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**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**ACT** : PLANNING AND DEVELOPMENT ACT 2005 (WA)

**CITATION** : POINT GREY DEVELOPMENT COMPANY PTY LTD and SHIRE OF MURRAY [2019] WASAT 106

**MEMBER** : MR P DE VILLIERS, MEMBER  
MS C BARTON, MEMBER

**HEARD** : 2, 3 AND 4 OCTOBER 2019

**DELIVERED** : 5 NOVEMBER 2019

**FILE NO/S** : DR 108 of 2019

**BETWEEN** : POINT GREY DEVELOPMENT COMPANY PTY LTD  
Applicant

AND

SHIRE OF MURRAY  
Respondent

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*Catchwords:*

Development - Excavation - Stockpile of excavated material - Stage 1 of Marina development - Application under Peel Region Scheme - 'Special Development' zone - Scheme provisions - Structure plan (Outline Development Plan) - Ramsar recognised wetlands - State and Commonwealth environmental approvals - Appropriate use class - Whether use is an 'Extractive Industry' - Consistency with zoning, character and amenity - Consistency with orderly and proper planning - Clearing and removal of trees and vegetation - Objections to exhibits - Whether approval for the use is required - Disciplined, methodical, logical and systematic exercise of discretion

*Legislation:*

*Aboriginal Heritage Act 1972 (WA), s 18*

*Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 130(1), s 133*

*Environmental Protection Act 1986 (WA), s 38, s 46*

*Peel Region Scheme, cl 5, cl 6, cl 22, cl 30(2), cl 34*

*Planning and Development (Local Planning Schemes) Regulations 2015 (WA), reg 79, Sch 2, cl 1, cl 27(1), cl 28(2), cl 60, cl 67, cl 67(p)*

*Planning and Development Act 2005 (WA), s 4*

*Shire of Murray Local Planning Scheme No. 4, cl 1.10, cl 2.2, cl 6.8, Sch 7*

*State Administrative Tribunal Act 2004 (WA), s 9, s 32(2)(a), s 32(3)*

*Result:*

The application is dismissed and the decision of the respondent affirmed

*Summary of Tribunal's decision:*

This proceeding involved the review of a refusal by the Shire of Murray for 'Earthworks for Stage 1 of Marina' at Lot 672 Carrabungup Road, Point Grey.

The substantive question for the Tribunal was whether proposed works could be dealt with independent of the use of the subject site for a marina.

The Tribunal found that what was proposed constituted a change of use and planning approval was required for such a change of use.

Given that the change of use had not been approved under TPS 4 or the PRS and the Tribunal found that the proposed development was not consistent with orderly and proper planning the Tribunal dismissed the application and affirmed the decision of the respondent.

*Category:* B

**Representation:**

*Counsel:*

Applicant : Mr P McQueen

Respondent : Mr DW McLeod

*Solicitors:*

Applicant : Lavan  
Respondent : McLeods

**Case(s) referred to in decision(s):**

Di Trent and Shire of Northam [2017] WASAT 121  
Goldrange Pty Ltd and City of Wanneroo [2011] WASAT 48  
Goldrange Pty Ltd and Western Australian Planning Commission  
[2018] WASC 350; (2018) 233 LGERA  
Leith v Western Australian Planning Commission [2014] WASC 499  
Marshall v Metropolitan Redevelopment Authority [2015] WASC 226  
Pioneer Concrete (Q) Pty Ltd v Brisbane City Council [1980] HCA 1;  
(1980) 145 CLR 485, (1980) 44 LGRA 346  
Project Blue Sky Inc v Australian Broadcasting Authority (1988) 194 CLR 355  
Randwick Municipal Council v Derria Pty Ltd (1979) 49 LGRA 95  
Robertson and Shire of Murray [2009] WASAT 171; (2009) 67 SR (WA) 66  
Stewart and Town of Cottesloe [2019] WASAT 100  
Two Rocks Investment Pty Ltd and Western Australia Planning Commission  
[2019] WASAT 59; (2019) 97 SR (WA) 270  
University of Western Australia v City of Subiaco (1980) 52 LGRA 360  
Western Australian Planning Commission v Narcom Holdings Pty Ltd  
[2011] WASC 259

**REASONS FOR DECISION OF THE TRIBUNAL:**

***Background***

1 On 6 February 2019 Point Grey Development Company Pty Ltd, (applicant), applied to the Shire of Murray (respondent, Shire, Council) seeking approval under the *Shire of Murray Local Planning Scheme No. 4 (LPS 4)* for 'Earthworks for Stage 1 of Marina' at Lot 672 Carrabungup Road, Point Grey (**development application**).

2 The works involve an overall works footprint of 11.67 hectares, comprising an excavation area of 5.8 hectares and a stockpile area of 5.86 hectares, and the clearing of 1.0 hectare of vegetation. Given that the excavated level will be above the maximum groundwater level, no dewatering is proposed.

3 At its meeting on 24 April 2019, the Council of the respondent resolved in the following terms:

*'That Council:*

1. *Refuse the application made by Roberts Day on behalf of Point Grey Development Company Pty Ltd, for Stage 1 marina earthworks at Lot 672 Carrabungup Road, Point Grey.*
2. *Welcomes a new application once the proponent provides documentation that demonstrates the meeting of all outstanding conditions, including the financial model for dredging and maintenance of the proposed channel to the satisfaction of the Council.'*

The minutes set out the reason for this:

*'To allow Council to have the time to review progress on the condition requirements for the proposal, and to give further due diligence to the project and the financial modelling.'*

4 On 22 May 2019 the applicant applied to the Tribunal seeking review of the Council's decision.

5 A second application dated 10 June 2019, made under LPS 4, was subsequently lodged with the respondent proposing a similar extent of development with the exception that the overall footprint had been reduced by approximately 1.5 hectares, omitting the 1.0 hectares covered by native vegetation included in the initial application and a reduction in the stockpile area.

6 At its meeting on 27 June 2019, the Council of the respondent refused to approve the second application for the following stated reason:

*'That Council and the community will not get to see an approved Capital Dredging and Spoil Disposal Plan prior to Commencement of Construction works as previously understood, given the changes to the Commonwealth's Environmental requirements dated March 2019. Previously the Commonwealth required this Plan to be prepared and approved prior to substantial commencement of the marina which would allow the ongoing costs and impacts of the overall project to be better understood and considered. As such, given the significance of the project and the potential ongoing financial costs, the risks associated with the dredging, spoil disposal and ongoing maintenance is deemed a risk significant enough to not support the officer recommendation.'*

7 On 20 March 2019 and 10 June 2019 the applicant lodged applications for approval to commence development for the same developments under the *Peel Region Scheme (PRS)*.

8 The respondent forwarded each of the PRS applications to the Western Australian Planning Commission (**WAPC**) for determination pursuant to cl 30(2) of the PRS.

9 As the report provided to the respondent in the agenda for the meeting of 24 April 2019 did not address the PRS (and the determination is silent as to the authority under which the decision was made), one could reasonably infer that the decision of 24 April 2019 was intended to be made under LPS 4.

10 However, at the time of that determination the respondent was in receipt of an application under the PRS for the initial development application. In addition, the WAPC subsequently advised the respondent that delegation of the decision to the local government would apply if a local government were to refuse such an application. Therefore under cl 22 of the PRS the local government can be deemed to have made, at the same time as the determination under the local planning scheme was made, the same determination under the PRS in respect of the development.

11 For that reason the matter before the Tribunal in this proceeding is the determination by the respondent on 24 April 2019 which is taken to have been made under both LPS 4 and the PRS.

*Site and locality*

12 The subject site is Lot 672 (745) Carrabungup Road, Point Grey  
(**Subject site**).

13 The Subject site is approximately 121.5 hectares in area and forms  
one of four adjoining lots owned by the applicant. The total area of the  
four lots is approximately 275 hectares.

14 Approximately 205 hectares of the four lots is zoned 'Urban' under  
the PRS and 'Special Development' under LPS 4. The remaining  
portions of the Lots are either zoned 'Rural' or are reserved for  
'Regional Open Space' under both the PRS and LPS 4.

15 The Subject site is situated on a promontory surrounded on three  
sides by the Peel Inlet and Harvey Estuary. The Peel Inlet and Harvey  
Estuary are significant wetlands recognised under the *Ramsar  
Convention on Wetlands of International Importance* (**Ramsar  
Convention**).

16 The applicant lodged an application to subdivide the subject site  
with the Department of Planning, Lands and Heritage on 7 March 2019.  
The application sought to create two lots in accordance with conditions  
attached to the State and Commonwealth environmental approvals,  
(see [18] and [19] below) which required the ceding of foreshore  
landholdings to the Crown for conservation and recreation purposes.  
The application was approved by the WAPC on 6 June 2019.

*The development*

17 On 6 February 2019 the applicant lodged with the respondent an  
application under LPS 4 seeking approval for 'Earthworks for Stage 1  
of Marina', comprising:

- (a) The excavation of sand and soil within part of the  
footprint of the marina as generally depicted on the  
approved Structure Plan and the State and  
Commonwealth Environmental Approvals.  
The excavation area is 5.8 hectares to a depth ranging  
from approximately 1.5 metres in the south-western  
corner to 3.0 metres in the north-eastern corner.  
The average excavation over the whole area is  
approximately 2.0 metres. The base of the excavation  
area is proposed at 1.0 metre AHD.

- (b) A stockpile area of a similar size as the excavation area is also proposed, receiving the excavated sand to an average stockpile height of 2.5 metres and a maximum height of 3.5 metres. The stockpile area is sited adjacent to the excavation area immediately north of the footprint of the Marina as generally depicted on the approved Structure Plan and the State and Commonwealth Environmental Approvals.
- (c) Clearing of approximately 1 hectare of native foreshore vegetation and 10 individual trees within the cleared pasture portion of the Subject site.

### *Environmental approvals*

18 Both the State Government and the Commonwealth Government have assessed and approved, subject to conditions, the development of an onshore Marina on the Subject site and the construction of a 2.5 kilometre navigation channel across the Harvey Estuary from the Marina to the Dawesville Channel.

19 The State's approval, under s 46 of the *Environmental Protection Act 1986* (WA) (**EP Act**) (**State environmental approval**), initially required substantial commencement of the Marina construction by 1 August 2017. In April 2017, the substantial commencement date was extended until 28 June 2019. In September 2018, a further extension was granted subject to a condition requiring that '[t]he proposal shall not commence implementation of the proposal after 1 August 2022, and any commencement, prior to this date, must be substantial'.

20 The Commonwealth's approval, under s 130(1) and s 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) (**Commonwealth environmental approval**) was initially granted in June 2014, having effect until December 2050, with a condition requiring substantial commencement by June 2019. In March 2019 an amended approval was granted, having effect until 31 December 2057, with a substantial commencement date of March 2029.

21 The State environmental approval, initially granted in August 2012, includes a number of conditions in Ministerial Statement No. 906 relating to compliance reporting, public availability of environmental data, protection of vegetation, environmental offsets, estuarine water quality management and monitoring, and dredge timing. Two of the

conditions are required to be complied with prior to ground disturbing activities taking place. These conditions concern transferring 10.6 hectares of privately owned foreshore land to the Crown for conservation and recreation purposes and the submission of a land purchase offset strategy.

- 22 The Commonwealth environmental approval requires a range of management plans to be prepared and approved by the Minister prior to certain works occurring, compliance reporting, and includes similar conditions to the State environmental approval regarding the transfer of land to the Crown, and an offset strategy. Conditions requiring management plans relate to dredging and spoil disposal management, acid sulphate soils and dewatering, construction environment management and foreshore management.

### *The planning framework*

- 23 A portion of the Subject site, of approximately 79 hectares, is zoned 'Urban' under the PRS and 'Special Development' under LPS 4, and has been generally cleared of native vegetation and is used as pasture for cattle grazing. A further portion of the Subject site, of approximately 11 hectares, is zoned 'Rural' under both Schemes and forms a strip of approximately 100 metres in width adjacent to the Harvey Estuary containing existing vegetation. The remaining portion of the Subject site, being approximately 31 hectares, is reserved for 'Regional Open Space' under both schemes.

### *Peel Region Scheme*

- 24 The purposes of the PRS are set out in cl 5 and include:
- (a) provide for the reservation and protection of land for regional transport, conservation, recreation, cultural and other public uses;
  - ...
  - (d) provide an opportunity for the formal environmental assessment of regional planning proposals and provide increased certainty to such proposals;
  - (e) provide a mechanism for certain development of regional significance, and development in areas of regional significance, to be considered and approved by the Commission[.]

- 25 The aims of the PRS are set out in cl 6 and include:



...

- (c) protect as regional open space the region's coastal foreshores, the foreshores of the Serpentine, Murray and Harvey Rivers and the Peel Inlet and Harvey Estuary, as well as other areas of regional conservation significance and areas for regional recreational facilities[.]

26 Clause 34 of the PRS sets out matters to which the Commission is to have regard in considering an application for planning approval and include:

...

- (g) the provisions of any Local Planning Strategy of the local government in respect of a local planning scheme, as approved by the Commission under regulation 12B of the Town Planning Regulations 1967 and amended from time to time;

...

- (m) the likely effect of the proposal on the natural environment and any means that are proposed to protect or to mitigate impacts on the natural environment;

...

- (w) whether adequate provision has been made for the landscaping of the land to which the application relates and whether any trees or other vegetation on the land should be preserved[.]

27 It should be noted that cl 34(w) as set out above, in essence, replicates cl 67(p) of the deemed provisions of *Planning and Development (Local Planning Schemes) Regulations 2015 (WA) (LPS Regulations)*, included as deemed provisions in LPS 4.

#### *Local Planning Scheme No. 4*

28 Clause 2.2 of LPS 4 sets out the Specific Objectives of the scheme, including:

- (a) to protect and foster the agricultural industry within the Scheme Area;

...

- (d) to foster the recreational potential of the Scheme Area;

...

- (f) to preserve the special environment associated with the lakes and waterways within the Scheme Area.

29 Clause 6.8 of LPS 4 includes the following provisions in regard to the Special Development zone:

...

6.8.4 The development of land within the Special Development zone shall comply in principle with an Outline Development Plan, adopted by Council and approved by the State Planning Commission and shall comply with the special provisions in the Schedule 7 applicable to the specified land.

...

6.8.13 In considering an application for any development, other than a building dealt with by the Residential Planning Codes, the Council shall have regard to:

- a) local amenity;
- b) the suitability of the site in relation to the existing or proposed road hierarchy of the locality;
- c) the effect of the development on existing and proposed supply services in the neighbourhood; and
- d) the provisions of an Outline Development Plan for the land.

6.8.14 Where there is any discrepancy between the provisions of this section and any other provisions of the Scheme, the provisions of this section shall prevail.

30 The Special Provisions of Sch 7 of the Scheme relating to the Point Grey Special Development zone, of which the Subject site forms part, relevantly include:

- 1.1 Subdivision and development shall generally be in accordance with an approved Outline Development Plan (ODP) or any variations as approved by the Shire of Murray and the Western Australian Planning Commission.
- 1.2 An ODP shall be prepared pursuant to clause 6.8 of the Scheme and shall be sufficient in its detail to establish the urban form, and the proposals in general terms for land use dispositions and densities, movement system, and services, and other matters which in the opinion of the Council are relevant to the orderly and proper planning of the land, and where appropriate the ODP

should contain policy statements on the general aims and objectives to be achieved in the various components of the land.

1.3 Notwithstanding the provisions of Clause 5.2.1 of the Scheme, the following Uses are classified as 'AA' Uses within the Outline Development Plan -

- Chalet Park
- Bed & Breakfast Accommodation
- Marina shall be classified as a discretionary 'AA' use subject to all required environmental approvals being granted.
- Educational Establishment

...

1.10 Prior to final subdivision approval (issue of clearances) for the first stage of any marina precinct as shown on the ODP, a legal agreement shall be prepared to the satisfaction of the Shire of Murray to address the long term funding arrangements by the proponent for the ongoing maintenance and asset replacement within any marina precinct, including the maintenance of any marina entrance channel or navigation channel should environmental approval for any marina be granted.

...

1.15 The implementation of the approved ODP will be facilitated though the development and subdivision approvals process which under the provisions of TPS 4 will be required to generally conform with the ODP. Future applications will be required to demonstrate compliance with the key principles and performance criteria as listed on the ODP.

#### 1.15.1 Community Design Principles

- The ODP is intended as a guide for future urban development with the objective of generally identifying appropriate locations for housing types and densities whilst permitting flexibility to ensure the delivery of a diverse range of lot sizes throughout all transects;
- The urban framework should facilitate sustainable urban and environmental outcomes to ensure social sustainability and improved diversity, equity and choice of housing;

- The neighbourhood structure should be sufficiently robust to facilitate diversity of land use (mix use development) which is flexible to change.

#### 1.15.2 Movement Network Principles

- The street network should be highly interconnected, legible and provide a structure that facilitates the requirements of all users;
- The street network should also facilitate view corridors to maximize vistas from the project area;
- The street network to be designed to reflect the principles of Liveable Neighbourhoods.

#### 1.15.3 Activity Centre Principles

The Marina Village precinct is the identified activity centre and is envisaged to be a highly functional mixed use precinct comprising transit facilities, local retailing, tourist support facilities and mixed use development (including residential), in a high quality public domain;

The Marina Village precinct will be subject to the preparation of an Activity Centre Plan to determine design content including allocation of uses, final design layout, retail floor space and general development standards;

The final configuration and size of any marina is subject to the environmental assessment outcome under Section 38 of the Environmental Protection Act. In the event that a marina is not granted environmental approval, the Marina Village Precinct shall be subject to a redesign to facilitate alternative water focused development.

#### 1.15.4 Housing Diversity (Lot Layout) Principles

Final residential densities will be determined at subdivision application stage, however will generally comply with the densities as identified on the ODP.

#### 1.15.5 Parkland Principles

Public Open Space to be provided as 10% of the residential development area and to be configured as a series of linear vegetation corridors.

A key principle for the location of public open space is to ensure the retention of significant areas of vegetation providing parkland linear corridors to facilitate pedestrian and cyclist movement.'

31 Relevantly, Appendix 1 of LPS 4 sets out the following definitions:

***Extractive Industry*** - includes the extraction of sand, gravel, clay, turf, soil, rock, stone, minerals or similar substance from the land, also the manufacture of products from those materials when the manufacture is carried out on the land from which any of those materials is extracted or on land adjacent thereto.

...

***Marina*** - means premises at which berths or pens, and fuelling, servicing, repairing, storage (including storage on land) and other facilities for boats are provided, with our [sic] without the sale of boating gear and equipment, and includes all jetties, piers, embankments, quays and moorings and all offices and store rooms used in connection with the Marina.

*Structure Plan (Outline Development Plan)*

32 A Structure Plan (an Outline Development Plan is taken to be a Structure Plan under reg 79 of the LPS Regulations) for the Subject site was approved by the WAPC on 28 June 2011. Under deemed provisions cl 28(2) in Sch 2 of the LPS Regulations, the approval of the Structure Plan has effect until 19 October 2025.

33 The approved Structure Plan shows an urban development over the land, including a 'Marina' and 'Marina Village Precinct'.

34 The approved Structure Plan includes notations including:

The chalet park and marina parking/boat ramp facilities fall outside of the Special Development Zone, are indicative only and require separate consideration by the WAPC.

**Marina Village Precinct**

The Marina Village Precinct will be subject to a Detailed Area Plan (DAP) to be prepared at subdivision stage to determine the final design configuration densities and development standards including land use, setbacks, carparking, height etc.

The marina is indicative only and its final configuration and size is subject to Section 38 environmental assessment.

The Marina Village Precinct will be subject to the preparation of a Detailed Area Plan to determine design content including allocation of uses, final design layout retail floor space and general development standards[.]

*Planning and Development (Local Planning Schemes) Regulations 2015 (WA)*

35 Clause 60 of the LPS Regulations establishes a requirement for development approval as follows:

A person must not commence or carry out any works on, or use, land in the Scheme area unless -

- (a) the person has obtained the development approval of the local government under Part 8; or
- (b) the development is of a type referred to in clause 61.

Note:

- 1. Development includes the erection, placement and display of advertisements.
- 2. Approval to commence development may also be required from the Commission if the land is subject to a region planning scheme.

36 The definition of works in cl 1 of the LPS Regulations includes the following:

*works*, in relation to land, means -

- (a) any demolition, erection, construction, alteration of or addition to any building or structure on the land; and
- (b) the carrying out on the land of any excavation or other works[.]

37 Clause 67 of the LPS Regulations sets out matters to which a local government, or the Tribunal on review, is to have due regard in considering an application for development approval. In this review the following matters are relevant to the development the subject of the application:

- (a) the aims and provisions of this Scheme and any other local planning scheme operating within the Scheme area;
- (b) the requirements of orderly and proper planning including any proposed local planning scheme or amendment to this Scheme that has been advertised under the *Planning and Development (Local Planning Schemes) Regulations 2015* or any other

proposed planning instrument that the local government is seriously considering adopting or approving;

...

(h) any structure plan, activity centre plan or local development plan that relates to the development;

...

(n) the amenity of the locality including the following -

(i) environmental impacts of the development;

(ii) the character of the locality;

(iii) social impacts of the development;

(o) the likely effect of the development on the natural environment or water resources and any means that are proposed to protect or to mitigate impacts on the natural environment or the water resource;

(p) whether adequate provision has been made for the landscaping of the land to which the application relates and whether any trees or other vegetation on the land should be preserved;

...

(za) the comments or submissions received from any authority consulted under clause 66;

(zb) any other planning consideration the local government considers appropriate.

### ***Issues***

38 The respondent set out its issues in its Amended Statement of Issues, Facts and Contentions dated 15 August 2019. They are as follows:

1.1 Appropriate use class

Is the Application properly to be regarded as involving the first stage of a marina development, or is it more properly to be regarded as an excavation which would involve the Extractive Industry use class under the Respondent's Town Planning Scheme No. 4 (TPS 4)?

1.2 Consistency with zoning, character and amenity

Is the proposed development consistent with the zoning of the subject land, the existing character and amenity of the locality, and the planned future character and amenity of the locality?

1.3 Consistency with orderly and proper planning

Would approval of the Application be consistent with the principles of orderly and proper planning?

1.4 Clearing, and removal of trees and vegetation

Would the proposed clearing and removal of mature native trees and vegetation on the Rural zoned portion of the subject land adversely impact the character and amenity of the locality, and therefore ought the trees and vegetation be preserved?

39 The applicant does not oppose the formulation of the issues as proposed by the respondent although it observes that these issues were not agitated in the reasons for refusal dated 24 April 2019.

***The environmental evidence***

40 Mr Stephen Rolls provided expert environmental evidence for the applicant.

41 Mr Rolls confirmed that the extent of clearing comprises 'the clearing and removal of 10 mature trees within the pasture area of the land and approximately 1 [hectare] of vegetation'. However, he questioned a number of the contentions put by the respondent in regard to the affected vegetation.

42 The first contention he challenged is the claim that the vegetation to be cleared is pristine. He noted that the publicly advertised environmental assessment documents map this vegetation as 'Very Good' using the Bush Forever condition scale; a category which falls below the Very Good to Excellent, Excellent and Pristine vegetation categories.

43 In addition, he questioned the potential impacts on the Cottesloe complex vegetation put by the respondent as follows:

The vegetation proposed to be cleared is Cottesloe complex vegetation, which includes significant species diversity and supports habitat of various species, including significant species. The vegetation forms part of a key north south environmental linkage between vegetated land to the north and south and clearing of the vegetation will introduce the risk of adverse impacts on the remaining vegetation adjacent to the clearing.



(Witness Statement of Stephen Wallace Rolls at para 6.1)

44 Mr Rolls considered no Declared Rare Flora species or Threatened Ecological Communities are located within the Point Grey Marina area. In addition, the Environmental Aspects report accompanying the development application, which he prepared, concluded that the development of the Marina will not result in the proportion of the Cottesloe Complex Central and South being below the threshold level of 30% within the Peel Harvey Estuary Area Catchment. In addition he noted that vegetation and linkage issues were assessed under both the EP Act and the EPBC Act prior to the issue of conditional approvals for the Marina.

45 In regard to the clearing of five Tuart trees within an agricultural pasture setting Mr Rolls considered the State and Commonwealth environmental approvals considered all vegetation including the Tuart trees and he noted that Tuart woodlands were listed as a Matter of National Environmental Significance after the grant of the commonwealth environmental approval extension for the project.

46 Mr Rolls also challenged the contention of the respondent that the '1 [hectare] of vegetation should be preserved and as a consequence the application ought to be refused, or an appropriate condition imposed on approval' on the basis that the development of the Marina is approved under both the EP Act and the EPBC Act, subject to conditions which considered the significance of impacts on vegetation.

47 On this basis Mr Rolls concluded that having obtained environmental approvals from both State and Commonwealth regulators, which were recently reviewed and extended, the proposed development is, in his view, acceptable from an environmental perspective.

48 Dr Vicki Stokes, WA Program Manager with Birdlife Australia, provided expert environmental evidence for the respondent.

49 Dr Stokes emphasised that Point Grey is surrounded on three sides by the Peel-Harvey Estuary which constitutes an important part of the Peel-Yalgorup wetland system, which in 1990 was designated a 'Wetland of International Importance' under the Ramsar Convention on Wetlands. The Australian Government, as a contracting party to the Ramsar Convention has obligations to manage wetlands such as the Peel-Yalgorup Ramsar Site to maintain their 'ecological character'.

50 The Peel-Yalgorup Ramsar site meets six of the nine criteria for Ramsar listing, two of which relate specifically to the ecological significance of the estuary and surrounding wetlands for waterbirds.

51 Dr Stokes advised that following the initial State and Commonwealth environmental approvals for the proposed Marina in 2012 and 2014, several migratory shorebird species for which the estuary provides important over-wintering habitat have been listed as threatened under the EPBC Act.

52 Based on the results of Birdlife Australia's monitoring program Dr Stokes considered that cumulative impacts are affecting the availability of estuarine habitat for shorebirds and it is very likely that populations cannot be sustained if remaining suitable sites are disturbed by development.

53 It is Dr Stokes' opinion that there is potential for the larger Marina development, channel construction, maintenance dredging and spoil management to have irreversible impact on the health and ecological character of the Peel-Yalgorup Ramsar site and '[r]esourcing any stage of the development would seem premature without the confidence it can proceed and not cause irreversible harm to a Ramsar wetland for which there is considerable uncertainty based on new information since environmental approvals.' (Expert Witness Statement of Dr Vicki Lynette Stokes at para 17).

54 In regard to the clearing of mature native trees and vegetation, Dr Stokes considered this vegetation provides shelter, foraging sites and nest sites for bush birds and waterbirds and will be important in buffering the effects of storms and sea level rise, and every effort should be made to avoid removing the remaining mature trees and native vegetation on the sit, particularly when there is considerable cleared area to work with.

55 Dr Steven Fisher, the Program Manager, Science and Waterways at the Peel-Harvey Catchment Council Inc. also provided expert evidence for the respondent.

56 Dr Fisher reiterated the fact that the Peel-Yalgorup Wetland system was designated as a 'Wetland of International Importance' under the Ramsar Convention on Wetlands and met six of the nine criteria for listing under the convention.

57 He also stated that Australia is party to a number of bilateral international agreements, initiatives and conventions for the conservation of migratory birds which are relevant to the Peel-Yalgorup Ramsar site.

58 Dr Fisher identified what he believes are a number of threats to environmental values associated with the proposed development. These include:

- the clearing and removal of 10 trees, including five Tuart trees, which have value as potential habitat for Carnaby's black cockatoos;
- the clearing of 1 hectare of vegetation which fringes the Peel-Harvey Estuary which has important ecological value through provision of habitat and a potential corridor for movement of native animals and as a habitat for birds including Carnaby's black cockatoos;
- the disturbance to bird habitat poses a threat to the international recognition of the Peel-Yalgorup wetlands as a Ramsar site; and
- the greatest threat to the environmental values of the Peel-Harvey Estuary are those activities which intersect with and disturb the estuary, in particular the dredging operations.

59 On this basis, Dr Fisher expressed the view that '[w]ithout the dredge spoil management and disposal plans in place it is not possible to adequately assess the risk of dredge spoil disposal, nor is it possible to discount the risk of perverse outcomes from onshore treatment and disposal near to the estuary' (Expert Witness Statement of Dr Steven James Fisher at para 37), and therefore '... it is not possible to determine the feasibility of the marina proposal' (Expert Witness Statement of Dr Steven James Fisher at para 38).

60 Dr Fisher concluded that:

The environmental risks posed by future stages of the marina development ... and the feasibility and effectiveness of their mitigation should be assessed through the development of the Capital Dredging and Spoil Disposal Management Plan before commencement of any

activity including those described in this application for Development Approval.

(Expert Witness Statement of Dr Steven James Fisher at para 49)

61 In the joint witness statement provided by the environmental experts they agreed the following:

- The 10 trees identified for removal through the earthworks, in particular the 5 mature tuart trees have high ecological value through provision of habitat for Carnaby's Black Cockatoos, listed as an endangered species under the EPBC Act. These mature trees cannot be easily replaced. Despite environmental approvals (with conditions) being in place to remove these trees, all expert witnesses agree that should the Stage 1, Phase 1 earthworks proceed the boundary of the footprint should be adjusted where possible to avoid removing all or some of these 10 trees for this stage of the development, given the close proximity of the trees to the northern boundary of the proposed earthworks footprint. This should not be at the expense of achieving 'substantial commencement'.
- The 1.06 ha of vegetation along the estuary foreshore has been assessed as being in Very Good condition. It has ecological value through provision of habitat and a corridor for movement of native animals and as foraging and nest habitat for birds. All expert witnesses agree that despite environmental approvals (with conditions) being in place to clear this vegetation, it should be retained where possible at this stage of the development. This should not be at the expense of achieving 'substantial commencement'.

### *The planning evidence*

62 Mr Timothy Trefry provided expert planning evidence for the applicant. Mr Trefry set out the nature of the proposal to undertake earthworks associated with what is described as Stage 1, Phase 1 of the Marina as follows:

... The works involve the excavation of a 5.81ha area of land, which is approximately 60% of the ultimate marina area, and an earthwork stockpile area of 5.86ha at an average height of 2.5m.

(Witness Statement of Timothy John Trefry at para 14)

63 Further to this description, Mr Trefry provided further contextual detail by noting that Schedule 1 of Ministerial Statement No. 906 (Point Grey Marina) included the following statement:

Construction of the marina will involve a two staged excavation program, with limited dewatering. It is proposed to construct the majority of the onshore marina as a 'wet' excavation which does not require dewatering.

(Witness Statement of Timothy John Trefry at para 15)

64 Mr Trefry stated that the extent of the Marina footprint has been determined by the environmental approvals and, in his view, there is no provision in LPS 4 or the approved Local Structure Plan which precludes the staging of a Marina.

65 Based on his experience in the preparation and negotiation of extractive industry applications he refuted the respondent's contention that the proposed development constitutes an 'Extractive Industry' and considered the proposal can be considered to form part of the construction of the Marina.

66 While Mr Trefry conceded '... no specific plans on the ultimate marina design and navigation channel were attached to the application' details are provided in the State and Commonwealth environmental approvals for the Marina (Witness Statement of Timothy John Trefry at para 23).

67 Mr Trefry questioned the validity of refusing the proposed development on the basis of potential ongoing costs to the community. In his view, the provisions of cl 1.10 of Schedule 7 - Special Development Zone in LPS 4, which require a legal agreement at subdivision stage addressing the maintenance of the Marina entrance channel or navigation channel, will address this issue.

68 Mr Trefry did, however, consider that the current development application does not does not trigger the requirement for a legal agreement at this stage for two reasons. Firstly, the proposed development is not a subdivision clearance; secondly, the foreshore reserve, the subject of the current subdivision, does not fall within the Marina Village Precinct. In his view, the application of Special Provision 1.10 should be effected by a condition attached to a later subdivision approval.

69 Mr Trefry considered that given the 'Urban' zoning under the PRS and the 'Special Development' zoning under LPS 4, the proposed works are consistent with the zoning of the Subject site.

70 Furthermore, given the conclusions of the Visual Landscape Study by Richard Hammond, which was in evidence, Mr Trefry considered it unlikely that the proposal will have an adverse impact on the amenity of the area as it is viewed externally.

71 Mr Trefry acknowledged that LPS 4 and the approved Structure Plan provide for a further layer of planning to be undertaken and that cl 1.15.3 of Sch 7 of LPS 4 and the Activity Centre Principles on the approved Structure Plan states that the final configuration and size of any Marina is subject to the environmental assessment outcome under s 38 of the EPA Act. However, he considered that Figures 1 to 4 of the Ministerial Statement No. 906 clearly articulate the footprint of the Marina and associated infrastructure and that the required Activity Centre Plan and Detailed Area Plan will need to be prepared in accordance with the approved Marina footprint.

72 In providing this evidence Mr Trefry stated as follows:

The Marina Village Precinct on the ODP is based on the original marina design and the Marina Village Precinct boundary is between the 'Marina carparking/boat ramp area' and proposed foreshore reserve. The approved marina design from the Section 38 moves the foreshore reserve boundary to the north and reduces the depth of the Marina carparking/boat ramp area, therefore reducing the footprint of the Marina Village Precinct (e.g. the Precinct boundary moves to between the foreshore reserve and Marina carparking/boat ramp area)[.]

(Witness Statement of Timothy John Trefry at para 41)

73 Mr Trefry noted that a portion of the works will encroach into a registered Aboriginal Site and will be subject to that granting of an approval under s 18 of the *Aboriginal Heritage Act 1972 (WA)* (**AH Act**) prior to any works commencing. In addition he advises that the Commonwealth approval under the EPBC Act and the State environmental approval permit the clearing of ten trees, and for this reason he would not consider the clearing of native vegetation should be an impediment to an approval of the proposed earthworks.

74 In concluding Mr Trefry considered:

... the Point Grey development as a whole has been systematically and logically planned over many years through the rezoning, structure

planning and environmental approval processes to accommodate a marina and associated marina village precinct with the scheme and approved structure plan specifically referencing and including provisions for a marina. Therefore the approval of the proposed earthworks as a first stage toward the construction of a marina would be considered to be consistent [with] the established planning framework and orderly and proper planning.

(Witness Statement of Timothy John Trefry at para 45)

75 Mr Joe Algeri provided expert planning evidence for the respondent.

76 Mr Algeri considered the proposed development 'Earthworks for Stage 1 of Marina' does not meet the definition of 'Marina' set out in Appendix 1 of LPS 4 which reads as follows:

*Marina* - means premises at which berths or pens, and fuelling, servicing, repairing, storage (including storage on land) and other facilities for boats are provided, with our [sic] without the sale of boating gear and equipment, and includes all jetties, piers, embankments, quays and moorings and all offices and store rooms used in connection with the Marina.

77 While Mr Algeri does not necessarily concur with the contention that the proposal should be classified as an 'Extractive Industry', he is of the view that '... when complete and in the absence of any other development approval for the marina, [the proposed works] will appear and have impacts much the same way as an extractive industry'.

78 In recognising that State and Commonwealth environmental approvals have been granted for a proposed Marina development which would necessitate some clearing of foreshore vegetation, Mr Algeri's view is that the proposed clearing of 1.07 hectares of remnant foreshore vegetation and ten mature trees is an adverse and premature environmental impact when there is no imminent approved development linked to these works.

79 In addition, Mr Algeri expressed concerns over the uncertainty associated with the development of the Marina. He stated:

Whilst not ordinarily a planning consideration, the significant development costs that will be associated with the development of a future marina, dredging of the associated channel, provision of suitable access roads, and provision of public utility services for the subject land are likely to remain so in the years to come. In this instance, I am of the

opinion that some consideration ought to be given to the uncertain future in respect to the further development of the land.

(Witness Statement of Joe Algeri at para 108)

80 The substantive concern raised by Mr Algeri is in his view, that the proposed works are inconsistent with orderly and proper planning. This case is put as follows:

... The Point Grey development as a whole has been planned in an orderly and proper fashion over many years through the rezoning, structure planning and environmental approval processes to accommodate a marina and associated marina village precinct[.]

(Witness Statement of Joe Algeri at paras 65 and 113)

More specifically, the approved Structure Plan which the Scheme provisions require any future subdivision and/or development to be generally consistent with, identifies the subject land as the location of a future marina. Furthermore, State and Commonwealth approvals have been obtained, subject to conditions, for a 300-boat onshore marina, associated boating infrastructure and a 2.5km navigation channel.

Notwithstanding all of the above and the fact that the Applicant has described the application as the earthworks for the first stage of the marina, no detailed designs have been prepared for the development of the marina itself and subsequently no development approvals have been granted. I also note that both the scheme and the approved Structure Plan require further comprehensive planning in the form of an ACP and an LDP for the Marina Village precinct which is also yet to be prepared and approved.

I can certainly appreciate the Applicant's motives behind this application, being to lock-in the environmental approvals by substantially commencing development and therefore negating the need to reapply and/or seek extension to those approvals. However, such motives are not orderly and proper planning considerations.

(Witness Statement of Joe Algeri at paras 114-116)

81 On this basis, Mr Algeri concluded that:

In the absence of an approval for the marina itself, the proposed works do not correlate with a detailed design that has been properly considered and the works are also being conducted prior to the further comprehensive planning that is required under the local planning framework.

(Witness Statement of Joe Algeri at para 116)



82 Mr Trefry and Mr Algeri provided a joint witness statement in which the experts relevantly agreed as follows:

- The planning experts are in broad agreement that the proposed development is not typical of an extractive industry.
- The planning experts broadly agree that the application does not give rise for the need of the legal agreement pursuant to c 1.10 of Sch 7 of LPS 4.
- The planning experts acknowledge the need for a s 18 application under Pt IV of the AH Act but this is a separate process for consideration.

83 The planning experts agree that the proposed development will not be visible from the surrounding locality.

84 However, the experts also disagreed on a number of matters.

85 In regard to the appropriate use class, Mr Trefry is of the opinion that the application involves Stage 1 of a Marina development which falls within a known use class definition in TPS 4. This position is based upon the designation of a Marina in the endorsed Structure Plan and as reflected in the State and Commonwealth environmental approvals. The application was lodged as Stage 1 for the construction of a Marina.

86 Mr Algeri is of the view that the proposal is not typical of an extractive industry. However, he accepts that in the absence of any other use class definition, it may be characterised as an extractive industry given it is not a complete application for a Marina. Mr Algeri maintains his opinion that 'works' alone, as defined by cl 1 of the deemed provisions, are not of themselves a land use classification that can be considered and approved.

87 In regard to the character and amenity of the locality, Mr Trefry is of the opinion that the character and amenity of the locality have been established by the zoning of the land and subsequent approval of the Outline Development Plan (**ODP**) which provides for the development of a Marina. In contrast, Mr Algeri is of the opinion that the works alone are inconsistent with the current and future character and amenity of the locality until such time that a complete application for a Marina is prepared and approved.

88 In regard to the question of orderly and proper planning, Mr Trefry is of the opinion that Stage 1 earthworks are necessary to deliver the proposed Marina. These works for the Marina accord with the zoning of the land and approved ODP, which establish a planning framework and strategic vision for the site.

89 Mr Algeri is of the view that all proposals and planning processes relating to the land, to date, have been consistent with the principles of orderly and proper planning. However, the current application essentially seeks to jump ahead to preliminary development in the absence of the complete consideration of the Marina itself, prompting his concern that the application is premature and incomplete.

90 In regard to the removal of trees and vegetation, Mr Trefry is of the opinion that the State and Commonwealth environmental approvals do not prohibit the clearing of land, as proposed in the development application. However he expresses the view that conditional approval does provide the Tribunal with the ability to exclude clearing of the foreshore area.

91 While this issue was not explicitly dealt with in his witness statement, Mr Algeri gave oral evidence that approval for the subject development alone, in the absence of any further planning approvals for the Marina and notwithstanding the respective State and Commonwealth environmental approvals, may potentially result in the unnecessary clearing of remnant vegetation.

### ***Tribunal considerations***

92 Prior to addressing the substantive issues between the parties there are preliminary matters which require attention.

93 Counsel for both parties objected to certain documents being made exhibits in the proceedings.

94 Counsel for the applicant objected to aspects of the witness statements of both Dr Stokes and Dr Fisher. The objection was that these witness statements addressed the potential threat and risks posed by future planning stages of the Point Grey Marina to the ecological character of the Peel-Yalgorup Wetlands and that this matter was not before the Tribunal in the current proceeding.

95 Counsel for the respondent objected to an undated briefing note prepared by Tian An Australia and provided to the Department of

Water and Environmental Regulation addressing the company's intention to progress substantial commencement under the State environmental approval and seeking clarification on three conditions attached to that approval.

96 The Tribunal determined each of the contested documents should be taken as exhibits in the current proceeding for the following reasons:

- The Tribunal is not bound by the rules of evidence (s 32(2)(a) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**)).
- In applying as little formality and technicality as is practicable (s 9 of the SAT Act) the Tribunal has generally sought to provide flexibility for parties seeking to provide exhibits (s 32(3) of the SAT Act) in proceedings.
- The determination in the current proceeding was based on a clear and explicit understanding that the Tribunal would both hear from the parties as to the weight to be given to these exhibits, and importantly, was clearly aware of the issues agreed between the parties for determination and would not be seeking to go behind those issues.

### **Appropriate use class**

*Is the Application properly to be regarded as involving the first stage of a Marina development, or is it more properly to be regarded as an excavation which would involve the Extractive Industry use class under the Respondent's Town Planning Scheme No. 4 (TPS 4)?*

97 Considerable time was taken up in the hearing on whether the proposed 'earthworks' constitute an Extractive Industry under the provisions of LPS 4. The applicant took the Tribunal to an extensive schedule of authorities which comprised *Di Trent and Shire of Northam* [2017] WASAT 121; *Goldrange Pty Ltd and City of Wanneroo* [2011] WASAT 48; *Goldrange Pty Ltd and Western Australian Planning Commission* [2018] WASC 350; (2018) 233 LGERA; *Leith v Western Australian Planning Commission* [2014] WASC 499; *Project Blue Sky Inc v Australian Broadcasting Authority* (1988) 194 CLR 355 (*Blue Sky*); *Randwick Municipal Council v Derria Pty Ltd* (1979) 49 LGRA 95; *Two Rocks*

*Investment Pty Ltd and Western Australia Planning Commission* [2019] WASAT 59; (2019) 97 SR (WA) 270 and *Western Australian Planning Commission v Narcom Holdings Pty Ltd* [2011] WASC 259. These authorities essentially went to the meaning of the term 'Extractive Industry' having regard to the principles of statutory construction.

98 In closing, counsel for the applicant submitted:

The principles that flow from those paragraphs [*Blue Sky* at [69]-[71]] in my respectful submission are that one has to look beyond the mere literal words in a provision; they have to be looked at in the context of the entire document and they have to be interpreted in a way to give effect to the purpose of the legislation; a purposeful approach.'

(ts 11.35am, 4 Oct 2019)

...

And when one adopts those principles in my submission there is nothing to put what we are doing away from the marina into the very narrow confined words of the extractive industry use.

(ts 11.36am, 4 Oct 2019)

99 Counsel for the respondent in closing submitted that '...within the clear terms of the definition there will be an Extractive Industry use if only the extraction or excavation category is present'.

100 This raises the question of what precisely is before the Tribunal in this proceeding and in this regard, counsel for the applicant submitted:

The starting point of course is always to understand the application before the Tribunal.

(ts 11.09am, 4 Oct 2019)

...

By reference to the application in itself this is clearly Stage 1 Phase 1 of the marina proposal.

101 The nature of development set out in the application for planning approval provided to the respondent on 6 February 2019 states 'Earthworks for Stage 1 of Marina'. It should be noted that this does not reflect Stage 1 of the environmental approval under the EP Act as that

includes dewatering which is not proposed in the application the subject of this review.

102 In addressing the proposal in some detail counsel for the applicant submitted:

The overview of the project, the development application and the construction works all dealt with in Section 4 [of the Application for Development Approval] Proposed Development make it abundantly clear consistent with what you see in Figure 6, noting it has been modified slightly because of the Section 38 [Environmental approval]; this development and the environmental report demonstrate that the intention of the applicant in this proceeding is to commence Stage 1 of the marina project.

(ts 11.11am, 4 Oct 2019)

103 This raises the issue of what constitutes development in the context of this proceeding.

104 The definition of development is set out in s 4 of the *Planning and Development Act 2005 (WA) (PD Act)* and relevantly includes the following:

*development* means the development or use of any land, including -

- (a) any demolition, erection, construction, alteration of or addition to any building or structure on the land;
- (b) the carrying out on the land of any excavation or other works[.]

105 This definition clearly encompasses both 'development' and 'use' of land.

106 In *University of Western Australia v City of Subiaco* (1980) 52 LGRA 360 (*University of Western Australia*) Burt CJ held at [363]-[364] as follows:

In my opinion the definition of 'development' in the *Town Planning and Development Act* makes use of and encompasses two ideas. The first is the 'use' of the land which 'comprises activities which are done in ... or on the land but do not interfere with the actual physical characteristics of the land' and the second being 'activities which result in some physical alteration to the land which has some degree of permanence to the land itself': see *Parkes v Environment Secretary* (1978) 1 WLR 1308 at 1311 per Lord Denning MR.

107 In this proceeding however, counsel for the applicant submits that the matter before the Tribunal for consideration does not involve a change of use, stating:

Our submission primarily is that when one looks at what is proposed and how it is described it clearly is aligned with the marina proposal and it is physical works not a land use change associated with that proposal.

(ts 11.30am, 4 October 2019)

...

This is not a change of use. This is an application for development in its own right. It is however entirely consistent with the environmental approvals for a marina and all of the works required to construct a marina. We are not seeking approval for the marina today. The approval of the marina itself will be a future development application. What we are seeking approval for are the works clearly associated with the future marina and an aspect of the physical alteration of the land not the change of use to the marina.

(ts 1.03pm, 4 October 2019)

108 The current use of the subject site was set out by the respondent in their Amended Statement of Issues, Facts and Contentions as follows:

The portion of the Land (79 [hectares]) zoned Urban under the PRS and Special Development under TPS 4, has been generally cleared of native vegetation and is used as pasture for cattle grazing[.]

(Respondent's Amended Statement of Issues, Facts and Contentions at para 2.6)

109 This statement was not challenged by the applicant in their Statement of Issues, Facts and Contentions.

110 In addition, in opening, counsel for the applicant made the following statement:

There are three aspects to this clearing. You can see the clearing on the, and this is by reference to Figure 6, outside the red area and indeed the majority of the red bordered area relates to paddock. My learned friend correctly characterised it as grazing land or pasture land.

(ts 1.55pm, 2 October 2019)

111 On this basis the Tribunal finds that the current use of the majority  
of the Subject site, and more relevantly the area of the excavation  
'works', is as grazing land or pasture land.

112 This use falls within the use call of 'Rural Pursuit' under the  
provisions of LPS 4.

113 The question then arises as to the relevance of this finding in the  
current review.

114 The application of the principles enunciated in *University of  
Western Australia* have been addressed by the Tribunal in *Robertson  
and Shire of Murray* [2009] WASAT 171; (2009) 67 SR (WA) 66  
(*Robertson*) where the Tribunal found at [52]-[55] as follows:

52 The Tribunal considers that the proposed modified motorcycle  
track involves the carrying out of 'development' in both senses  
referred to by Burt CJ in *University of Western Australia* and  
requires development approval under cl 3.1.2 of TPS 4 for the  
following reasons.

53 A 'work' is 'the physical product of labouring operations': *The  
Council of the City of Parramatta v Brickworks Limited* (1972)  
128 CLR 1 at 24 per Gibbs J with whom Barwick CJ, at 3, and  
Owen J, at 4, agreed. In *Parramatta City Council v Shell  
Company of Australia Limited* (1972) 26 LGRA 25  
(*Parramatta*) Street J in the Supreme Court of New South Wales  
said the following, at 31, in the course of his Honour's  
consideration as to whether the depositing of 1,200 cubic yards  
of fill on land constituted 'development':

As was pointed out during the course of argument, the  
depositing of filling on land may or may not be of such  
significance as to be regarded as a 'work', and thus a  
'development', within the relevant legislation. The  
building-up of a large sports ground or oval could  
readily and properly be regarded as a 'work'. At the  
other end of the scale, the construction in a private  
garden of a small earth pocket in which to plant a shrub  
would not seem to be of such significance as to justify  
description as a 'work'. In selecting where, between  
these two extremes, the present case falls, I am of the  
view that both the quantity of the filling as well as its  
significance in relation to the site is of importance. The  
spreading of 1,200 cubic yards of filling or topsoil over  
a very large area might very well not be of such  
significance as to amount to a 'work'. But the  
depositing of that quantity in a suburban allotment,

having the effect of building up the height of that allotment at one corner to a point 8 feet 6 inches above its natural level, and the creation of a relatively level surface extending over most of a block of land such as this, is, in my view, a 'work' within the meaning of the Act. I am accordingly of the view that the depositing of this filling amounted to 'development' ...

- 54 Having referred to the statement by Burt CJ in *University of Western Australia* and the statement by Street J in *Parramatta*, Pidgeon J in the Supreme Court of Western Australia held in *Claude Neon Limited v City of Perth* (1982) 53 LGRA 267 at 270, in the course of determining whether signs proposed to be erected on a building in Perth comprised a 'development', as follows:

I consider therefore that the answer to [this] question is dependent upon a finding of fact as to the degree of change of use or physical alteration to the land and it would include as envisaged by [Burt CJ] an examination of the degree of permanence of the physical alteration. It must be looked at subjectively having regard to the location of the land concerned and the area it is in.

- 55 Having regard to these authorities, the proposed modified motorcycle track in this case is clearly a 'work' which involves significant physical alteration of a permanent nature to a substantial part of the site, and is therefore, 'development'.

115 Given that the proposed development in this review involves significant physical alteration of a permanent nature to a substantial part of the site, the Tribunal finds, consistent with the decision in *Robertson*, that the works proposed constitute development in both senses referred to by Burt CJ in *University of Western Australia*.

116 Given the finding of fact that the current use is as grazing land or pasture land which fall within the 'Rural Pursuit' use class of LPS 4 and the applicant concedes the intended works are 'part of the marina development' applying the principles established in *University of Western Australia* and *Robertson*, the Tribunal finds that what is proposed constitutes development which includes a change of use and planning approval is required for such a change of use under cl 60 of the LPS Regulations. The reasons for this finding are set out below.

117 Firstly, the Tribunal finds that the current State and Commonwealth environmental approvals do not displace the statutory



requirement to obtain approval for a change of use under the relevant planning provisions.

118 Secondly, in addition, the Tribunal finds that the designation of the Marina in the ODP endorsed by the WAPC does not obviate the need for an approval for a change of use. The ODP under the provisions of r 79 of the LPS Regulations is to be taken as a structure plan.

119 The effect of a structure plan is set out in cl 27(1) of the deemed provisions of the LPS Regulations in the following terms:

A decision-maker for an application for development approval or subdivision approval in an area that is covered by a structure plan that has been approved by the Commission is to have due regard to, but is not bound by, the structure plan when deciding the application.

120 Structure planning is an element of strategic planning which necessarily precedes and informs the process of development or subdivision assessment. It cannot displace the statutory requirement for development approval under cl 60 of the LPS Regulations.

121 Thirdly, the Tribunal finds that the applicant is not seeking planning approval for a Marina, but approval for preliminary works associated with a future Marina (ts 1.03pm, 4 Oct 2019 - see [107] above). The Tribunal further finds that the proposed future use of the Subject site for a Marina does not form part of the development application and is a change of use that has not been previously approved under LPS 4 and the PRS.

122 In addition, given that no details of the proposed Marina have been provided, the Tribunal finds it is not in a position to consider the question of an approval for the 'Marina' use.

123 Finally, given the evidence and findings set out above, the Tribunal finds that the 'works' are associated with a future Marina project, and are not motivated by any other purpose, and that the application is for the first stage of a future Marina project and not for an 'Extractive Industry'.

**Consistency with zoning, character and amenity**

*Is the proposed development consistent with the zoning of the subject land, the existing character and amenity of the locality, and the planned future character and amenity of the locality?*

124 The framing of this issue raises two questions; the first relates to zoning the second to amenity.

125 Counsel for the applicant in dealing with these issues submitted as follows:

Consistency with zoning, character and amenity. Is the proposed development consistent with the zoning of the subject land? Well it must be if the Tribunal accepts our submission that it is part of the marina development.

(ts 11.46am, 4 Oct 2019)

126 Marina is defined in LPS 4 as follows:

*Marina* - means premises at which berths or pens, and fuelling, servicing, repairing, storage (including storage on land) and other facilities for boats are provided, with our [sic] without the sale of boating gear and equipment, and includes all jetties, piers, embankments, quays and moorings and all offices and store rooms used in connection with the Marina.

127 A 'Marina' is an 'AA' use under LPS 4 which requires the respondent, or the Tribunal in its shoes, in exercising discretion to be satisfied that such a use would not be contrary to the orderly and proper planning of the area.

128 While a 'Marina' is generally consistent with the provisions of the ODP which sets out major land uses, zoning and reserves proposed by the plan, and the development applied for is 'Earthworks for Stage 1 of Marina', given the fact that the applicant is not seeking approval for a Marina at this stage and that no information is provided in terms of the details of the proposed Marina, the Tribunal is not in a position to assess the proposal for the Marina in the context of the zoning established by the ODP.

129 With regard to potential impacts on amenity, the Tribunal accepts the evidence of the planning experts that the proposed development will not be visible from the surrounding locality and, on this basis, combined with the fact that the intention is that the stockpile will not on

the evidence before it be permanent, finds that the proposed development would not adversely affect the amenity of the locality.

### Consistency with orderly and proper planning

*Would approval of the application be consistent with the principles of orderly and proper planning?*

130 In *Marshall v Metropolitan Redevelopment Authority* [2015] WASC 226 (*Marshall*) the Supreme Court found at [179] as follows:

The starting point for determining the meaning of the phrase 'orderly and proper planning' in s 66(1)(d) of the MRA Act is the ordinary and natural meaning of those words. The ordinary meaning of the word 'proper' includes 'suitable for a specified or implicit purpose or requirement; appropriate to the circumstances or conditions; of the requisite standard or type; apt, fitting; correct, right'. The ordinary meaning of the word 'orderly' includes 'characterised by or observant of order, rule, or discipline'. In other words, to be orderly and proper, *the exercise of a discretion within the planning context should be conducted in an orderly way - that is, in a way which is disciplined, methodical, logical and systematic*, and which is not haphazard or capricious.

(Emphasis added)

131 The submission of the applicant that the Tribunal should consider the exercise of discretion to approve the proposed 'works' runs counter to the principles of orderly and proper planning in a number of respects.

132 Firstly, it runs counter to the legislative requirement under cl 60 of the LPS Regulations and the principles enunciated in *University and Western Australia* and *Robertson* for approval for both 'use' and 'development'.

133 Secondly, with no information with respect to the nature of the Marina, the Tribunal is in no position to assess the proposal against the provisions of the ODP, a requirement specifically required under cl 27(1) of the LPS Regulations.

134 Thirdly, the Tribunal rejects the evidence of Mr Trefry that a final plan for a Marina is contingent upon inputs from initial earthworks followed up by any feedback from the various environmental management plans, and that any comprehensive planning assessment of the Marina needs to post-date excavation works on the Subject site, for reasons that follow.

135 Under cross-examination Mr Trefry confirmed that he had not  
seen detailed plans for the Marina (ts 12.14pm, 3 October 2019).

136 Mr Trefry's oral evidence in the hearing was as follows:

'My practical experience in dealing with construction even though we have got a defined section 38 area for the works to occur... what happens we find when the initial construction happens in terms of anything that might be discovered in terms of areas that you might need to move boundaries etc and then the detailed plan is prepared for the marina as a result of inputs from initial earthworks followed up by any feedback we get from the various environmental management plans that need to be prepared and influence the final boundaries of a final design.

So the way that this application and project is put forward is that Stage I occurs in terms of excavation which is foreshadowed in the ODP. Anything that comes out of those initial construction works that may impact upon the design. The environmental work is undertaken in terms of the management plans. That all comes together in terms of where the final boundaries of a final plan and layout of the various moorings and boat launching areas occurs and then you ultimately get to a final plan which will then form the basis for the Stage 2 application'.

(ts 12.19pm, 3 October 2019)

137 In responding to the issues raised by Mr Trefry's evidence,  
Mr Algeri stated as follows:

'All those things that Mr Trefry has just mentioned in my view should be subject to a planning assessment. I wholly agree with him but the repercussions of those things cannot be flung off into the distance at some future time because then we need to understand what the repercussions of, and as I said earlier without repeating myself, it's quite normal when we go from general to specific that this sort of thing happens from structure plan to development but all those considerations require a planning assessment.'

(ts 12.53pm, 3 October 2019)

138 While the Tribunal accepts that the transition from structure planning may require adjustments and minor amendments in response to particular circumstances arising from the construction process, it has not been demonstrated that the circumstances in this case are so uncertain that they effectively preclude more detailed planning. Such an approach puts the cart before the horse, runs counter to a disciplined, methodical, logical and systematic approach to the planning process, and in this regard the Tribunal prefers the evidence of Mr Algeri.

139 Fourthly, in *Stewart and Town of Cottesloe* [2019] WASAT 100 (*Stewart*) the Tribunal dealt with the issue of piecemeal planning applications and referred to the decision of the High Court in *Pioneer Concrete (Q) Pty Ltd v Brisbane City Council* [1980] HCA 1; (1980) 145 CLR 485, (1980) 44 LGRA 346 (*Pioneer Concrete*).

140 As the Tribunal stated at [144] in *Stewart*:

In *Pioneer Concrete* Stephen J found that (at 360):

- (a) that proceeding with planning applications in a piecemeal fashion results in an application being severed in a way that is likely to impede its proper consideration;
- (b) the lodgement of piecemeal applications is likely to place planning authorities in a dilemma as the initial application may well need to include assessment of the entire proposal even though elements of the development are yet to be applied for and which must be dealt with later as separate and individual applications which are to be assessed on their merits; and
- (c) where land is proposed to be used for the one purpose, at one time, consent for that use in an overall sense must be applied for in the one application.

141 It is to be noted that *Pioneer Concrete* can be distinguished from the matter under review in terms of the specific provisions of the planning framework in that case. However, this does not displace the application of the principles established by the High Court in *Pioneer Concrete* in terms of the question of orderly and proper planning in the current proceeding.

142 Accordingly, the Tribunal finds approval of the application would not be consistent with the principles of orderly and proper planning.

### **Clearing, and removal of trees and vegetation**

*Would the proposed clearing and removal of mature native trees and vegetation on the Rural zoned portion of the subject land adversely impact the character and amenity of the locality, and therefore ought the trees and vegetation be preserved?*

143 The evidence provided in the joint witness statement of the environmental experts was that:

- Some of the ten trees identified for removal through the earthworks, in particular the five mature Tuart

trees, have high ecological value and the boundary of the footprint should be adjusted where possible to avoid removing all or some of these ten trees for this stage of the development, although not be at the expense of achieving 'substantial commencement'; and

- The 1.06 hectares of vegetation along the estuary foreshore has ecological value and it should be retained where possible at this stage of the development. This should not be at the expense of achieving 'substantial commencement'.

144 In response to questions put to the experts it emerged that there was considerable uncertainty as to what they meant by 'substantial commencement'.

145 As the applicant correctly pointed out, these questions have been assessed by the relevant State and Commonwealth environmental agencies and those approvals include the permanent loss of 7.1 hectares of foreshore vegetation and a requirement for environmental offsets.

146 It is not the role of the Tribunal to go behind the determinations of environmental agencies when considering the merits of planning applications. Furthermore, should clearing permits be required these are again subject to provisions under other legislation which do not fall within the jurisdiction of the Tribunal.

147 The Tribunal acknowledges that the proposed development will require a s 18 clearance under the AH Act. This again is a separate legislative requirement falling outside the jurisdiction of the Tribunal.

148 Finally, given the evidence of the planning experts that the proposed works will not be visible from the surrounding locality there is no basis for the Tribunal to make an adverse finding in terms of impacts on the character and amenity of the locality.

### ***Summary of findings***

149 In terms of the questions before the Tribunal in this review, for the reasons set out above, the Tribunal makes the following findings:

#### ***Issue 1.1***

150 The current use of the majority of the Subject site, and more relevantly the area of the excavation 'works', is as grazing land or

pasture land. This use falls within the use class of 'Rural Pursuit' under the provisions of LPS 4.

151 The works proposed constitute development in both senses referred to by Burt CJ in *University of Western Australia*; that is both 'use' and 'activities which result in some physical alteration to the land which has some degree of permanence to the land itself'.

152 What is proposed constitutes development which includes a change of use and planning approval is required for such a change of use under cl 60 of the LPS Regulations.

153 Given that no details of the proposed Marina have been provided by the applicant, the Tribunal is not in a position to consider the question of an approval for the 'Marina' use.

154 In regard to the issue as put by the parties, the application is properly to be regarded as the first stage of a proposed future Marina project rather than an 'Extractive Industry'.

#### *Issue 1.2*

155 While the 'Marina' use is consistent with the zoning of the Subject site established by the ODP, no details of the proposed Marina have been provided to the Tribunal and, therefore, the Tribunal is not in a position to assess the proposed development in the context of the 'Marina' use.

156 The proposed development will not affect the amenity of the locality.

#### *Issue 1.3*

157 The proposed development is not consistent with orderly and proper planning.

#### *Issue 1.4*

158 The clearing of vegetation at the Subject site has been assessed and approved by State and Commonwealth environmental agencies subject to conditions and may require further regulatory approvals. It is not the role of the Tribunal to go behind those determinations.

***Conclusion***

159 In weighing up all of the evidence before it in this proceeding and given the finding that the proposed development is properly to be regarded as the first stage of a proposed future Marina project, and the change of use has not been approved under TPS 4 or the PRS, the Tribunal finds that the correct and preferable decision is to dismiss the application and affirm the decision of the respondent.

***Orders***

160 For the reasons set out above:

1. The application for review is dismissed.
2. The decision of the respondent is affirmed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MR P DE VILLIERS, MEMBER

5 NOVEMBER 2019