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Planning Law Update

A review of Planning and Environmental Law in Western Australia

CLIMATE CHANGE AS A PLANNING CONSIDERATION

There have been a number of recent Tribunal or Court determinations in Australia which have confirmed the willingness of decision making authorities to accept climate change as a relevant planning consideration.

Those decisions suggest that issues associated with climate change have the potential to be not only a relevant consideration in the assessment of coastal development proposals but, potentially, the determining factor.

Recent decisions

In *Northcape Properties Pty Ltd v. District Council of Yorke Peninsula* [2008] SASC 57, the Supreme Court of South Australia upheld a decision of the South Australian Environment, Resources and Development Court to refuse consent to subdivide a large coastal area of land. The land the subject of the proposed subdivision was subject to a planning instrument which contained objectives that took into account predicted changes in sea level due to natural subsidence and climate change for the first 100 years of the development. The Court appeared to have no difficulty accepting the evidence given in connection with the likely effect of climate change on coastal erosion, and refused the proposal for reasons associated with non-compliance with the objectives of the planning framework.

In *Walker v. Minister for Planning* [2007] NSWLEC 741, a challenge to the validity to a concept plan approved by the Minister for a residential subdivision and retirement development on coastal land was upheld by the New South Wales Environment Court on the basis that the Minister failed to take into account implied mandatory considerations, including the principles of ecologically sustainable development, and whether the flooding impacts of the project would be compounded by climate change.

The most significant planning decision relating to climate change is probably that of the Victorian Civil and

“Given the recent decisions in other jurisdictions ... the possibility of sea level rises and coastal inundation due to climate change are relevant planning considerations.”

Administrative Tribunal in **Gippsland Coastal Board v. South Gippsland Shire Council & Ors** [2008] VCAT 1545, as it is the first “merits review” decision in Australia that used climate change as a ground for refusing a coastal development.

In the **Gippsland** case there were no specific planning provisions or policies relating to coastal recession or sea level rise similar to those which applied in **Northcape**. The VCAT nevertheless determined it is legitimate to consider the question of climate change and sea level rise and went on to consider CSIRO reports submitted in evidence relating to those issues.

Based on the evidence provided, the VCAT decided it was appropriate to adopt the “precautionary principle” and, given there was a reasonably foreseeable risk of inundation of the subject land and the proposed dwellings and as there was no urgent or overriding need for the dwellings to be located on that land, the VCAT found the longer term reasonably foreseeable risk was not acceptable. In doing so, the VCAT concluded “... *there is a general consensus that some level of climate change will result in extreme weather conditions beyond the historical record that planners and others rely on in assessing future potential impacts*”.

Impacts for local government in WA

Few, if any, Western Australian local governments have policies or planning scheme provisions which deal expressly with the possible impact of climate change. Other than the WAPC Statement of Planning Policy No. 2.6 – State Coastal Planning Policy, Western Australian planning legislation does not deal specifically with the issue.

Given the recent decisions in other jurisdictions, it seems appropriate to accept that the possibility of sea level rises and coastal inundation due to climate change are relevant planning considerations. Accordingly, local governments should probably adopt the “precautionary principle” when considering development proposals where the impact of climate change on coastal development may be relevant. In those circumstances, it may be reasonable to insist upon the applicant providing an assessment of the possible implications of climate change for the long term sustainability of the development.

Please contact Craig Slarke on 9383 3133 or cslarke@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

