

Local Planning Policy 1.5: Response to State Administrative Tribunal Matters

ADOPTION DATE: 28 August 2018 (DV18.119)

AMENDED DATE: 28 June 2022 (11.2)

23 June 2020 (DV20.68)

March 2019 (DV19.29)

AUTHORITY: *Planning and Development Act 2005*

Planning and Development (Local Planning Schemes) Regulations 2015

Town of Cambridge Local Planning Scheme No. 1

State Administrative Tribunal Act 2004

POLICY PURPOSE

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

This policy does not deal with 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

1.0 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 the Towns Officers, then in the interests of the Council and the Towns Officers, an independent Town Planning Consultant will be engaged to represent the Town. Further, where the applicant has retained legal representation, the Town will be legally represented.

In such cases, officers may represent the Town at the mediation sessions, as far as practicable, with Elected Members being able to attend on a voluntary basis as observers.

The Towns officers may receive a subpoena requiring them to appear as a witness at the Tribunal and this 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 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.

2.0 Council Decision Consistent with Officer Recommendation

Where a Council decision is the same or essentially the same as an officer's recommendation or corrects or improves the content of an officers' recommendation, then officers, or a consultant appointed by the Town, shall 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.

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

3.0 Parties not legally represented

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

4.0 Legal Representation

The Town 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 Town 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 Statutory Planning.
- (b) Where an applicant is legally represented in either class of application, the Town shall engage suitably 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 Town will engage legal representation where it is considered appropriate in the opinion of the Manager Statutory Planning, because the proceedings raises a matter of law.
- (d) Where the Council decision is inconsistent with the officer recommendation, instructions to the Town's legal representative will be provided by two nominated elected members and the CEO. Where the Council has not nominated elected members to provide instructions on behalf of the Council, the instructions will be provided as agreed between the Mayor, Deputy Mayor and CEO.

5.0 Expert Witnesses

Expert witnesses shall generally be engaged in cases where it is necessary to refute the evidence of expert witnesses to be used by the applicant. Expert witnesses shall be selected on the merits of the individual matter based on their knowledge or experience for use of as evidence in proceedings or giving an option to proceeding. The selection of expert witnesses will be made on recommendation of the Town's legal representative and/or consultant (where engaged) and agreement of either the Manager Statutory Planning or the Director Planning and Development.

6.0 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 Town will advise all parties who made a submission with regard to the original decision that such an application received. The notification shall be made in writing once only within ten (10) days of the Town receiving such advice and shall only contain information regarding the reviewable decision, the tribunal's reference number and contact details.

The Town shall not provide updates as to the progress of any application of review.

7.0 Involvement of Third Parties

7.1 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 Town's evidence to the Tribunal.

7.2 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 Town'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 Town's officers.

7.3 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 s(37)(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 Town will not ordinarily object to an application by an immediate neighbour to make a submission to the Tribunal.

8.0 Mediation

The Town acknowledges the Tribunal's desire to resolve matters by mediation where possible and will agree to participate in mediation as proposed by the Tribunal. Discussions occurring for the purpose of mediation are conducted by the Tribunal on a "without prejudice" basis and the Council acknowledges that the content of this discussion cannot be referred to beyond the mediation session. 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 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 Statutory Planning will inform the Mayor and advise all elected members of the details of the mediation session. Immediately prior to the mediation, the Manager Statutory Planning may arrange a briefing for elected members to ensure that 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 Town'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:

- (a) Shall participate constructively in the mediation in order to attempt to reach a compromised solution;
- (b) Shall not agree to any compromised solution at the mediation beyond the scope of the officer's delegated power; and
- (c) Shall refer any potential solutions arising out of the mediation back to the decision maker in the original application.

9.0 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. Upon receipt of this information, the officer shall 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.

Where submissions relating to the original proposal were received, the Town shall notify those submitters of the meeting at which the item will be considered however, it will not seek further submissions on the proposal.

10.0 Adjournment of proceedings

Where an officer is responsible for conducting a proceeding on behalf of the Town, that officer may request, or agree to, an adjournment of the matter in cases where he/she considers that operational needs of the Town are assisted by doing so. 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*.

11.0 Hearings

Where the matter is referred to a hearing, the consultant, legal representative or officer with conduct of the matter shall present the Council's decision in its

entirety, inclusive of all reasons for refusal or conditions of approval under review. Council's decision is to be presented in all material submitted to the Tribunal in preparation for the hearing, notably the Statement of Issues, Facts and Contentions.

Should the consultant, legal representative or officer be of the view that a reason for refusal, or condition of approval, cannot be reasonably defended during the hearing, a revised decision of Council may be sought.

12.0 Application for Review lodged while a Direction under S214 of the *Planning and Development Act 2005* is in Force

Where an application for review of a decision is lodged and the matter is also the subject of a directions notice under S214 of the *Planning and Development Act 2005*, the Town will defer enforcement of the directions notice until such time as the application before the Tribunal is determined.

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

13.0 Appeals against Decisions of the Tribunal

The Town 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 Town or Local Government in general.

14.0 Costs

The Town 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 Town will seek legal advice as to the reasonable chance of success if this avenue were pursued prior to making a decision to seek such an order.

15.0 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 Town is considered a third party and its participation is at the invitation of the Tribunal.

15.1 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 application of Elected Members in these matters may be limited to the Mayor or the Mayor's delegate.

15.2 Reports

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

15.3 Legal Representation

The Town will engage professional legal representation where, in the opinion of the Chief Executive Officer (in liaison with the Manager Legal and Risk, Manager Statutory Planning and/or the Director Planning and Development, it is appropriate in serving the best interests of the Council.

All requests for legal representation and other consultants shall be prior approved by the Chief Executive Officer.

Amended: 26 March 2019 (DV19.29)
23 June 2020 (DV20.68)
28 June 2022 (11.2)