This Bulletin contains summaries of all written reasons for decisions published by the Tribunal in the development and resources stream in March 2007. The full text of decisions and reasons can be found on the Tribunal's website at www.sat.justice.wa.gov.au. If you would like the monthly bulletin emailed to you directly, please enter your email address and details at our subscription page.

MT LAWLEY PTY LTD and WESTERN AUSTRALIAN PLANNING COMMISSION [2007]
WASAT 59
2 MARCH 2007
MR D R PARRY (SENIOR MEMBER), MS M CONNOR (MEMBER), MR B HUNT
(SENIOR SESSIONAL MEMBER)

Town planning - Development application - Sand extraction and earthworks - Extraction of approximately 101 000 cubic metres of sand - Primary Regional Roads reservation - Extracted sand to be used to construct approved subdivision on adjoining "Urban" zoned land - Earthworks would form part of base of regional road in accordance with Main Roads WA's preliminary design - Proposed development would necessitate importation by Main Roads WA of approximately 50 000 cubic metres of fill at a net cost of approximately $600 000 (2007) to construct regional road - Main Roads WA could import fill by using regional road reserve rather than local road system - Alternative source of fill for approved subdivision would involve additional 11 222 truck trips though local road system - Whether and to what extent proposed development would affect integrity and purpose of regional road reservation - Whether and to what extent proposed development would prejudice the development of the regional road - Whether proposed development acceptable in relation to clearing of natural vegetation - Sustainable use and development of land - Whether need for proposed development is a relevant threshold planning consideration

Mount Lawley Pty Ltd sought review of the refusal of a development application for sand extraction and earthworks on land which is the subject of a regional road reservation in order to facilitate the construction of an approved residential subdivision on adjoining land. The subdivision requires 272 000 cubic metres of fill of which 101 000 cubic metres could be obtained from the reserved land. The development application proposed excavation to the box gutter level of the regional road and earthworks to form the base of the carriageway in accordance with a preliminary design. Approval of the development application would necessitate the importation by Main Roads WA of 50 000 cubic metres of fill to construct the road.

The principal issues involved:
whether and if so to what extent the proposed development would affect the integrity and purpose of the reservation, including whether and if so to what extent it would prejudice the development of the road; and
whether the clearing of a 200 metre by 20 metre area was acceptable.

The Tribunal determined that the proposed development is consistent with the integrity and purpose of the road reservation and would not prevent the use, acquisition or development of the reserved land for its intended purpose. Although the cost of importing fill for the construction of the road would prejudice the development of the reserve to an extent, the degree of prejudice is not significant and does not warrant refusal in the exercise of planning discretion.

The proposed development involves orderly and proper planning, and in particular, the sustainable use and development of land. It involves the efficient utilisation of fill material and avoids social, economic and environmental detriments which would flow from 11 222 heavy truck movements passing through local streets. By avoiding these movements, the development also preserves the amenities of the locality. Although fill would have to be imported to ultimately construct the road, the volume that would need to be imported is half the volume to be obtained by the proposal, and the road reservation would be utilised avoiding local roads.

The Tribunal also determined that the land clearing proposed is acceptable, because the approval can be conditioned to require suitable revegetation and the vegetation associations will be sufficiently protected within the adjacent Bush Forever site.

The application for review was allowed and development approval was granted subject to conditions.

HEALTH RESORTS OF AUSTRALASIA PTY LTD and WESTERN AUSTRALIAN PLANNING COMMISSION [2007] WASAT 60
7 MARCH 2007
JUDGE J CHANEY (DEPUTY PRESIDENT)

Planning - Coastal development height - Whether approval required under Peel Region Scheme - Approval by local government - Approval by Western Australian Planning Commission lacking jurisdiction - Change of Scheme to catch proposed development - Subsequent application for review of decision made without jurisdiction - Whether open to Tribunal to deal with matter - Effect of amendment to Peel Region Scheme - Whether accrued right unaffected by amendment - Definition of "storey"
Words and Phrases - "storey" - "mezzanine"

In July 2006, Health Resorts of Australasia Pty Ltd received approval from the City of Mandurah to develop a motel and accommodation complex in Halls Head. The City wrongly advised the applicant that it also needed approval from the Western Australian Planning Commission under the Peel Region Scheme. The applicant did not consider that approval was necessary, but out of caution made an application to the WAPC. That application was granted subject to a condition that the building be reduced by one storey.

The applicant sought a review of that decision by the Tribunal. It argued that no approval from the WAPC was necessary. Shortly before the proceedings were instituted, but after making its decision, the WAPC, published a resolution that had the effect of requiring that its approval be obtained under the PRS for developments of the kind proposed by the
applicant. The applicant contended that the new resolution could not be applied to its proposed development, and that the WAPC's decision to give conditional approval was of no effect.

The parties formulated four preliminary questions concerning the requirement to obtain the WAPC's approval and the application of the PRS. The Tribunal examined those questions and concluded that the approval of the WAPC, and in turn the Tribunal, was not required under the PRS.

KELLETT and TOWN OF VINCENT [2007] WASAT 62
9 MARCH 2007
MR L GRAHAM (SENIOR SESSIONAL MEMBER)

Town planning - Development application - Amenity - Orderly and proper planning - Precedent - Cumulative impact of the changes - Potential for conflict with nearby residents - Use not permitted unless Council has exercised its discretion - Discouraging expansion of commercial activity outside identified centres - Adequacy of car parking bays

The application for review was lodged against a decision of the Town of Vincent to refuse a planning application for the partial demolition of, and alterations and additions to, an existing beauty salon at the corner of Charles Street and Mabel Street, North Perth. The Tribunal had regard to the respective arguments of the parties, the existing legislative and policy provisions and matters relating to amenity, orderly and proper planning and precedent. It concluded that the weight of argument was with the applicant, and the decision under review was set aside.

PATRONI and CITY OF FREMANTLE [2007] WASAT 63
8 MARCH 2007
MR D R PARRY (SENIOR MEMBER), MR R EASTON (SENIOR SESSIONAL MEMBER), MR A EDNIE-BROWN (SENIOR SESSIONAL MEMBER)

Town planning - Development application - Four-level mixed use commercial/residential building - Levels 1, 2 and 3 nil setback to street frontage with three roofed balconies and two level fin wall projecting above public footpath - Level 4 setback 3.0 metres from street frontage - Whether height acceptable in relation to streetscape including heritage value of streetscape - Whether projecting balconies acceptable in relation to streetscape including heritage value of streetscape

These proceedings involved an application for review of the refusal of a development application for a four-storey mixed use commercial/residential building on the northern side of Norfolk Street, Fremantle, in the Fremantle West End Conservation Area.

Buildings in the street are predominantly one- to two-storeys in height, with the exception of three- to four-storey buildings in the south-western part of the street. The proposed development would have a nil front setback up to Level 3 and a 3.075 metre setback to Level 4. Three covered balconies and a two-storey high fin wall would project by up to 2.0 metres into the public domain above the footpath.

The issues were:
• whether the height of the proposed development is acceptable in relation to streetscape, including the heritage values of the streetscape; and
• whether the projecting balconies are acceptable in relation to streetscape, including the heritage values of the streetscape.

Following the hearing, the Tribunal gave an oral decision in which it dismissed the application for review and affirmed the decision to refuse development approval.

The Tribunal found that the proposed building would be distinctly higher than surrounding built form. The Tribunal determined that the visual domination of the proposed building over existing built form in the streetscape involves an adverse impact on the streetscape, which is unacceptable. Moreover, a three- to four-storey building juxtaposed against one- to two-storey buildings involves a discordance in scale which is unacceptable.

The Tribunal found that the historic character of the relevant part of the Conservation Area comprises a mix of modest commercial and residential buildings of mostly one to two storeys. The Tribunal determined that the dominant three- to four-storey scale of the proposed development would adversely affect the heritage quality of the street in terms of the predominant scale of built form.

Although projecting balconies exist in other parts of the Conservation Area, the Tribunal determined that the form of the balconies proposed in this case has no historical context and is inappropriate because of the need to prune a Norfolk Island pine tree that is one of a heritage-listed group.

J & P METALS PTY LTD and SHIRE OF DARDANUP [2006] WASAT 282 (S)
15 MARCH 2007
JUDGE J CHANEY (DEPUTY PRESIDENT), MS M CONNOR (MEMBER)

Costs - Assessment of reasonable costs - Substantive matters decided on documents - Respondent raising no planning objections to proposal - Whether matter complex - Relevance of importance of matter to applicant to determination of whether costs reasonable - Appropriate measure as to costs

On 14 September 2006, the Tribunal, then constituted by Member Ms M Connor, allowed an application by J & P Metals Pty Ltd for review of a refusal by the Shire of Dardanup to grant approval for the upgrade of an existing landfill facility from class 2 to class 3 subject to certain conditions. Member Connor also made an order that the Shire of Dardanup pay the applicant's reasonable professional costs and disbursements arising from the application for review on the basis that the Shire had failed to genuinely attempt to make a decision on the merits of the application.

The parties were unable to agree the quantum of costs, and in accordance with Member Connor's order, the costs were to be assessed by the Tribunal. The President of the Tribunal appointed the Deputy President, Judge Chaney, and Ms Connor to constitute the Tribunal for the purpose of assessing the appropriate amount of costs.

The applicant claimed recovery of a total in excess of $85 000, some $15 000 of which constituted costs said to have been incurred in relation to the assessment of costs. The respondent contended that the costs claimed were excessive and thus unreasonable. The Tribunal agreed with the respondent. It concluded that the matter was not complex, that the time said to have been spent on the matter was not adequately explained, and it would be unreasonable to require the Shire to pay costs anything like the amount claimed. It
considered that an appropriate recovery of costs was $10,288. In view of the unreasonableness of the claim for costs, the Tribunal declined to allow recovery of any of the applicant's costs related to the assessment of costs.

MASIELLO and CITY OF SOUTH PERTH [2007] WASAT 65
16 MARCH 2007
MR P McNAB (MEMBER)

Town Planning - Development approval - Modern two storey house - Flat or skillion roof proposed - House on lot with wide frontage - Design per se not in issue - Unusually shaped lot - Planning framework required attention to "rhythm" of focus area or precinct - Suggested consistency of streetscape, scale and form not made out by respondent - Significant variation in precinct area - Tribunal accepting in the alternative that this modern design had intrinsic merit and did not offend planning framework standards - Application of previous Tribunal decisions to this effect - Ancillary concessions to R Codes design elements made out by applicant - Development approved on conditions - Words and phrases: "skillion roof"

This review considered whether a modern two-storey single house development in South Perth was consistent with the "rhythm" (as to such matters as streetscape, bulk, form and colour) of the precinct (or "focus area") in which it was proposed to be built. This was the principal regulatory standard set out in the planning framework.

The respondent City of South Perth considered that there was such consistency evident in the focus area and that the proposed development, particularly with its low, flat (skillion) roof, would offend these standards of desired consistency.

The Tribunal, after considering the evidence, found that there was in fact no such consistency of design and scale in the focus area, at least to the extent that had been suggested. Moreover, the Tribunal was of the view that the proposed development otherwise had merit in terms of its modern, striking design. The Tribunal applied a number of previous Tribunal decisions (some of them dealing with skillion roofs) which indicated that such developments were possible or even, in some cases at least, to be encouraged.

The Tribunal also accepted that the applicant's expert evidence demonstrated that some concessions or variations were necessary or desirable in relation to some ancillary design elements (such as setbacks) prescribed under the Residential Design Codes 2002. This was because of the awkward shape of the Lot, its wide frontage and its position in relation to maximising solar access.

The Tribunal allowed the review and set aside the decision under review, going on to grant planning approval on certain conditions.

DETATA & ANOR and TOWN OF CAMBRIDGE [2007] WASAT 66
16 MARCH 2007
MR L GRAHAM (SENIOR SESSIONAL MEMBER)

Town planning – Application for planning approval – Grouped dwellings – Acceptable development provisions and performance criteria of the Codes – Matters of orderly and proper planning, amenity and streetscape – Driveway width – Visual privacy – Boundary setback requirements – Solar access to courtyard areas – Site constraints
The application for review was lodged against a decision of the Town of Cambridge to refuse the construction of eight grouped dwellings at No 122 Kimberley Street, West Leederville.

The Tribunal examined the respective arguments of the parties, the relevant legislative and policy provisions, and the variations sought by the applicants to the *Residential Design Codes of Western Australia 2002* and the *Town’s Residential Design Guidelines*. Matters of amenity and streetscape were examined.

The Tribunal did not accept that the proposed development met the broad intent of the Objective and Performance Criteria of the Codes with respect to boundary setbacks; specifically the need to ameliorate the impact of building bulk on neighbouring properties and the desirability of achieving solar access into rear courtyards.

The application for review was dismissed.

**PEARL BAY ENTERPRISES PTY LTD and SHIRE OF HARVEY [2007] WASAT 68**

23 MARCH 2007

MR D R PARRY (SENIOR MEMBER)
MR R AFFLECK (SENIOR SESSIONAL MEMBER)

Town planning - Condition of development approval for 71 short stay accommodation units and associated amenities requiring the development to be connected to the Water Corporation sewer at the property boundary and advising the developer that a private connection is not acceptable - Applicant seeks substitution of condition requiring the developer to construct a private sewerage pumping station on site and a private sewerage main for distance of 470 metres under public roads to connect to a Water Corporation pumping station and to enter into an agreement requiring it and its successors to indemnify the Shire and maintain insurance to cover the indemnity - Whether land to which the development application relates includes the roads in which private sewerage main is proposed to be located - Whether Tribunal should give owner's consent to the making of the development application in respect of the roads - Whether granting development approval for or imposing a condition requiring the construction of the private sewerage main in the roads would be futile - Whether condition imposed by Shire is invalid - Likely practical consequence of condition is that applicant must pre-fund public sewerage pumping station to cater for wider catchment and recoup cost not attributable to its development from Water Corporation over time - Whether condition significantly alters development applied for - Whether condition has requisite nexus to proposed development - Whether condition which precludes private sewerage connection has a planning purpose - Whether condition is an impermissible fetter on subsequent administrative decision - Whether condition imposed by Shire is unreasonable - Whether alternative condition proposed by applicant is consistent with orderly and proper planning of the locality - Unreasonable enforcement burden

The Shire granted development approval for 71 short stay accommodation units and associated facilities at a former caravan park site subject to conditions. One of the conditions required the connection of the development to the public sewer at the property boundary and advised the developer that a private connection is not acceptable.

The developer sought review of this condition and proposed an alternative condition requiring the connection of the development to the public sewer via a private sewerage
pumping station on site and a private sewerage main within public road reserves of a
distance of 470 metres. The developer also proposed conditions requiring it to provide a
$10 000 bond for 10 years to the Shire for the maintenance, upgrading or replacement of
the private sewerage facilities and to enter into a legal agreement with the Shire to ensure
that it and its successors in title indemnify the Shire for the maintenance, upgrading or
replacement of the infrastructure and maintain insurance in this regard.

The developer argued that the Shire's condition could not be lawfully imposed and was, in
any case, unreasonable. It contended that, as a practical matter, compliance with the
condition would require it to pre-fund the construction of a public sewerage pumping station
with capacity to cater not only for its development, but also for the wider sewerage
catchment, cede land, free of cost, for the pumping station and give up two units because of
the additional space required to cater for the wider catchment.

The evidence did not permit a finding to be made that compliance with the condition would
require the developer to give up land, because an off site location for the pumping station
may be secured, or that two units would be lost, as the location of the pumping station is
unknown. It was common ground that, under current Water Corporation provisions,
compliance with the condition would require pre-funding a larger pumping station than
would be required to cater simply for the development. However, it was also common
ground that the developer would be reimbursed over time.

The cost of compliance with the Shire's condition was estimated by an officer of the Water
Corporation to be in the vicinity of $500 000 to $750 000, although this figure involved
speculation and was heavily dependent upon further site investigations. The cost of
compliance with the developer's alternative condition was approximately $130 000,
excluding fees and traffic management.

The Tribunal determined that the Shire's condition could be lawfully imposed. In particular,
the condition:

• would not significantly alter the development in respect of which the application was
  made or leave open the possibility that it will be significantly different;
• does not seek to fulfil a public need the existence of which bears no relationship with
  the development, because the developer is likely to recoup the costs of pre-funding;
  and
• has a proper planning purpose.

The Tribunal also determined that the Shire's condition is reasonable and appropriate, given
the scale and value of the development.

Finally, the Tribunal determined that the applicant's alternative condition is not appropriate
as it would be contrary to the orderly and proper planning of the locality. In particular, the
condition:

• would give rise to an unreasonable enforcement burden on the Shire in ensuring the
  execution of deeds by land owners and the maintenance of insurance;
• would cast primary responsibility for maintenance and repair of the sewerage main
  on the Shire, which is not the sewerage authority for the district; and
• may frustrate the provision of future public sewerage infrastructure.

AUSTGOLD HOLDING PTY LTD and TOWN OF VINCENT [2007] WASAT 70
26 MARCH 2007
MR L GRAHAM (SENIOR SESSIONAL MEMBER)
The application for review was lodged against a decision of the Town of Vincent to impose a cash-in-lieu contribution of $44,772 for the equivalent value of 17.22 car parking spaces for a change of use from "Shop and Take Away Food Outlet" to "Shop, Take Away Food Outlet and Eating House".

The Tribunal examined the relative arguments of the parties, the background to previous approvals, legislative and policy provisions, an alternative calculation for assessing the cash-in-lieu contribution and the matter of "fairness" in imposing planning conditions.

The Tribunal believed that the alternative contribution of $18,655 for a car parking shortfall of 7.175 bays was fair and reasonable.

The application for review was upheld.

BOULTER and CITY OF SUBIACO [2007] WASAT 71
27 MARCH 2007
MR D R PARRY (SENIOR MEMBER)

The principal issues concerned whether the development conformed to the streetscape, open space, design for climate and boundary setback provisions of the Residential Design Codes of Western Australia (2002) and whether it satisfied the objectives for development in the zone, which include to enhance amenity of the neighbourhood by, among other things, the adherence to solar and environmentally sound design principles. The Tribunal determined that the development conformed to the Acceptable Development provisions in relation to streetscape (southern house) and setback, and conformed to the Performance Criteria in other respects. The Tribunal also determined that the development generally satisfied the objective of the zone in the circumstances. In particular, although the
southern house had very poor solar access, it incorporated solar and environmentally sound design principles to the maximum extent possible, having regard to the size, orientation and dimensions of the lots and the need to avoid potential impacts on the adjoining property to the south.

The Tribunal therefore allowed the application for review and granted conditional development approval.

The Tribunal observed that the case highlighted a difficulty which can result from the split planning system in Western Australia, which is unique to this State, under which subdivision control and assessment is undertaken at State level whereas development control and assessment is generally undertaken at local government level. In this case, the proposed southern house, while a reasonable response to characteristics of the approved allotment, has very poor solar access. This difficulty raised the issue of whether, in some contexts, such as urban infill, a single system of development/subdivision control and assessment may be preferable.

KATICH & ANOR and WESTERN AUSTRALIAN PLANNING COMMISSION [2007] WASAT 72
28 MARCH 2007
MR J ADDERLEY (SENIOR SESSIONAL MEMBER)

This was a review of a decision by the Western Australian Planning Commission on advice of the Swan Valley Planning Committee to refuse amalgamation and re-subdivision of two rural lots in the Swan Valley for the purposes of consolidating a vineyard and excising a smaller lot containing an existing residence.

The Tribunal found that the subdivision should be allowed because evidence was presented to the effect that the proposal was consistent with the objectives of the Swan Valley Planning Act 1995 (WA) which seeks to encourage traditional agriculture and other productive uses that complement the rural character of the Swan Valley.

However, most unusually, the application for review can not be upheld unless the Minister for Planning and Infrastructure allows the Tribunal to disregard the advice of the Swan Valley Planning Committee in order to conditionally approve the subdivision. The Tribunal requested the Minister to do so and adjourned the proceedings to enable the Minister to advise the Tribunal of her decision.
RICHARDSON and SHIRE OF SERPENTINE-JARRAHDALE [2007] WASAT 73
29 MARCH 2007
MR L GRAHAM (SENIOR SESSIONAL MEMBER)

Town Planning - Approval to commence development - Fair and reasonable planning conditions - Amenity - Precedent - Building envelope - Fire management plan - Acceptable development provisions - Incidental development - Outbuilding - Outdoor living area - Common boundary - Minimum setback

The application for review was lodged against a decision of the Shire of Serpentine-Jarrahdale to approve the construction of a shed and attached carport at Lot 604 (No 139) Bruns Drive, Darling Downs. Two of the ten conditions of approval (conditions (1) and (3)) were unacceptable to the applicant.

The Tribunal examined the respective positions of the parties together with the background to the matter, the legislative and policy provisions, the substance of an objection from the adjoining neighbour to the south and matters relating to fire management and "building envelopes".

The Tribunal found no valid planning reason against proposed conditions (1) and (3), and found that they were fair and reasonable in the circumstances of this case.

The application for review was dismissed.

ANDERSONCOOKE PTY LTD & ANOR and CITY OF SOUTH PERTH [2007] WASAT 74
28 MARCH 2007
MS M CONNOR (MEMBER), MR P DE VILLIERS (SENIOR SESSIONAL MEMBER), MR R EASTON (SENIOR SESSIONAL MEMBER)

Town planning – Development application – Multiple dwelling development – 23 single bedroom dwellings – High density coding adjacent to low/medium density coding – Impacts of proposed development on Focus Areas in terms of streetscape, visual amenity and character – Whether sufficient resident and visitor car parking – Whether to permit the minimum site area to be reduced by up to one third to allow for single bedroom dwellings – Shortfall in "Minimum Total" open space

Andersoncooke Pty Ltd and Sealcrest Pty Ltd applied to the State Administrative Tribunal for review of the decision of the City of South Perth refusing planning consent for the construction of 23 single bedroom dwellings on Lots 390 and 391 (No's 3 and 5) Barker Avenue, Como.

The principal issues identified were:

1. Whether the proposed development would have a significant and detrimental impact on the streetscape, visual amenity and character of Park Street, Barker Avenue and adjacent residential areas.
2. Whether the development provides sufficient resident and visitor car parking.
3. Whether the discretion to permit the minimum site area to be reduced by up to one third to allow 23 single bedroom dwellings under the Residential Design Codes of Western Australia 2002 should be exercised.
4. Whether the development should be permitted with the amount of open space proposed.
In relation to the first issue, the Tribunal considered that the proposed development made a positive contribution to the Barker Avenue focus area and the restricted length of the Park Street elevation, the setback to the southern boundary, the provision for tree planting and the treatment of the eastern end of the southern boundary all considerably mitigated the adverse impacts of a "high density" residential development on the Park Street focus area. The Tribunal considered that the impacts of the proposed development on the streetscape, visual amenity and character of the Barker Avenue and Park Street focus areas were acceptable.

As to whether the development provided sufficient resident and visitor parking, the Tribunal determined that, notwithstanding that each of the single bedroom dwellings had a plot ratio in excess of 60 square metre, the additional floor space would not warrant additional car parking bays to be provided and therefore, considered there was adequate car parking provided on site to satisfy the projected need for the proposed development.

The Tribunal considered that the proposed development provided an alternate dwelling type that was consistent with the objectives of the City of South Perth Town Planning Scheme No 6 and satisfied the performance criteria under par 4 of cl 4.1.3 of the Residential Design Codes of Western Australia 2002.

In relation to the fourth issue, the Tribunal was satisfied that in the context of the proposed development the amount of open space provided satisfied the relevant performance criteria of the Codes.

The Tribunal determined that the application did not warrant refusal and that the discretion available under par A3 of cl 3.1.3 of the Codes should be exercised. The application for review was allowed and development approval was granted subject to conditions.