

How to make a valid planning decision

LGPA Breakfast Seminar

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Too much discretion? Planning conference 1985

“In the last decade planning schemes have made almost every use subject to the discretion of local councils. Planning has become an ad-hoc process of control and development. Is there now too much discretion?”

Three steps to a valid decision

1. Is there a power to grant approval?
2. Identify the decision-making framework and apply it.
3. Do not make a manifestly unreasonable decision.

Clause 67 of the deemed provisions

“In considering an application for development approval the local government is to have due regard to the following matters to the extent that, in the opinion of the local government, those matters are relevant to the development the subject of the application —

- (a) the aims and provisions of this Scheme and any other local planning scheme operating within the Scheme area;
- (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;
- (c) any approved State planning policy; ...”

Orderly and proper planning

In *Marshall v Metropolitan Redevelopment Authority* [2015] WASC 226, Justice Pritchard said:

“181 However, there is no reason in principle why planning legislation and instruments will be the only matters warranting consideration in determining what is a 'proper' planning decision. The matters which warrant consideration will be a question of fact to be determined having regard to the circumstances of each case.

Orderly and proper planning

182 While the exercise of discretion will involve a judgment about what is suitable, appropriate, or apt or correct in a particular case, that judgment must (if it is to be 'orderly') be an objective one. If the exercise of discretion is to be an orderly one, the planning principles identified as relevant to an application should not be lightly departed from without the demonstration of a sound basis for doing so, which basis is itself grounded in planning law or principle. A broad range of considerations may be relevant in that context.”

Due regard?

- Some consideration
or
- Proper, genuine and realistic consideration?

Weight

- Generally the decision-maker decides how much weight should be given to a relevant consideration.

Nairn v Metro-Central JDAP

Plot ratio standard

- Residential not to exceed 1.5 where total exceeds 3.0 : Proposed 7.9 (residential 6.4, non-residential 1.5)

Height standard

- 24.5m : Proposed 97m

Manifest unreasonableness

“241 Manifest unreasonableness may be discerned in a decision which is arbitrary, capricious, vague or fanciful, or a decision which, having regard to the scope and purpose of the statute, involved an error in reasoning, or illogical or irrational reasoning, or gave disproportionate weight to some factor. However, a decision which is manifestly unreasonable will not be limited to a decision which is, in effect, irrational, bizarre, or one which is so unreasonable that no reasonable person could have arrived at it. Instead, if the decision is one which 'lacks an evident and intelligible justification', that will signal jurisdictional error.”

Manifest unreasonableness

“243 Whatever synonyms for manifest unreasonableness might be used, it remains the case that the test for manifest unreasonableness remains a stringent one. Any other approach would risk a descent into wholesale merits review, where the court engaging in judicial review simply substituted its own view of the proper (or preferable) exercise of the discretion for that reached by the decision-maker.”

