The WA Supreme Court of Appeal distinction between 'land use' and 'land development' within the context of non-conforming use rights

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The Western Australian (**WA**) Court of Appeal has upheld the challenge brought by the Shire of Murray (**Shire**) against the WA Supreme Court's decision in *IVO Nominees Pty Ltd v Shire of Murray* [2019] WASC 67.

In this article, Solicitor **Lily Robinson** and colleagues provide an overview of the primary and the Court of Appeal's decisions.

Background

On 20 April 2018, the Mandurah Magistrates Court convicted IVO Nominees Pty Ltd (**IVO**) of two offences of contravening clause 3.1.2 of Shire of Murray Town Planning Scheme No 4 1989 (WA) (**TPS 4**), contrary to section 218(a) of the *Planning and Development Act 2005* (WA).

The substance of the offences were that:

- in April 2015, IVO caused 11 hectares of vegetation to be cleared on Lot 9510 (**Land**), causing significant alterations to the Land, without the approval of the Shire; and
- in May and June 2015, IVO caused significant expansion of an existing drain on the Land resulting in the removal of large amounts of soil and excavation of substantial vegetation, without the approval of the Shire.

On appeal to the Supreme Court of Western Australia, IVO contended, among other things, that the Magistrate erred in fact and law in concluding that the clearing of vegetation and the drain expansion works required the Shire's approval given IVO's non-conforming use rights extended to it being able to undertake these activities. This argument was accepted by the primary judge who subsequently upheld the appeal and set aside the convictions.

The Shire then appealed the decision on the grounds that on a proper construction of TPS 4, the non-conforming use rights did not encompass the clearing activities the subject of the offences.

Decision of the Supreme Court

On appeal to the Supreme Court, IVO relied on clause 8.1(i) in TPS 4 which provided that no provision of TPS 4 would prevent the continued use of any land for the purpose for which it was being lawfully used at the time TPS 4 came into force.

TPS 4 was gazetted in 1989 and amended in 1996. The amendment resulted in the Land being rezoned from "Rural Pursuit" to "Special Development". Prior to 1996, the Land was lawfully used for the purposes of grazing cattle, watering cattle and producing cattle feed. Such use continued after the 1996 rezoning, which in the opinion of the primary judge, enlivened the non-conforming use provision in clause 8.1 of TPS 4. The primary judge found that even though at the time of the alleged offences the Land was zoned "Special Development", the vegetation clearing and the drain

excavation works were permitted non-conforming activities within the scope of the purpose for which the Land was being used before the 1996 rezoning.

Further, as the vegetation clearing and drain excavation works were found to be part of the continuing non-conforming use of the Land, the question of development approval did not arise. Consequently, the primary judge considered that it was not necessary to determine whether these activities would be classified as development.

Decision of the Court of Appeal

On appeal, the Shire submitted that when properly construed, clause 8.1 TPS 4 provided no protection to IVO. The Court recognised the ambulatory effect of clause 8.1 TPS 4 in that, when TPS 4 was amended, any use that was a lawful one prior to amendment continued to be a lawful use. However, as contended by the Shire, the Court found that on the proper construction of TPS 4, the non-conforming use rights did not encompass the clearing activities that were the subject of the offences.

In reaching this conclusion, the Court examined the distinction between the concepts of 'use' and 'development' within the context of the definition of 'development' in TPS 4. The Court stated that '*…use is a subset of the broader concept of development in that both are an activity done in or on the land, but 'use', unlike 'development', does not interfere with the actual physical characteristics of the land*'. Consideration of the criteria discussed in *Claude Neon Ltd v City of Perth* [1983] WAR 147, as to whether an activity amounted to development for the purposes of TPS 4 was a question of fact to be determined having regard to:

- the degree of physical alteration to the land;
- the degree of permanence of the physical alteration; and
- all of the circumstances.

Applying that criteria, the Court concluded that the activities resulted in a permanent and significant physical alteration to the Land which constituted 'development' and therefore required approval.

Pursuant to the fact dependent nature of the above criteria, whether an activity will amount to development and therefore require development approval for the purposes of TPS 4 will not always be easy to predict and will vary depending on the circumstances of the case.

Conclusion

Whether activities on land will be deemed a 'use' or 'development' for the purposes of requiring approval will be determined by the particular scheme provisions in play and the criteria applied to the facts of a particular case. A preserved non-conforming right does not necessarily eliminate a requirement for development approval. Accordingly, awareness of the distinction between 'use' and 'development' is vital for landowners who want to avoid a fate similar to IVO's.

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