LA News

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SPRING 2009

Lessons to be learned from the bust

The recent global economic crisis has highlighted the need for property developers to ensure that issues associated with their planning and environment approvals are addressed at the earliest possible opportunity.

Most, if not all, planning and environmental approvals are conditional. As a consequence of the recent downturn, developers need to complete their projects or obtain approval for their projects as expeditiously as possible.

One of the many stumbling blocks to achieving completion has been the ability to comply with conditions of approval. Alternatively, there have been difficulties in convincing the relevant local and State authorities that compliance with the conditions has been achieved. Such issues have resulted in delay or a requirement to lodge an application with the State Administrative Tribunal.

The lessons to be learnt are:

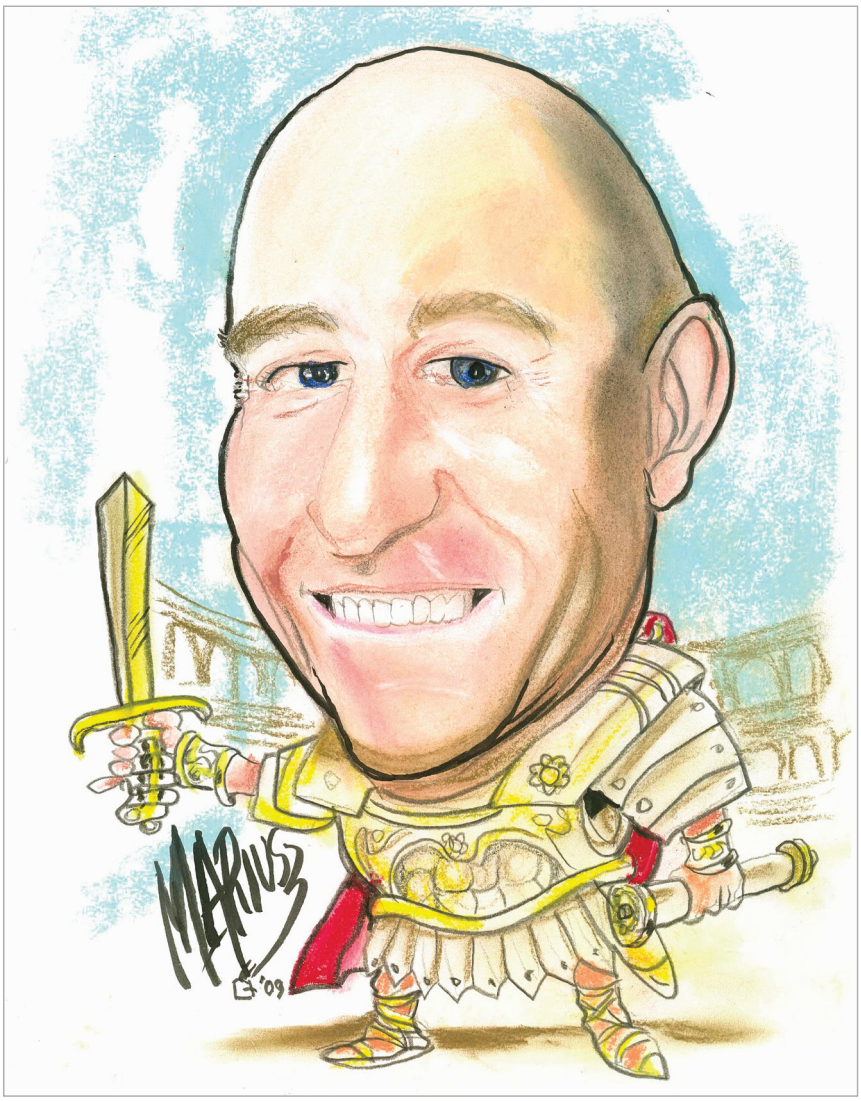
Make sure it is clear what is required to comply with a condition

There is often a wide gap between what the developer believes is required and what the relevant government authority believes is required to satisfy a condition. It must be remembered that a condition is generally not valid if it is vague or ambiguous.

When a conditional approval is received, a close examination of the conditions is required. If there is doubt as to what is required, the reconsideration process can be used to rewrite the condition to make it clear to all parties what action is required.

Making assumptions can delay the finalisation of your project.

Paul McQueen returns from long service leave having conquered (ravaged!?) Europe



About Lavan Legal:

Lavan Legal is the largest independently owned law firm in Western Australia. Lavan Legal has more than 200 staff, including 21 partners.

Our Planning, Environment and Land Compensation Team offers advice on environmental enforcement and licence conditions, legislation and its impacts on proposed developments, advising government on amendments to planning legislation and sensitive developments which include rail freight facilities and claypit redevelopments. Injurious affection caused by the reservation of land is a frequent issue facing our clients and we represent them in the State Administrative Tribunal for compensation for their land.

We understand the intricate web of environmental laws encompassing all levels of regulation from Commonwealth to Local Government. We service an established client base which includes leading town planners, engineers and environmental consultants, as well as large public and private developers, local councils and State Government authorities.

Our vast experience in land compensation, planning and environmental law allows us to meet all our clients' needs with integrated and highly efficient services.

Make sure the condition is reasonable and relates to your project
A condition is generally invalid if it is unreasonable or does not relate to your project. During the boom it appears that developers were content to perform work that may not technically have been their responsibility. During the bust the position changed. It is, however, very difficult to unscramble the egg.

Make sure you are happy to comply with a condition that may be outside the scope of your development.

Do not leave environmental issues to the end
Environmental issues are sometimes complicated and can cause considerable headaches. For some it was a case of 'out of sight, out of mind'. The area of environmental issues is the one area of a project that has the potential to take a lengthy period of time to resolve.

Developers should address these issues early in the project and take a proactive approach.

Be careful with your pre-sale contracts
During the boom the General Conditions of Sale contracts were rarely of concern. People were buying and completing on their contracts. In the bust purchasers were/are generally trying to avoid their contracts.

The General Conditions are generally not appropriate for large developments, in particular pre-selling lots off the plan.

The General Conditions:

- do not provide sufficient time for the approval process to occur;
- arguably do not allow for conditional approval; and
- do not provide an opportunity for developers to exercise their legal rights of review without potentially resulting in the contract of sale becoming voidable.

Have your contracts reviewed by a property lawyer with knowledge of planning matters or who has access to a planning lawyer.

Contract management
During the good times, many property developers paid scant attention to their obligations in their sale contracts – especially the deadlines for obtaining approvals and the like. This has come to haunt many developers in the tough times.

It is clear that the main lesson to be learnt from the bust is that a little time spent at the beginning of a project can avoid significant delays and financial loss at the end of the project.

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Forget Zoning - it's all in the Structure Plan

Lavan Legal acted for the Applicants in the case of *Hocking Land Company Pty Ltd and Ors v City of Wanneroo* [2009] WASAT 139 in the State Administrative Tribunal, the decision of which was published on 20 July 2009.

This case concerned the following proposed amendments to East Wanneroo Cell 4 Agreed Structure Plan:

- reduction of the special residential lots on Elliot Road within the ASP area from 6 to 4; and
- creation of 20 residential lots at a density coding of R20, located at the front of the special residential lots.

The case required a determination from the State Administrative Tribunal as to whether land zoned 'Special Residential' under the City of Wanneroo's District Planning Scheme No. 2 (DPS2) could be capable of being classified 'Residential R20' under the ASP.

The Tribunal determined that land zoned 'Special Residential' could be classified as 'Residential R20' in the ASP, because the provisions of DPS2 do not preclude the adoption or amendment of a structure plan in this zone. A critical issue in the event of conflict between the scheme and a structure plan was the determination of which document had primacy.

It was the view of the Tribunal that the wording of section 9.8.2 of DPS2, in particular, provided the following interpretation of the operation of structure plans under this planning scheme:

> 'Where an Agreed Structure Plan imposes a classification on the land included in it by reference to reserves, zones (including Special Use Zones) or Residential Density Codes, until it is replaced by an amendment to the Scheme imposing such classifications:
>
> (a) the provisions of the Agreed Structure Plan shall apply to the land within it as if its provisions were incorporated in this Scheme and it shall be binding and enforceable in the same way as corresponding provisions incorporated in the Scheme; and
>
> (b) provisions in the Scheme applicable to land in those classifications under the Scheme shall apply with the necessary changes or alterations to the Agreed Structure Plan area.'

It is of note that the other issues raised by the City, namely whether the proposal was consistent with proper and orderly planning, whether it would adversely affect residential amenity, and whether the proposal represented good urban design, were all resolved by the Tribunal in the Applicants' favour upon the evidence of the planning and urban design experts involved in the proceedings.

The Tribunal further held that the test to be applied for determining whether to amend a structure plan is whether it would be appropriate to do so, having regard to all relevant planning scheme provisions and all relevant planning considerations. It determined that it was appropriate to amend the structure plan as proposed by the Applicant as the proposed amendment was not 'objectionable', and was appropriate.

Implications
When progressing an application under a planning scheme, ensure that all relevant provisions of the planning scheme allow for the application to be approved by the decision-making authority. In this case, the Applicants were able to use sections of the local planning scheme to show that the structure plan amendment should be approved by the local government.

In particular, when amending a structure plan, consideration should be given to the comments of the Tribunal from this case, that is, whether it would be appropriate to amend the structure plan in the manner proposed. This should include consideration of all relevant planning scheme provisions as well as other planning considerations including amenity and proper and orderly planning.

Should you require advice on applications for planning approval, please do not hesitate to contact Emma McGrath on 08 9288 6910 or Paul McQueen on 08 9288 6921.

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Seminar Summary – Avoiding environmental prosecutions at State and Federal level

Melanie Palmer, a Senior Associate in our Environment and Planning Team, and Andrew Mack, Environmental Consultant at Cardno Global Infrastructure Services Consultancy jointly presented a seminar at our offices on 27 August 2009 on how to best avoid environmental prosecutions at a State and Federal level.

The seminar attracted a varied audience including private developers, planning consultants, liquidators and administrators and environmental officers from firms with extractive licences.

The seminar provided attendees with a synopsis of the environmental prosecution regime at State and Federal level and offered some helpful insights in how to avoid prosecution.

In summary, the advice from both a legal and environmental consultant perspective was clear:

- don't ignore environmental issues, tackle them up front;
- promote a proactive rather than reactive approach to enforcement action, including a careful analysis of the environmental provisions relevant to the project (at state and Federal level), setting up the right team (internally and externally), maintaining relationships within the team based on trust and experience and promoting the right ethos to avoiding prosecution:
- acting in a proactive manner from the outset will mean you are best placed to avoid prosecution altogether and maximise the availability of defences to prosecution should an incident occur, ultimately resulting in substantial savings of time and money; and
- in the event that accidents do happen - don't panic, take proper advice and carefully consider your position.

Please contact Craig Wallace, Senior Solicitor on 9288 6828 or Emma McGrath, Solicitor on 9288 6910 if you require advice on environmental considerations relevant to your project.

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As many of you know, Melanie Palmer has now embarked on maternity leave and we are sure you will join us in wishing her all the best in her new career as a mother.

Case Note - Directors, Obligations, and Opportunities

Western Areas Exploration Pty Ltd v Streeter (No 3) [2009] WASC 213

EM Heenan J handed down reasons for the decision in *Western Areas Exploration Pty Ltd v Streeter* (No 3) [2009] WASC 213 on 31 July 2009, upholding the claims of the plaintiff, Western Areas Exploration Pty Ltd (**WAE**), against former directors Terry Streeter and David Cooper. The decision is of particular importance to directors as it clarifies the scope of their duties in situations involving conflicting corporate and personal interests.

WAE claimed that in 1999 and 2000, Streeter and Cooper breached their fiduciary duties by diverting a corporate opportunity away from WAE and towards a new company, Western Areas NL (**WANL**), of which they became directors and shareholders. WAE claimed that the relevant opportunity was to participate in a nickel exploration venture, either as the corporate vehicle for listing with the Australian Securities Exchange (**ASX**), or by way of capital contribution. WANL has subsequently enjoyed great success and ultimately listed with the ASX in July 2000. By way of relief, WAE sought the imposition of a constructive trust over approximately 11 million shares in WANL held by the defendants.

The defendants, however, denied that breaches of fiduciary duty had occurred, on the basis that the opportunity had come to Streeter in his personal capacity, and further contended that WAE was 'moribund' and not a suitable corporate vehicle in any event. Alternatively, the defendants denied that WAE was entitled to the relief sought as, they contended, such relief would unjustly enrich WAE.

After detailed consideration of the scope of fiduciary duties owed by directors to their companies, and the operation of the corporate opportunities doctrine, EM Heenan J ultimately found for WAE and declared the constructive trust sought.

His Honour's judgment closely examined the conduct of Streeter and Cooper during the relevant period, and the case highlights that directors of Australian companies should be aware that:

- their fiduciary duties oblige them to act in the company's interests to the exclusion of the interests of others, including their own;
- the scope of their duties will be determined with reference to the degree and type of involvement in company operations, and that the court will not make such determinations based solely on whether a director is described as executive or non-executive;
- their ability to hold a directorship with a competing company will be curtailed when there is a real possibility for conflict of interests, unless expressly authorised by the company;
- they must give honest consideration to the company's objectives and aspirations when presented with a corporate opportunity, and must give full disclosure in situations of potential conflict; and
- the scope of their duties will not be attenuated even where the company is financially insecure and may not be in a position to exploit the opportunity.

The full text of the judgment can be found at http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/PDFJudgments-WebVw/2009WASC0213/$FILE/2009WASC0213.pdf.

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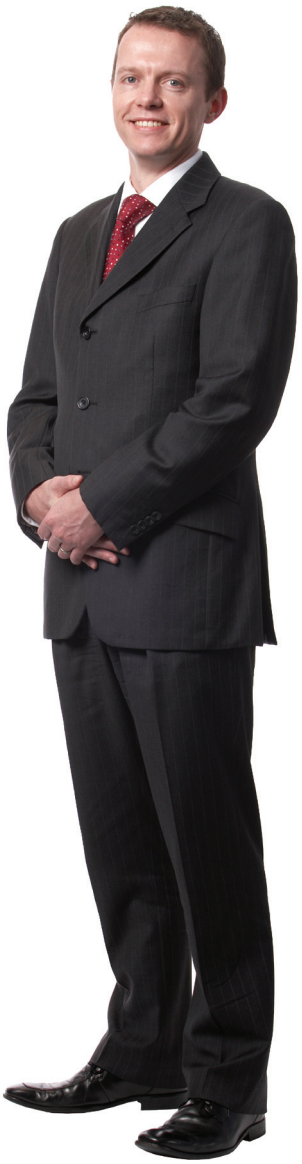

Craig Wallace, Senior Associate

BProc, LLB

Craig Wallace is a Senior Associate in the Planning, Environment and Land Compensation Team within the Property Services Group.

Craig has 10 years of experience in local government and private practice in London and Perth. The experience he brings from the UK includes quality work in the areas of planning, compulsory purchase and environmental law, and he was involved in a number of major urban regeneration projects including the Greenwich Millennium Village in London, as well as being involved in the conduct of judicial review proceedings to the High Court, Court of Appeal and the House of Lords.

Since moving to Western Australian in 2007, Craig has been involved in a range of matters for developer and resource clients including general advice on development, building licence and environmental approvals, the conduct of statutory appeals to the State Administrative Tribunal and the Office of the Appeals Convenor, advising on all aspects of Contaminated Sites Act legislation, the conduct of environmental due diligence for corporate transactions (mining and wind farms) and defending prosecutions brought under the Environmental Protection Act 1986 and the Planning and Development Act 2005. Craig also has a special interest in Climate Change and has advised clients on all aspects of the National Greenhouse and Energy Act 2007 and the Carbon Pollution Reduction Scheme Bill 2009.

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 Asha Clucas at asha.clucas@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 calley.kempson@lavanlegal.com.au providing your name, company name, title, email address, postal address and a contact telephone number.