

# Reducing Your Local Government's Risks When Engaging in the SAT

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## Risk management strategies with words

Local governments have the power under various statutes, including the Planning and Development Act, to make decisions that affect stakeholder interests significantly. Anecdotally, a common complaint by local governments is that when their decisions are challenged in the State Administrative Tribunal (the "SAT") the odds are stacked against them.

Yet, when a local government is on the wrong side of an argument in the SAT, it is sometimes because of its own failure to take better preventative measures much earlier in the process.

Those measures do not require complicated processes. They are just some "back to basics" risk management strategies that can easily be adopted.

Here are some tips that will help your local government reduce its risks when drawn into the SAT.

## Tip 1 – Make sure all the right skills and experience are being used

Ensure that your planning department has the requisite skills or experience in assessing planning applications. In analysing skill levels, note that there can be a major gap between technical planning skill and the skill of crafting a form of words that captures the technical analysis.

Where the department is not strong (often the case in some smaller shires), then consider engaging consultants with planning expertise. However, when doing so, consider whether they also have the requisite skill in the use of the English language when the time comes to drafting correspondence and planning conditions.

You do not want correct planning reasons to be failed by an inappropriate use of words.

**"The devil can often live in the detail of the wording."**

## Tip 2 – Choose your words carefully

Never use the words *approved*, *approved conditionally*, *provisionally approved*, *approved subject to* or any variations of these words in your planning approval process unless you have already:

- (a) undertaken all necessary consultations;
- (b) obtained all necessary expert advice and reports;
- (c) obtained all the information that you want from the applicant; and
- (d) satisfied yourself that Council has the power to give the approval sought.

Do not be tempted to use these words to satisfy a persistent proponent. Only use the word *approved* to describe the status of the application when the process of assessing the application has actually ended and all you now need to do is get a formal decision from Council. That decision is the point at which you can say that approval is indeed to be given.

## Tip 3 – Make the wording of the conditions your friend

If conditions are to be placed on an application, they should be worded so clearly that the applicant can be in no doubt from reading them just what action is required when acting on the approval. Avoid potentially ambiguous wording that can be interpreted against Council.

If Council has decided that an outstanding issue needs to be brought back to it for additional approvals, then this should also be stated clearly in the planning conditions.

For example, if approval is given to develop a building site *subject to* the issue of a building licence by Council or approval of the final plans for the building, then that should be clearly stated.

## Tip 4 – Get the wording checked

Consider having the wording of the particular approval conditions vetted by Council's lawyers. At first sight, this might seem like overkill or the use of the wrong type of consultant. However, there is a significant benefit in having rigorous wording used when a party's rights are about to be affected.

It is surprising just how many sets of planning conditions drafted by planning experts have been significantly improved by the wordsmithing skills of lawyers. Unfortunately for many local governments, the most rigorously worded conditions often get accepted too late in the day, namely when SAT proceedings are about to be concluded.

## Tip 5 – Keep accurate Council records

Council minutes are often regarded as a *pro forma* process, in which few, if any councillors actively check their accuracy before passing them as a true and correct record. The Administration is often relied upon as having taken an accurate minute at the previous meeting.

There is some risk in not checking the minutes of previous meetings carefully before accepting them as a true record. The minutes might mistakenly record a decision as an approval when it was not. If those minutes are affirmed as a true record, Council has created a piece of evidence, which in law can be quite difficult to overturn. Council would then be irretrievably committed to an incorrect position and if SAT proceedings are instituted, would have that record used as strong evidence against them.

Council resolutions should also be drafted very carefully. The overall theme of the resolution is often not the problem. The devil can often live in the detail of the wording. Once again, be rigorous with wording. Do not be afraid to defer the item to the next meeting to enable access to resources that can remove ambiguities. Better slow and accurate than quick and hopeful.

## Conclusion

When preparing approvals, be rigorous in the language you use. Explain conditions clearly and fully. Make sure that minutes really are a true and accurate record because incorrect ones may well affect the outcome or the costs when defending a challenge mounted in the SAT. There is merit in using Council's lawyer as their wordsmith to ensure the most effectively worded documentation.

## Key Points

- Ensure your planning department has the skills, or engage third parties to assist.
- Choose your words carefully when drafting planning conditions to achieve clarity.
- Be accurate with your minutes and Council resolutions.
- Make sure that Council has the right processes and records

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