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1HY 2020: A master class from WASAT on planning conditions

By Peter Wittkuhn

Introduction

The first half of 2020 was not marked by a particularly large number of published planning decisions for the WA State Administrative Tribunal, but a recurring theme in a majority of those that were handed down, was a focus on various principles surrounding conditions of planning approval. In that respect, the first half of 2020 might be described as a master class from the Tribunal as to planning conditions. The Tribunal explored principles such as whether conditions could remedy concerns that went to the heart of the acceptability of the development; how the 'nexus' test should be applied to expansions of an existing development; and the circumstances in which notifications on title should or should not be imposed as conditions. The present article reviews four Tribunal cases from January to June 2020, being ***Ursula Frayne***, ***Joynson***, ***Glossop*** and ***Edge Holdings***.

Ursula Frayne decision

In ***Ursula Frayne Catholic College and Town of Victoria Park*** [1], a catholic school sought review of the local government's decision to refuse development approval for the establishment of a 'green space' on the opposite side of the road from the school's existing campus. The subject site comprised former residential lots where the school had demolished the residences after purchasing the lots. The site, 1,442m^2 in area, abutted residences on two sides, and a right-of-way to the rear, on the opposite side of which were additional residences. The proposed green space was to be used for passive recreation activities (described as 'contemplative study sessions') for a maximum of 70 students (the equivalent of two classes of students). Students would also be allowed to use the green space during lunch and recess breaks under staff supervision. No ball sports, formal sports or 'noise-generating performing arts' would be permitted.

The Tribunal upheld the local government's refusal of the green space application.

The Tribunal noted[2] that ultimately the case was about noise. The decision is interesting for its analysis of the planning framework, however for present purposes the focus is upon the Tribunal's treatment of the applicant's proposition that a suite of management conditions was capable of producing an acceptable noise outcome.[3]

As to this, Senior Member Willey concluded as follows:

> '184 In my view, the extent of the conditions and restrictions on the use of the green space incline me to the view that the Appeal Site is not an appropriate site on which to establish an 'educational establishment' to be used as a green space.'

The Tribunal found, more specifically:

- the range and extent of the proposed conditions would strike directly at the heart of the intended use[4];
- the restrictions would go 'way beyond incidental aspects of the use'[5];
- the conditions could potentially be breached by virtue of 'school children just being school children';[6]
- the acceptability of the use was made to rest too heavily on the school's strict adherence to a very extensive and restrictive range of conditions.[7]

***Joynson* decision**

Joynson and Shire of Capel[8] also explored the efficacy of proposed conditions, in terms of whether they provided sufficient safeguards to allow the development to be approved. The case involved a review of the local government's decision to refuse an extractive industry (sand mining). Ultimately, the Tribunal upheld the local government's refusal of development approval and an extractive industry licence.

The issue occupying most of the Tribunal's attention, and the issue on which the effectiveness of proposed conditions came to the fore, was that of traffic safety. The proposed site was located on South Western Highway. More specifically, it was proposed to be located near to where an overtaking lane merged back into a single lane travelling in a southerly direction.[9]

The applicant's traffic engineer proposed the installation of a 'no-right turn' sign for the driveway, and recommended that the applicant enforce a 'no-right turn' policy for any customers coming from the north. This would of course mean that trucks coming from the north would need to pass the site first, find a way of turning around, and then approach the site from the south so that they could make a left-in turn. A number of suggested options were put forward for this turn-around manoeuvre which would have involved using other parts of the road network some distance separated from the site.[10]

The Tribunal noted the following[11]:

> '69 The applicant submitted that, so long as there was a public road system that could be used to allow vehicles to enter from the south in a safe manner, and because [the applicant] proposes to largely cart the extracted product himself and would be in a position to properly instruct and manage and vehicle drivers to ensure there was no-right turn, the Tribunal need not concern itself with how that was done.'

The Tribunal concluded:

> '77 On the evidence before us, the Tribunal is not satisfied that any 'no right turn' policy is or would be appropriately enforceable by the Shire. How would the respondent be able to know whether the applicant was or was not appropriately and successfully enforcing a condition of that kind?
>
> 78 ... The Tribunal does have positive evidence before it, which is agreed between the experts, that the access to the site from a northerly direction, by way of a right turn, is a significant safety concern. In light of that knowledge, we are not satisfied that it is appropriate to allow any additional development, including the proposed development,

without ensuring that the safety risk has been appropriately ameliorated. On the evidence before us, we are not satisfied that there is any method of ameliorating this risk that is appropriately workable and enforceable. We find that the access issue is potentially a significant safety risk that goes to the heart of the proposed development. …

79 The Tribunal finds that, because we are unable to be satisfied that a sufficiently workable and enforceable condition can be imposed to sufficiently and appropriately ameliorate the real and potentially very dangerous safety risk, a risk that we have found goes to the heart of the proposed development, it is therefore not appropriate to allow the proposed development. …'

Key legal principles concerning conditions

Ursula Frayne and ***Joynson*** both involved reiterations, and interesting applications, of the following principles[12] concerning conditions:

- The power to impose conditions is vested in a planning authority for the purpose of enabling it to regulate *incidental aspects of the development* so that the development does not have an adverse effect upon the amenity of the neighbourhood of the development, either in the course of construction or when the development is completed.
- The power to impose conditions is *not* provided to enable a planning authority to *alter the nature of the proposal* and hedge it about with conditions which are unworkable, unenforceable, and seek to confine the development form being used in the ordinary way.
- Resort to the use of such conditions would be tantamount to an acknowledgement that the proposed development is inappropriate for the subject land.

Glossop decision

The significance of ***Glossop and City of Swan***[13] lay in the imposition of conditions for an expansion of an *existing* use. The local government had reconsidered its earlier decision to refuse a restaurant expansion for a site in the Swan Valley, and had resolved to grant development approval subject to conditions. The contest at the final hearing concerned certain conditions which remained in dispute.

The existing approved restaurant was located on a property abutting commercial vineyards. Customer and supplier access was via a battleaxe driveway. Since the establishment of the restaurant, there had been an acrimonious dispute involving two sides – viticulturists on one side and the restauranteur on the other – each alleging and cross-alleging adverse impacts on the other's business due to conflicts between aspects of the two land uses.

The case is of general interest from the point of view of the formulation of conditions upon an expansion *to an existing use*. It was not a case where the fundamental suitability of the restaurant use on the site, set amid predominantly viticultural land uses, was open to be revisited. Nevertheless, the conditions proposed on the expansion needed to 'fairly and reasonably relate' to the development. This is a well-established aspect of the three-step test for the validity of planning conditions – planning conditions must be imposed for a proper planning purpose; they must fairly and reasonably relate to the development; and they must not be so unreasonable that no reasonable planning authority would impose them.[14] The 'fairly and reasonably relate' aspect is also often known as the 'nexus' test.

In applying the nexus test to the disputed terms of a proposed condition concerning accesses, parking etc areas, the Tribunal found that the restaurant expansion, involving as it did a 50% increase in permitted patron numbers, did legitimately give rise to a need to reconstruct and re-seal those areas[15] (which included a 192 metre-long driveway passing close to one neighbour's table grape vines[16]). However, the Tribunal also found that the standard of reconstruction and re-sealing did not need to be upgraded to that of bituminous concrete. A seal achieved by replacing the recycled asphalt would suffice for the expansion.[17]

With regard to a condition requiring a gate at a secondary access way to be kept closed, the Tribunal found[18], that an increase of 50% patronage increased the likelihood of unintended vehicles using the secondary driveway, creating a dust drift risk for adjacent vineyards.[19] Accordingly, it was reasonable to require the gate to that driveway to be kept closed apart from when the operators were in the process of entering or exiting it. In so far as this was an existing problem associated with the already-approved restaurant, this circumstance did not preclude a finding that the condition fairly and reasonably related to the expansion. The increase in patronage and the corresponding increase in likelihood of unintended use, provided the relevant nexus.

Another key issue was spray drift from an adjacent vineyard into the restaurant carpark area. Three mechanisms were under consideration for conditioning this interface: the composition of a physical screen; the height of the screen; and the separation distance of the carpark from the vineyard lot boundary. The parties ultimately agreed that the composition of an acceptable form of barrier was a fence which achieved 50% porosity. With regard to the remaining two aspects, on one hand, the Tribunal did not uphold the local government's proposal for a 20-metre separation distance of the carpark from the vineyard lot boundary, imposing an 11-metre separation instead. On the other hand however, the Tribunal required an increase in the height of the barrier fence relative to that imposed by the local government and accepted by the applicant.[20]

The observation can be made that the viticultural interface issues which the conditions addressed, were not entirely new issues, in as much as they would have existed to a degree in association with the originally-approved restaurant development. Nevertheless, the modification and expansion of the restaurant could be seen to have intensified the likely land use conflict to a point where conditions which amounted to some degree of upgrade to the protection of ordinary viticultural activities, was justified and constituted a relevant nexus.

Edge Holdings **decision**

The last case reviewed in this article, ***Edge Holdings No. 6 Pty Ltd and Acting Presiding Member of the Metro Central JDAP*** [21] involved a review of a JDAP decision to refuse a 29-level mixed-use development on the South Perth Peninsula. In a 269-page decision, the Tribunal conditionally approved the application.

The present article is concerned only with one aspect of the contest concerning conditions to be imposed. An adjacent owner was granted leave to make submissions on certain issues, including whether a condition should be imposed notifying prospective purchasers of units in Edge Holdings' development; that:

- traffic congestion has the potential to increase in the surrounding locality; and
- other development in the surrounding location has the potential to block or restrict views for occupiers of Edge Holdings' development.

Such a condition would have the statutory basis of section 70A of the *Transfer of Land Act 1893*. That provision authorises planning authorities to lodge on the title of land 'notification of a factor affecting the use or enjoyment of the land'.

The Tribunal ruled against imposing a section 70A notification as a condition. The Tribunal noted[22] that it had found earlier in its reasons, that on-site traffic arrangements for the development would not be problematic and would not cause congestion and traffic conflict.[23] The Tribunal also found, more generally that, to the extent that traffic was likely to increase in the locality as other properties are progressively developed, this would be obvious as a matter of reasonable anticipation.[24]

In so far as the proposed condition sought to achieve notification of the potential for views to be built out, the Tribunal noted that it was obvious that there was a property between Edge Holdings' site and the Swan River, so the potential for obstruction of views was inherent in the pre-existing arrangements of the lots relative to one another.

Conclusion

The WA State Administrative Tribunal's planning decisions in the first half of 2020 made useful contributions to the jurisprudence concerning conditions of development approval. ***Edge Holdings*** contributed to a better understanding of the circumstances in which notification should be placed on title notifying prospective purchasers of units in the development site. Future potential impacts on such developments which can reasonably be anticipated from normal expected development patterns – such as building-out from an intervening potential development site, or general cumulative increases in traffic from progressive future development in the locality – would appear not to be suitable subject matters for notifications on title. ***Glossop*** provides an instance of the nexus test for conditions in the context of an expansion of an existing use. Significant increases in patronage can legitimately be seen to provide the causative link that justifies an upgrade in conditions even in respect of an interface issue with other land uses which, to a degree, pre-existed the expansion of the subject development. ***Ursula Frayne*** and ***Joynson*** concerned an even more fundamental proposition – perhaps the key takeaway from 1H 2020 – that conditions should not be utilised to make suitable a use that is fundamentally unsuitable for its setting.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information, please contact Peter Wittkuhn by email to pwittkuhn@mcleods.com.au.

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Footnotes

[1] [2020] WASAT 17.

[2] At [183].

[3] At [182-183].

[4] [186].

[5] [189].

[6] At [192].

[7] At [195].

[8] [2020] WASAT 21.

[9] At [66].

[10] Options put forward included: including an information bay site; turning around at the next closest town; and a circuitous route along three dirt roads: [68].

[11] At [69].

[12] See especially ***Kipa Freeholds v Development Assessment Commission*** (1999) 101 LGERA 414.

[13] [2020] WASAT 27.

[14] At [34], especially involving an overview of ***Two Rocks and Western Australian Planning Commission*** [2019] WASAT 59.

[15] At [103].

[16] At [2(d)], [98].

[17] At [103].

[18] At [86].

[19] [87].

[20] At [113] – [114]. It is important to note that, as the main exposure risk was in relation to the carpark, the exposure risk was found to be relatively transitory: see [77]. It is suggested that a more demanding position might have pertained if the sensitive activities exposed to spray drift were, for example, premises comprise activities such as residential or al fresco dining.

[21] [2020] WASAT 35.

[22] At [443].

[23] At [443].

[24] At [445].