LA News

LAVAN LEGAL Leaders in Law

SUMMER 2010/2011

Reform of the planning approvals process

The *Approvals and Related Reforms (No.4) (Planning) Act 2010* (**2010 Amendment Act**) was granted Royal Assent on 19 August 2010 and was proclaimed on 19 November 2010. As you will be aware from our Spring 2010 edition of LA News, the 2010 Amendment Act amends the *Planning and Development Act 2005* (**PD Act**) in an effort to streamline and improve the planning approvals process in Western Australia.

The purpose of this article is to provide a summary of those amendments and to point out the release of Planning Bulletins by the Department of Planning to provide guidance in relation to those amendments.

Summary of 2010 Amendment Act

A summary of the key amendments arising from the 2010 Amendment Act include the following:

- the scope of matters a local planning scheme can now deal with has been modified. Future regulations will allow the introduction of *model provisions and deemed provisions* for local planning schemes (ss.68(2), 69(3), 73(2A), 256, 257A and 257B). New regulations are proposed to be prepared in 2011 to amend the *Town Planning Regulations 1967* and *Model Scheme Text;*
- a head of power has been provided for the preparation and approval of documents ancillary to the carrying out of a planning scheme (cl.13(4), sch.7). This is intended to cover common planning instruments, such as structure plans and detailed area plans. Further provisions regarding the preparation and operation of structure plans and detailed area plans are proposed to be addressed in new regulations, together with new structure plan preparation guidelines;
- the 2010 Amendment Act provides that the Minister can direct a local government to prepare or adopt an amendment to a local planning scheme (s.76). For further guidance in this regard please see *Planning Bulletin 102 – Section 76 of the Planning and Development Act 2005* released in late November 2010;
- the Minister has a new power to direct a local government to amend its local planning scheme to be consistent with a specified State Planning Policy (s.77A). For further guidance in this regard please see *Planning Bulletin 103 – Section 77A of the Planning and Development Act 2005* released in late November 2010;
- the responsibility for publishing approved local planning schemes in the *Government Gazette* has been transferred from local governments back to the Western Australian Planning Commission (**WAPC**) (s.87(3));
- the possible use of planning control areas has been broadened, so that they may be declared in any area throughout the State, not just in areas where a region planning scheme applies (s.112);
- the possible use of *improvement plans* has been broadened, so that they may also be declared in any area throughout the State, not just in areas where the WAPC has resolved to prepare a region planning scheme (s.119). For further guidance in this regard please see *Planning Bulletin 104 – Improvement Schemes and Plans* released in late November 2010;
- a new type of planning scheme has been introduced, called an *improvement scheme* (ss.122A – 122M). Improvement schemes are planning instruments made to give effect to the objectives of an improvement plan. Improvement schemes will have statutory effect and will override the provisions of any local planning scheme or region planning scheme that might otherwise have applied to the area. For further guidance in this regard please see *Planning Bulletin 104 – Improvement Schemes and Plans;*

- the procedures relating to *concurrent amendments* have been modified (s.126). Concurrent amendments to region and local planning schemes could only previously be published upon a request by the relevant local government to the WAPC. The Commission can now initiate the publication of its own notice, although it must still consult with local government. For further guidance in this regard please see *Planning Bulletin 105 – Section 126 – Zoning amended by region planning schemes;*
- the development control provisions under Division 5, Part 10 of the PD Act have been amended to apply irrespective of the tenure of the land – that is, whether freehold or *Crown land* (s.133);
- clarification has been provided that WAPC approval required for certain transactions, where land is not dealt with as a lot or lots, does not affect the operation of the *Strata Titles Act 1985* (s.136). That is, the *sale of strata lots* prior to the registration of a strata plan is not regulated by the PD Act;
- heads of power have been introduced for the establishment of *Development Assessment Panels (**DAPs**)* (Part 11A, ss.171A – 171F). The subject of DAPs was dealt with in some detail in our Spring Edition. Importantly, unlike the other provisions of the 2010 Amendment Act, Part 3, which inserts new provisions at Part 11A of the PD Act, to introduce Development Assessment Panels, will not be commenced until new regulations have been prepared in 2011;
- heads of power have been provided to regulate reporting by local governments in relation to planning matters, to enable the State to collect data on local development decisions, and to monitor the effectiveness of planning reforms (ss.263(ea) and 263(eb)). In Western Australia, there is no centralised collection of information on the administration of the planning system by local governments. Therefore, the State is impeded in monitoring performance and identifying where inefficiencies need to be improved. This change will enable the State to collect such data in a form to be prescribed by new regulations, which will be introduced in 2011; and
- finally, the 2010 Amendment Act makes minor but significant amendments to the *Local Government Act 1995* (s.5.42). The changes allow local governments to delegate to CEOs powers under the PD Act to issue directions with regard to unauthorised development.

Lavan Legal comment

The 2010 Amendment Act is a significant reform and the view of many is that it has the effect of diluting responsibility for decision making from local governments. Indeed, although local governments retain significant duties in implementing State Government planning initiatives, they are now more accountable to the WAPC.

What this means for developers is more transparency in the decision making process and the ability to approach the WAPC for assistance when planning projects of merit are otherwise stifled at local government level. If you have any queries in relation to the impact of the 2010 Amendment Act on your development or are having any difficulties in obtaining planning or subdivision approval, please 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.

Objector's challenge to WAPC subdivision approval abandoned

The outcome of the case of *Western Australian Planning Commission; ex parte Solomon Supreme Court* CIV 1574 of 2010 has demonstrated the importance and effect that undertakings as to damages may have where third party objectors to subdivision and other planning approvals seek to challenge such approvals in the Supreme Court. The objector applicants (Solomon and others) were the trustees, having ownership of a property held for the purposes of a meditation centre, and applied to the Supreme Court to challenge a subdivision approval of an adjoining property by the West Australian Planning Commission.

The orders nisi (preliminary orders) issued by the Supreme Court acted as a stay of proceedings preventing the WAPC from acting further to implement the subdivision approval and the issue of titles, pending the ultimate hearing of the application. The Supreme Court originally did not require the applicants to give an undertaking as to damages in favour of the subdivider (Commercial Properties Pty Ltd), however, Commercial Properties subsequently applied for dissolution of the stay order, or alternatively a variation of the stay order to require an undertaking as to damages on the part of the objector applicants.

The Court (Simmonds J) accepted that there was a case for varying the stay order to require the objectors to provide an acceptable undertaking as to damages in the event their application failed and varied the stay order accordingly. A challenge to that requirement by the objectors failed and the objectors thereafter applied to have the proceedings discharged (ie abandoned) rather than make an undertaking as to damages that would have placed their assets at risk.

The outcome of the Solomon proceedings demonstrates that a stay order preventing the planning authority from proceeding to implement a subdivision or other planning approval, acts very much like an injunction, and parties affected by a stay order (such as the developer) may apply for an undertaking from the applicant as to damages, in the same way that such an undertaking would be required in due course in an injunction application. This is in addition to other measures (eg seeking security for costs) that a respondent may apply for in such cases.

Please contact Brian McMurdo, Consultant, at Lavan Legal on (08) 9288 6893 or brian.mcmurdo@lavanlegal.com.au if you have any questions as to the effect of these decisions.

New planning guidelines for medium and higher density housing

The government has recently introduced new multi unit housing provisions to the existing Residential Design Codes (**R Codes**). The Minister for Planning has stated that the introduction of these new provisions is intended to better regulate the development of higher density housing in urban areas and to promote a diversity of housing choices for the community. The new guidelines have been implemented through amendments to the R Codes effective from 22 November 2010 and apply to the development of multiple dwellings in areas with a coding of R30 or greater, within mixed use development and in activity centres.

The guidelines for multiple dwellings in these areas will not specify any minimum site area per dwelling, or number of dwellings within a proposed development, other than to impose a minimum area of 40 square metres for any dwelling. The new codes seek to provide a diversity of multiple dwellings and where a development contains more than 12 dwellings, the development will comply where a minimum of 20% (up to a maximum of 50%) of one bedroom dwellings and a minimum of 40% of two bedroom dwellings are provided.

The focus of the general site requirements for multiple dwellings in these areas are on the bulk and form of the proposed development and site design. The new Table 4 in the codes sets out these requirements including new maximum plot ratio, maximum height limits, set backs to boundary and minimum open space. The new codes follow a similar format to the existing codes, in terms of providing acceptable development criteria where compliance is deemed to be acceptable, and for performance criteria to be addressed in all other cases. The codes are inserted in a new Part 7, the objectives are stated to ensure that development of multiple dwellings occurs with due regard to the existing development context and/or the desire to future built form for the locality as defined by the local government planning framework.

The design elements for multiple dwellings in these areas set out in Part 7 of the new codes addresses:

- context;
- streetscape;
- site planning and design; and
- building design.

The new codes also set out separate site requirements and standards for multiple dwellings within mixed use development and activity centres through Residential Activity Centre Codes (R-AC Codes). The new R-AC Code will only be applied through the scheme amendment process undertaken by the local government. It is not proposed that acceptable development criteria will be applicable to R-AC Code development due to the inherit diversity in mixed use development, but it is intended that any mixed use development application will be assessed on merit against the stated performance criteria.

The new codes will also have new parking requirements which acknowledge different onsite parking demands dependant on the size of the individual units and the proximity of public transport. The new codes will also remove the requirements for communal open space for codings over R30 as well as the removal of minimum fronting requirement in R30 coded areas.

The new codes will apply to all development applications for multiple dwellings within these areas determined on/or after 22 November 2010, regardless of when they were lodged. The new provisions, however, should not affect the validity of any existing development approved, unless substantial variations are sought through a new application for approval.

The intent of the new provisions are to focus on quality of design rather than prescriptive regulation and to allow flexibility in design and to promote the use of the performance criteria.

If you have any queries concerning the application of the new codes please contact Brian McMurdo, Consultant, at Lavan Legal on (08) 9288 6893 or brian.mcmurdo@lavanlegal.com.au.

Clare Gleeson

Solicitor LLB, BSc (Env)

Clare Gleeson is a solicitor in the planning, environment and land compensation team within the property services group.

Clare was admitted as a solicitor in New South Wales in 2006 and in Western Australia in 2007. She holds degrees in Law and in Environmental Science and is currently studying towards a Masters in Business Administration.

She brings to Lavan Legal extensive experience working in the local government on numerous development projects, environmental matters and general local government issues. Her experience in the planning area includes working on development and subdivision proposals, appeals to the State Administrative Tribunal, land use conflict resolution, planning, building and health prosecution proceedings, as well as drafting local laws and policy.

Clare has been involved in a range of environmental matters including clearance of native vegetation, threatened flora and fauna, project referral requirements under various local, state and commonwealth laws, noise regulations, contaminated sites and water licensing.

Since joining Lavan Legal, Clare has developed a special interest in water law, becoming a Member of the Australian Water Association's Young Water Professionals, keeping abreast with water issues within WA including the impacts of the proposed water statutory reform.

Areas of expertise

- Planning
- Environment
- Local Government
- Water

Tel: (08) 9288 6782
Email: clare.gleeson@lavanlegal.com.au

We want your feedback

If you have topics or issues that you would like the team to write about please let us know. Suggestions can be sent to Carleen Wiseman at carleen.wiseman@lavanlegal.com.au.

Your personal details

Lavan Legal may use personal information we have collected about you to send materials to you about legal and related issues we think will be of interest, as well as news about Lavan Legal and the services we provide.

If you do not want us to use your personal information for that purpose, or would like us to update your contact details, please email anna.zander@lavanlegal.com.au providing your name, company name, title, email address, postal address and a contact telephone number.