

Discretion to approve undersized lots

By Craig Slarke

The State Administrative Tribunal (**Tribunal**) recently delivered a decision which had the somewhat unusual outcome that a provision of the Residential Design Codes Volume 1 (**R-Codes**) does not mean what it says.

In **Taylor and WAPC** [2023] WASAT 16, the Tribunal was concerned with an application for subdivision approval in which the two lots proposed would vary from (i.e. be less than) both the average and minimum lot sizes set out in the R-Codes by more than 5%. That was problematic, because design principle clause 5.1.1 P1.2 of the R-Codes in its terms expressly limits the discretion of the WAPC to vary the minimum or average lot size by no more than 5% when approving the creation of new lots. The R-Codes were incorporated into the applicable local planning scheme, with the result that the clause must be given its 'full force and effect' as if enacted by the PD Act.

Additionally, section 138(2) of the *Planning and Development Act* (**PD Act**) provides that the WAPC is not to give an approval that conflicts with a provision of a local planning scheme.

In consequence of those provisions, the WAPC argued it did not have the power to approve the new lots, and neither did the Tribunal. Nevertheless, the applicant maintained that the R-Codes is concerned with development (which does not include subdivision), and consequently the R-Codes did not operate to restrict the Commission's power to grant approval to undersized lots.

The Tribunal accepted that, when read in isolation, the argument that clause 5.1.1 P1.2 provided an absolute limit to lot sizes had 'considerable strength', however it was necessary to construe the provision in the context of the R-Codes as a whole and having regard its legislative purpose. Having done so, the Tribunal found that the provision 'appears to have no active or operational work to do under the R-Codes'.

That conclusion followed from the following matters of context and purpose:

- The R-Codes as a whole are concerned not with applications for subdivision but for development approval;
- Applications for development approval are assessed by first having regard to the deemed-to-comply provisions and only if the deemed-to-comply provisions are not met are the design principles (such as 5.1.1 P1.2) relevant;
- The deemed-to-comply provisions for site area are concerned with development applications where the subdivisional process has already been completed and the resulting lot size is already known; and
- Clause 2.5.3 of the R-Codes, properly construed, is concerned with the power to approve development applications and is not concerned with the WAPC's subdivisional decision-making power.
- Clause 2.5.3 provides that 'The decision-maker shall not vary the minimum or average site area per dwelling requirements set out in Table 1 (except as provided in the R-Codes Volume 1 or the scheme).' The relevant 'decision-maker' is the local government determining a development application, not the WAPC in determining a subdivision application.

According to the Tribunal, the consequence of those matters of context and purpose is that while ‘...the terms of the clause are clear and unambiguous, they are located with the R-Codes in a place that gives them no practical effect’. The further consequence of clause 5.1.1 P1.2 having no practical effect is that the approval by the WAPC of lots which vary from (i.e. are less than) the average or minimum lot sizes set out in the R-Codes by more than 5% would not give rise to any conflict with a scheme provision. Therefore, section 138(2) of the PD Act was not engaged.

The Tribunal’s decision was made in answer to a preliminary legal issue, and so the merits of the subdivision application were not determined. The Tribunal was at pains to observe that, notwithstanding the decision on the preliminary issue, as a matter of orderly and proper planning the obligation to give due regard to the R-Codes requires that, in the absence of a sound planning policy or another cogent reason, subdivisional approval which would create lots smaller than the stated sizes ought not be granted.

The upshot of the decision is that while there is no legal barrier to the creation of ‘undersized’ lots, it is likely to be a rare case in which they will be approved.

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 Craig Slarke by email to cslarke@mcleods.com.au.

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