

Failure of JDAP to Defend Decision

By Denis McLeod

The impression given by the Department of Planning (DoP) when the Development Assessment Panel (DAP) system was introduced in 2010 was that DAPs would stand in the place of local governments in the development approval processes for the more significant development proposals. The way the DAP system operates, government appointed experts form the majority on every DAP, and the impression given was that the DoP which is responsible for the DAPs, would provide the support to ensure that the DAPs could perform the same role in regard to the development approval processes as had been performed by local governments.

If that was the impression gained from the way the DoP presented the DAP system to the public, then it is not accurate. The DoP does not consistently hold to the principle that DAPs perform the same development control function as local governments in dealing with DAP Applications.

CASE COMMENT: LENZ V SHIRE OF SERPENTINE-JARRAHDALE

The deficiency in the DoP conception of the DAP's responsibility has been demonstrated in a case which is presently before the Supreme Court. In the case *S & L Lenz v Shire of Serpentine-Jarrahdale & Ors*, an application for a commercial development in Serpentine-Jarrahdale was valued at \$7m when the application was made in 2014. At that time, \$7m was the bottom of the range for mandatory DAP applications.

Ultimately, the Metro East Joint Development Assessment Panel (MEJDAP) gave planning approval. However, a commercial competitor of the proposed development has commenced proceedings in the Supreme Court for judicial review of the MEJDAP decision, and also challenging the validity of the provisions in the Shire's local planning scheme which deal with the effect to be given to an Outline Development Plan (Structure Plan). The MEJDAP has been named as a respondent in the Supreme Court action. In ordinary circumstances, the responsible decision-maker would participate in the Supreme Court challenge and defend the decision made on the development application, and at the same time deal with the invalidity challenge in regard to any provision of the local planning scheme that was relevant to the planning approval process.

Surprisingly, the MEJDAP at the same time as filing a Memorandum of Appearance in the action, has also filed a Notice that it will abide the decision of the Supreme Court in the action. The effect of that notice is to say that the MEJDAP will take no active role in the proceedings, and will just wait to see what decision the Supreme Court makes.

POLICY OF DOP IN DEFENDING DAP DECISION

Ordinarily the responsible local government would be an active respondent in an application for judicial review of one of its decisions. However, the MEJDAP was substituted for the Council as a decisionmaker by clear statutory provisions, and by what would have been thought to be a clear and deliberate policy of the DoP. The policy of the DoP is perplexing, as it is prepared on the one hand for the DAP to make the decisions in DAP applications, but is not willing on the other hand for the DAP to undertake the full role of the decision-maker in defending the application for judicial review.

If judicial review of a SAT decision was sought in the Supreme Court, then it would be appropriate for the SAT to lodge a Notice of Intention to Abide the decision of the Court. The parties in the SAT review would have standing and could be relied on to present the opposing arguments. That is a common position adopted by inferior courts and tribunals when their decisions are challenged in appeals or judicial review in the Supreme Court. However, it is not ordinarily proper for a first instant planning decision-maker, such as a local government, the WAPC or a DAP to do so. The result of such an approach is that a case in defence of the planning decision is not put to the Court, making it more difficult for the Court to make the correct and preferable decision in all the circumstances.

The decision of the DoP to take no active role in the present matter is more puzzling in view of the fact that the provisions which are the target of the invalidity challenge are provisions which the DoP required to be included in the structure planning provisions of local planning schemes, and are part of the 2002 draft model text provisions relating to Structure Plans. If the DoP is not prepared to defend the validity of provisions which it required local governments to incorporate in their schemes, then the situation is odd indeed.

CONCLUSION

If the decision made by the DoP in this case is an indication of the way in which the DAPs will respond to any other action for judicial review of DAP decisions, then that presents a real problem for local government, and for the public interest. A local government might readily join as a respondent and argue in support of a decision it recommended. But if a DAP was to make a decision on a DAP application which was inconsistent with the views of the responsible local government, then the responsible local government may be left to defend a decision it does not support in the application for judicial review. That would be an absurd and intolerable situation. What is likely to happen in that situation is, if the local government is joined as a party, the local government may very well indicate that it will abide the decision of the Court, and if the developer for some reason decides not to participate in the proceedings, the Court could be left with no effective respondent.

The simple fact is that if the DoP intends DAPs to stand in place of local governments as a decision-maker, it should be prepared to ensure that the DAPs are provided with the resources to defend decisions they have made.

If you would like to discuss any of the matters raised in this article further, please do not hesitate to contact Denis McLeod at dmcleod@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.