

COUNCIL
Item No: 9.3.13
No. P: 8

Strata Titles, Issue Built Strata Certificate

Head of Power **Strata Titles Act 1985**

Power/Duty Delegated

Part	2
Division	3
Section	25
Sub section	Strata Titles General Regulations 1996 Prescribed Forms

Detail of delegation

The CEO is authorised to execute the form prescribed by the Strata Titles General regulations 1996 to endorse with or without conditions an application for a strata plan

Conditions Imposed

This delegation may only be exercised after the appropriate public authorities have been consulted and no objections to the proposal have been received.

Sub-delegation Permitted Yes

Sub-delegated to Director Development Services
Manager Planning Services

Record requirements Documentation to be placed on the property file and
in the Information Bulletin Report

Reporting requirements To be reported monthly in the Information Bulletin

DECISION

The Delegator	Date	Reference
Reviewed by	Date	Reference
Amended by	Date	Reference

Note details of the notice of any sub-delegation here. This will be the date of the Memo from the CEO to the designated employee (s)

NOTICE OF DELEGATION

Notice in writing	Date	FILE ARE 02
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Prohibition (s5.71) and Code of Conduct

If an employee has been delegated a power or duty relating to a matter in which the employee has an interest that employee must not exercise the power or duty and must refer the matter to the CEO, and if the CEO to the President.

The disclosure must be recorded in the Register of Disclosures.

Disclosure requirements (s5.75 and s5.76)

The delegation of a power or duty to an employee triggers the requirement to make disclosures in primary and annual returns. The LGA contains severe penalties for failure to comply. It is the responsibility of each individual employee to ensure compliance.



June 2009

Western
Australian
Planning
Commission

Planning Bulletin 52/2009

Process for Seeking Approval Under the Strata Titles Act 1985 (and Planning and Development Act 2005) for Strata Titles and Delegation to Local Government of Built Strata Applications

1 Purpose

This planning bulletin consolidates and updates previous bulletins relating to strata subdivision, outlining the Western Australian Planning Commission's (WAPC) policy, practice and procedures in relation to strata title subdivision.

The bulletin also outlines the new delegation arrangements adopted by the WAPC regarding applications for the issuing of a certificate of approval for subdivision of built strata. These new arrangements are part of a series of changes being implemented to improve and streamline the planning approvals process.

The WAPC has previously released:

- Development Control Policy 1.3 Strata Titles;
- Planning Bulletin 14 Amendments to Strata Titles Act (1996);
- Planning Bulletin 19 Strata Titles Amendment Act 1996 – Update on Policy and Practice (1997);
- Planning Bulletin 52 Process for Seeking Approval Under the Strata Titles Act 1985 (and Town Planning and Development Act 1928) for Strata Titles and
- Planning Bulletin 58 Subdivision Applications: Information Checklist and Minor Variations to Strata Plans After Subdivision Approval.

This bulletin supersedes planning bulletins 14, 19, 52 and 58.

2 Delegation to local governments of built strata applications

2.1 Current legislative framework for built strata applications

Strata subdivision can take place where buildings are fully constructed, where buildings are

proposed to be constructed or where vacant strata lots are to be created. The term 'built strata' refers to a strata plan for existing dwellings or buildings (or a building which is proposed to be constructed) and where there are no vacant lots.

Section 25 of the *Strata Titles Act 1985* states that every strata plan and every plan of re-subdivision or consolidation for a strata scheme lodged for registration is required to be accompanied by a certificate of approval from the WAPC. Built stratas also require the approval of the local government.

However, if the application falls within an exemption set out in regulation 15 of the Strata Title General Regulations 1996, then WAPC approval is not required. Regulation 15 states that approval is not required for an application where:

- it relates to residential development;
- it relates to a development containing no more than five dwelling units;
- each strata lot contains one existing dwelling unit;
- it relates to a land parcel which does not exceed 2,500 square metres in area; and
- it relates to land within an urban zone and to development which conforms with an approved local planning scheme, or where no scheme exists, it relates to land in a gazetted townsite.

The relevant local government is required by the Strata Titles Act to certify that a given strata plan is exempt from the need to obtain WAPC approval.

Under the existing legislative and policy framework, the WAPC is able to impose a variety of conditions on built strata applications. However, as a matter of practice, the only condition that the WAPC generally imposes is that the application

must comply with the development approval and conditions imposed by the local government. This is because the WAPC usually receives a built strata application some time after the relevant local government has already determined the applications for development approval and granting of a building licence. In many circumstances, construction of the building has been completed before an application is received by WAPC.

The policy requirements regarding public open space for grouped/multiple dwelling development are usually considered at the structure planning or subdivision stage prior to a proposed development being built. In addition the local government at the time of considering the development application also takes the policy requirements into account.

Therefore, it is considered that for the majority of built strata applications, the requirement for WAPC consideration adds another layer of regulatory 'red tape' which adds little value to the approval process.

2.2 New delegation arrangements

On 26 May 2009, the WAPC resolved to delegate its power to issue a certificate of approval under s25 of the Strata Titles Act to all local governments, except for those applications that:

- propose the creation of a vacant lot;
- propose vacant air stratas in multi-tiered strata scheme developments;
- where, in the opinion of the WAPC as notified to the relevant local government in writing, or in the opinion of the relevant local government as notified to the WAPC in writing, relate to
 - (a) a type of development and/or

- (b) land within an area, which is of state or regional significance, or in respect of which the WAPC has determined is otherwise in the public interest for the WAPC to determine the application.

An instrument of delegation regarding these arrangements was made under s16(3)(e) of the *Planning and Development Act 2005* and gazetted on 9 June 2009.

As part of the delegation arrangements, local governments will be required to provide the WAPC with data regarding the exercise of this power.

The Department for Planning and Infrastructure has consulted with local governments, the Western Australian Local Government Association and Landgate regarding this proposal and obtained their approval to these new arrangements.

3 Standard strata application

The original system of strata titles in Western Australia was introduced by the *Strata Titles Act 1966* to create separate titles solely for parts of buildings. The *Strata Titles Act 1985* allowed, inter alia, the inclusion of land and vacant lots within the strata system. The Act was substantially modified by the *Strata Titles Amendment Act 1995* and the *Strata Titles Amendment Act 1996* which came into operation on 14 April 1996 and 20 January 1997 respectively.

Strata plans of subdivision and survey-strata plans of subdivision are two types of strata scheme defined under the Strata Titles Act. A strata scheme is the division of a parcel of land or buildings into lots and common property, the allocation of unit entitlement, and the rights and obligations of proprietors to use and maintain the lots and common property.

Strata subdivision can take place where buildings are fully constructed, where buildings are proposed to be constructed or where vacant lots are to be created.

Under the Strata Titles Act, when a plan is registered, separate titles are created for each lot. Common property is held in shared ownership.

The WAPC's certification (approval) to strata subdivision is required under s25 of the Strata Titles Act. The WAPC may impose conditions on its approval. As outlined in section 2, the WAPC has delegated its powers to approve built strata applications under s25 to all local governments.

Application guides and forms for strata applications are available from the WAPC's website (www.planning.wa.gov.au).

3.1 Built strata

The term 'built strata' refers to a strata plan for existing dwellings or buildings (or a building which is proposed to be constructed) and where there are no vacant lots.

The WAPC has delegated its power to determine built strata applications to all local governments, although it retains call in powers where the WAPC determines the type of development or land is within an area of state or regional significance.

The process to be followed to obtain WAPC approval in accordance with s25 of the Strata Titles Act is:

- The application, including the form 24, two copies of the plan showing full particulars of the division of the property into lots or proposed lots, and the correct application fee as prescribed in schedule 1 of the regulations, is lodged with the relevant local government.
- Where, in accordance with the notice of delegation, the WAPC has notified the local government in writing, or the local government has notified the WAPC in writing that the type of development and/or land is within an area which is of state or regional significance, the local government will forward the form 24 application to the WAPC for determination.
- The determining authority refers the proposal to consulting authorities, where appropriate, for comments. The nature of individual proposals and/or factor/s affecting the subject land will determine which public bodies the application will be referred to.
- The determining authority has 40 days to determine the application.

- The determining authority may agree to endorse an appropriate form prescribed under the regulations (form 26 prescribed in schedule 2 of the Strata Titles General Regulations 1996) with or without conditions, or refuse the application.
- The determining authority issues a decision letter.
- Section 27 of the Strata Titles Act provides a right to apply to the State Administrative Tribunal (SAT) for a review of a decision of the WAPC to refuse an application or impose conditions of approval. An application to SAT for a review is to be submitted in accordance with part 14 of the *Planning and Development Act 2005* and part 2 of the State Administrative Tribunal Rules 2004 within 30 days of the date of the decision.
- An approval is valid for two years from the date of the decision.
- Following compliance with any conditions and clearance by relevant agencies, the determining authority endorses a form 26, submitted by the applicant.
- Where the determining authority is the WAPC, the WAPC will refer a copy of the approved plan to the local government to ensure consistency of approved plans.

3.2 Vacant strata

Strata schemes may show the creation of vacant strata title lots, provided that there is at least one building on any land parcel in the scheme. These strata schemes are referred to as 'vacant' stratas. All proposals for strata subdivision which propose the creation of a vacant lot must be approved by the WAPC.

The WAPC refers vacant stratas to the local government and service providers (such as Water Corporation and Western Power) for comments. Applications may be referred to any public body for comment. The nature of individual proposals and/or factor/s affecting the subject land will determine which public bodies the application will be referred to.

Where the local government local planning scheme requires development approval for grouped dwelling, the WAPC may impose a condition requiring compliance with an approval or may impose a condition requiring development approval be sought. Where the local government does not require development approval for grouped dwellings, the WAPC may impose a condition requiring compliance with the grouped dwelling requirements of the *State Planning Policy 3.1 Residential Design Codes (Variation 1)* (R-Codes).

The process to be followed to obtain WAPC approval in accordance with s25 of the Strata Titles Act is:

- The application, including the form 24, six copies of the plan showing full particulars of the division of the property into lots or proposed lots, and the correct application fee as prescribed in schedule 1 of the regulations, is lodged with the WAPC.
- The WAPC refers the proposal to consulting authorities for comment. The nature of individual proposals and/or factor/s affecting the subject land will determine which public bodies the application will be referred to.
- The WAPC has 90 days to determine the application.
- The WAPC may agree to endorse an appropriate form prescribed under the regulations (form 26 prescribed in schedule 2 of the Strata Titles General Regulations 1996) with or without conditions, or refuse the application.
- The WAPC issues a decision letter.
- Section 27 of the Strata Titles Act provides a right to apply to the SAT for a review of a decision of the WAPC to refuse an application or impose conditions of approval. An application to SAT for a review is to be submitted in accordance with part 14 of the *Planning and Development Act 2005* and part 2 of the State Administrative Tribunal Rules 2004 within 30 days of the date of the decision.
- An approval is valid for two years from the date of the decision.

- Following compliance with any conditions and clearance by relevant agencies, the WAPC endorses a form 26, submitted by the applicant.

3.3 Survey strata

Survey stratas were introduced by the *Strata Titles Amendment Act 1995*. The lots are defined by surveyed land boundaries. No buildings need to be shown on the plan, although this type of strata can be used where there are existing buildings. Common property lots are shown as separate lots and identified as 'CP' on the plan.

Survey strata lots can provide greater independence than other strata lots, in that the owners of a survey strata lot do not require the agreement of other owners to construct, alter or add to a building on their own survey strata lot, unless a by-law states otherwise or the building will affect open space requirements.

While survey strata lots are determined pursuant to the procedures of the *Planning and Development Act 2005*, once created, they are subject to the provisions of the Strata Titles Act.

The WAPC will have regard to normal policy provisions for subdivision, including lot size and access, when considering proposals for survey strata lots.

Development on survey strata lots must comply with the provisions of the local government local planning scheme and a condition requiring development approval prior to final endorsement may be imposed. Where no development approval is required, the WAPC may impose a condition requiring compliance with the grouped dwelling requirements of the R-Codes.

The process to be followed to obtain WAPC approval is:

- The application is lodged with the WAPC on a form 1A.
- The WAPC refers the proposal to the local government and other consulting authorities for comment.
- The WAPC has 90 days to determine the application.
- The WAPC approval may be with or without conditions, and is valid for three years for subdivisions of five lots or less,

and four years for subdivisions of six lots or more.

- The WAPC issues a decision letter.
- If the WAPC decides to refuse an application or to approve an application subject to conditions, under the *Planning and Development Act 2005* the applicant may lodge a request with the WAPC to reconsider the refusal or conditions. The request must be lodged in writing on a form 3A within 28 days of the decision. The request must include information to explain why the WAPC should reconsider its decision and must be accompanied by the correct application fee.
- Section 251 of the *Planning and Development Act 2005* provides the right to apply to SAT for a review of a decision of the WAPC to refuse an application or to impose conditions or approval. An application for a review to the tribunal is to be submitted in accordance with part 14 of the *Planning and Development Act 2005* and part 2 of the State Administrative Tribunal Rules 2004, within 28 days of the date of the decision.
- Following a decision to approve an application subject to conditions, the applicant is responsible for fulfilling the conditions in consultation with the relevant authority and obtaining clearances.
- The WAPC will endorse the strata plan that has been certified correct by Landgate. In addition, the applicant/owner is responsible for submission of a form 1C with appropriate fees to the WAPC requesting endorsement of the survey strata plan. The WAPC must be satisfied that the plan is in accordance with the approval and that all conditions have been complied with.

4 Minor variations to strata plans after subdivision approval

The WAPC's role is completed when it has given its approval under s25 Strata Titles Act whether with or without conditions and so certified. It is then for the local government to certify compliance with any conditions set by the WAPC under

s23(1) Strata Titles Act by issuing a form 7. While there is no express power to enable the WAPC to allow variations, there is an implied power for the WAPC and local government to allow or approve non-substantial or minor variations. In other cases the proponent may either make a fresh application or proceed with the original proposal but seek re-subdivision pursuant to s8A of the Strata Titles Act.

Where a form 26 certificate is provided conditionally, it may include the following condition to clarify the extent of the pertinent variation:

'The floor plan and the location plan of the strata plan shall either be: the same as those set out in the sketch; or contain only such variations from the sketch as are considered by the local government to be minor variations.'

The following are examples of variations that would not be acceptable as minor variations:

- variation in the number of lots;
- variation in the area of any one lot or part lot, and the area of the common property, in excess of 10%;
- variation to an easement or other encumbrance registered or area shown as vested or dedicated on the sketch, which would adversely affect any lot or common property shown on the plan; or
- amendment to the location of any building or other improvement shown on the sketch, in relation to the boundary of the parcel. In situations where the local government is not prepared to issue a form 7 due to non-compliance of a condition and variation is required, the proponent should be required to submit a fresh application to lodge a strata plan or where there is an existing strata plan, to apply for re-subdivision.

To enable the determining authority to readily determine the variations, all forms 26 lodged for signing are required to be accompanied with the original transparencies for the strata plan. When the final strata plan is lodged with the application, the applicant must also provide a summary report which lists the variations made to the original strata plan and the reasons for the variations. An example is as follows:

Sheet no	Variation	Reason for variation
Sheet 1 of 9	Lot 2 shows variation to lot size	Reason
Sheet 2 of 9	Car bay 2 removed	Reason

5 Vacant air stratas in multi-tiered developments

5.1 Vacant air stratas

The WAPC has in the past granted approvals for development of multi-tiered or vertical staged developments based on an understanding that the building would be totally completed before the issue of certificates of title. The WAPC has since noted that in some cases certificates of title have been issued prior to the building being completed. In those cases proponents prepared plans with reference to an existing structure on the ground, such as a concrete slab, building, shed or storeroom, referred to as a 'monument'. This instrument formed the basis for approval of vacant air stratas so as to show a connection to the existing structure or the ground.

Staged development and the issue of certificates of title for yet to be completed buildings raises two issues:

- There may be risk of a financial failure of insurances written into the sales contract between developer and purchaser.
- There is a possibility where measurements are shown on the strata plan, that the walls, floors and ceilings (as constructed) may not be in exactly the same location as indicated in the strata plan (and therefore the certificates of title) and each unitholder's title would be affected.

In these cases the development of vacant air stratas have followed a process that involves:

- issuing a certificate of title for each unitholder with respect to the vacant air strata lot;
- the unitholder securing his/her own independent finance;
- the developer constructing the building;
- the unitholder depositing monies into a trust account set up by the developer and the developer being paid from the trust account on completion of the building and the unit;

- the unitholder is provided with a management statement and sales contract;
- the unitholder is provided with complete disclosures that they are purchasing unit entitlements where construction of the entire building will not commence until all the units are sold off first; and
- the developer assuring that insurances are secured for the unitholder in the event of the project not being completed for unforeseen reasons by providing a construction guarantee.

5.2 Legislative interpretation

Legal advice has been received which has highlighted the following:

- vacant air strata lots, based on space above a building within the strata plan, appear to be inconsistent with the provisions of the Strata Titles Act;
- accordingly such lots should not be registered and created as a basis for staging development within an uncompleted building; and
- the WAPC may not be empowered to approve a strata title for only part of a building where vacant air stratas are yet to be completed.

In terms of the existing legislation:

- the WAPC can approve a future building in a strata scheme pursuant to s25(3) Strata Titles Act;
- a vacant lot is defined as an unimproved lot pursuant to s25(A)(2) Strata Titles Act and therefore cannot be contained within or above buildings;
- a strata lot cannot be sold until the strata plan has been registered, unless under the contract of sale, the deposit or other monies are paid into a trust account on trust for the purchaser as referred to in s70(1) Strata Titles Act; and
- the local government is required to certify that the

parcel and the buildings as shown on the plan pursuant to s23(1)(e) Strata Titles Act comply with the WAPC's certificate of approval under s25(4) Strata Titles Act including conditions of that approval; and this is difficult where the building is not complete.

While the WAPC or local government, where delegated, is able to approve multiple level developments as built strata prior to construction, this should be distinguished from vacant air strata in that the approval by the determining authority is for a fully constructed building and certificates of title would not be issued until the building is certified by the local government in accordance with regulation 20 of the Building Regulations 1989. The legal advice is that the Registrar of Titles can only register and deal with a strata plan to issue titles for lots within the strata plan where the approvals required have been given and the building, the subject of the strata plan, has been built in accordance with the plan and inspected and certified for by the local government. The floor-by-floor approval with certificates of title issued on completion of each floor does not appear to accord with the intent of the Strata Titles Act.

5.3 WAPC's position on vacant air strata

The WAPC has resolved that it will determine future applications for built stratas subject to a condition requiring the building to be completed prior to the issue of certificates of titles and accordingly the WAPC will now generally impose the following condition as considered necessary on built strata applications lodged prior to completion:

"The buildings have been completed in accordance with the development plans and building licence approved by the local government prior to the issue of strata titles"

The clearance of the condition will require specific advice from the local government as to whether the building has been completed in accordance with the appropriate plans and building licence. In these cases the WAPC will advise applicants that no certificates of title should be issued prior to the completion of the building and that

the building should be completed in accordance with the planning approval and building licence issued by the local government.

Where current applications for vacant air stratas have progressed or financial arrangements entered into prior to 28 August 2001, the WAPC is prepared to consider applications on their merits. In these cases the WAPC will impose a condition to advise future purchasers of requirements.

Proposals for vacant air stratas will be subject to a condition that:

- the developer and registered landowner/s enter into a deed of covenant with the WAPC that the building in question would be completed in its entirety and re-subdivided to address the entire building; and
- memorials be lodged on each certificate of title issued pursuant to s165 of the *Planning and Development Act 2005* so as to advise prospective purchasers of the strata title units that occupancy of the lot is subject to the local government issuing a certificate of classification of the entire building to be constructed on the land pursuant to regulation 20 of the Building Regulations 1989 and a re-subdivision of the strata scheme to address the entire building.

The developer and registered landowner/s will need to provide the following documents, which are to be appended to the deed of covenant:

- copies of the plans approved by local government;
- the WAPC's letter of approval to the proponent;
- schedule of works specifying detailed works and dates for completion including final completion date for project;
- construction guarantee by the developer and landowner/s that if the building is not completed by the scheduled completion date for some unforeseen reason, such as the builder going bankrupt, then the developer and landowner can replace the builder and bear any increase in construction costs without

this affecting the purchasers of the units;

- management statement; and
- standard sales contract for purchasers and complete disclosures to purchasers that building to commence only when a specified proportion of the units on plan for project sold.

Amendments to the legislation may be initiated by the government to address the creation of vacant air strata.

6 Management statements

The determining authority will take into account *Development Control Policy 1.3 Strata Titles* when it considers applications for strata subdivision and may require that a management statement to address particular issues be lodged as a condition of approval. Form 25, schedule 3 of the regulations provides the prescribed format for this statement. Section 5C of the Strata Titles Act states that when a strata or survey strata plan is lodged for registration a management statement may be lodged with it. The management statement sets out by-laws of the strata company that have effect under s42, s42A and s42B of the Strata Titles Act as well as any amendments and repeals referred to in s42(2) and may include by-laws in relation to any matter specified in schedule 2A. Requirements for management statements to address particular matters are sometimes imposed, as a condition of approval, by the determining authority, when it is viewed that in order to give effect to some planning objective, an appropriate requirement or restriction may be placed on the land by means of by-laws contained in the management statement.

Alternatively, restrictions on use may be required by the determining authority to be endorsed on the strata plan pursuant to s6 of the Strata Titles Act. Where repeal or variation of such a restriction is proposed, the WAPC's approval under s6(3a) of the Strata Titles Act is required, where the original plan had required the approval of the WAPC under s25. Section 42(2d) of the Strata Titles Act states that where by-laws are included due to the management statement requiring these, then the consent of the WAPC is required if these

by-laws are to be varied or repealed. This process can take up a great deal of the WAPC's time as the WAPC's approval is required for each and every variance or repeal of a by-law. In future, management statements should only be used when the planning objective concerned cannot be effected in any other way.

7 Conversion of strata title lots to conventional freehold lots

Some owners of strata title lots may wish to convert to freehold lots to avoid joint responsibility for insurance or maintenance of common property. Such applications may be approved provided the proposal complies with the R-Code requirements, boundary clearances, minimum and average lot sizes and other WAPC policy requirements including the provision of street frontage for vehicular access.

Where a party wall forms part of the boundary between the two new lots, a condition requiring the creation of party wall lots may be imposed.

Applications for conversion to freehold lots are to be submitted on the standard form 1A and will be processed and determined under the normal provisions of the *Planning and Development Act 2005*.

Survey strata lots may also be converted to freehold lots by termination; however, WAPC consent is required in relation to this. For further information, refer to the Strata Titles Practice Manual for Western Australia available at www.landgate.wa.gov.au.

8. Caravan parks

The strata titling of caravan parks is precluded by the *Caravan Parks and Camping Grounds Act 1995* and the Strata Titles Act. The WAPC will not grant approvals for strata titling of caravan parks.

Proposals for short-stay residential accommodation which do not fall within the definition of a caravan park may be approved for strata title. Such applications and developments will be assessed on their merits having regard to the local government local planning scheme and *Planning Bulletin 83/2009 Planning for Tourism*.

9 Rural strata applications

The WAPC's *Development Control Policy 3.4 Subdivision of Rural Land* (DC 3.4) provides a framework for planning in rural areas. Emphasis is placed on rural strategies as a mechanism for rational decision-making for the future zoning, subdivision, strata titling and development of rural land.

DC 3.4 recognises that strata subdivision is particularly useful when it is proposed to cluster dwellings to achieve farm management or environmental protection objectives. The policy identifies that development proposed to be strata subdivided including rural-residential, rural-smallholdings, rural multiple occupancy and intensive agriculture should be on land identified for these purposes in local planning strategies and zoned appropriately in the local planning scheme.

10 Further information

Further information, any enquiries or correspondence on this planning bulletin should be directed to:

Director
Policy Development and
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469 Wellington Street
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