

Local Development Plans and the realities of the Deemed Provisions

17 December 2021

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Worthwhile read for: Town Planners, Local Governments, Property Developers, Environmental Consultants

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The State Administrative Tribunal has taken the opportunity in its decision of *Mastaglia and City of Cockburn* [2021] WASAT 154 (**Mastaglia**) to issue a reminder to local governments to review their planning frameworks in light of the *Deemed Provisions* contained in the *Planning and Development (Local Planning Schemes) Regulations 2015* (WA).

Mastaglia concerned an exposed parapet boundary wall that had not been rendered to match the dwelling in non-conformance with the city's Local Development Plan. In this alert, we provide an overview of the impact of the *Deemed Provisions* on local development plans.

The Deemed Provisions

Clause 46 of the Deemed Provisions defines a 'local development plan' to mean:

'a plan setting out specific and detailed guidance for a future development including one or more of the following:

- Site and development standards that are to apply to the development; and
- *Specifying exemptions from the requirement to obtain development approval for development in the area to which the plan relates.'*

Local development plans (**LDP**), previously known as detailed area plans, are used by local governments to control development, usually in small or mixed use developments so as to ensure consistency of overall approach to design. LDPs can also be used to amend or replace the requirements of *State Planning Policy 7.3 – Residential Design Codes (R Codes)*.

In *Mastaglia*, the relevant LDP provided that exposed parapet walls were to be suitably finished. The city issued a directions notice directing the owner to apply an appropriate matching finish to the boundary wall. It was argued that the requirements of the LDP had been incorporated into the TPS and had the effect of varying the city's planning policies and the R Codes.

Mastaglia contended that the city's power to issue the notice had not been enlivened. It argued that although LDPs were able to amend or replace the deemed-to-comply provisions in the R Codes the power to do so was limited to only those matters contained in Parts 5 and 6 of the R Codes which did not apply to the external finish of buildings, the impact of the Deemed Provisions limited the effect of LDPs requiring local governments to have due regard to them but noting they were no longer bound by them. As the development otherwise met the deemed-to-comply provisions, no development approval was required.

Comment

The Tribunal found that due to the implementation of the Deemed Provisions there was nothing in the

transitional provisions which preserved the effect of an LDP and therefore an LDP could not be viewed as triggering the need to obtain development approval where non-compliance occurred. There was nothing in the relevant TPS displacing the exemption in cl 61(1)(c) of the Deemed Provisions with respect to single dwellings where the provisions of the R-Codes were met. That is, once the deemed-to-comply provisions were met development approval was not required.

The case demonstrates the unintended consequences of the Deemed Provisions on LDPs that have otherwise been carefully constructed so as to achieve the desired planning outcome. Where residential development meets the deemed-to-comply provisions of the R Codes, development approval will not be required, even where the requirements of an LDP are not met.

Given the importance of amenity and aesthetics to areas being developed and noting the absence in the R Codes relating to external finishes, this is an unfortunate outcome which has arisen due to the deemed-to-comply provisions failing to reflect outcomes sought to be achieved by planning policies. If compliance with the deemed-to-comply provisions is to remain the touchstone for residential developments, then it is possibly time to consider a review, particularly with respect to the public domain interface and façade design requirements.

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