

Duelling Development Approvals

By Craig Slarke

Last year the State Administrative Tribunal delivered its decision in the matter of Paintessa Developments Pty Ltd and Town of East Fremantle [2014] WASAT 81. The case did not involve a major development and the decision received little fanfare. However, the decision by Deputy President Judge Parry finally put an end to a legal issue which had been controversial in Western Australia for nearly 35 years; namely whether an approval under a local planning scheme is required in a case where approval for the same development has already been obtained for the purposes of the Metropolitan Region Scheme (MRS).

Approvals under Metropolitan Region Scheme and local planning schemes

In most cases where a development is proposed on land zoned under both the MRS and a local planning scheme, the relevant local government has delegated authority to determine the application for the purposes of the MRS. However in some cases, such as when the land in question abuts or is partly within an MRS reserve, the local government has no delegated power to determine an application under the MRS but, instead, is required to send its recommendation to the WAPC. In those cases where the WAPC determines the application for planning approval under the MRS, what role is there for the local government under its scheme?

Review of authorities

The issue first gained prominence following the decision of Chief Justice Burt in the well-known case *University of Western Australia v City of Subiaco* (1980) 52 LGRA 360. In that case the Chief Justice concluded the development in question did not require approval under the relevant local planning scheme because the land on which the development was proposed was reserved under the MRS, but not under the local planning scheme. However, he went on to observe that where an application for the development of land reserved under the MRS is made, clause 29(1) of the MRS requires the application “to be submitted to the authority (WAPC) for its ‘determination’ which I would understand to mean for its final determination and not for its determination subject to the approval of the defendant City under its scheme. To construe it in that way would, I think, be to review an inconsistency within the meaning of section 3 of the Metropolitan Region Town Planning Scheme Act and the provisions of the region scheme would prevail.

Subsequently, in 1998 the former Town Planning Appeal Tribunal applied the UWA case in the matter of *City and Suburban Group Pty Ltd v City of Stirling* (TPAT Appeal No. 37 of 1998) in deciding that a proposed development which had obtained approval under the MRS did not require approval under the applicable local planning scheme.

Since that time, at least, the practices of metropolitan local governments had been inconsistent in cases where they did not have delegated authority to determine an application for planning approval under the MRS, but instead were required to refer the application to the WAPC for approval with the local government’s recommendation. In some cases local governments independently determined the application for the purposes of the local planning scheme, and in others they

did not.

SAT decision in Paintessa

The legal issue came squarely to a head in the Paintessa matter where the development was proposed on land which was partly within, and partly abutting, the Canning Highway road reserve, which is the subject of a regional road reservation under the MRS. The WAPC had granted approval to commence the development for the purposes of the MRS, and the applicant asserted that no approval was necessary under the local planning scheme because that gave rise to at least the possibility of an inconsistency between the MRS and the local planning scheme upon which section 124(1) of the Planning and Development Act would operate. Section 124(1) provides that to the extent of any inconsistency between a region planning scheme and a local planning scheme, the region planning scheme is to prevail to the extent of that inconsistency.

Judge Parry considered the relevant legislative provisions and decided cases and concluded that the MRS is not inconsistent with the local planning scheme in so far as the local planning scheme requires development approval for the proposed development (to the extent that it is on land zoned under the local scheme). His Honour found the earlier observations of Chief Justice Burt in UWA “unpersuasive” and declined to follow the reasoning in that case.

The outcome reinforces the point made in other planning cases that region schemes and local planning schemes do not perform precisely the same role, and that the approval of a local government under a local planning scheme may, and usually does, involve greater attention to precise local planning needs for the particular locality and community than is the case in respect of approval under the MRS.

For further information in regard to the above, contact Craig Slarke on 9424 6223 or cslarke@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.