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Reviewing someone else's approval in the SAT

By Peter Wittkuhn

Western Australia's *planning* laws do not recognise any right of an objector to a proposed development to institute review proceedings to challenge development approvals in the State Administrative Tribunal (**SAT**). In the SAT, only an aggrieved applicant can seek review of development refusals or development conditions. However, in *Polo Enterprises Australia Pty Ltd and Shire of Broome* [2013] WASAT 98 (***Polo No. 1***), the SAT determined that it does have jurisdiction *in specific circumstances*, to entertain a challenge to someone else's approval granted *under the Local Government Act 1995*, or under regulations or local laws made under that Act.

Competing applications for approval

In *Polo No. 1*, the Council received competing applications to stage a beach polo event on Cable Beach, specifically, for the same portion of beach space and for the same weekend. The approvals were sought under a Local Government Property and Public Places Local Law. The Council undertook a selection process and resolved to simultaneously approve one application and to refuse the other. The unsuccessful applicant sought review in the SAT. The Shire accepted that the applicant had a right to seek SAT review *in respect of the refusal of its application*. However, the Shire argued that the only decision reasonably open to the SAT on that review would be to uphold the refusal, because another party had been granted an approval for the same place and time, and the SAT had no jurisdiction to set aside the successful applicant's approval.

SAT decision on jurisdiction

The SAT determined that it did have jurisdiction to undertake a merits review of the two competing applications, and consequently, had jurisdiction to set aside the successful applicant's approval if satisfied that the unsuccessful applicant made a better case. Senior Member McNab reasoned as follows:

> '19. The issue before the Tribunal in this case is the proper characterisation of the decision, or decisions, under review. The context here is between two competing applicants who, in the one transaction, secured, in substance, simultaneous decisions of approval... and refusal...
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> 20. I do not wish to be taken as suggesting that the form or timing of such a decision necessarily dictates the rights of review. **If an administrative 'transaction' can be characterised as including a decision relating to a refusal, which is the case here, then in my opinion the review of that decision consequently opens up all directly material issues relating to that refusal, including in effect the fate of the rights held by the successful applicant.'** [emphasis added]

Following a subsequent hearing, the SAT upheld the Shire's selection of the successful applicant on the merits as they stood

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at the time of the Tribunal's decision.

Polo No. 2

Further litigation ensued in respect of a subsequent year's beach polo event. In that instance, the elected Council resolved at a Council meeting to approve a proponent's event. Another proponent had lodged a competing application two days before that Council meeting, and the report to Council (which had been written some time before that) did not of course allude to the competing application, though it did allude to that competing applicant having stated an *intention* to lodge a competing application. In *Polo Enterprises Australia Pty Ltd and Cable Beach Polo Pty Ltd* [2014] WASAT 3 (***Polo No. 2***), the SAT distinguished *Polo No. 1*, noting that there were no truly competing transactions considered at the critical decision making point. Senior Member McNab added:

'Nor do I think that the Tribunal can consider imputed or constructive or corporate knowledge of an application for a decision to be made as the same as the actual making of a relevant decision.'

The SAT's decision in *Polo No. 2* was unsuccessfully challenged in the Supreme Court: *Polo Enterprises Australia Pty Ltd v Shire of Broome* [2014] WASC 120. Polo Enterprises Australia Pty Ltd is currently pursuing a further appeal to the Court of Appeal division of the Supreme Court.

Implications for local government

The important implication of the *Polo* litigation is that, in particular circumstances, a person can launch a challenge in the SAT to someone else's statutory approval granted under the *Local Government Act* or under subsidiary legislation made under that Act. At any rate, that is the interpretation of the *Local Government Act* rights of review on the case law as it presently stands. As such *Polo No. 1* does make inroads into the finality of a successful applicant's statutory approval. The classic situation will be where two applicants apply for competing statutory approvals that are mutually exclusive, and the competing applications are determined simultaneously as part of the same administrative transaction. The right to challenge does not extend, however, to tendering processes: this was determined by the earlier case *Byrne and Shire of Broome* [2006] WASAT 376. As such, the most likely application of *Polo No. 1* will be to instances of local law approvals in respect of competing uses of public land, where no commercial tendering component is involved. However, the full scope of the principle could remain for development in subsequent cases, and might also come under consideration for legislative clarification.

For further information in regard to the above, contact Peter Wittkuhn on 9424 6220 or pwittkuhn@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.