

Challenging DAP Approvals

By Andrew Roberts

While some DAP approvals have been controversial, there have only been a small number of legal challenges against these approvals since 2011 when DAPs were introduced. Two have been in the City of South Perth and one in the City of Subiaco. The explanation for this low level of cases may lie in the difficulties confronting individuals or local governments wanting to challenge a DAP approval. This article discusses a number of these difficulties.

LEGAL AVENUES TO CHALLENGE DAP APPROVAL

While an applicant for development approval can bring proceedings in the State Administrative Tribunal to challenge the refusal of a DAP to approve a development, those wishing to challenge an approval granted by a DAP cannot go to the SAT. The SAT's jurisdiction is limited to the review of refusals and conditions of approval. Those wanting to challenge a DAP approval must go to the Supreme Court and seek judicial review of the DAP's decision.

Not everyone has a right to pursue a legal proceeding in the Supreme Court to challenge a DAP approval. Generally, a person must have 'standing' which is to say they must have some interest in the matter over and above the general public. Two of the three actions to date have been brought by the owners of properties potentially affected

by an approved development in some material way (eg adverse impact on property values caused by obstruction of views). The other action was brought by a local government in whose scheme area the development approved by the DAP was to be located. No question was raised in that case about the local government's standing to challenge the DAP's approval.

Unlike the SAT where each party bears its own costs, it is usual in the Supreme Court for the unsuccessful party to pay the successful party's legal and other costs of the litigation. The risk for an unsuccessful applicant in having to pay its own legal costs and those of the successful party is a significant deterrent to challenging a DAP approval.

GROUND FOR CHALLENGE OF A DAP APPROVAL

The grounds on which a DAP approval can be challenged are limited. In the Supreme Court the merits of a DAP approval cannot be challenged. Rather, it is necessary to persuade the Supreme Court that the DAP made one or more errors of law in granting an approval. Examples of such errors are a failure by the DAP to consider some matter that it was required to take into account, considering some irrelevant matter and asking itself the wrong question under the applicable local planning framework.

Establishing that a DAP has made an error of law is made potentially difficult because DAPs have no obligation to explain their reasons for granting an approval even where this is contrary to a recommendation of refusal in a local government's responsible authority report. Further, even though DAP members would be named as respondents in a Supreme Court proceeding, they would not actively participate. The practice is for them to agree to abide by the Court's decision. This ensures that the DAP does not prejudice its impartiality by actively seeking to justify its approval when it may be required to

re-decide the matter if the legal proceedings succeed. Given, the DAP's passive role in proceedings it would not provide any explanation of its reasons for granting an approval as part of the proceedings. Therefore, there is no ready means of understanding and establishing how a DAP came to its decision to grant an approval. Conceivably, the reasons among the DAP members voting in favour of an approval may differ. While these issues do not prevent a DAP approval being challenged, they can present a significant hurdle for those wanting to do so.

LEGAL PRESUMPTIONS

Another set of potential difficulties arises from some presumptions that are applied by the Supreme Court in considering a DAP approval. The first presumption is that a DAP is taken to have considered all the information that was placed before it. Consequently, the Supreme Court is unlikely to accept that a DAP failed to consider a particular matter if a local government's responsible authority report refers to it or it is contained in some other document before the DAP.

The second presumption is that all the necessary prerequisites to the exercise of a DAP's power to approve a development application have been fulfilled. Consequently, where it is necessary for the DAP to form an opinion about a particular matter specified in a local government's scheme or its local planning policies, it will be presumed that these opinions were correctly formed by the DAP before it granted an approval.

These presumptions are not irrefutable and may be shown to be incorrect. One means of displacing the second presumption is to show that the DAP accepted and applied a particular interpretation of the planning framework which appears in the local government's responsible authority report but which was incorrect. However, the Supreme Court will not simply assume that the DAP has adopted what is contained in a responsible authority report or that the DAP's reasons for granting an approval are a reflection of the reasoning contained in the responsible authority report. To show that a DAP has adopted the erroneous reasoning in a responsible authority report it is necessary to establish that there is no other basis upon which the DAP could have made its decision. If a plausible alternative exists, then the Supreme Court is unlikely to find fault in the DAP's decision.

Most DAP minutes record a declaration by DAP members that they have duly considered the documents before them. However, the Supreme Court has been cautious about placing any real reliance on this declaration. In particular, where the planning framework of a local government requires the DAP members to have 'due regard' to particular matters or to particular planning instruments, the members declaration is unlikely to be accepted as establishing that there was 'due regard' to these matters or instruments. The expression 'due regard' has been interpreted by the Supreme Court to require that proper, genuine and realistic consideration be given to a matter or instrument and the Court will not assume this has occurred simply because of the DAP members' declaration in its minutes.

In view of the limited legal avenues and grounds for challenge to DAP approvals, the risk of an adverse costs order and the application of legal presumptions, it is likely that even though DAP approvals may continue to be controversial in some instances, legal challenges to these approvals will continue to be rare.

CHANGES TO DAP SYSTEM

On 13 October 2016, the Minister for Planning announced a number of changes to the DAP system. One proposed change is that more information will be available around reasons for decisions, to ensure that the decision making process is clearly



communicated and can be better understood. The means of delivering this outcome appears to be that local governments' responsible authority reports will be required to include more information about why decisions can be made so as to ensure that the decision making process is clearly communicated and can be better understood. However, as the Supreme Court has stated, it is not safe to assume that a DAP's reasons for making a decision reflect what appears in a responsible authority report. Therefore, simply including more detail in responsible authority reports is unlikely to provide any greater understanding of a DAP's reasons for making a decision.

If you would like to discuss any of the issues further, please do not hesitate to contact Andrew Roberts at andrew.roberts@mcleods.com.au. The information contained in this update should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.