

# **LGPA BREAKFAST SEMINAR**

**HOW MUCH REGARD IS DUE REGARD?**

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# How much regard is due regard?

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) ...

# How much regard is due regard?

- Clause 27(1) – structure plans.
- Clause 43(1) – activity centre plans.
- Clause 51(c), 56(1) – local development plans.

# How much regard is due regard?

Is due regard giving:

- Proper, genuine and realistic consideration
- Some consideration?
- Active or positive consideration?
- Consideration which is adequate in the circumstances?

# How much regard is due regard?

Have “regard” to appears in:

- Clause 3(5) – Local planning policies.
- Clause 12(3) - heritage.
- Clause 78E – bushfire prone areas.

# How much regard is due regard?

MRS clause 30(1)

‘The Commission or a local authority exercising the powers of the Commission so delegated to it under the Planning and Development Act 2005 may consult with any authority that in the circumstances it thinks appropriate; and **having regard to** the purpose for which the land is zoned or reserved under the Scheme, the orderly and proper planning of the locality and the preservation of the amenities of the locality may, in respect of any application for approval to commence development, refuse its approval or may grant its approval subject to such conditions if any as it may deem fit.’

# How much regard is due regard?

Common grounds of judicial review.

- Taking into account an irrelevant consideration.
- Failing to take into account relevant consideration.
- 'Manifest' unreasonableness.

# How much regard is due regard?

In the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the Court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power – *Minister for Aboriginal Affairs v Peko-Wallsend Limited*.

# How much regard is due regard?

- (1) In determining an application in accordance with this Part the State Administrative Tribunal is to have due regard to relevant planning considerations including —
- (a) any State planning policy which may affect the subject matter of the application; and
  - (b) ...'

# The case that changed planning law - almost

*DCSC Pty Ltd v Southern Joint Development Assessment Panel:*

SAT proceeding

- Proposed Puma petrol station.
- Preliminary decision as to use class – Convenience Store.

# DCSC – SAT proceeding

- Merits hearing based on preliminary decision as to use class.
- Scheme amendment to Service Station use class definition.
- Decision delivered without reference to Scheme Amendment – approved.

# DCSC – Single Judge appeal

- JDAP alleged failure to have due regard to the Scheme in force.
- Held – preliminary decision binding.
- Held – DCSC had an accrued right to have the application determined based on the preliminary determination (pre-Scheme amendment).

# DCSC – Single Judge appeal

Accrued rights – section 37 *Interpretation Act* Repeal of a written law does not:

‘affect any right, interest, title, power or privilege created, acquired, accrued, established or exercisable or any status or capacity existing prior to the repeal’.

# DCSC – Single Judge Appeal

Section 27(2) SAT Act:

‘The purpose of the review is to produce the correct and preferable decision at the time of the decision upon the review.’

# DCSC – Court of Appeal

- The only right enjoyed by an applicant is to a review under Part 14 of the *Planning and Development Act*.
- The review has to be carried out having due regard to the aims and provisions of the local planning scheme.
- This means the provisions of the scheme in force at the time of the review.