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Case Law Update

Local Government Planner's Association

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10 September 2019
LAVAN

OUTLINE

- JUDICIAL REVIEW
 - Third party challenge
 - Implications for Proponents and Decision Makers

- TWO ROCKS and WAPC
 - Application of State Planning Policy 2.6
 - Implications for Local Government Planners

Third Party Review

- Third party involvement in planning matters is limited
- Submission (*Planning and Development Act 2005* (WA), s 242)
- Intervention/Joinder (*State Administrative Tribunal Act 2004* (WA), ss 36 and 37)
 - *Sufficient standing* (**ACF v Cmwllth** [1980] HCA 53)
 - *Intervention necessary to meet SAT objectives* (**ING and WAPC** [2008] WASAT 104)
- Judicial Review (*Rules of the Supreme Court 1971* (WA), order 56)

What is “Judicial Review”?

- Enables a person aggrieved by an administrative decision to seek review by a court of the lawfulness of that decision
- Limited grounds, including:
 - a breach of natural justice;
 - an error of law (unreasonableness); or
 - a failure to take into account a relevant consideration
- Remedies
 - Prerogative writs of certiorari, prohibition and mandamus
 - Equitable remedies of injunction and declaration
- *Note: Rules of the Supreme Court 1971 (WA), order 56*

What is “unreasonableness”?

- ***Associated Provincial Picture Houses Ltd v Wednesbury Corp*** [1948] 1 KB 223 (Greene, Somervell and Singleton JJ)
- “*Wednesbury unreasonableness*”
- Adopted in Australia by the High Court in *Paramatta City Council v Pestell*
- A standard of unreasonableness used in assessing an application for judicial review of a public authority's decision
- **A reasoning or decision is *Wednesbury* unreasonable (or irrational) if it is so unreasonable that no reasonable person acting reasonably could have made it**

Why is it relevant?

- Increased use of Judicial Review in WA
- Role of community/stakeholder opposition
 - South Perth
 - Roe 8
- Implications are significant
 - Proponent risk – delay and cost
 - Decision makers more conservative
- Important to understand mechanics and trends

Milem v Metro Central JDAP [2018] WASC 371

- **Supreme Court (Archer J) – review of DAP Decision**
- **Context:**
 - Review JDAP approval of proposed Woolworths in Mount Pleasant
 - Applicant – competing retailer
- **Issue:**
 - Nature of “due regard” and unreasonable decision (failing to consider traffic)
- **Held:**
 - ‘Due regard’ requires active consideration to the matters the JDAP considers to be relevant (*Marshall v MRA* and *Lenz v Shire of SJ*)
 - A JDAP must read all the relevant material (agenda, attached papers and any other documents that appear relevant)
 - The JDAP did not act legally unreasonably

Humich Nominees v Metro East JDAP [2019]

WASC 200

- **Supreme Court (Smith J) – Judicial Review of DAP Decision**
- **Context:**
 - Condition of development approval requiring Caltex to construct a solid median impacting approval for another site
 - Applicant – registered proprietor of land adjacent (subject of separate DA)
- **Issue:**
 - Whether condition in the development approval was beyond power (jurisdictional error) – Does s28A MR Act prevent condition under PD Act?
- **Held:**
 - Condition to construct a solid median inconsistent with previous decision
 - No certainty that intersection can be developed in future
 - Condition imposed by JDAP quashed in part

Milem v Metro Central JDAP [2019]

WASC 207

- **Supreme Court (Archer J) – Review of DAP Decision**
- **Context:**
 - Amending a development approval - review of the different ‘use permissibility’ of a ‘shop’ compared to a ‘liquor store-small’
 - Applicant – competing retailer
- **Issue:**
 - Whether a change of use would ‘substantially change the development approval’ - Jurisdictional error
- **Held:**
 - Reg 17 application limited to amendment
 - Distinguished *DCSC* case – no change in planning framework
 - Change of use did not substantially change the development approval
 - Application dismissed

Sanders v City of South Perth [2019] WASC 226

- **Supreme Court (Quinlan CJ) – Review of LG Decision**
- **Context:**
 - Review of development approval for single residential home
 - Applicant – neighbours
- **Issue:**
 - The legality of the decision to grant development approval
 - Utility – building substantially completed
- **Held:**
 - There was no legal error in approving the development approval
 - Note: discretionary consideration given to utility of proceedings and prejudice suffered
 - Application dismissed

Dain v Shire of Peppermint Grove

[2019] WASC 264

- **Supreme Court (Archer J) – Review of LG Decision**
- **Context:**
 - Review of several decisions to enter a property on heritage list
 - Applicant – registered proprietors
- **Issue:**
 - Whether decisions were unreasonable or subject to apprehended bias
- **Held:**
 - A fair-minded lay observer might reasonably apprehend that the history of the dealings had caused the Shire to become determined to ensure the property was placed on the heritage list
 - Test for apprehension of bias - possibility
 - Application granted

Aloi v John Nominees [2019] WASC 270

- **Supreme Court (Quinlan CJ) – Review of SAT Decision**
- **Context:**
 - Review of decision to approve development of neighbourhood centre (s105 SAT Act)
 - Applicant – competing landowners (Intervenor)
- **Issue:**
 - Application of SPP 4.2 – did misunderstanding of SPP requirements amount in error?
 - Did SAT fail to give adequate reasons?
- **Held:**
 - Application of SPP 4.2 not necessarily in error – but failure to ensure reliability of RSA and make findings on viability of other centres did not meet statutory obligation to give due regard
 - SAT failed to give adequate reasons
 - Application granted – remitted back to SAT

Lessons learned

- Significant implications for all parties
- Judicial Review is still very difficult and expensive
- Recent decisions indicate:
 - decisions that reflect established principles are unlikely to be overturned
 - Discretionary consideration – undue hardship
- Lessons:
 - Community consultation essential
 - Maintain planning framework - understand ‘due regard’
 - Get on with it

Two Rocks and WAPC [2019] WASAT 59

- **SAT Decision (Parry J and Connor)**
- **Context:**
 - Landowner required to amend structure plan to remove proposed urban land use in land that are anticipated to be exposed to rising sea levels and coastal processes over the next 100 years
- **Issue:**
 - Structure plans – review rights and nature/scope
 - The practical application of SPP 2.6 – State Coastal Planning Policy
- **Held:**
 - Modifications required to a structure plan = refusal and able to be appealed
 - A structure plan may only be prepared in respect of land for which a local planning scheme contemplates a structure plan being prepared
 - Clarified application of SPP 2.6
 - Decision upheld in part subject to modification

Two Rocks and WAPC [2019] WASAT 59

- **Structure Plans**
 - Review right clarified - Requirement to modify is a refusal
 - Structure plan may only be prepared for land which a local planning scheme contemplates a structure plan being prepared (not MRS)
 - Interim use and delayed vesting – needs to be statutory [248 -267]
- **Application of SPP 2.6**
 - Due Regard
 - SPP distinguishes coastal foreshore reserve and POS
 - Coastal foreshore reserve can be required to be ceded without compensation
 - Coastal nodes – SPP encourages innovative approaches [208]

Questions?

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