



Government of **Western Australia**
Development Assessment Panels

Development Assessment Panel Code of Conduct 2017

Under the
*Planning and Development
(Development Assessment Panels)
Regulations 2011*

August 2017





I, Gail McGowan, interim Director General of the Department of Planning, Lands and Heritage, make this Code of Conduct under regulation 45 (1) of the *Planning and Development (Development Assessment Panels) Regulations 2011*.

Gail McGowan

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Published by the
Department of Planning,
Lands and Heritage
Gordon Stephenson House
140 William Street
Perth WA 6000

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Perth WA 6001

Published August 2017

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National Relay Service: 13 36 77

This document is available in alternative formats on application to Communication Services.



Introductory statement

This Code of Conduct (the Code) sets out principles to guide the behaviour of members of Development Assessment Panels (DAPs) established under Part 11A of the *Planning and Development Act 2005* (the Act).

DAP members are required, under regulation 45 (2) of the *Planning and Development (Development Assessment Panels) Regulations 2011* (DAP Regulations), to comply with this Code.

Other legal requirements applying to DAP members are contained in the Act and DAP Regulations.

Where requirements of the Act or DAP Regulations are relevant to matters dealt with in this Code of Conduct, the relevant provisions are referred to in the text of the Code for information purposes. However, the references in this Code, Act or DAP Regulations are not intended to be a comprehensive statement of all legal obligations applying to DAP members.

It remains the responsibility of each DAP member to be aware of the legal obligations that apply to them in the performance of their functions under the Act.

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Part 1 - Preliminary

1.1 Citation

This Code of Conduct may be cited as the *Development Assessment Panel Code of Conduct 2017*.

1.2 Purpose

This Code of Conduct establishes a set of principles to guide the behaviour of members of DAPs.

1.3 Application of Code

1.3.1 This Code of Conduct applies to a person performing functions as a DAP member.

Note: see regulation 45 (2) of the DAP Regulations

1.4 Definitions

1.4.1 In this Code, unless otherwise defined, words and phrases have the same meanings as they have in the Act, the DAP Regulations and the *Development Assessment Panel Standing Orders 2017* (DAP Standing Orders).

1.4.2 In particular:

DAP means a development assessment panel established under Part 11A of the *Planning and Development Act 2005*.

DAP member means a specialist member, a local government member, or a deputy member, of a DAP.

DAP regulations means the *Planning and Development (Development Assessment Panels) Regulations 2011*.

DAP Standing Orders means the *Development Assessment Panel Standing Orders 2017*.

DAP secretariat means the departmental officer or officers made available to provide services to a DAP or DAPs under regulation 49 of the DAP Regulations.

Department means the Department of Planning, Lands and Heritage.

Director General means the Director General of the Department.

presiding member means the DAP member presiding at a meeting of a DAP under regulation 27 of the DAP Regulations.

relevant DAP, in relation to a DAP member, means the DAP of which the member is a member.

the Act refers to the *Planning and Development Act 2005*.

Part 2 - Personal behaviour and communication

Division 1 personal behaviour

2.1 DAP member behaviour

- 2.1.1 Each DAP member, when carrying out the member's functions as a DAP member, must:
- act with due care and diligence;
 - act honestly, ethically and responsibly;
 - be open and accountable to the public;
 - consider issues consistently, comprehensively, promptly and fairly;
 - base decisions on relevant and factually correct information;
 - treat others with respect and fairness;
 - uphold the highest standards of professional behaviour;
 - not seek to improperly influence other DAP members;
 - not engage in fraudulent or corrupt behaviour; and
 - act in accordance with the law and the provisions of this Code of Conduct.

Note: *Section 266(2) of the Act requires a DAP member, at all times, to act honestly in the performance of a function under the Act. There is a \$5,000 penalty for non-compliance with section 266.*

- 2.1.2 A local government member of a DAP is not bound by any previous decision or resolution of the local government in relation to the subject-matter of a DAP application. The member must exercise independent judgment, and consider the application on its planning merits, in deciding how to vote.
- 2.1.3 A DAP member is not bound by any confidential discussions that occurred as part of a State Administrative Tribunal process. The member must exercise

independent judgment, and consider the application on its planning merits, in deciding how to vote.

- 2.1.4 A DAP member must not make improper use of the member's position:
- to gain, directly or indirectly, an advantage for the member or for any other person; or
 - to cause detriment to the DAP or to any other person.
- 2.1.5 A DAP member must not make improper use of information obtained in the course of their member duties, or use such information for direct or indirect personal or commercial gain, or to harm another person.

Note: see section 266 (6) of the Act

- 2.1.6 No specialist member, in their private capacity, is to represent an applicant in relation to a DAP application that is before the relevant DAP.
- 2.1.7 A DAP member must not make any statement that is critical, or that could be understood as being critical, of the Minister, the Director General, a local government, a local government employee, departmental employee, a DAP or another DAP member.
- 2.1.8 Any departmental resources provided for use in the performance of the member's duties under the Act must be used effectively and economically.
- 2.1.9 A DAP member must not use any departmental resources provided for use in the performance of the member's duties under the Act for private purposes, unless such use is authorised in writing by the Director General.

Division 2 communication

suggest to a member of the public that such preferential treatment has been received.

2.2 Definitions

In this division, **an applicant**, in relation to a development application, includes the person making the application and a representative or associate of that person.

2.3 Communication with local government and departmental staff

- 2.3.1 A DAP member, other than a local government member performing functions as a member of the local government, is not to have any involvement with a development application that is before the relevant DAP, or which the member is aware may come before that DAP in future, during the assessment of the application by the local government or the Department.
- 2.3.2 A DAP member must not, in relation to a development application that is before the relevant DAP or which the member is aware may come before that DAP in future, attempt to direct the action or influence the conduct of a person who is a local government or departmental employee, in the person's capacity as an employee.
- 2.3.3 A DAP member who is a ratepayer or an elector in a local government district in relation to which the relevant DAP is constituted:
- a. must not request preferential treatment by the local government due to his or her membership of the DAP; and
 - b. must avoid making any statement, doing or omitting any act that could

2.4 Communication in relation to applications

- 2.4.1 A DAP member is not to approach an applicant in relation to any application that is before the relevant DAP, or which the member is aware may come before that DAP in the future, otherwise than in the circumstances set out in the provisions of the DAP Standing Orders.
- 2.4.2 A DAP member must not make a representation to any person that the member commits, or purports to commit, his or her vote on an application that is before the relevant DAP or which the member is aware may come before that DAP in the future.
- 2.4.3 If a DAP member is approached with a request to commit his or her vote on an application the member must inform the presiding member of the DAP of the details of the approach.
- 2.4.4 Subject to 2.4.5, a DAP member is not to accept an invitation from an applicant to attend any meeting in relation to an application that is before the relevant DAP or which the member is aware may come before that DAP in the future.
- 2.4.5 A DAP member must not participate in:
- a. a discussion with an applicant, formally or informally, in person or otherwise; or
 - b. a site visit, private meeting, briefing, discussion or similar event with any other DAP member
- in respect of a development application that is before the relevant DAP or which

the member is aware may come before that DAP in future, UNLESS the discussion, visit, meeting or similar event has been consented to by the presiding member of the relevant DAP and arranged by the DAP secretariat.

- 2.4.6 In the case of DAP members participating in a site visit, private meeting, briefing, discussion or similar event:
- no DAP member may express a view that may suggest pre-judgment of the relevant development application; and
 - the members must ensure that a written record of the event is prepared and submitted to the DAP secretariat for discussion at the next DAP meeting during which the relevant application is discussed.
- 2.4.7 If a DAP member participates in a site visit, private meeting, briefing, discussion or similar event and later becomes aware that a DAP application has been made that relates to the meeting, briefing, discussion or event, the member is to ensure that a written record of the event is prepared and submitted to the DAP secretariat for discussion at the DAP meeting during which the relevant application is discussed.
- 2.4.8 Nothing in this Code of Conduct prevents DAP members from communicating with local government or departmental staff members in accordance with Part 3 of the DAP Standing Orders prior to a DAP meeting, or during the discussion of any matter at a DAP meeting.
- 2.4.9 Nothing in this clause prevents a local government member from performing functions as a member of a local government.
- 2.4.10 Nothing in this clause prevents a DAP member from performing functions as part of the State Administrative Tribunal process.

2.5 Communication with the general public

- 2.5.1 Only the presiding member of a DAP may publicly comment on the operations or determinations of the DAP.

Note: *This is a requirement under regulation 48 of the DAP Regulations.*

- 2.5.2 If a member of the public attempts to initiate discussion on the operations or determinations of a DAP with a DAP member, the DAP member is not to make any comment.

2.6 Protecting confidential or sensitive information

- 2.6.1 A DAP member must maintain confidentiality and not divulge information deemed confidential or sensitive, other than as required by law or where proper authorisation is given.
- 2.6.2 A DAP member is to respect confidential information and observe any restrictions agreed by the presiding member (subject to *Freedom of Information Act 1992* requirements).

Part 3 - Conflicts of interest and disclosure procedures

3.1 Definitions

3.1.1 In this section:

close associate of a DAP member means a person who:

- a. operates a business in partnership with the member, employs the member or is a beneficiary under a trust, or an object of a discretionary trust, of which the member is a trustee; or
- b. is a body corporate; or
- c. is a director, secretary or executive officer where the member holds shares with a total value exceeding \$10,000 or one per-cent of the total value of the issued share capacity of the body corporate, whichever is the lesser; or
- d. is the spouse, de facto partner, child or close relative of the member; or
- e. has a relationship of a kind specified in any of paragraphs (a) to (d) in relation to the member's spouse or de-facto partner if the spouse or de-facto partner is living with the member.

3.1.2 For the purposes of this part, a DAP member has an interest in a matter if either -

- a. that DAP member; or
- b. a close associate of that DAP member, has -
 - i. a direct or indirect pecuniary interest in the matter;
 - ii. a proximity interest in the matter; or
 - iii. an impartiality interest in the matter.

direct pecuniary interest is one where a person has an interest in a development application where it is reasonable to expect that the application, if dealt with by a DAP, will result in a financial gain, loss, benefit or detriment for the person.

indirect pecuniary interest is one where it is reasonable to expect that a person may receive a benefit or incur a loss, measurable in monetary terms, as a consequence of a benefit received or loss incurred by another person who has a direct or indirect interest in the matter.

impartiality interest means an interest that could, or could reasonably be perceived to, adversely affect the impartiality of a member with such an interest and includes an interest arising from kinship, friendship, partnership, or membership of an association, that is connected to a development application that is before the relevant DAP or which the member is aware may come before that DAP in future.

proximity interest, in relation to a DAP member, means an interest of the member, or of a close associate of the member, in a development application if the application concerns land that is adjoining the person's land or is directly across a thoroughfare from the person's land.

3.2 Members to identify conflicts and interests

- 3.2.1 As a general principle, a conflict of interest exists when a person has a private interest that could corrupt or undermine his or her performance of a public duty. As a decision maker must bring an open mind to deliberations, he or she cannot be affected by an improper influence. For this reason, DAP members must be alert to any private circumstances which could affect, or be seen to affect, the exercise of their judgment. Such interests must be declared and may be of a sufficient magnitude to preclude the member from participating in the decision.

3.2.2 On account of the principles above, a DAP member must identify any:

- a. direct or indirect pecuniary interest; or
- b. impartiality interest

that the member has, or may reasonably be perceived to have, in relation to any development application that is before the relevant DAP or which the member is aware may come before that DAP in the future.

3.2.3 A DAP member must identify any proximity interest that the member has in relation to any development application that is before the relevant DAP or which the member is aware may come before that DAP in the future.

3.3 Disclosure of conflicts of interest

3.3.1 Pecuniary or Proximity interests

Before a meeting:

- a. A DAP member who identifies he or she has a pecuniary or proximity interest should disclose this to the DAP secretariat as soon as possible.
- b. Such interests can give rise to a reasonable apprehension that the DAP member may be biased and so unable to bring an impartial mind to the deliberations.
- c. Accordingly, the DAP secretariat may arrange for another member to participate in deliberations on the matter which gives rise to the conflict of interest.
- d. The DAP member can perform his or her functions in relation to any other applications before the same meeting, if no conflict of interest arises in relation to those applications.

During a meeting:

- a. A DAP member who identifies he or she has a pecuniary or proximity interest in the application being considered:
 - i. is to disclose the interest to the other members as soon as possible after the relevant facts have come to the member's knowledge; and
 - ii. following the disclosure, is not to be present during any consideration or discussion of the relevant matter or to vote on the matter.

Note 1: *This is a requirement under section 266(3) of the Act. There is a \$5,000 penalty for non-compliance with section 266.*

Note 2: *The size of person's pecuniary interest appears irrelevant. The Act simply states applies to "direct or indirect financial interests." So disclose any financial interest, be it of one dollar or a million.*

3.3.2 Impartiality interests

Before a meeting:

- a. A DAP member who identifies he or she has an impartiality interest should disclose this to the DAP secretariat as soon as possible.
- b. The presiding member will decide whether the interest is of a magnitude that could give rise to a reasonable apprehension that the DAP member may be biased and so unable to bring an impartial mind to the deliberations.
- c. If the interest is considered sufficient to give rise to such an apprehension, the DAP secretariat may arrange for an alternative member to perform the members functions in relation to that application.

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- d. The DAP member can perform his or her functions in relation to any other applications before the same meeting, if no conflict of interest arises in relation to those applications.
 - e. If the presiding member does not consider the impartiality interest significant, the DAP member can continue to participate in the matter.

During a meeting:

- a. A DAP member who becomes aware that he or she has an impartiality interest should disclose the existence, and nature, of the interest to the other members as soon as possible.
- b. The presiding member will determine whether the interest is sufficient to preclude the member from further participation.

3.3.3 Part 6 of the Standing Orders contain further technical details on the disclosure process.

3.4 Disclosure of communication

If a DAP member has engaged in verbal communication with a person, or the representative of a person, who has a direct or indirect pecuniary interest in a development application that is to come before a meeting of the relevant DAP, the member, as soon as possible after the relevant facts have come to the member's knowledge is to make a record of the communication and disclose it to the DAP secretariat, as if it were correspondence, in accordance with item 3.6 of the DAP Standing Orders.

Part 4 - Gifts

4.1 General principles relating to gifts

- 4.1.1 A DAP member is not to seek any gift for themselves or any other person in connection with the exercise of the member's functions under Part 11A of the Act.
- 4.1.2 A DAP member is not to accept any gift from a person in connection with the exercise of the member's functions under Part 11A of the Act, otherwise than in the circumstances set out in regulation 46 of the DAP Regulations.

undertake development that will require the determination of a development assessment by a DAP.

- 4.2.3 As provided in regulation 46 (3) of the DAP regulations, a DAP member who accepts a notifiable gift from a person who is undertaking, seeking to undertake, or it is reasonable to believe is intending to undertake development that will require the determination of a development assessment by a DAP, is required to notify the Director General of the acceptance of the gift. Notification is to accord with regulation 46 (4) of the DAP Regulations
- 4.2.4 As provided in regulation 46 (5) of the DAP Regulations, the Director General is to maintain a register of notified gifts.

4.2 Notifiable gifts and prohibited gifts

- 4.2.1 As provided in regulation 46 (1) of the DAP regulations:
- a. a notifiable gift is:
 - i. a gift worth more than \$50 and less than \$300; or
 - ii. a gift that is one of two or more gifts given to a DAP member by the same person within a period of six months that are, in total, worth more than \$50 and and less than \$300;
 - b. a prohibited gift is:
 - i. a gift worth \$300 or more; or
 - ii. a gift that is one of two or more gifts given to a DAP member by the same person within a period of six months that are, in total, worth \$300 or more.
- 4.2.2 As provided in regulation 46 (2) of the DAP Regulations, a DAP member must not accept a prohibited gift from a person who is undertaking, seeking to undertake, or is reasonable to believe is intending to

Note: Regulation 46 of the DAP Regulations imposes requirements, as summarised above, in respect to notifiable and prohibited gifts. These requirements are based on the provisions regarding gifts that local government councillors are subject to under the Local Government Act 1995 and associated regulations.

Part 5 - Dealing with misconduct and breaches of this Code

5.1 Reporting suspected breaches of the Code

Suspected breaches of this Code can be reported by DAP members and externally where appropriate in accordance with the complaint-handling procedures set out in the DAP Member Procedures Manual.

5.2 Application of *Corruption, Crime and Misconduct Act 2003*

5.2.1 The Corruption and Crime Commission (CCC) has statutory powers to investigate and deal with allegations of serious misconduct by public officers as defined in section 4 (a), (b) or (c) of the *Corruption, Crime and Misconduct Act 2003* (CCM Act) including where a public officer:

- a. acts corruptly or corruptly fails to act in the course of his or her duties; or
- b. corruptly takes advantage of his or her position for the benefit or detriment of any person; or
- c. commits an offence which carries a penalty of two or more years imprisonment.

5.2.2 The Public Sector Commission (PSC) has statutory powers to investigate and deal with allegations of minor misconduct by public officers as defined in section 4 (d) of the CCM Act. Minor misconduct occurs if a public officer engages in conduct that:

- a. adversely affects the honest or impartial performance of the functions of a public authority or public officer, whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct;

- b. involves the performance of functions in a manner that is not honest or impartial;
- c. involves a breach of the trust placed in the public officer; or
- d. involves the misuse of information or material that is in connection with their functions as a public officer, whether the misuse is for the benefit of the public officer or the benefit or detriment of another person; and
- e. constitutes, or could constitute, a disciplinary offence providing reasonable grounds for termination of a person's office or employment.

5.2.3 The main difference between serious and minor misconduct is that serious misconduct must involve corrupt intent and/or criminal conduct.

5.2.4 DAP members are public officers within the meaning of the CCM Act.

5.2.5 Accordingly, DAP members may be subject to the scrutiny of the CCC and the PSC in relation to the exercise of their functions under the Act.

5.3 Consequences of misconduct or contravention of Code

5.3.1 Section 266 of the Act imposes penalties for DAP members in relation to:

- a. failure to act honestly in the performance of a function under the Act (s 266 (2));
- b. unlawful disclosure of information acquired in connection with the carrying out of functions under the Act (s 266(5));
- c. making improper use of information to gain an advantage or to cause a detriment.

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- 5.3.2 Under regulation 32 (1) of the DAP Regulations, a DAP member's office automatically becomes vacant on the following grounds (among others):
- a. conviction for an offence punishable by imprisonment for at least 12 months; or
 - b. conviction for an offence against section 266 of the Act.
- 5.3.3 The Minister may, under regulation 32 (3) of the DAP Regulations, remove a DAP member from office on the following grounds (among others):
- a. neglect of duty; or
 - b. misconduct or incompetence.