

# Construing the Terms and Scope of a Planning Approval

By Adam Watts

The recent State Administrative Tribunal (WA) case of *AAA Egg Company Pty Ltd and Shire of Gingin* [2013] WASAT 149 involved a review of the Shire of Gingin's (**Shire**) refusal of an application for planning approval for a free-range and other non-caged production farm, which included layer and pullet rearing sheds, storage sheds, residence and support facilities, cattle and cropping.

Subsequent to the Shire's original refusal, the parties engaged in mediation leading to the application being reconsidered by Council at the invitation of the Tribunal, pursuant to s. 31 of the *State Administrative Tribunal Act 2004*. Upon its reconsideration of the application, the Council resolved that it "...advise the State Administrative Tribunal that it will grant Planning Approval for the proposed Animal Husbandry – Intensive (Poultry Farm)...subject to the following conditions...".

The Tribunal was required to determine two preliminary issues, being:

- (a) whether Council's resolution in the terms it was made amounted to a formal planning consent; and
- (b) if so, whether the consent authorised AAA Egg Company Pty Ltd (**Applicant**) to operate its free-range activities by permitting the chickens to roam beyond the layer sheds and connected patio and verandah areas?

## **Whether resolution constituted grant of planning approval**

On the first issue, the Shire's contention was that the Council resolution did not constitute a valid planning approval as it amounted to no more than advice to the Tribunal that formal approval would be given, it being contemplated that this would be effected by a minute of consent orders.

In considering this issue, Senior Member McNab of the Tribunal cited the comments of Wells J in the Supreme Court of South Australia in *Myer Queenstown Garden Plaza Pty Limited v City of Port Adelaide* (1975) 33 LGRA 70, at 92:

"[It] is essential, therefore, to look at the circumstances in which the resolution or proposition was made if it is to be given its fair and natural meaning. ...

It would, accordingly, be misleading to rely only on the bare words of the resolution disengaged from the events that led to, and resulted from, it being passed, and to look for unreason rather than for reason."

The Tribunal considered the critical circumstances in the case before it to be that the Shire had been involved in a "long and difficult process of negotiation, mediation and decision-making concerning the applicant's free-range egg farm proposal" and that the Tribunal had, as part of that process, "formally invited reconsideration of the Shire's refusal". The manner of that

reconsideration appeared to be a formal resolution of approval narrowly carried by a majority of the members of the Council of the Shire on 19 February 2013. Additionally, the resolution appeared to have been treated as an approval by the parties in subsequent mediation, where the Tribunal's orders referred to specific conditions as the "remaining issues in dispute" between the parties.

In the Tribunal's view, both "the *form* and the *substance* of the resolution indicated formal conditional planning approval was being given", notwithstanding the resolution only purported to "advise" the Tribunal that "it will grant Planning Approval" for the proposed development.

### Scope of the approval in relation to free range areas

The second preliminary issue considered by the Tribunal was the extent of the 'free range' area for poultry authorised by the approval.

The Shire argued that the approval only authorised the 'free ranging' of poultry to a limited extent within the verandah annexes surrounding the proposed laying sheds, for the following reasons:

1. The various site plans submitted by the applicant did not depict any outside ranging areas;
2. The Environmental Management Plan submitted by the applicant did not refer to the management of outside ranging areas at all and also stated that all manure would be contained within sheds.
3. Odour Reports submitted by the applicant referred to contained "verandah/annexes between each shed and surrounding" as providing the "free-range yards for birds to roam".
4. The approval granted by the Shire was stated, in the conditions of approval, to be an approval "...for an Animal Husbandry - Intensive (Poultry Farm) with twelve layer sheds and ancillary buildings only".

The applicant for its part contended that the approval should be construed as extending to free range areas as the original application had been for approval of a "free-range" egg production farm.

The Tribunal reviewed the authorities relevant to construing the scope of a planning approval, referring initially to **Allandale Blue Metal Pty Ltd v Roads and Maritime Services** [2013] NSWCA 103, where Meagher JA said that the meaning of a planning consent:

"...must be determined objectively, having regard to ... matters which do not focus on the circumstances in which the consent was given by reference to what was known both to the applicant and the consent authority. To that extent, the principles of construction appropriate to contracts, which provide that in the case of ambiguity or uncertainty reference may be made to surrounding circumstances known to the relevant parties, do not apply ..."

The Tribunal further noted that only limited reference could be had to "extrinsic evidence" when construing a planning consent, once again citing Meagher JA in **Allandale Blue Metal Pty Ltd v Roads and Maritime Services** in relation to the incorporation of extrinsic evidence when construing a planning approval:

"The extrinsic evidence to which reference legitimately may be made when construing a public document, such as a development consent, is more limited. Reference may be made to documents other than the consent itself if those

documents, or parts of them, are incorporated into the consent expressly or by necessary implication ...

What is sufficient to constitute incorporation, by necessary implication, for the purpose of these principles is less clear. If the consent in terms does no more than approve the application, it will be necessary to go to the application at least to identify the subject matter of the consent ...

A consent in those terms would not necessarily have the effect of incorporating all of the matters dealt with in the application. For example, general matters of fact or assertions of intention furnished or made for the purpose of informing the consent authority of the nature of the development, are not likely to be incorporated..."

*"...ambiguity in the terms of a planning consent may be resolved in favour of the construction which places the least burden on the land owner"*

Senior Member McNab additionally noted the "longstanding authority" to the effect that ambiguity in the terms of a planning consent may be resolved in favour of the construction which places the least burden on the land owner', citing **Brisville Pty Ltd v Brisbane City Council** [2007] QPEC 63, [2007] QPELR 637; (2007) 1 PDQR 165, per Rackemann DCJ and **Transpacific Industries Group v Ipswich City Council** [2012] QPEC 69 per Robin QC DCJ.

With reference to the application documentation, the Tribunal concluded that "...there is nothing in the evidence and material ... that suggests with any degree of certainty (to the standard required by planning law) that the hens were, in fact, to be confined, as was assumed by the Council, and its staff and elected members" (at [32]). This conclusion was reached by the Tribunal, notwithstanding the fact the application site plans did not depict free range areas outside the layer sheds and the reference in odour reports submitted by the applicant to the Shire to "... verandah/annexes between each shed and surrounding to provide the free-range yards for birds to roam." The Tribunal indicated that it did not consider the odour reports formed part of the approval, despite the express reference to the odour limits in those reports made in condition 9 of the approval.

The decision additionally briefly considered the meaning of "free-range". The Shire had argued that the legal meaning of "free range" was not settled, in the absence of any regulatory or accepted industry standard, and could as a matter of law refer to confined outdoor areas, such as a fenced yard or annexe to a layer shed. However, the Tribunal noted that that free-range egg farms, by definition, often require substantial non-cage or non-barn runs, citing the Australian Competition and Consumer Commission's *Initial assessment of Certification Trade Mark application CTM1390450 filed by the Australian Egg Corporation Limited*, which discusses various standards and definitions for free-range eggs.

## Conclusion

The decision of the Tribunal in **AAA Egg Company Pty Ltd and Shire of Gingin [2013] WASAT 149** is further confirmation that where there is any ambiguity in the scope of a planning approval, the terms of the approval are likely to be construed in a manner to benefit the applicant. In particular, planning authorities cannot assume that restrictions or operating conditions described in documents accompanying an application will apply to limit the scope of an approval, unless those documents are expressly incorporated by reference in a condition of approval.

The scope of a planning approval may also in certain circumstances be taken to extend to matters not described in the



application itself, such as in this case free range areas, which were not depicted in the application plans or the supporting documentation submitted by the applicant. Planning authorities must therefore be vigilant to ensure that all potential components of a proposed use or development are addressed in approval conditions, even where certain components of the use or development are not described or addressed in the planning application itself.

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