

**CITY OF SUBIACO
PLANNING POLICY 7.4**

**APPLICATIONS FOR REVIEW OF TOWN PLANNING DECISIONS AND WRITTEN
DIRECTIONS**

ADOPTION DATE: 11 October 2011
REVIEW DATE: 23 February 2021 (renumbered)

AUTHORITY: TOWN PLANNING SCHEME NO. 4; PLANNING AND DEVELOPMENT ACT, 2005; STATE ADMINISTRATIVE TRIBUNAL ACT, 2004.

STATUTORY BACKGROUND

Clause 36 of Town Planning Scheme No. 4 provides an applicant with the right to seek a review of a decision of the Council in certain circumstances in accordance with Part 14 of the *Planning and Development Act, 2005*. An application for the review of the decision is made to the State Administrative Tribunal and the procedures for dealing with such applications are subject to the requirements of the *State Administrative Tribunal Act, 2004*.

Part 13 of the *Planning and Development Act, 2005* provides for the Council (as the responsible authority) to compel development undertaken in contravention of a planning scheme, interim development order or planning control area requirements to be dealt with through the issue of a direction notice to undertake the necessary works to achieve compliant development. Section 255 of the *Planning and Development Act, 2005* provides that the person to whom such a direction is issued may apply to the State Administrative Tribunal for a review of the decision to issue the direction.

Upon the Tribunal accepting an application for the review of a decision, the Council is not able to vary or set aside the original decision as the powers of the Council are restricted under section 26 of the *State Administrative Tribunal Act, 2004*.

PURPOSE

This policy provides guidance to city officers in responding to all applications for the review of a planning decision made by the Council and direction notices issued under Part 13 of the *Planning and Development Act, 2005* that are lodged with the State Administrative Tribunal.

This policy does not deal with the procedures involved in making an application for review or the process of the review as these matters are the subject of separate legislation and regulations.

It is recognised that where a decision which is made by the Council that is substantially inconsistent with an officer recommendation becomes the subject of an application for review, it is not appropriate to require that officers respond on behalf of the Council.

POLICY

1. Council Decision Inconsistent with Officer Recommendation

Where an application is made for the review of a decision that is substantially inconsistent with a recommendation made by officers, then in the interests of both the Council and City officers, an independent town planning consultant will be engaged to represent the City. However, where the applicant has retained legal representation, the City will also be legally represented.

In such cases, officers may represent the City at the initial directions hearings to ensure, as far as practicable, that the matter is not unduly delayed.

City officers may receive a subpoena requiring them to appear as a witness at the Tribunal and this situation is most likely to occur where a Council decision is inconsistent with an officer's recommendation. Any officer receiving a subpoena is legally compelled to attend the hearing to give evidence and the Council acknowledges that in these circumstances, an officer's evidence to the Tribunal may be contrary to Council's decision with respect to the development that is the subject of review.

2. Council Decision Consistent with Officer Recommendation

Where a Council decision is the same, or is essentially the same, as an officer's recommendation, or it corrects or improves the content of an officer's recommendation, then officers may provide a written response on behalf of the Council and/or attend mediation or Tribunal hearing as an expert witness to represent the Council's position or an independent town planning consultant may be engaged to do so. However, the decision to engage an independent town planning consultant to represent the Council is at the discretion of the City's Manager Planning Services.

Where the applicant has retained legal representation, the City will also be legally represented.

3. Parties not legally represented

Where the applicant elects that neither party will be legally represented, a consultant may be retained to represent the City at the hearing and appear as an expert planning witness giving evidence to the Tribunal.

4. Legal Representation

The City will engage professional legal representation in defending decisions as follows:

- (a) In Class 1 applications where the applicant elects that no party be legally represented, the City is prevented from engaging a solicitor to represent it. In this case, a solicitor may be engaged to check witness statements and provide advice as to the conduct of the matter and any issues that may arise as deemed necessary by the Manager Planning Services;
- (b) Where an applicant is legally represented in either class of application, the City may engage legal representation to conduct all aspects of its defence;
- (c) Where the applicant elects not to have legal representation in a Class 2 application, the City will engage legal representation where it is considered appropriate, in the opinion of the Manager Planning Services, because the proceedings raise a matter of law.

5. Expert Witnesses

Expert witnesses will generally be engaged in cases where it is necessary to address the evidence of expert witnesses to be used by the applicant. Expert witnesses will be selected on the merits of the individual matter based on their knowledge and/or experience for use as evidence in proceedings or giving an opinion in a proceeding. The selection of expert witnesses will be made on

recommendation of the city's agent (where engaged) and agreement of either the Manager Planning Services or the Director Development Services.

6. Notification of Interested Parties of an Application for Review of a Decision

Upon receipt of written advice that an application for a review of a decision has been lodged, the City will advise all parties who made a submission with regard to the original decision that such an application has been received. This notification shall be made in writing once only within ten (10) days of the City receiving such written advice and will only contain information regarding the reviewable decision, the Tribunal's reference number and contact details.

The City will not provide updates as to the progress of any application for review.

7. Involvement of Third Parties

(a) Submissions

Where submissions from interested parties relating to the development or proposal that is the subject of an application for review are received during the course of the assessment process, those submissions will also form part of the City's evidence to the Tribunal.

(b) Witnesses

Third parties who made submissions to Council during the assessment of a proposed development will not normally be invited to appear as a witness on the City's behalf unless any person can provide evidence of factual matters relevant to an issue arising in the proceeding that cannot be provided by the City's officers.

Third parties who are called to appear as a witness on the City's behalf before the Tribunal will be provided with assistance in preparing their witness statements. The City will not pay a witness fee and witnesses appear before the Tribunal at entirely their own cost.

(c) Other

Neighbours, nearby landowners or other third parties may also make an application to the Tribunal to:

- (i) Seek leave to intervene in the matter under s37(3) of the *State Administrative Tribunal Act, 2004*; or
- (ii) Seek leave to make a submission independent of the Council on the matter under s242 of the *Planning and Development Act, 2005*.

It is a matter for the Tribunal to determine whether an application referred to above is accepted and the third party will be notified by the Tribunal of its decision.

The City will not ordinarily object to an application by an immediate neighbour to make a submission to the Tribunal.

8. Mediation

The Council acknowledges the Tribunal's desire to resolve matters by mediation where possible and will agree to participate constructively in mediation in good faith as proposed by the Tribunal. Discussions occurring for the purposes of mediation are conducted by the Tribunal on a "without prejudice" basis and the Council acknowledges that the content of these discussions are confidential and cannot be

referred to beyond the mediation session or discussed with any third party. A third party may only be present during a mediation session by invitation from the Tribunal.

8.1 Involvement of Elected Members

Elected Members may attend mediation sessions on a voluntary basis where they are invited by the Tribunal to do so. The Tribunal expresses such an invitation through an order inviting the attendance of the Mayor and stating that the invitation may be extended to one or more councillors.

Upon receipt of such orders, the Manager Planning Services will inform the Mayor and advise all elected members of the details of the mediation session. Immediately prior to mediation, the Manager Planning Services may arrange a briefing for elected members to ensure they are fully informed of the matter prior to attending mediation. The location of the mediation is determined by the Tribunal and may include a site visit.

Elected members attending mediation are obliged to act at all times in accordance with the *Local Government Act 1995*, its subsidiary legislation and the city's code of conduct.

8.2 Conduct of Mediation

Where a matter is referred to mediation, the consultant or officer with conduct of the matter shall:

- (a) Participate constructively in good faith in the mediation in an attempt to reach a compromise solution;
- (b) Not agree to any compromise solution at the mediation beyond the scope of the officer's delegated power; and
- (c) Refer any potential solutions arising out of the mediation back to the decision maker in the original application.

9. Referrals under s31 of the State Administrative Tribunal Act

The Tribunal may refer a matter to Council under s31 of the Act inviting Council to reconsider the decision at any stage of the proceedings. Upon receipt of this referral, the officer will assess the proposal and refer it to Council to affirm the decision, vary the decision or set aside the decision and substitute a new decision in accordance with the provisions of s31.

Where submissions relating to the original proposal were received, the City will notify those submitters that the matter has been referred to Council under the provisions of s31 of the Act however, it will not seek further submissions on the proposal unless directed to do so by the Tribunal.

(a) Meetings with Elected Members

It is recognised that, in these circumstances, applicants may wish to meet with Elected Members and/or arrange a site visit in order to explain any changes to a plan where this is proposed as a result of mediation. Applicants are encouraged to arrange only one such meeting enabling all of the Elected Members to be in attendance at the same time rather than to conduct individual meetings.

The meeting should be confined to a view of the site and an explanation of the alterations to the plans resulting in the referral to be considered by Council.

Where possible, the consultant or officer with conduct of the matter will also attend the meeting.

(b) Reports to Council

Where the matter referred under s31 of the Act results in the preparation of amended plans through mediation, the item presented for Council's consideration will not usually be considered as a "confidential" item under the provisions of s5.23 of the *Local Government Act 1995* solely on the basis of the application for review. In order to preserve the integrity of the mediation process and to comply with the requirements for mediation under the *State Administrative Tribunal Act, 2004*, matters referred to in mediation will not be included in the public report.

Where it is necessary for the purpose of making a decision that elected members require access to information relating to a matter raised in mediation or to information would otherwise be considered confidential under the *Local Government Act 1995*, this will be provided as a separate confidential attachment to the public report.

In the interests of transparency, officers will inform all parties to the mediation that the contents of such an item (including plans) will be published in the public agenda papers prior to Council's consideration. For clarity, this section does not apply to any matter that would otherwise be considered as a confidential item under the provisions of s5.23 of the *Local Government Act 1995*.

(c) Notification of Council decision under s31 Referral

Council recognises that its recommendation under the s31 referral may not be the final decision in the matter. The Tribunal and the applicant will be advised of Council's resolution in writing but the resolution will not be communicated in writing to the submitters or other members of the public until such time as the Tribunal advises that the matter has been finalised.

Upon receipt of confirmation from the Tribunal that the matter has been finalised, all parties who made a submission with regard to the original decision will be notified in writing of the final decision and the applicant will be issued with a Schedule 4 Notice under the Scheme.

10. Adjournment of Proceedings

Where an officer is responsible for conducting a proceeding on behalf of the City, that officer may request, or agree to, an adjournment of the matter in cases where he/she considers that operational needs of the City are assisted by this. It is acknowledged that the granting of an adjournment is a discretionary matter for the Tribunal to determine and that such an adjournment may not be granted.

Generally, an adjournment should not be sought or agreed to in relation to reviews of a direction notice issued under Part 13 of the *Planning and Development Act, 2005*.

11. Application for Review lodged while a Direction under s214 of the *Planning and Development Act* is in Force

Where an application for review of a decision is lodged and the matter is also the subject of a direction notice under s214 of the *Planning and Development Act*,

2005, the City will defer enforcement of the direction notice until such time as the application before the Tribunal is determined.

In the event that the application is dismissed, the City will enforce the direction notice immediately without further consideration by Council.

12. Appeals against Decisions of the Tribunal

The City will not generally appeal a decision of the Tribunal unless, in the opinion of the Council following legal advice, it is considered that the Tribunal has made an error of law and the issue at stake has significant implications for the City or local government in general.

13. Costs

The City will not generally seek an order relating to costs against an applicant, unless the applicant behaves in a dishonest, frivolous or vexatious manner in conducting the proceeding. In this case, the City will seek legal advice as to the reasonable chance of success if this avenue were pursued prior to Council making a decision to seek such an order.

14. Development Assessment Panels

Where an application is made for the review of a decision that was made by the Development Assessment Panel (DAP), the DAP is the respondent in any such matter under regulation 18(3) of the *Planning and Development (Development Assessment Panels) Regulations 2011*. In these circumstances, the city is considered a third party and its participation is at the invitation of the Tribunal.

14.1 Mediation

As the respondent, the DAP participates in mediation in the place of the local government. It is the practice of the Tribunal to invite the attendance of local government officers to mediation to assist the Tribunal and in anticipation of any subsequent referral requiring the preparation of a further report.

Council recognises that any participation of elected members in mediation is at the discretion of the Tribunal who may seek the views of the parties to the mediation prior to making such orders and that the participation of elected members in these matters may be limited to the Mayor or her delegate.

14.2 Reports

Any matter referred by the Tribunal to the DAP following mediation requiring the preparation of a Responsible Authority Report by the city will be dealt with in accordance with the provisions of this policy where appropriate and the city's usual procedures for dealing such reports.

14.3 Legal Representation

The City will engage professional legal representation where, in the opinion of the Manager Planning Services or the Director Development Services, it is appropriate in serving the best interests of the Council.