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# **Planning Decisions of Interest to Local Government Planners**

**LGPA Breakfast Seminar**

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# Local Heritage Significance

The Moullin principle –

- Heritage listing of limited significance
- Heritage status only one consideration
- MHI's used wrongly

# Sharpe v Town of Vincent

- Moullin principle dead



- Demolition of a State heritage place is rarely appropriate and should require the strongest justification. Demolition of a local heritage place should be avoided wherever possible, although there will be circumstances where demolition is justified. The onus rests with the applicant to provide a clear justification for it.
- Demolition approval should not be expected simply because redevelopment is a more attractive economic proposition, or because a building has been neglected. Consideration of a demolition proposal should be based upon the significance of the building or place; the feasibility of restoring or adapting it, or incorporating it into new development; the extent to which the community would benefit from the proposed redevelopment; and any local planning policies relating to the demolition of heritage places.

## SPP 3.5

### The rise of local heritage

- Demolition of a local heritage place should be avoided wherever possible
- The applicant has the onus to provide a clear justification for demolition
- Demolition should not be expected simply because of cost, or because the building is neglected.

# Feasibility and Capability of Conservation

- It is necessary to consider whether a building is reasonably capable of conservation, and whether it is feasible to do so;
- Cost and inconvenience to the owner are an aspect of that consideration;
- Cost is not the determining factor. The cost of conservation can be considerable, but conservation can still be feasible;
- Hardship to an owner is not a relevant consideration.

# Mobile Phone Towers



## SPP 5.2

- Telecommunications infrastructure is essential and beneficial to modern life
- Towers must be elevated
- Radiation exposure unarguable
- Cannot argue that perceptions are relevant



- ‘Unless it is impractical to do so telecommunications towers should be located within commercial, business, industrial and rural areas and areas outside identified conservation areas.’
- No reference to sensitive receptors in SPP 5.2

‘Where the facility is proposed to be located near a community sensitive site, including residential areas, childcare centres, schools, aged care centres, hospitals, playgrounds and regional icons:

- I. the community has been fully consulted, and wherever possible has agreed to the facility; and
- II. alternative less sensitive sites have been considered; and
- III. efforts have been made to minimise electro magnetic radiation exposure to the public.’

# What's the use?

Pearce v City of Wanneroo [2010] WASAT 77

‘Having regard to the evidence as to what activity is, in reality, proposed by development application, it is for the planning authority to characterise the proposed land use and then determine the application on its planning merits. As it would be contrary to orderly and proper planning to grant development approval for an illegal activity, a sham development application that, in reality, proposes an illegal activity will generally be refused development approval.’

## Su v City of Canning [2011] WASAT 34

- 6 bedroom 'grouped dwellings' found to be 'residential buildings'.

- Generally speaking it is reasonable and appropriate for a local government to accept at face value the information provided in a development application.
- A local government is however entitled to consider all of the evidence as to what activity is proposed and then characterise the land use accordingly. If the evidence shows that the proposal is a sham and that the intention in fact is to use it for a different and illegal purpose, a local government is entitled to refuse the application.

- A decision to refuse on the basis the application is a sham or a front for illegal activity must be made on the basis of evidence. It is not open to refuse a proposal merely because of the fear of illegal activity, or the suspicion that conditions of the approval will be breached.
- The location and design of a development can be relevant in assessing how it will function and the activities it is intended will be carried out in it.

# Sitting on the fence



Factors relevant to whether approval required includes:

- Height – greater than 1.8m?
- Materials – not standard solid metal or timber?
- Location – behind front setback?



# Approach to Construction of Schemes

- Purposive approach has been favoured
- Possible return to more orthodox approach?

# Cost of Appeal

## Section 105 (12) SAT Act

‘(12) In the case of a decision in a proceeding coming within the Tribunal’s review jurisdiction, any leave to appeal granted to the decision-maker is to be granted on the condition that the costs of each other party are to be met by the decision-maker, unless the court considers that it would be unjust or unreasonable to impose that condition, whether generally or in respect of the costs of a particular party.’

# Approach to Costs

- ‘It is now well established that the award of costs, by legislation and rule, is generally discretionary. Section 66 rule 1 of the Rules of the Supreme Court 1971 (WA) provides that the costs of and incidental to all proceedings shall be in the discretion of the court. But the judicial discretion is not exercised as *Deborah under a palm tree*: [citation omitted]. It is a discretion ‘*governed by rule not by humour: it must not be arbitrary, vague and fanciful; but legal and regular*’ [citation omitted].’

