

Some Good News for Developers – SAT Decision Improves “Substantial Commencement” Extension Process

In yet another step in the Como Hotel redevelopment saga, the State Administrative Tribunal (SAT) last week ruled in favour of ALH Group Property Holdings’ (ALH) application to extend the period in which its refurbishment and redevelopment is to be substantially commenced.

This case has important findings and commentary for the development industry and specifically those involved in hospitality, says partner Margie Tannock, who represented ALH at the SAT hearing.

Background to the Dispute

ALH was granted development approval in 2015 for alterations to the existing Como Hotel and to replace the existing BWS bottle shop with a larger Dan Murphy’s store. It was given only 24 months to substantially commence work before the development approval lapsed in April 2017. Before being able to substantially commence work, ALH was required under the Liquor Control legislation to obtain a variation to its tavern licence. That process remains on foot after two and a half years. ALH sought to extend the period for substantial commencement, to allow more time for the Liquor Commission to make its decision before work could begin on site. The City of South Perth opposed the extension and responded by amending its planning scheme to prevent the development being capable of approval. It also requested from Main Roads Western Australia (Main Roads), and Main Roads agreed to carry out road works to reduce vehicular access to the site. On the recommendation of the City and Main Roads, the Metro Central Joint Development Assessment Panel (JDAP) refused ALH’s request for an extension in February this year. On review of that decision, the SAT determined that an extension of time was necessary and that the original 24 months was wholly inadequate.

Extension of Substantial Commencement – Welcome Ruling Brings Increased Flexibility to the Process

There is now support for extended substantial commencement periods to be imposed in development approval conditions where other regulatory approval processes (such as liquor licences) are likely to delay the implementation of the development.

Planning consent authorities need to give “careful consideration... at the time when development approval is sought and granted, as to what is a reasonable and adequate period for substantial commencement of the development to occur.” In this case, the 24 months originally imposed by JDAP was wholly inadequate. ALH had proactively sought to amend this condition when it was first imposed, seeking 36 months instead due to the length of time it would take to obtain a redefinition of its existing liquor licence for the Como Hotel, to allow the redevelopment to proceed. However JDAP refused to extend it.

The clear implication of the SAT’s decision is that greater consideration ought to have been given at the time to what ALH was seeking and why. Those in the hospitality industry who are facing the dual planning and liquor licensing approval process for development can now cite this decision to the planning authority as support for a realistic substantial commencement period for development approval.

The SAT further progressed the test of what constitutes “actively and contentiously pursued” implementation of a development approval, which is relevant when an extension of time is sought. Citing *Kapila v City of Stirling [2016] WASAT 59*, the SAT stated that “the range of considerations in the exercise of discretion as to whether to extend the period within which an approved development must be substantially commenced is ‘not closed’” and expanded the existing three considerations with a further two. The broader five-step test being:

- Whether the planning framework has changed substantially since the development approval was granted
- Whether the development would likely receive approval now
- Whether the holder of the development approval has actively and relatively conscientiously pursued the implementation of the development approval
- Whether the time originally limited was adequate in all of the circumstances
- Was the developer seeking to “warehouse” the approval

This wider range of considerations brings much needed flexibility and a more sensible approach to the exercise of discretion to extend a lapsed development approval, especially whether other regulatory processes are at play.

Why is This Case Important?

In granting an extension to the substantial commencement period, the decision of the SAT shines a light on the following material issues facing the development industry in WA:

- The complex, expensive and lengthy conflict that is the Western Australian experience of separate planning and liquor approval processes
- The increasing levels of intervention of Main Roads WA in land use and planning approvals in WA
- A major precedent for applications extending the time allowed for the commencement of development

Judicial Commentary on the Planning/Licensing Approvals Process and the Role of Main Roads

The SAT appears to be critical of the sequential process the hospitality industry is required to follow under the Planning and Development Act 2005 and then the Liquor Control Act 1988 when seeking to redevelop licensed premises. Developers cannot be criticised for requiring an extension to a lapsed development approval when the liquor licensing process has held up progress of the development.

This decision also presents interesting considerations for Main Roads, for local governments' deference to Main Roads, and for developers who find themselves frustrated by Main Roads' role in the planning process. Rather than providing an objective input, their role is widely perceived to be self-defined and increasingly excessive. Main Roads' actions to stymie this redevelopment with road works in conjunction with the City of South Perth were of no effect and the weight given to its evidence was minimal. For example, its assertion that traffic volume has increased at the site significantly since the development was originally approved in 2015 was baseless and provided no justification for a refusal of the application. In our view, this significantly narrows the role of Main Roads in the planning process.

Please get in touch if you would like to speak to someone about your planning or licensing approvals.

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