

Development approval under the MRS: the case of *Shalom v Joondalup*

By Peter Wittkuhn

The State Administrative Tribunal has determined that – with two categories of exceptions – development approval under the *Metropolitan Region Scheme* is required even for developments that enjoy an exemption from local planning scheme development approval.

Town planning law could not be further from the core activities of the charitable organisation West Australian Shalom Group Inc, yet, for the second time in five years, the organisation’s land use intentions have proved to be the lightning rod for an important town planning law decision. To the surprise of many, the State Administrative Tribunal has determined that development approval under the *Metropolitan Region Scheme* (**MRS**) is required for most developments that enjoy an exemption from local planning scheme development approval. The determination came in the decision ***West Australian Shalom Group Inc and City of Joondalup*** [2023] WASAT 63, delivered on 17 July 2023 (***Shalom v Joondalup***).

That decision follows on from a 2018 decision which classified the organisation’s rehabilitation centres as ‘Community Purposes’: ***West Australian Shalom Group Inc and City of Swan*** [2018] WASAT (***Shalom v Swan***).

Facts of *Shalom v Joondalup*

The applicant (**Shalom**) operates live-in rehabilitation centres for people struggling with life-controlling issues, including, but not limited to, drug addiction. Shalom had purchased land in Craigie which was zoned ‘Private Community Purposes’ under the City of Joondalup’s local planning scheme. Within that zone, the use class ‘Community Purpose’ was a ‘P’ use. On this score, the 2018 Tribunal decision of ***West Australian Shalom Group Inc and City of Swan*** [2018] WASAT 36, was relevant. In that decision, the Tribunal’s then-Deputy President Judge Parry had determined that Shalom’s live-in rehabilitation use qualified as a ‘Community Purpose’ under Swan’s local planning scheme. Shalom’s intended use of the purchased Craigie premises was sufficiently similar as to be legally indistinguishable.

Therefore, it seems that unless ***Shalom v Swan*** was incorrectly decided, the Craigie use should also be classified as a ‘Community Purpose’, which was also a recognised use class under Joondalup’s Scheme. No physical works were required or proposed for Shalom’s intended Craigie use to commence. The combination of a ‘P’ use and the absence of a works component, would trigger an exemption from local planning scheme development approval under clause 61(2)(b) of the **Deemed Provisions** (ie, Schedule 2 to the *Planning and Development (Local Planning Schemes) Regulations 2015*). The City of Joondalup nevertheless took the point that, notwithstanding any local planning scheme exemption, development approval was separately required under the MRS.

Further observations

Joondalup's assertion that MRS development approval was separately required, was perhaps not unexpected within the specific context that uses immediately adjacent to Shalom's intended rehabilitation use, included a primary school and a child care centre.

The wisdom of enacting the wide range of development approval exemptions under the Deemed Provisions without a case-by-case opportunity for assessment of their compatibility with neighbouring uses, was previously questioned by this firm at the time when those intended exemptions were out for public comment.[\[1\]](#)

Is MRS development approval required?

In seeking to confirm that MRS development approval was not required, Shalom relied upon MRS clause 26(1) which provides so far as relevant:

'... an approval given by the local authority to develop land comprised in the Scheme which has been zoned under this Part shall be deemed to be an approval under this Scheme.'

Shalom argued that an exemption from the need for development approval under a local planning scheme, was a kind of 'approval given by the local authority to develop land' for the purposes of MRS clause 26. That argument was rejected by the Tribunal, constituted by Senior Member Dr S Willey. Senior Member Willey's key reasoning was as follows:

- Separate applications for development approval under a local planning scheme and the MRS must be lodged in most cases;
- Under the MRS, "development" carries the Planning and Development Act meaning of including both use and works;
- The only MRS development approval exemptions are for single houses and certain works under a road or street;
- The Deemed Provisions' exemptions only operate only in the context of *local* planning schemes;
- An exemption from requiring approval is not the same as a development approval;
- Clause 26(1) of the MRS operates in circumstances where the local authority has undertaken its own merits assessment of a proposed development. It doesn't operate where there is an *exemption* from a merits assessment under the local scheme: see [139] - [147].

The exceptions from the need for MRS development approval are therefore confined to single houses and certain works under a road or street. Exemptions under the Deemed Provisions don't translate into exemptions under the MRS.

'Satisfaction' as to development approvals when assessing occupancy permit applications

The statutory route through which the need or otherwise for development approval arose for determination by the Tribunal, was actually the *Building Act 2011* section 58(1)(j) requirement that the City, as building permit authority, be satisfied as to certain matters before issuing an occupancy permit. Shalom had applied for an occupancy permit for a 'recovery accommodation facility'. The City as building permit authority needed to be satisfied, among other things, that the applicant had obtained 'in relation to the building' all approvals required under the *Planning and Development Act 2005*: see *Building Act*, section 58(1)(j) read together with *Building Regulations 2012*, Regulation 37(b).

Shalom relied on section 58(1)'s expression 'in relation to the building ...' and Regulation 37(b)'s expression 'as relevant to

the building ...', for a submission that the only relevant development approvals were those concerned with the construction of the building which Shalom intended to occupy. Shalom argued that it did not matter that the historical development approvals which had authorised the construction of the building, were for a different *use* (in planning law terms) from that now intended by Shalom.

The Tribunal however preferred the contention of the City, that the development approvals that the building permit authority needed to be satisfied about, extended to development approvals concerning use as well as construction. The key to Senior Member Willey's reasoning on this point was:

'Ultimately, the occupancy permit approval process is intended to ensure the *building is fit for its designated use*' (emphasis added): see [81].

The Senior Member also acknowledged that 'more would be needed' in order to limit the application of the term 'approval required under the *Planning and Development Act*' to those approvals which only involved physical works: at [80]. This was a reference to the City's argument that in terms of Western Australian planning law and practice, use approvals are an entrenched feature of the jurisdiction; and that it is a fundamental feature of planning law that the term 'development' includes use and works: at [72].

'Going behind' a planning authority's advice

The remaining preliminary question for the Tribunal arose as a result of a statement of advice given by the Chairman of the Western Australian Planning Commission (**Commission**) in correspondence to Shalom's lawyer. The Chairman had issued a letter to Shalom's lawyer initially stating that the Commission was of the view that a local plan scheme exemption 'should be taken to be an exemption from the need to obtain a separate approval under the MRS', having regard to MRS clause 26(1).

After the commencement of the Tribunal proceedings, the Commission issued various submissions and other communications to the SAT and the parties, whereby it emphasised that the Chairman's advice had only been a statement of view. The Commission ultimately even submitted that the correct position was that MRS development approval was probably required after all. It was the Tribunal which, of its own motion, identified the preliminary question whether a building permit authority (or the Tribunal on review) could 'go behind' advice given by a planning authority to the effect that approval is or is not required under the *Planning and Development Act*. The Tribunal ultimately accepted that the building permit authority and the Tribunal *could* go behind a planning authority's advice. In this regard, the Tribunal confirmed the agreed position of Shalom and the City. Accordingly, when a planning authority asserts that development approval is or is not required in a particular instance, the building permit authority is not bound by the planning authority's assertion – and neither is the Tribunal on review.

In the course of reaching that determination, Senior Member Willey also made some interesting observations about the role of the Commission and the local government under the MRS. He noted that most MRS development applications are actually determined by local governments under delegation from the Commission, and in such cases, the 'responsible authority' for the purposes of the MRS is in fact the local government, not the Commission: see [111] – [117]. Accordingly, the Commission should not be solely regarded as the 'responsible authority' for the purposes of the MRS.

Implications

The current state of the law, in light of ***Shalom v Joondalup***, is that, within the Perth metropolitan area, the Deemed Provisions seem to have misfired, in so far as they aimed to cut red tape by exempting a wide range of developments from the need for development approval: see Deemed Provisions clause 61. Despite local planning scheme exemptions, it is clear that a form of development approval – MRS approval – is still required after all.

Uses which have commenced within the Perth metropolitan area on the basis of exemptions under the Deemed Provisions are now revealed to be technically non-compliant, if they lack corresponding MRS development approval. The only exceptions to this seem to be single houses and certain works under a road or street. It seems likely that a legislative solution is necessary – in all probability a solution which will be both retrospective and prospective.

For the time being, proponents whose developments would fall within the scope of exemptions created by the Deemed Provisions, will need to recognise that their exemptions relate only to the local planning scheme, and do not absolve them for the need to seek MRS development approval. MRS exemptions only extend to single houses and to the carrying out of works under a road or street by a public authority.

It should be noted that the position under WA's other two region schemes – the *Peel Region Scheme* and the *Greater Bunbury Region Scheme* – is different. Development approvals under those region schemes are only required in respect of:

- Land *reserved* under the region scheme: see PRS at clause 18(a); GBRS at clause 24(a); and
- Zoned land subject to a special gazetted resolution that development upon that land requires Commission approval in addition to local planning scheme approval: PRS clauses 18(b) and 21; GBRS clauses 24(b) and 27.

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 on matters discussed in this article please contact Peter Wittkuhn by email to pwittkuhn@mcleods.com.au.

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[1] See
<https://www.mcleods.com.au/news/expansion-of-development-approval-exemptions-under-the-deemed-provisions/>