LA News

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Challenging Developer Contribution Schemes

Local governments are implementing Developer Contribution Schemes (**DCS**) requiring developers to pay excessive or uncertain costs. Developers should be aware of their review rights in respect of a DCS where it appears inequitable or unreasonable.

Background

State Planning Policy 3.6 – Development Contributions for Infrastructure (**SPP3.6**) is the principal policy document relevant to decision making authorities considering mechanisms to impose development cost contributions for the provision of infrastructure. All local governments are bound to have regard to SPP3.6.

Accordingly, any DCS or local policy relating to a DCS must be consistent with the principles in SPP3.6, namely – need and nexus, transparency, equity, certainty, efficiency, consistency, a right of consultation and arbitration and accountability.

Unfortunately, there appears to be a tendency for local governments seeking to impose DCSs or prepare draft policies relating to DCSs which contradict these principles in SPP3.6. This is of significant concern to developers as there is no certainty in relation to the required infrastructure and results in delays to their proposals whilst they carefully review and scrutinise the draft policy documentation and lodge the relevant appeals if necessary.

Review rights

A DCS must be released for public submissions prior to approval. This affords developers the opportunity to make submissions to which the local government must pay regard.

Additionally, a DCS does not take effect until it is incorporated into a local planning scheme and therefore must go through the advertising procedures as required by the *Town Planning Regulations 1967* (WA) prior to Ministerial approval. This affords developers the opportunity to lobby the Minister.

In our experience, in the situation of the assesment of an application for subdivision approval where a DCS is still in preparation by a local government, the Western Australian Planning Commission (**WAPC**) has sought to impose a condition requiring the developer to enter into a legal agreement with the local government or in effect consent to the form of the draft DCS. This effectively requires the developer to sign a blank cheque, as the final form of the DCS (the nature and cost of the infrastructure) is unknown and consequently no certainty can be provided with regard to the amount and type of the developer contribution.

In our view, a condition such as this contradicts SPP3.6 which specifically contemplates two mechanisms for the collection of developer contributions – (1) where a DCS is in operation, through subdivision or development conditions, and (2) where no DCS is in operation, through voluntary legal agreement. Accordingly, where a voluntary agreement cannot be reached, it is not appropriate to require a developer to enter a DCS where one does not currently exist as a condition of subdivision. Our advice to the client in these circumstances is to appeal such a condition to the State Administrative Tribunal (**SAT**) for lack of certainty or finality.

Legal agreements

It has come to our attention that a local government in the Perth Metropolitan area has recently prepared a policy requiring developers, as condition of subdivision, to enter into a standard agreement for the purpose of securing a contribution and allows the local government to lodge an absolute caveat over a developer's land to secure payment whilst the DCS is finalised.

In our view, a policy which mandates entry into a unilateral standard agreement, is inconsistent with the provision of a 'voluntary' agreement as contemplated by SPP3.6 and is subject to challenge.

Estimates and rates

Under a DCS or the relevant provisions of the

About Lavan Legal:

Lavan Legal is an independently owned law firm in Western Australia, comprising over 188 staff which includes 19 partners.

The Property Services Group, a division of Lavan Legal, pride themselves on being the leaders in property and planning law. We offer a comprehensive range of services advising on all aspects of property transactions including acquisition, disposals, leasing and developments including syndications.

At Lavan Legal we believe in building long lasting relationships with our clients. We provide the best legal advice and service and continue to improve our understanding of our clients' needs, staff, history, motivations and directions. We provide clients with regular industry insights, updates on changing technology and business strategies in an effort to take the relationship to a more successful position. We are committed to increased efficiency through continuous innovation and process improvement.

scheme, local governments are subject to a requirement to make determinations with respect to the estimates and rates required for the provision of infrastructure under a DCS. Usually, this determination ultimately requires the approval of the Minister for Planning. Determination of estimates and rates will involve a rationalisation of the infrastructure requirement, valuation of land and determination of infrastructure costs. This is a complex task and prone to disagreement, particularly in relation to valuation of land. When making submissions on a draft DCS, it is our strong recommendation that developers seek to secure a right of review in the draft DCS to the SAT in order to ensure the inclusion of a mechanism to resolve any disputes at this pivotal stage.

Types of items in DCS

The types of items eligible for a DCS should be clearly outlined in the DCS to ensure they are legitimate inclusions. This is two fold for developers, in that costs incurred by developers for local structure planning (environmental, traffic reports, etc) may be recovered under the DCS.

Additionally, consistent with the need and nexus principle in SPP3.6, a local government cannot include an item in a DCS where the need and demand for it has not been clearly demonstrated.

Summary

In our view, there are various DCSs that have been released by local governments across the state that do not comply with the underlying principles in SPP3.6. The consequence for developers in the majority of these circumstances is delay and perhaps more problematically, the resulting increase in the development costs for each lot.

It is our strong recommendation to developers and landowners with land that is the subject of either a proposed DCS or operative DCS, that a careful review of the provisions of the DCS be undertaken to determine compliance with the principles in SPP3.6 and that cost contributions are readily ascertainable/certain. If you are unsure about the financial implication of a direct DCS or one affected by a DCS, please contact Paul McQueen, Partner on (08) 9288 6943 / paul.mcqueen@lavanlegal.com.au or Rebecca Somerford, Solicitor on (08) 9288 6820 / rebecca.somerford@lavanlegal.com.au to clarify your thoughts and obligations.

Legislation Update Heritage and Planning Legislation Amendment Act 2011

On 2 March 2011, the *Heritage and Planning Legislation Amendment Act 2011* (**Amendment Act**) amended the *Heritage of Western Australia Act 1990* (**Heritage Act**) and the *Planning and Development Act 2005* **(Planning Act**) to increase the penalties for offences set out.

The principal amendments include:

- Section 61 of the Heritage Act which provides penalties for the contravention of a conservation order. The section has been amended to increase the maximum fine of $10,000 (with a maximum daily fine of $1,000) to $1 million (maximum daily fine of $50,000).
- Section 62 of the Heritage Act relates to restoration order and allows a Court discretion to order an offender convicted of a contravention of any type of conservation order to restore a damaged or demolished place to its former condition and makes the failure to comply with the restoration order an offence subject to a maximum fine. The Amendment Act will amend the maximum fine of $10,000 (maximum daily fine of $3,000) to $1 million (maximum daily fine of $50,000).
- Section 67 of the Heritage Act provides for penalties for continuing offences not otherwise specified elsewhere in the Act. The Amendment Act amends the maximum daily fine of $500 to $50,000.
- Section 79 of the Heritage Act establishes a basic offence and relevant penalties for damaging a state-registered place. The Amendment Act increases the maximum fine from $5,000 (maximum daily fine $500) to $1 million (maximum daily fine $50,000).
- Section 80 of the Heritage Act provides for prohibiting further development of a place following conviction for contravention of any type of conservation order in relation to that place (by imposing a development moratorium). The Amendment Act will amend this section to allow the imposition of a development moratorium following conviction of an offence in respect of that registered place, whether or not a conservation order is in effect and will amend the maximum fine from $10,000 (maximum daily fine $500) to $1 million (maximum daily fine of $50,000).
- Section 223 of the Planning Act provides for fines or offences occurring under the Act. Currently, the maximum fine for any offence under the Planning Act, including the unauthorised development or demolition of any place, is $50,000 (maximum daily fine of $5,000). The Amendment Act will amend s223 to increase the maximum fine for any offence to $200,000 (maximum daily fine $25,000). Importantly, this penalty will apply to any unauthorised work to any place whether or not it is a heritage place.

The increase in the level of fines in the Heritage Act and Planning Act becomes effective from 3 March 2011. Please do not hesitate to contact Paul McQueen, Partner on (08) 9288 6943 / paul.mcqueen@lavanlegal.com.au or Craig Wallace, Senior Associate on (08) 9288 6828 / craig.wallace@lavanlegal.com.au should you have any queries in relation to the impact that this legislation will have on your landholding or development.

A recent win – road widening requirements reduced

Many local governments routinely impose development conditions as standard due to the fact that they are recommended in adopted local planning policies. However, just because a standard condition may be common practice to a local government, does not mean it's a valid condition for every development.

In the recent decision of *Dalcorp Holdings Pty Ltd v Town of Victoria Park* [2011] WASAT 189 (***Dalcorp***), two such conditions imposed by the Town of Victoria Park (**Town**), which were required by the Town's streetscape policy, were deleted and amended by the Tribunal.

Background

The *Dalcorp* matter involved an application for review of two conditions imposed by the Town on a development comprising two two-storey multiple dwellings and an office, namely:

- the first condition required that provision be made for the ceding to the Crown of a 1.5 metre wide strip of land adjacent to the boundary of the right of way, with the ceding to be undertaken in conjunction with any future subdivision of the lot; and
- the second condition required that no buildings or other development encroach within the 1.5 metre strip.

The decision

The Tribunal found that the conditions served a valid planning purpose and there was planning merit in the effecting of the Town's streetscape policy. However, the Tribunal found that the condition did not directly and reasonably relate to the development for the following reasons:

- firstly, the respondent failed to produce evidence that a development of the scale proposed precipitated the need for a wider right of way; and
- secondly, on the basis that the conditions required the ceding to occur upon subdivision of the lot (which is a decision of the Commission and not the Town), there was no temporal connection between the development and the requirement imposed on the condition. That is, a condition of development must relate to the application and not attempt to circumscribe future decisions by others involving the land.

Relevantly, the Tribunal held at paragraph [48]:

'The requirements of condition 2 are considered by the Tribunal to go beyond requirements involving a third party imposed on subdivision or development approval. Such conditions can, for example, involve work such as a median strip or sewerage connection. Conditions of this type might be imposed when there is a genuine likelihood that the condition can be satisfied within the life of the approval granted are not in speculation'

The Tribunal accordingly deleted the ceding condition and amended it to require a 1.5 metre setback and amended the encroachment condition to allow for landscaping within the 1.5 metre strip.

The consequence of this decision is that a condition which places a requirement on a decision of a third party, which may or may not occur, potentially is invalid.

Impact for developers

There are three key benefits for developers arising from the *Dalcorp* decision:

- pursuant to the amended condition, the client was not required to cede the land for free, rather a setback was imposed. The effect of this is that when the road is eventually widened, the Crown will have to pay compensation to the client for the acquisition;
- standard conditions imposed on developments are not necessarily valid on the basis that they give effect to local planning policy; and
- conditions which purport to leave matters to a third party's decision which is not forthcoming, may be invalid conditions.

Lavan Legal represented the applicant in the *Dalcorp* matter. If you have a similar condition imposed or likely to be imposed to your development, please contact Paul McQueen, Partner on (08) 9288 6943 / paul.mcqueen@lavanlegal.com.au or Rebecca Somerford, Solicitor on (08) 9288 6820 / rebecca.somerford@lavanlegal.com.au to discuss your options in this regard.

Shauna Mounsey

Associate, LLB, BSc

Shauna Mounsey joined Lavan Legal as an Associate in the Planning, Environment and Land Compensation team on 14 February 2011, after relocating to Perth from Darwin. During the course of her practice in Darwin, Shauna provided specialised environmental law advice to clients from a range of industries including energy and resources, pastoral, property development and government. Shauna also ran the environmental law practice at Ward Keller Lawyers, the Northern Territory's largest law firm.

Shauna has also worked as an environmental lawyer for Clayton Utz and as corporate in-house lawyer for URS Corporation Ltd, one of the world's largest environmental and engineering consultancy firms. Prior to becoming a lawyer Shauna was an environmental scientist with URS where she was responsible for the project management of some of the Northern Territory's most prominent projects.

Shauna has lectured in Environmental and Planning Law at Charles Darwin University for the past two years, been a co-author of Global Climate Change: Australian Law and Policy, taken up appointment as an Executive Committee Member of the Northern Territory branch of the Australia China Business Council and been an active Member of the Environment Committee of the Northern Territory branch of the Minerals Council of Australia.

In 2010 Shauna was recognised for her professional accomplishments and awarded the Northern Territory Young Career Achiever of the Year and in 2008 Shauna was awarded the Charles Darwin University Prize for Environmental and Planning Law.

Areas of expertise

- Environmental law
- Property law
- Climate change
- Renewable energy law

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