Abuse of process: Re-litigation of previously determined matters

By Alicia Nguyen

Development applications previously refused by local governments may be re-submitted in the form of a new and amended development application. Whilst some re-submitted development applications have indeed undergone significant amendments or have been re-submitted due to changes in the relevant planning framework, some re-submitted applications are not noticeably different to the original refused application.

The State Administrative Tribunal (**SAT**) in *Cloghan and Shire of Harvey* [2019] WASAT 111 (***Cloghan***) has, once again, held that development applications that have previously been determined by the SAT will not be entertained in the SAT again where no significant change of circumstances has occurred.

Background

In 2015, the applicant sought review in the SAT of the Shire's refusal of his application to relocate a building envelope for a house. The building envelope was located on Lot 1 Lofthouse Drive, Leschenault (**Site**). The western side of the Site was located within the odour buffer of a nearby abattoir. A consequence of the proposed development would have been to place the building envelope within the odour buffer. The SAT subsequently dismissed the 2015 review application for reasons connected to the buffer.

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In 2019, the applicant applied to the Shire, again, to relocate the building envelope within the odour buffer. The Shire refused the development application and the applicant, again, applied to the SAT for a review of the decision. The applicant submitted that due to changes in the internal operations of the nearby abattoir, the scale of the odour buffer should not extend to the location of the building envelope.

The Shire submitted that the odour buffer remained necessary in order to alleviate amenity concerns. The Shire further submitted that the 2019 proposal was an abuse of process as it was an attempt by the applicant to re-litigate a matter that was previously determined in circumstances where the applicable planning framework has not changed since the SAT's dismissal of the earlier 2015 review proceeding.

The principles of abuse of process

In *Rogers v The Queen* (1994) 181 CLR 251 (***Rogers***), Mason CJ said at 255 that *'the circumstances in which an abuse of process may arise are extremely varied and it would be unwise to limit those circumstances to fixed categories.'* In the same case, McHugh J also observed that:

> Although the categories of abuse of procedure remain open, abuses of procedure usually fall into one of three categories:
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> (1) the court's procedures are invoked for an illegitimate purpose;
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> (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or
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> (3) the use of the court's procedures would bring the administration of justice into disrepute.

The concept finds expression in section 47(c) of the *State Administrative Tribunal Act 2004* (**SAT Act**) which empowers a legally qualified member of the SAT to dismiss or strike out applications and make any appropriate orders if the SAT believes that a proceeding '*is otherwise an abuse of process.*'

As a general principle, '*an issue between parties should, subject to appeal, be determined by a court once and for all*': *Russo v Kogarah Municipal Council* [1999] NSWCA 303; (1999) 105 LGERA 290 at [12]-[19]. As a result, attempts to re-litigate matters that have already been judicially decided in earlier proceedings may constitute as an abuse of process if there has been no significant change in circumstances.

The leading cases

In analysing whether the applicant's 2019 proceeding amounted to an abuse of process due to re-litigation of matters, the SAT discussed the leading cases of: *Erujin Pty Ltd v Western Australian Planning Commission* [2010] WASC 326 (***Erujin 2010***); *Erujin Pty Ltd and Western Australian Planning Commission (No 2)* [2011] WASAT 50; (2011) 75 SR (WA) 42 (**Erujin 2011**); and *van der Feltz and City of Vincent* [2017] WASAT 153 (***van der Feltz***).

The Erujin 2010 case

The proceedings involving Erujin Pty Ltd (**Eurjin**) and the Western Australian Planning Commission (**WAPC**) are somewhat long and convoluted. In 2008, Erujin applied to the WAPC for subdivision approval (**Subdivision 1**). The WAPC granted the subdivision approval subject to a number of conditions. Erujin subsequently applied to the SAT for a review of the approval disputing the imposition of the conditions (*Erujin Pty Ltd v Western Australian Planning Commission* DR 220 of 2008). In DR 220 of 2008, the SAT, by consent orders, ordered that the disputed conditions be kept subject to minor variations. In 2009, Erujin applied to the WAPC for two separate subdivision approvals (**Subdivision 2 and Subdivision 3**). As both Subdivision 2 and Subdivision 3 were highly similar to Subdivision 1, the WAPC granted approval subject to the same conditions imposed under the approval given for Subidivision 1. Erujin once again commenced proceedings in SAT disputing the imposition of the conditions for Subdivision 2 and 3. In response the WAPC sought to have the proceeding dismissed as an abuse of process. The SAT found that the proceedings amounted to an abuse of process due to the litigation of matter previously decided by the SAT. Erujin subsequently applied for leave to appeal the matter in *Erujin 2010*, leave was granted and the matter was remitted to the SAT which was heard in *Erujin 2011*.

In *Erujin 2010*, the SAT commented that '*so long as the issue of law or fact which has been determined in the earlier judgment can be identified, the court and the parties may be protected against an abuse of process by way of attempted re-litigation of the issue already judicially determined.*'

In *Erujin 2011*, the SAT dismissed the proceedings for abuse of process due to re-litigation of matters already judicially decided for the following reasons:

(1) the conditions were essentially identical to conditions which were imposed by the tribunal by making consent orders in a previous proceeding between the same parties in relation to the subdivision of the same land;

(2) the applicant was seeking to re-agitate issues which had, as a matter of substance, already been determined by the Tribunal;

(3) there had been no significant change in circumstances and the proceedings involved a collateral attack on the prior decision of the Tribunal; and

(4) to allow the proceedings to continue would bring the administration of administrative justice into disrepute.

The van der Feltz case

In *van der Feltz*, the SAT dismissed an application for review of the decision of the respondent to refuse to grant development approval for a carpark in the front setback area of the applicant's dwelling. Three weeks later, the applicant lodged a further development application for the carpark which, unsurprisingly, was refused. The applicant sought review of the City's refusal in the SAT. SAT reasoned that since the planning framework had not changed and no other change of circumstances of substance had been identified since the earlier SAT review, it would be an abuse of process to allow the proceeding to continue. The SAT observed that section 9 of the SAT Act placed heavy emphasis on SAT's objective to act as speedily as is practicable, and minimise the costs to parties.

The SAT observed that to allow the '*proceeding to continue would bring the administration of administrative justice into disrepute. This is because it would undermine the important public interest that there should be finality in litigation, and also because it would be inconsistent with: the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole'*.

SAT's decision in Cloghan

Although the planning framework had significantly changed since the 2015 decision with the commencement of the deemed provisions, the SAT held that these changes had no direct bearing on the issues in the proceedings before the SAT. Further to this, the Shire's District Planning Scheme had not changed and still required building envelopes to be located outside the odour buffer. Although changes within the internal operations of the nearby abattoir had occurred, these changes had no material planning implications and as a result, the SAT held that the 2019 proposal was an abuse of process as it attempted '*to re-litigate a matter that was previously determined by the Tribunal in circumstances where the applicable planning framework [had] not changed in any material way*.'

Significance of the case

Where issues or facts have been previously determined by the SAT, local governments should find relief in the fact the SAT will refuse to entertain proceedings which seek to re-agitate such issues or facts. *Cloghan* reiterates the need to show material changes in circumstances before proceedings will be allowed by SAT where it has previously refused an application for the same or a similar development. *Cloghan* also establishes that significant changes to the planning framework will be irrelevant where the change has no 'direct bearing' on the current proceedings.

In the SAT, re-litigation of previously determined matters is an abuse of process which falls into the first and third categories identified by McHugh J in *Rogers* namely, where the Tribunal's procedures are invoked for an illegitimate purpose and the use of the Tribunal's procedures would bring the administration of justice into disrepute.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information please contact Alicia Nguyen by email to anguyen@mcleods.com.au.

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