



DESIGN WA

SOME LEGAL ASPECTS OF THE FIRST STAGE OF THE DESIGN WA INITIATIVES

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for
LGPA Seminar 7 March 2019**

COMMENCEMENT OF R-CODES

The R-Codes commenced as the residential planning codes, gazetted in 1982 as Appendix 2 of Statement of Approved Planning Policy No. 1 (**SPP 1**).

Laurie O'Meara was chairman of the TPB from 1981 and confirms that the intent from the outset was that the R-Codes would be enforceable through incorporation by reference in Local Government Planning Schemes (LPSs). That has apparently been the intent ever since, but there has not always been a successful incorporation by reference.

TREATMENT OF R-CODES 1982 to 1999

Provision for statements of planning policy was first made in the *Town Planning and Development Act 1928 (TP & D Act)* in 1976. In the *Planning and Development Act 2005 (P & D Act)* they were called State Planning Policies (**SPP**) and that is the term that will be used hereafter in this presentation.

Section 5AA of the TP & D Act in the 1976 gave power to the TPB and the MRPA to make SPPs. Section 7 at all times from 1976 required local governments to **have regard to** SPPs in making or amending the LPSs.

From at least 1988, section 7 also contained provisions facilitating the incorporation of a SPP in a LPS by reference. Those provisions continue in s.77(1) and (2) of the P & D Act. However the legislative invitation for incorporation of the R-Codes by reference in local planning schemes was not advanced until 1999.

TREATMENT OF R-CODES 1982 to 1999 cont'd

In 1999 a Model Scheme Text (MST) was added as Appendix B to the *Town Planning Regulations 1967*. That MST continued to identify the R-Codes as the Residential Planning Codes published as Appendix 2 to the WAPC's SPP 1.

The common treatment of the R-Codes in LPSs at that time was to require residential development to be carried out 'in conformity with the scheme' (MST Cl. 5.2.2).

That did not have the effect of incorporating the R-Codes in the scheme by reference as section 7 of the TP & D Act from 1988 clearly provided.

The relevant provisions in section 7 of the TP & D Act have been included as section 77 of the P & D Act.

PROVISIONS FOR THE INCORPORATION OF THE R-CODES BY REFERENCE IN AN LPS

- 1) The MST in Schedule 2 of the *Planning & Development (Local Planning Schemes) Regulations 2015 (LPS Regulations)* in clause 25(1) makes the critical provision for incorporation by reference of the R-Codes as follows:

‘The R-Codes, modified as set out in clause 26, are to be read as part of this scheme’

- 2) The connecting provisions in the legislation are in section 77 of the P & D Act as follows:

‘77(1) Every local government in preparing or amending a local planning scheme:

- (a) is to have due regard to any State planning policy which effects its District; and

PROVISIONS FOR THE INCORPORATION OF THE R-CODES BY REFERENCE IN AN LPS cont'd

- (b) may include in the scheme a provision that a specified State planning policy, with such modifications as may be set out in the scheme, is to be read as part of the scheme, or a provision however expressed to the same effect.
- (2) Where a scheme includes a provision referred to in subsection 1(b)-
 - (a) the scheme is to have effect as if the State planning policy as from time to time amended, or any subsequent policy by which it is repealed under this Act, was set out in full in the scheme; and
 - (b) the State planning policy is to have effect as part of the scheme subject to any modifications set out in the scheme.
- (3) Modifications referred to in subsection 2(b) prevail over any later amendment of the State planning policy or subsequent policy referred to in subsection 2(a) which is inconsistent with the modification.'

INCORPORATION OF R-CODES BY REFERENCE IN AN LPS AS AT MARCH 2019

- 1) An LPS which includes an R-Codes provision in the terms of cl. 25 of the MST in Schedule 1 of the LPS Regulations will have achieved an effective incorporation by reference. In those cases, the R-Codes can be applied as having the same effect as provisions of the LPS. By virtue of P & D Act s.87(4) that means the R-Codes would have the same effect as provisions of the Act.
- 2) As at March 2019, the R-Codes are now known as the Residential Design Codes, the subject of SPP 3.1.
- 3) In deemed cl. 1 (in schedule 2 of the LPS Regulations) the term ***R-Codes*** is defined to mean –

‘... the Residential Design Codes prepared by the Western Australian Planning Commission under section 26 of the Act as amended from time to time’.
- 4) An LPS which has been amended since October 2015 is likely to contain (probably as clause 5.2) a clause identical to cl. 25 of the MST, which then operates with section 77 of the P & D Act as an effective incorporation by reference.

THE DESIGN WA PROPOSAL

- 1) The Design WA pamphlet on the third page sets out the following –

‘DESIGN WA STAGE ONE TIMELINE’.

On that page there is a further heading **‘BRIEFINGS AND REFINEMENT’** under which heading the following the comment appears –

‘Design WA Stage One documents were reviewed for alignment with the principles of fairness, transparency, integrity and efficiency, identified through the independent planning review.

DOCUMENTS APPROVED AND GAZETTED’

Query: does the above passage mean what it appears to say, namely that the Stage One documents are already approved and gazetted? If so, have they already taken effect, considering that s29(2) of the P & D Act provides that an SPP ‘... has no force or effect until it is approved by the Governor and published in the Gazette’.

THE DESIGN WA PROPOSAL cont'd

2) Then under the heading 'IMPLEMENTATION' it is stated –

'The WAPC will publicise Design WA Stage One as soon as possible after approval. SPP 7.0 and SPP 7.3 Volumes 1 and 2 will be made public for a minimum of three months (Special Gazettal) before they are operational to ensure that designers and assessors are familiar with the provisions.

The Apartment Design policy will replace Part 6 of the Residential Design Codes (R-Codes) forming the following two volume approach:

- *SPP 7.3 Residential Design Codes Volume 1*
- *SPP 7.3 Residential Design Codes Volume 2 - Apartments*

Existing R-Codes to be renamed *SPP 7.3 Vol.1*.
Everything except Part 6 will continue to apply.

SPP 7.3 Vol.2 will replace Part 6 of the existing R-Codes and will consequently be read into local planning schemes.'

CAUTIONS FOR THE WAPC

To ensure the operation of the incorporation by reference provisions in s77 of the P & D Act, the new SPP 7.3 Volume 1 and Volume 2 should satisfy the following:

- (a) The change from SPP 3.1 to SPP 7.3 should be presented either as an amendment of the R-Codes, or as a repeal of SPP 3.1 and its replacement by SPP 7.3.
- (b) The deletion of Part 6 of SPP 3.1, and the substitution of SPP 7.3 Vol.2 should be presented either as an amendment of the R-Codes or as part of a process of repeal of SPP 3.1 and the substitution of SPP 7.3.
- (c) To avoid problems of interpretation at a later time, ideally the change in the name of the SPP and the substitution of Volume 2 – Apartments for Part 6 should be presented and gazetted as SPP amendments, so that the consequential document is identifiable as a single SPP. To avoid problems with interpretation, the appearance of having effectively two SPPs dealing with Residential Design, should be avoided.

CAUTIONS FOR THE WAPC cont'd

Ideally the amendment provisions should state that SPP 3.1 – Residential Design Codes is amended by -

- (a) deleting the name 'State Planning Policy 3.1 - Residential Design Codes' and substituting the name 'State Planning Policy 7.3 Volume 1, and Volume 2 – Apartments'; and
- (b) deletion of Part 6 and substitution of Volume 2 – Apartments as follows – ... etc'

I am not suggesting that precisely those words should be used, but those elements of the amendment should be included so as to ensure that the product is a single SPP in a unitary R-Codes instrument.

DESIGN CODES ISSUES FOR PLANNERS AS AT MARCH 2019

- 1) The currently operational R-Codes are still the subject of SPP 3.1, namely the Design Codes in 6 parts, unless the new SPP 7.3 has already been approved by the Governor and Gazetted.
- 2) If the WAPC remains true to its advertised intent, the amended Design Codes in SPP 7.3 Volume 1 and Volume 2 will come into operation on 24 May 2019. That is a Friday, the normal Gazettal day, and I suspect that there will be a Gazettal to give effect to the amendments on that date.

I will proceed on the assumption that the coming into operation of SPP 7.3 will be effective and will not give rise to any problems of informality or interpretation.

R-CODES WEBSITE

The R-Codes website as at 1/03/2019 advised that –

'As of 24 May 2019, SPP 3.1 R-Codes will be renamed State Planning Policy 7.3 Residential Design Codes Volume 1, with all existing content except for Part 6 to remain. The new State Planning Policy 7.3 Residential Design Codes Volume 2 – Apartments will replace the content of Part 6 of the R-Codes focusing on improved design outcomes for apartments (multiple dwellings).'

COMMENT

- 1) I hope that description in the website is inaccurate. The above passage from the website suggests:
 - (a) that there are intended in effect to be two R-Codes. The first would be the old SPP 3.1 with Part 6 deleted, but which would be renamed 'State Planning Policy 7.3 Residential Design Codes Volume 1'.

R-CODES WEBSITE cont'd

- (b) The website further suggests that there would be a new SPP 7.3 Residential Design Codes Volume 2 - Apartments, the effect of which would be to replace the content of Part 6 of the R-Codes. I hope that Volume 2 will not be Gazetted as a new SPP for the reason explained below.

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R-CODES WEBSITE cont'd

- 2) Is the website description is not intended to be strictly accurate. If the process undertaken results in there being two R-Codes, that will cause problems with the definition of the term 'R-Codes' in deemed clause 1, and will cause problems with the terms of MST Clause 25, and the provisions of sections 6 and 77 of the P & D Act.

- 3) For the purpose of section 77, for there to be continuity in the identity of a SPP, a previous SPP would either need to be amended, or would need to be repealed and replaced by a subsequent SPP. What the website indicates is neither of those. There needs to be clarity as to exactly what is intended.

MODIFICATIONS OF SPP IN A LPS

- 1) It is possible some provisions of SPP 7.3 – Volume 2 may be modified by existing provisions with any particular LPS, from the outset. I will explain that.
- 2) S77(1)(b) of the P & D Act provides that a LG may include in a scheme a provision that a specified SPP with such modifications as may be set out in the scheme, is to be read as part of a scheme, or a provision however expressed to the same effect.
- 3) S77(2) provides that –

‘where a scheme includes a provision referred to in sub-section (1)(b)-
 - (a) the scheme is to have effect as if the State planning policy as from time to time amended, or any subsequent policies by which it is repealed under this Act, was set out in full in the scheme; and
 - (b) the State planning policy is to have effect as part of the scheme subject to any modifications set out in the scheme.

MODIFICATIONS OF SPP IN A LPS cont'd

4) S77(3) then provides that –

‘Modifications referred to in the sub-section (2)(b) prevail over any later amendment of the State planning policies or subsequent policy referred to in sub-section (2)(a), which is inconsistent with the modifications’.

MODIFICATION ISSUES cont'd

It follows from the provisions of s77 that if a LPS contains provisions which modify the provisions in the R-Codes Part 6, they may have the effect of modifying provisions in SPP 7.3 in Volume 2 – Apartments.

LG planners should be alert to that possibility, and the fact that s77(3) provides that the modifications prevails over any later amendment to the SPP, where a subsequent SPP.

ISSUES FOR LG PLANNERS

- 1) The majority of residential developments determined by LGs are likely to fall within the scope of Parts 1 to 5 of the R-Codes.
- 2) The majority of apartment developments coded R40+ are likely to be determined by a DAP.
- 3) The majority of issues of concern of LG planners are likely to involve developments in the R40+ range. LG planners in those cases will have the responsibility of preparing reports and recommendations, most commonly for a DAP.
- 4) LG planners should be prepared to prepare informed reports for their Councils and for DAPs as to the amended R-Codes and SPP 7.0 in the interim period between the present and the advertised SPP 7.3 Volume 2 commencement date of 24 May 2019. I will explain that comment briefly.

HAVING REGARD TO THE AMENDED R-CODES AND SPP 7.0

- 1) Section 29(2) of the P & D Act provides that a SPP has no force or effect until it is approved by the Governor and published in the Gazette. But s87(4) of the P & D Act makes a similar provision in regard to a LPS or an amendment to a LPS, when approved by the Minister and published in the Gazette, it has full force of effect as if enacted in the P & D Act. The provisions in regard to an LPS and SPP seem to be similar, though the provision in regard to an LPS in s87(4) is expressed in the positive, while the provision in regard to an SPP in s29(2) is expressed in the negative. Nevertheless, it seems safe to assume the effect is the same.
- 2) In any event, given there is now more than two months before the stated commencement date of SPP 7.3, the time is approaching where LG planners will need to proceed on the assumption that the Reports they prepare between now and 24 May 2019 will relate to development proposals which may not be determined before 24 May.

HAVING REGARD TO THE AMENDED R-CODES AND SPP 7.0 cont'd

- 3) Even if the initial determination of a development proposal is made before 24 May 2019, any application for review regarding that proposal would be determined by the SAT after 24 May, and the decision maker, whether it be a Council, DAP or the SAT would be required to apply the law existing at the time of the determination.

INTERIM APPLICATION OF R-CODES

- 1) For decision making purposes, the law that applies is that in existence at the date of the decision. For example see the Court of Appeal Decision in

Presiding member of the Southern JDAP v DCSC Pty Ltd
[2018] WASCA 213 at [48], [83] and [107]

- 2) Any application which is not likely to be determined by the LG or a DAP before 24 May should be processed on the basis that the new/amended R-Codes apply.

INTERIM APPLICATION OF R-CODES cont'd

- 3) If there is doubt as to whether the relevant determination will need to be made before 24 May, the LG Planner if possible should prepare a report taking into consideration both scenarios, ie. the existing R-Codes and the new/amended R-Codes. The decision maker will then be able to apply the appropriate assessment of the proposal, as at the date of decision.

- 4) Even if it is clear that a determination will be made before 24 May, the LG planner may be wise to remember that any decision made on a SAT review may need to apply the provisions of the new/amended R-Codes.

INTERIM APPLICATION OF R-CODES cont'd

- 5) If there is doubt as to whether the relevant determination will need to be made before 24 May, the LG Planner if possible should prepare a report taking into consideration both scenarios, ie. the existing R-Codes and the new/amended R-Codes. The decision maker will then be able to apply the appropriate assessment of the proposal, as at the date of decision.
- 6) Even if it is clear that a determination will be made before 24 May, the LG planner may be wise to remember that any decision made on a SAT review may need to apply the provisions of the new/amended R-Codes.
- 7) Similar considerations would apply in regard to SPP 7.0.

INTERIM APPLICATION OF R-CODES cont'd

- 8) So far as the Design Review Guide is concerned, that is intended as guidance for local governments to set out and operate design review processes. It is not an SPP, and there is no statutory commencement date.

- 9) a proposed SPP does not fall squarely within deemed clause 67(b) (proposed planning instrument that the local government is seriously considering adopting or approving). Nor does it fall within deemed clause 67(c) (any approved SPP). However there may be circumstances in which the amended/new R-Codes may provide useful guidance in regard to orderly and proper planning, and regard could be had to any such provision as in the case of any seriously entertained scheme amendment or policy.



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