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Mr D Carew-Hopkins
A/Director General
Department of Environment
PO Box K822
PERTH WA 6842

ATT: Eve Bunbury
VIA EMAIL: eve.bunbury@environment.wa.gov.au

Dear Mr Carew-Hopkins

FINANCIAL DISINCENTIVES TO CONSERVATION

The Urban Development Institute of Australia (UDIA) is the peak body representing the property development industry in Western Australia.

It is in this capacity that we thank you for the opportunity to respond to the current inquiry into disincentives for conservation.

UDIA believes that current town planning and environmental legislation, regulation and policy act as a disincentive for conservation, for industry as well as individual property owners.

This view primarily relates to the limited compensation available to landowners who are impacted by planning legislation, regulation and policies and the increasing emphasis by government on conservation through regulatory and policy restriction rather than by zoning a property as a regional reserve for conservation purposes.

It also reflects increasing concern among industry and individuals about the complexity of environmental requirements and the limited ability of landowners to understand their responsibilities for environmental management without obtaining costly advice from environmental and land management consultants.

Other issues associated with this include:

- A perception among landowners that the current legislative and policy framework penalises individuals for good environmental management of their property.
- Lack of direct incentives or assistance for property owners to manage their property in an environmentally responsible manner.



TOWN PLANNING LEGISLATION IN WESTERN AUSTRALIA

In 1928, the common law was modified in Western Australia with enactment of the Town Planning and Development Act. This Act provided for the making of town planning schemes for local authority areas and enabled for a person whose land is injuriously affected by the making of a town planning scheme to claim compensation. A claim must be made within six months of a scheme being approved and gazetted. However, land is not considered to be injuriously affected unless development is not permitted for a use other than a public purpose; or non-conforming land use rights are cancelled (wholly or partly).

Non-conforming land use rights relate to a use that was lawful immediately prior to the coming into operation of a scheme that is not in conformity with any provision dealing with the new zoning or classification of land, for example when residential land is rezoned from “Urban” to “Public Purpose Road Reserve” the use of the land for residential purposes is no longer in accordance with the site’s zoning and the land would be considered to have been injuriously affected.

In Western Australia, injurious affection is not payable on 'zoned' land - that is land that is not required for a public purpose such as commercial, residential, rural and industrial. Where a town planning scheme ‘up zones’ land (from a land use with a low market value to a use where the land will have an increased value) a landowner gains a potential benefit. Where this occurs, the concept of “betterment” has been increasingly entertained by local authorities. Betterment in effect seeks to tax a landowner at the time of development for any upzoning that has occurred – basically as a result of the passage of time in a growing area. Where land is ‘down zoned’ for whatever reason, no compensation is payable if a loss occurs.

Reserved land can also be purchased or compulsorily acquired by the State Government for the purpose of a scheme.

In 1959, the Metropolitan Region Town Planning Scheme Act was enacted which provided particular provisions in respect of the Metropolitan Area including the making of a planning scheme for the whole Perth area, the Metropolitan Region Scheme (MRS). The provisions of the Town Planning and Development Act (so modified) also apply to compensation under the Metropolitan Region Scheme.

Under the Metropolitan Region Town Planning Scheme Act there are situations in which compensation for injurious affection is payable or where the Western Australian Planning Commission can elect to acquire land reserved under the Metropolitan Region Scheme instead of paying compensation for injurious affection.

Land reserved under the Metropolitan Region Scheme that is required by the Commission for implementation of the Scheme the Commission can purchase the land for ‘fair market value’ unaffected by the Scheme i.e. the reservation is disregarded and the assumed alternative zoning substituted.



While some landowners have concerns about the level and process for compensation that is payable through town planning legislation, recently, additional concerns have arisen whereby areas of land have been 'sterilised' from particular uses or future development through the application of planning policies (such as Bush Forever). The use of policy to restrict land use, but not actually reserve it under the MRS means that no compensation is available to land owners and we believe that this acts as a clear disincentive for conservation.

ENVIRONMENTAL AND HERITAGE LEGISLATION

In addition to this, environment and heritage legislation also impacts on the use of private property and does not provide recourse for compensation. Key environmental legislation in Western Australia includes the Environmental Protection Act 1986, the Conservation and Land Management Act, Wildlife Conservation Act and the Contaminated Sites Act 2003. Heritage legislation includes the Heritage of Western Australia Act 1990, the Australian Heritage Commission Act 1975 (Cth) and the National Trust of Australia (WA) Act 1964.

All of these Acts and their associated regulatory requirements incorporate provisions enabling the government to restrict the use of private property to achieve conservation outcomes. In the eyes of many land owners these types of restrictions amount to defacto reservation of their land.

For example, environmental legislation enables the State Government to restrict the ability for property owners to clear private land and enables the government to require property owners to protect certain types of native vegetation; wetlands and habitats. Heritage legislation enables the government to restrict the use of property that is considered to be of heritage significance through mechanisms such as Heritage Agreements and Conservation Orders.

While UDIA appreciates the need for this type of legislation, we are concerned that environmental and heritage legislative, regulatory and policy restrictions and requirements are becoming excessive, and we believe that where property rights are removed or restricted, property owners should have access to fair compensation.

INADEQUATE RECOURSE FOR COMPENSATION

As such UDIA members are particularly concerned about situations where the use of land is severely restricted for conservation purposes however is not reserved in the Metropolitan Region Scheme and there is therefore no avenue for compensation for the affected property owner.

This includes situations where:

- Owners of land considered to have particular features of environmental significance and are required to conserve these features through both environmental and



planning legislation but are not compensated and do not have recourse to compensation;

- The inclusion as a condition of subdivision a requirement for a property owner to give up land for regional reservations even though this is contrary to a number of Supreme Court appeal cases. In particular, foreshore land has been required to be ceded;
- Town planning, heritage or environmental legislation and regulations which severely restrict the use of private property such as the ability to use land for a particular purpose;
- Policies which place restrictions over the use of part or all of a private property (such as Bush Forever, conservation policies or buffer policies) but for which there is no or minimal avenues for compensation because they are only policies, not legislation;
- Town planning legislation which restricts the use of private property by classifying or zoning it for conservation but not actually reserving the land for this purpose – removing the rights of the property owner but providing no avenue for compensation or for acquisition of the land by the government. This includes the zoning of private property as “conservation” or the imposition of “conservation covenants” which make the property owner responsible for managing the conservation and landscape values of the site and severely restrict any opportunities for future development; and
- Restricting access to resources, such as water, severely restricting the potential use and productivity of private property (such as farms) without providing any access to compensation.

These types of restrictions can have devastating impacts on private property owners. They can eliminate the ability of property owners to enjoy their property and importantly, to sell and profit from their property which for most West Australians is their only asset of significant value and is crucial to ensuring a secure retirement.

PENALISING LAND OWNERS FOR RESPONSIBLE MANAGEMENT

A key issue associated with the lack of compensation for land owners who are impacted by environmental legislation, regulation and policy requirements is that property owners who are impacted feel that they have been penalised for the responsible management of their land.

This has been raised by a number of individual land owner groups who have approached UDIA for support in relation to the issues faced by their members. They have expressed frustration that their responsible approach to conserving the environmental quality of their land had resulted in their property being reserved by environmental and planning



policies while land owners who have not been responsible and have cleared all of their land have been 'rewarded' by their land being 'upzoned' for development.

They expressed genuine concern that the restrictions placed on the future use of their land would mean substantially reduced values could be obtained through sale and that, in addition to this, their ability to use the land for other purposes such as agriculture were also reduced.

Anecdotally these groups suggested that some land owners have cleared bushland areas to avoid getting 'caught' by environmental and planning policy in the future. This is clearly a disincentive to conservation.

LACK OF INCENTIVES FOR PROPERTY OWNERS

A further disincentive to conservation is simply the lack of incentives available to property owners and industry for conservation activities.

UDIA members have expressed ongoing frustration in regards to the lack of flexibility within environmental departments in considering opportunities for dual conservation and recreation outcomes from some conservation and buffer areas, which they feel would assist in compensating them for the costs associated with conservation requirements. They have also advised that, in most cases processes such as the 'negotiated planning solutions' promoted through Bush Forever have not allowed for any incentives for developers and property owners.

We strongly believe that there is a need for the state government to develop innovative and flexible opportunities to compensate land owners and industry for conservation and that this would assist in achieving better development and conservation outcomes for the state as a whole. UDIA would be happy to assist government in identifying opportunities to achieve these objectives.

COMPLEXITY OF LEGISLATION, POLICY AND THE APPROVALS PROCESS

Over the last thirty years, the growth of legislation, regulation and policies relating to land development, agriculture and various other land use activities have been so great that today there is a broad set of poorly co-ordinated and overlapping legislation and regulations that few people are able to understand. As a result, land owners and developers are required to hire teams of town planning, engineering, environmental, architectural and social science professionals in order to obtain the various required town planning and environmental approvals associated with new development and to meet conditions of subdivision.

The complexity, costs and time requirements associated with this process act as a serious disincentive for individuals or industry to purchase or undertake any works on a site with environmental constraints.



Furthermore people with a site of environmental value are required to pay more for the long term management and development of their site than a person whose site has been previously cleared or has little environmental worth.

This means that a site with environmental values often has a substantially lower monetary value than a degraded land area, acting as a further disincentive to land owners to conserve the environmental features of their property.

We believe that if the government is serious about preserving land with conservation values the best way to achieve this would be to assign it a monetary value that is commensurate with the value that the wider community places on conserving these areas. This could be achieved through a broad scale environmental levy which could be used to compensate and assist property owners to manage land of conservation value.

Thank you for the opportunity to make comment on this matter, if you would like to discuss this submission further, please contact Gemma Davis on 9321 1101.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Marion Fulker', is positioned below the 'Yours sincerely' text.

MARION FULKER
Executive Director