

Public Works – Power of local governments to undertake public works without obtaining planning approval

By Denis McLeod

The issue

The decision of the majority in the Court of Appeal in the case ***City of Gosnells v Reid***^[1] is significant as to the question whether it is open to a local government in WA to undertake a public work without first obtaining planning approval, by relying on s.6 of the *Planning and Development Act 2005* (**P&D Act**). This article discusses that issue, the different judicial opinions, and the decision of the majority in the Court of Appeal that leaves the option open.

Discussion of the issues

S.6 of the P&D Act is headed '**Act does not interfere with public works**'. Subs.6(1) provides –

'(1) Subject to subsections (2) to (4), nothing in this Act interferes with the right of the Crown, or the Governor, or a public authority, or a local government –

- (a) to undertake, construct or provide any public work; and
- (b) to take land for the purposes of that public work.'

Subss.(2) and (3) of s.6 set out the straightforward matters that a local government or other government body is to observe before undertaking the public work.

Under subs.(2), the right to carry out public work is to be exercised having due regard to –

- the purpose and intent of any planning scheme that has effect in the locality where, and at the time when, the right to carry out the public work is exercised; and
- the orderly and proper planning, and the preservation of the amenity of the locality at that time; and
- any advice provided by the responsible authority in the course of the consultation required under subs.(3).

Under subs.(3), at the time when a proposal for any public work is being formulated, the responsible authority under the

relevant planning scheme is to be consulted on the issues of the purpose and intent of the scheme, and the issues of orderly and proper planning and preservation of amenity dealt with under subs.(2).

S.6 appears on the face of it to excuse local governments and other government bodies from the obligation of complying with the development approval provisions of a planning scheme before undertaking a public work. It has commonly been relied on by local governments proposing to undertake a public work on land they own or control. Before the decision in the case the subject of this article, the power or right of a local government to undertake a public work under the authority of s.6 of the P&D Act, had not been questioned in any published Court decision.

S.6 background

- S.6 and its predecessor in the planning legislation, has since 1929^[2] commonly been relied on by local governments proposing to undertake a public work on land they own or control without obtaining planning approval.
- The term ‘public work’ is defined in s.4 of the P&D Act to mean *inter alia* – ‘(a) any public work as defined in the *Public Works Act 1902 (PW Act)* section 2’.
- S.2 of the PW Act gives a very extensive definition of the term ‘public work’. The definition was clarified to some extent by amendment of the PW Act in 2024, but at all material times, the term was defined to include works that a local authority is authorised to undertake, construct or provide under the PW Act or any other Act.
- The question then arises as to what works a local government is authorised to undertake under the PW Act or any other Act.

Power of a local government to carry out public works under the local government legislation

Under the *Local Government Act 1960* (WA) (**LG Act 1960**), the powers of a local government to carry out a wide range of stipulated works were prescribed. In doing so, the Act was said to have taken a prescriptive approach to the powers of local governments. However a different approach was adopted under the *Local Government Act 1995* (WA) (**LG Act 1995**). Part 3 of the LG Act 1995 deals with Functions of a Local Government, and in the Minister’s foreword to the draft of the ‘Bill for a new *Local Government Act*’ published in December 1994, the Minister’s summary of significant proposals for the new Act explained the executive functions of local governments under the new Act as follows –

‘In performing its executive functions, a local government will be able to provide such **services and facilities** as it considers appropriate for the good government of people in its district.

However, a local government will have to satisfy itself that the services and facilities provided do not duplicate unnecessarily the **services or facilities** provided by other spheres of government or other public or private bodies, but integrate and coordinate with them.

Local governments will also have to ensure, as far as reasonable and practicable, that the **services and facilities** provided are managed efficiently and effectively. These provisions are aimed at ensuring that public resources are used in an appropriate manner without unduly limiting the powers and autonomy of a local government.’

(Emphasis added).

Then in the second reading speech on the *Local Government Bill 1995*^[3], the Minister for Local Government said –

‘I now outline the broad background of the legislation. A major change introduced in the Bill is devolution to the local level of authority and decision making in many areas of local government activity. Whereas under the current Local Government Act there are approximately 150 areas where local governments must seek the approval of the Minister or Governor, the new Act will reduce these to about 30. This should enhance the efficiency of local governments in their overall operations. Local governments will also have increased functional autonomy. In contrast with the specific powers in the current Act, 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.’

(Emphasis added).

It is important to note that there was reference in the Minister’s speech, to local governments having general powers to provide **services and facilities** for the good government of people in their district.

Part 3 of the LG Act 1995 deals with the functions of local governments, and the following provisions are of particular relevance:

- In s.3.1(1), it is provided that the general function of a local government is to provide for the good government of persons in its district.
- Under subs.(3) of s.3.1, it is provided that – ‘A liberal approach is to be taken to the construction of the scope of the general function of a local government.’
- Under s.3.4, it is provided that the general function of a local government includes legislative and executive functions.
- The executive functions of local governments are dealt with in Division 3 of Part 3, and in s.3.18 headed ‘Performing executive functions’, it is provided significantly as follows –

‘(1) A local government 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 this Act.

(2) In performing its executive functions, a local government may provide **services and facilities**. ...’.

(Emphasis added).

That reference to the provision of services and facilities harks back to the second reading speech of the Minister for Local Government when introducing the *Local Government Bill 1995* into Parliament, quoted above, where he stated that local governments would have general powers to make laws and provide services and facilities for the good government of people in their district. He said those are commonly referred to as general competence powers. That was clearly the intent of the

government, and one may assume the intent of the Parliament, when passing the LG Act 1995 into law.

Those provisions relating to the undertaking of public works by local governments were considered by the first instance Judge in April 2023 in **Reid v City of Gosnells**¹. She considered the arguments in relation to the general competence powers of local governments, and the asserted power of local governments to undertake public works under the provisions of s.6 of the P&D Act, but concluded that the power of local governments to undertake public works were far more circumscribed than is suggested by the provisions of the LG Act 1995 referred to above. At [122]-[124] of her Reasons, the trial Judge referred to arguments put by the Applicant and said –

‘122 I agree that these processes, and the legislative framework as a whole (including s 11 of the *Public Works Act*), indicate that Parliament intended that there be oversight of works done by a local government.

123 If a local government wants to undertake a specific public work, it can include that work in its scheme or apply for development approval under the region planning scheme and local planning scheme. If a local government wants to undertake particular classes or kinds of public works, it can designate them as public works in its scheme. In each case, there will be oversight.

124 If, as the City contends, the City had the right to undertake public works due to the power given in s 3.18, there would be no oversight of such public works. Not only would the City not need approval under its local scheme, it would also not need (unlike Non-Crown public authorities) approval under the applicable region scheme.’

At para.[129], the trial Judge further concluded –

‘129 ... I do not accept the City’s contention. I do not accept that the powers given to a local government by s 3.18(2) (read with s 3.1 and s 3.18(1)) of the *Local Government Act* give a local government the right to undertake Public Works.’

What was challenged in the *Reid* case at first instance

The subject matter of the **Reid** case at first instance was a proposal by the City of Gosnells (**City**) to undertake the construction of a new works depot, or Operations Centre, on land which it owned in Wattle Grove, which was a disused and partly rehabilitated landfill site. The proposed Operations Centre was to include a waste recycling facility and an animal holding facility, which included kennel for impounded dogs.

The Plaintiff, Reid, resided on land which was located near to the boundary of the former landfill site, and approximately 500m distant from the proposed Operations Centre. In an attempt to act entirely transparently, the City had decided not to use the public work provisions in s.6 of the P&D Act, but decided to take the route of planning approval. It obtained the planning approval of the WAPC for the purpose of the MRS (which it required under the MRS as it then was), and then undertook the process of considering and determining its own application for planning approval under its own Local Planning Scheme No. 6 (**LPS 6**). The City ultimately resolved to give planning approval to the proposal, and the **Reid** case deals with Reid’s challenge to the validity of the planning approval which the City granted to itself.

Reid’s challenge asserted that in approving the Operations Centre, the City approved six uses that have an ‘X’ permissibility

designation in LPS 6. The trial Judge rejected the challenge as to four of the six alleged 'X' uses, and the Court of Appeal unanimously held that the trial Judge erred factually in regard to one of two remaining alleged 'X' uses, but was correct in finding that the proposed Operations Centre, as it included the animal holding facility, would involve the keeping of dogs, and as such fell within the definition of the use class 'Kennels' which was an 'X' use in the Rural zone. It was on that narrow basis that the City's purported planning approval was at fault under the Court of Appeal decision.

As part of the City's response to the Reid challenge at first instance, the City asserted that the challenge to the validity of the planning approval was futile, as the City had the power under s.6 of the P&D Act to undertake the Operations Centre development as a public work without requiring planning approval. Reid argued in response that s.6 did not give the City power to carry out the Operations Centre development as a public work. As explained above, the trial Judge took the view that a local government could only rely on s.6 for a public work where it has a right to carry out the public work confirmed by a written law such as a statutory provision or a planning scheme.

Court of Appeal decision

The City took the first instance decision on appeal to the WA Court of Appeal. There were six grounds of appeal, 3-6 of which dealt with the decision of the Council to grant planning approval under its LPS 6, and grounds 1 and 2 dealt with the asserted power of the City to undertake a public work under the provisions of s.6 of the P&D Act. The Court of Appeal unanimously agreed on upholding ground of appeal 6, but the majority Buss P and Vandongen JA did not agree with the trial Judge and Lundberg J, the third member of the Court of Appeal, in regard to grounds of appeal 1 and 2 which related to the s.6 argument. However, for reasons explained by the majority, the upholding of ground of appeal 6, and the ruling out of the trial Judge's decision on grounds of appeal 1 and 2, did not alter the ultimate outcome, and the appeal was dismissed.

Notwithstanding the dismissal of the appeal, the views offered by the majority of the Court of Appeal Judges on the P&D Act s.6 arguments, remain significant. The dismissal of the appeal was related essentially to the facts of the case and the analysis by the trial Judge of the elements of the proposed Operations Centre in terms of the relevant use class definitions, and the finding that the animal holding facility fell within the 'Kennels' use class in LPS 6, and as such was an 'X' use which the City could not approve in the Rural zone. The use class issues, and specifically the finding that the animal holding facility fell within the 'Kennels' definition, though trivial in the context of the City's much broader intentions for the new Operations Centre, were fatal to the appeal.

However, the position taken by President Buss and Vandongen JA as the majority of the Court of Appeal, in regard to the public work issue, is significant. Their views are at odds with the views of Lundberg J as the third member of the Court of Appeal, and the views of the trial Judge, and are potentially important in the context of local governments proposing to carry out public works on land they own or control.

It is important to note that the City did not in fact purport to exercise the s.6 power to undertake the Operations Centre development as a public work. The possibility of it being able to do so had been raised in argument in the trial Court and the Court of Appeal, but the s.6 provisions, and particularly the requirements of subss.(2) and (3), had not in fact been engaged in the **Reid** case.

The trial Judge had concluded^[4] that the proposed Operations Centre was not a public work that the City had the right to undertake within the meaning of s.6 of the P&D Act, and nor was it a collection of individual public works. Having expressed

those conclusions at [151], the trial Judge concluded ‘... it required development approval’.

Buss P and Vandongen JA in their joint Reasons as the majority of the Court of Appeal, noted that the ultimate effect of the decisions of the trial Judge and Court of Appeal was that the City was prohibited from commencing to undertake the proposed Operations Centre development **under the development approval granted on 21 January 2022.**

BUT, significantly as to the option of any local government in the future undertaking a public work under the authority of s.6 of the P&D Act, the majority at [188] of the Appeal Court Reasons said –

‘In our view it is unnecessary to decide whether the primary judge was correct to conclude that the Proposed Development was not a ‘public work’ for the purposes of s 6 of the *Planning and Development Act*. This is because the relief sought by the first respondent would not be rendered inutile even if the Proposed Development is a ‘public work’.’

At [190], the majority, having noted that the judicial review remedy granted by the trial Judge would stand, went on to say –

‘... This means that the appellant must ... either obtain a different validly granted development approval, or, as a responsible local government operating under the *Local Government Act*, decide whether it is open to proceed with the Proposed Development by exercising different powers, including by deciding whether it has the right to undertake, construct or provide the Proposed Development as a ‘public work’.’

Conclusion on s.6 issue

It is apparent from those comments of the majority in the Court of Appeal, that the option of a local government undertaking public works without planning approval, under the authority of s.6 of the P&D Act, has not been ruled out by the decision and Reasons of the trial Judge and the conclusions of Lundberg J, in **Reid**. The s.6 route to undertaking public works still remains open to a local government prepared and able to satisfy the amenity and orderly and proper planning requirements in subss.(2) and (3).

It is worth noting that the planning approval option for local governments proposing public works has been made easier by the new MRS which came into operation on 31 March 2025, as planning approval under the MRS generally will not be required for developments on zoned land.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For any comments or questions on this article please contact Denis McLeod (dmcleod@mcleods.com.au).

[1] [2024] WASCA 155: 15 December 2024. The term ‘the **Reid** case’ is used in this article to refer where applicable to the Court of Appeal decisions, the decision of the case at first instance, **Reid v City of Gosnells** [2023] WASC 48, and sometimes the first instance and appeal decisions in conjunction.

[2] The *Town Planning and Development Act 1928* (WA) (**TP&D Act**) in s.32, contained provisions which were essentially the

same as those in s.6 of the P&D Act. The TP&D Act came into operation in 1929.

[3] Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 August 1995, 7547.

[4] At [151] of the trial Judge's Reasons.

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