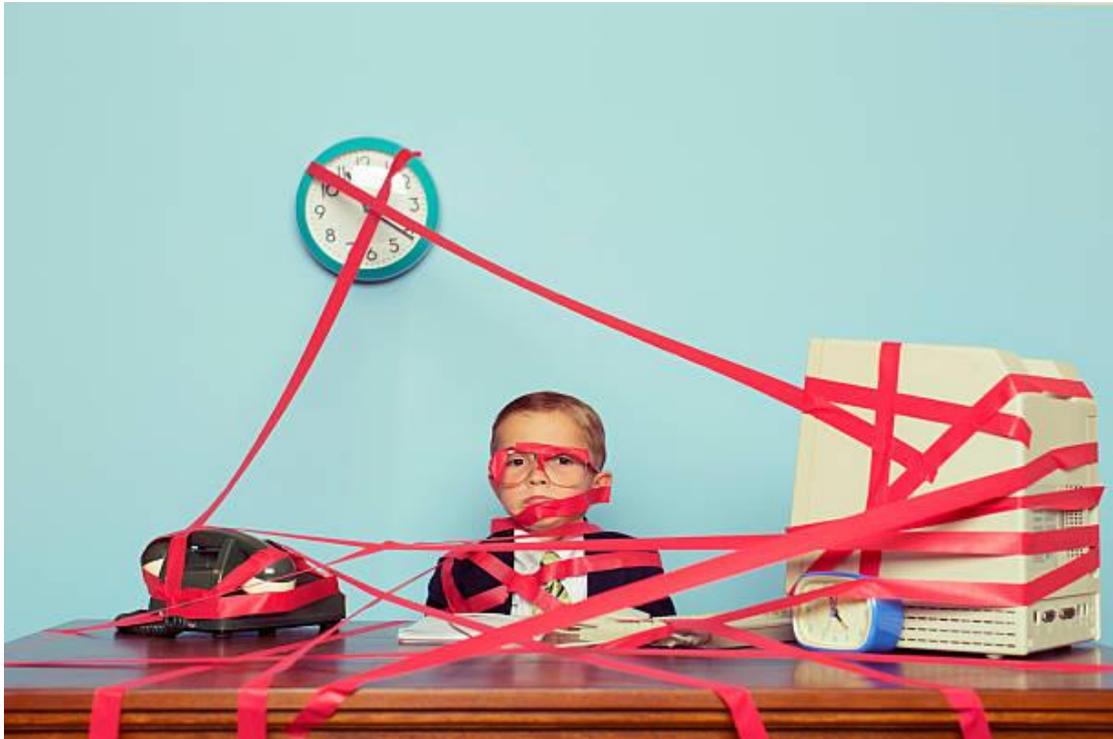


SAT decision exposes an 'inconvenient truth' - approval required under the MRS for everything other than the erection of a single dwelling house



MRS approval now required for *all* development other than a single dwelling house

On Monday 17 July, the State Administrative Tribunal handed down its decision in *West Australian Shalom Group Inc. v City of Joondalup* [2023] WASAT 63. The decision relates to a series of preliminary issues, the last of which was in the following terms –

Where development approval is expressly not required for development under a local planning scheme (and specifically, under Sch 2, cl 61 of the *Planning and Development (Local Planning Schemes) Regulations 2015* (WA) (**Deemed Provisions**)), is this to be construed as being an approval given by the local authority for the purposes of cl 26(1) of the *Metropolitan Region Scheme* (**MRS**)?

The Tribunal, at paragraphs [138] - [151] of the judgment held that unless specifically exempted from the requirement for development approval in the MRS, all 'development' as that term is defined in the *Planning and Development Act 2005* (PD Act) requires approval.

The Tribunal did not agree with Shalom's argument that an exemption under the Deemed Provisions amounted to an approval under the relevant local planning scheme, which would have the effect of providing a deemed approval under the MRS pursuant to clause 26.

Impact of decision

The State has been aware of this irregularity for some time, and has chosen to do nothing about it.

This was made clear by section 32 of the *COVID-19 Response and Economic Recovery Omnibus Act 2020 (WA)* (**COVID-19 Response Act**), which expressly exempted from the requirement for development approval under a region scheme, any activity undertaken in reliance of an exemption set out in a notice issued by the Minister for Planning under clause 78H of the Deemed Provisions. These notices can be issued by the Minister to exempt works on land or the use of land from the requirement for development approval under a local planning scheme in the context of a State of Emergency or COVID-19 declaration.

Almost three years after the COVID-19 Response Act was assented to, no equivalent provision has been proposed to regularise the hundreds of thousands of land uses and works which have commenced without approval under the MRS on reliance of exemptions under local planning schemes or the Deemed Provisions, nor to avoid the barrage of development applications which will now need to be lodged to ensure development commences lawfully.

The Tribunal noted in the penultimate paragraph of the judgment –

As I raised with the parties, at least in my view, Issue 3 draws attention to an inconvenient truth in relation to development that does not require approval under a local planning scheme and what that means in the context of the MRS. That inconvenient truth has existed for many years.

The impact of this decision cannot be understated, and has significant flow on effects, for example –

- whether tenants have obtained 'all necessary approvals' under commercial leases;
- whether insurance policy pre-conditions have been complied with;
- whether a Building Permit under the *Building Act 2011* can issue without an MRS approval being in place.

What does this mean for you?

Until such time as the State intervenes by either amending the MRS, or by way of an amendment to the PD Act, **all development on zoned land in the Metropolitan Region will require approval**, unless exempt from the requirement for development approval in clause 24 of the MRS (erection of a single dwelling house, and works by a public authority under, or over a street).

The decision also raises questions regarding the lawfulness of existing development.

In circumstances where a failure to have all necessary approvals in place could amount to a breach of a lease or insurance policy, approval under the MRS should be sought as a matter of urgency.

Further reading

- A copy of the decision is available at the following link –
<https://ecourts.justice.wa.gov.au/eCourtsPortal/Decisions/DownloadDecision?id=491abba0-9b72-4313-9774-11fb0f9c3e26>.
- A table setting out development which will now require approval is available at the following link:
<https://moharichandmore.com.au/wp-content/uploads/2023/07/230720-Shalom-Impact.pdf>