

Local Government Update

A review of Local Government Law in Western Australia

CHANGING PLANNING DECISIONS AT SAT'S INVITATION

If the State Administrative Tribunal (**SAT**) invites a council to reconsider a decision to refuse approval for a development, does a council decision to grant approval need to be made by an absolute majority?

SAT Act

An applicant for planning approval who has been refused approval by a local government can seek review by SAT. One of the powers available to SAT, often exercised after mediation, is to invite the relevant council to reconsider its decision to refuse approval. Section 31 of the *State Administrative Tribunal Act 2004* (**SAT Act**) gives a council the power to reconsider (which it would not otherwise have). However, section 31 says nothing about the procedures that apply to that reconsideration. In particular, it says nothing about whether the decision can be made by a simple majority, or whether another kind of majority is required.

Administration Regulations

Regulation 10 of the *Local Government (Administration) Regulations 1996* (**Administration Regulations**) sets out the procedures that must be followed if a council wishes to revoke or change an earlier decision. Under these procedures, in a typical case –

- (a) a motion to revoke or change the original decision cannot be debated unless it is supported by at least $\frac{1}{3}$ of the members; and
- (b) the motion cannot succeed unless an absolute majority of members votes in favour.

These provisions are expressed in unqualified terms to apply to any attempt to revoke or change a decision of a council or committee where the effect of the new decision would be that the original decision was revoked or became 'substantially different'.

Analysis

Do the procedural and voting requirements in the Administration Regulations apply to a decision of a council made in response to the invitation from SAT?

As a general principle, if a regulation is inconsistent or conflicts (directly or indirectly) with the section of an Act, the section of the Act will prevail (and the regulation would be invalid to the extent of the inconsistency or conflict). In this case, there is no direct conflict (because it is possible for both to apply). Whether there is an indirect conflict depends largely on the purpose or object of the SAT Act provisions.

It is arguable that Parliament would not have intended that regulation 10 should apply in the circumstances. The SAT Act provisions appear to be intended to facilitate and encourage a council to reconsider a matter, perhaps on the basis of fresh information resulting from the mediation. Imposing more onerous procedural and voting requirements (than those which applied in respect of the original decision) would be inconsistent with this objective.

Another factor to support this conclusion is that it seems anomalous that if after reconsidering its decision to refuse approval, the Council decided to affirm its original decision, it could do so by a simple majority. However, if it decided to grant approval, it would require an absolute majority. Similar reasoning applies where the review to SAT was based on a deemed refusal (ie no decision was made by the Council).

An alternative argument is that, at the time that the SAT Act was passed, Parliament was aware (or must be taken to have been aware) of the requirements of regulation 10 and did not attempt to exclude or limit its operation. Of course, it may simply have been overlooked.

Conclusions

Because the legislation does not address this issue, and it has yet to be considered by a Court, the legal position is in some doubt. The preferable solution would be for an appropriate amendment to be made to the SAT Act or the Administration Regulations.

In the meantime, the safer option for local governments would be to act on the basis that regulation 10 applies to planning decisions of this type – so that, if invited by SAT to reconsider a decision to refuse approval for a development, a council's decision to grant approval must be made by an absolute majority.

Please contact Neil Douglas on 9383 3133 or neil.douglas@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

