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Local Government Update

Technical non-compliance with section 3.58 found not to affect the validity of a Local Government's decision to enter into a lease – *Swan Foreshore Protection Association Incorporation v City of Melville* [2018] WASC 211

By Jennifer Long, McLeods

The Western Australian Supreme Court has upheld the validity of a ground lease entered into by a local government in circumstances where the public notice published for the proposed lease was found not to comply with sections 3.58 and 3.59 of the *Local Government Act 1995*.

Factual Background

The City of Melville (**City**), as Lessor and Urbnsurf (**Perth**) Pty Ltd (**Urbnsurf**), as Lessee executed a ground lease for land in Tompkins Park comprising two lots, one owned by the City in fee simple and the other vested in the City under a management order for the purpose of recreation. The purpose of the lease was to enable Urbnsurf to develop a Wave Park and Surf Sports Recreation & Leisure Facility on the land.

The City advertised public notice of the disposition of the land (which was a major land transaction) on four occasions, however due to a change in name of the subsidiary company, the parent company 'Wave Park Group Pty Ltd' was named as the proponent in the notice.

Swan Foreshore Protection Association Incorporated (the Applicant, being an incorporated association brought into existence by a group of residents primarily for the purpose of the proceedings), opposed the lease and applied for judicial review of the ground lease.

Application for Judicial Review

The Applicant brought an application for judicial review on the ground that the City had exceeded its jurisdiction by resolving to direct the Chief Executive Officer and Mayor to enter into and execute a ground lease, in circumstances where the City was required, but failed to comply with the public notice requirements for disposal of property and entering into a major land transaction under sections 3.58 and 3.59 of the *Local Government Act* respectively.

The Applicant brought an application for judicial review on the ground that the City had... failed to comply with the public notice requirements for disposal of property and entering into a major land transaction under sections 3.58 and 3.59 of the Local Government Act

The principal issues at trial were:

- (a) whether regulation 30(2a) of the *Local Government (Functions and General) Regulations 1996 (Regulation)* applied to exempt the disposition from the obligation to comply with sections 3.58(4)(a) and (b);
- (b) whether a failure to name Urbnsurf as the party concerned in the disposition in the local public notice resulted in a failure to 'name all the parties concerned' in the Statewide public notice as required by section 3.59(4);
- (c) whether the published public notices failed to give notice of the details required by section 3.58(4), resulting in non-compliance with section 3.58;
- (d) what the consequence was for a failure to comply with 3.58 was;
- (e) whether the public notice published in *The West Australian* was sufficient to constitute 'local public notice' as required by section 3.59(5a); and
- (f) whether the Court should grant the Applicant leave to proceed out of time pursuant to O56 of the *Rules of the Supreme Court 1971 (WA)*.

Decision of Allanson J

Allanson J held that the exemption under regulation 30(2a)(c)(i) did not apply, as the business plan only referred to the parent company 'Wave Park Group Pty Ltd' and that the Act required Urbnsurf to be named as the proposed lessee.

The result of this finding meant that the provisions in both section 3.58 and 3.59 applied to regulate what notice should have been given to the public, and it was found that none of the public notices published gave notice of the details required by section 3.58(4).

Allanson J further held that whilst the public notices published by the City did not comply with section 3.58, the failure did not affect the validity of the decision to enter the lease.

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In delivering his findings, Allanson J stated that:

- (a) the language of section 3.58 is not concerned with power and whether a disposition that does not comply with the section is legally effective but rather with regulating process and accountability of local governments to their communities;
- (b) the sanction or consequence for a failure of a local government to perform its functions properly lies in part 8 of the *Local Government Act* which provides for scrutiny of the operations and affairs of a local government; and
- (c) the consequences of holding invalid any disposition of property where the local government did not comply would potentially cause substantial public inconvenience and a party dealing with a local government, in good faith and on commercial terms, would have no certainty if a disposition of property could be set aside for a technical non-compliance.

The Court further considered whether there had been a failure to comply with section 3.59. The crux of the complaint raised by the Applicant was that the public notice in *The West Australian* was not sufficient, and that the City was required to publish the notice a second time in a newspaper circulating generally throughout the district, to satisfy the requirement of providing 'local public notice' under section 3.59(5a).

Allanson J held that the ordinary meaning of section 3.59(5a), when read with sections 1.7 and 1.8, is that the notice must be published in a newspaper that circulates in the district which may include a

newspaper that circulates in a wider area (including the State) and that the notice published in the West Australian on 3 December 2016 was sufficient to comply with section 3.59.

Ultimately, Allanson J found that the only relief the Applicant could be granted on his findings, would be a declaration regarding the failure of the City to comply with section 3.58, and since that failure did not affect the validity of the challenged decision it would not be in the interests of justice to extend time by granting leave under O56 due to the lack of utility in any order. Allanson J consequently refused leave and dismissed the application.

Significance of case

The decision of *Allanson J in Swan Foreshore Protection Association Incorporation v City of Melville*, provides useful guidance and judicial commentary on important provisions of the *Local Government Act*, namely section 3.58 regulating the disposal of local government property and section 3.59 regulating commercial enterprises including major land transactions. Whilst compliance with both sections remains a mandatory legal requirement, the decision establishes that:

- (a) where there is technical non-compliance with section 3.58 of the *Local Government Act* this is unlikely to affect the validity of a local government's decision to dispose of property and enter into the lease;
- (b) the proposed lessee must be named in public notice under section 3.58 and the naming the parent company, or another subsidiary of the parent will not suffice; and
- (c) the requirement for 'local public notice' under section 3.59(5a), does not require separate publication in a newspaper that only circulates in the district and can be satisfied by public notice in a newspaper that circulates in the district, even if that newspaper has wider circulation throughout the State.

For further information please contact Jennifer Long on 9383 3133 or by email to jlong@mcleods.com.au. The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.



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