

 <p>Serpentine Jarrahdale Shire</p>	<p>DRAFT COUNCIL POLICY NO. PP11 PROCEEDINGS BEFORE THE STATE ADMINISTRATIVE TRIBUNAL</p> <p>DRAFT VERSION: 1.2 UPDATED: 24 October 2010 FILE: A1048 TRIM: E10/XXXX</p>
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1.0 Policy Objectives

The objectives of this Policy are to:

- To outline the Shire's general position and approach to proceedings before the State Administrative Tribunal;
- To support the Shire's continued efforts to achieve general community compliance with relevant statutory requirements;
- To support the Shire's continued efforts to operate in an open and transparent manner; and
- To support the Shire's continued efforts to operate in a financially responsible manner.

2.0 Background and Application

The State Administrative Tribunal (SAT) was established in Western Australia in 2005 as an independent body that makes and reviews a range of administrative decisions. Individuals, businesses, public officials and vocational boards can bring before the SAT many different types of applications related to civil, commercial and personal matters. These range from reviews of multi-million dollar tax judgements and dog destruction orders to disciplinary proceedings, guardianship questions and town planning and compensation issues.

The SAT was established by the State Administrative Tribunal Act 2004 (**SAT Act**) and the State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004 (Conferral Act). The Conferral Act refers to more than 130 existing Acts of Parliament, known as enabling Acts. The enabling Acts give the SAT the jurisdiction to make decisions on specific matters. The most common proceedings before the SAT for the Shire are in relation to the following:

- Where an applicant is aggrieved by a determination on an application for development approval under the provisions of the Shire's Town Planning Scheme No. 2 (TPS 2);
- Where an applicant is aggrieved by the lack of a determination on an application for development approval within the timeframes prescribed in TPS 2;
- Where a party is aggrieved under the provisions of the Dog Act.

The SAT is required to consider all relevant information available to it, including any submissions received during the advertising of the proposal previously conducted by the Shire and the formal determination of the Shire. In general terms, the SAT may ultimately:

- Reaffirm the original decision;

- Set aside or vary the original decision and substitute its own decision; or
- Invite the Shire to re-consider the proposal, often in the light of new information that has become available during proceedings before the SAT.

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.

3.0 Status

(a) Relationship to State Administrative Tribunal Act 2004

This policy shall be read in conjunction with the SAT Act. To the extent of any inconsistency between this policy and the SAT Act, the SAT Act shall prevail.

(b) Relationship to Town Planning Scheme No.2

This Policy shall read in conjunction with Clause 8.6 of TPS2 , which states the following:

‘An applicant aggrieved by a decision of the Council in respect of the exercise of a discretionary power under the Scheme may appeal in accordance with Part V of the Act and Rules and Regulations made pursuant to the Act.’

To the extent of any inconsistency between this policy and the provisions of TPS2, the Scheme shall prevail.

4.0 Interpretations

This policy does not seek to establish any specific interpretations or definitions for terms it contains.

5.0 Policy Measures

Council’s Role in SAT Proceedings

- 5.1 Upon the commencement of a SAT review the Council ceases to be the decision-maker with respect to the matter the subject of the review (unless the SAT invites the Council to reconsider its original decision), and instead becomes a party to the proceeding. However the Council has an obligation under the SAT Act to use its best endeavours to assist the SAT to make the correct and preferable decision in the review.
- 5.2 In order to maintain the integrity of the SAT review process and uphold its obligation to the SAT, elected members and staff should avoid discussions or correspondence concerning an ongoing SAT review with third parties, except where necessary or appropriate:
- to inform a person that a matter is before the SAT;
 - to make a person aware of their ability to access relevant information on the SAT website at www.sat.justice.wa.gov.au, including information concerning the role of third parties in SAT reviews;
 - to inform a person of the outcome of a step in, or the outcome of, the SAT proceedings; and

- to assist the SAT or the Council in the SAT review (eg to obtain advice from an expert or government agency, or to obtain a witness statement).
- 5.3 In the interests of avoiding any later conflict and in maintaining integrity in the process, direct communication between a proponent and the Shire's elected members (individually or collectively) should be avoided for the duration of proceedings before the SAT. Should contact be made by a proponent, the elected member/s are encouraged to:
- Make the person aware of this Council policy; and
 - Advise the applicant to contact the Shire's responsible officer if they require any further information.

Representation

- 5.4 Where the applicant has retained legal representation, the Shire will be legally represented.
- 5.5 Where an applicant has elected on their application for review to the SAT in a Class 1 planning matter to not have legal representation, the Shire shall be represented by either officers or appointed consultants.
- 5.6 Where a Council decision is the same or essentially the same as an officer's recommendation, or corrects or improves the content of an officer's recommendation, then officers shall generally provide a written response on behalf of the Council and/or attend a mediation or Tribunal hearing as an expert witness to represent the Council's position. Decisions in respect of which officers are to attend proceedings shall be made by the relevant Director or Executive Manager.
- 5.7 Where an application is made for the review of a decision that is substantially inconsistent with a recommendation made by Shire officers, then in the interests of the Council and Shire officers, and to assist the SAT, independent consultants may be engaged to represent the Shire during the SAT process, and will usually be engaged if the matter proceeds to a final hearing.
- 5.8 The decision to engage, or not engage, independent consultants pursuant to Clause 5.7 shall be made by the relevant Director, Executive Manager or Manager.

Mediation Proceedings

- 5.9 The Shire acknowledges the Tribunal's desire to resolve matters by mediation where possible and will generally agree to participate in the SAT mediation process, provided there is a reasonable prospect of reducing or clarifying the issues in dispute, or achieving a negotiated outcome. Discussions occurring for the purposes of mediation are conducted by the Tribunal on a "without prejudice" and confidential basis and the Council acknowledges that the content of this discussion cannot be discussed outside the mediation session.

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

- (a) Shall participate constructively in the mediation in order to attempt to reach a compromise solution;

(b) Shall not agree to any compromise solution at the mediation beyond the scope of the officer's delegated power.

(c) Shall refer any potential solutions arising out of the mediation back to the decision maker in the original application.

With respect to (b) above, where the matter was originally considered by Council, any proposed compromise solution arising from the mediation shall be presented to Council for further consideration in accordance with the procedures for section 31 reconsiderations set out below.

- 5.10 Where practical, officers shall provide regular updates on proceedings before the SAT to elected members at Policy Forum meetings. The updates shall, however, generally be limited to issues relating to the programming of proceedings, including timeframes and likely cost implications. Specific details in relation to the proceedings shall generally not be discussed and officers and elected members shall acknowledge that Policy Forum meetings are not decision-making forums.

Section 31 Reconsiderations

- 5.11 The Tribunal may refer a matter to Council under section 31 of the SAT Act, inviting Council to reconsider the original decision. This regularly occurs following the mediation process, or where there has been a deemed refusal. In the interests of achieving time and cost-effective outcomes for all parties involved, officers shall generally seek to resolve matters through a section 31 reconsideration process.
- 5.12 The responsible Shire officer, in consultation with their Director or Executive Manager, shall have the discretion to advise the SAT member during mediation proceedings as to whether or not a reconsideration under section 31 would likely to assist with the resolution of matter in a timely and cost effective manner.
- 5.13 Upon receipt of an invitation from the SAT to reconsider the matter, the officer shall assess the proposal and refer it to the Council. The Council may then affirm the original decision, vary the decision or set aside the decision and substitute a new decision.
- 5.14 Except where , in the opinion of the Chief Executive Officer there are exceptional circumstances which justify a contrary position, reports presented to Council for consideration under Section 31 of the Act following mediation shall be presented as confidential reports.
- 5.15 Where a proposal the subject of a SAT review has already been advertised by the Council, the proposal will not be re-advertised before the Council reconsiders the proposal pursuant to a section 31 invitation except where:
- (a) the SAT mediating member suggests re-advertising, or the applicant agrees; or
 - (b) the proposal to be re-considered is substantially different to the proposal in the form already advertised and may add planning issues not raised by the original proposal;
 - (c) in the judgment of the officer with conduct of the matter, there are exceptional circumstances which justify re-advertising.

If it is determined by the relevant officer that a proposal should be re-advertised before a re-consideration by the Council, but the applicant does not consent to the re-advertising, the officer shall be entitled to decline to refer the proposal back to the Council.

- 5.16 Following the Council's decision upon re-consideration, the Shire will inform persons who made a submission (whether on the original or amended proposal) of the Council's decision.

Involvement of third parties

- 5.17 Third parties may make a request at any time to the SAT to make a submission, either in person or in writing, in respect of a particular matter. Such requests must be in writing and sent to the SAT (not through the Shire).

- 5.18 A third party may only be present during a mediation session by invitation from the Tribunal.

- 5.19 It is the responsibility of any third party interested in proceedings before the SAT to obtain their own independent advice. The Shire may, however, raise awareness of the ability of a third party to make a submission to the SAT through the following methods:

- making this policy publicly available through the Shire's policy manual, which is published in the Shire's website; and
- informing those persons who lodged a submission during the public advertising of a proposal of the lodgement of a SAT application for review. The Shire shall make all reasonable endeavours to contact, in writing, such persons within a fourteen (14) day period of the Shire's receipt of a copy of the application for review.

- 5.20 Upon receipt of a request by a third party to make a submission, the SAT must consider whether the person has 'sufficient interest' in the proposal to justify their involvement and whether the involvement of the person would aid the SAT in progressing the matter towards an ultimate determination. The involvement of a third party is generally limited to final hearings, which are usually only programmed where mediation proceedings have failed to reach an agreed outcome between the applicant and the Shire.

- 5.21 As the Shire is bound by the confidential nature of the process, the Shire will generally be unable to provide any updates to a third party as to the progress of a section 31 re-consideration until after it has been determined.

Appeals against Decisions of the Tribunal

- 5.22 The Shire 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 Shire or local government in general.

Parallel Direction Notice under s214 of the Planning and Development Act

- 5.23 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 Shire will generally defer enforcement of the direction notice until such time as the application before the Tribunal is determined. In the event that the

review application is dismissed, the Shire will enforce the direction notice immediately without further consideration by Council.

Notifying parties of proceeding outcomes

- 5.24 Upon the conclusion of proceedings before the SAT, information about the outcome is notified in the following manner:
- Through the publication of a decision report by the SAT on the SAT website at www.sat.justice.wa.gov.au;
 - Through written advice being sent to those persons who lodged submissions during the public advertising of the proposal;
 - Through the inclusion of relevant details in the monthly 'Information Report' presented to Council through relevant Committee and Council Meetings.
- 5.25 The information made available by the Shire will usually be limited to the decision outcome (eg approval or refusal) and shall not include information that is not generally publicly available – for example the nature of discussions before the SAT that were conducted in a confidential manner.