

Do local governments in Western Australia lack a general power to provide public works?

By Denis McLeod

The recent decision of Archer J in **Reid v City of Gosnells** [2023] WASC 48 has called into question the power of local governments to provide public works within their districts. This article considers the legislative history and context for the provision of public works by local governments in Western Australia and discusses the Court's decision in **Reid v City of Gosnells** and its potential implications for local government.

Local Government Act 1960

In local government legislation prior to 1995, the power of local governments (**LGs**) to provide public works in their districts was dealt with on a prescriptive basis; the powers thought necessary for an LG to provide good government in its district were specifically prescribed in the constituting Act. In the *Local Government Act 1960* (**LG Act 1960**), many specific powers enabling LGs to provide services and facilities in their districts were prescribed including for instance –

- in ss.300, 301 and 331 of the LG Act 1960, there were extensive specific powers to provide, construct and maintain streets and ways and other public places under the LG's care, control and management;
- in ss.315 and 365-368, powers were specifically given to provide drainage works in public land (Governor's approval being required to provide works in private lands);
- in s.446, power was given for an LG to expend money on libraries, recreation grounds, etc; and
- in s.449, power was given to establish public pounds for animals.

Local Government Act 1995

None of the powers set out in the LG Act 1960 was conferred specifically in the *Local Government Act 1995* (**LG Act 1995**). The Minister in the Second Reading Speech of the *Local Government Bill 1995* said –

'... In contrast with the specific powers in the [LG Act 1960], local governments will have general powers to make laws and provide services and facilities for the good government of people in their district. These are commonly referred to as general competence powers.'

The conferral of general competence powers to provide services and facilities was thought to be effected in Part 3 of the LG Act 1995, particularly –

- 3.1(1) which provides that the general function of an LG is to provide for the good government of persons in its

district;

- 3.4 which provides that the general function of an LG includes legislative and executive functions
- 3.18(1) which provides that an LG is to administer its local laws and may do all other things that are necessary or convenient to be done for or in connection with, performing its functions under the Act; and
- 3.18(2) which provides that in performing its executive functions, an LG may provide services and facilities.

Decision in *Reid v City of Gosnells*

In her Reasons in ***Reid v City of Gosnells*** [2023] WASC 48, Archer J did not accept that the provisions of the LG Act 1995 referenced above were effective to confer on LGs the power to provide public works within their districts. Her Honour's comments seem to suggest her view that the power to provide public works must be conferred by specific legislative provisions, perhaps subject to State Government oversight, or the power can be conferred in some way by a planning approval under an LG's planning scheme, and also under any applicable region scheme.

If a LG has power to provide public works, then s.6 of the *Planning and Development Act 2005* (WA) (**P & D Act**) would provide a simple process for an LG to avoid the necessity of obtaining planning approval every time the LG proposes to undertake a public work. Planning schemes have the same effect as if enacted in the P & D Act^[1]. Consequently in providing that nothing in the P & D Act (including any scheme having effect under the Act) interferes with the right of an LG to undertake, construct or provide any public work, it was thought that s.6 excused an LG from obtaining planning approval for its proposed public works.

The stumbling block for the City of Gosnells in the ***Reid*** case was that Archer J did not accept that the provisions in the combination of ss.3.1(1), 3.4 and 3.18 of the LG Act 1995 conferred a power for an LG to provide public works in its district.

Facts in *Reid* case

In the ***Reid*** case, the City had proposed to provide a new Operations Centre on a substantial area of land which it owned, being the former landfill site in Orange Grove. There had been extensive environmental, traffic and engineering studies supporting the proposed development of the Operations Centre on that site, and the proposal had obtained WAPC approval under the MRS

The City in the interest of transparency had opted to process the proposal through a Development Application under its local planning scheme, instead of using the less public process under section 6 of the *Planning and Development Act 2005* (P & D Act). After consideration of the proposal and its supporting information, the City's development assessment unit recommended approval, and approval was subsequently issued by the CEO.

The validity of both the WAPC approval under the MRS and the City's approval under its scheme were challenged by Reid in judicial review applications in the Supreme Court. Reid resides in a rural-residential property located some 500 metres from the nearest point of the Operations Centre development, and claimed *locus standi* on essentially that basis. Standing was not ultimately contested.

The City in its processing of the development application treated the proposal as involving either a composite Operations Centre development including the proposed waste transfer facility, falling within the 'Civic Use' use class in the scheme, or as involving the Operations Centre as a Civic Use, and the waste transfer facility as a Use Not Listed. Each 'Civic Use' and 'Use Not Listed' was a use permissible in the discretion of the City under its scheme. If the Court had accepted those classifications, it would have been recognised as within the discretion and the power of the City to approve the proposal, and the application for judicial review would have failed on that basis. However, the Court did not accept the proposal as involving a single use, but separated out three activity areas within the proposal, treating them as individual uses which were not permitted in the subject General Rural zone of the scheme.

Had the Court been prepared to accept that the City had the power to provide public works, it would have been open to the Court to accept that the Operations Centre proposal involved one or more works which were exempted by s.6 of the P & D Act (which provides that nothing in the P&D Act is to interfere with the right of a local government to undertake a public work) from the requirement of planning approval. On that basis, the City argued that it was open to the Court to conclude that the grant of judicial review of the City's decision to approve the development under its scheme was futile on the basis either that the processing of the development application amounted to a de facto satisfaction of the procedures in s.6(2), or alternatively it remained open to the City to complete the minimal s.6(2) procedures. However, those arguments were ultimately not upheld by the Court, which determined that the planning approval had been invalidly granted and (for the reasons discussed above) the City did not otherwise have legal power under the LG Act 1995 to undertake the proposed development as a public work.

Conclusion

The point of significance for LGs generally arising out of the **Reid** case is the view of Archer J that the legislative attempt at providing a general competence of LGs to provide public works as services and facilities for their districts, through the provisions of s.3.1(1), s.3.4 and s.3.18 of the LG Act, did not achieve that purpose. In the absence of specific powers to provide specific public works in other legislation (e.g. the power in s.11(1) of the *Dog Act 1976* (WA) for an LG to establish and maintain dog management facilities), LGs do not have power to provide public works. The suggestion that all public works would be subjected to the development approval process in an LG scheme, quite apart from the complications and delay that would cause, does not seem to solve the problem, as planning approval gives only the authority's approval for a work to be provided, but doesn't provide the power. That suggestion is also seemingly at odds with the provision made in section 6 of the P & D Act, which provides that nothing in the Act interferes with the right of a local government to undertake, construct or provide any public work.

The decision in the **Reid** case is likely to be appealed to the Court of Appeal.

The pending proclamation of the amendments to the definition of 'public work' in s.2 of the *Public Works Act 1902*^[2], and clarification of the meaning of the term 'public work' under that Act, is not likely to solve the problem of power, as the amendments to the *Public Works Act* will only clarify the meaning of the term 'public work', and won't give a general power for LGs to provide public works.

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 Update please contact Denis McLeod by



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[1] For local planning schemes, P & D Act s.68(1)(b) and s.87(4); for region schemes, s.56(3).

[2] Under the *Land and Public Works Legislation Amendment Act 2022* (WA), which received the Royal Assent on 24 March 2023.

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