking feedback from the Environmental Defender's Office WA on the Private Member's Bill regarding third party planning appeals.

It is our view that including third party appeal rights in legislation will be successful to the extent that it results in a number of outcomes. These include:

1. Entrenched appeal rights for all concerned third parties to seek a review by the State Administrative Tribunal of an authority's decision;
2. Entrenched rights of notice for all materially affected third parties regarding permit applications; and
3. Consistent planning schemes. Ensuring that affected third parties have consistent appeal rights throughout Western Australia is important from the perspective of both local governments and residents. From a local government perspective, it should not be unfairly disadvantaged in the property development assessment process simply because the provisions of its planning scheme grant third party appeal rights, while other planning schemes do not. Similarly, third party appeal rights must be consistent state-wide so that residents are not unfairly disadvantaged by the planning scheme governing their particular locale.

On the basis of this view, our comments below are aimed at highlighting the extent to which we believe the proposed amendment to the Planning and Development Act 2005 will successfully generate these outcomes.

Provisions relating to the giving of notice

As you have noted in the Explanatory Memorandum, requiring notice to be given to owners of adjoining land, those who may be detrimentally affected or aggrieved by the grant of a permit, and to the public at large, is an important feature of the proposed Part 5A. We agree that these notice provisions should “ensure that interested third parties are informed of applications and provided with the opportunity to object to an application”. To this end, we provide for your consideration the following issues:

1. Section 97A(2) provides that the notice requirement in 97G does not apply “if the land has been used or developed for more than 2 years before the date of the application in a manner which would have been lawful under this Act but for the existence of the restriction”.

Does this mean that if the land has been used or developed for 2 years, and then an application is made to use the land in a significantly or substantially different, but still arguably “lawful”, manner, no notice needs to be given under 97G? This provision seems only to envisage the circumstance where an application is made to reverse the effect of an existing restriction. Arguably however, notice should still be given where an application is made to use the land in a substantially different manner but that application does not seek to reverse the effect of an existing restriction.

2. Section 97G(10) provides that a “planning scheme may exempt any class or classes of applications from all or any of the requirements of sub-section (1) except paragraphs (d) and (e)”. Section 97G(11) provides that an exemption “may be made subject to any other requirements as to notice that are set out in the planning scheme in respect of that class of applications”.

It would appear that these sub-sections significantly weaken the requirements of giving notice contained in section 97G(1). Under sub-section (10), it seems that an authority could effectively reduce its responsibility of giving notice to affected parties by exempting all classes of applications from sub-section (1). It would thereby only be required to give notice to owners and occupiers of land benefiting from a registered restrictive covenant where the application would breach that covenant, or sought to remove or vary it.

Under sub-section (11), an authority is also able to reduce its responsibility of giving notice through provisions in the applicable planning scheme. If one outcome of the proposed amendments to the Act is in fact to **ensure** that interested third parties are informed, then it should not be left to the discretion of an authority to release itself from that responsibility.

3. Section 252G provides that the President of the Tribunal may require notice to be given to any specified person either by the applicant or the authority if satisfied that notice was not given or inadequate.

Given that this section allows the Tribunal to review the sufficiency of any notice given to third parties upon appeal, it could be argued that there is a reduced likelihood of an authority amending its planning scheme so as to lessen or eliminate its responsibility of giving notice (the scenario referred to above). However, there are problems with interpreting this section as a safeguard of notice requirements.

Firstly, it depends on a person having the right to seek leave to appeal to the Tribunal under section 252E. If the potential objectors to an application are not in fact notified of the initial

application for a permit, then it is quite unlikely that they will be aware that an application is being considered. Assuming that no objection to the application is registered, the permit may be granted under section 97W. This is despite the fact that no objection to the application may have been made precisely because the affected third parties had no knowledge of that application.

Once the permit is granted without objection, the potential objector will have lost their right to appeal that decision to the Tribunal: section 252E(6)(a). Effectively then, the issue of adequate notice may not be considered by the President because no appeal can be brought.

Secondly, the Tribunal cannot require notice to be given “*if under a planning scheme* the person is not entitled to apply to the Tribunal under section 252D for a review of a decision to grant the permit” (emphasis added). Section 252D(2) grants a local government the power to introduce a planning scheme setting out “classes of applications for permits the decisions on which are exempted” from review under 252D(1). Where this exemption is granted, an application for review of that decision cannot be made: section 252D(3). The effect of this provision is to grant local governments the power to exempt many or all classes of applications from a review by the Tribunal, and thereby preclude the Tribunal from considering whether adequate notice was given in a particular case.

Essentially, reading section 252G alongside the sections discussed above suggests that its potential to safeguard notice requirements is extremely restricted. Moreover, this scope is largely determined by the planning scheme generated at a local authority level. The current drafting of the section suggests that any determination as to the adequacy of notice would be assessed against the extent of notice provided for by the planning scheme, as opposed to an assessment of whether the planning scheme sufficiently provides for the giving of notice.

As we have suggested above, allowing local authorities to exempt any or all classes of applications from a review of whether adequate notice was given diminishes the likelihood that local governments across Western Australia will maintain consistent procedures for notifying third parties. At a more fundamental level, it seems contradictory to ensuring that third parties are informed.

Provisions relating to objections to applications for permits

1. Section 97T(4) provides that “if no notice is required to be given under section 97G(1) or 97P or the planning scheme of an application, the responsible authority is not required to consider any objection or submission received in respect of the application before deciding the application”.

In our view, this section is particularly concerning. It refers to where an authority, having been granted the power to exempt nearly all classes of applications from having to give notice of a permit application, has in fact exercised that power. In this circumstance, even if third party objections are lodged with regard to the application (and despite no notice being given of that application), the authority is not required to consider that objection. This section is concerning because it clearly undermines the goals of entrenching third party appeal rights. In fact, it actively discourages third parties from objecting to applications, because if they were to lodge any objection to an application of which they had not been required to be notified, there is no requirement for the authority to consider it.

This section does not seek to entrench third party appeal rights, but rather would have the opposite effect of allowing authorities to choose which classes of applications they would

like to consider objections to, and which they need not. If they do not wish to consider objections to a class or all classes of applications, they simply need to exempt having to give notice when applying for a permit under that class or classes.

For these reasons, we would strongly urge that sub-section (4) of section 97T be removed in its entirety.

3. Section 252D states that “an *objector* may apply to the Tribunal for review of a decision of the responsible authority to grant a permit” (emphasis added). Section 252E provides that “any person who is affected may apply ... for leave to apply for review ... in any case in which a written objection to the grant of the permit was received by the responsible authority”.

The combined effect of sections 252D(1) and 252E would appear to be that, in addition to an exemption operating under section 252D(2), no third party right of appeal exists if a written objection was not received by the authority during the initial application. Given that authorities under this Bill are able to exempt nearly all classes of applications for which they are required to give notice, and thereby limit the classes of applications for which they are likely to receive objections, we question the appropriateness of limiting third party appeal rights to the circumstance where objections have been received. It is our view that any person affected by the authority’s decision to grant the permit should have the right to seek a review of that decision by the Tribunal, regardless of whether or not objections to the permit application were received by the authority.

Another concern regarding these two sections is the different treatment of “objectors” and non-objectors. The use of the word “objector” suggests that the right of third parties to appeal an authority’s decision is restricted to those who made a submission objecting to the initial permit application. Affected parties who did not make an initial submission must first seek leave to apply for appeal, and only if an original objection was received by the authority: section 252E. We note that sections 82 and 82B in the Victorian Planning and Environment Act 1987, make a similar differentiation between an initial objector and “any person who is affected” but did not make an initial objection. However, the reason for this differentiation is uncertain and concerning. Effectively, it forces those who did not make an initial objection to go through an additional stage of review by the Tribunal, even where objections were raised to the authority’s decision. Arguably the Tribunal could just as easily consider the merits of any objection raised, and whether that objection is frivolous and vexatious, as part of a review of the authority’s decision.

Our concern is with the practical effect that this different treatment may have – that third parties are essentially discouraged from appealing for a review by the Tribunal by having to justify their objection before any review will be heard. This negative effect must be understood in the context of the other proposed sections discussed above, which grant significant discretion to an authority to exempt itself from giving notice and needing to have regard for objections raised.

For these reasons, we would therefore urge an amendment to sections 252D and 252E which recognises the right, without the need to seek leave, of “any person affected by the decision of the responsible authority to grant the permit” to seek a review by the Tribunal.

4. Section 252D(2) allows a local authority, through its planning scheme, to “set out classes of applications for permits the decisions on which are exempted from [review by the

Tribunal of a decision to grant a permit]”. In this circumstance, “an application for review cannot be made under that sub-section in respect of that decision”: section 252D(3).

This section effectively grants local authorities the power to exempt applications from being reviewed on appeal. If the third party appeal rights are considered important enough to be worth entrenching in legislation (and we would argue that they certainly are), then there is no validity in devolving the power to exempt such rights to local authorities.

For this reason, we would strongly urge that sub-sections (2) and (3) of section 252D be removed in their entirety.

Yours faithfully

CAMERON POUSTIE
Principal Solicitor