

# Return of the ‘seriously Entertained Planning Proposal’ Principle

By

The case of *Nicholls and Western Australian Planning Commission* [2005] WASAT 40; (2005) 149 LGERA 117 (**Nicholls**) identified a 4 stage process for determining the relevance and weight to be given to draft planning instruments. *Nicholls* explained that the first stage as follows:

*In jurisdictions where there is no statutory requirement to take into consideration a draft planning instrument (or policy or a draft amendment to a planning instrument or policy) once it has reached a certain specified stage, the authority or tribunal must consider whether the draft constitutes a seriously-entertained planning proposal. If it is a seriously-entertained planning proposal, it is a relevant matter for consideration in relation to the planning assessment.*

The application of the ‘seriously entertained planning proposal’ principle was affected by the introduction of clause 67(b) of the deemed provisions in Schedule 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015* which provides that:

(b) the requirements of orderly and proper planning including any proposed local planning scheme or amendment to this Scheme that has been advertised under the *Planning and Development (Local Planning Schemes) Regulations 2015* or any other proposed planning instrument that the local government is seriously considering adopting or approving.

Clause 67(b) has 2 limits and applies:

1. *any proposed local planning scheme or amendment to this Scheme that has been advertised under the Planning and Development (Local Planning Schemes) Regulations 2015; or*
1. *any other proposed planning instrument that the local government is seriously considering adopting or approving.*

In relation to the second limb, in *Terra Spei Pty Ltd and Shire of Kalamunda* [2015] WASAT 134, the Tribunal held that ‘any other proposed planning instrument’ must be a planning instrument that the local government has the power to approve or adopt. The recent SAT case of *Radha Soami Satsang Beas Australia Pty Ltd and City of Swan* [2019] WASAT 24 has determined whether consideration can be given under the first limb of clause 67(b) to proposed planning instruments that the local government can initiate but cannot ultimately approve or adopt.

## Factual Background

The applicant is a spiritual and philosophical organisation that operates spiritual centres. It applied to the City of Swan for development approval to use land in the district as a place of worship and to carry out associated development works. The City refused the application on the basis that the proposed development was inconsistent with the planning objectives of the

particular district area. The applicant subsequently sought a review of the City's decision by the SAT.

In order to support its determination, the City relied on 5 draft planning instruments, none of which could be adopted or approved by the City itself. Among the 5 instruments, 1 document could be adopted or approved by the Western Australian Planning Commission and another, by Parliament.

The City argued that these documents should be given due regard under clause 67(b) of the deemed provisions.

The Tribunal held that the words 'the requirements of orderly and proper planning' gave clause 67(b) a broad application.

### **Decision of the SAT**

The Tribunal at [40] stated that:

*... In my view, if a planning proposal (other than a local planning scheme or other planning instrument that may be proposed by a local government) is a 'seriously entertained' planning proposal, applying the test in Nicholls, it is likely that orderly and proper planning would require regard to be had to that planning proposal, with the weight to be given dependant on all of the circumstances...*

Therefore draft planning instruments, which local governments can initiate but not approve (e.g. structure plans) are potentially relevant as seriously entertained planning proposals. The weight to be accorded to these documents will depend on the satisfaction of the remaining stages identified in *Nicholls*.

In relation to the draft planning instruments under consideration in the case, only one was found to be a 'seriously entertained' planning proposal. The Tribunal however, found that little to no weight could be given to this instrument.

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 please contact Alicia Nguyen by email to [anguyen@mcleods.com.au](mailto:anguyen@mcleods.com.au).