JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
CITATION	**:**	PRESIDING MEMBER OF THE METROPOLITAN CENTRAL JOINT DEVELOPMENT ASSESSMENT PANEL -v- 43 MCGREGOR ROAD PTY LTD [2018] WASC 98
CORAM	**:**	LE MIERE J
HEARD	**:**	21 MARCH 2018
DELIVERED	**:**	18 DECEMBER 2018
FILE NO/S	**:**	GDA 17 of 2017
BETWEEN	**:**	PRESIDING MEMBER OF THE METROPOLITAN CENTRAL JOINT DEVELOPMENT ASSESSMENT PANEL Appellant AND 43 MCGREGOR ROAD PTY LTD Respondent

ON APPEAL FROM:

Jurisdiction	**:**	STATE ADMINISTRATIVE TRIBUNAL
Coram	**:**	MS L EDDY (MEMBER)
Citation	**:**	43 MCGREGOR ROAD PTY LTD and PRESIDING MEMBER OF THE METRO CENTRAL JOINT DEVELOPMENT ASSESSMENT PANEL [2017] WASAT 127
File Number	**:**	DR 160 of 2017

Catchwords:

Town planning - Appeal from determination of State Administrative Tribunal - Determination of whether a condition of a development approval should be set aside - Whether Tribunal made errors of law - Appeal allowed

Judicial review - *State Administrative Tribunal Act 2004* (WA) - Whether Tribunal erred in law in holding that the Joint Development Assessment Panel is not a public authority within the meaning of s 70A of the *Transfer of Land Act 1893* (WA) - Whether a Joint Development Assessment Panel has a public function or public purpose - Whether a Joint Development Assessment Panel may be a State instrumentality - Turns on own facts

Judicial review - *State Administrative Tribunal Act 2004* (WA) - Whether Tribunal erred in law in failing to hold that the Joint Development Assessment Panel had power to impose a condition of the planning approval that a landowner provide written consent to a notification on the owner's title - Error of law - Turns on own facts

Judicial review - *State Administrative Tribunal Act 2004* (WA) - Whether Tribunal erred in law in holding that the condition of the approval did not have a proper planning purpose - Whether legal test for validity of development approval conditions made out - Error of law - Turns on own facts

Judicial review - *State Administrative Tribunal Act 2004* (WA) - Whether Tribunal erred in law in failing to have regard to relevant planning considerations - Error of law - Turns on own facts

Legislation:

Environmental Protection Act 1986 (WA), s 3
Planning and Development (Development Assessment Panels) Regulations 2011 (WA), reg 5, reg 8, reg 16, reg 18
Planning and Development (Local Planning Schemes) Regulations 2015 (WA), cl 68
Planning and Development Act 2005 (WA), s 3(1)(b), s 26, s 29, s 165, s 171A, s 171C, s 241(1)
State Administrative Tribunal Act 2004 (WA), s 105
Town Planning and Development Act 1928 (WA), s 20
Transfer of Land Act 1893 (WA), s 4, s 70, s 70A

Result:

Leave to appeal granted
Appeal allowed
Decision of Tribunal set aside
Matter sent back to Tribunal for reconsideration

Category: B

Representation:

Counsel:

Appellant	:	Mr T C Russell & Mr J Misso
Respondent	:	Mr M Hotchkin

Solicitors:

Appellant	:	Office of the State Solicitor for Western Australia
Respondent	:	Hotchkin Hanly

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

Antonas v Town of Vincent [2006] WASAT 303, 45 SR (WA) 327
Cardwell Shire Council v King Ranch Australia Pty Ltd [1984] HCA 39
Compliance Admin Services Pty Ltd v Town of Claremont [2004] WATPAT 198; (2004) 37 SR (WA) 28
John Street Marina v Minister for Transport [2005] WASC 171
Lloyd v Robinson (1962) 107 CLR 142
LR Archibald & Co Pty Ltd v Western Australian Planning Commission [2010] WASAT 129
Miragliotta v Town of Vincent [2008] WASAT 207
Newbury District Council v Secretary of State for the Environment [1981] AC 578
Re Anti-Cancer Council of Victoria; Ex parte State Public Services Federation (1992) 175 CLR 442
Re Town Planning Appeal Tribunal; Ex parte Environmental Protection Authority (2003) 27 WAR 374
Real Estate Institute of Western Australia v City of Subiaco [2009] WASAT 111
Reid v Western Australian Planning Commission [2016] WASCA 181

Western Australian Planning Commission v Temwood Holdings Pty Ltd (2004) 221 CLR 30

Zampatti v Duff Western Australian Planning Commission [2010] WASCA 149

LE MIERE J:

Summary

1 The respondent applied to the State Administrative Tribunal for review of the decision of the appellant, the Metropolitan Central Joint Development Assessment Panel (Metro Central JDAP), to amend the planning approval for the construction of 258 multiple dwellings on land near Leach Highway, Palmyra by removing condition 9 which required a notification pursuant to s 70A of the *Transfer of Land Act 1893* (WA) (TLA) to be lodged on the relevant certificates of title to alert prospective buyers that the residences may be affected by transport noise and odours which may occur in certain weather conditions. The Tribunal determined that condition 9 of the development approval is not valid and set aside the condition.

2 The appellant now seeks leave to appeal against the decision of the Tribunal, that the appeal be allowed, that the decision of the Tribunal be set aside and the matter be remitted to the Tribunal to determine whether the correct and preferable decision is that condition 9 be imposed as a matter of development approval. The respondent agrees that leave to appeal should be granted but submits that the appeal should be dismissed.

3 For the reasons which follow leave to appeal will be granted, the appeal will be allowed and the matter will be sent back to the Tribunal for reconsideration.

Condition 9

4 The land the subject of this appeal is situated on McGregor Street in the City of Melville and abuts Leach Highway. D'Orsogna Ltd's smallgoods facility is located on the corner of Stock Road and Leach Highway, Palmyra. The respondent, on behalf of the owner of the land, applied for development approval to construct 258 multiple dwellings which are generally three stories in height. At its meeting on 12 January 2017 the Metro Central JDAP approved the application subject to conditions. Condition 9 was:

> Prior to occupation of development, a notification pursuant to s 70A of the *Transfer of Land Act 1893* is required to be lodged on the relevant certificates of title to alert prospective buyers that the residences may be

> affected by transport noise and odours emanating from nearby industrial land uses.

5 On 17 March 2017 the respondent applied to the Metro Central JDAP to modify condition 9 to remove reference to odours. The Responsible Authority Report prepared by the City of Melville referred, amongst other things, to State Planning Policies, Environmental Protection Authority guidance notes and the smallgoods facility. The report concluded:

> A s 70A notification on title does not prevent future residents from lodging complaints with the City in regard to odour issues, nor does it excuse the operators of the industrial land uses from complying with their obligation under the relevant legislation. While the state planning framework does not provide a statutory requirement for a s 70A notification to be placed on title where residential land uses are proposed in close proximity to industrial premises, it is considered that a notification does serve to alert future purchasers and will inform their decision to purchase. This information may serve to protect the future operations of the industrial land uses and may ensure that future land owners provide an implied acceptance of the associated risk.
>
> It is therefore considered that condition 9 should remain unchanged.

The City recommended that condition 9 remain unmodified.

6 On 16 May 2017 the Development Assessment Panel's secretariat informed the respondent that its application was considered by the Metro Central JDAP on 11 May 2017 where, in accordance with the provisions of the *City of Melville Local Planning Scheme No 6* (LPS6), it was resolved to approve the application in accordance with its determination. The determination stated that in accordance with reg 8 of the *Planning and Development (Development Assessment Panels) Regulations 2011* (the DAP Regulations) the respondent's application for planning approval was granted subject to the deletion of conditions 2 and 6, and condition 9 being amended to read:

> Prior to occupation of development, a notification pursuant to s 70A of the *Transfer of Land Act 1893* is required to be lodged on the relevant Certificates of Title to alert prospective buyers that the residences may be affected by transport noise and odours may occur in certain weather conditions (south-easterly winds) approximately five times a year for approximately three hours at a time during daylight hours.

The determination stated that all other conditions and requirements on the previous approval remained.

Respondent appeals to the Tribunal

7 On 18 May 2017, the respondent lodged an application with the State Administrative Tribunal pursuant to reg 18 of the DAP Regulations seeking review of the appellant's decision. The respondent sought removal of condition 9 of the approval.

8 The primary facts were not in dispute before the Tribunal. The parties agreed a statement of facts dated 9 June 2017. The following facts were agreed in relation to odour issues. D'Orsogna's operations generate waste water which is settled to remove major solids before being delivered to the Water Authority sewer. The solids are retained on site and sealed in underground pits which are pumped out every two to three months and the contents disposed of by a licenced contractor. The pump out activities take approximately three hours and generate odours which are mildly offensive. Prior to the pump out activities, D'Orsogna conducts letter drops in the local area. D'Orsogna has been conducting letter drops advising residents of the pump out activities since 2002. In the period since 2009, the City has received 12 complaints from residents concerning odour from the D'Orsogna site. Six of these complaints were made by residents living on McGregor Road or Forrest Street. Complaints have also been received from residents living on Marmion Street and Justinian Street. The most recent complaint in relation to odour from the D'Orsogna site was made in February 2017.

9 The following facts were agreed in relation to transport noise. The respondent submitted an Acoustic Design Report (Vipac Report) with its application for development approval. The ambient outdoor noise levels for the land, reported in the Vipac Report, exceed the target outdoor noise criteria and outdoor noise limit referred to in State Planning Policy 5.4. Main Roads Western Australia provided comments in relation to the Vipac Report in a letter to the City of Melville of 19 December 2016. Main Roads stated that, based on the environmental advice, the development application would be acceptable to Main Roads subject to a number of specified conditions being imposed. The conditions included:

> A notification pursuant to s 70A of the *Transfer of Land Act 1893* is required to be lodged on the Certificates of Title to alert prospective buyers that the residences will be affected by transport noise and vibration.

10 In determining the application, the Tribunal considered a number of questions. The first question was whether a Joint Development Assessment Panel (JDAP) is a 'public authority' within the meaning of s 70A of the TLA, so as to be able to lodge a notification under s 70A of the TLA with the Registrar of Titles. The Tribunal determined that the Metro Central JDAP was not a public authority within the meaning of the TLA and is therefore not itself able to lodge a notification under that section.

11 The second question was whether a 'factor affecting the use or enjoyment of land' could include something arising from another site that could cause a subjective loss of enjoyment in the land because of an impact on amenity. The Tribunal found that there is no reason, in principle, why a TLA s 70A notification could not be lodged in relation to a factor that arises from activities off site that cause an impact on amenity and therefore affects the use or enjoyment of the site.

12 The third question was whether a local government or public authority could compel a landowner, by way of a condition of development approval, to provide written consent to a notification on the owner's title under s 70A of the TLA. The Tribunal determined that it was not necessary or appropriate to determine this question because it had determined that this particular condition had no proper planning purpose in the context of this development application and because determination of this question may require the Tribunal to consider whether a number of previous decisions of the Tribunal were 'clearly wrong' and should not be followed.

13 The fourth and final question was whether, in the circumstances of this development application, condition 9 had a proper planning purpose and fairly and reasonably related to the proposed development. The Tribunal found that in this case the condition did not have any proper planning purpose.

14 The Tribunal concluded that condition 9 should not be imposed as a condition of this development approval. The Tribunal ordered that condition 9 imposed by the Metro Central JDAP on 11 May 2017 be set aside.

Appeal to this court

15 The appellant now appeals to this court from the decision of the Tribunal that condition 9 of the development approval be set aside.

Section 105 of the *State Administrative Tribunal Act 2004* (WA) (SAT Act) empowers a party to a proceeding in the Tribunal to appeal from a decision of the Tribunal to this court if leave to appeal is granted by the court. A judge of this court has ordered that the application for leave to appeal is to be heard together with the appeal. The respondent submits that the appeal raises matters of general importance and leave should be granted. I will grant leave to appeal.

16 An appeal can only be brought on a question of law. There are four grounds of appeal.

(1) The Tribunal erred in law in holding that the Metro Central JDAP is not a public authority within the meaning of s 70A of the TLA.

(2) The Tribunal erred in law in failing to hold that the Metro Central JDAP had power to impose condition 9 pursuant to cl 68(2)(b) of sch 2 to the Planning and Development (Local Planning Schemes) Regulations 2015.

(3) The Tribunal erred in law in holding, on the facts agreed between the parties, that condition 9 could not have a proper planning purpose.

(4) In the alternative to ground 3, the Tribunal erred in law in failing to have regard to relevant planning considerations, contrary to s 241(1)(a) of the *Planning and Development Act 2005* (WA) (PDA).

Appeal ground 1: is the Metro Central JDAP a public authority?

17 The TLA was amended in 1996 to insert s 70A of the TLA in these terms:

> (1) Where, in relation to land under the operation of this Act -
>
> (a) the local government of the district in which the land is situated; or
>
> (b) a public authority,
>
> considers it desirable that proprietors or prospective proprietors of the land be made aware of a factor affecting the use or enjoyment of the land or part of the land, the local government or the public authority may, on payment of the prescribed fee,

> cause a notification of the factor to be prepared in an approved form and lodged with the Registrar.
>
> (2) Where -
>
> (a) a notification is lodged under subsection (1); and
>
> (b) the written consent of the proprietor of the land accompanies the notification,
>
> the Registrar shall endorse the certificate of title for the land to that effect.
>
> (3) The local government or the public authority which lodged the notification under subsection (1) and the proprietor of the land for the time being may, at any time after the notification has been lodged, on payment of the prescribed fee and in an approved form, request the Registrar to remove the notification from the certificate of title for the land or modify the notification.
>
> (4) Without limiting subsection (2), the Registrar shall endorse certificates of title with such information about notifications and their modification or removal, and in such manner, as the Registrar thinks fit.

18 Section 4 of the TLA defines 'public authority' to mean:

> (a) a Minister of the Crown in right of the State; or
>
> (b) any State Government department, State trading concern, State instrumentality or State agency; or
>
> (c) any public statutory body, whether or not corporate, established under a written law but not including a local government;
>
> except where the subject or context or the other provisions of the Act require a different construction.

19 The appellant says that the Metro Central JDAP comes within (c) in that it is a public statutory body established under a written law or alternatively comes within (b) in that it is a State instrumentality.

A JDAP may be a public statutory body

20 The Tribunal found that a JDAP could be a 'statutory body established under a written law'. The Tribunal further found that a 'public statutory body … established under a written law' is to be properly understood as a requirement that the body has a public function or a public purpose of

some kind. The Tribunal found that a JDAP does not have a public function or a public purpose because it:

- has a limited part of the relevant local government's executive power to determine specified classes of development applications under its local planning scheme;
- has no role in the creation of policies and/or legislative instruments that guides planning decisions;
- is not involved in the development of strategic planning for a local government or wider area;
- has no ability to enforce the need to obtain approval for the use or development of land, nor to be ensured development occurs consistently with its decision on the development application; and
- is a decision maker of what is in essence a private application to develop the land, albeit the relevant planning framework (created by the local government or by relevant State bodies) will require that determination to be made having regard to wider community factors, from a planning perspective.

21 I do not agree that a JDAP does not have a public function or a public purpose. JDAPs perform a public function, conferred by legislation, in determining prescribed development applications in place of the local government and the Western Australian Planning Commission (Planning Commission). It is not to the point that a JDAP makes decisions on an application by a private individual or corporation to develop land. The development approval is a public document which constitutes the decision of the authority. It is not personal to the applicant. It runs with the land and may be relied upon by many persons.

A JDAP may be a State instrumentality

22 The appellant also submits that the Metro Central JDAP is a State instrumentality.

23 In ***Re Anti-Cancer Council of Victoria; Ex parte State Public Services Federation*** (1992) 175 CLR 442 at 448 the High Court observed that:

> [T]he expression 'State instrumentality' is one that carries much the same meaning in popular usage as in a legal context. That meaning

> directs attention to the purpose or end served, so that a body is a State instrumentality if it is empowered to and does, in fact, serve some State government purpose. And that is so even if it is neither a servant or agent of the State (footnotes omitted).

24 Those observations were applied in ***Re Town Planning Appeal Tribunal; Ex parte Environmental Protection Authority*** (2003) 27 WAR 374 at [35] - [36] and [42] where the Full Court held that the former Town Planning Appeal Tribunal was a State instrumentality for the purposes of the definition of a public authority in s 3 of the *Environmental Protection Act 1986* (WA). A JDAP is empowered by the PDA and the DAP Regulations to serve a State government purpose - determining development applications that meet prescribed type and value thresholds, as if it were the responsible authority under the relevant planning instrument. A JDAP may be a State instrumentality.

A JDAP is not a public authority within the meaning of TLA s 70A

25 However, that is not the end of the matter. Section 4 of the TLA defines 'public authority' to mean any State instrumentality or any public statutory body established under a written law but not including a local government, except where the subject or context or the other provisions of the Act require a different construction. The respondent submits that the subject or context or the other provisions of the Act require a different construction. The respondent says that a JDAP does not have the functions or powers which a public authority must necessarily have if it is to exercise the power and functions under s 70A of the TLA.

26 The respondent submits, and I accept, that if a body is to cause the notification to be lodged with the Registrar under TLA s 70A it must necessarily have the following powers:

(a) the power to lodge the notification;

(b) the power to pay the prescribed fee;

(c) the power to liaise and confer with the current proprietor about whether it is desirable to lodge a notification and to procure his consent;

(d) the power to receive and consider at undefined times in the future any request from the registered proprietor of any such

land upon which notification is endorsed on the certificate of title for removal or modification of the notification; and

(e) any functional role which involves the ongoing management or responsibility for a land use which may include such powers secondary to its primary statutory function.

27 A JDAP does not have those powers or functions. The Minister establishes Development Approval Panels (DAPs) under s 171C of the PDA for each local government area, by the publication of an order in the Gazette. There are two types of DAPs: Local Development Assessment Panels (LDAPs), and Joint Development Assessment Panels (JDAPs). JDAPs are established to service two or more local governments. Members of DAPs are appointed by the Minister on the nomination of the relevant local government. Sections 171A to 171F of the PDA provides for the making of regulations to establish DAPs and specify their powers and functions. The DAP Regulations make provisions for the establishment, powers and functions of DAPs. The key function of a DAP is to determine significant applications for development approval. A JDAP determines applications as if they are the responsible authority under the relevant planning instrument, such as the local planning scheme. Under the DAP Regulations, any application which qualifies as one that can be determined by a DAP cannot be determined by local government or the Planning Commission.

28 A DAP is an entity brought into existence by a Ministerial order under s 171C of the PDA and constituted from time to time by a meeting of sufficient members to form a quorum. A DAP's primary function is to decide DAP applications by resolution. A DAP is, therefore, not a separate legal entity with the capacity to act in its own name. It does not have a legal personality separate to that of its members, and does not have the capacity to take action or respond to matters in its own name. Administratively, a DAP functions by certain individuals or organisations carrying out tasks or responsibilities on behalf of the DAP.

29 Regulation 16 of the DAP Regulations provides that, except as provided in sub-regulations which are not presently relevant, the provisions of the PDA and the planning instrument under which a DAP application is made apply to the making and notification of a determination by a DAP as if the DAP were the responsible authority in relation to the planning instrument. The panel will consider the same

range of matters required under the applicable local planning scheme as the local government would consider.

30 Where the DAP determination is made under the relevant local planning scheme, the local government is responsible for the monitoring and enforcement of any conditions of approval as well as dealing with enquiries in relation to the application.

31 DAPs are purely decision-making panels; they are not empowered to monitor compliance with any conditions upon which development approval was granted. Where development approval is granted, the local government that received the application will be responsible for ensuring the applicant complies with any conditions of approval under the local planning scheme. A 'public authority' for the purposes of TLA s 70A must have an ongoing responsibility for the land use management in order for it to exercise its power to request that the Registrar remove the notification from a certificate of title. A JDAP does not have such a function or power. It is not a public authority for the purposes of s 70A of the TLA.

32 Only a local government or a public authority has power to cause a notification to be prepared and lodged with the Registrar under s 70A of the TLA. As the Metro Central JDAP is not a public authority it does not have power to cause a notification to be lodged under s 70A. The first ground of appeal fails.

Effect of Metro Central JDAP not being a public authority

33 The Tribunal observed that only the Registrar is able to endorse a notification on a certificate of title under s 70A of the TLA. The Registrar is required to do so if a notification has been lodged by a local government or public authority and is accompanied by a written consent from the landowner. The Tribunal found that if it is otherwise valid, condition 9 would have to be reworded to direct attention to what the respondent is required to do, that is, to give its consent to a notification to be lodged by the local government or a public authority.

34 The Tribunal found that the Metro Central JDAP is not a public authority within the meaning of s 70A of the TLA and is therefore not itself able to lodge a notification under that section. The Tribunal considered the other substantive questions before it for that purpose. I will therefore consider the remaining grounds of appeal which go to whether condition 9 is otherwise valid.

Appeal ground 2: Did JDAP have power to impose condition 9?

35 The Tribunal said that the third substantive question it was required to consider was whether a local government or public authority could compel a landowner, by way of a condition of development approval, to provide written consent to a notification on the owner's title under s 70A of the TLA. The Tribunal determined that it was not appropriate to determine that question in the context of the application because it had determined that condition 9 had no proper planning purpose in the context of the development application and because determination of the question may require the Tribunal to consider whether a number of previous decisions of the Tribunal were clearly wrong and should not be followed.

36 By ground 2 of its appeal the appellant says that a JDAP has power to impose a condition of planning approval which requires the owner of the land to consent to the lodgement on the land title of a notification under s 70A of the TLA. The appellant says that the power derives from:

(a) PDA s 171A;

(b) DAP Regulations 5, 8 and 16; and

(c) clause 68 of the Deemed Provisions, which form part of and are read with LPS6.

37 The appellant submits, and I accept, that the effect of these provisions is that in respect of all mandatory DAP applications the application must be determined by a DAP as if the DAP were the responsible authority under the relevant planning instrument in relation to the development. The PDA s 171A(3) provides that, unless otherwise provided under the DAP Regulations, a determination by a DAP is to be regarded as, and has effect as if it were, a determination of the responsible authority to which the application was made.

38 The appellant referred to a number of decisions of the Tribunal to the effect that a local government, and a DAP determining a development application as if it were the responsible authority, has power to impose a condition of development approval requiring a notification on title under s 70A of the TLA.

39 In ***Compliance Admin Services Pty Ltd v Town of Claremont*** [2004] WATPAT 198; (2004) 37 SR (WA) 28 (Compliance Admin Services)

the Town Planning Appeal Tribunal considered whether the development approval should be subject to a condition that the applicant agree to the local government lodging a notification on the certificate of title on all the single bedroom apartments under the provisions of s 70A of the TLA, notifying purchasers that the planning approval is for a single bedroom only and modifying the apartment to create an additional bedroom will be a contravention of the *Town Planning and Development Act 1928* (WA). The Tribunal observed that the local government cannot unilaterally lodge a notification on title of land and therefore the Tribunal had no power itself to lodge a notification. The Tribunal distinguished between a condition requiring an applicant as part of the approval process to lodge such a notification and whether the Tribunal could unilaterally affect such an outcome. The Tribunal said:

> As with any condition it is just that, that is, if accepted by the Appellant it represents the basis upon which the matter can proceed which involves compliance with its terms.
>
> A condition such as that proposed by the Respondent therefore if accepted by the Tribunal as appropriate represents an order to be carried into effect if the Appellant is to give effect to the approval so obtained.
>
> In nature and kind therefore it is no different to other conditions which require things to occur before those conditions could be cleared [23] - [25].

40 The Tribunal determined that the condition should not be imposed because there was no proper planning basis for the imposition of the condition. The Tribunal said:

> However I am not satisfied on the material available to me that there exists a proper planning basis for the imposition of the condition proposed by the Respondent. The condition serves to do no more than record on the title that which has already been approved. That cannot in my view be a proper basis upon which the specific powers of the s 70A are to be utilised [42].

41 In ***Antonas v Town of Vincent*** [2006] WASAT 303, 45 SR (WA) 327, the Tribunal held that it was an appropriate condition to development approval that, prior to the issue of the building licence, the proprietor of the site provide a written consent to the local government pursuant to s 70A of the TLA to the notification on the title of the site of the continuing obligation of the proprietor for the time being of the land comprising the existing dwelling, to comply with the condition that the existing dwelling must be retained and maintained while the proposed

dwelling remains on the site. The Tribunal stated that the decision in ***Compliance Admin Services***, that the condition in question did not relevantly have a proper planning purpose, was correct because it involved a notification on title of a static fact which would be obvious on inspection of the apartment, namely that the relevant approval was for a single bedroom apartment. However, the Tribunal stated that the reasoning expressed in ***Compliance Admin Services*** in the last sentence of [42] set out above:

> was clearly in error, because a condition of development approval which requires notification on title of the continuing effect of another condition can, in certain circumstances, have a proper planning purpose, be reasonably referable to the proposed development and be reasonable and appropriate [39].

42 The appellant referred to decisions of the Tribunal where it declined to impose a condition that the owner agree to a notification under TLA s 70A but did not question the power to impose such a condition: ***Miragliotta v Town of Vincent*** [2008] WASAT 207 at [24] - [29]; ***Real Estate Institute of Western Australia v City of Subiaco*** [2009] WASAT 111, [49]; ***LR Archibald & Co Pty Ltd v Western Australian Planning Commission*** [2010] WASAT 129 [32].

43 In ***John Street Marina v Minister for Transport*** [2005] WASC 171 at [35] Jenkins J observed that a condition may be placed on the development approval that the proprietor consent to a notification being placed on the title, pursuant to TLA s 70A, of a condition that affects the use or enjoyment of the land. Her Honour was determining a claim for compensation pursuant to TLA s 144 for lodging a caveat against land without reasonable cause. In the course of considering whether the defendant had a caveatable interest in the land, her Honour observed that conditions of development approval are often secured by other conditions. Her Honour said that a condition may be placed on the development approval that the proprietor consent to a notation being placed on the title, pursuant to TLA s 70A, of a condition that affects the use or enjoyment of the land. Whether, as a matter of law, a condition may be placed on a development approval that the proprietor consent to a notation pursuant to TLA s 70A, was not an issue in the case and was therefore not the subject of argument or the subject of her Honour's considered opinion.

44 I am not bound by the decisions of the WA Town Planning Appeals Tribunal or the Tribunal and such decisions are as persuasive as the persuasive effect of the reasoning in them.

45 The respondent submits that a proper construction of the TLA s 70A is that the lodging party must be the responsible local government or a public authority. I agree. Therefore the local government or the JDAP have no power to direct a proprietor or developer to lodge a notification. The relevant power of a local government or public authority, if any, is to make a condition of development approval that the proprietor consent to the lodging of a notification.

46 The respondent submits that on a proper construction of TLA s 70A a notification can only be lodged with the written consent of the proprietor in order for the Registrar to be charged with the power of endorsing the proprietor's title with the notification. If a local government or public authority wishes to exercise the power to lodge a notification at any time other than as a condition of development approval, it cannot do so over the proprietor's objection because it has no power to do so. The respondent says that the limitation on that power cannot alter simply because the occasion is one of granting planning approval.

47 LPS6 includes the deemed provisions set out in the *Planning and Development (Local Planning Schemes) Regulations 2015* sch 2 (Deemed Provisions). Clause 68(2) of the Deemed Provisions provides that the local government may determine an application for development approval by, amongst other things, granting development approval with conditions.

48 There is no reason in principle why a local government or a public authority may not make a condition of development approval that the proprietor consent to the lodging of a notification under s 70A of the TLA. That is consistent with the reasoning of the High Court in ***Lloyd v Robinson*** (1962) 107 CLR 142 and ***Western Australian Planning Commission v Temwood Holdings Pty Ltd*** (2004) 221 CLR 30.

49 ***Lloyd v Robinson*** concerned the validity of conditions imposed upon the subdivision of part of a larger portion of land situated south of Mandurah. Part of that larger portion had already been subdivided pursuant to earlier approvals. The Town Planning Board and subsequently the Minister on appeal purported to impose a condition requiring the developers to transfer to the Crown two areas of land outside the area of the land to be subdivided, in order that those areas could be used for public open space. The conditions were imposed pursuant to s 20 of the *Town Planning and Development Act* which then governed the subdivision of land and which, like the legislation

currently in force, conferred a general power to impose conditions upon an approval of a subdivision. The validity of the condition was challenged on two grounds. First, that the condition was beyond power because it had been imposed for a purpose extraneous to the subdivision and which was therefore beyond the power conferred upon the Board by the Act, essentially because the land to be ceded to the Crown was outside the area of the land to be subdivided; and second, because the Act should not be construed in a way which would effectively authorise the confiscation of private property without compensation. At first instance, the first ground of attack upon the validity of the condition was rejected, and the second upheld. On appeal, the High Court held that both grounds of attack should have been rejected. The High Court said that the *Town Planning and Development Act* had taken away the right to subdivide land without approval, but enabled land owners to obtain approval by complying with any conditions which might be imposed bona fide within limits indicated by the nature of the purposes for which the power was conferred. The court held that the conditions imposed in that case were valid.

50 In ***Temwood Holdings*** the appellant approved the respondent's applications for subdivision of a parcel of land, subject to the condition that the respondent transfer a certain portion of the land to the Crown, free of charge and without compensation. The respondent challenged the condition before the Town Planning Tribunal, as well as a single judge and the Full Court of the Supreme Court of Western Australia. The relevant basis of the challenge was the legality of the condition and the absence of compensation, under the *Town Planning and Development Act* and the *Metropolitan Region Town Planning Scheme Act 1959* (WA). The respondent was unsuccessful before the Tribunal and the single judge, but had its challenge upheld in the Full Court. Accordingly, the appellant appealed to the High Court. The High Court held that the appellant had power to impose the condition under s 20 of the *Town Planning and Development Act* and had exercised that power for a planning purpose: see [45], [51], [70], [114] - [116], [156] - [157], [186].

51 The respondent submitted by a notice of contention that a JDAP, and a local government, does not have power to impose as a condition of development approval that the proprietor of the land provide a written consent to a notification under TLA s 70A.

Notice of contention ground 2

52 The respondent's second ground of contention is that a landowner cannot be compelled to consent to a notification on title by way of a condition of development approval. The respondent says that a landowner has a vested statutory proprietary right created by TLA s 70A to not consent to a notification under TLA s 70 and it is not lawful to attempt to remove, or confiscate, that proprietary right by way of a condition of planning approval.

53 The Tribunal said at [57] and [58] that TLA s 70A does not create any vested proprietary right. The Tribunal said at [57] that there is nothing in the TLA that requires the proprietor of land to consent to notification on the certificate of title pursuant to s 70A of the TLA. The Tribunal said, and I agree, that this does not mean that s 70A of the TLA creates any vested proprietary right. All it means is that a statutory mechanism that allows for a notification to be lodged on a certificate of title can only occur with the proprietor's written consent. There is no more a vested proprietary right taken away by a condition of development approval that the owner consent to a notification under s 70A of the TLA than there was a proprietary right to develop the site without approval.

54 A planning authority has power to impose, as a condition of development approval, a condition that the proprietor of the land consent to a notification on the title pursuant to TLA s 70A, if the condition is for a planning purpose and reasonably relates to the development approved. To that extend ground 2 of the appeal has been established and contention 2 in the respondent's notice of contention fails.

Appeal ground 3: Did condition 9 have a proper planning purpose?

55 Ground 3 of the appeal is that the Tribunal erred in holding that condition 9 could not have a proper planning purpose.

Legal test for validity of development approval conditions

56 The decision in ***Lloyd v Robinson*** is entirely consistent with the subsequent decisions of the High Court, including in particular the subsequent decision in ***Temwood Holdings***, all of which require that in order to be valid, there must be a real connection between the condition imposed and the proposed subdivision or development approval.

57 In ***Temwood Holdings***, all members of the court were agreed upon the test to be applied in order to ascertain the validity of a condition imposed upon the approval of a subdivision, which includes the requirement that the condition reasonably and fairly relate to the subdivision proposed.

58 In ***Reid v Western Australian Planning Commission*** [2016] WASCA 181 Martin CJ, with whom Newnes and Murphy JJA agreed, considered the legal test for the validity of a subdivision or development condition. Martin CJ traced the development of the relevant principles through the decisions of ***Lloyd v Robinson***, ***Cardwell Shire Council v King Ranch Australia Pty Ltd*** [1984] 53 ALR 632 and McHugh J's adoption in ***Temwood Holdings*** of the three part test for validity expounded by the House of Lords in ***Newbury District Council v Secretary of State for the Environment*** [1981] AC 578. The Chief Justice cited with apparent approval the statement of McHugh J in ***Temwood Holdings*** at [29] that a condition attached to a grant of planning approval will not be valid unless:

1. The condition is for a planning purpose and not for any ulterior purpose. A planning purpose is one that implements a planning policy whose scope is ascertained by reference to the legislation that confers planning functions on the authority, not by reference to some preconceived general notion of what constitutes planning.

2. The condition reasonably and fairly relates to the development permitted.

3. The condition is not so unreasonable that no reasonable planning authority could have imposed it.

59 The Chief Justice also referred with apparent approval to the statement of Callinan J in ***Temwood Holdings*** at [155] where his Honour cited with apparent approval the three step test for validity adopted by the House of Lords in ***Newbury District Council***:

> [T]he conditions imposed must be for a planning purpose and not for any ulterior one and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them. (p 600)

60 Martin CJ noted that in ***Temwood Holdings*** all members of the court were agreed upon the test to be applied in order to ascertain the validity of a condition imposed upon the approval of a subdivision, which includes the requirement that the condition reasonably and fairly relate to the subdivision proposed. Having referred to the principles enunciated in ***Lloyd v Robinson***, ***Cardwell*** and ***Temwood Holdings*** the Chief Justice said:

> Those principles require the establishment of a connection or relationship between the planning purpose for which the condition has been imposed, and the likely or possible consequences of the proposed subdivision. That connection or relationship must be established as a matter of fact. A relevant connection or relationship will not be established merely because the application for subdivision approval provides an opportunity or occasion to impose a condition in the furtherance of a proper planning purpose. Rather, the relevant connection or relationship must be between the planning purpose to be served by the condition and the likely or possible consequences of the proposed subdivision - such as a need to public open space, or a foreshore reserve, or improved road access as a consequence of residential subdivision and development [37].

Tribunal decision on validity of condition

61 The Tribunal correctly directed itself as to the relevant law. At [60] the Tribunal referred to the test for the validity of a planning condition articulated by the House of Lords in ***Newbury District Council v Secretary of State for the Environment*** applied and endorsed by the High Court in ***Temwood Holdings*** at [57]. At [61] the Tribunal referred to a passage from the judgment of Martin CJ in ***Reid v Western Australian Planning Commission*** where the Chief Justice referred to the principles in ***Temwood Holdings*** and said that those principles required the establishment of a connection or relationship between the planning purpose for which the condition has been imposed and the likely possible consequences of the proposed subdivision.

62 At [60] the Tribunal correctly identified that a planning purpose is one that implements a planning policy whose scope is ascertained by a reference to the legislation that confers planning functions on the authority, not by reference to some preconceived general notion of what constitutes planning. The Tribunal accepted that it was a proper planning purpose to ameliorate amenity impacts on residents. The Tribunal found that a condition requiring consent to a s 70A notification is not a planning purpose because of the effect of a notification on title. The Tribunal said:

> If the purpose is to warn of potential amenity impacts, in circumstances where those impacts have not been sufficiently and appropriately ameliorated, then why has the proposed development been approved? Warning of the impact cannot ameliorate or remove the impact, so again, what does it achieve? [71]

and

> In this case, it is impossible to see how a notification advising potential purchasers that there are potential amenity impacts can have any effect on the existence of those amenity impacts, or the need for there to be potentially be more of a buffer between inconsistent land uses [72].

63 Although the Tribunal qualified its statement at [72] with the words 'in this case' its statement at [73] that:

> If the purpose of the condition is to make potential purchasers aware of a potential negative amenity impact, while that might be a desirable goal at large, the Tribunal is not persuaded, if that is all it is for, that it has any planning purpose.

leads to the conclusion that the Tribunal found that a condition cannot be for a planning purpose if it does no more than alert potential purchasers of a potential negative amenity impact. The Tribunal's decision rests on the premise that a notification merely advising of amenity impacts is not a planning purpose.

64 The Tribunal erred in law in finding that a condition requiring consent to notification to warn potential purchasers of an amenity impact cannot be a planning purpose.

65 The Tribunal erred by applying too narrow a definition of the concept of a planning purpose. In doing so the Tribunal excluded from that concept a purpose which seeks to avoid future land use conflict by giving notice to potential purchasers of an existing land use. The Tribunal erred in determining that such a purpose is not a planning purpose because it falls outside the scope of what can be a planning purpose.

66 A s 70A notification gives a warning to potential purchasers of likely amenity impacts that may affect the use and enjoyment of the land. To that extent a notification may serve a planning purpose by making prospective residents aware of potential impacts on amenity that may not otherwise be obvious from a physical inspection of the land itself.

67 That object finds support in the planning framework. Section 3(1)(b) of the PDA provides that one of the purposes of the Act is to provide for an efficient and effective land use planning system in the State. Conditions which facilitate notification being given to potential purchasers of land use factors which may from time to time impact their future residential amenity is consistent with the purpose of creating an efficient and effective land use planning system.

68 Under PDA s 165, when the Planning Commission considers it desirable that prospective owners of land comprised in a proposed plan of subdivision be made aware of the factors seriously affecting the use or enjoyment of that land and determines that the title in respect of that land should be noted accordingly, the Planning Commission may cause a notification of the factor affecting the use or enjoyment of the land to be endorsed by the Registrar on the title. Although that provision is confined to subdivision applications, it confirms that a planning purpose may be served by a condition whose only affect is to give notice of a factor affecting the use or enjoyment of the land.

69 The Draft State Planning Policy 4.1 State Industrial Buffer (Amended) prepared under pt 3 of the PDA at s 6.4 says that in considering development or planning proposals in a buffer area, supported by an endorsed technical analysis, regard should be given to, amongst other things:

> The level of understanding demonstrated by existing landowners as to the potential likely impact (including an acceptance of likely reduced amenity) and/or risk, and the mechanisms proposed to ensure that prospective purchasers or future landowners will be made aware of the likelihood of reduced amenity or potential risk from those impacts.

70 State Planning Policy 5.4 prepared under s 26 of the PDA by the Planning Commission at s 5.7 (notification on title) provides that:

> If the measures outlined previously [ie noise management and mitigation measures] cannot practicably achieve the target noise levels for new noise-sensitive developments, this should be notified on the certificate of title.
>
> Notifications on certificates of title and/or advice to prospective purchasers advising of the potential for noise impacts from major road and rail corridors can be effective in warning people who are sensitive to the potential impacts of transport noise …
>
> The notification is to ensure that prospective purchases are advised of -

> • the potential for transport noise impacts …
>
> Notification should be provided to prospective purchasers and be required as a condition of subdivision (including strata subdivision) for the purposes of noise-sensitive development as well as planning approval involving noise-sensitive development, where noise levels are forecast or estimated to exceed the target outdoor noise criteria, regardless of proposed noise attenuation measures.

71 A s 70A notification on title is a mechanism which in this case would ensure that prospective purchasers of the multiple dwellings to be developed will be made aware of the likelihood of reduced amenity arising from odour and noise.

72 The Tribunal erred in taking too narrow a view of a planning purpose by requiring that the condition ameliorate or remove the negative impact on amenity rather than merely give notice to residents of the negative impact on amenity. That is an error of law. Ground 3 is made out.

Appeal ground 4: did Tribunal have regard to relevant planning considerations?

73 Ground 4 of the appeal is that the Tribunal erred in law in failing to have regard to relevant planning considerations, contrary to s 241(1)(a) of the PDA. That ground is an alternative ground to ground 3. As I have upheld ground 3 it is strictly not necessary to determine ground 4. However, I will set out in summary form my conclusion on ground 4.

74 Section 241(1) of the PDA says that in determining an application to which part 14 of the PDA applies, which includes the development application now being considered, the Tribunal:

> is to have due regard to relevant planning considerations including- (a) any State planning policy which may affect the subject matter of the application.

75 Section 4 of the PDA says that a State planning policy means any policy approved under s 29 of the PDA. State Planning Policy 5.4 is an approved policy. Draft State Planning Policy 4.1 had been advertised and publically available since 2009 and is 'seriously entertained' and for that reason is a relevant planning consideration: see ***Zampatti v Duff Western Australian Planning Commission*** [2010] WASCA 149, especially [121 - 123].

76 The appellant says that the reasons of the Tribunal make no reference to Draft State Planning Policy 4.1 and State Planning Policy 5.4 and the Tribunal's reasons, read as a whole, do not consider the substance of the matters raised in those policies and in particular the means by which prospective purchasers should be made aware of amenity impacts on land and a rationale for doing so, as expressed in those policies. Therefore, the appellant submits, the Tribunal has not had due regard to Draft State Planning Policy 4.2 or State Planning Policy 5.4.

77 I agree. The Tribunal's reasons must be read as a whole. The Tribunal made no reference to the relevant State planning policies which refer to prospective purchasers being made aware of amenity impacts on land to be subdivided or developed by means of notification on title. Having regard to the Tribunal's conclusions I find that the Tribunal failed to have regard to those planning policies in determining whether condition 9 is for a planning purpose. Section 241(1) of the PDA required that the Tribunal have due regard to, amongst other things, relevant state planning policies. Ground 4 is made out.

Notice of contention ground 1

78 The respondent filed a notice of contention that the decision of the Tribunal should be upheld on the ground that notification on a title under TLA s 70A may be directed at a restriction or obligation on the manner in which the land may be used but not towards matters of subjective amenity impact.

79 The Tribunal considered and rejected that argument at [43] - [51]. The Tribunal said that the phrase 'a factor affecting the use or enjoyment' is a broad one; the words are not words of limitation. I agree with the Tribunal when it stated that it was not satisfied:

> [T]hat there is anything in the words and grammar used, the context of s 70A within the TLA as a whole, or the apparent purpose of the provision, that would make it appropriate to interpret the provision in the way contended for by the [respondent]. The Tribunal is not persuaded by the reference to the examples used in the Minister's second reading speech in relation to what became s 70A of the TLA that it should seek to change or narrow the plain words used in s 70A of the TLA [51].

80 Ground 1 of the notice of contention is not made out.

Conclusion

81 Leave to appeal will be granted and the appeal will be allowed. The decision of the Tribunal will be set aside and the matter will be sent back to the Tribunal for reconsideration without the hearing of further evidence. I will hear the parties as to whether or not the Tribunal reconsidering the matter is to be constituted by the member who made the original decision.

82 Section 105(12) of the SAT Act provides that in the case of a decision in a proceeding coming within the Tribunal's review jurisdiction, any leave to appeal granted to the decision maker is to be granted on the condition that the costs of each other party are to be met by the decision maker, unless the court considers that it would be unjust or unreasonable to impose that condition, whether generally or in respect of the costs of a particular party. I have decided to grant leave to appeal to the appellant. The appellant must pay the costs of the respondent unless the court considers that it would be unjust or unreasonable to impose that condition. It is not unjust or unreasonable to impose that condition notwithstanding that the appeal is allowed. However, it would be unjust and unreasonable to require the appellant to pay the respondent's costs incurred in and incidental to its notice of contention. The respondent failed in those contentions and unnecessarily added to the cost of the appeal by advancing those contentions.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

RK
Associate to the Honourable Justice Le Miere

18 DECEMBER 2018