



Department of **Planning,
Lands and Heritage**



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PUBLIC CONSULTATION

draft

Operational

Policy

1.13

Significant Development Pathway – Public Interest Considerations

May 2024

The Department of Planning, Lands and Heritage acknowledges the traditional owners and custodians of land and waterways across Western Australia. The Department is committed to reconciliation to improve outcomes for Aboriginal and Torres Strait Islander peoples and to work together to provide a culturally-safe and inclusive environment.

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1. Introduction

Part 11B of the *Planning and Development Act 2005* (P&D Act) establishes a significant development pathway in the Western Australian planning system. Provisions in this Part detail circumstances where the Western Australian Planning Commission (WAPC), as decision maker for all significant development proposals, can deviate from the applicable planning instrument. There are three decision pathways available under this section, and one of these includes an assessment that a determination is ‘in the public interest’.

This provision is a discretion available to the WAPC to exercise only where the application is determined to be of State or regional importance, and conflicts with an applicable planning instrument. Part 11B defines applicable planning instrument to mean a local planning scheme, region planning scheme, Swan Valley Planning Scheme, or an interim development order, in relation to a development application that would otherwise be determined under those instruments.

This policy provides the principles and guidance that underpin how ‘public interest’ is considered by the WAPC in its assessment of development applications under the significant development pathway.

2. Application of this policy

This policy applies to development proposals seeking consideration under the significant development pathway, as provided for in Part 11B of the P&D Act and the *Planning and Development (Significant Development) Regulations 2024*, where exercise of the extraordinary discretion provided by section 171R(1)(a) of the P&D Act is sought.

Section 171R(1)(a) allows the WAPC to approve a significant development proposal that conflicts with the provisions of the applicable planning instrument, i.e. is a ‘non-compliant’ proposal not usually capable of approval, where the WAPC is of the opinion that the application raises issues of State or regional importance and the determination is in the public interest.

The principles and criteria outlined in **Appendix 1** of this policy, based on the sources listed in **Appendix 2**, will be referenced by the WAPC in its assessment and determination of all proposals of State or regional importance seeking determination based on public interest.

In applying this policy the WAPC acknowledges that an efficient and effective land use planning system inherently serves the public interest, and it is imperative to ensure that this continues to underpin all decision-making. Regardless of the ability to determine development proposals, which

conflict with planning instruments, the WAPC will ensure that any decision aligns with the P&D Act as well as have due regard to the well-established principles of orderly and proper planning.

This policy is supported by, and should be read in conjunction with the following WAPC documents:

- *Significant Development Pathway Application Guide* ([Application Guide](#)).
- *Fact Sheet - Premier Authorisation to lodge a development application under Part 11B of the Planning and Development Act 2005* ([Part 11B Fact Sheet](#)).



3. Policy objective

The objective of this policy is to detail principles and assessment criteria relevant to public interest, based on established case law and legal precedent, to assist the WAPC with the implementation of Part 11B of the P&D Act.

4. Policy measures

4.1 Decision-making pathway

4.1.1 Determining State or regional importance

In order for the public interest assessment to be triggered under section 171R(1)(a)(ii) of the P&D Act, an application must first raise issues of State and regional importance. In the broadest of terms this is likely to include matters concerning the social, economic and environmental impact of the application to the entire State or a particular region.

The [Part 11B Fact Sheet](#) contains a series of broad criteria that will be used by the WAPC in determining whether a proposal raises issues that are considered to be of State or regional importance. Once this has been met, the WAPC is not limited to planning considerations and may have regard to any other matter when determining matters in the ‘public interest’.

4.1.2 Consideration of proposals

Prospective applicants may submit a proposal requesting that an assessment be made by the WAPC in the manner permitted by section 171R(1)(a). Alternatively, where specific circumstances arise, the WAPC itself may decide that a particular application warrants consideration and determination through these means.

To determine whether the proposal warrants approval in the public interest, the WAPC shall refer to the principles and criteria detailed in **Appendix 1**. Likewise, prospective applicants shall provide evidence and justification addressing these provisions at the pre-lodgement engagement and formal assessment stages. Further information on application requirements is detailed in Part 4.3 of this policy as well as the [Application Guide](#).

4.2 Public interest assessment

4.2.1 Determining ‘in the public interest’

While it is generally accepted that the concept of public interest is not a closed definition and is broad in scope, established case law and legal commentary suggests that there are several universal principles that can be applied when considering public interest matters as part of decision-making.

Broadly speaking, it involves the careful weighing of considerations and objectives common to many discretionary planning decisions with considerable flexibility to factor in the long-term environmental, social and economic impacts of a development over its foreseeable lifespan. It is not an additional consideration but rather an overarching conclusion of what is the best outcome for the community as a whole. It also requires demonstration of benefit/s to the public over and above requirements that are mandatory under other relevant legislation.

Identifying what is in the public interest is a primary obligation of public officials who are exercising discretionary powers. In this regard the WAPC will consider the following matters, which underpin the formal assessment criteria listed in **Appendix 1**:

- *Who should be considered to be the relevant ‘public’ in the context of the proposal?*
- *What are the relevant statutory (i.e. legal) or other factual matters which contribute to the determination of the application in the public interest?*
- *What considerations should be given to each of these identified matters?*

4.2.2 Overarching considerations

While in some cases there may not be a clear answer to each of the above questions, it is imperative the WAPC can demonstrate that the appropriate approach was followed, and all relevant matters were considered.



With this in mind, in identifying the public interest in the course of determining a proposal, the WAPC will factor the following overarching considerations:

- *Ensuring compliance with applicable law (i.e. the P&D Act).*
- *Delivering functions fairly and impartially, with integrity and professionalism.*
- *Adherence to the principles of procedural fairness/natural justice.*
- *Acting reasonably.*
- *Ensuring proper accountability and transparency.*

4.2.3 WAPC assessment criteria

Appendix 1 expands on these by providing specific principles and formal assessment criteria based on legal precedent. These will be used by the WAPC in the assessment and determination of relevant proposals to verify whether their determination 'in the public interest' is warranted, noting that the WAPC is not limited to considering land use planning matters when exercising its discretion in arriving at a decision under this scenario.

It is expected that these principles and criteria will also be referenced by prospective applicants seeking a decision under section 171P(1) in a manner permitted by section 171R(1)(a), as part of the development application and in conjunction with the requirements of the Applicant Guide.

4.3 Applicant requirements

Application requirements for proposals seeking a decision through this pathway are detailed in the [Application Guide](#). It is the obligation of the proponent to demonstrate a proposal's capability of a decision under public interest considerations.

In summary, the WAPC requires proponents to submit clear documentation, technical reports or other evidence highlighting how the proposal demonstrates capability of a decision in the 'public interest'.

It is expected that proponents will provide this justification at pre-lodgement engagement stage, to allow for advice to be provided prior to formal lodgement.

Information submitted at formal lodgement stage to support the request for non-compliance, will be published by the WAPC when the application is publicly advertised. This information should be presented in a format that the general public will be able to interpret the discretion being sought and the public benefit being provided in return.

In making a final determination under section 171P(1) in a manner provided for by section 171R(1)(a), the WAPC will rely upon information and other evidence submitted with the application, the principles detailed in **Appendix 1** and any other matters considered pertinent, including submissions received during advertising, to the proposal under consideration.



Appendix 1 – WAPC assessment criteria

Public interest principles	Key considerations
<p>In general, matters of public interest shall:</p> <ul style="list-style-type: none"> involve considering different statutory (i.e. legal) or other factual matters, and judging the extent to which each informs the outcome; involve a value judgment where reasonable minds may differ; require decisions to be made appropriately while not acting as a means for an improper purpose or ulterior objective; and include outcomes that promote a prompt and efficient resolution of a matter. <p>In a planning context, matters of public interest shall:</p> <ul style="list-style-type: none"> fall within the scope and purpose of the <i>Planning & Development Act 2005</i>; refer to relevant statutory and other factual matters, which may include but are not limited to the applicable planning instrument, as well as public amenity and convenience; promote good planning outcomes as contemplated under the planning framework; maintain public confidence in planning instruments and the planning system more broadly; include considerations beyond official planning instruments, such as future society-wide issues, including climate change, alongside moral and social factors; and demonstrate a clear benefit to the community over and above the mandatory requirements of other relevant legislation. <p>In all circumstances, matters of public interest should not:</p> <ul style="list-style-type: none"> benefit a private individual or entity only; conflict with the <i>Planning & Development Act 2005</i>; extend to matters that are illegal; and be merely 'of interest' to the public-at-large. 	<p>In considering proposals seeking determination under Part 11B of the <i>Planning & Development Act 2005</i>, involving the exercise of extraordinary discretion on the basis of public interest under section 171R(1)(a), the WAPC will:</p> <p>A. At lodgement stage:</p> <ul style="list-style-type: none"> <input type="checkbox"/> confirm the proposal raises issues of State or regional importance; and <input type="checkbox"/> ensure adequate supporting material applicable to its assessment is provided by the proponent in accordance with the requirements of this policy and the Applicant Guide, following discussions at pre-lodgement engagement stage. <p>B. At formal assessment stage:</p> <ul style="list-style-type: none"> <input type="checkbox"/> determine who should be considered the relevant 'public' in the context of the proposal; <input type="checkbox"/> ensure that all relevant factors, principles and issues relating to the public interest are considered, with particular reference to how the proposal benefits the wider community as well as the aspects that conflict with the applicable planning instrument; <input type="checkbox"/> dismiss factors concerning the benefit or interest of a private entity in the context of assessing 'public interest'; and <input type="checkbox"/> disregard interest in a proposal by the public-at-large, including media coverage, from achieving an outcome in the 'public interest' (important note – this does not apply to consideration of submissions received during the formal consultation period). <p>C. At determination stage:</p> <ul style="list-style-type: none"> <input type="checkbox"/> demonstrate compatibility of a proposal with the P&D Act, including to promote the sustainable use and development of land; <input type="checkbox"/> demonstrate compatibility with the overarching strategic objectives for the community, region and/or state as envisaged by the applicable planning framework, including consideration of long-term public amenity and character of an area; <input type="checkbox"/> consider non-planning matters affecting the 'public interest' where these are of relevance to the proposal; <input type="checkbox"/> ensure its opinion is appropriately reasoned and details the specific factors applicable to the decision.



Appendix 2 – case law and references

1. Case law

This policy has been prepared with reference to the following matters:

Case law excerpt(s)	Citation
<i>“The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals.”</i>	<i>Director of Public Prosecutions v Smith</i> [1991] VicRp 6; [1991] 1 VR 63
<i>“I recognise that in the balancing of public interest against private interests and private rights in a case such as this, one should not allow personal considerations of sympathy with litigants to dictate or influence a departure from sound principles”</i>	<i>Kane v Sydney City Council</i> (1955) 20 LGR (NSW) 133 per Hardie AJ at 137
<i>“the expression ‘in the public interest’, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only ‘in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view”</i>	<i>O’Sullivan v Farrer</i> (1989) 168 CLR 210 at 216 (Mason CJ and Brennan, Dawson, Gaudron JJ)
<i>“Whilst a particular case may call for the public interest to be examined by reference to an adopted planning scheme and other relevant matters, the extent to which the latter informs the outcome of that examination involves matters of fact and degree. The outcome will of course be informed by, inter alia, the knowledge that a planning scheme is a statutory instrument with the force of law. Decision making that maintains confidence in such a document is itself a matter of public interest. For reasons that follow, the facts and circumstances here do not suggest the planning scheme is inconsistent with contemporary expressions of waste management policy or the public interest.”</i>	<i>Austin BMI Pty Ltd v Ipswich City Council & Ors</i> [2023] QPEC 27 at [117].
<i>“It is contrary to the public interest that the Tribunal grant consent to a use that is illegal.”</i>	<i>Builtwell Corporation Pty Ltd v Town of Port Hedland</i> [2000] WATPAT 13 at [6]
<i>“There are many instances where it is misleading to construe a composite phrase simply by combining the dictionary meanings of its component parts. In the law of defamation [for example], ‘public interest’ does not mean ‘of interest to the public’...”</i>	<i>XYZ v Commonwealth</i> (2006) 227 CLR 532
<i>“Questions about ‘the public interest’ will therefore rarely have only one dimension. Whether a particular course will be ‘in the public interest’ will often involve judgement about which reasonable minds may well differ.”</i>	<i>East Melbourne Group Inc v Minister for Planning</i> (2008) 23 VR 605 at [353]



Case law excerpt(s)	Citation
<i>"It may readily be accepted that most questions about what is in 'the public interest' will require a consideration of a number of competing arguments about, or features or "facets" of, the public interest."</i>	<i>McKinnon v Secretary, Department of Treasury [2005] FCAFC 142 at [12]</i>
<i>"the public interest is not a static concept. It is, instead, a concept that takes its shape and substance from the circumstances which are said to give rise to it. Those circumstances will be factual and statutory."</i>	<i>Philip Morris Ltd and Prime Minister [2011] AATA 55</i>
<i>"General public amenity and convenience are matters which fall within ordinary conceptions of the public interest..."</i>	<i>O'Sullivan v Farrer (1989) 168 CLR 210 at 216 at [17]</i>
<i>"For one thing, the government is not the only source of wisdom in this area. A consent authority may range widely in the search for material as to the public interest..."</i>	<i>Austin BMI Pty Ltd v Ipswich City Council & Ors [2023] QPEC 27 at [115], citing Terrace Tower Holdings Pty Ltd v Sutherland Shire Council (2003) 129 LGERA 195 at 209-210, [81]</i>
<i>"Although the planning authorities are given very wide powers to impose 'such conditions as they think fit', nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority is not at liberty to use their powers for an ulterior object, however desirable that object may seem to be in the public interest."</i>	<i>Pyx Granite Co Ltd v Minister for Housing and Local Government [1958] 1 QB 554 (1958)</i>
<i>"In any event, matters relevant to the public interest touching a particular application are not confined to those appearing in published environmental planning instruments, draft or final. Obviously such instruments carry great weight and at times determinative weight, but they are not the only source of information concerning the public interest in planning matters.... Nothing in the Environmental Planning and Assessment Act stipulates that environmental planning instruments are the only means of discerning planning policies or the 'public interest'..."</i>	<i>Austin BMI Pty Ltd v Ipswich City Council & Ors [2023] QPEC 27 at [114] and [115], citing Terrace Tower Holdings Pty Ltd v Sutherland Shire Council (2003) 129 LGERA 195 at 209-210, [81]</i>
<i>It is, as Council submits, correct to say a planning scheme embodies the public interest. It is, in my view, also correct to say a planning scheme is not the only source of information about the public interest."</i>	<i>Austin BMI Pty Ltd v Ipswich City Council & Ors [2023] QPEC 27 at [114] and [115], citing Terrace Tower Holdings Pty Ltd v Sutherland Shire Council (2003) 129 LGERA 195 at 209-210, [81]</i>



Case law excerpt(s)	Citation
<p><i>“Hardie J was of the view that the power vested in the responsible authority and the court to consider the public interest on the hearing of a development application did not empower them to take into consideration moral and social considerations affecting the young and impressionable section of the community, a view with which I am not wholly in agreement. However, His Honour was clearly of the view ... that a use which led to offensive and unlawful behaviour on the party of other persons might properly be rejected on the ground that it would impair the amenity of the neighbourhood”</i></p>	<p><i>Kelly v Toowoomba City Council and Ors [1995] QPLR 3 at 6</i></p>
<p><i>“A development approval is a right granted at a particular point in time, in a particular context and pursuant to a particular planning framework. The rights granted by that approval should be acted upon within a timely fashion. It is contrary to the public interest for that right to commence that development to endure indefinitely, given that the planning context is always changing as are community needs and attitudes.”</i></p>	<p><i>Auscon Pty Ltd and Town of Cambridge [2021] WASAT 116 at [49]</i></p>

2. References

- Linda Pearson, *Tribunals and the Public Interest* AIAL Forum No. 101, <https://www5.austlii.edu.au/au/journals/AIAdminLawF/2021/2.pdf>
- Richard Mulgan, *Public Servants and the Public Interest*, <https://www.aph.gov.au/binaries/senate/pubs/pops/pop36/mulgan.pdf>
- Chris Wheeler, *The Public Interest, We Know Its Important But Do We Know What It Means* AIAL Forum No. 48, <https://www5.austlii.edu.au/au/journals/AIAdminLawF/2006/2.pdf>