



Mediation in the SAT and Confidentiality

‘See no evil, hear no evil, speak no evil’

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Standard approach

- mediation in SAT
- amended plans
- section 31 invitation to reconsider
- 'behind closed doors' reconsideration

SAT Act – section 55

Evidence of anything said or done in the course of a compulsory conference or mediation is not admissible at any later stage of the proceeding unless:

- (a) all parties agree to the admission of the evidence; or
- (b) it is evidence of directions given or orders made at a compulsory conference or mediation or the reasons for those directions or orders

SAT Act – section 54(6)

(6) Unless the mediator directs otherwise, the mediation is to be held in private.

- “held in private” is associated with confidentiality
- No unauthorised use of confidential information obtained in circumstances of confidence
- Information obtained in a mediation will generally be confidential information obtained in circumstances of confidence

SAT decisions – *Ridgecity Holdings Pty Ltd and City of Albany* [2006] WASAT 97

- no section 31 invitation
- amended plans from mediation rejected by Council
- leave to substitute amended plans sought, and opposed by Council
- SAT decided that application to amend the plans was independent of mediation

SAT decisions – *Jacobs and City of Subiaco* [2007] WASAT 84

- no section 31 invitation
- Council considered but rejected amended plans ‘behind closed doors’ with confidential report
- applicant proceeded with original plans, but sought order for copy of report
- Tribunal refused to order provision of report
- broad view should be taken of what is “in the course of a mediation”
- steps taken following the mediation can be ‘in the course of the mediation’, as is reflected in the common practice of ‘behind closed doors’ reporting by local governments

SAT decisions – *Wiseowl Investments and Shire of Busselton* [2010] WASAT 122

- section 31 invitation following mediation
- expert reports obtained by Council pursuant to Tribunal order, and were sought by applicant
- Reports submitted to Council under section 31 process considered to be part and parcel of mediation process, and therefore privileged from production

SAT Act – section 31

31. Tribunal may invite decision-maker to reconsider decision

- (1) At any stage of a proceeding for the review of a reviewable decision, the Tribunal may invite the decision-maker to reconsider the decision.
- (2) Upon being invited by the Tribunal to reconsider the reviewable decision, the decision-maker may —
 - (a) affirm the decision; or
 - (b) vary the decision; or
 - (c) set aside the decision and substitute its new decision.
- (3) If the decision-maker varies the decision or sets it aside and substitutes a new decision, unless the proceeding for a review is withdrawn it is taken to be for the review of the decision as varied or the substituted decision.

Effect of section 31

- application is determined afresh
- the reconsidered decision becomes the operative decision

Amended development plans considered under section 31 not confidential

- (a) A planning approval 'runs with the land', and is similar in nature to a 'public document'. The nature and substance of a planning approval is that it cannot be a 'secret' or 'private' document.
- (b) Just as a planning approval cannot be confidential, neither can a decision of a local government, DAP or the SAT in relation to an application for planning approval.
- (c) If the end product of the section 31 reconsideration cannot be confidential, it is difficult to see how the development proposal which is being reconsidered can be treated as confidential. How can the act of making a decision on reconsideration of itself transform the plans from a confidential document to one that does not attract confidentiality?
- (d) The section 55 privilege cannot attach to the reconsidered plans, because the reconsidered plans become the plans the subject of the review and the SAT may be called upon to make a determination with respect to the plans at a hearing. That could not occur if the SAT was precluded by section 55 from hearing evidence about the plans.

Reporting following section 31 invitation

- sophisticated reporting
- confidential information to be provided by another means
- obtain applicant's agreement to re-advertising etc

DAP practices

- Practice note requires a closed meeting for reconsiderations unless otherwise ordered by SAT
- Practice note gives little weight to the following:
 - (a) A section 31 reconsideration involves the DAP making a fresh determination of the development application;
 - (b) Regulation 40(2) expressly and unequivocally states that any DAP meeting to determine a development application is to be open to the public;
 - (c) A section 31 invitation may, and often will, be made where the original decision was to refuse the development application. That is a quite different circumstance to Regulation 17, which only applies to a reconsideration by the DAP in cases where it has already granted development approval; and
 - (d) It is possible to have a meeting which is open to the public without breaching the confidentiality associated with the mediation.

Reconsideration by local governments

- 5.23(2) If a meeting is being held by a council or by a committee referred to in subsection (1)(b), the council or committee may close to members of the public the meeting, or part of the meeting, if the meeting or the part of the meeting deals with any of the following —
- (a) a matter affecting an employee or employees; and
 - (b) the personal affairs of any person; and
 - (c) a contract entered into, or which may be entered into, by the local government and which relates to a matter to be discussed at the meeting; and
 - (d) legal advice obtained, or which may be obtained, by the local government and which relates to a matter to be discussed at the meeting; and
 - (e) a matter that if disclosed, would reveal —
 - (i) a trade secret; or
 - (ii) information that has a commercial value to a person; or
 - (iii) information about the business, professional, commercial or financial affairs of a person, where the trade secret or information is held by, or is about, a person other than the local government; and
 - (f) a matter that if disclosed, could be reasonably expected to —
 - (i) impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law; or
 - (ii) endanger the security of the local government's property; or
 - (iii) prejudice the maintenance or enforcement of a lawful measure for protecting public safety; and
 - (g) information which is the subject of a direction given under section 23(1a) of the *Parliamentary Commissioner Act 1971*; and
 - (h) such other matters as may be prescribed.

Conclusion

- (a) Mediation in the SAT is confidential. Things said or done in the course of a mediation must remain confidential unless the parties agree otherwise. However the requirement to observe confidentiality does not mean that every concept discussed or proposition made in the course of a mediation must be treated as confidential.
- (b) Plans which are proffered for reconsideration under section 31 of the *SAT Act* following mediation are not “without prejudice” plans and are not protected by the confidentiality of the mediation.
- (c) While there is an obligation to respect the confidentiality of the mediation, there is no absolute requirement for section 31 reconsiderations to be held behind closed doors.
- (d) When a publicly available report is produced for a section 31 reconsideration, care should be taken to ensure the confidentiality of the mediation is not breached. It is advisable to reach prior agreement with the applicant on what can be made public through the reconsideration process.



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