

PROPERTY LAW AND CONVEYANCING 2008 (WA)

**The Structure Planning Process and Other Planning Law Changes
Relevant to Property Lawyers**

INTRODUCTION

This paper will consider various issues in planning law relevant to property lawyers, but will primarily focus on issues relevant to the Structure Plan Process.

The most significant development in Planning Law in the last 15 years, impacting on Property Law and Conveyancing, is the radical move -

- from development guided by a Guided Development Scheme (“GDS”), which I refer to as “**the Development Scheme Process**”;
- to development guided by a Structure Plan (“SP”) together with a Development Contribution Plan (“DCP”), which I refer to as “**the Structure Plan Process**”.

Development Scheme Documentation

Property development pursuant to a GDS required little documentation after drafting of the GDS text and the text for the associated Zoning Scheme amendment.

Structure Planning Documentation

Property development pursuant to a SP has a significant documentation spin-off for property lawyers. That may be regarded as a positive feature.

On the negative side however, there are a number of complex issues which make the task of documentation hazardous in this highly specialized area.

Need to Understand the Process

For the property lawyer to negotiate the hazards it is necessary to have a clear understanding of the process. The principal purpose of this paper is to provide that understanding. With that in mind, the paper will comprise the following major parts:

1. Explanation of the Development Scheme Process so as to provide a historical and legal context for an understanding of the Structure Plan Process.
2. Explanation of the principal elements of the Structure Plan Process.
3. Development related documents involving Local Governments: Issues Problems and Hazards.

1. EXPLANATION OF THE HISTORICAL AND LEGAL CONTROL FOR THE STRUCTURE PLAN PROCESS

1.1 Systematic development control has its origin in WA in the *Town Planning & Development Act 1928* (“TP&D Act”). That Act was based on the *Housing Town Planning Etc Act 1909* of the UK¹ which had focused on the achievement of amenity and convenience through town planning schemes. The principal planning functions introduced by the TP&D Act were:

- (1) Provisions for the making of town planning schemes “... with the general object of improving and developing ... land to the best possible advantage ...” and provisions generally aimed at preserving and promoting amenity;²

From the beginning this function was performed primarily by local governments (“LGs”) though legislation was introduced in 1955 specifically to provide for the making of the Metropolitan Region Scheme (“MRS”) for Perth. In WA, at least since 1928, LGs have always had the primary responsibility for administering the land use and development control function (other than subdivision).

- (2) Provisions to control subdivision of land³.

From the beginning this function has been performed exclusively by a State Government planning agency (firstly the Town Planning Board, then the State Planning Commission and now named the Western Australian Planning Commission (“WAPC”)).

¹ Parliamentary Debates 1928, and Report of the Select Committee of the Legislative Assembly 30/10/28 (1928 Parliamentary Papers Vol 11)

² TP&D Act s6(1) and Part I generally

³ TP&D Act Part III

- 1.2 It should be noted that both these planning functions were intended as controls on property development in the public interest. LGs and the WAPC performing their proper development control functions are providing a service to the public by avoiding or curbing possible excesses of developers, though property developers and entrepreneurs complaining about the constraints and delays of the system, assume the system is providing a service to them. This incorrect assumption is responsible for many of the developer complaints about WAPC and LG delays.
- 1.3 Although they had the power from 1928, local governments generally did not become serious about the making of planning schemes until after the MRS came into operation in September 1963. Local governments in the Perth Metropolitan Region then began to prepare zoning schemes for their districts which provided for:
- zoning and classification of land; and
 - land use and development control⁴.

Those have always been the two principal functions of local government Zoning Schemes. But it was also during the late 1960s that some local governments at the metropolitan development front began to introduce Development Schemes. The inspiration for development schemes arose from a relatively innocuous provision in cl 3 of the *Town Planning Regulations 1967* (“TP Regulations”) which made a distinction between Development Schemes and Zoning Schemes by defining a Development Scheme as one which does not provide for the zoning or classification of land.

- 1.4 From 1967 onwards, a large number of Development Schemes were made by LGs in developing areas including primarily the City of Stirling, the City of Wanneroo, the City of Bayswater, the City of Swan, the City of Armadale, the City of Gosnells and the City of Canning. Numerous other local governments have benefited from the use of Development Schemes made with the object of improving and developing land to the best possible advantage. The earliest Schemes tended to be of the simple resumption kind where the local government resumed all of the land in the Scheme Area, subdivided and developed the land, selling sufficient subdivided lots to cover the cost of the Infrastructure Works, and returning the balance of the subdivided lots to the

⁴ In fact the Metropolitan Region Town Planning Scheme Act 1959, s35(1) imposed a statutory obligation on Perth Metropolitan LGs to prepare zoning schemes with effect from 1966.

participating landowners. That particularly suited land under a multiplicity of fragmented ownerships, where no single owner could afford to introduce expensive infrastructure such as sewerage, water supply and drainage.

1.5 As time went by, and as large development companies became more active in broad acres development, the format of Development Schemes began to change from the resumption model to the Guided Development Scheme (“GDS”) model. The GDS model was extraordinarily flexible. A GDS could be as simple as a LG publishing a Guide Map and requiring in the Scheme text that all development within the Scheme Area was to be consistent with the Guide Map. In that case the responsible LG had very little administrative responsibility and landowners had maximum flexibility to carry out development consistent with the LG approved pattern in the Guide Map. At the other end of the scale, a Guided Development Scheme could involve substantial works by the responsible LG in the provision of shared Infrastructure Works, and the equitable apportionment between owners within the Scheme Area of the shared Infrastructure Costs. Many of the later Development Schemes were a hybrid of the resumption scheme and the GDS, in that they provided for a Council Development Area which usually was an area of small landholdings, where the Council provided all of the Infrastructure Works and apportioned the costs between the owners in the Council Development Area, combined with a Guided Development element, usually involving larger landholdings owned by development companies who were responsible for their own Infrastructure Works, the Scheme at the most providing a mechanism for the equitable sharing between those owners of the shared Infrastructure Costs⁵.

- 1.6 The principal elements of a typical Development Scheme were as follows:
- (a) statement of the objects of the Scheme;
 - (b) identification of the Infrastructure Works which would constitute the Scheme Works;
 - (c) provision for the estimation from time to time of the Scheme Costs, being the costs of the Scheme Works;

⁵ Examples of such hybrid schemes are the Shire of Kalamunda TPS No 6 (High Wycombe/Maida Vale); and City of Swan TPS No 14 (Malaga Industrial Development Scheme).

- (d) provision for the equitable sharing of the Scheme Costs between the Scheme Owners;
- (e) formal provisions enabling the LG to administer the Scheme.

1.7 The three core elements:

- identification of the shared Infrastructure Works;
- accurate and reliable costing of the shared Infrastructure Works; and
- establishing a formula for the equitable sharing of the Scheme Costs between participating owners

were fundamental for the effective operation of a GDS. The provisions for sharing the Scheme Costs between owners was challenged on a number of occasions in the early 1980s, but was definitively resolved by the Supreme Court in the *Costa* case in 1982⁶. The collecting of contributions to shared Infrastructure Costs was alleged in that case to involve the imposition of a tax or levy, and as there was no specific provision in the TP&D Act empowering a LG to impose a tax or levy, the Scheme was claimed to be invalid. Olney, J repeated the observation made by the Supreme Court in a case in 1968⁷ that s.6 of the TP&D Act provided a very wide prescription for the making of planning schemes. The power in s.6 was considered to be wide enough to allow a LG to impose an obligation to contribute to Infrastructure Costs. Development Schemes were not subsequently exposed to any further serious legal challenge.

1.8 Although the TP&D Act was repealed in 2006 and replaced by the *Planning and Development Act 2005* (“P&D Act 2005”), that was essentially a consolidation Act (5.3(1)(a)) and the relevant provisions of the TP&D Act have been retained. The law relevant to Development Schemes and Structure Plans remains unchanged except in regard to compensation issues which I will mention later. But what was achievable under the TP&D Act is likely to be achievable under the P&D Act 2005.

⁶ *Costa v Shire of Swan* [1983] WAR 22 at 33

⁷ *Pearse v City of South Perth* [1968] WAR 130 at 134-5. In this case the validity of a zoning scheme was challenged as it imposed development and land use control without any express power in the TP&D Act to do so. D’Arcy, J held that the scope of s.6 was broad enough to authorize such a provision.

Continuing Significance of the Development Scheme Process

- 1.9 Development Schemes in the last 15 years have become unpopular with both developers and local governments for a range of reasons, (most of which can be demonstrated to be mistaken or false) and they have been replaced by the Structure Plan Process. However the three fundamental elements identified in 1.7 above still provide the pattern for broad acres development under the Structure Plan Process.
- 1.10 In understanding the difference between the Development Scheme Process and the Structure Plan Process, it is important to note that the Development Scheme Process necessarily involved the making of a Development Scheme and the amendment of a Zoning Scheme as follows:
- (a) the Development Scheme was required to be made pursuant to the procedures in the TP Regulations;
 - (b) additionally, because broad acres land was generally zoned “Rural” under the relevant local government scheme, it was necessary to change the zoning and classification of land in the Scheme Area of the Development Scheme to a combination of typical urban classifications, or industrial, depending on the character of the Scheme.
- 1.11 The change from rural zoning to an appropriate urban zoning also generally involves an MRS amendment. However that is also a prerequisite for application of the Structure Plan Process; it is a constant that doesn’t require further consideration in this paper.
- 1.12 The new Development Scheme and the amendment to the LG’s Zoning Scheme were generally run through the statutory processes together, were often advertised simultaneously, and were generally dealt with in the same timeframe. In the days when the State Government planning agency was well staffed, the total timeframe could be as little as 6 months. LGs have been able to force Development Schemes through the statutory processes in only a few months, but that speed depends on co-operation from State Government agencies, principally the EPA and the WAPC. It was however this process of Scheme making and amending which most concerned the development industry, and is the foremost explanation for the decline of the Development Scheme Process in favour of the Structure Plan Process.

2. EXPLANATION OF THE PRINCIPAL ELEMENTS OF THE STRUCTURE PLAN PROCESS

2.1 For developers, much of the attraction of the Structure Plan Process is based on the perception that it avoids the bottleneck delays of Guided Development Schemes.

BUT most of that perception is illusory because:

1. It has always been equally possible for developers to obtain subdivision/development approval subject to their agreement to pay, or to provide security for the payment, of shared Infrastructure Cost contributions upon a proposed GDS being completed and coming into operation; and
2. Most of the delay on Guided Development Schemes was associated with the three fundamental elements identified in 1.7 above, namely:
 - (a) identification of the shared Infrastructure Works;
 - (b) accurate and reliable costing of the shared Infrastructure Works; and
 - (c) establishing a formula for the equitable sharing of Scheme Costs between participating owners.

Those three elements are still required under the Structure Plan Process. Also, because it is necessary to give the Development Contribution Plan statutory force, a Zoning Scheme amendment is required to incorporate it in a schedule of the Scheme.

Early Release

2.2 Under the Guided Development Scheme Process, the WAPC in dealing with subdivisions and LGs in dealing with development applications, could always keep the wheels of the land release programme turning by granting approvals before completion of the Scheme-making process, subject to an appropriately secured agreement to make a contribution when the GDS is in place. There are problems with those agreements, but the problems were no worse under the Development Scheme Process than they are under the Structure Plan Process where they are routinely used.

2.3 Experience of many Development Schemes and many Structure Plans would suggest that the perceived time saving is largely illusory. Often where it is perceived to occur,

the perception is due to the taking of shortcuts in the three fundamental elements (1.7 above), and generally results in a legacy of problems for the developers and/or the responsible LG. Commonly, developers who were fortunate enough to develop their land before the final establishment of the formula for Infrastructure Cost sharing will have been allowed to complete their subdivision or development without contribution to Infrastructure Costs, or on payment of an amount which is very significantly less than the amount ultimately established as the appropriate Infrastructure Cost contribution per lot. It may take a decade or more for the irregularity to be identified, and for appropriate steps to be taken to mitigate the consequences.

2.4 Common consequences of the too early release of land under the Structure Plan Process are:

- (a) later developers are left to bear a disproportionately large share of the Infrastructure Costs;
- (b) LGs are burdened with the task of unravelling the administrative muddle;
- (c) often ratepayers of the local government are left to bear the burden of the surplus cost of Infrastructure Works; and
- (d) it is possible that LGs faced with a significant deficit in Infrastructure Cost contributions will elect not to carry out significant works, such as bridge construction or full construction of major distributor roads, and that may involve a betrayal of the expectations of those who have already purchased subdivisional lots in the Development Area, and the expectations of landowners forced to develop and market their subdivisional lots in a radically changed environment.

Absence of Detailed Planning Structure under Zoning Schemes

2.5 The Structure Plan Process occurs in a situation where land within the Scheme Area of a Zoning Scheme has not been provided with a detailed planning structure.

2.6 In ordinary circumstances under a Zoning Scheme, development of land occurs within a well defined planning structure. Under that structure there will ordinarily be in place:

- (a) a pattern of ultimate zones, reserves, and in residential zones, a pattern of R-Code densities;
- (b) an applicable Zoning Table, which contains a matrix of land uses against zones, where each land use is given a permissibility designation within each zone;
- (c) a set of provisions applying development standards and requirements either to zones, or to land uses, or to both.

2.7 In some parts of some LG districts where there are broad-acres of rural land undergoing transition to urban, the strategic planning will not have reached the stage where the level of planning structure explained in the preceding paragraph, has been worked out. Rather than go through the more traditional process of undertaking studies, consulting with landowners and other stakeholders, strategic planning and then Scheme amendment, which is the more orderly and proactive approach, a responsive approach is adopted where in effect landowners within the development area are allowed to fill in their own planning structures by means of a Structure Plan. These areas are commonly classified as “Development Zone”, or perhaps a Residential Development Zone”, or “Industrial Development Zone”, or some kind of “Deferred” zoning, or a special rural lifestyle classification such as “Rural Landscape Living Zone”. In all those cases, approval of a Structure Plan will generally be a prerequisite for subdivision or development approval.

2.8 Ordinarily a Structure Plan may be prepared by a LG, or by owners of land within the Structure Plan area. However it is generally not in the interest of orderly and proper planning for a LG to surrender, or to be deprived of the initiative in formulating the detailed planning structures for an area. The SAT in the case *Rafferty & Ors v City of Joondalup*⁸ reflected on the role of LGs in making Structure Plans, and endorsed the notion that a LG should have the power, without appeal, to determine whether or not a Structure Plan should be advanced for part of its district. At para 22 the SAT (Senior Member Parry) made the following comment -

“Given that a structure plan is a strategic planning instrument which can vary standards and requirements under the Scheme, the urban development object of the Scheme, to promote planning, management and strategic control of development in a

⁸ [2006] WASAT 229 at paras 18 to 22

rational and systematic manner, and the designation of the City as the authority responsible for carrying out the Scheme in general and determining the parameters of strategic planning in the form of structure plans in particular, it could not be the intention of the Scheme to allow landowners to prepare and present to the City for approval structure plans which have not been required by the City. If this were the case, it would potentially lead to sporadic and uncoordinated, rather than rational and systematic, planning, management and strategic control of development, contrary to the objective of the Scheme.”

2.9 Notwithstanding those reservations, many Zoning Schemes, and in fact the draft Model Scheme Text (“MST”) provisions for structure planning⁹ contain a provision which allows either a landowner or the LG to prepare a Structure Plan. Where a Structure Plan depends on the responsible LG for its implementation, and for the onerous task of administering an Infrastructure Cost sharing arrangement under a Development Contribution Plan, it would be very short-sighted of landowners to seek to force the Structure Plan on the LG against its will. The same might not apply where a Structure Plan covers a single landholding.

2.10 The kind of Structure Plan contemplated in this paper thus far would be commonly described as a “Local Structure Plan”. It has become common for Structure Plans to be recognized in three categories:

- Regional Structure Plan. This tends to be “broad-brush” in its approach, usually identifying major regional infrastructure, such as major distributor roads and routes for supply of sewerage, water supply and drainage, major commercial centres, public purposes sites, school sites, and major recreational areas. The term “regional” in this context is confusing as no Regional Structure Plan would attempt to deal with the whole of the area covered by a regional planning scheme, where the term “regional” most commonly occurs.
- District Structure Plan. This is also a Structure Plan with a certain amount of generality but which fills in the major infrastructure over a broad area usually covering numerous land ownerships. The term “district” in this context is confusing as no District Structure Plan would attempt to cover the whole of the district of a LG, where the term “district” most commonly occurs.

⁹ Not yet approved by the WAPC or published, but available on request from the Department of Planning and Infrastructure (“DPI”)

- Local Structure Plan. This is the Structure Plan at the highest degree of particularity which generally sets out the subdivisional road pattern, subdivisional lots, zones and reserves and usually R-Code densities for residential areas. The term “local” is confusing as it is uncommon for a Local Structure Plan to cover the whole of the locality in a LG district, or the Scheme Area of a Local Planning Scheme (generally the whole of the LG district), where the term “local” otherwise commonly occurs.

Plans like Structure Plans, but Under Other Names

- 2.11 A planning instrument may do the same work as a Structure Plan, but may be given a different name, such as “Development Plan”, or “Outline Development Plan”. The name difference doesn’t matter if the effect is the same.

Focus on Local Structure Plans

- 2.12 A Local Structure Plan will generally include all of the detail that might be included in each a Regional Structure Plan, a District Structure Plan, and a Local Structure Plan. The draft MST contemplates that even after the preparation of a Structure Plan, landowners may be required to prepare a Detailed Area Plan which require detailed structures within individual landholdings intended to be subdivided (e.g. building envelopes on proposed residential lots). However a properly prepared Local Structure Plan should contain the same detailed planning structures as are traditionally shown in a Scheme Map for the parts of a LG district which have undergone detailed planning.

Advantage for Owners Proposing a Structure Plan

- 2.13 Because the preparation of a Structure Plan involves considerable expense, it is generally only major landowners in a Structure Plan Area who will be prepared to commission its preparation. It is understandable that the consultants for the major landowner will tend to view the development potential within the Structure Plan Area from the major owner’s point of view. It is not uncommon for Structure Plans prepared in that way to plan for the location of high value uses, such as major commercial centres and high density R-codings within the landholding of the client owner, and tending to locate major areas of POS, school sites etc in the landholdings of other owners. The plan having been prepared and published for comment, it is

often difficult for the minor landowners to argue against the Structure Plan proposals which may be supported by a team of experts employed by the proponent.

Orderly Planning Requires LG Control over Structure Plan

2.14 If a Zoning Scheme contains provisions similar to the draft MST which allows a Structure Plan to be initiated either by the LG or by a landowner, then in a very significant way the initiative for detailed planning within its district is removed from the LG responsibility. Ever since statutory planning was introduced in WA in 1928, LGs have had unqualified authority in initiating planning scheme amendments, and that, generally speaking, is the effect of a Structure Plan to that proposed zoning and classification of land, use class permissibilities, and R-Code densities. It is not possible under the legislation for the Minister or for SAT or for a Court to compel an LG to initiate a Scheme Amendment. It should not be possible for an LG to be compelled to initiate a Structure Plan, which after all only does the same work as a traditional Scheme Amendment in applying planning scheme type detailed planning to an otherwise unplanned area. Under the draft MST provisions, a landowner dissatisfied with an LG's refusal to advertise a proposed Structure Plan can apply to the SAT to review that decision. It seems inappropriate for the fundamental strategic planning of a LG district to be carried on in effect through the process of SAT appeals. Most LGs are simply not able to devote the funds and expert officer time to dealing with constant appeals on Structure Plan proposals, and are generally not able to match the financial resources and self-interest motivation of landowners in the SAT forum. Provisions for Structure Plans in LG Schemes should not allow for the possibility of a Structure Plan being initiated against the will of the responsible LG. The City of Joondalup Scheme considered by the SAT in the *Rafferty* case⁸, allowed a Structure Plan to be prepared where the LG **required it**¹⁰.

Development Contribution Plan

2.15 It is not uncommon for developers to promote a Structure Plan without having gone to the trouble of preparing a Development Contribution Plan, dealing with the three core elements identified in 1.7 above. However the Development Contribution Plan, dealing adequately with those three core elements, is an essential accompaniment for a

¹⁰ City of Joondalup LPS2, cl 9.1.1. The City of Wanneroo has an identical provision in its District Zoning Scheme and Wanneroo is probably the foremost user of the Structure Plan Process.

Structure Plan which covers land in multiple ownerships. It is possible that a Structure Plan could be prepared over an area owned by one or a small number of owners who reach agreement as to the basis upon which the costs of the required Infrastructure Works will be shared. All that is required then is for the responsible LG and the servicing agencies to be satisfied that the Infrastructure Works identified in the Structure Plan are adequate and appropriate. The development of the massive Ellenbrook Estate was guided by the Structure Plan Process, and no Development Contribution Plan was required as the three owners of the land concerned had reached agreement on the basis of sharing costs. However that was an unusual case. More frequently there will be numerous land ownerships, and much expert time and consideration is required in order to arrive at a Development Contribution Plan which not only properly identifies the required Infrastructure Works, but also reliably costs the works, and establishes a workable formula for the equitable sharing of the costs. The massive East Wanneroo area in the City of Wanneroo is being developed under the Structure Plan Process.

- 2.16 It is not uncommon for the process involved in identifying Infrastructure Works, costing those works and devising an acceptable formula for the equitable sharing of the costs, to take 12 months or more from beginning to end. Additionally, provision needs to be made for the periodical review of cost estimates.
- 2.17 Because the cost contributions pursuant to the Development Contribution Plan will often need to be enforced against individual owners, it seems to be essential that the Development Contribution Plan have statutory force, at least to the extent of being incorporated in the relevant LG Zoning Scheme, which then would give the provisions the same force as if enacted in the P&D Act 2005¹¹. There are very strong reasons why a Structure Plan should not be allowed to be implemented until the Development Contribution Plan has been prepared and incorporated by reference or otherwise in a Schedule of the relevant Zoning Scheme. A number of LGs have faced damaging situations as a result of Structure Plans being forced on them before effective and enforceable Infrastructure Cost sharing arrangements were in place¹².

¹¹ P&D Act 2005, s.87(4)

¹² The Shire of Serpentine-Jarrahdale proposed a Scheme Amendment providing for structure planning for the Byford locality, but the Minister refused approval for the vital accompanying provisions for a Development Contribution Plan. A number of disputes and some litigation have occurred as a consequence.

Property Lawyer Role

2.17 It is common for developers to press urgently for their subdivisions or developments to be given planning approval prior to a Development Contribution Plan being prepared and incorporated in the relevant Zoning Scheme text. It is common for the WAPC when approving subdivision in these circumstances, or for the responsible LG when approving an application for approval to commence development, to impose as a condition of the subdivision or development approval, a requirement that the applicant enter into an agreement with the responsible LG to make an appropriate contribution to Infrastructure Costs upon the preparation of the Development Contribution Plan, or upon the Development Contribution Plan being incorporated in the relevant Zoning Scheme. The imposition of such conditions frequently results in problems, both for the responsible LG and for landowners within the Structure Plan Area, but the approach has frequently been adopted, and is likely to be adopted frequently in the future. It will fall to the property lawyer to ensure that the documentation associated with such agreements is effective, or at least prepared as competently as the circumstances permit.

Some of the documentation that spins off from development of land under Structure Plans

2.18 The following are some of the types of documentation that may spin off from the development of land under a Structure Plan, particularly in the case of a Structure Plan involving significant shared Infrastructure Works, necessitating the preparation of a Development Contribution Plan.

- (1) The landowners for whom the Structure Plan is to be prepared will commonly enter into a Joint Venture Agreement or Memorandum of Understanding with one another. The preparation of these documents requires a sound understanding of the Structure Planning Process, the importance and role of the Development Contribution Plan, and an awareness of the powers and limitations on the powers of relevant authorities particularly the responsible LG and the WAPC. At the same time, an agreement or MOU with the LG may be required.
- (2) The property lawyer may be engaged to prepare the text, or some part of the text, or documents to accompany the text for a Structure Plan, or the text of the

Scheme Amendment or the Amendment Report required for the LPS amendment which effectively incorporates the Development Contribution Plan in the relevant LPS.

- (3) Following the adoption of a Structure Plan by the responsible LG and its endorsement by the WAPC, some or all of the owners within the Development Area may then require a joint venture agreement, or co-operative development agreement. Most of the Packham area in Cockburn was developed with the use of such agreements.
- (4) Commonly owners of land within a Structure Plan area seek the agreement of the responsible LG to certain aspects of the critical path for the Structure Plan and the Development Contribution Plan. Developers will often seek to bind the LG to a programme including the approval of the Structure Plan and Development Contribution Plan, the approval of development applications, providing support for subdivisions dealt with by the WAPC, and agreement to initiate and progress a relevant Scheme Amendment. Property lawyers preparing this type of document need to be keenly aware of the limitations on the powers of statutory authorities in such agreements, and problems associated with fettering statutory discretions¹³.
- (5) The WAPC commonly requires subdividers, as a condition of subdivision approval, to enter into an agreement with the responsible LG in regard to such matters as the making of appropriate Infrastructure Cost Contributions. This will commonly be the case where the relevant Development Contribution Plan has not yet been completed to the point where it is capable of being incorporated by reference in the LPS. Particular problems arise if there is an unacceptable degree of uncertainty as to the amount of the required Cost Contributions, and in securing the payment of contributions. The lawyer representing the responsible LG must ensure that the agreement is sufficiently certain to be enforceable, and that the payment of contributions is adequately secured, perhaps by a charging provision supported by an absolute caveat, and a requirement that any subsequent owner enter into a similar agreement with the LG.

¹³ See discussion of “fettering discretion” in Part 3 below.

- (6) The LG in giving planning approval for unit developments may impose a similar condition requiring the developer to contribute, and to secure the payment of contributions for shared Infrastructure Costs. Similar precautions are required as in the case of the agreement required as a condition of subdivision approval.
- (7) A common conveyancing spin-off from the documents required as conditions of subdivision approval is the lodgement of caveats and withdrawals of caveats, and the preparation of replacement deeds when there is a change in ownership of the contributing land. It is common for the representatives of the contributing developer to argue that the securing of the owner's payment of Cost Contributions does not require an absolute caveat. It is inconceivable that adequate security could be obtained in the typical Development Contribution Agreement without an absolute caveat.
- (8) It is common in agreements between developers and LGs, in situations involving joint or co-operative development of land in different landholdings, for there to be a requirement for reciprocal easements. The more appropriate solution in most cases, both for the responsible LG and for the developing owners, is for easements in those circumstances to be "in gross", pursuant to ss 195 and 196 of the *Land Administration Act 1997*. This avoids the requirement for a dominant tenement, and ensures the continuity of an easement regardless of changes of ownership, and avoiding the possibility of agreements between owners, without the knowledge of the LG, extinguishing the reciprocal easements.
- (9) Commonly agreements between developing owners and LGs will require the imposition of restrictive covenants. Again it should be noted that a restrictive covenant agreement required by an LG can be "in gross" pursuant to s 129BA of the *Transfer of Land Act 1893*, thus avoiding the necessity for a dominant tenement.
- (10) Commonly agreements between responsible LGs and developing owners will give rise to the need for the lodgement on subdivisional land titles of a notification under section 70A of the *Transfer of Land Act 1893*.

As already indicated, the preparation of any of the above documents requires a keen awareness of the powers, and the limitations on the powers, of LGs and other responsible authorities. The property lawyer needs to be constantly alert to the possibility of developments of certain kinds on certain lands or in certain areas requiring the approval of other agencies or Ministers, such as development within the Swan Valley, developments within the management area of the Swan River Trust, developments within the redevelopment areas of one of the Redevelopment Authorities, developments on or affecting Crown land whether under the care, control and management of the responsible LG or otherwise, etc. Some of the problems and hazards associated with the contemplated documentation are discussed in Part 3 below.

- 2.19 The discussion of Infrastructure Cost issues, and Infrastructure Cost Sharing set out above is an extension and elaboration of issues discussed in previous conference papers¹⁴.

3. DEVELOPMENT RELATED DOCUMENTS INVOLVING LOCAL GOVERNMENTS: ISSUES PROBLEMS AND HAZARDS

The following discussion of issues problems and hazards in connection with documents involving LGs does involve reference to some recent cases, but the primary objective is to draw attention to a number of principles which are important, and sometimes critically important in the preparation and application of contracts and other documents involving LGs.

Interpretation of Planning Schemes

- 3.1 Property lawyers and conveyancers preparing documents involving LGs will commonly be required to consider provisions in planning schemes. While it may be that a Local Planning Scheme or amendment to a Local Planning Scheme, when approved by the Minister and published in the Gazette, has full force and effect as if enacted by the *Planning and Development Act 2005*¹¹, the approach to interpretation

¹⁴ D McLeod "Who Pays for Urban Infrastructure? - Developer Contributions in WA", AIUS 25th National Conference 1992, 25/9/92; D McLeod "A Flexible Instrument for Infrastructure Cost Sharing: The Western Australian Solution" International Bar Association Conference Infrastructure '96, NZ.

of a planning scheme is not quite the same as the approach to the interpretation of a statute.

On this point, in the recent WA Court of Appeal case *Re: Shire of Mundaring. Ex parte Solomon & Ors*¹⁵ McLure JA referred to the statutory effect principle in s 87(4) of the *Planning and Development Act 2005*, and went on to make the following comment at para 23:

“Further planning schemes are not drawn with the precision of Acts of Parliament and should be construed broadly rather than pedantically and with a sensible practical approach: *Westfield Management Ltd v Pine Rivers Shire Council* [2004] QPELR 337 at [18]; *Harburg Investments Pty Ltd v Brisbane City Council* [2000] QPELR 313 at [31].”

Planning schemes are practical documents generally made by practical people to deal with practical situations, and should be construed and applied accordingly.

Planning Approval and Conditions of Approval Run with the Land

3.2 In dealing with contracts and other documents prepared as a consequence of conditions imposed on a planning approval for subdivision or for other development under a planning scheme, it is important to remember that the planning approval, and necessarily conditions attached to the planning approval, run with the land. Thus a condition in a subdivision approval requiring the subdivider to enter into an agreement with a LG to secure the payment of a Cost Contribution under a Structure Plan will be enforceable against a subsequent owner (at least until the subdivision process is completed by WAPC approval of the Deposited Plan). Likewise, a condition of planning approval under a LPS requiring the applicant to grant an Easement in Gross to assist with a rational access and traffic circulation arrangement in a shopping centre development involving multiple ownerships will be enforceable against subsequent owners.

Following the first publication of the High Court’s decision in *Hillpalm Pty Ltd v Heaven’s Door Pty Ltd*¹⁶, there was a certain amount of consternation arising from some passages in the Judgments which suggested there was doubt about the principle

¹⁵ [2007] WASCA 132

¹⁶ (2004) 220 CLR 477

that planning approvals and conditions run with the land. However the *Hillpalm* case was principally concerned with the issue of indefeasibility of title, and the High Court was not focussing on the important planning issue of planning approvals running with the land. However any doubt there may have been on that question was soon after removed by an unequivocal statement on the principle by the majority of the High Court in *Concrete Pty Ltd v. Parramatta Design & Development Pty Ltd*¹⁷. At para [67], Kirby and Crennan JJ (Gummow ACJ agreeing) said -

“... There is a long-standing principle that a development consent is not personal to the applicant but enures for the benefit of subsequent owners during the currency of the development consent. In *Ryde Municipal Council v Royal Ryde Homes* (1970) 91 WN(NSW) 440, Else Mitchell J said:

‘... a consent to the development of land under a prescribed planning scheme is not personal to the applicant but enures for the benefit of subsequent owners and occupiers, and in some respects a consent is equivalent to a document of title.’ ”.

If a planning consent runs with the land, the conditions attached to the planning consent, to the extent that they have continuing effect, must also run with the land.

This principle should be kept clearly in mind by property lawyers when they are preparing development related contracts.

Operation of the *Ultra Vires* Principle

3.3 When preparing contracts involving LGs, it is necessary always to keep in mind the fact that a LG is a statutory corporation, and a power to be exercised by a LG under any contract must have its origin in a statute. In WA, in contracts by LGs associated with planning approvals, or with Structure Plans or decisions made under Structure Plans, the immediate source of the LG power may be the relevant LPS, which in turn derives its force from the *Planning and Development Act 2005*. As appears from the *Costa* case at ⁶ and the *Pearse* case ⁷ referred to above, the Courts have tended to give a broad and generous interpretation to the statutory provisions for the making of planning schemes and amendments. Nevertheless, where a provision in a contract involving a LG is clearly contrary to a provision of the relevant LPS, and probably by extension, the provisions of an adopted and approved Structure Plan, or where on the

¹⁷ (2006) 229 CLR 577 at [67]

proper construction of a LPS or Structure Plan, action required of a LG under a related contract is *ultra vires*, then the contract may be void, unless the relevant provision is severable.

A simple but clear statement of the *ultra vires* principle is given by Wade and Forsyth¹⁸ as follows -

“Any administrative act or order which is *ultra vires* or outside jurisdiction is void in law, i.e., deprived of legal effect. This is because in order to be valid it needs statutory authorisation, and if it is not within the powers given by the Act, it has no legal leg to stand on.”

When preparing documents involving LGs, it is essential to consider the terms of the legislation that enables the LG to enter into the relevant relationship, and any other relevant written laws. For contracts dealing with development, development control and Infrastructure Cost sharing, not only the Local Government legislation and Regulations may be relevant but also the *Planning and Development Act 2005*, and any relevant Structure Plan and Development Contribution Plan.

A Local Government Cannot Contract to Fetter its Discretion in the Exercise of a Statutory Power

3.4 It is surprising how frequently property lawyers prepare contracts related to the development of land, provisions of which require a LG to determine an application for planning approval **in a certain way**, or to adopt a Scheme Amendment, or to approve and implement a Structure Plan. All of those processes involve the exercise of powers conferred by statute or by a planning scheme which are conditioned by the exercise by the LG of a discretion pursuant to a prescribed legal process. It is not open to the LG to contract in advance to exercise its discretion in a particular way. A LG cannot “bargain away the important powers that the legislature has conferred on it”¹⁹. In the Australian High Court, Mason J in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth*²⁰ expressed the principle as follows:

“... The public interest requires that neither the government nor a public authority can by a contract disable itself or its officer from performing a statutory duty or from

¹⁸ HWR Wade and CF Forsyth, *Administrative Law* (8th Ed, OUP, Oxford, UK, 2000), p36.

¹⁹ *Ransom and Luck v Surbiton Borough Council* [1949] 1 Ch 180 at 193

²⁰ (1977) 139 CLR 54 at 74-75

exercising a discretionary power conferred by or under a statute by binding itself or its officer not to perform the duty or to perform the discretion in a particular way in the future.”

The above passage applies not only to powers conferred by statute, but necessarily to planning schemes which under WA legislation have the same force and effect as if incorporated in the *Planning and Development Act 2005*²¹. If a provision in a LG contract purports to fetter the discretion of the LG, that provision will be void, and unless the provision is severable, the whole contract may be void²². Gummow J in the Federal Court in *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic*²³ regarded the common law’s refusal to recognize estoppel in administrative law as simply one manifestation of a larger doctrine disallowing any attempt to fetter the future exercise of a statutory discretion.

Uncertainty of Contractual Provisions for Infrastructure Cost Contribution

3.5 Property lawyers are often instructed to prepare contracts between property developers and LGs pursuant to conditions of subdivision or development approval requiring, amongst other things, that the property developer give satisfactory security for the payment of an appropriate contribution to Infrastructure Costs at a later point of time. The nominated later time may be when a Cost Contribution Plan has been prepared, and incorporated by reference in a schedule of the relevant LPS, or at some other point of time. There are at least two sources of uncertainty in such provisions. Commonly the provision will require the contribution to be made “when the appropriate Cost Contribution has been ascertained”, or words to that effect, or when a LPS amendment giving effect to the Cost Contribution obligation has reached a certain point, which point is often stipulated without any apparent regard to the relevant statutory procedures. Unless the Cost Contribution, and the date that the contribution becomes payable, can be ascertained with reasonable certainty, there is a risk that the contract, or the relevant provision in the contract, will be unenforceable.

²¹ For an LPS see s.87(4). For a Region Planning Scheme see s.56(3).

²² *Rederiaktiebolaget “Amphitrite” v R* [1921] 3KB 500; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54; *Sita Queensland Pty Ltd v Queensland* (1999) 164 ALR 18 at 23.

²³ (1990) 92 ALR 93 at 11.

Proper Security for Payment of Contributions

3.6 Commonly the company that applies for and obtains subdivision or development approval for certain land will have been formed for the sole purpose of owning and developing that land. Once the land is developed and subdivisional lots sold, the company will not be worth suing and may be wound up. For a property lawyer representing a LG to produce an agreement for payment of a Cost Contribution without abundantly adequate security may be negligent. The most appropriate security would be unencumbered land independently valued at a sum well in excess of the likely Cost Contribution.

For the purpose of determining adequate security, it again will be necessary to have established the three essential elements referred to in 1.7 above, and that generally means that a Cost Contribution Plan needs to have been prepared and approved by the LG.

The land to be used as security will need to be the subject of an Absolute Caveat so that the LG can be certain that dealings which may diminish the value of the security cannot occur without the LG's knowledge and consent. In order to have an Absolute Caveat, it is necessary to have a caveatable interest, and consequently the agreement must contain an effective charge which can be the subject of the Caveat. A further and in some ways more effective support for a Caveat would be a provision in the relevant LPS charging land the subject of a Structure Plan with an obligation to contribute to the shared Infrastructure Cost.

Property lawyers representing LGs soon become accustomed to insistent demands by property lawyers representing developers that any Caveat lodged be a "subject to claim" Caveat. A property lawyer representing a LG agreeing to a subject to claim Caveat in those circumstances should ensure that it has professional indemnity insurance cover at least equal to the greatest possible Cost Contribution liability of the developer.

Problems with security can be overcome if the developer provides a bond or bank guarantee that is unequivocally abundantly adequate. Fixing on an amount will be difficult if adequate work has not been done in refining a Cost Contribution Plan.

Easements in Gross and Restrictive Covenants in Gross in LG documents

3.7 As mentioned above, the *Land Administration Act 1997* in ss 195 and 196 makes provision for Easements in Gross which can be granted to a LG, so as to avoid the necessity of a dominant tenement.

Section 129BA of the *Transfer of Land Act 1893* makes provision for the granting of a Restrictive Covenant in Gross to an LG, again avoiding the necessity for a dominant tenement.

There are many circumstances in which Easements may be required as a condition of subdivision or development approval. If the existence of the Easement is essential for orderly and proper planning, then the only effective way for the LG to ensure that the Easement remains in place is for the LG to be a party, and as the LG will seldom own relevant land which could function as a dominant tenement, the Easement to the LG will need to be an Easement in Gross. Easements in Gross conveniently avoid the necessity for cumbersome reciprocal Easements.

Property lawyers representing developers frequently resist Easements in Gross, but the vehemence of their resistance is often directly related to their ignorance of the nature and function of the Easement in Gross.

There is similar justification for the granting of a Restrictive Covenant in Gross in circumstances where a restriction on land use is relevant to orderly and proper planning, and the preservation of the amenity of the relevant locality, and the ability to impose the Restrictive Covenant may often critically affect the balance of the planning merits of a proposal.

The Absolute Requirement of an Absolute Covenant to Support Security for the Payment of Contributions and Performance of Other Obligations

3.8 The point has been made in 3.6 above that where a LG is seeking to secure the payment of Infrastructure Cost Contributions through a provision in a contract, there must be land capable of being charged, and the charge should be the subject of an Absolute Caveat registered on the Title of the relevant land. There are numerous other circumstances where the performance or obligations arising out of conditions of subdivision or development approval is most appropriately secured by a charge over land, which in turn is protected by an Absolute Caveat. Property lawyers representing

LGs ought not to be persuaded to accept a “subject to claim” Caveat. LGs which allow the developer’s lawyers to prepare the relevant agreement and rely on the well known integrity of all lawyers to ensure that the LG’s interests are adequately protected, should at least ensure that the Caveat lodged to protect the developer’s obligation under the Contract is an Absolute Caveat.

Giving a Structure Plan the Same Effect as if Incorporated in a Scheme

3.9 It is tempting for LGs dealing with Structure Plans to seek to give the Structure Plan, when adopted by the LG and approved by the WAPC, the same effect as if it was incorporated in the LPS. This is particularly the case with Structure Plans which zone or otherwise classify land, and contain provisions for land use permissibility designations, and R-codings. Since it is contemplated that the Structure Plan will operate for all intents and purposes as a Detailed Planning Structure under an LPS in dealing with land use and development control within the Structure Plan Area, the LG will not have effective control unless the Structure Plan provisions do have the same effect as provisions of a Scheme.

However that arrangement gives rise to a serious compensation problem which could land property lawyers acting either for the LG or for the developer in serious difficulty.

Under the provisions of the old TP&D Act, prior to 9 April, 2006 when the *Planning and Development Act 2005* came into operation, as a general rule claims for compensation for injurious affection arising out of the making of a Scheme could only be made within the 6 months of the coming into operation of the Scheme. Some LPSs in more recent times have mirrored the compensation provisions of the MRS in regard to reserved land, and have allowed claims for compensation for injurious affection in respect of reserved land within 6 months after a refusal of development approval, or an approval subject to unacceptable conditions.

Under the *Planning and Development Act 2005*, claims for compensation for injurious affection (except relating to non-conforming uses) are only made within 6 months after an unsatisfactory decision on a development application. Furthermore one of the three categories of circumstances in which claims for compensation for injurious affection may now be made, arising out of the making of a Scheme, is where the

Scheme permits development for no purpose other than a public purpose. If a Structure Plan is given the same force as if it was included in the relevant LPS, and if it shows certain land as reserved for public purposes (e.g. POS, school sites, utilities sites such as drainage basins etc) then it may be possible to argue that the making of the relevant LPS even though indirectly through the process of adoption of the Structure Plan, and giving the Structure Plan the same effect as a provision of the Scheme, has injuriously affected land. In those circumstances, where the Structure Plan shows land as intended for a school site, nothing would prevent the owner of that land, immediately on the publication of the Structure Plan, applying to the LG for approval to develop the land for say residential purposes, and if the LG is unwise enough to refuse the application, a claim for compensation for injurious affection may follow. The LG in those circumstances may be compelled to purchase a school site which in ordinary circumstances would, in the fullness of time, have been purchased by the relevant State Government agency. It might not be possible for the LG to obtain Infrastructure Cost contributions from other owners developing in the area. An LG placed in that position may very well be entitled to take action for damages for negligence against the property lawyer who allowed the situation to occur

It is the common and in fact almost invariable experience of LGs dealing with State Government agencies, that if the State Government agency can pass off to the LG the responsibility for acquiring land for the agency's purposes, then they will do so. The WAPC has done that with regional roads and regional open space, and the Water Corporation has done that with reserves for water supply mains.

Property lawyers acting for LGs administering development control under a Structure Plan should ensure that the landowners within the Structure Plan Area indemnify the LG against any claim for compensation for injurious affection. The LG may not otherwise be prepared to protect the integrity of lands classified for public purposes under the Structure Plan.

CONCLUSION

It is likely that the law and practices relating to development of land under the Structure Plan Process will continue to evolve, along with the associated documentation opportunities and problems for property lawyers.