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[3.0]

Annotated *Planning and Development Act 2005*

[3.213.0] 213. Effect of exercise by Minister of powers in s. 212

(1) When the Minister exercises powers conferred under section 212 and prepares or causes to be prepared and published in the *Gazette* —
  (a) an amendment to a local planning scheme; or
  (b) a local planning scheme, incorporating, if necessary, any modifications to, or conditions on, the scheme; or
  (c) a consolidated local planning scheme; or
  (d) the repeal of a local planning scheme,

that amendment, scheme, scheme as modified or with conditions, consolidation or repeal, as the case may be, has effect as if it were made, published and adopted by the local government and approved by the Minister and the local government is to implement it accordingly.

(2) A reference in this or any other Act to —
  (a) an amendment to a local planning scheme is to be read and construed as including a reference to an amendment to a local planning scheme prepared or caused to be prepared by the Minister under section 212; and
  (b) a local planning scheme is to be read and construed as including a reference to a local planning scheme prepared or caused to be prepared by the Minister in accordance with section 212.

[3.214.0] 214. Illegal development, responsible authority's powers as to

(1) For the purposes of subsections (2) and (3) —
  (a) a development is undertaken in contravention of a planning scheme or an interim development order if the development —
    (i) is required to comply with the planning scheme or interim development order; and
    (ii) is commenced, continued or carried out otherwise than in accordance with the planning scheme or interim development order or otherwise than in accordance with any condition imposed with respect to that development by the responsible authority pursuant to its powers under that planning scheme or interim development order;
  (b) a development is undertaken in contravention of planning control area requirements if the development —
    (i) is commenced, continued or carried out in a planning control area without the prior approval of that development obtained under section 116; or
    (ii) is commenced, continued or carried out otherwise than in accordance with the approval referred to in subparagraph (i) or otherwise than in accordance with the conditions, if any, subject to which that approval is given.

(2) If a development, or any part of a development, is undertaken in contravention of a planning scheme or an interim development order or in contravention of planning control area requirements, the responsible authority may give a written direction to the owner or any other person undertaking that development to stop, and not recommence, the development or that part of the development that is undertaken in contravention of the planning scheme, interim development order or planning control area requirements.

(3) If a development has been undertaken in contravention of a planning scheme or interim development order or in contravention of planning control area requirements, the responsible authority may give a written direction to the owner or any other person who undertook the development —
  (a) to remove, pull down, take up, or alter the development; and
  (b) to restore the land as nearly as practicable to its condition immediately before the development started, to the satisfaction of the responsible authority.

(4) The responsible authority may give directions under subsections (2) and (3)(a) and (b) in respect of the same development and in the same instrument.

(5) If it appears to a responsible authority that delay in the execution of any work to be executed under a planning scheme or interim development order would prejudice the effective operation of the planning scheme or interim development order, the responsible authority may give a written direction to the person whose duty it is to execute the work to execute that work.

(6) A direction under subsection (3) or (5) is to specify a time, being not less than 60 days after the service of the direction, within which the direction is to be complied with.

(7) A person who —

(a) fails to comply with a direction given to the person under subsection (2); or

(b) fails to comply with a direction given to the person under subsection (3) or (5) within the time specified in the direction, or within any further time allowed by the responsible authority,

commits an offence.

Contents

[3.214.5] Operation

The operation of s 214 was considered by the Tribunal in *Daawah Association of Western Australia Inc and City of Canning* [2009] WASAT 129. The Tribunal stated (at [34]):

> Section 214 of the PD Act confers a discretion of the responsible authority as to whether or not to give a direction to the owner of land or any other person who undertook development in contravention of a town planning scheme, and if it decides to give a direction as to its terms. This includes development commenced, continued or carried out otherwise than in accordance with any condition imposed with respect to the development by the responsible authority pursuant to its powers under that scheme.

There is a close link between s 214(2) and (3) – the former enables unlawful development to be restrained, whereas the latter enables unlawful development to be remedied: *Lafou Pty Ltd and Town of Claremont* [2009] WASAT 187 at [13].

[3.214.10] Sec 214 direction

In *Lafou Pty Ltd and Town of Claremont* [2009] WASAT 187, the Tribunal considered the operation of s 214(3) in view of practical difficulties that could arise when making a direction to restore the land to its pre-development condition. The Tribunal stated (at [24] and [26]-[27]):

> [Section] 214(3) of the PD Act recognises that unlawful development, as remedied in accordance with a direction under that subsection, is unlikely to be precisely the same as the pre-development situation. The PD Act provides a necessary degree of flexibility to address the [fact that, if something has been demolished, it is very difficult, if not impossible, to identify precisely what has been demolished, and what is therefore required to re-instate it]. The verb 'to alter', that is to make different in some particular or to modify, imports flexibility. Furthermore, para (b) of s 214(3) refers to restoring the land 'as nearly as practicable' to its pre-development situation. Paragraph (b) of s 214(3) also imports flexibility by the words 'to the satisfaction of the responsible authority'.
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> …
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> Furthermore, [such] difficulties … are not restricted to development comprising demolition … similar difficulties may arise in remedying unlawful development comprising erection, construction, alteration of or addition to any building or structure on land … [for example,] an unlawful extension or addition to a building. In order to remedy the unlawful development, it may be necessary to entirely rebuild a demolished roof or walls. However, it is not necessary for the direction to specify the materials that the recipient of the direction must use to rebuild demolished elements of the building or structure. It would be sufficient for the

> direction to state that the unlawful development must be pulled down and the land restored as nearly as practicable to its condition immediately before the development started.
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> Finally, the potential problem of the land having been sold to an unrelated third party who does not agree to provide access to the property is not restricted to development comprising demolition, but could equally apply in relation to any other form of development. The fact that the land may have been sold to an unrelated third party who does not agree to provide access to enable a person to remedy unlawful development may be a relevant factor in the exercise of discretion as to whether to give a direction or to confirm a direction on review, but it does not affect the lawful capacity to give a direction.

In regard to s 214(3)(a), the verbs "to remove, pull down, take up, or alter" used in that sub-paragraph assume "that something exists": *Lafou Pty Ltd and Town of Claremont* [2009] WASAT 187 at [20]. According to the *Macquarie Dictionary* (4th ed, 2005), those verbs have the following relevant meanings: "to remove" means "to move from a place or positions; take away" and "to move or shift to another place or position"; "to pull down" means "to demolish"; "to take up" means "to lift; pick up"; "to alter" means "to make different in some particular; modify": *Lafou Pty Ltd*, above, at [18].

In the case of development comprising "demolition", there is something that exists following the undertaking of the development, namely either a partially demolished building or structure or a cleared site: *Lafou Pty Ltd*, above, at [20]. A cleared site "may be 'altered', that is made different in some particular or modified, by rebuilding a demolished building or structure on the site. The verb 'to alter' is, therefore, conducive to the term 'development' including 'demolition'": *Lafou Pty Ltd*, above, at [21]. The term "development" in s 214(3) bears its defined meaning under s 4(1) of the Act and includes demolition: *Lafou Pty Ltd*, above, at [29]-[35].

[3.214.20] Sec 214 direction – Terms

Where development has been undertaken in contravention of a condition of development approval, although the responsible authority has a discretion as to whether to give a direction and in relation to the terms of any direction, the terms must involve the rectification of the relevant contravention: *Goldenstep Pty Ltd and Town of Vincent* [2007] WASAT 260 at [24]. A s 214(3) direction can require the rebuilding of a demolished building or structure: *Lafou Pty Ltd and Town of Claremont* [2009] WASAT 187.

A direction can only be given to a landowner who undertook unlawful development or to any other person who undertook unlawful development. A direction cannot be given to a landowner who acquired ownership after unlawful development was undertaken and who did not itself undertake the unlawful development. It would be contrary to the legislative purpose to expose innocent third parties to an order to remedy unlawful development that they did not undertake: *Lafou Pty Ltd*, above, at [40]-[41].

In *Lafou Pty Ltd and Town of Claremont* [2009] WASAT 187, the Tribunal held that a responsible authority retains the ability under s 214(3) of the PD Act to give a direction to a previous landowner who undertook unlawful development. The Tribunal also outlined how practical difficulties associated with this might be addressed, stating (at [42]):

> While, ideally, responsible authorities should act promptly to give directions to restrain and/or remedy unlawful development under s 214(2) and s 214(3) of the PD Act, it is conceivable that the identity of the landowner may change before the responsible authority is in a position to give a direction, either because of a deliberate attempt on the part of the landowner to seek to avoid having to remedy unlawful development or an innocent change of ownership … Despite a change or changes of ownership of the land in question, the responsible authority retains the ability under s 214(3) of the PD Act to give a direction to the landowner or any other person who undertook the unlawful development. It is true that the recipient of such a direction would need to obtain permission from the current landowner to enter the land and comply with the direction. However, if that permission were not obtained, or if the direction were not otherwise complied with according to its terms, the responsible authority may itself enter the land and carry out the direction in accordance with s 215(1) of the PD Act. The responsible authority may then recover any expense involved

in implementing the direction from the person to whom the direction was given as a debt in a court of competent jurisdiction under s 215(2) of the PD Act.

Cases

House, garage and fences demolished – land subsequently transferred to applicant – applicant did not undertake demolition or cause demolition to be undertaken – local government issued s 214(3) direction requiring applicant to restore land as nearly as practicable to its condition immediately before development started by rebuilding house, garage and fences – *Held:* Direction set aside because landowner was not owner at time demolition undertaken and did not itself undertake the development: *Lafou Pty Ltd and Town of Claremont* [2009] WASAT 187.

[3.214.25] Sec 214 direction – Relevant considerations for exercise of discretion

Where, on review, the Tribunal is required to determine whether a s 214 direction is a suitable response and should be affirmed or whether it should be varied or set aside, relevant considerations will include (*Drake and City of South Perth* [2005] WASAT 271 at [93]-[97]):

- the expectation that, in the interests of proper and orderly planning, planning laws should generally be complied with;
- the impact of the contravention of the town planning scheme, including consideration of whether the breach is purely technical;
- the factual circumstances in which the contravention took place;
- the time that has elapsed since the development was undertaken in contravention of the scheme; and
- the expense and inconvenience involved in remedying the contravention.

The planning merit of a development is not the primary question to be asked in respect of a s 214 direction but consideration of the planning merit of the development may be of assistance in disposing of all the issues: *Wignall and City of Albany* [2009] WASAT 73 at [39]-[50]; *Drake*, above; *Smart and Town of Port Hedland* [2008] WASAT 74 at [54]-[60]; *Morea Architects and Town of Vincent* [2006] WASAT 263; (2006) 44 SR (WA) 301. The factors which guide or inform the exercise of discretion under s 214 cannot, however, be exhaustively stated: *Morea Architects and Town of Vincent* [2006] WASAT 263; (2006) 44 SR (WA) 301 at [62].

In regard to the expectation of compliance, the Tribunal held in *Garnham and City of Mandurah* [2010] WASAT 106 (at [23]) that, unless there are found to be particular circumstances that dictate that the applicants' development be treated differently from others in the locality, the planning consent should be complied with. Unless an exceptional circumstance is found, the person seeking to avoid compliance might enjoy a private advantage in not complying with a development consent that others cannot enjoy. In that case, in order to determine whether there were circumstances that identified the development as one deserving special consideration, the Tribunal considered (at [24]) the impact on the affected locality of the non-compliance with the planning consent.

Whilst the time that has elapsed since a development was undertaken in contravention of the relevant planning scheme is a relevant consideration in the exercise of discretion as to whether a direction should be given under s 214, delay does not preclude an authority from giving a direction: *Morea Architects and Town of Vincent* [2006] WASAT 263; (2006) 44 SR (WA) 301 at [63]; *Lafou Pty Ltd and Town of Claremont* [2009] WASAT 187 at [34].

The expense and inconvenience of remedying the contravention does not warrant that an unlawful development should remain: *Robertson and Shire of Murray* [2009] WASAT 171 at [118]. There might be situations where an applicant is subject to significant inconvenience and cost in remedying a contravention, for example, the partial or complete demolition of someone's home for a mere technical breach of a TPS identified a considerable time after the breach has occurred: *Garnham*, above, at [36]. However, in some instances, any expense or inconvenience that might arise from

having to complete a development will be a consequence of the course the applicants undertook earlier when construction of the development was underway. Such expense or inconvenience will often not outweigh the public interest in having the planning consent complied with and having remedied the adverse impact the non-compliance has on the local amenity: see *Garnham and City of Mandurah* [2010] WASAT 106 at [35].

In *Robertson and Shire of Murray* [2009] WASAT 17, the Tribunal held that a relevant factor was the fact that the unauthorised use prevented part of the subject land from being used for a special use for which approval had been granted. In that case, the applicants were issued a s 214 direction to remove an unapproved motocross track which had been constructed on their land which, under special use provisions in the local planning scheme, could only be used for training, trotting and stabling of horses and associated activities including residential. The Tribunal considered that the special use zoning of the land justified an order that the land be reinstated to its prior condition so that it could continue to be used for the approved special use. The Tribunal stated (at [119]):

> A further factor which … is relevant in the present case is that the physical alteration of the site for the purposes of the existing motorcycle track precludes, or at least impedes, the use of the northern part of the site for equestrian purposes. Given that the site and 15 other lots in the vicinity have been specifically zoned for equestrian purposes, it is appropriate that the site should be restored as nearly as practicable to its condition before it was altered for the purposes of the track and therefore be available for equestrian purposes.

In regards to change in ownership of land, the Tribunal in *Lafou Pty Ltd and Town of Claremont* [2009] WASAT 187 stated (at [43]):

> the fact that ownership of the land has changed may be a relevant consideration in the exercise of discretion. However, if there were a relationship between the current landowner and the owner or any other person who undertook the development, then this consideration may not militate against the giving of a direction. The Tribunal does not express any considered view in relation to this topic.

Cases

Review of Tribunal's determination upholding authority's direction requiring reinstatement of part of heritage building – original development approval required approval of plans demonstrating relevant part of heritage building would remain intact prior to issue of building licence – Tribunal found this condition breached – Tribunal commented applicant had not sought to have condition reconsidered by authority or reviewed by Tribunal and had commenced contravening development in knowledge of procedures required for obtaining necessary approval – whether these comments implied wilful wrongfulness and indicated irrelevant considerations – *Held*: No error of law – fact that applicant knew procedure to obtain approval and did not seek review of condition were part of factual circumstances of contravention and not irrelevant – Tribunal had not elevated matters to determinative considerations: *Goldenstep Pty Ltd and Town of Vincent* [2007] WASAT 260.

[3.214.30] Review of s 214 direction

Section 255 of the PD Act entitles a person to whom a s 214 direction has been given to apply to the Tribunal for a review of the decision to give the direction.

Cases

Shed. Applicant denied development approval to build 300 sq m shed – building licence not applied for – applicant built shed – council issued s 214 direction to remove shed and restore site – applicant sought review of direction – *Held:* Direction affirmed – applicant must not gain advantage by not complying with law – development undesirable in locality – no circumstances supported direction being set aside: *Wignall and City of Albany* [2009] WASAT 73.

Waste. Applicant dumped waste in hole – authority directed applicant to remove waste and restore hole to previous condition within 65 days – applicant sought retrospective approval of dumping – authority refused approval – applicant sought review of direction and refusal – authority argued waste may contain hazardous materials – applicant provided test results purporting to be of relevant waste – third party had been observed dumping waste in same hole – *Held*: No independent confirmation of link between specific waste and testing – no expert opinion as to stability of fill – insisting upon removal of fill and reinstatement of hole contrary to orderly and proper planning – cost of reinstating hole not unreasonable – cost in terms of disadvantage and danger of reinstatement significant – retrospective approval granted conditional upon certification by independent experts that fill inert and stable – s 214 direction amended – applicant given period to comply with conditions under approval: *Smart and Town of Port Hedland* [2008] WASAT 74.

Walls and fences. Review of s 214 direction – City considered first 2 m of boundary wall of dwelling garage to be 0.17 m higher than approved height of 3.12 m – wall height of 3.12 m was constant relative to finished floor level of garage but varied in relation to existing ground level – rectification of alleged non-compliance would require removal of one row of brickwork for first 2 m of wall – section of wall adjoined forward section of garage on adjoining property – due to design of dwelling and location of electrical sub-board, removal of one row of brickwork would result in need to substantially redesign and strengthen gutter as large box gutter located adjacent to wall – any change to box gutter would impact greatly on waterproofing and structural integrity of building – *Held:* Notice set aside – constructed wall compliant with approval as no specific condition on approval limited height to 3.12 m above existing ground level – negligible and no undue impact on amenity of adjoining property – impacts did not warrant expense and inconvenience involved in remedying situation: *Bielawski and City of Bayswater* [2010] WASAT 103.

Review of s 214(3) direction requiring applicants to complete rendering and painting of partly rendered side wall of 5-storey multiple dwelling development as required by planning approval – notice did not include time within which applicants required to remedy non-compliance – *Held:* City decision to issue direction affirmed because of negative impact on amenity – not mere technical breach of planning consent discernable only to an expert – unfinished sections clearly visible beyond site leaving development with standard of finish worse than that of other houses in locality – neither timing of service of notice nor expense and inconvenience involved in remedying contravention justified applicants not complying with planning consent – notice varied by setting 90 day time limit to complete building: *Garnham and City of Mandurah* [2010] WASAT 106.

Heritage building. Review of Tribunal's determination upholding authority's direction requiring reinstatement of front doors and windows of heritage building and refusal to grant retrospective development approval for installation of wide commercial openings – original development approval required approval of plans demonstrating front doors and windows to be left intact prior to issue of building licence – Tribunal found this condition breached – applicant argued condition not breached as building licence not required for development to date and Tribunal had no power to affirm direction – Tribunal also imposed three further requirements in direction: (1) if reinstatement impractical, to be reconstructed based on photographic or documentary evidence; (2) if additional door required, separate previous door to be reinstated; (3) if further alterations required, applicant to undertake professional investigations for authority to assess – *Held*: Tribunal did not err in law in upholding direction – condition required doors and windows be kept intact – development not in accordance with condition – additional direction (1) valid as involved rectification of contravention of development approval – directions (2) and (3) did not involve such rectification and Tribunal did not have power to impose these requirements under s

purposes of fulfilling late husband's wishes, providing means of building herself suitable accommodation and having family nearby to provide assistance to her in retirement – applicant argued culturally not allowed for widow to dispose of inherited lands – *Held:* Proposal inconsistent with sound planning principles – personal circumstances of insufficient weight to be determinative – review dismissed: *Bingwa and WAPC* [2007] WASAT 204.

[3.242.0] 242. Submissions from persons who are not parties

The State Administrative Tribunal may receive or hear submissions in respect of an application from a person who is not a party to the application if the Tribunal is of the opinion that the person has a sufficient interest in the matter.

Contents

[3.242.5] Operation

In *ING Development Australia Pty Ltd and WAPC* [2008] WASAT 104, Chaney J considered the legislative intent behind s 242. His Honour said (at [21]):

> Commonly, submissions are invited from members of the community affected by the proposed development to make submissions to a planning authority in relation to particular developments. Those submissions are taken into account in the decision-making process. However, the planning system is such that the function of making the ultimate decision falls upon the nominated planning authority. Beyond their submissions, people who take a particular interest in a proposed development have no further role to play. Unlike in some other jurisdictions in Australia, no third party rights of review exist under the PD Act. Section 243 of the PD Act, and its predecessor s 63 of the TPD Act, suggest a clear legislative intention to limit the rights of third parties in the planning process.

Third party rights of review exist, to varying degrees, in every Australian State other than Western Australia. However, in Western Australia, the proposed intervener does not have such an independent right to review but, rather, may solely make submissions in relation to a planning application: *Canal Rocks Pty Ltd and WAPC* [2010] WASAT 176 at [32].

Section 242 facilitates submissions being made by third parties if they can demonstrate "a sufficient interest in the matter". The provision involves a two-stage approach. The first stage is to determine whether there is a sufficient interest for the purposes of the section (see [3.242.15]-[3.242.17]). If a sufficient interest exists, the second stage is to consider whether to exercise the discretion to receive submissions (see [3.242.10]): *Shire of Augusta-Margaret River v Gray* [2005] WASCA 227 at [139] per Pullin JA (applied in *Yum Restaurants International and City of Rockingham* [2008] WASAT 136); see also *Rennet Pty Ltd and City of Joondalup* [2006] WASAT 183; *Ironbridge Holdings Pty Ltd and WAPC* [2007] WASAT 325 at [26].

[3.242.10] Relevant considerations for exercise of discretion

In *Shire of Augusta-Margaret River v Gray* [2005] WASCA 227, Pullin JA (Le Miere AJA agreeing) held (at [139]) that the requisite sufficient interest must be shown before the Tribunal's discretion is enlivened. After citing *Pitt v Environmental Resources and Development Court* (1995) 66 SASR 274, his Honour went on to state (at [139]):

> That is not to say that if the jurisdiction is enlivened that the Tribunal is then obliged to exercise the discretion in favour of the applicant. Factors such as those referred to in *Pitt's* case would then be taken into account in deciding whether to permit a person, not a party, to make submissions

These comments were applied by Chaney J in *Yum Restaurants International and City of Rockingham* [2008] WASAT 136 (at [30]). Chaney summarised factors referred to in *Pitt* as including (at [31]):

- the contribution which the interested party is likely to be able to make to the proper disposition of the issues before the Tribunal;
- whether the interest which the interested party represents and the material to be advanced by that person will be adequately dealt with by the parties already before the Tribunal;
- the impact on the proceedings of permitting submissions to be made;
- the interests of the parties before the Tribunal as of right and the public interest in the prompt and efficient dispatch of proceedings; and
- any other factors particular to the case.

An intervener will not ordinarily be allowed to extend the subject matter of the proceeding. Ordinarily, an intervener will be allowed only to support or oppose a position contended for by one or the other of the parties: *Viento Property Ltd and WAPC* [2009] WASAT 229 at [46].

Cases

Applicant filed application for review of authority's refusal of retrospective development approval for air conditioning unit – Tribunal invited authority to reconsider decision – authority substituted new decision approving development subject to conditions concerned with screening and baffling to conceal unit and reduce noise – applicant accepted new decision and applied for leave to withdraw application with authority's consent – neighbour applied for leave to make submission – Tribunal granted leave to make submission on application for withdrawal – submission suggested alternate conditions of approval and discussed planning framework – *Held*: Submission went to merits of development and discretion of authority – beyond grant of leave – no grounds to refuse application – leave granted to withdraw application for review: *Smith and City of Fremantle* [2007] WASAT 322.

[3.242.15] "Sufficient interest"

The expression "sufficient interest" means that the Tribunal must be satisfied that the applicant has an interest which would give standing for judicial review and which would pass the test for standing approved by the High Court in *Australian Conservation Foundation Inc v Commonwealth of Australia* (1980) 146 CLR 493: *Shire of Augusta-Margaret River v Gray* [2005] WASCA 227 at [139] per Pullin JA (Le Miere AJA agreeing); *Yum Restaurants International and City of Rockingham* [2008] WASAT 136 at [17]; *Ironbridge Holdings Pty Ltd and WAPC* [2007] WASAT 325 at [27]-[28].

In *ING Development Australia Pty Ltd and WAPC* [2008] WASAT 104, Chaney J provided the following overview of the findings in *Australian Conservation Foundation Inc* (at [22]-[26]):

> In [*Australian Conservation Foundation Inc*], Gibbs J said (at 530):
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> > "However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of writing a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it."

His Honour also observed (at [531]) the fact that the applicant in that case was incorporated with particular objects does not strengthen its claim to standing. He said:

> "A natural person does not acquire standing simply by reason of the fact that he holds certain beliefs and wishes to translate them into action, and a body corporate to advance the same beliefs is in no stronger position."

Mason J agreed that a person or body which has no special interest in the subject matter of an action over and above that enjoyed by the public generally will not have *locus standi* to seek to prevent violation of a public right or enforce the performance of a public duty. He considered that:

> "A plaintiff will in general have a *locus standi* where he can show actual or apprehended injury or damage to his property or proprietary rights, to his business or economic interests (as to which the *NSW Fish Authority v Phillips* (1971) NSWR 725) and perhaps to his social or political interests. Beyond making this general observation, I consider that there is nothing to be gained from discussing in the abstract, the broad range of interests which may serve to support a *locus standi* …"

He specifically agreed with the observations of Gibbs J set out above (see 547-548). In relation to standing to enforce a public right, Gibbs J (at 526-527) applied the test that, to have standing, a plaintiff must demonstrate that it will suffer special damage, peculiar to itself, from the interference with the public right. He observed however, that "special damage" should be regarded as equivalent in meaning to "having a special interest in the subject matter of the action.

In *Yum Restaurants International and City of Rockingham* [2008] WASAT 136, Chaney J considered whether an economic interest is sufficient to constitute a "special interest". His Honour stated (at [26] and [29]):

> It does not, in my view, follow that in all cases a "business or economic interest" is incapable of amounting to a sufficient interest for the purposes of s 242. Each case requires an examination of the relationship of the interest to the matter before the Tribunal. It would, in my view, be an error to exclude particular categories of interest as a general rule applicable to all cases. As Mason J said in *Australian Conservation Foundation v Commonwealth of Australia* [(1980) 146 CLR 493], "there is nothing to be gained from discussing in the abstract the broad range of interests which may serve to support a locus standi".
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> …
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> The purposes of the PD Act include the provision of an efficient and effective land use planning system in the State, and the promotion of the sustainable use and development of land in the State. It cannot, in my view, be said that a recognition of a purely commercial interest as a "sufficient interest" for the purposes of s 242 is necessarily inconsistent with those objects. For example, in the type of case referred to by Stephen J in *Kentucky Fried Chicken Pty Ltd v Gantidis* [(1979) 140 CLR 675], where economic factors might be a proper consideration as a matter of town planning, the perspective of a person with a commercial interest might assist the Tribunal to reach the correct and preferable decision.

For additional discussion of relevant authorities, see *Viento Property Ltd and WAPC* [2009] WASAT 229 at [13]-[17].

Cases

Applicant sought to make submissions in application for review of deemed refusal of outline development plan in relation to land in sub-precinct of a development area – applicant owned land in different sub-precinct of development area – local structure plan for whole precinct showed location of high school on applicant's land – applicant wished to participate in proceedings to argue that high school should be located on land subject of proposed outline development plan rather than on its land – *Held:* Permission refused to make submissions – applicant did not have sufficient interest in outcome of application for review, partly because it did not have interest not shared by at least a segment of public: *Viento Property Ltd and WAPC* [2009] WASAT 229.

[3.242.17] "Sufficient interest" – Specific factors and circumstances

Strata lot owners have been held to have sufficient interest in relation to a development application by a strata lot owner where the strata lots are all on the same site: see *Adam and City of Fremantle*

[2008] WASAT 226 (lot owners permitted to make written submission on effect on their dwellings of screening wall on balcony of 2-storey dwelling).

The fact that a society's constitutional objectives make the society's activities relevant to a particular development proposal is not sufficient to give standing under s 242. Nor is it sufficient that members of the organisation hold genuine and strong intellectual or emotional concerns about the proposed development, and have a strong interest in having what they see as the proper planning outcome achieved: *ING Development Australia Pty Ltd and WAPC* [2008] WASAT 104 at [45]. If interest and concern of that nature were sufficient to constitute the required interest, any person who felt strongly enough about the proposed development would be entitled to intervene: *Australian Conservation Foundation Inc v Commonwealth of Australia* (1980) 146 CLR 493 per Gibbs J; *ING Development Australia Pty Ltd*, above, at [45].

It is not sufficient that a person seeking to make submissions has actively sought to influence the original decision-maker. In such an event, the person's submissions will generally be before the Tribunal upon review: *ING Development Australia Pty Ltd*, above, at [45].

In most subdivision applications, a direct interest would not exist simply because of potential financial consequences for residents having additional properties in their vicinity which may, given the fluctuations of supply and demand, reduce the value of property: *Ironbridge Holdings Pty Ltd and WAPC* [2007] WASAT 325 at [29].

Cases

Owner of adjoining property. Review of refusal of development approval for construction of grouped dwelling at residential density of R30 – owner and resident of property adjoining relevant site sought leave to make written submissions in relation to whether Tribunal had jurisdiction to determine proceedings and in relation to application generally – neither party proposed to argue that Tribunal did not have jurisdiction to entertain proceedings – adjoining land owner called as a witness for local government in relation to application generally – *Held:* Leave granted to make submissions in relation to Tribunal's jurisdiction but not in relation to application generally: *B & F Holdings (WA) Pty Ltd and City of South Perth* [2009] WASAT 17.

Commercial interest. Appeal against refusal to develop fast food outlet – third party formerly operated fast food outlet from nearby site pursuant to franchise agreement with applicant – franchise agreement terminated, but third party's lease of premises had six years to run – third party sought s 242 order to make submissions – third party argued it had "sufficient interest" by virtue of its commercial interest in outcome of proceedings, namely, if applicant successful in gaining approval, would affect third party financially by reducing its prospects of obtaining new franchise agreement with applicant and would give rise to competition to any different fast food outlet which third party may operate from premises – third party unaware of issues between parties and unable to identify matters upon which it would make submissions – third party sought leave to attend proceedings and, at conclusion, make submissions on any matters arising during proceedings – *Held:* Indirect impact of proceedings on third party's commercial interest did not amount to sufficient interest in matter – even if sufficient interest had been established, leave to make submissions would have been refused as no issues for determination in proceedings could have been informed by commercial issues of nature raised by third party: *Yum Restaurants International and City of Rockingham* [2008] WASAT 136.

Local residents. Proposed subdivisions would more than double population of country town and have material impact on town's character – initially refused due to lack of structure plan – structure plan prepared and approved during proceedings – parties asked Tribunal to approve conditional subdivision – local residents' association and three local residents applied for leave to make submissions regarding approval – residents argued insufficient regard given to particular provision of planning framework and subdivision would affect character, amenity and services of town – one resident directly affected in terms of visual impact – *Held:* Resident affected by visual

impact had sufficient interest and granted leave – leave refused to raise issues regarding character, amenity and services as already addressed in structure plan process and public consultation – leave granted to residents' association, but denied to others, regarding provision of planning framework: *Ironbridge Holdings Pty Ltd and WAPC* [2007] WASAT 325.

For a case in which a local society with 140 members representing residents sought to make submissions in an attempt to influence the final design of a proposed development of a commercial precinct, see the case summary of *ING Development Australia Pty Ltd and WAPC* [2008] WASAT 104 at [3.242.20].

Planning authority. Proposed development of commercial precinct comprising mixed use retail and commercial premises – site reserved for Public Purposes (Special Uses) – city's approval not required under LPS – application considered by WAPC which granted conditional approval – developer sought review of conditions – development of concern for city in sense that form of proposed development had potential to impact upon city's CBD in relation to matters such as traffic, views and pedestrian access and relationship of certain commercial premises and commercial focus of CBD – local society with 140 members representing residents sought to make submissions in attempt to influence final design – *Held:* General interest and concern on part of city did not constitute sufficient interest for purposes of s 242 – city did, however, have sufficient interest in relation to conditions concerning vehicular and pedestrian access and parking – leave granted for city to make submissions in event that matter not resolved between parties and issues remaining to be determined by Tribunal related to conditions in respect of which city had sufficient interest – local society did not have sufficient interest: *ING Development Australia Pty Ltd and WAPC* [2008] WASAT 104.

Review of WAPC refusal of development approval – subject land reserved under Metropolitan Region Scheme (MRS) – heritage-listed – not zoned or reserved under LPS – day prior to refusal, MRS reservation removed – local authority required to amend scheme in line with MRS – authority applied to intervene or, alternatively, make submission – *Held*: Application allowed – removal of reservation recognised planning responsibility would in future rest with authority – review might foreclose authority's planning options regarding land – in public interest for authority to intervene: *McKimm and WAPC* [2007] WASAT 193.

Additional evidence. Application for residential development – leave to intervene in proceedings originally refused on basis that intervenors sought to do no more than present same case as second respondent – later became apparent that second respondent did not intend to adduce any expert evidence in relation to an issue which it had raised in its documents, that issue being likely impact of proposal on neighbouring heritage house – intervenors had engaged heritage expert who had prepared report on matter which would assist Tribunal – *Held:* Leave granted to intervene for limited purpose of adducing evidence from heritage architect and making submissions: *Walsh and Shire of Peppermint Grove* [2009] WASAT 46.

[3.242.25] "Matter"

The "matter" referred to in s 242 is the controversy as to the planning merits of the particular proposal and the potential use and enjoyment of the subject site: *Yum Restaurants International and City of Rockingham* [2008] WASAT 136 at [25].

[3.242.30] Mediation/settlement/consent orders

There would need to be something exceptional about a case to permit a third party to make submissions pursuant so s 242 where the applicant and decision-maker have reached agreement as to an appropriate outcome: *ING Development Australia Pty Ltd and WAPC* [2008] WASAT 104 at [40] per Chaney J; *Canal Rocks Pty Ltd and WAPC* [2010] WASAT 176 at [30]. It would be contrary to the Tribunal's objectives to permit submissions to be made by the third party to the effect that the

Planning Case Notes

Contents

[18.80.0] Amenity

Contents

Related materials

- [18.500.0] Height
- [18.780.0] Noise
- [18.1320.0] Streetscape
- [15.25.276] Meaning of "primary street" under R Codes
- [18.1080.31] Non-residential uses – Schools – Adjoining site
- For summaries of cases involving amenity in the context of specific development types, see entries under "amenity" in the subject index or under "amenity" sub-headings under relevant topics in these Planning Case Notes.

[18.80.08] Meaning of "amenity"

In *Cipriano v City of Perth* (unreported, TPAT, appeal no 20 of 1979, 21 January 1980) "amenity" was defined (at 5) as being: "The sum of the expectations of the residents concerning the quality of their residential environment as determined by the character of an area, its appearance and land uses". This definition relies on the views of residents as to the quality of their environment and their individual expectations going forward: *Bonomi and Town of Vincent* [2008] WASAT 48 at [49]. In *Rajneesh Foundation of Australia v Shire of Manjimup (No 2)* (1985) 3 SR 65, amenity was defined by Mr Malcolm QC from a different perspective: "... the likelihood of a proposed activity causing a nuisance is one way of testing whether or not a given activity will have a detrimental effect on the amenity of the locality." This definition accepts the existing amenity as given, good or bad, and the likely consequences of a proposed development on that amenity as assessed by individuals within the locality: *Mondello and Town of Vincent* [2008] WASAT 88 at [77]-[80]; *Bonomi*, above, at [51].

There are two parts to amenity of a site: public amenity (what it looks like from the street) and internal amenity: *Riede and Town of Vincent* [2007] WASAT 209 at [45]. As to the weight to be given to each, see [18.80.10].

In *Freeman and City of Subiaco* [2008] WASAT 303, the Tribunal (at [94]) separated the amenity of the locality from the amenity issues that may impact on neighbouring properties and considered that in these matters consideration needs to be given to privacy, overshadowing and solar access and bulk (cited with approval in *Arnold and Town of Claremont* [2009] WASAT 231 at [59]).

An argument that an appropriate dictionary definition of amenity was one that referred to the "pleasantness" of a place has been rejected by the Tribunal – see *Bartulovic and City of Stirling* [2009] WASAT 173 at [42].

[18.80.10] Assessment

In *Tempora Pty Ltd and Shire of Kalamunda* (1994) 10 SR (WA) 296, the Town Planning Appeal Tribunal outlined the general approach to the assessment of amenity impact. The Tribunal stated (at [304]):

> Determination of amenity of the locality is a question of fact and consists of three parts: the existing amenity, the manner in which the proper use will effect the existing amenity and the degree of impact on the locality.

In *Sunbay Developments Pty Ltd and Shire of Kalamunda* [2006] WASAT 74; (2006) 150 LGERA 116, Barker J went further, finding that, whilst the approach in *Tempora* should be followed, the assessment should, in addition to present amenity, also consider likely future amenity. His Honour stated (at [22]):

> However, the approach in *Tempora v Shire of Kalamunda* to the consideration of the impact of a proposed development on existing amenity does not preclude an assessment, required by an applicable planning instrument, of the impact of the development on likely future amenity.

Barker J's comments have been applied in numerous cases (see, eg, *Freeman and City of Subiaco* [2008] WASAT 303 at [101]; *Smith and City of Albany* [2008] WASAT 251 at [85]; *Driscoll and Shire of Augusta-Margaret River* [2008] WASAT 219 at [94]; *St Patrick's Community Support Centre and City of Fremantle* [2007] WASAT 318 at [40]; *Hamzah and City of Fremantle* [2009] WASAT 110 at [108]). Accordingly, in order to assess the impacts of a proposed development on the amenity of a locality, it is necessary in relevant cases for the Tribunal to undertake an objective inquiry as to the character of the area that represents that state of amenity and an assessment of the likely future character of the area: *Sunbay Developments*, above; *St Patrick's Community Support Centre*, above, at [40]; *Woolworths Ltd and City of Joondalup* [2009] WASAT 41 at [65]; *Arnold and Town of Claremont* [2009] WASAT 231 at [63].

There are two parts to amenity. There is public amenity, being what the development looks like from the street, and internal amenity of a site. Consideration must be given to both perspectives, but it is the overall community benefit that must be accorded the greatest weight: *Riede and Town of Vincent* [2007] WASAT 209 at [45]-[46]. In *MacCormac and Town of Vincent* [2009] WASAT 177, the Tribunal held (at [44]-[45]):

> the applicants are principally viewing amenity from the perspective of the future occupants of the two houses, rather than the likely effect of the proposed development on others and the terms expressed in [the local planning scheme] and in *Tempora*.
>
> It is generally believed that on-site amenity is a product of design and that 'amenity', as understood in planning terms, is considered within a broader community context.

[18.80.15] Adjoining sites

Related materials

- [18.1080.31] Residential areas – Non-residential uses – Schools – Adjoining site
- [18.1580.06] Zoning – Zone interface

In *Inghams Enterprises Pty Ltd v Kira Holdings Pty Ltd* (1996) 90 LGERA 68, Cole JA held in the NSW Court of Appeal (at 70-71) (quoted with approval in *Sunbay Developments Pty Ltd and Shire of Kalamunda* [2006] WASAT 74; (2006) 150 LGERA 116 at [52] per Barker J):

> It is not, however, any part of the function of [a development] authority (or the Court when acting in substitution for the authority) … to be concerned … with the prospect that the holder of the land adjoining the proposed development could or should be expected to make adjustments to its land use to accommodate the new development.

In *Inghams Enterprises*, Barker J went on to state (at [53]):

> It is fundamental to orderly and proper planning that a proposed development should generally provide appropriate mitigation for its impacts within its site and not require adjoining developments to "make adjustments" (to borrow Cole JA's words) or limit the development potential of adjoining land below that reasonably contemplated by the zoning and planning controls. However, there are exceptions to this general principle, for example where the applicable zoning and planning controls reasonably contemplate certain impacts across boundaries (see, for example, *Big Country Australia Pty Ltd and Shire of Serpentine-Jarrahdale* [2006] WASAT 10 at [55]-[59]) or use of public land or facilities either with or without payment (see, for example, *Randall and Town of Vincent* [2005] WASAT 129 at [128]-[129]).

In *Greenelm Pty Ltd and City of Swan* [2010] WASAT 142, the Tribunal held (at [74]) that a further exception to this general principle is where a perceived impact is extremely unlikely to occur. It would, in itself, be contrary to orderly and proper planning to require a development to have to mitigate an extremely unlikely impact on an adjoining property.

An application may be refused on the basis that it will impact adversely on the amenity of part, as opposed to the entirety, of a locality. In *Sunbay Developments*, the Tribunal stated (at [28]) (applied in *Clifford and City of Stirling* [2009] WASAT 208 at [79]):

> Although an assessment of the impact of a development on the existing or likely future amenity of the locality must take into consideration positive, negative and neutral impacts on all parts of the locality, it is open in planning assessment to refuse an application because of the extent of the impact on a part of the locality or on a single property. Were it otherwise, the overall amenity of a locality would be undermined incrementally, application by application.

Accordingly, where a planning authority is required to consider the impact of a development on the likely future amenity of the locality, provided it takes into account the whole of the locality, it is open to focus attention on a particular part, such as adjoining land: *Sunbay Developments*, above, at [2] per Barker J; applied in *Hamzah and City of Fremantle* [2009] WASAT 110 at [109].

The issue of whether the amenity of neighbouring areas will be adversely affected or unreasonably diminished cannot be reasonably or appropriately resolved as a preliminary issue. The determination of this issue requires and involves evidence and planning assessment at the final determination of the development application: *Hughes and Town of Mosman Park* [2010] WASAT 190 at [23].

[18.80.20] Residents' views

Related materials

- [18.140.105] Assessment – Development application – Relevant considerations – Views of residents/neighbours

In *Tempora Pty Ltd v Shire of Kalamunda* (1994) 10 SR (WA) 296, it was held that decisions considering amenity must be based on objective evidence of the character of the area. Residents' views must still be taken into account, but as factors which confirm or deny the objective evidence being presented: *Quayda Pty Ltd and Shire of Peppermint Grove* [2007] WASAT 191 at [55]. However, this aspect of the decision in *Tempora* was not followed by Barker J in *Sunbay Developments Pty Ltd and Shire of Kalamunda* [2006] WASAT 74; (2006) 150 LGERA 116 who held that the assessment should include not only the opinions of experts but also the subjective views of residents. His Honour stated (at [21]):

> The general approach to the assessment of amenity impact set out in *Tempora v Shire of Kalamunda* is sensible and should be followed. However, as the State Administrative Tribunal recognised in *Canning Mews Pty Ltd and City of South Perth* [2005] WASAT 272 at [48], "in undertaking [the] objective inquiry [as to the character of the area that represents the state of amenity] a specialist planning tribunal is assisted not only by the expert opinions of town planners, but also by the views of residents. Indeed, residents of a locality are often well-placed to identify the particular qualities and characteristics which contribute to their residential amenity". Thus, the decision in *Tempora v Shire of Kalamunda* plainly is not correct, and should

[18.140.0] Assessment – Development application

Contents

Related materials

- [18.120.0] Approvals
- [18.260.0] Change of land use
- [18.920.0] Planning instruments
- [18.1340.40] Assessment – Adoption of structure plan
- [18.1340.50] Assessment – Amendment of structure plan
- [3.138.0] PD Act, s 138 ("Commission's functions when approving subdivision etc")
- [3.162.0] PD Act, s 162 ("No development except with approval")
- [3.241.0] PD Act, s 241 ("Tribunal to have regard to certain matters")
- [21.1020] Meaning of "locality"

[18.140.5] Assessment process

In *Pearce and City of Wanneroo* [2010] WASAT 77, the Tribunal outlined the planning assessment process, stating (at [35]) (applied in *Le and City of Wanneroo* [2010] WASAT 154):

> Having regard to the evidence as to what activity is, in reality, proposed by a development application, it is for the planning authority to characterise the proposed land use and then determine the application on its planning merits …

A planning authority must give "proper, genuine and realistic consideration" to a relevant consideration when making a planning assessment. Failure to do so involves legal error: *Christie and Town of East Fremantle* [2010] WASAT 160 at [24], citing *Kahn v Minister for Immigration and Ethnic Affairs* [1987] FCA 457 at [33]; (1987) 14 ALD 291 per Gummow J.

Cases

Failure to consider relevant matter. Review of Tribunal determination to impose condition on approval of boundary fences of residential property with masonry piers and pier caps that some piers be reduced in height to 1.8 m due to impact on amenity of adjoining neighbour caused by loss of views – reasonable expectation that planter would be planted with landscaping of a height likely to block views from adjoining property – *Held:* Condition requiring fence piers to be reduced in height deleted – Tribunal erred by failing to give proper, genuine and realistic consideration to effect that landscaping adjacent to common boundary between properties could have on views which was same as fences in question – clearly a relevant consideration in determining whether fence piers should be reduced in height: *Christie and Town of East Fremantle* [2010] WASAT 160.

[18.140.10] Relevant considerations – Planning policy

Related materials

- [3.241.0] PD Act, s 241(1)(a) (regarding requirement for Tribunal to have due regard to State planning policy)
- [18.920.60] Planning instruments – Departure from policy
- [18.920.70] Planning instruments – Departure from planning instrument/standards

The purpose and role of planning policy is to guide or inform the exercise of planning discretion in the assessment and determination of individual planning applications. However, whilst planning policy is essential to town planning, it does not have a legislative or binding effect: *Citygate Properties Pty Ltd and City of Bunbury* [2009] WASAT 249 at [48]. In *Citygate Properties*, the Tribunal stated (at [48]) (citing Stein LA, *Principles of Planning Law*, (2008)):

> As Professor Stein explains, 'in the quest for the best planning outcome, policy forms the background for the consideration of a planning application by planning authorities, planning courts, and tribunals', and, indeed, may become 'the primary consideration because it contributes to or fully explains the 'sentiment' of the case: the sense of what is orderly and proper planning in the circumstances'. (citations omitted)

A relevant planning policy is one of the matters to which regard must be had in determining an application, but is not the only test to apply. However, where a policy has been specifically formulated in order to guide the exercise of planning discretion in relation to a matter, the provisions of the policy are material in the proper determination of the application. The policy is a fundamental element in, or a focal point of, the decision-making process: *Zhang v Canterbury City Council* [2001] NSWCA 167; (2001) 51 NSWLR 589; (2001) 115 LGERA 373 at [75] per Spigelman CJ (cited with approval in *Fryer and City of Subiaco* [2006] WASAT 199 at [56]; *Sanctuary Apartments Pty Ltd and Shire of Broome* [2008] WASAT 163 at [39]; *Adbooth Pty Ltd and City of Perth* [2007] WASAT 76 at [208]-[209]; *Citygate Properties Pty Ltd and City of Bunbury* [2009] WASAT 249 at [50]). This is true even where not expressly provided: *Busen Pty Ltd and City of Subiaco* [2007] WASAT 49 at [33]; *Cityrun Pty Ltd and Town of Cambridge* [2007] WASAT 143 at [20].

Statements of planning policy and development control policies are not to be used to override more "finely tuned" instruments of planning control that are directly applicable to a site and locality, such as a planning scheme or an Act of Parliament: *Katich v WAPC* [2007] WASAT 72 at [103]; *Downs-Stoney and WAPC* [2008] WASAT 178 at [29].

Planning policy is expected to guide the discretion of the administrator, but is not intended to replace the discretion in the sense that it is to be inflexibly applied regardless of the merits of the particular case before it. The "relevant consideration in many applications will be why the 'policy' should not be applied; why the planning principles that find expression in the 'policy' are not relevant [to the] particular application": *Clive Elliott Jennings & Co Pty Ltd v WAPC* [2002] WASCA 276 at [24]-[26] (applied in numerous cases – see, eg, *Zampatti v WAPC* [2010] WASCA 149 at [10]; *Zampatti and WAPC* [2009] WASAT 70 at [86]-[87]; *Freeman and City of Subiaco* [2008] WASAT 303 at [85]; *Damave and Shire of Dandaragan* [2008] WASAT 257 at [43]; *Yum Restaurants International and City of Rockingham* [2008] WASAT 235 at [10]; *Chambers and City of Subiaco* [2008] WASAT 259 at [48]; *Sanctuary Apartments*, above, at [41]; *Cityrun*, above, at [20]). Development criteria to achieve policy objectives should not be completely set to one side because of the nature of the site and the use of other lots in the locality. In certain circumstances, strict adherence to policy might be undesirable or unreasonable: *Yum Restaurants International*, above, at [70]. Accordingly, policies should not be applied so inflexibly that where a variance may be appropriate it is simply rejected. The function of the Tribunal is to have regard to that policy but to exercise its discretion in relation to it in light of the evidence in the particular case: *Karafil and Shire of Waroona* [2007] WASAT 190 at [37] (citing *Falc Pty Ltd v State Planning Commission* (1991) 5 WAR 522 per Nicholson J).

Decision-makers in the planning area will fall into error if in substance the decision-maker has regarded itself as bound by a policy and inflexibly applied that policy: *Tah Land Pty Ltd v WAPC* [2009] WASC 196 per Simmonds J. In other words, an inflexible approach to the application of a policy without considering site-specific factors would involve an error of law: *Re Romato; Ex Parte Mitchell James Holdings Pty Ltd* [2001] WASCA 286 at [26]-[28]; *Marshall v Town Planning Appeal Tribunal of WA* [2004] WASCA 2002 at [41]. In an application for review before the Tribunal, the function of the Tribunal is to have regard to that policy, but to exercise its discretion in relation to it in the light of the evidence in the particular case: *Falc Pty Ltd v State Planning Commission* (1991) 5 WAR 522 per Nicholson J.

It is the Tribunal's task to apply current policies faithfully in accordance with the maker's intention. It is not the Tribunal's function to investigate wider policy issues, or attack the processes that led to, or assumptions that underlay, or to effectively re-write, such policies. Where policy is expressed mainly in legislative form and is otherwise rational and capable of application, it ought to be applied as it was intended, regardless of whether better models of regulation might exist or can be imagined. Any exercise of discretion should have regard to the underlying purposes of the instrument empowering the decision-maker to exercise its discretion: *Slusarczyk and City of Stirling* [2008] WASAT 194 at [41]; *Stevsand Investments and City of Nedlands* [2009] WASAT 36 at [72]-[73].

Although a discretion under a local planning scheme can be guided by an adopted planning policy, in order to guide the exercise of the discretion, the assessment criteria under the policy must relate to the discretion rather than to its own assessment criteria: *Insitu Contemporary Design Pty Ltd and City of Geraldton-Greenough* [2008] WASAT 202 at [46].

Policies found to be valid and applicable must be applied in the knowledge that they were drafted with reference to the status quo and must be construed and applied in that light: *Tooth v City of Subiaco* (2005) 41 SR (WA) 198; [2005] WASAT 317 at [58]. Accordingly, in *Slusarczyk and City of Stirling* [2008] WASAT 194, the Tribunal stated, when acknowledging hardships often imposed by policies on owners of heritage listed properties (at [53]) (followed in *Hobbs and Town of Vincent* [2009] WASAT 167 at [63]):

> the point can be made that … considerations of hardship, even perhaps suggestions of "unreasonable hardship", were well-known to the promulgators of instruments imposing restrictions on the owners of heritage property and notwithstanding that recognition, the policies were still issued or made.

The provisions of the relevant planning framework are only one factor that must be considered if a development application is to be refused: *Smith and WAPC* [2007] WASAT 261 at [69]. In *Morrissey v State Planning Commission* (1994) II SR (WA) 35, the Tribunal stated (cited in *Smith*, above, at [69]):

> The situation cannot arise that a policy or strategy, no matter how cogent or refined, can be the basis for the enquiry to end and the appeal determined. Every strategy is entitled to a different weight in deliberations, depending on its certitude ...

Cases

Inflexible application of policy – Subdivision. Review of refusal of Tribunal (upholding decision of WAPC) to adopt structure plan to increase retail net lettable area of existing district shopping centre from 15,434 sq m, including supermarket and discount department store, to 32,000 sq m – new proposal included second supermarket, second discount department store, "main street" retailing precinct, cinemas and mixed commercial/high density residential development – policy envisaged "flexibility" in floor space – expanding population – expansion of site would result in new jobs – Tribunal had held: proposal materially inconsistent with strategic and statutory planning framework, principally due to size of proposed retail area and introduction of second discount department store; quantity of floor space allocated for comparison shopping would increase significantly and be inconsistent with function of a district centre; proposal changed function of centre from district centre to regional centre; proposal undermined established and planned hierarchy of metropolitan centres; size of expansion went beyond policy's contemplation of "flexibility"; may be scope for more limited expansion to include principally second supermarket and main street precinct, with total retail net lettable area of 20,000 sq m, particularly if mixed commercial/high density residential uses would also be carried out on site, provided would not adversely affect economic viability of existing and planned centres as this could result in deterioration in level of service to local community or undermine public investments in infrastructure or services – *Held:* Tribunal decision quashed – Tribunal erred in law by in substance regarding itself as being bound by State planning policy and inflexibly applying it – Tribunal made no reference to legal and practical consequences of position of centre on site as a district centre in hierarchy, matters which outweighed planning considerations that Tribunal was considering – Tribunal had not regarded itself as free to exercise its discretion contrary to policy: *Tah Land Pty Ltd v WAPC* [2009] WASC 196 (quashing decision in *Tah Land Pty Ltd v WAPC* [2008] WASAT 227).

Review of refusal by Tribunal of application to subdivide land zoned rural farming which Commission had refused – Tribunal had agreed land was suitable for subdivision – refused on basis that to allow subdivision of land would be to treat land as zoned special rural, which it was not, and Tribunal had consistently upheld general policy not to permit rural subdivision into small holdings unless land was zoned special rural – reason for policy was special rural zoning had special controls which other zonings lacked – Commissioner had refused appeal from that decision on basis did not involve question of law – *Held:* Appeal allowed – Tribunal exercised discretion in manner that gave rise to error of law – Tribunal was prepared to be persuaded to depart from policy, however, in reaching conclusion that proper controls can only be achieved by

application of policy, Tribunal failed to give proper, genuine and realistic consideration to merits of case as did not properly consider whether requisite level of control could be achieved by other means – remarks that approval of subdivision "would be to treat the land as if it was zoned special rural, which it is not", without reference to any resultant town planning consequences, suggested Tribunal opposed to such treatment in principle – by considering it was not possible to put scheme zoning aside, Tribunal tied exercise of its discretion to existence of policy – Tribunal did not regard itself as free to exercise discretion contrary to policy: *Falc Pty Ltd v State Planning Commission* (1991) 5 WAR 522.

Zone boundary. For a case in which policy objectives remained relevant even though the subject site was at the margins of the relevant zone area and amenity of the locality, see *Yum Restaurants International and City of Rockingham* [2008] WASAT 235 at [70].

[18.140.20] Relevant considerations – Planning policy – Weight

For a policy to be given weight, it must be tested against the criteria set down in *Permanent Trustee Australia Ltd v City of Wanneroo* (1994) 11 SR(WA) 1. The test is (*Land Alliance Pty Ltd and City of Belmont* [2005] WASAT 100; *Damave and Shire of Dandaragan* [2008] WASAT 257 at [36]):

- whether it is based on sound town planning principles;
- where it is a public, rather than a secret policy;
- whether it is a public policy conceived after considerable public discussion;
- the length of time that a policy has been in operation; and
- whether it has been continuously applied.

The history of a policy can also be a relevant matter: *Damave*, above, at [37].

In *Tah Land Pty Ltd v WAPC* [2009] WASC 196, the Supreme Court of WA indicated that it is for the Tribunal to determine the amount of weight it allocates to a relevant planning policy, although there are circumstances in which an error of law may be committed in this regard. The Tribunal stated (at [48]):

> if 'due regard' has been given to relevant policy considerations the weight to be assigned to them is a matter for the SAT, not for the court. That is, the matter of weight assigned in that circumstance will not involve an error of law. See the authority referred to in *Falc* in this connection: *Laslett v District Council of Mount Gambier (No 2)* (1985) 56 LGRA 195; and see *Paridis v Settlement Agents Supervisory Board* [2007] WASCA 97; (2007) 33 WAR 361 [54] (Buss JA, Wheeler and Pullin JJA concurring). This is unless the decision-maker gave inordinate weight to a consideration of relatively little importance or very little weight to a consideration warranting very great importance, such that in either case the decision rendered was 'manifestly unreasonable': *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1985) 162 CLR 24, 41 (Mason J, Gibbs CJ, Deane and Dawson JJ concurring) as explained in *Federal Commissioner of Taxation v Swift* [1989] FCA 413; (1989) 18 ALD 679, 693 - 694 (French J).

The fact that a policy has not been reviewed for a certain time and that the policy of another authority provides differently does not mean that the authority or the Tribunal is entitled to treat the policy other than as a focal point of the decision-making process, or to determine the application on the basis of a policy control which applies in an adjoining local government area: *Cityrun Pty Ltd and Town of Cambridge* [2007] WASAT 143 at [51].

The Tribunal recognises the importance and role of policy in guiding a local government in its decisions and promoting rational and consistent decision-making. However, policies should not be applied so inflexibly that where a variance may be appropriate it is simply ignored. As pointed out by Nicholson J in *Falc Pty Ltd v State Planning Commission* (1991) 5 WAR 522, "the function of the Tribunal is to have regard to that policy but to exercise its discretion in relation to it in the light of the evidence in the particular case": *Caltex Australia Petroleum Pty Ltd and Town of Vincent* [2010] WASAT 174 at [40].

As the R Codes have been prepared as a State planning policy, the Tribunal is required to have regard to them under s 241(1)(a) of the PD Act: *Tomasso and City of Stirling* [2009] WASAT 245 at [14]. In *Tangelo Design Consultants and Town of Vincent* [2005] WASAT 67, the Tribunal held (at [42]) (applied in *Hamzah and City of Fremantle* [2009] WASAT 110 at [69]; *Marron and City of Nedlands* [2009] WASAT 12 at [59]; see also *Robert Baccala and City of Fremantle* [2005] WASAT 55 at [24]):

> In most planning assessments, the fact that a development conforms to a relevant provision of the R-Codes is likely to be significant in relation to a related required matter for consideration under a town planning scheme, although it cannot be in itself determinative of such a consideration.

Compliance with the performance requirements of the Codes does not necessarily mandate approval of an application under a town planning scheme: *Dumbleton and Town of Bassendean* [2005] WASAT 145 at [22]-[23]; *Freeman and City of Subiaco* [2008] WASAT 303 at [99]. Accordingly, there remains a residual discretion to refuse a residential development application which conforms to the Codes: *Crystal Lakes Pty Ltd and City of Subiaco* [2006] WASAT 15 at [59]; *Hawkins and City of Joondalup* [2008] WASAT 64 at [23].

Clause 2.5.4 of the R Codes (2002 and 2008 versions) provide:

> A council shall not refuse to grant approval to an application in respect of any matter where the application complies with the relevant acceptable development provision and the relevant provisions of the council's planning scheme or a local planning policy.

Where the Codes are not expressly incorporated into a town planning scheme, it may be that, notwithstanding the wording of cl 2.5.4, even if there was compliance with acceptable development standards of the Codes, there remains a residual discretion within the town planning scheme to decide whether the proposed development should be approved. The provisions of the Codes are to be given considerable weight but any residual discretion within the town planning scheme must still be applied: *Dumbleton and Town of Bassendean* [2005] WASAT 145 at [23], applied in *Miktad Holdings Pty Ltd and City of South Perth* [2009] WASAT 77 at [29]; *Trevenen and Town of Claremont* [2010] WASAT 119 at [77].

The cumulative effect of a series of departures from the acceptable development provisions of the Codes can lead to a conclusion that a site is being overdeveloped: *Willicombe and City of Gosnells* [2006] WASAT 13; *Walsh and Shire of Peppermint Grove* [2009] WASAT 46 at [86] (upheld on review in *Goyder and Walsh* [2009] WASAT 108).

[18.140.105] Relevant considerations – Views of residents/neighbours

Related materials

- [18.80.20] Amenity – Residents' views

The views of local residents are a relevant matter for consideration in a planning assessment: *Ironbridge Holdings Pty Ltd and WAPC* [2008] WASAT 38 at [31].

The views of affected neighbours, while of interest, are not finally determinative as regards planning decisions. This is especially so where crucial judgments need to be made about overarching standards promulgated in the public interest which are designed to reflect a broader community interest in achieving a particular goal: *Hawkins and City of Joondalup* [2008] WASAT 64 at [53]. Concerns such as neighbouring residents' objections to having patients with mental health problems visiting a proposed psychiatric consulting service are not generally matters relevant to planning decisions: *Charkey-Papp and Town of Cottesloe* [2007] WASAT 319 at [11]. The weight to be given to objections of neighbours is a matter entirely for the Tribunal: *Williams and WAPC* [2005] WASAT 10 at [17]; *Bottecchia and Town of Vincent* [2008] WASAT 19 at [16].

For commentary on the relevance of residents' views in assessing impact on amenity, see [18.80.20].

Cases

Review of refusal of application for second storey development over existing garage to dwelling – neighbour strongly believed proposal would have significant and adverse impact on amenity due to additional bulk, overshadowing and loss of direct sunlight – neighbour's opinion was well informed – *Held:* Neighbour's expectations not consistent with zoning of locality – approval granted – proposal would increase adverse impact on amenity of neighbouring land but entirely within range of reasonable expectations of development on lot: *Hamzah and City of Fremantle* [2009] WASAT 110.

Two subdivision applications – proposal would significantly increase population of adjacent country town – resident made submission that subdivisions should be refused based on impact on his historic house that faced onto part of development site – resident claimed he had bought house to live in small country town and avoid population growth – resident aware house overlooked a possible development site at time of purchase and made extensive enquiries as to possibility of development and thought TPS protected his interests – *Held:* Subdivision approval granted – although proposed subdivisions would bring about significant visual change when viewed from resident's property, subdivisions reasonably anticipated by, and consistent with, zoning and statutory and strategic planning framework, including those in place at time resident purchased house: *Ironbridge Holdings Pty Ltd and WAPC* [2008] WASAT 38.

[18.140.110] Relevant considerations – Subdivision approval

A subdivision approval predetermines, to a considerable degree, the likely form of development of the site and creates a reasonable expectation for the approval of single dwellings of the nature proposed in the development application. When the local government is ultimately presented by the landowner with a development application for a reasonable sized house for the locality which is reasonably responsive to the size and orientation of the site and the applicable local zoning and planning controls, the application must be assessed in the context of the expectations created by the approval of the subdivision: *Boulter and City of Subiaco* [2007] WASAT 71 at [66], applied in *Walsh and Shire of Peppermint Grove* [2009] WASAT 46 at [42]. However, subdivision of itself does not create an entitlement to a particular type of house. There is a statutory regime that allows houses to be approved as a right when there is strict compliance with the relevant planning framework. Where there is not, an applicant has to seek the exercise of discretion. That is when the myriad of planning factors, including the preservation of heritage values, becomes enlivened: *Walsh*, above, at [44].

In *Walsh and Shire of Peppermint Grove* [2009] WASAT 46, the Tribunal, constituted of non-judicial members, referred (at [43]) to the expectation created by the approval of a subdivision as "the presumption of subsequent development" for a reasonable sized house being created by the approval of the subdivision. However, on review, in *Goyder and Walsh* [2009] WASAT 108, the Tribunal clarified that such a "presumption" (such term being used by the non-judicial members in accordance with general common usage rather than in the technical way lawyers may use the word) is not an enforceable entitlement (at [38]).

In proceedings solely concerning a development application, it is not open to the Tribunal to review a decision to grant conditional subdivision approval. The subdivision approval exists and is operative. This highlights a difficulty that can result from the split planning system in Western Australia under which subdivision control and assessment is undertaken by the WAPC at State level, whereas development control and assessment is generally undertaken by local governments applying local planning schemes and policies at local level: *Lombardo v Development Underwriting (WA) Pty Ltd* [1971] WAR 188 at 197; *Boulter and City of Subiaco* [2007] WASAT 71 at [60]. It must be assumed to be valid unless it is declared invalid by a court of competent jurisdiction: *Antonas and Town of Vincent* [2006] WASAT 303 at [55]; *Boulter*, above, at [63]; *Walsh and Shire of Peppermint Grove* [2009] WASAT 46 at [41]-[42]; *Goyder and Walsh* [2009] WASAT 108 at [37].

[18.200.0] Car parking

Contents

Related materials

- [21.1900] Meaning of "transport depot"
- [18.380.130] Dwelling – Car parking
- [18.240.50] Centres and shops – Car parking
- [18.280.50] Child care centre – Car parking
- [18.760.30] Mixed use – Car parking
- [18.1100.24] Café – Car parking
- [18.1180.40] Schools – Car parking

[18.200.10] Amenity

A shortfall in car parking can have a significant impact on the amenity of an area: *St Patrick's Community Support Centre and City of Fremantle* [2007] WASAT 318 at [60].

In regards to the impact on amenity of vehicles parked in residential streets, the views of nearby residents are particularly important as it is the residents who have to tolerate the vehicles parked outside their homes: *Stevsand Investments and City of Nedlands* [2009] WASAT 36 at [81].

[18.200.20] Shortfall in capacity

As a general principle of planning, any parking demand generated by a development should be provided for on-site: *Hunter and City of Rockingham* [2008] WASAT 28 at [46]; *Daawah Association of Western Australia Inc and City of Canning* [2009] WASAT 129 at [32].

The Tribunal has been critical of parking policies which seek to reduce parking obligations on a developer through recognition of nearby public transport and public parking areas. In *Govardhan and Town of Vincent* [2008] WASAT 196, the respondent's parking policy required a minimum number of bays on site besides any payment of cash in lieu of parking, but also gave a concession for any previously acknowledged shortfall. This had a paradoxical outcome whereby the higher the previously approved shortfall, the greater the deduction and the more likely an applicant would be to satisfy the parking requirements. The Tribunal stated (at [94]-[95]):

> Under [the Parking Policy], the basic rationale is that on-site parking is to be provided at a rate that adequately meets the demand generated by a particular activity. However, the Policy also introduces the concept of 'adjustment factors' which attempt to recognise the proximity of public transport as a means of lessening travel by car, and public parking areas as an alternative to street parking.

> The overall effect of the 'adjustment factors' is to reduce the parking requirement, but just why further adjustment factors ('the most recently approved car parking shortfall') should be built into the final calculations is far from clear to the Tribunal. Quite clearly, its effect is to significantly reduce the car parking obligations on a developer.

In *Jones and Town of Vincent* [2009] WASAT 180, a case relating to a parking policy containing a similar provision, the Tribunal "invite[d] the Town's attention to the reworking of this provision so as to produce a more workable and, perhaps, more equitable formula" (at [45]).

Caution should be exercised when reducing required car parking on the ground of historical shortfall where there is a difference in the nature of a former use and the proposed use: see *Able Lott Holdings Pty Ltd and City of Fremantle* [2010] WASAT 117 at [29]-[30].

In relation to exceeding the number of required parking lots, see [18.200.130].

Cases

Review of refusal of application to construct mixed use two-storey and three-storey office and two-storey residential development – commercial/residential zone – 96 car parking bays proposed – development generated need for 105 on-site car parking bays under TPS – scheme contained provision allowing proposed number of car parking bays to be reduced having regard to availability of public transport in locality of site and provision of end of trip bicycle facilities within development – *Held:* Proposed number of car parking bays adequate – appropriate to exercise discretion under scheme to reduce number of parking bays required: *Real Estate Institute of Western Australia and City of Subiaco* [2009] WASAT 111.

Regarding proper interpretation and application of town's parking policy, in particular how any parking shortfall is to be calculated – parking policy required minimum number of bays on site besides any payment of cash in lieu of parking, but gave concession for previously acknowledged shortfall – effect of policy was to significantly reduce car parking obligations on a developer – application for change of use of site to establish dance studio – refused for non-compliance with parking policy – subject site originally built as supermarket without any car parking on site – 100 bay car park previously established near site on lots zoned as car parks and currently operated as de facto public car parks – town had recalculated previous shortfall which made it difficult for applicant to comply with policy – *Held:* Decision set aside, approval granted and matter sent back to respondent for reconsideration in relation to conditions – reasonable parking associated with use of site could be met through existence of de facto public car parks – town invited by Tribunal to consider reworking concession clause of policy: *Jones and Town of Vincent* [2009] WASAT 180.

Application for construction of 3-storey development comprised of 10 residential apartments, three commercial units and a cafe – 27 car parking bays on-site – 8 parking bay shortfall in minimum number of bays required on-site – 10 additional car parking bays adjacent to development within verge areas – discretion under TPS to modify provision of on-site car parking for development – consideration of whether condition requiring approval for and construction of car parking bays within verge areas futile – *Held:* Verge areas were correct and preferable location for provision of car parking for cafe in circumstances – additional 10 spaces could be taken into account in determining whether car parking requirements satisfied – on-site spaces, together with 10 off-site parking bays, sufficient to meet demand generated by proposed development – condition not futile and was appropriate mechanism to ensure verge car parking would be provided as part of development: *Hunter and City of Rockingham* [2008] WASAT 28.

[18.200.23] Cash-in-lieu

A policy should not impose on an individual site a compulsory requirement for the payment of money. The payment of money, if not directly attributable to the approved development, should be the subject of an express provision in a planning scheme. An offer of cash-in-lieu is normally made by an applicant to overcome difficulties where parking cannot be provided on a site or a proposed development includes floor space at the expense of sufficient area for the number of bays required: *Yum Restaurants International and City of Rockingham* [2008] WASAT 235 at [61].

[18.200.30] Public/street parking spaces

Although, in the exercise of planning discretion, some limited use by private development of existing public car parking spaces might be acceptable, it is fundamentally inconsistent with orderly and proper planning for a private development, which is incapable of meeting its car parking impacts on-site, to monopolise presently available public car park spaces. Such an approach would undermine the potential for orderly development of other sites in the commercial strip which might, like the site, be incapable of providing adequate on-site car parking: *Randall and Town of Vincent* [2005] WASAT 129 at [121]. The fact that there is parking available in public car parks and on streets does not affect the correctness of this statement of principle. Indeed, the statement of principle is only apposite where there is public car parking available: *Govardhan and Town of Vincent* [2008] WASAT 273 at [25].

Cases

Applicant sought review of decision to refuse development approval for change of use from "recreation facility" to "small bar" – existing building could not accommodate required on-site parking – applicant proposed to pay cash-in-lieu – planning framework permitted cash-in-lieu only in certain circumstances – *Held*: Proposal would monopolise existing public parking spaces – physical incapacity for parking spaces warranted refusal in entirety – application dismissed: *Govardhan and Town of Vincent* [2008] WASAT 273 (affirming *Govardhan and Town of Vincent* [2008] WASAT 196).

Authority proposed condition requiring applicant ensure applicant's staff did not park in street – applicant proposed standing instruction to staff – *Held*: Intent of condition was to ensure there was some regulatory control over use of on-street car parking bays – authority's proposal absolute and unreasonable, whereas applicant's proposal was limited in that only considered one method of achieving desired outcome – Tribunal imposed condition requiring comprehensive parking strategy: *St Patrick's Community Support Centre and City of Fremantle* [2007] WASAT 318 at [81].

[18.200.40] Public/street parking spaces – Adjoining residential-commercial areas

It is to be expected that the amenity of a residential street in which all day parking is allowed adjoining a commercial area will have a level of amenity less than that of a street in a residential location. The presence of commercial parking does, however, have an adverse effect on the amenity of the residential use of the street and the greater the requirement for commercial parking the further into the residential area that effect on the local amenity will spread. A relevant consideration in whether a commercial development can be allowed with relaxed on-site parking requirements is minimising of the spread of this impact: *Quayda Pty Ltd and Shire of Peppermint Grove* [2007] WASAT 191 at [60]. Other commercial sites not providing on street parking is a relevant planning consideration. This is not considered to indicate that additional development on a commercial site should be excused compliance with the parking standard. The expansion of a use on another site would need to be considered on its merits, but the ready availability of extended areas of on-street parking extending into a neighbouring residential zone should not be viewed as a matter of course as an alternative to on-site parking: *Quayda Pty Ltd*, above, at [66].

[18.300.0] Conditions

Contents

Related materials

- [3.138.0] PD Act, s 138(1) regarding WAPC power to approve subdivision subject to conditions
- [3.148.0] PD Act, div 3 (Conditions of subdivision")
- [3.162.0] PD Act, s 162 ("No development except with approval")
- [3.217.0] PD Act, s 217 ("Environmental conditions, Minister's powers to enforce")
- [3.218.0] PD Act, 218 ("Contravening planning scheme or conditions on development")
- [18.1280.90] Filing of draft conditions
- [18.1360.50] Subdivision – Conditions
- [21.380] Meaning of "condition"

[18.300.10] Subject matter

Key elements of a proposed development or use, such as the maximum number of persons proposed to be accommodated and the location where the use is to take place, should be stated in the form of conditions of approval. This is for the avoidance of doubt and is in the interests of both the holder of an approval and the wider community: *Phillips and Shire of Mundaring* [2009] WASAT 193.

The Tribunal is reluctant to impose conditions that strike at the heart of a use and which would be difficult to police: *Land Alliance Pty Ltd and City of Belmont* [2005] WASAT 100. However, a proposed use may be regulated by conditions to control it rather than be refused: *Morgan and City of Albany* [2008] WASAT 211 at [93]. It would be unreasonable to impose a condition that is unrelated to the relevant application: *Adam and City of Fremantle* [2008] WASAT 226 at [54]; cf *Kellet and Town of Vincent* [2007] WASAT 155 and *Booth and Town of East Fremantle* [2008] WASAT 155.

The Tribunal is only able to consider imposing conditions of planning approval "that have precision, are relevant to the planning circumstances, are enforceable, and are reasonable in all other aspects … [I]tems listed for additional work should be dealt with to a degree sufficient to establish what the impact of the development will be and what planning controls it would require": *Downer EDI Works Pty Ltd and City of Gosnells* [2009] WASAT 201 at [95].

In relation to conditions which require the preparation of some plan, detail or specification for approval by the decision-maker and for that plan to be implemented, only incidental aspects of a development should be the subject of such a condition: *Phil Lukin Pty Ltd and Lowe Pty Ltd and Shire of Busselton* [2006] WASAT 124; *Barwell Nominees Pty Ltd and City of Wanneroo* [2007] WASAT 156 at [53].

In *Downer EDI Works Pty Ltd and City of Gosnells* [2009] WASAT 201, the Tribunal held that it would not be consistent with orderly and proper planning to grant an approval for a development subject to conditions that require additional environmental assessment when that additional work might reach conclusions that would otherwise have resulted in a planning approval not being granted (at [7]). The Tribunal went on to state (at [94]):

> there are circumstances where, for example, design issues might need to be addressed prior to the issue of a building licence or management issues finalised prior to the occupancy of a building or a use commencing. Examples such as particular materials and colours to be used in construction or use of a parking area would be such conditions. In this instance, the matters yet to be properly addressed are fundamental to whether the development would be acceptable in planning terms. The matters listed are not severable from the development. If they cannot be satisfactorily resolved, the problems that arise could be fatal to the development in planning terms. It might also be that the consequence of studies [to be] carried out would be to require the development being altered to a degree that a planning approval that has been issued might not have otherwise been forthcoming. [R]eliance in … conditions on the satisfaction of a council officer might result in an impasse on whether or not a study is acceptable or whether a planning condition the officer might want imposed as a consequence of the studies is reasonable.

It is not possible for a condition of planning approval to modify the provisions of a local planning scheme: *Barwell Nominees Pty Ltd and City of Wanneroo* [2007] WASAT 156 at [100].

Cases

Review of refusal of approval for bitumen emulsion plant – applicant sought approval subject to conditions that required completion of studies addressing unresolved environmental aspects of development – applicant said additional work required on its environmental management plan would establish that use could be developed with existing buffer without any adverse effect on amenity of residential area – *Held:* Application dismissed – inappropriate to grant conditions sought – more needed to be known about environmental impact of use – items in suggested conditions would be fundamental to any approval and were not those that might be addressed while development proceeded: *Downer EDI Works Pty Ltd and City of Gosnells* [2009] WASAT 201.

[18.300.20] Validity

In *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, the House of Lords outlined when a planning condition will be valid:

> A condition attached to a grant of planning permission will not be valid therefore unless:
>
> (1) The condition is for a planning purpose and not for any ulterior purpose.
>
> (2) The condition reasonably and fairly relates to the development permitted.
>
> (3) The condition is not so unreasonable that no reasonable planning authority could have imposed it.

This test has been applied in numerous instances: see, eg, *WAPC v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at [57] per McHugh J; *Radici and City of Gosnells* [2009] WASAT 54 at [21]; *WA Developments Pty Ltd and WAPC* [2008] WASAT 260 at [14]; *Kellet and Town of Vincent* [2007] WASAT 155 at [19]; *Booth and Town of East Fremantle* [2008] WASAT 155 at [41]; *Smith and WAPC* [2008] WASAT 129 at [89]; *Kellett and Town of Vincent* [2007] WASAT 155 at [19]; *Timberlane Nominees Pty Ltd and Shire of Dandaragan* [2007] WASAT 150 at [24]. A condition of approval can be said to reasonably relate to a development if it arises from changes precipitated by

the development: *Baumgartner and City of Joondalup* [2005] WASAT 234 at [33] (cited with approval in *Booth and Town of East Fremantle* [2008] WASAT 155 at [39]).

[18.300.30] Validity – Unrelated to development/unnecessary

For commentary relating to the requirement for conditions of subdivision approval to be related to the subdivision, see [18.1360.50].

Cases

Deck screen wall/boundary wall. Conditional approval granted for additional deck screen wall on balcony – wording of proposed condition referred to "boundary walls" which would have included elements that were not part of application – *Held:* Unreasonable to impose condition unrelated to application – however, not unreasonable to require section of wall that was part of application to be compatible in finish and colour with existing screen walls of lower deck area and upper level balcony: *Adam and City of Fremantle* [2008] WASAT 226.

Front fence/screening of entire setback. Review of condition placed on retrospective approval for variations to front fence and bin enclosure – condition required screening within entire setback of original development – respondent argued condition necessary as bin enclosure overlooked pre-existing spa on neighbouring property and route to bin would overlook at every point – *Held:* Although condition for screening was necessary, condition was not properly connected to issues arising from approval for variation which was limited to front fence and bin enclosure – condition varied to relate only to proposed bin enclosure area: *Booth and Town of East Fremantle* [2008] WASAT 155.

Number of school children/documentation for any future increase. Review of condition imposed on approval for additions to school – condition limited student numbers to 1,800 "unless a formal application for additional students is made, with such application including a master plan demonstrating future development for the entire site" – *Held:* Condition did not fetter future decision-making – condition fairly and reasonably related to proposed development – however, requirement for master plan not reasonable or necessary as any requirements could be discussed at time of any future development application – condition retained with deletion of requirement regarding master plan: *Chisholm Catholic College and City of Bayswater* [2008] WASAT 144.

Daytime operations/security lights. Alterations and additions to existing building – parties agreed to condition requiring installation of motion sensor security lights – proposed activities operated only during daytime – *Held:* Condition did not reasonably relate to development as fact that activities operated during daytime meant they did not necessitate such a requirement – Tribunal refused to impose such requirement as condition of approval: *St Patrick's Community Support Centre and City of Fremantle* [2007] WASAT 318 at [80].

Increase in treatment rooms/hours of operation of business. Review of Tribunal's imposition of condition of approval for alterations and additions to existing beauty salon – increase in treatment rooms from 9 to 10 – condition restricted hours of operation – no reasons given for condition – *Held:* Tribunal should have given reasons – authority had previously approved existing salon without condition – existing rooms not subject of application – condition unreasonable – Tribunal erred in law – review partly upheld – condition deleted and imposed in respect of new treatment room only: *Kellett and Town of Vincent* [2007] WASAT 155.

Cray-fishing operator/prohibition on refuelling. Review of conditions imposed by authority on retrospective development approval – applicant cray-fishing boat operator – applicant had installed bulk diesel storage tank and bowser on property adjoining beach without approval – applicant had been refuelling boats from and across beach – beach was recreation reserve – common use jetty had been created – authority sought to have condition imposed that would refuse or prohibit beach refuelling aspect of proposal – applicant argued that use of beach reserve not part of development application – *Held:* Application did not include use of reserve – fuel

[18.1361.0] Subdivision – Rural land

Contents

Related materials

- [18.1360.0] Subdivision
- [18.160.0] Assessment – Subdivision application
- [18.160.70] Assessment – Subdivision – Relevant considerations – Precedent
- [18.160.150] Relevant considerations – Rural land – Zoning
- [18.160.153] Relevant considerations – Rural land – Productive capacity
- [18.400.0] Environment and sustainability
- [18.1120.0] Roads
- DC 3.4 Subdivision of Rural Land (June 2004)
- DC 3.4 Subdivision of Rural Land (Feb 2008)
- WAPC, *Planning Bulletin 26: Water Source Requirements Relating to the Assessment of Subdivision Applications for Intensive Agriculture* (Nov 1997)
- WAPC, *South-West Rural Subdivision Guidelines* (Apr 2009)

[18.1361.10] Policy

Established policy regarding subdivision of rural and agricultural land, found in SPP 2.5 Agricultural and Rural Land Use Planning (Mar 2002) and DC 3.4 Subdivision of Rural Land (Feb 2008), is generally against subdivision, with certain exceptions: *Downs-Stoney and WAPC* [2008] WASAT 178 at [71]. In *West and WAPC* [2005] WASAT 326, the Tribunal considered the effect of various policies relevant to rural subdivision, including SPP 1, SPP 2.5 and DC 3.4 (2002). The Tribunal stated (at [34]-[36]) (followed in *Musitano and WAPC* [2010] WASAT 92 at [73]):

> As regards the relevant policies under consideration, which are discussed above, and conceded to be directly relevant, the main focus of them is preventing the ad hoc fragmentation of productive agricultural land, which, it is common ground, is the status of the land here. Fragmentation relevantly arises from 'unplanned' subdivisions, and the ad hoc concerns are said to arise out of the lack of a (usually local) planning process to deal with the other consequences of that fragmentation.
>
> The premise, as an aim of government, is that such subdivision of land is to be avoided as it necessarily has the tendency to reduce the mass of productive agricultural land available to the State and otherwise

> adversely impacts upon orderly land use and development. Such consequences include the negative impact of smaller lots on particular types of agriculture and land use, pressure on or demands for infrastructure and services (particularly as regards rural residential lots), and the 'precedential' effect of approvals having the further effect of fragmenting land. As already mentioned, of particular importance is the required existence of further planning strategies (for example, a local planning strategy) dealing with such consequences.
>
> Policies with these aims, if rational in their approach, if designed accordingly, if otherwise lawful and if consistently applied, ought to be generally applied in their terms by this Tribunal on review to promote consistency and fairness in administrative decision-making, as well as transparently assisting the pursuit of legitimate aims of government - whenever relevant discretionary power is exercised by any of its agencies. Further reliability is achieved by a similar consistency of decisions across this and the previous Town Planning Appeal Tribunal.

To achieve the adopted strategies, WAPC policy is to resist subdivision that creates lots suitable only for rural residential use and small rural holdings and to resist development of lots for non-rural uses that have the potential to conflict with commercial agricultural practices. This includes the subdivision and development of lots within the rural zone that are not, or are unlikely to be, significant horticultural holdings. The creation and development of additional such lots in an agricultural area has the potential to create land use conflicts that make achieving the planning objective of preserving agricultural productivity more difficult: *Fairborn and WAPC* [2007] WASAT 266 at [87].

In *Goedhart and WAPC* [2006] WASAT 237, it was held that the policies of the WAPC regarding rural subdivision (at [37]) (cited with approval in *Horne and WAPC* [2007] WASAT 263 at [63])

> are soundly based, well established and consistently applied. The policies include a general presumption against rural subdivision unless the land has been identified for subdivision in a town planning scheme or an adopted local planning strategy or local rural strategy.

Similarly, in *Fewster and WAPC* [2007] WASAT 79, the Tribunal held (at [36]) (cited with approval in *Horne*, above, at [64]):

> The planning framework that has been formulated in regards to the subdivision of rural land both at State and local level is soundly based on key principles and objectives to establish future planning direction which provides the context for decision-making. The overarching objective embodied in all of the planning instruments relevant to this matter underlines the protection of agricultural land by ensuring the continued use of rural land for productive agricultural purposes. The State planning policies advocate a general presumption against subdivision of rural land to safeguard against further fragmentation of rural land unless specifically planned for through the use of appropriate planning mechanisms to achieve co-ordinated development.

While the effect of one additional lot might not be readily discernible, each additional lot increases the potential for an unplanned demand for services in conflict with SPP 2.5 and DC 3.4. The policy of selecting localities for rural small holdings and planning for increased density so that there can be an orderly planning of services is consistent with orderly and proper planning: *Fairborn and WAPC* [2007] WASAT 266 at [76].

A site within two different rural zones is not a basis for subdivision where one lot created would be significantly inconsistent with planning scheme standards: *Dungey and WAPC* [2010] WASAT 89 at [25].

It is not unusual for a rural holding to have an area of land within it that would make only a marginal contribution to the productivity of a farming operation. A marginal contribution to productivity does not provide a basis for excision, particularly where it would create a lot inconsistent with the prevailing lot size and zone requirements: *Dungey*, above, at [25].

Section 138(2) of the PD Act provides that due regard is to be had to the provisions of any LPS that apply to the land and approval is not to be granted to a subdivision that conflicts with the provisions of a LPS.

[18.1361.20] Rural zone

It is not uncommon for rural zoned lots to have areas within them that make only a marginal contribution to the productivity of the overall holding: *Dungey and WAPC* [2010] WASAT 89 at [79]. An 8 ha general rural lot would have virtually no capacity for viable large scale farming activity: *Dungey*, above, at [25].

Cases

Non-agricultural uses. Review of refusal of subdivision application to subdivide lot into two lots of 57 ha and 3 ha – rural zone under region scheme and general farming zone under DPS – subdivision followed existing physical situation of proposed lots where small portion of lot separated from larger portion by road reserve and adjoining rail reserve – *Held:* Approval refused – underlying principles of planning framework weighed against subdivision – potential loss of productive agricultural land – would set an undesirable precedent – would be ad hoc fragmentation of rural land not supported by planning framework: *Musitano and WAPC* [2010] WASAT 92.

Review of WAPC refusal of approval for subdivision into two 5.8ha lots – rural zoning – applicant argued site had no horticultural potential, similar in size to nearby lots and distant from agricultural properties – local planning framework had presumption against rural subdivision – non-agricultural uses on adjoining land – adjoining site designated as townsite lot – subject land of similar size and character – applicant argued surrounding reserves provided sufficient buffer from agricultural use – *Held*: Approval refused – no weight given to designation of adjoining lot as townsite – little impact on horticultural viability – buffer insufficient – approval would set undesirable precedent for creation of lots only suitable for non-rural use – site to remain rural: *Fairborn and WAPC* [2007] WASAT 266.

Structure planning. Review of refusal for subdivision of rural zoned property into two lots of 77.5 ha and 80.5 ha – refused on basis land identified for public purposes in draft structure plan and tentatively identified for more intensive development in local rural strategy and subdivision in absence of further detailed planning could prejudice future planning outcomes – site used as cattle farm – *Held:* Approval granted – consistent with orderly and proper planning – lots consistent with size of lots used for farming in locality and enabled continued broadacre farming – did not involve loss of rural character through fragmentation of rural land – met minimum 40 hectare site area: *RA Adam Family Trust and WAPC* [2010] WASAT 88.

Battleaxe. Review of WAPC refusal to approve subdivision of lot into two freehold lots of 1.72 ha and 2.4 ha in battleaxe configuration – rural zone – locality contained two lots of similar size to those proposed and remainder of lots over 4 ha – *Held:* Application refused – no cogent and adequate reason to depart from planning framework – proposed subdivision represented ad hoc subdivision of rural land contrary to orderly and proper planning of area and would not accord with sound planning principles – undesirable precedent – proposed subdivision objectionable and more than mere chance or possibility of future undistinguishable applications because were considerable number of lots within locality that were 4 ha in area and zoned same as subject land: *Williamson and WAPC* [2009] WASAT 178.

Miscellaneous. Application for review by judicial member of determination of Tribunal to refuse to grant subdivision of rural zoned property – grounds of review included that Tribunal erred in law in its consideration of adverse planning precedent – Tribunal found proposed subdivision "not unobjectionable" – Tribunal referred to over 50 rural and non-rural land uses permitted or discretionary within zone – *Held:* Tribunal's finding vitiated by error of law – fact that other non-rural land uses may be approved in exercise of relevant authority's discretion established, at its highest, a mere chance or possibility of similar applications but did not establish more than a mere chance or possibility of undistinguishable applications: *Cornhill and WAPC* [2009] WASAT 9.

and would not prejudice amenity of locality by way of operating hours or traffic – however, Tribunal not satisfied that subject site no longer required for purpose for which was zoned: *Sunkar and City of Canning* [2010] WASAT 162.

[18.1380.0] Telecommunications

Contents

Related materials

- SPP 5.2 Telecommunications Infrastructure (Mar 2004)
- WAPC, *Planning Bulletin 46: Applications for Telecommunications Infrastructure* (Nov 2000)

[18.1380.10] Amenity

It has been held that wireless services to be provided by a telecommunications facility were an important element of modern life and provided an important amenity to both motorists travelling along an adjoining freeway and existing and future residents of the area: see *Crown Castle Australia Pty Ltd and WAPC* [2008] WASAT 162.

Cases

For a case in which the separation of a telecommunications facility from residences by bushland meant that an existing facility and any additional facility would have a minimal impact on the environment or residential amenity, see *Crown Castle Australia Pty Ltd and WAPC* [2008] WASAT 162.

[18.1380.30] Mobile phone tower

State Planning Policy 5.2 – Telecommunications Infrastructure expressly foreshadows mobile telephone infrastructure in rural zones: *Telstra Corporation Limited and Shire of Murray* [2009] WASAT 117 at [59]. In relation to the weight that is to be given to the policy in planning assessments involving telecommunications infrastructure, see [18.1380.60].

Cases

Review of refusal of application for mobile phone tower as part of telecommunications infrastructure to serve various points along highway and surrounding areas – lattice steel tower 50m high plus 6 m extension on top, self-supporting and to have some base equipment – rural zone – site surrounded by "special rural" land, being land that was to become rural residential in character – site to be approximately 400m to 475 m from residences surrounding subject land – refused on basis rural character of area would be compromised by height of tower; insufficient planning or coordination had gone into proposals connected with highway; tower more of a utility service rather than development relevantly rural; perceptions of adverse health effects caused by electromagnetic radiation; applicant unable to guarantee facility would not cause negative health impacts – *Held:* Approval granted – respondents arguments rejected – planning framework contemplated telecommunication infrastructure in rural areas – proposal had benefit for community, met service demand and had minimal impact upon amenity – significant weight given to State Planning Policy 5.2 – Telecommunications Infrastructure – rural zones earmarked for such facilities – was a need for tower – not necessarily incompatible with rural values expressed in planning framework – visual amenity impact significant because of tower's height but minimised due to placement – evidence pointed to safe operation of tower – disingenuous to

demand guarantee of no adverse health impact when present knowledge and research suggests issue does not arise: *Telstra Corporation Limited and Shire of Murray* [2009] WASAT 117.

Review of refusal of approval for construction of 5 m mobile telephone tower – vibrant commercial, restaurant and heritage area – site was modern commercial building of international style – heritage protection area – tower to be shrouded, colour coded facility, set well back from street – justified by technical, social and communications needs – generalised design guidelines applicable to land did not usefully contemplate telecommunications infrastructure – *Held:* Approval granted – by itself, tower complemented building – reduction in visual amenity and impact on surrounding heritage properties, streetscape and locality did not warrant refusal – justification for facility made out and design and location minimised negative impacts: *Optus Mobile Pty Ltd and City of Stirling* [2008] WASAT 238.

For a case involving an application for construction of two antennae on a heritage building, see the case summary of *Optus Mobile Pty Ltd and the Town of Vincent* [2006] WASAT 179 at [18.1380.55].

[18.1380.40] Mobile phone tower – Height

In relation to the height of telecommunications towers and their impact on visual amenity, the Tribunal stated in *Optus Mobile Pty Ltd and City of Stirling* [2008] WASAT 238 (at [59] per Member McNab):

> While it is true that the tower will be higher than any other point in the immediate vicinity of the subject land … such height is an integral part of the successful functioning of the infrastructure, a matter recognised by SPP 5.2, cl 2.3 ('mounted clear of surrounding obstructions'). The weight to be afforded to SPP 5.2 in the planning framework is, as has been explained above, significant. Importantly, this finding has effect in relation to both the subject land and its immediate vicinity, and will influence any discussion of the impact on visual amenity …

In *Telstra Corporation Limited and Shire of Murray* [2009] WASAT 117, a case involving an application for a mobile phone tower, the Tribunal stated (at [46] per Member McNab), after citing the passage above in *Optus*:

> expressions of opinion on the visual impact of such a facility – at least as to its height – must be proffered in the knowledge that a facility which is otherwise capable of approval (because of matters such as its satisfactory location relevant to other non-preferred locations, and because of proved relevant need) must necessarily have a degree of functionality that is not inimical to the facility's required technical operation. Thus, without sufficient height the facility will not perform its function. This principle is expressly recognised in the [applicable] planning framework. These matters will, as I suggested in *Optus* at [59], 'influence any discussion of the impact on visual amenity'. This is so, in my view, in respect of both rural and non-rural settings.

In *Telstra Corp Ltd v Pine Rivers Shire Council* [2001] QPELR 350, Newton DCJ, of the Queensland Planning and Environment Court, stated (at [48] and [49]) (quoted with approval in *Telstra Corporation Limited and Shire of Murray*, above, at [58] and [62] respectively):

> There is no doubt that the proposed [mobile phone] tower will be able to be seen from many points within the neighbouring locality. However, visibility is not the test and no-one has a right to preservation of a particular view, although interference with a view may have an effect on amenity … In particular, there is no requirement for facilities such as those proposed to be located so that they cannot be seen. Indeed, the nature and operational requirements will ordinarily require them to be elevated structures visible to heights which exceed that of the existing vegetation. It must be remembered that the proposal is not something which is prohibited by the planning scheme. The facilities are a permissible form of development in the zone …
>
> I have already referred to the provisions of … the Local Planning Policy in relation to visual amenity. It will be noted that the paragraph speaks of 'limiting' visual impact and ensuring that such impacts are 'minimised'. Having regard to the evidence … that the proposal is acceptable from a town planning perspective in relation to visual amenity, and accepting that the Appellant has undertaken to design the proposed tower to minimise visual impact in terms of its shape, height and colour, I am satisfied that any

[18.1500.0] Walls and fences

Contents

Related materials

- [21.1960] Meaning of "wall"
- [21.1560] Meaning of "retaining wall"
- [21.1940] Meaning of "visually permeable"
- [15.6.175] R Codes, cl 6.2.5 (Street walls and fences)

[18.1500.10] Amenity

Cases

Residential. Application for construction of two grouped dwellings and retention of existing house as third grouped dwelling – wall of dwelling 2, which encompassed garage and store area, had length of 8.8 m and height of 3 m – wall would abut courtyard of dwelling 1, would be seen in part from living room of dwelling 1 and would directly, in part, face dining room of dwelling 1 – *Held:* Wall would not have unacceptable impact on amenity of future occupants of dwelling 1 in use of their outdoor living area – would not have unacceptable impact on visual amenity for four reasons: firstly, was single storey; secondly, it did not occupy whole of internal boundary between dwelling 1 and dwelling 2; thirdly, wall not parallel to façade and living area and veranda of dwelling 1, but rather, projected at an angle, with the width of outdoor living area of dwelling 1 increasing adjacent to veranda; fourthly, site was coded R60 and was a reasonable expectation of walls of this nature in that coding, at least between one dwelling on land coded R60 and another dwelling on land coded R60: *Disan Pty Ltd and City of South Perth* [2010] WASAT 184.

Review of refusal for construction of front boundary fence addition to two approved 2-storey dwellings – applicant sought to achieve high level of privacy for outdoor living areas (courtyards) of dwellings – 1.8 m solid boundary wall broken by single panel of 50% visually permeable fencing 1.8 m high – R Codes and council policy required solid wall to 1.2 m and visually permeable above if development assessed against acceptable development provisions – original single storey housing stock in locality being replaced by 2-storey houses and grouped dwellings and second-storey additions – streetscape open style fencing and appearance – *Held:* Approval refused – development not in interests of orderly and proper planning or preservation of amenity of locality – undesirable precedent as could lead to similar proposals which could detrimentally affect streetscape character of locality – privacy could be achieved without compromising streetscape character through use of judicious planting or placement of semi-mature or mature vegetation: *MacCormac and Town of Vincent* [2009] WASAT 177.

Residential site adjoining site with non-residential use. Application for review of refusal of approval for garage and parapet wall on boundary – wall adjoining site with primary school with two classrooms – boundary wall policy allowed consideration of buildings proposed to be built to one boundary – *Held:* Approval granted – character of space and design of existing and proposed buildings would result in negligible impact from wall on overshadowing, light and ventilation –

insufficient evidence to conclude space adjacent to wall unusable: *Parker and City of South Perth* [2010] WASAT 35.

Finish to wall. For a case involving an application for review of a direction requiring the applicants to complete rendering and painting of a partly rendered side wall of a 5-storey multiple dwelling development, see the case summary of *Garnham and City of Mandurah* [2010] WASAT 106 at [3.214.30].

[18.1500.20] Height

In *Jolimont Development Company and City of Subiaco* [2010] WASAT 137, a fencing policy deemed a sufficient fence to be 1.8 m high. The Tribunal held that higher fences might be appropriate, particularly where a lot is higher than its neighbour: *Jolimont Development Company and City of Subiaco* [2010] WASAT 137 at [75].

For commentary on measuring the height of a fence positioned in a garden bed within a constructed masonry planter, see under the meaning of "ground level" in the Planning and Development Dictionary at [21.947].

Cases

Dwellings. Review of s 214 direction – City considered first 2 m of boundary wall of dwelling garage to be 0.17 m higher than approved height of 3.12 m – wall height of 3.12 m was constant relative to finished floor level of garage but varied in relation to existing ground level – *Held:* Constructed wall compliant with approval as no specific condition on approval limited height to 3.12 m above existing ground level: *Bielawski and City of Bayswater* [2010] WASAT 103.

Review of refusal of retrospective approval for 3.27 m high rear boundary wall – residential dwelling – planning framework favoured 1.8 m high walls and fences and focused on loss of amenity to immediate neighbours – one neighbour, whose views were obstructed by wall, opposed development and another neighbour, who was not directly affected by wall, supported it – *Held:* Application dismissed – significantly diminished local amenity – opinion of neighbour whose views affected by wall given more weight than opinion of neighbour who supported wall: *Du Heaume and City of South Perth* [2010] WASAT 111.

Review of refusal for construction of 12 single bedroom multiple dwellings – perimeter wall up to 2.4 m high – perimeter fencing policy deemed sufficient fence to be 1.8 m high – wall sufficiently addressed visual permeability requirements – *Held:* Wall would be consistent with fencing policy – proposed wall not so high as to be reason for refusing application: *Jolimont Development Company and City of Subiaco* [2010] WASAT 137.

Review of Tribunal determination to impose condition on approval of boundary fences of residential property with masonry piers and pier caps that some piers be reduced in height to 1.8 m due to impact on amenity of adjoining neighbour caused by loss of views – *Held:* Condition requiring fence piers to be reduced in height deleted – Tribunal erred by failing to give proper, genuine and realistic consideration to effect of landscaping that could be installed without development approval on views from adjoining property across front of applicant's property – landscaping adjacent to common boundary between properties could have same impact on views as fences in question: *Christie and Town of East Fremantle* [2010] WASAT 160.

Condition 1.3 of planning consent for additions and alterations to existing dwelling required proposed wall of building to be set back by approximately 720 millimetres to match building line setback of original cottage – application had been for wall to be on boundary, or as subsequently amended in submissions, such that wall be "set back off the northern boundary sufficient to retain the existing brushwood fence and associated footings in their present alignment" – applicant sought review of condition on basis application met performance criteria of R Codes (2008) and relevant provision of applicable of TPS – *Held:* Condition deleted – impact of wall not sufficiently adverse to refuse proposal – impact of wall mitigated by retention of brushwood

[21.0]

Planning and Development Dictionary

About this chapter

This chapter provides commentary on the meaning and interpretation of words and phrases used in planning instruments that are *not* defined in planning legislation or regulations but which have received consideration by Tribunals and courts in planning cases. Part 1 sets out commentary on "words" and Part 2 commentary on "phrases".

Part 1 – Words

Contents

[21.20] "Adjacent"

"Adjacent" is not a word to which a precise and uniform meaning is attached by ordinary usage. It is not confined to places adjoining and includes places close to or near: *Mayor, Councillors and Citizens of the City of Wellington v Mayor Councillors and Burgesses of the Borough of Lower Hutt* [1904] AC 773 at 775; *Camberwell Corporation v Waldmann* (1945) 72 CLR 250 at 252; *Geneff v Shire of Perth* [1967] WAR 124 at 128; *Freeman and City of Subiaco* [2008] WASAT 303 at [59].

[21.40] "Affordable housing"

At the bottom end of the market, the size of a unit is very important. However, a typical or larger than typical sized unit in a private development is not of a size that involves the provision of affordable housing. In terms of the size of dwellings, affordable housing in a private development requires modest-sized units, in the order of 50-55 sq m for one bedroom units and 65-70 sq m for two bedroom units. Proximity to public transport may contribute to affordability where, in consequence, on-site car parking is not required. Generally, the closer to the city centre, the more expensive the housing: *North Perth Developments Pty Ltd and Town of Vincent* [2008] WASAT 169 at [29]-[30].

Cases

Review of authority's refusal of application proposing development of 8-storey mixed-use building above 2-level car park – density approximately 30 per cent above permitted level – planning framework provided for density bonus where "affordable housing" proposed – unit quality typical – size typical or greater than typical – each unit likely to have one on-site parking space – price would be increased despite access to public transport – *Held*: Total number not so significant in light of other considerations – not "affordable housing" – application refused: *North Perth Developments Pty Ltd and Town of Vincent* [2008] WASAT 169.

[21.60] "Agist"

The *Macquarie Concise Dictionary* (4th ed) defines "agist" as "to take in and feed or pasture (livestock) for payment": *Evers and Shire of Serpentine-Jarrahdale* [2008] WASAT 5 at [27].

[21.80] "Agricultural land"

It has been held that as a consequence of land not being able to be used for primary production, it is not "agricultural land": *Knight and WAPC* [2003] WATPAT 6 at [20]-[23]; *Squires and WAPC* [2006] WASAT 144 at [23]; *Schmidt and WAPC* [2007] WASAT 147 at [50].

[21.90] "Ailment"

Where a district planning scheme referred to "[a] building used by not more than one health care consultant at any one time for the investigation or treatment of human injuries or ailments and for general patient care", the Tribunal has held (*Pearce and City of Wanneroo* [2010] WASAT 77 at [25]-[26]):

> The noun 'ailment' is defined in *The Macquarie Dictionary* at 28 relevantly as 'a morbid affection of the body or mind'. The adjective 'morbid' is defined at 930 of *The Macquarie Dictionary* as follows:
>
> > 1. suggesting an unhealthy mental state; unwholesomely gloomy, sensitive, extreme, etc. 2. affected by, preceding from, or characteristic of disease. 3. relating to diseased parts: morbid anatomy.
>
> Therefore, an 'ailment' refers to a significantly more serious physical or mental affection than mere bodily aches and pains. Furthermore … while 'injury' involves 'harm of any kind done or sustained' (*The Macquarie Dictionary* at 732), and while massage may possibly prevent injuries or ailments, it does not involve the investigation or treatment of injuries or ailments.

[21.100] "Amenity"

For commentary on the meaning of "amenity", see [18.80.08].

[21.120] "Amenities"

The most apposite meaning of "amenities" is "features, facilities, or services of a house, estate, district, etc., which make for a comfortable and pleasant life". In relation to the office component of a mixed use building, the normal and common meaning of "amenities" is features, facilities or services of the building which make for a comfortable and pleasant working life. However, in addition to the normal and common meaning of the word "amenities", the context in which the word appears is also important in ascertaining the legislative intention: *Broadway and City of Subiaco* [2009] WASAT 40 at [18]-[19].

Cases

"Amenities" appeared in planning framework definition of "floor area of a building" for non-residential building as part of phrase "areas of lift shafts, stairs, toilets, amenities [and] plant rooms" – *Held*: "Amenities" included lobbies, bin storage areas and ancillary passageways: *Broadway and City of Subiaco* [2009] WASAT 40.

[21.127] "Ancillary accommodation"

Cases

Review of requirement that upper floor of proposed additional building at rear of existing house have certain minimum set back – proposed building comprised basement, ground floor double garage opening onto rear right of way and first floor room with living and sleeping areas – outside deck would extend between new building and rear of single storey house at front of lot – whether extension was "ancillary accommodation" or extension of existing residence – house was built to accommodate three generations – intention was to use proposed development to accommodate two generations in single house – *Held:* Proposed development was extension of existing single residence – little variation to living arrangements: *Trevenen and Town of Claremont* [2010] WASAT 119.