

Section 70A Notifications on Title as a Condition of Development Approval

By Denis McLeod

It has become common for local governments when giving planning approvals to impose a condition requiring the owner to consent to the lodgement on the title or titles on the subject land of a notification under section 70A of the Transfer of Land Act 1893. The purpose of such a notification is to give notice of circumstances which may affect the amenity or enjoyment of the land. Such conditions are most commonly required in the case of residential developments. Examples of the circumstances where section 70A notifications have been required are multiple or grouped dwelling developments likely to be affected by factors such as aircraft noise, traffic noise, or industrial noise or odours.

STATUTORY FRAMEWORK

Section 70A relevantly provides:

1. Where, in relation to land under the operation of this Act —

- the local government of the district in which the land is situated; or
- a public authority,

considers it desirable that proprietors or prospective proprietors of the land be made aware of a factor affecting the use or enjoyment of the land or part of the land, the local government or the public authority may, on payment of the prescribed fee, cause a notification of the factor to be prepared in an approved form and lodged with the Registrar.

2. Where —

- a notification is lodged under subsection (1); and
- the written consent of the proprietor of the land accompanies the notification,

the Registrar shall endorse the certificate of title for the land to that effect.”

A notification under section 70A may thus be required where a local government or a public authority considers it desirable

that proprietors or prospective proprietors of the land be made aware of a factor affecting the “use or enjoyment” of the land or part of the land. The written consent of the proprietor is also required in order for the Registrar to then endorse the certificate of title for the land with the notification.

PREVIOUS CASES CONSIDERING PLANNING CONDITIONS IMPOSING NOTIFICATIONS

The ability of a planning authority to impose a requirement on an owner to execute a notification was initially questioned by the Town Planning Appeal Tribunal in *Compliance Admin Serv*

“[a] condition [that] serves to do no more than recall on title that which has already been approved ... cannot ... be a proper basis upon which the specific powers of section 70A [of the TL Act] are to be utilised.”

However, in *Antonias and Town of Vincent* [2006] WASAT 303; (2006) 45 SR (WA) 327 at [39], the State Administrative Tribunal held that this aspect of the decision in *Compliance Admin Services Pty Ltd v Town of Claremont* was:

“...clearly in error, because a condition of development approval which requires notification on title of the continuing effect of another condition can, in certain circumstances, have a proper planning purpose, be reasonably referable to the proposed development and be reasonable and appropriate.”

In *Antonias and Town of Vincent* the Tribunal found that where a condition of development approval imposes a continuing obligation on the owner or occupier for the time being of the land, which affects the use or enjoyment of the land, and is unusual, it may be appropriate to impose a further condition requiring the proponent to provide written consent to the local government to the notification of the terms of the condition on the title under section 70A.

In addition to a situation where a notification advised prospective purchasers of an unusual condition of development approval that imposed continuing obligations, the State Administrative Tribunal has at least acknowledged the possibility of a condition of planning approval requiring notification of potential external impacts of commercial or nonresidential activities which may affect residential amenity: see *Miragliotta and Town of Vincent* [2008] WASAT 207 at [29]. However, some conditions of this nature have been disallowed where the external impact identified in the notification is obvious, although the planning purpose of the condition was not questioned: *Real Estate Institute of Western Australia and City of Subiaco* [2009] WASAT 111 at [49].

CASE UPDATE: A MORE RESTRICTIVE APPROACH?

In the recent State Administrative Tribunal case of *43 McGregor Road Pty Ltd and Presiding Member of the Metro Central JDAP* [2017] WASAT 127, the JDAP imposed a condition requiring the owner to consent to a s.70A notification being lodged on the relevant certificates of title to alert prospective purchasers of the proposed 258 multiple dwelling units that the residences may be affected by transport noise and odours in certain circumstances.

The Tribunal found on the evidence before it that the future residents of the proposed development would have the result of significantly increasing the number of residences within the locality, which will be potentially affected, from time to time, by ‘odorous air’ (at [65]). The Tribunal additionally found that the proposed development would have the result of significantly increasing the number of residences within the locality, which will possibly be affected by transport noise to varying degrees

at different locations within the site (at [67]).

Whilst the external impacts the subject of the notification were thus established, and were moreover not considered to be sufficiently obvious as to not warrant a notification, the Tribunal found that the condition requiring the notification was not imposed for a proper planning purpose, stating (at [69] – [73]):

“There would appear to be a proper planning purpose of ameliorating any amenity impact on the increased numbers of residents who it is planned would live within the development. There is also a proper planning purpose in considering whether or not there is a sufficient conflict between the land uses, given the relevant proximities, and where the proposed development is one of relatively high density residential dwelling in close proximity to a major transport corridor and to an existing land use with known odour emissions, whether a greater buffer should be required between those uses. However, condition 9 is not directed to any of these purposes and cannot achieve any of these purposes.

In this case, it is difficult to see how a notification warning prospective buyers about those amenity impacts has a proper planning purpose.

If the amenity impacts are sufficiently ameliorated by relevant details of the proposed development, or by way of conditions of approval that add additional aspects of amelioration, then what is the purpose of the notification? On the information before the Tribunal, the answer to that question is not apparent. If the purpose is to warn of potential amenity impacts, in circumstances where those impacts have not been sufficiently and appropriately ameliorated, then why has the proposed development been approved? Warning of the impact cannot ameliorate or remove the impact, so again, what does it achieve?

In this case, it is impossible to see how a notification advising potential purchasers that there are potential amenity impacts can have any effect on the existence of those amenity impacts, or the need for there to potentially be more of a buffer between inconsistent land uses.

If the purpose of the condition is to make potential purchasers aware of a potential negative amenity impact, while that might be a desirable goal at large, the Tribunal is not persuaded, if that is all it is for, that it has any planning purpose.”

The Tribunal thus considered a notification merely advising of amenity impacts did not in this case at least serve a proper planning purpose. Nonetheless, it did not hold that a section 70A notification condition would never satisfy the proper planning purpose test. The Tribunal recognised that there have been a number of previous decisions of the Tribunal where section 70A notification conditions were upheld, and probably for that reason left open the possibility that a notification might be appropriate in other cases.

COMMENT

The decision in the 43 McGregor Road case represents a serious setback for local governments attempting to strike a responsible balance between the interests of developers and the interests of prospective purchasers of lots created in an area subject to potential environmental or amenity impacts. A section 70A notification gives an appropriate warning to potential lot purchasers of likely environmental or amenity impacts that may affect the use and enjoyment of the land the subject of the notification. To that extent a notification serves a planning purpose by making prospective residents aware of

potential impacts on residential amenity that may not otherwise be obvious from a physical inspection of the land itself. Where there are factors that may affect the use or enjoyment of land it is arguably in the interests of orderly and proper planning for those factors to be made known to prospective purchasers, who can then make an informed decision when purchasing a lot. In practical terms, a planning condition is the only mechanism in most cases for a notification to be imposed for this purpose. Where a notification does not give fair warning of such issues, the most common consequence is that the owners/ occupiers of the new lots will then pester the local government with complaints and demands for a remedy where anticipated environmental or amenity impacts do occur.

A local government contemplating the imposition of a condition on a development approval requiring an owner to consent to the lodgement of a section 70A notification may need to obtain legal advice as to whether the circumstances of that case are subject to the Tribunal determination in the 43 McGregor Road case, or whether in the circumstances of that case it can be said that the proposed section 70A notification condition does have a proper planning purpose.

For further information in regard to the above, contact Denis McLeod or David Nicholson on 9383 3133 or via mcleods@mcleods.com.au. The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.