

Submission (Draft) on Development Assessment Panel Regulations

Introduction

The Western Australian Local Government Association is the united voice of Local Government in Western Australia. The Association is an independent, membership-based group representing and supporting the work and interests of 139 Local Governments in Western Australia.

The Association provides an essential voice for 1,222 elected members and approximately 22,600 Local Government employees as well as over 2 million constituents of Local Governments in Western Australia. The Association also provides professional advice and offers services that provide financial benefits to the Local Governments and the communities they serve.

WALGA welcomes the opportunity to comment on the proposed amendments to the Development Assessment Panel Regulations 2011 (draft Regulations). ~~Local Governments have been consulted in the development of this submission and it has been endorsed by WALGA State Council.~~

Local Government is a decision maker, regulator, and participant in the planning system, and has a key role in setting the strategic land use planning framework and managing statutory functions at a local level as part of the Western Australian planning system. As such, the community has a strong expectation that local character will continue to be considered within the planning framework and that Local Government is the level of government best placed to ensure this.

WALGA acknowledges the ongoing engagement between the Department of Planning, Lands and Heritage (DPLH) and the Local Government sector throughout the State Government's planning reform agenda. The opportunity for Local Government officers and Elected Members engagement has been positive. However the Association wishes to express its concern with the limited timeframe provided to comment on these proposed amendments, which has restricted the ability for Local Governments to seek a Council Resolution for their submission, which, considering the community interest on this issue, would have been preferred and appropriate.

WALGA has previously commented on a number of reviews to the planning system, including submissions on the *Planning makes it happen – Phase 2 Planning Reform Discussion Paper* in 2013, the *Planning makes it happen – phase two: Blueprint for planning reform* in 2014, the *Independent Planning Reform – Green Paper* in 2018, and both Phase 1 and Phase 2 of the *Action Plan for Planning Reform*.

WALGA has a demonstrated, long-held commitment to supporting planning reform, in particular the aim to refocus strategic priorities, address design and operational problems in the planning approval process and clarify and streamline institutional arrangements. As part of this work, WALGA has undertaken several reviews of the DAPs system. The reviews found that the system still fails to meet its intended aims

and objectives and needs further reforms if these objectives are to be achieved. The outcomes and findings of these reviews form the basis of WALGA's existing policy advocacy positions.

~~WALGA has sought comment from Local Governments to inform this submission.~~ The submission also reflects the Association's existing positions as well as key issues and concerns raised by WALGA members during the consultation period.

Background

WALGA opposes the DAP system in its current form and has proposed a number of reforms to the planning system to ensure it operates in an efficient, effective, and transparent way, and importantly, to ensure that matters of local planning context are adequately considered by decision makers.

The DAP system was established in 2011 with the intention of creating a more streamlined planning assessment process and to establish a better balance between professional advice and community representation for significant development proposals. Justification for its establishment centred on the encroachment of local politics into planning decision making and the need to ensure significant proposals that align with the state planning framework are given an expedited assessment pathway.

Both justifications questioned the suitability of Local Government to continue its role as decision maker for development proposals and insinuated that this task has become less efficient and ineffective in recent years. These assertions were not substantiated with any quantitative evidence at the time and in subsequent years have been refuted by evidence produced by WALGA through the Performance Monitoring Project.

Considering the findings of WALGA's review of the DAP system and responses to the State Government's planning reform agenda, the Association has endorsed the following position in relation to DAPS:

That WALGA does not support DAPs in their current form, and supports

- 1. the abolishment of the current 'mandatory' mechanism where a proposal has a value of \$10 million or greater, and its replacement with an 'opt in' mechanism for all proposals,*
- 2. raising the DAP threshold from the current \$2 million to \$5 million,*
- 3. the composition of DAPs should also be modified to provide equal representation of Specialist Members and Local Government Members,*
- 4. The creation of a distinct Special Matters DAP is considered unnecessary, given there are already multiple avenues for determination on the basis of zoning and monetary value of applications,*
- 5. In principle, the further reduction in the number of panels from five to three is supported, to the extent that this reduces the administrative burden on local governments and enhances consistency of decision making,*
- 6. WALGA supports the permanent appointment of panel members where this results in consistent decision-making, reduces the potential for conflicts of interest and ensures sound knowledge of DAP processes and procedure,*
- 7. WALGA is wholly supportive of greater transparency around DAP processes and decisions, as community distrust of DAP decision-making is a key area of concern for many local governments,*
- 8. Local Government supports the introduction of Third-Party Appeal Rights for decisions made by Development Assessment panels.*

Summary Comments

Several proposed amendments to the DAP Regulations align with WALGA's advocacy positions and are generally supported, including:

- The reduction in the number of district DAPs to three,
- The appointment of permanent specialist members,
- The centralisation of DAP secretariat functions within DPLH,
- The removal of the minimum district DAP Mandatory Threshold.

WALGA, in its submissions to both the *Planning and Development Amendment Act 2021 (Amendment Act)* and *Phase 2 Planning Reform*, opposed the establishment of a Special Matters Development Assessment Panel (SMDAP) on the grounds that such a panel is unnecessary, given there are already multiple avenues for determination on the basis of zoning and monetary value of applications. WALGA maintains this position and does not support the proposal in the draft Regulations to establish a SMDAP.

Whilst WALGA strongly opposes the establishment of the SMDAP, it is acknowledged that the legal framework to establish is enshrined in the *Planning and Development Act 2005*, and passage of the Regulations is likely. Thus, in line with the Association's general position to seek to improve the DAP system, the following modifications to the SMDAP are recommended:

1. Proposals that meet the threshold or criteria should be able to opt-out of the SMDAP pathway and allow assessment and determination by Local Government,
2. The draft DAP Regulations should be amended to mandate consultation with the relevant Local Governments prior to the issuing of a Ministerial Order in relation to SMDAP Precinct Criteria, and
3. That the membership of the SMDAP should include the Local Government members of the District DAP.

Consideration of the proposed amendments and their alignment with WALGA's existing advocacy positions, as well as additional comment on the amendments are provided in the sections below.

Comments on Government proposals

Comments in this table relate to significant matters proposed by the Government

Proposal	Alignment with WALGA Position	Comments and Recommendations
Reduction in number of District DAPs to three	Aligned	<p>WALGA endorsed conditional support for the reduction in the number of District DAPs in its submission on Phase 2 Planning Reform. Support was conditional on the proposal reducing the administrative burden on Local Governments, enhancing the consistency of decision making, and the appointment of permanent presiding members. These matters have all been satisfactorily addressed in the proposed DAP Regulations.</p> <p>The reduction in the number of panels will likely see the need for more Local Governments and members of the community to travel greater distances to access meetings.</p> <p>Recommendation:</p> <p>The State Government should ensure that the DAP secretariat is adequately resourced to support DAP meetings and provide adequate online access for the community so that distance does not become a barrier to participation.</p>
Appointment of permanent specialist members	Aligned	<p>WALGA endorsed conditional support for the appointment of permanent specialist members to the District DAPs in its submission on Phase 2 Planning Reform. This change should result in consistent decision-making, reduce the potential for conflicts of interest and ensures sound knowledge of DAP processes and procedures. It is proposed that the Presiding and Deputy Presiding Member must have planning expertise, this is broadly supported. However, this requirement should be worded to include broad planning expertise in government as well as consulting, with a preference for those that have recent and extensive statutory planning work within a Local Government.</p> <p>Transparency in the recruitment process for appointment to the panel and independence of panel members from interference from the DPLH and Government is critical to enhancing public understanding and trust of DAP decision-making. The draft Regulations propose that the permanent specialist members would be employed by DPLH and appointed by the Minister. The DAP Regulations should be amended to make clear the role of the permanent specialist members and outline their broad independence in decision making.</p>

		<p>Permanent panel members should be restricted from undertaking other paid work in the planning and development industry, or other industries deemed to create a real or perceived conflict to improve transparency and reduce negative community perceptions related to conflicted or biased processes.</p> <p>Recommendation:</p> <p>That the DAP Regulations be amended to outline the role of DAP specialist members and the need for that role to be undertaken without interference from DPLH, the Minister or external forces.</p>
<p>Centralisation of DAP secretariat functions within DPLH</p>	<p>Aligned</p>	<p>It is proposed that the secretariat and administrative support for both District DAPs and the Special Matters DAP will be provided by DPLH.</p> <p>Under the current arrangements DPLH maintains a DAP secretariat that provides a range of services to administer parts of the DAP system, however Local Governments have historically been expected to provide administrative support to DAP meetings. This has led to additional administrative burden on Local Governments and thus increased costs.</p> <p>The proposal will see a reduction in costs for Local Governments and support more consistent administration of the DAP system. The proposal is supported.</p>
<p>Minimum District DAP Mandatory Threshold Removed</p>	<p>Aligned</p>	<p>It is proposed that the minimum mandatory thresholds for District DAPs be removed. The current system mandates that all proposals for development approval that have a value of greater than \$10m are required to be determined by a District DAP.</p> <p>Having the option to 'opt' into the system for all proposals would allow applicants to choose whether they want to go to a DAP or through a Local Government to gain an approval, and hence 'opt out' of the DAPs system. A WALGA survey of Local Governments in 2016 found that within the 'opt in' threshold of DAPs at that time, 75% of applications were determined by Local Government, and that those decisions on average were made more quickly than those made by a DAP.</p> <p>WALGA has supported the removal of the mandatory threshold since 2020 following analysis of all decisions made by DAPs collected between July 2011 until the end of the 2020/21 financial year. Thus, the proposal to remove the minimum mandatory thresholds are supported. However, the ability of an applicant to choose their preferred pathway should be extended to proposals that meet the criteria for assessment by the SMDAP. This matter is discussed in detail below.</p>

		<p>WALGA current policy position is that an opt-in mechanism should exist for all proposals, including those proposed to fall within Special Matters DAP.</p>
<p>Local Planning Scheme to have statutory weight in decisions made by Special Matters DAP</p>	<p>Partially Aligned</p>	<p>In 2020, the State Government proposed amendments to Planning and Development Act 2005 that sought to establish a new process for significant projects with the WAPC as the decision maker. The resulting State Development Assessment Unit was established to manage this new process. Of particular concern for the Local Government Sector was the ability of the WAPC to not be bound by a Local Planning Scheme when approving a proposal. In its decision-making on a number of proposals through the SDAU pathway, the WAPC exercised discretion outside the established statutory framework, thus approving development that would not have otherwise been able to be approved. Such decisions have been a matter of great concern for Local Governments and their communities.</p> <p>It is noted that these powers to 'suspend' local planning frameworks will not be extended to the SMDAP, and that the SMDAP will need to act as the Local Government would in determining any proposal and thus give appropriate statutory weight to the Local Planning Scheme. This is appropriate and supported.</p> <p>Noting of course that support for this change should be read in the context of WALGA's general opposition to the establishment of the SMDAP.</p>
<p>Establishment of a Special Matters DAP</p>	<p>Not Aligned</p>	<p>In July 2020, the Amendment Act was passed by the WA Parliament. This legislation included the establishment of a Special Matters DAP to determine projects of state or regional importance, or certain types of applications in precincts of state or regional importance.</p> <p>WALGA in its submissions to both the Amendment Act and Phase 2 Planning Reform opposed the establishment of a SMDAP on the grounds that such a panel is unnecessary, given there are already multiple avenues for determination on the basis of zoning and monetary value of applications. WALGA's current advocacy position is that it opposes the establishment of a Special Matters DAP.</p> <p>The draft Regulations provide the administrative framework for the SMDAP, and provide for:</p> <ul style="list-style-type: none"> • The criteria for proposals to be considered by the Special Matters DAP, • The assessment, referrals and determination process, and • The membership of the Special Matters DAP. <p>Proposals that meet the SMDAP criteria would be lodged and assessed by officers of the DPLH. All SMDAP applications would be treated as complex applications and thus require public consultation. Comment from Local Governments would be sought on all applications and the response given 'due</p>

regard' by the SMDAP. The SMDAP will need to act as the Local Government would in determining any proposal and this give statutory weight to the Local Planning Scheme.

It is also proposed that the DAP Regulations would be supported by a range of Ministerial Order/s which specify:

- The projects of State and regional importance to be determined by the Special Matters DAP
- The precincts of State and regional importance and the type of applications that will be determined by the Special Matters DAP in these areas.

Proposals must meet the project criteria and construction value threshold to be eligible for the SMDAP pathway. The proposed threshold is \$50m in the Perth and Peel Region Scheme boundaries and \$30m outside. Proposals in the precincts of State and regional importance must meet both the precinct and project criteria.

Whilst WALGA opposes the establishment of the SMDAP for the reasons outlined above, it is acknowledged that the legal framework to establish it is already enshrined in the Planning and Development Act 2005, and passage of the Regulations is highly likely. Thus, in line with the Association's general position to seek to improve the DAP system, the following modifications to the SMDAP are recommended:

1. Proposals that meet the threshold or criteria should be able to opt-out of the SMDAP pathway and allow assessment and determination by Local Government.
2. The draft DAP Regulations should be amended to mandate consultation with the relevant Local Governments prior to the issuing of a Ministerial Order in relation to SMDAP Precinct Criteria, and
3. That the membership of the SMDAP should include the Local Government members of the District DAP.

In support of Recommendation 1 above, analysis of DAP decisions with a project value above the proposed SMDAP threshold shows that Local Governments recommend approval for such applications in over 90% of circumstances and took on average 108 days to determine these applications.

For example:

for the 23 high-value mining related proposals considered by a DAP between 2011-12 and 2020-21:

- all were recommended for approval by the Local Government.
- took on average 86 days to determine, and

- had a total value of \$43.8 billion,

for the 26 high-value mining related proposals considered by a DAP between 2011-12 and 2020-21:

- 25 were recommended for approval by the Local Government.
- took on average 106 days to determine, and
- had a total value of \$4.6 billion

for the 4 airport related proposals considered by a DAP between 2011-12 and 2020-21:

- all were recommended for approval by the Local Government
- took on average 58 days to determine, and
- had a total value of \$73 million

Allowing proposals to be determined by a Local Government would reduce decision timeframes; reduce administrative and regulatory burden on both levels of governments and applicants; and provide applicants with greater choice. Determination by a Local Government would also remove the need for mandatory complex advertising where it is not required by the Local Planning Scheme. The Association is concerned that by mandating advertising for proposals that otherwise do not require advertising under the Local Planning Scheme, the profile of these proposals is raised and as a result they are more likely to invite vexatious objections, objections based on non-planning grounds, and objections that relate to other approval processes, such as those under the Environmental Protection Act 1986.

Local Governments advise WALGA that from a planning perspective high value industrial and energy proposals, and proposals for mixed use developments in activity centres (such as Cockburn Central), would likely be determined under delegation as the land uses are proposed on appropriate land and such proposals generally don't seek policy variation or scheme discretion.

In support of Recommendation 2 above, it is noted that the Regulations give power to the Minister to issue Orders to identify precincts of State and regional importance and the type of applications that will be determined by the Special Matters DAP in such areas. While examples are provided in the consultation supporting documentation, it is understood that the final thresholds have not been determined. It is vital that a formal process be included in the draft Regulations that mandates engagement with the relevant Local Government and consideration of any submission prior to the Minister issuing the Order.

Recommendation:

	<p>That the DAP Regulations be amended to:</p> <ol style="list-style-type: none"> allow proponents with proposals that meet the threshold or criteria being able to opt-out of the SMDAP pathway and allow assessment and determination by Local Government, to mandate consultation with the relevant Local Governments prior to the issuing of a Ministerial Order in relation to SMDAP Precinct Criteria, and allow membership of the SMDAP to include the Local Government members of the District DAP.
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Additional Comments related to WALGA Positions

Comments in this table raise matters concerning WALGA's existing advocacy positions where they are not related to matters proposed by the Government

Topic	Comments and Recommendations
Maintenance of two Local Government members on District DAPs	<p>The draft Regulations proposes no change to the make-up of district DAPs. Each district DAP will continue to have 2 Local Government members, 2 specialist members and a presiding member.</p> <p>WALGA's current advocacy position is that the composition of district DAPs should be 3 Local Government members, 2 specialist members and an independent presiding member. This would create an equal share of local and specialist input in decision making by DAPs.</p> <p>Recommendation:</p> <p>That Regulation 25(1)(a) be amended to read:</p> <p><i>the 3 local government members included on the local government register for the relevant local government in relation to the development application; and</i></p> <p>That Regulation 26(2)(a) be amended to read:</p> <p><i>3 of whom must be designated as the local government members for the local government; and</i></p>

<p>District DAP opt-in threshold retained at \$2m</p>	<p>The draft Regulations proposes to maintain the current 'opt-in' threshold for DAPS at \$2 million, meaning any development application with a value above this can choose to have their proposal considered by either the DAP or Local Government.</p> <p>The Association's detailed analysis of all DAP decisions from 2011/12 to 2019/20 found that the decision to reduce the entry threshold from \$3m to \$2m saw a range of negative consequences that have reduced the effectiveness of the DAP system to achieve its aims and objectives by focusing on assessing significant and more complex proposals. There has been a steady increase in the number and proportion of proposals that falls within the \$2m-\$3m value range. In 2015/16, 10% and 29% of proposals fell within \$2m-\$3m and <\$5m value brackets, respectively, however in 2019/20 this increased to 26% and 38%, respectively.</p> <p>Developments with a lower development value are unlikely to be strategic in nature, such as proposals for service stations, childcare and small-scale residential developments, and they are considerably more likely to be refused or deferred by a DAP.</p> <p>WALGA's current advocacy position is that the DAP threshold should be raised from \$2 million to \$5 million.</p> <p>Raising the application cost threshold would remove the low cost, simple applications, the vast majority of which would be determined under delegation by Local Government. Given that these correlate to the large proportion of resource intensive applications, being those that are either refused or deferred, would help to deliver greater efficiency within the planning assessment process. Increasing the threshold would also have a positive impact on the perception of the planning system in the community; the DAP process has the tendency to politicise/fuel greater community concern for certain types of proposals and an increase in the threshold would reduce this.</p> <p>Recommendation</p> <p>Raise the DAP threshold from the current \$2 million to \$5 million.</p>
<p>Third Party Appeal Rights for decisions made by Development Panels</p>	<p>WALGA supports the introduction of Third-Party Appeal Rights for decisions made by Development Assessment Panels, in certain circumstances. WALGA has developed a preferred model for third party appeals that clarifies who can appeal a decision, how to appeal a decision and the benefit of the proposed model for the Local Government sector.</p>

	<p>WALGA's position applies to all DAPs, and as such supports the inclusion of third party appeal rights, in line with our preferred model, for decisions made by the Special Matters DAP.</p> <p>It is acknowledged that any change to incorporate third-party appeals into the planning system, will require modifications to the Planning and Development Act 2005, and this cannot be brought about through changes to the DAP Regulations alone.</p>
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Specific comments

Comments in this table raise minor matters of a technical nature that go to an efficient and effective DAP system

<p>Local Government clearing and certifying conditions</p>	<p>The supporting consultation documentation states that in relation to a SMDAP that:</p> <p><i>Following the determination of an application, local governments will be responsible for the clearance and compliance of conditions.</i></p> <p>Under the current arrangements, conditions on approvals issued by the WAPC through the SDAU process are cleared by the DPLH with assistance and input by the Local Government. This arrangement is appropriate as it is the WAPC that is issuing the approval and has ownership of the conditions. The proposed arrangement would see Local Government's required to clear conditions that they may not have been involved in setting and may not support. The proposal also has the potential to impact the resourcing of Local Government planning teams, particularly as Local Government planning fees have not been increased since 2013. The Association supports the current arrangement that the DPLH is responsible for clearing conditions that they recommend for inclusion on approvals.</p> <p>Recommendation:</p> <p>That DPLH should be responsible for the clearing of conditions and compliance relating to any approval of the SMDAP.</p>
<p>Timeframes</p>	<p>Regulation 12(3) provides the report must be provided at least 12 days prior to the application being otherwise refused under the planning instrument.</p> <p>The <i>Planning and Development (Local Planning Schemes) Regulations 2015</i> provides the ability for the Local Government to not accept a proposal until such time the application is taken to be accepted once the Local Government is satisfied that all information has been provided (Regulation 63A).</p>

	<p>Clarification is required on whether the time taken to provide the report commences on lodgement of a DAP application, or once the application is accepted by the Local Government.</p> <p>Regulation 12(5) should be amended to include a new sub-clause, requiring any public submissions on the matter and the responsible authority's response to be included in the report to the DAP.</p> <p>Whilst many Local Governments already include a schedule of submissions, this is not enshrined in regulation.</p> <p>It is particularly important that all public submissions be required to be provided to the DAP where access to public participation may otherwise be limited by reducing the number of DAPs. This should apply to both the District and Special Matters DAPs.</p> <p>Recommendation:</p> <p>Regulation12(5) should be amended to require the preparation of a schedule of submissions and the responsible authority's response as part of a responsible authority report to a DAP/</p>
Further Services from Responsible Authority	<p>Several Local Governments have raised concerns with WALGA about presiding members lodging Regulation 13 requests, including alternate recommendations, and requiring these to be provided the same business day. Ad-hoc and late requests for additional information from the responsible authority prior to a DAP being considered is inappropriate and compromises effective decision making. Further, requests that seek complex and extensive responses should allow reasonable time for the work to occur and adequately outline the service required. Legal advice provided to Local Governments have called into question the validity of directions under R.13 where these tests are not met.</p> <p>Recommendation:</p> <p>Regulation13(2) should be amended to require a minimum timeframe and level of detail in which the presiding member may request the responsible authority provide additional services such as technical advice and information.</p>
Commencement Date	<p>Regulation 16A should be amended to clarify the date in which the decision is made is not the date in which development approval is granted by the DAP, rather, the date in which the decision is conveyed to the applicant in line with recent determinations of the State Administrative Tribunal (SAT v City of Swan 2022 (WASAT 17). The Regulations do not provide such a timeframe in which to convey the decision.</p>
Fees	<p>The draft Regulations set a higher sitting fee for specialist members than Local Government members. No justification is provided for this discrepancy.</p>

Recommendation:

The fee for attendance of the local government member to the district DAP should be the same as for a specialist member, given all members are deliberating and making decisions on the same agenda.

Conclusion

Thank you for the opportunity to provide comment on the Development Assessment Panel Regulations 2011 (draft Regulations), and for the Department's consultation with WALGA and the sector to date in shaping the proposed reforms. As outlined in the above submission, a number of the proposed amendments align with existing WALGA positions and are therefore supported. Notwithstanding, the draft Regulations contain several provisions which are of great concern to the Local Government sector and as such the draft Regulations should not proceed in their current form without the revisions outlined above. WALGA looks forward to further consultation with the Local Government sector on these important reforms to the DAP system as the Regulations progress.

