LOCAL GOVERNMENT ELECTED MEMBERS ASSOCIATION

THIRD PARTY MERITS REVIEW RIGHTS

LGEMA Supports Third Party Merits Review Rights in State Administrative Tribunal

1. Review of development decision makers' approvals decisions is more important than who makes the decisions
2. LGEMA Supports:
    a. Third Party Merits Review Rights in the State Administrative Tribunal Against Development, Subdivision and Zoning Decisions (TPMRRs).
    b. LGEMA Endorses Local Government Councils Endorsing TPMRRs.
    c. LGEMA Endorses Following Notice of Motion Endorsing TPMRRs.

Third Party Merits Appeal Rights (TPMAR) Elected Member Model Notice of Motion

(Adjust for your LG by adding information as indicated at [insert]

MOTION

1. Council supports and urges the introduction of Third Party Merits Review Rights (TPMRRs) in the Western Australian State Administrative Tribunal against approvals of development and/or the conditions or absence of conditions of an approval, subdivision and rezoning.

2. That the [insert name of City/Town/Shire] administration forward this TPAR Council resolution and supporting rationale to the Minister for Planning along with a covering letter signed by the Mayor/President at its earliest convenience and not later than before the next Council meeting and table the response at the Council meeting immediately following receipt of that response is received.

3. That the [insert name of City/Town/Shire] administration prepare compliant petitions to the WA Legislative Assembly and Legislative Council supporting the adoption of TPMRRs against development, subdivision and rezoning decisions, for the next Council meeting

4. That the [insert name of City/Town/Shire] administration bring a draft scheme amendment to Council within three months to amend the [insert name of City/Town/Shire] Local Planning Scheme to introduce TPMRRs against development approvals.

5. That this Motion is Council policy and published on Council's website as Council Policy

RATIONALE

1. Assertions by Ministers or public servants or decision makers about the robustness, productivity, good intentions or worthiness of the WA planning and development framework are without any force or foundation in the absence of a system that independently tests those assertions. A system that does not independently measure or test itself is without moral or ethical integrity and will produce economic environment and social failures. Local governments are required to regard the needs of future and current generations through integration of environmental protection, economic and social advancement and economic prosperity as required by the LG Act s.3(1)(1A). The DLGSC has evinced intentions that support limited TPMRRs . The Planning Act purposes support TPMRRs.
2. The WAPC use a large budget and significant human resources to draft and adopt State Planning Policies (SPPS) , Development Control Policies (DCPs) and Local Planning Schemes, which all need TPMRRs to have any effect on development outcomes.[insert here the relevant aims and intentions of your LG's Local Planning Strategy and Local Planning Scheme].

3. Statutory planners move back and forth between private industry, state and local governments, and tribunals and state bodies. So the likelihood of conflicts of interest and bias is very high in any decision making environment. It is just about impossible to remove those conflicts of interest and the only way to mitigate the adverse impacts from those conflicts affecting the merits of approvals is TPMRRs to foster their probity and merit.
4. The *first party* in a development decision is the applicant. The applicant has the right of review (appeal) in Western Australia to the State Administrative Tribunal (SAT) against the merits of a development refusal, or any condition of an approval.
5. The *second party* to a development decision is the decision maker, which includes the local government, Development Assessment Panels (DAPS), SDAUs (State Development Assessment Unit) or the Western Australian Planning Commission.
6. Everyone else is a *third party*, for example affected neighbours, community groups such as Coastcare groups, and local governments to SDAU, DAP, WAPC r Ministerial decisions.
7. The WA State Administrative Tribunal (SAT) hears administrative reviews of a decision to refuse development or impose an unwanted condition, which all relate to the merits of the decision. SAT is a no costs jurisdiction, which means the applicant for review has to pay a fee to lodge a review application but does not have to pay the legal costs of the decision maker if the application is unsuccessful (unless the SAT finds the application was frivolous or vexatious). SAT is much less complex procedurally than a court, and an applicant can self- represent or have legal representation.
8. The SAT can refer a matter of law to the Supreme Court.
9. There are no TPMRRs in the WA SAT. For example, this means a third party cannot commence an application for review in the SAT against an unmeritorious development approval that,
    - fails to take sufficient notice of applicable planning policy
    - does not refuse on the basis of or apply conditions such as those necessary,
        - for the continued quiet enjoyment of the third party neighbour's property and local amenity
        - so new house does not have a shiny roof, overshadow a solar panel, or have near a boundary a noisy air conditioner, swimming pool pump
        - to mitigate tree and biodiversity loss
        - to mitigate climate change impacts
        - to mitigate parking and traffic impacts
        - to mitigate waste water or flooding impacts
        - to mitigate fumes from waste bins approved petrol station
10. WA is the only state in Australia with no SAT TPMRRs or in an equivalent tribunal .
11. An unmeritorious approval includes one that is inconsistent with policy, where the discretion of the decision maker has failed because it has been exercised in a manner that is inconsistent with adopted policy without good reason to depart from the policy – that is the decision is unmeritorious but not quite an unlawful breach of development assessment legal framework (unless it is so devoid of merit it legally unreasonable).
12. A third party can only appear in the SAT to give evidence in a review of a refusal or condition already commenced by the first party recipient of a development refusal (or against a condition of an approval it objects to), and only at the discretion of the SAT presiding member. A disgruntled neighbour cannot initiate a review (appeal), and neither can the local government against a SDAU, Joint Development Assessment Panel (JDAP) (development over a certain value) or Western Australian Planning Commission (subdivision) decision or a Ministerial decision (zoning).

13. Thus, access to the rule of law is not evenly available between developers and those adversely affected. The absence of TPMRRs is undemocratic because equal access to the law is a fundamental tenet of a functional democracy.
14. WALGA is against TPMRRs as are many local government planning employees (WALGA associate members through their professional associations).
15. WALGA literature review on TPMRRs appears cursory, shallow and not wide ranging, and some of the papers appear to be from property and/or development industry members.
16. All arguments against TPMRRs have been rebutted and outweighed in academic research and examination of relevant statistics.
17. For example, there is an excellent TPMRR analysis in 2009 paper by the Hon. Judge Trenorden on the inevitability of third party appeal rights in the SAT . Some points raised include:
    - are that it is dangerous to draw conclusions from the raw number of merits appeals that are made because so few actually go to trial
    - there are more first party appeals than third party appeals in the jurisdictions examined
    - third party appeals provide the opportunity for the parties to meet, often for the first time, and understand both the proposal and the objections to it and talk through a consensus position.
    - rebuts the floodgates arguments
    - suggests that policies may not cover all elements that could adversely impact on the merits of a decision and some other elements can be considered on the appeal if missed in the original approval
    - meaningful or adequate community consultation does not always occur prior to a development decision being made (the TOC consultation policy specifically excludes the policy from applying to development applications)
    - prospect of an appeal with not deter quality projects
    - third party appeals introduce multiple views to the decision, which improves the outcome
    - third party appeals dispel fears about collusion between the developer and planning authorities. They are a means of checking that planning authorities do not act capriciously or arbitrarily.
    - planning is ultimately a communicative process, which needs to embrace the public in more meaningful ways. It is now recognized that society is not homogenous but comprised of a range of interests that are fragmented, contradictory and even conflictory. Thus, local government decisions presented as being in "the public interest" make an ambitious claim. Third party appeals facilitate greater public participation and beneficially draw the public into land-use decision-making
    - the Courts and Tribunals have an important filtering function to prevent irrelevant considerations from influencing an application. Stein concluded , inter alia, with an observation on the benefits of appeals generally being heard by courts or tribunals. Although he may not have intended it, the following statement is a clear argument for third-party appeals rights to a court or tribunal: After 25 years as an academic, practitioner and judge in this (planning) area, it is my clear belief that the authorities must be kept in line and planning must be viewed as a matrix of interconnected policy, legal, scientific and political filaments which can only be seen when the fullest testing is done on the evidence that is brought forward.
18. Some members of the property and development industry are against TPMRRs because they create the only true legal nexus between planning policies (SPPS, DCPs, LPPs and LG policies) and development decision making but this is not the argument they articulate. They say NIMBY - red

tape – delays, which mask the real reasons for not wishing a careful assessment of their applications against planning policies adopted to guide meritorious development outcomes.

19. Without TPMRRs, WA have a development approval system, not a development assessment system.
20. Some Councils have formally opposed the DAP system and many local government communities and localities are suffering adverse impacts of DAP decisions, because they had no right of appeal.
21. TPMRRs will partly bring planning to development decision making. They have the potential to improve a local government officer Responsible Authority Reports to the JDAP, because the JDAP decision could be third party appealed by neighbours and/or the local government.
22. With the introduction of TPMRRs, developers will know that approvals that are inconsistent with planning policies will be challenged and can be overturned. So, some outcomes from the introduction of TPMRRs that can be expected include:
    - State and local government policies will have much more influence on development assessment decisions, thus raising the standard of decision making, because TPMRRs create an accountable legal nexus between planning policy and development decision making, which does not currently exist (That is why there is wide consultation on planning policies because this makes the community think (wrongly) that they are engaged in an important process and that good policy outcomes influence development decision making, which they often do not).
    - There may be an initial spike in SAT reviews but once developers and their representatives understand what TPMRRs mean - i.e. that unmeritorious (dodgy) approvals may be overturned – the numbers will drop off
    - The potential for undue influence, cosy relationships between the first and second parties are less likely to influence the outcome, and the potential for corruption is reduced by TPMRRs.
    - Local government statutory planners will also not be minded to make hasty ill-considered approval decisions, which can happen for a whole variety of reasons, say for example because of a heavy workload.
    - Assessment of development applications and delegated decision making and reporting to Council improves because of a more thorough examination of all the relevant applicable policies, because an approval and a refusal can be reviewed against applicable policies
    - Bullying of a decision maker's decision makers by applicants tends to be reduced
    - Poor development approvals are exposed and corrected on review
    - A body of SAT case law develops teaching us what is meritorious and proper practice, and what is not; having regard for example to the State Coastal Planning Policy 2.6 or a local planning policy on the determination of Natural Ground Level, or how to deliberate over a decision – say about whether or not the content of a discretion to vary a height restriction.
    - The level of public consultation tends to increase and decision makers are more inclined to take note of and act on any objections, because this communication will foster picking up anything that the decision maker has missed out.
23. In the long run, there is no doubt at all that TPMRRS in SAT will modernise its approach to inclusive development decision making in the public interest (as in the rest of Australia) and,
    a. the quality and compliance of development applications will improve
    b. ambit claims in a development application will reduce over time and thus they are able to be processed more quickly, and so the decision-making process will become more streamlined and development assessment productivity increases
    c. use of irrelevant planning considerations will be minimised
    d. the decision maker's workplace environment will improve
    e. efficiency of the decision maker's workplace will improve

f. development decisions will be transparent and accountable to and more trusted by the people and community they impact on
g. there will be more public engagement in the assessment process because affected neighbours and interest groups, such as Coastcare, will know they can make a difference
h. development outcomes will improve because TPMRRs create a legal nexus between planning and development that is so desperately needed in WA.

24. LGs are directly responsible for much of the green, blue and recreation infrastructure. LGs manage the provision, operation and maintenance of local parks, gardens, beaches, waterways, bridges and culverts, and public sporting and recreational facilities. This local infrastructure has a significant impact on the perceived and actual liveability of a community. However, LGs often lack influence and resources to plan for green and blue infrastructure in an integrated way across jurisdictions, and there are also resourcing challenges to plan, fund, deliver and maintain local green infrastructure; noting state, territory and LGs share many aspects of the planning process, often without effective coordination , which is exacerbated by the absence of TPMRRs
25. While it is acknowledged that TPMRRs probably cannot be lawfully inserted into Local Planning Schemes under the current legislative framework, attempting to amend the scheme will send the strongest message possible to the Planning Minister and the government to adopt TPMRRs.
26. The absence of TPMRRs combined with the presence of political donations from property developers being permitted in WA (prohibited in other jurisdictions) are significant and toxic drivers of conflicts of interest and corruption in WA development subdivision and zoning.
27. The absence of TPMRRs combined with the absence of compulsory Local Government voting and not allowing all Elected Members to be voted in altogether once every four years are significant drivers of conflicts of interest and corruption in local government development decision making because well intentioned Council majorities may only last for two years; and are mor easily manipulated in the absence of compulsory voting.
28. The absence of TPMRRs combined with the *Integrity (Lobbyist) Act* not applying to local governments or town planning, or to employees of property developers are significant drivers of conflicts of interest and corruption in local and state government development decision making.
29. The absence of TPMRRs combined with the failure of Councils to require published meeting registers to record who meets with whom and when and what about, to apply to Elected Members, employees and contractors are significant drivers of conflicts of interest and corruption in local government development decision making.
30. The absence of TPMRRs combined with the failure of local Government Councils to restrict their employees exercising delegated authorities to make decision only that comply with Council policies or otherwise refer the decision to Council are significant drivers of conflicts of interest and corruption in local government development decision making.
31. The absence of TPMRRs and the failure of the Public Service guidelines, such as Conflicts of Interest and Secondary employment to apply to Local Government employees, which means there are few if any controls on the revolving door movement (or in holding more than one position at a time) of personnel between sitting on decision-making authorities (such as WAPC committees, SDAU JDAP, LG Councils), private property firms, local governments and politics together with the weak conflict of interest LG Act provisions are significant drivers of conflicts of interest and corruption in local and state government development decision making.
32. The absence of TPMRRs combined with the lack of a requirement for independent technical reports to be paid for by development, subdivision and rezoning proponents are significant drivers of conflicts of interest and corruption in local and state government development decision making.

33. The absence of TPMRRs means corruptly obtained (difficult to prove) development approvals without planning merit cannot be reviewed by the SAT.
34. Recent amendment to the *Planning and Development Act* to give sole decision making over residential house development applications to LG CEOs and upcoming changes to the *Local Government Act* to give CEOs sole authority to make submissions to the DAP, are significant drivers of conflicts of interest and corruption in local and state government development decision making.

35. TPMRRs are essential to foster a well-planned built biodiverse landscape in WA that is properly planned for high local amenity now and for future generations, having regard to the need for climate change adaptation responses.