

Squire Patton Boggs recently represented ALH Group Property Holdings in the Supreme Court of Western Australia and successfully defeated a challenge by the City of South Perth to the planning approval for the redevelopment of the Como Hotel in South Perth.

Facts

The Como Hotel, owned by ALH Group Property Holdings (ALH), was the subject of a development application lodged in May 2014.

Situated on the intersection of Canning Highway and South Terrace in South Perth, the site is subject to the City of South Perth Planning Scheme No. 6. ALH elected to have the development application determined by the Joint Development Assessment Panel (JDAP).

The development application was initially refused by the JDAP on two occasions: in August 2014 and February 2015. Both refusals were preceded by mediation at the State Administrative Tribunal (SAT) and by modified development proposals. The modified proposal submitted in March 2015 was approved by the JDAP at its meeting on 17 April 2015. It is this approval which was challenged by the City of South Perth, the applicant, in judicial review proceedings before Martino J in the Supreme Court of Western Australia in *City of South Perth v ALH Group Property Holdings Pty Ltd* 2016 WASC 141.

In the judicial review proceedings the JDAP, as is its custom, chose to abide by the court's decision. ALH was a respondent to the proceedings.

Grounds for Review

The issue before the court was whether the JDAP had acted in excess of its jurisdiction in failing to have regard to a Development Control Policy (DCP 5.1) of the Western Australian Planning Commission (WAPC).

Under the scheme, the JDAP acting as decision maker of this application,¹ is required to have "due regard" to DCP 5.1.² This policy addresses matters relating to the control of developments adjacent to regional roads, such as Canning Highway.

In particular, DCP 5.1 provides that regional roads are principally for traffic movement and that "ideally" there should be no vehicular access to or from properties abutting these roads, whilst acknowledging that nevertheless many regional roads do give access to private property, particularly for commercial developments.³

The existing development on the site has access to Canning Highway through a crossover. The development approved by the JDAP (and the subject of judicial review proceedings) retained that crossover. The parties agreed the proposed development would increase the use of the crossover.

Outcomes

Having found that the JDAP was obliged to have due regard to DC 5.1,⁴ Martino J dismissed the applicant's grounds of appeal, finding that the JDAP did not act in excess of its jurisdiction in approving the development application.

In summary, his Honour found for ALH, for the following reasons:

- Although the decision to approve the development did not refer to the increased use of the crossover, the City had not established that the JDAP did not give a proper, genuine and realistic consideration to DCP 5.1, as the minutes of the JDAP meeting reflected that the JDAP was aware with the conflict of the development proposal with DCP 5.1.
- Martino J rejected the applicant's submission that the fact that ALH relied on the use of the crossover could not rationally found a reason to approve the development when it conflicted in DCP 5.1. Martino J said that it was open to the JDAP to rationally decide that, notwithstanding the conflict with DCP 5.1, the JDAP could approve the development including the use of the crossover.
- In its decision, the JDAP had regard to the fact that the WAPC had not itself required the closure of the crossover. His Honour considered that this showed only that the JDAP had regard to the position of the WAPC and did not show, as the applicant had submitted, that they had failed to have regard to DCP 5.1.
- The fact that at two previous meetings the JDAP had refused the development application, did not, His Honour opined, demonstrate that the JDAP failed to have due regard to DCP 5.1 at its meeting of 17 April 2015.

¹ Pursuant to regulations 8 and 16 of the *Planning and Development (Development Assessment Panels) Regulations 2011*, the JDAP was required to determine the application as if the JDAP were the City.

² Through the operation of clauses 3.3(5) and 7.5(d) of the *City of South Perth Town Planning Scheme No. 6* (as amended, at the time of the ALH application).

³ See clauses 3.1.1 to 3.1.4 of DCP 5.1.

⁴ *City of South Perth v ALH Group Property Holdings Pty Ltd* [2016] WASC 141 at [40].

Our Team Our Experience and How We Can Help

We have a leading regulatory and planning practice in Western Australia, headed by partner Margie Tannock. The team has recent proven experience in successfully arguing judicial review cases on planning matters.

Margie Tannock delivers strategic advice and commercial solutions involving property and infrastructure developments. She works for a number of major property developers, in planning, land compensation and environmental litigation.

Lauren Barnett, senior associate, specialises in land use regulation. She works in our regulatory team in the areas of development, infrastructure, town planning, building, land compensation, environmental and administrative law.

Naomi Kefford, associate, works in the regulatory team advising commercial and local government clients on a range of issues including planning, development and administrative law.

Contacts



Margie Tannock

Partner, Perth

T +61 8 9429 7456

E margie.tannock@squirepb.com



Lauren Barnett

Senior Associate, Perth

T +61 8 9429 7530

E lauren.barnett@squirepb.com



Naomi Kefford

Associate, Perth

T +61 8 9429 7617

E naomi.kefford@squirepb.com



The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

© Squire Patton Boggs.

All Rights Reserved 2016