

Planning Law Update

A review of Planning and Environmental Law in Western Australia

Incidental use decision may not be open to review

For many years in appeals before the Town Planning Appeal Tribunal (“TPAT”) and subsequently the State Administrative Tribunal (“SAT”), a common preliminary issue involved whether the use proposed in an application for development approval involved one use class or another. The issue generally arose where a planning authority had refused an application for development approval based on a determination that the development proposal involved a use which properly fell within a use class which was designated as “not permitted” in the relevant local planning scheme.

Jurisdictional issue

Where that occurred, a jurisdictional issue arose because the classification of a use was recognized as a mixed question of fact and law which did not involve a decision in the exercise of a discretionary power and, therefore, was not subject to appeal in the TPAT or review in the SAT. That issue was subsequently defused, however, by s 252(2) of the *Planning and Development Act 2005*, which specifically provided that an applicant may apply to the SAT for a review of a responsible authority’s decision under a local planning scheme as to the classification of a use under a local planning scheme or the permissibility of a use that is not listed under a local planning scheme.

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Incidental uses

The determinations of a planning authority associated with incidental uses is another significant area involving an issue of fact and degree and which has been recognized as not involving a decision in the exercise of a discretionary power so as to give rise to a right of appeal or review.

In *Re Minister for Planning; Ex Parte City of Canning* (1998) 101 LGERA 284, the Full Court of the Supreme Court of Western Australia held that the question whether one use was incidental to another use involved a question of fact

and degree and did not involve the exercise of a discretion and, therefore, was not subject to appeal to the Minister (or necessarily appeal to the TPAT, or review to the SAT). In the later Supreme Court decision in *City of Swan v Taylor* [2005] WASCA 88, Johnson J provided a thorough analysis of the issues involved in determining whether one use is incidental to a predominant other use. In that decision, the Court confirmed that the process of identifying the predominant use and deciding whether the subject use is incidental to that predominant use involves the questions of fact and degree identified by the Full Court in *Ex Parte City of Canning*.

Conclusion

No attempt was made in s 252, or elsewhere in the *Planning and Development Act 2005 (WA)*, to specifically render the decision-making on incidental uses subject to review to the SAT. It is likely therefore that the question whether a proposed use is incidental to another predominant use will be recognized as involving an issue of fact and degree and not involving the exercise of a discretion, and therefore not subject to review by the SAT. Accordingly, the issue as to whether a proposed use is incidental to another predominant use will remain as a potential preliminary issue in applications for review in the SAT.

Please contact Denis McLeod if you have any queries regarding the issues 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

