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Restrictions on the ‘Principle of Consistency in Decision-making’

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Introduction

The principle of consistency in decision making refers to the principle that: in circumstances where the planning framework is identical and the circumstances have not changed in any substantial way, it is in the interests of orderly and proper planning that planning decisions in relation to a site are made in a consistent manner. The State Administrative Tribunal (**SAT**) has recently clarified the principle and its application in *Churches and Shire of Collie* [2019] WASAT 76.

Background

In an earlier proceeding (*Churches and Shire of Collie* [2015] WASAT 23), SAT gave development approval for a transport depot on the applicant’s site. A dispute arose between the Shire and the applicant as to whether the development had been substantially commenced within the relevant 2-year period. This dispute gave rise to separate Tribunal proceedings.

The applicant also submitted a new development application to the Shire, again for what was described as a ‘transport depot’. The proposal was not identical to the development approved in 2015. The application was refused by the Shire on the grounds that the proposed development was a light industrial use which was incapable of approval under the Shire’s Local Planning Scheme No. 5 (**LPS 5**). The applicant applied to SAT for review of this decision.

Where the planning framework is the same and the circumstances have not changed in any substantial way, it is in the interests of orderly and proper planning that planning decisions in relation to a site are made in a consistent manner.

An argument raised by the applicant was that if the proposed development was not materially different from the development approved in 2015, then the principle of consistency in decision making should be applied such that the proposed development should be approved. Alternatively, the applicant argued that the proposed development, properly classified, was a transport depot and should be approved on its merits.

Historical significance of the principle of consistency in decision making

The principle of consistency in decision making has been referred to in *Stockland Development Pty Ltd v Manly Council* (2004) 136 LGERA 254 as 'a fundamental objective of those who make administrative decisions.'

In *Dilatte v MacTiernan* [2002] WASCA 100 at [57], Malcolm CJ commented that:

'Inconsistency has the potential of bringing the decision making process into disrepute because it suggests that the decision is arbitrary, rather than one made in accordance with a disciplined approach reflecting the application of sound town planning principles and consistent with commonly accepted notions of justice.'

When the principle of consistency in decision making applies

In *Churches*, the Tribunal extracted a number of principles from earlier cases:

1. In coming to a planning decision, the principle of consistency in decision making must be applied where the circumstances have not significantly changed in any material way.
2. The occurrence of an inconsistency between successive decisions depends upon a comparison involving questions of fact and degree between the circumstances in each case and, in particular, to those relevant to each decision. The test is that similarity, if not a virtual duplication of circumstances and conditions would be required to establish a complaint of inconsistency.
3. A failure to apply the principle would risk a decision being regarded as 'unreasonable'.
4. In the context of discretionary planning decisions, orderly and proper planning will require consideration to be given to consistency in decision making.

Limits on the principle

SAT also recognised that there were circumstances where the principle will not apply:

- the previous decision involved a serious and important mistake or error; and
- the previous decision was made on the basis of misleading or inaccurate information and where the subsequent decision-maker now has the correct and accurate information before it.

The Tribunal emphasised that 'care should be taken not to overly elevate the concept' as it is one aspect of orderly and proper planning – orderly and proper planning being only one of many relevant considerations that must be considered by a decision-maker (*Planning and Development (Local Planning Scheme) Regulations* Sch 2 cl 67 and *Metropolitan Region Scheme* cl 30(1)). By itself, it is not a determinative matter.

SAT also observed that an inconsistency in decision-making does not necessarily indicate that an unreasonable decision was made especially where the exercise of the discretion 'takes into account relevant factors, does not take into account irrelevant factors, is not an abuse of the discretionary power and does not result in a decision that lacks an evident and intelligible justification'.

It is noted that decisions by local governments are not binding precedents and each application must be considered on its merits. Similarly, the SAT is not bound to follow and apply its own earlier decisions.

The Tribunal's decision in Churches

SAT found that the development application in the current proceeding was materially different from the planning application that was the subject of the 2015 approval due to the addition of 2 new substantial buildings and as a result of the different wording used in the later application. As a result, the 'principle of consistency in decision making' could not be applied. The Tribunal also held that a large part of the development was properly classified as a transport depot, some aspects consisted of an unlisted use and others constituted an impermissible storage use. In the end, the Tribunal granted a conditional approval for all aspects of the development apart from the separate storage use.

Significance of the decision

The Churches decision is significant as it clarifies the principle of consistency in decision-making as an aspect of orderly and proper planning. It is simply one of many issues which, if relevant in the circumstances, should be given due regard to along with all other relevant considerations.

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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