



McLEODS  
BARRISTERS & SOLICITORS

# Planning Law Update

A review of Planning and Environmental Law in Western Australia

## BUILDING LICENCE CONDITIONS DEALING WITH PLANNING MATTERS

Although there is a practical overlap and interrelationship between planning and building matters, the regulatory regime governing each serves a different purpose. Consequently, caution must be exercised to ensure that building licence powers are not used in an attempt to control planning matters and vice versa. The difficulties that can arise when this occurs were highlighted in the decision of the State Administrative Tribunal (“the Tribunal”) in *Maraldi v City of Rockingham* [2007] WASAT 225.

### The facts

Mr Maraldi applied for a building licence to erect a single house on a lot. The lot was located in close proximity to a livestock holding yard which gave rise to potential adverse impacts in the form of noise, odour, dust and light emissions.

Single houses were exempt from the requirement for planning approval under the City’s town planning scheme. In granting a building licence, the City imposed a condition requiring a notification to be placed on the certificate of title for Mr Maraldi’s lot, under section 70A of the *Transfer of Land Act*. Section 70A provides a consensual method for notifying the public (including potential future purchasers) of any factor affecting the use or enjoyment of land. The notification required by the building licence issued by the City was in the following terms:

*‘This lot is in close proximity to a livestock holding yard and may be adversely affected by virtue of the noise, odour, dust and/or light emissions from that land use and future similar land uses.’*

The condition requiring the notification (among others) was challenged in review proceedings in the Tribunal.

*“...caution must be exercised to ensure that building licence powers are not used in an attempt to control planning matters and vice versa.”*

## Consideration by the Tribunal

The Tribunal acknowledged that the City's motivation in imposing the condition was well intentioned. However, after examining the regulatory regime controlling building, constituted by the *Local Government (Miscellaneous Provisions) Act 1960 (WA)* and the *Building Regulations 1989 (WA)*, the Tribunal concluded that the scope and purpose of that regime was principally concerned with matters of design form, blueprints, specifications, construction, engineering, safety and the like in relation to a specified construction project.

The Tribunal did not regard the condition requiring the notification as having any connection to such matters. Rather, it regarded the condition as dealing with a planning issue. Consequently, the Tribunal held there was no power to require the notification as a condition of the building licence.

## Conclusion

The Tribunal's decision reflects the dichotomy between the planning and building approval regimes. The scope and purpose of each regime is different, although there is some overlap and interrelationship between them. However, care must be taken to ensure that the power to impose conditions under one regime is not used to address issues within the scope and purpose of the other.

Please contact Andrew Roberts on 9383 3133 or [andrew.roberts@mcleods.com.au](mailto:andrew.roberts@mcleods.com.au) if you have any queries regarding the issues raised in this Update.

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

