Local Planning Update

The effect of scheme amendments on development applications awaiting decision - The case of *Presiding Member of Southern Joint Development Assessment Panel v DCSC Pty Ltd* [2018] WASCA 212

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When a local planning scheme is amended, it is not uncommon for there to be development applications awaiting decision which are affected by the amendment but which were submitted before the amendment became operational. Historically, the accepted position has been that development applications are to be determined by reference to the provisions of a local planning scheme as they stand on the date a decision is made, not as they stood when the development application was made. As a consequence, the scheme amendment is applied to a development application even though lodged before the amendment came into effect. This proposition was recently tested again in a series of cases involving a proposed Puma Energy petrol station on a site within the Dunsborough townsite.

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DCSC Case

In September 2015, the owner of a site, DCSC Pty Ltd (**Owner**), applied for a development approval for the site. The proposed development included the retail sale of petrol and the retail sale of convenience goods to be undertaken by Puma Energy. At that time, the City of Busselton *Local Planning Scheme No. 21* (**Scheme**) contained two use classes: 'convenience store' and 'service station'. Within the Dunsborough townsite, the first was a 'P' or permitted use and the second was a 'D' or discretionary use. The distinction between a 'P' (ie permitted) use and a 'D' (ie discretionary) use is significant. As is common to many local planning schemes, a 'P' use is one that is permitted provided it complies with the relevant development standards and requirements of the Scheme. With 'P' uses the starting position is that the use is necessarily consistent with the zoning of the site and the inquiry focuses on specific physical works for the development and its manner of its intended operation. By contrast, a 'D' use is one that was not permitted unless a discretion is exercised to grant approval. Consistency of a proposed use with the zoning of a site is not presumed in these cases.

JDAP decision

On 14 December 2015, the Southern Joint Development Assessment Panel (**JDAP**) refused to grant development approval for the Puma Energy development. In considering the development application, the JDAP classified the proposed development as a 'service station'. The Owner sought review of the JDAP's

decision in the State Administrative Tribunal (**Tribunal**). The Tribunal first determined the applicable use class for the proposed development as a separate, preliminary issue. It found that it was a 'convenience store' not a 'service station' as the JDAP had determined.

Scheme Amendment

At the time of the Tribunal's decision on 25 August 2016, the City of Busselton had initiated Amendment 1 to the Scheme, the effect of which was to replace the Scheme's definition of 'service station' such that the proposed development was more likely to be classified as a service station than a convenience store. However, the Tribunal found that Amendment 1 could not displace the existing definition in the Scheme. The JDAP did not appeal the decision of the Tribunal regarding its decision to classify the proposed development as a convenience store.

At a later separate hearing in early February 2017, the Tribunal considered the proposed development on the basis that it was properly classified as a convenience store. However, it did not deliver its decision until 23 August 2018 having received a number of extensions of the usual 90-day decision period. The Tribunal granted conditional approval for the development. However, earlier that month on 4 August 2017, Amendment 1 to the Scheme came into operation which replaced the definition of 'service station'. Neither the Tribunal nor the parties were aware that this had occurred. Therefore, at the time of the Tribunal's decision, the Scheme had changed in a material way going to the proper classification of the proposed development.

Appeal to Supreme Court

The JDAP appealed the SAT's decision to the Supreme Court. The JDAP argued that the Tribunal had committed an error of law because it failed to have regard to the terms of the Scheme as in force at the date of its decision, which incorporated Amendment 1. A number of arguments were considered in the appeal. Importantly, these included an argument that the Owner had an 'accrued right' to have its review application determined in accordance with the Tribunal's earlier decision that the development was a 'convenience store'. The Supreme Court accepted this proposition which seemed to be at odds with the accepted understanding that applied up until this time. As a consequence, the Supreme Court dismissed the appeal.

The conclusion of the Court of Appeal is consistent with the position previously understood and applied over many years, both by local governments in determining development applications and by the Tribunal in review proceedings

Appeal to Court of Appeal

The JDAP then appealed this decision to the Court of Appeal. Again, a number of arguments were mounted, but on the key question whether the Owner had an accrued right to have the Tribunal determine the review application on the basis of the Scheme as it stood before Amendment 1 came into effect, the Court of Appeal upheld the appeal. The Court of Appeal summarised its finding on this point as follows:

> '… *the right which the respondent had was not a right to have its application for development approval determined by reference to the provisions of the Scheme as they stood at the date that the review application was made. Rather, the right was to have the Tribunal consider whether, at the time of the Tribunal's decision, the correct and preferable decision, having due regard to the provisions of the Scheme then in force, was to grant (conditionally or unconditionally) or refuse development approval for the proposed development*'.

This conclusion is consistent with the position previously understood and applied over many years, both by local governments in determining development applications and by the Tribunal in review proceedings.

The Court of Appeal ordered that the matter be returned to the Tribunal for reconsideration by a differently constituted Tribunal. However, it appears that the Puma Energy has decided not to pursue its plans any further for a petrol station on the site. As a consequence, the Tribunal will not proceed to reconsider the matter.

Significance of decision

The decision of the Court of Appeal in the DCSC case is a significant one for local governments in Western Australia. The previous decision of the Supreme Court threatened to overturn the established principle that the legal framework applicable to the decision of a planning authority or tribunal is the framework that applies at the time of decision, not the time of application. The notion of an 'accrued right' to have an application determined on the basis of the legal framework as it previously applied was inconsistent with that principle. The Court of Appeal's decision confirms that the only right that may be accrued by an applicant is the right to have the application determined under the planning framework as it applies at the time of decision.

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 Andrew Roberts on 9424 6203 or by email to aroberts@mcleods.com.au.

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