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# Planning Law Update

**Compliant but unacceptable – the discretion to refuse deemed-to-comply development**

**By Craig Slarke, McLeods**

Planning law can be complicated at times, and local planning schemes can have their individual quirks. But dealing with a minor amendment to a development approval, where the amendment satisfies the deemed-to-comply requirements of the *Residential Design Codes (R-Codes)* should be straightforward, should it not? Not necessarily, as the recent Supreme Court decision in *Baker Investments Pty Ltd and City of Vincent* [2017] WASC 203 has shown.

## Facts

The case concerned an application to amend a development approval to permit the removal of plastic film from 4 bedroom windows of a multiple dwelling development. The film had been applied in accordance with a previous development approval to prevent overlooking to neighbouring properties. The Council refused the application and a SAT review ensued. The hearing took place over 4 days – effectively one for each window. The applicant lost in the SAT, appealed to the Supreme Court and lost again. That outcome might be considered unusual as, in a sense, the development was compliant.

The setback from the upper north-facing bedroom windows of the applicant's land satisfied the deemed-to-comply requirements of the R-Codes with respect to visual privacy. That is, it did not require screening or the obscure glazing shown in the plans in order to meet the R-Codes' deemed-to-comply requirement. The obscure glazing had originally been proposed by the applicant in order to address the concerns of the Council and the neighbours, even though the R-Codes did not require it. The Council also had a policy relating to minor development which included a provision to the effect that development which meets the deemed-to-comply requirements of the R-Codes does not require development approval.

Having failed in the SAT, the applicant argued in the Supreme Court that:

- (a) removing the obscure glazing was a development which did not require planning approval, and the Tribunal erred in law by not finding that it was exempt; and
- (b) even if development approval was required, it could not be refused because it satisfied the deemed-to-comply requirements of the R-Codes for visual privacy.

## Whether development exempt from approval under deemed provisions

Clause 61(1)(i) of the deemed provisions provide that development approval is not required for 'works specified in a local planning policy ... as works that do not require development approval'. However, the Court said that when the deemed provisions are properly construed, clause 60 (which imposes the obligation to obtain development approval) and clause 61 (which provides for exemptions) do not apply to an application to amend a development approval which has been granted by the local government. Rather, where development approval has already been obtained, an application to amend that approval must be dealt with under clause 77 of the deemed provisions.

The Court also considered that it would be contrary to the planning purpose of both cl 77 and the requirement to obtain and comply with the terms of the development approval if cl 61(1)(i) allowed individual aspects of a previously approved development to be amended without approval, as the applicant had suggested.

### **Whether development approval could be refused**

The applicable local planning scheme provided that the R-Codes were to be read as part of the Scheme. Clause 2.5.4 of the R-Codes provides that a decision maker shall not refuse to grant approval to an application where the application satisfies the deemed-to-comply provisions of the R-Codes.

However, the Court found that clause 2.5.4 of the R-Codes did not apply to an application under clause 77(1) of the deemed provisions to amend a development approval. The Court also found that clause 2.5.4 of the R-Codes was inconsistent with clause 77(4) of the deemed provisions, which provides that the local government 'may' determine an application made under subclause (1) by approving the application, with or without conditions, or refusing the application. Clause 77(4) thus conveyed a discretion on local government to conditionally approve or refuse an application to amend a development approval, notwithstanding that the application complied with the deemed to comply provisions of the R-Codes.

### **Whether deemed-to-comply requirements satisfied**

The Court's third reason for rejecting the applicant's argument was that the application to remove the obscure glazing did not satisfy the deemed-to-comply requirements of the R-Codes construed as a whole. The application could not be taken to satisfy the deemed to comply provisions of the R-Codes merely because the element of the design sought to be amended met deemed to comply requirements. The amended development would still have been substantially non-compliant with other deemed to comply requirements for plot ratio and minimum site area.

### **Implications of decision**

The reasoning of the Supreme Court in relation to the discretion to refuse a complying application could equally apply to an application for development approval for fully compliant grouped or multiple dwellings as under clause 68(2) of the deemed provisions there is a broad discretion to approve any development with or without conditions, or to refuse it.

A grouped dwelling development or multiple dwelling development fully compliant with the Codes could therefore still be refused in the exercise of discretion. The local government could also apply conditions which imposed controls more stringent than deemed-to-comply requirements. The decision thus has potentially far-reaching implications for future application of the R-Codes when construed together with the deemed provisions.

For further information please contact Craig Slarke on 9383 3133 or by email to [cslarke@mcleods.com.au](mailto:cslarke@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.

