

Planning Law Update

A review of Planning and Environmental Law in Western Australia

Do minor structures require planning approval?

The question whether minor structures (eg cubby houses, flagpoles, satellite dishes etc) constitute development requiring planning approval arises regularly. A recent decision of the State Administrative Tribunal illustrates the proper approach to determining this question. In *Smith v City of Fremantle* [2007] WASAT 153, the Tribunal considered whether a standard sized air conditioning unit, installed on the exterior of a house, was development requiring approval.

The Facts

The air conditioning unit was fixed to a side wall of a house. It was located approximately 2.8 m from the ground, 9 m from the front boundary of the site and 2.5 m from the closest side boundary. The unit was visible from the street.

The air conditioning unit was installed without planning approval being obtained. The City gave the Smiths a notice under section 214(3) of the Planning and Development Act requiring its removal. The Smiths challenged the notice in proceedings before the Tribunal and argued that the air conditioning unit did not constitute development and therefore its installation without approval did not contravene the City's scheme.

The City's scheme incorporated the definition of development in the Planning and Development Act. Relevantly, this definition provides that 'development' means:

"the development or use of any land including –
(a) any... erection ... of ... any ... structure on the land"

“The Tribunal’s decision indicates that the issue cannot be approached on the basis that all minor structures of a particular type should be treated the same.”



Consideration by the Tribunal

The Tribunal regarded the air conditioning unit as falling within the above definition on 2 grounds. First, it involved the development of land, in the sense that it resulted in some physical alteration to the land which had some degree of permanence. Secondly, the installation involved the erection of a structure on the land.

However, the Tribunal did not adopt the position that any kind of structure erected on land will constitute development in all the circumstances. The Tribunal adopted a 'purposive' approach to the question of whether planning approval was required. That approach involved an examination of the City's scheme to determine the purposes which its provisions sought to achieve and whether the requirement for a particular structure to be approved in the circumstances fulfilled that purpose.

In examining the City's scheme, the Tribunal noted that its stated purposes included promoting and safeguarding the convenience and general welfare of the inhabitants and the amenities of the City's district. The Tribunal formed the view that the air conditioning unit could affect the convenience and general welfare of the occupants of the adjoining property and their residential amenity as it could transmit noise across the common boundary. Further, the Tribunal found that the air conditioning unit could affect the visual amenity of the locality.

In view of these factors, the Tribunal concluded that it was within the scope and purpose of the scheme to regulate, by requiring planning approval, the installation of the air conditioning unit in the circumstances.

Conclusions

Some local governments have sought to address the issue of minor structures by scheme provisions exempting such structures from the need for approval. However, where it is necessary to determine whether a particular structure is development requiring approval, the Tribunal's decision indicates that the issue cannot be approached on the basis that all minor structures of a particular type (eg air conditioners) should be treated the same. For each structure, it will be necessary to look at the particular circumstances of the structure and its proposed location and determine whether it would have planning impacts which are within the purpose of the scheme to regulate by requiring a planning approval.

Please contact Andrew Roberts on 9383 3133 or andrew.roberts@mcleods.com.au if you have any queries regarding the issued raised in this article.

The information contained in this update should not be relied upon without obtaining further detailed legal advice in the circumstance of each case.

McLeods BARRISTERS & SOLICITORS

Stirling Law Chambers 220 - 222 Stirling Highway Claremont WA 6010
Telephone (08) 9383 3133 Facsimile (08) 9383 4935 Email mcleods@mcleods.com.au