CASE NOTES

Western Australia

Notes on Cases and Statutes

Freedom of Information and Ministry for Planning

Minister for Planning v Taweel

Ministry for Planning v Collins

Two recent Supreme Court decisions have exposed the decision making processes of the Minister and Ministry for Planning to the requirements of the *Freedom of Information Act* 1992 (WA) ("the *FOI Act*").

In *Minister for Planning v Taweel*,[1] the Minister appealed to the Supreme Court against the decision of the Information Commissioner ordering access under the *FOI Act* to documents held by the Minister in relation to an appeal by Taweel to the Minister against the decision of the City of Canning refusing planning approval to develop a child care centre on their land. Under the *Town Planning and Development Act* 1928 (WA) ("*TP&D Act*"), an appeal from the decision of a local authority can be made either to the Town Planning Appeal Tribunal or the Minister. An appeal to the Tribunal is a relatively formal open process, whereas "[b]y complete contrast, the appeal to the Minister is substantially informal"[2] closed to the public and the Minister gives no reasons for decision. The issue in the case concerned the interpretation of cl.4(2) of the Glossary of the *FOI Act* which provides that access to a document in the control of a Minister is restricted to those documents which "relate to the affairs of another agency", not being another Minister or an agency for which the Minister is responsible". Notwithstanding the absence of an evident policy explanation for the distinction between the right of access to documents held by a Minister relating to the affairs of an agency for which the Minister was not responsible, but the denial of access to documents in the control of the Minister relating to the affairs of an agency for which the Minister was responsible, Parker J held that the exception to the denial of access to ministerial documents was not to be narrowly construed. His Honour held that the documents in the appeal file of the Minister could be regarded as relating to the affairs of "the City of Canning" and the respondent Taweel was entitled to have access to them.

In *Ministry for Planning v Collins*[3] the Ministry appealed to the Supreme Court against the decision of the Information Commissioner under the *FOI Act* to order that documents held by the WA Planning Commission be produced to Mr Collins. The documents, held by the Ministry, related to negotiations between the WA Planning Commission and Mr Collins for the voluntary sale of land by Collins to the Commission, and included certain valuations of the land and related documents concerning the Commission's deliberations about the negotiations. The question for the determination of the Information Commissioner and the Court was whether the documents were exempt from disclosure under cl.6 of Schedule 1 to the Act. As Templeman J pointed out, that clause requires that the agency seeking the exemption must show that the disclosure of the document would (a) reveal the deliberative processes of the Government, and (b) on balance, be contrary to the public interest.[4] It was clear that the documents concerned were part of the deliberative processes of government, so the real question was whether there disclosure would be contrary to the public interest. The Commissioner rejected the Ministry's submissions that disclosure of the documents would compromise the public interest in the integrity of the Planning Commissions deliberative processes in using taxpayers funds and recognized the public interest in the Planning Commission dealing fairly with private citizens in acquiring property on just terms. On appeal to the Supreme Court, it was necessary for the appellant to show that the Information Commissioner had made an error of law in her determination of the public interest in disclosure of the documents. Without traversing all of the submissions considered by Templeman J, it is sufficient to say that his Honour rejected the appeal and held that the Commissioner had made no error of law in her determination.

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1 Supreme Court of WA, Parker J, delivered November 13, 1996, Library no.960654.
2 Ibid, Parker J @ p.3 of the transcript of judgment
3 Supreme Court of WA, Templeman J, delivered 22 November 1996, Library no.960668.
4 Ibid. pp.12-13.

Consideration of Objections to a Town Planning Scheme

On 10 December 1996, Anderson J of the Supreme Court rejected a challenge brought by Uniting Subiaco (Inc), a local community group, to various decisions taken by the Minister for Planning and the Subiaco Redevelopment Authority ("SRA" under the *Subiaco Redevelopment Act* 1994 (WA) (*"the Act"*).[5] The Act establishes the SRA to plan, undertake, promote and co-ordinate the development and re-development of 71 hectares of land (mostly public land) near the centre of Subiaco. A central feature of the initial concept for the redevelopment project designed by the City of Subiaco in 1993 was the sinking of the suburban railway, and this feature has been maintained in the redevelopment scheme prepared by the SRA and eventually approved by the Minister for Planning though it was not described or specified in the Act. The plaintiff group objected to the sinking of the railway. The principal ground of legal challenge was that the Minister had a closed and biased mind when considering the public objections to the proposed re-development scheme because the Minister had already agreed (in writing) with the City of Subiaco that the development would include the sinking of the railway before exercising the power under the Act to approve the scheme. Anderson J answered the argument by saying that the sinking of the railway had always been a central feature of the project proposed by the City of Subiaco and their participation in it, and the fact that the Minister accepted this showed only that the Minister's response to the objections would determine whether or not the project went ahead. His Honour held: "[n]o doubt that serious consequence of upholding objections to the sinking of the railway would be a factor in any consideration of those objections. But this must be so whenever planning objections go to the fundamentals of a new plan. It does not necessarily mean that there will no, or no fair, appraisal of the objections."

Town Planning Schemes and Subdivision

In the previous issue of the AELN the effect of the *Planning Legislation Amendment Act* 1996 (WA) (*"PLA Act"*) was noted. An article by Vince McMullen exploring the effect of that legislation is included in this issue. An extra amendment which snuck through with that Act relates to the effect of town planning schemes on subdivision control decisions by the WA Planning Commission under s.20 of the *Town Planning and Development Act* 1928 (WA). A new s.20(5), inserted by s. 50 of the *PLA Act*, provides:

In giving its approval under subsection (1)(a), the discretion of the Commission is not fettered by the provisions of a town planning scheme except to the extent necessary for compliance with an environmental condition relevant to the land under consideration.

This amendment could be called the "Wallesly amendment" because it overturns the decision of Murray J in *State Planning Commission v Wallesley Pty Ltd*[6] that a town planning scheme which provided limits on the subdivision of land was binding on the Commission exercising power under s.20 (and on the Town Planning Appeals Tribunal on appeal from the Commission) and not just a relevant consideration. The reference in the new provision to environmental conditions is to conditions imposed on a planning scheme as a result of the scheme being assessed by the Environmental Protection Authority under the main provisions created by the *PLA Act*. What is disturbing about this amendment is that it is likely that only about 5% of planning scheme proposals will be formally assessed by the EPA and thus be subject to binding environmental conditions. There could be many occasions where "environmental protection" conditions may be included in a planning scheme without formal assessment by the EPA but for the purpose of restricting the type of subdivision that might be approved. Whilst the Planning Commission will have to consider such conditions, it will not be bound to observe them. This is a retrograde step.

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5 *Uniting Subiaco (Inc) v Lewis & Subiaco Redevelopment Authority*, delivered December 10, 1996 Library no 960706
6 Supreme Court of WA, delivered May 26, 1995.