

Orderly and Proper Planning – Lessons from Point Grey Development Company Pty Ltd and Shire of Murray

By Denis McLeod

Introduction

The WA State Administrative Tribunal (**SAT**) on 5 November 2019 published its Reasons in the review **Point Grey Development Company Pty Ltd and Shire of Murray**^[1] for refusing planning approval for the first stage of a substantial marina development on the Point Grey Peninsula in the Peel Harvey Estuary (**Marina proposal**). The total Marina proposal involved some significant environmental issues, but although there have been State and Federal environmental assessments and approvals, planning approval of the first stage of the Marina proposal was refused by the SAT for the essentially planning reasons that:

- the application involved a ‘piecemeal’ approach to the development approval process; and
- the application in all of the circumstances was not consistent with orderly and proper planning.

Point Grey Marina proposal

A Marina proposal including a 300 berth on-shore Marina, a Marina village, and a 3,000 lot residential development, is proposed on the Point Grey Peninsula, a promontory surrounded on three sides by the Peel Inlet and the Harvey Estuary, known as the Peel Harvey Estuary (**the Estuary**). The Estuary is located immediately to the south of the City of Mandurah, and approximately 70km south of the Perth CBD. It 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^[2]. The water over most of the Estuary is shallow and able to accommodate only dinghies and small vessels, or vessels with a shallow draft. A controversial part of the Marina proposal is the proposed dredging of a navigation channel for 2.5km from the marina site on the Peninsula to the Dawesville Channel which opens the Estuary to the Indian Ocean. The channel is intended to give large recreational vessels access to the marina, and is contemplated to be part of a later stage of the Marina proposal.

Construction of the marina and dredging of the channel have an acknowledged potential to cause significant damage to the Estuary and its waters if not appropriately researched, designed and managed. At the time of the application under review, detailed management programs for construction management and maintenance had not been provided.

The proposed marina and navigation channel had received the environmental approval of the WA Environmental Protection

Authority (**EPA**) subject to conditions including a condition which ultimately requires substantial commencement by March 2022. Commonwealth environmental approval also had been given subject to conditions, including a condition requiring substantial commencement by March 2029.[\[3\]](#)

The limited development approval sought

The development proposal the subject of the SAT review was for an excavation over the contemplated 5.8ha footprint of the marina, the excavation being calculated to produce approximately 660,000m³ of sand and soil to be stockpiled on an adjoining site of 5.86ha. There was no indication of the time the excavation and stockpile would remain before commencement of the marina construction and navigation channel dredging stages of the development.

The excavation was described by the Applicant as ‘earthworks for Stage 1 of marina’[\[4\]](#), but no plans or other details of the marina were provided to the Shire of Murray (**Shire**) or to the SAT, nor was any timeframe given for commencement or completion of the marina construction.

The application for planning approval for the ‘first stage’ excavation was made to the Shire, in whose municipal district the Point Grey Peninsula is located, pursuant to deemed cl.60 of the Shire’s LPS 4[\[5\]](#)

The Respondent Shire argued *inter alia* that for planning approval to be given for the substantial excavation without any plans or details of the proposed marina, or a timeframe for its development, would be contrary to orderly and proper planning.

Purpose of application

The Applicant’s development application supporting submission included the interestingly frank statement that the purpose of the application (for the excavation) was to achieve substantial commencement under the State and Federal environmental approvals and therefore entrench those approvals for the long term.[\[6\]](#) The SAT however found that the works the subject of the present application were ‘associated with a future marina project’, and ‘are not motivated by any other purpose’.[\[7\]](#)

Although there are very significant environmental issues involved in the total Point Grey Marina development proposal, the most significant being associated with the proposed 2.5km navigation channel, and although evidence touching those issues was given at the hearing by environmental experts essentially to clarify the context in which the proposed excavation would occur, the SAT decision did not seriously canvas the environmental issues. Those issues were taken, for the purpose of the SAT review, to be the province of the State and Federal environmental assessment and approval processes.[\[8\]](#) Both State and Federal approvals previously given included conditions effectively requiring those issues to be addressed.[\[9\]](#)

If and when a serious planning application is made for approval to develop the marina and navigation channel, the environmental issues will need to be, or to have been, addressed satisfactorily. That did not occur in connection with the application the subject of the present review, and in the view of the SAT did not need to be. The present review was decided on the technical planning point that the application being only for the initial excavation for the marina (notwithstanding it was described as the first stage of the marina development) involved a ‘piecemeal’ approach to the development, and for that reason was inconsistent with orderly and proper planning.[\[10\]](#) In that regard, the SAT relied on the decision of the High

Court in ***Pioneer Concrete (Q) Pty Ltd v Brisbane City Council***[\[11\]](#), as applied by the SAT in the case ***Stewart and Town of Cottesloe***[\[12\]](#).

The proposed excavation site on the Point Grey Peninsula had been substantially cleared at a much earlier time and was used for pasture. One of the issues raised by the Shire was that the proposed excavation involved the use class 'Extractive Industry' under the Shire's local planning scheme, given the unusual definition of 'Extractive Industry' in the Scheme as including '... the extraction of sand, gravel, clay, turf, soil, rock, stone, minerals or similar substances from the land ...'. The term 'Industry' was defined in the Scheme in terms of premises used for manufacture, processing, servicing, maintenance or repair of goods or products, but unlike other industry definitions in the Scheme, the 'Extractive Industry' definition included the term 'Industry' only in the definiendum and not in the definiens. On that basis the Shire argued that the 'Extractive Industry' use class definition was not required to comply with the 'Industry' definition, but should be interpreted literally in terms of its own definiens, which referred explicitly to 'the extraction of sand etc', with no reference to processing. The SAT did not accept that argument.

The Applicant had argued that the development application did not involve a change of use, but was simply an application for approval of the excavation as comprising works.[\[13\]](#) As such, the Applicant argued the application could be approved in the discretion of the SAT without the complication of dealing with the Shire's argument that the application involved a change of use[\[14\]](#).[\[15\]](#) The SAT concluded the application did involve a change of use and not just works[\[16\]](#), but considered:

- the change was from Rural Pursuit to Marina and not to Extractive Industry[\[17\]](#);
- the designation of Marina as a discretionary use in the Structure Plan did not obviate the need for an approval for a change of use[\[18\]](#);
- the Applicant was not seeking planning approval for a Marina use, but for preliminary works associated with a future Marina[\[19\]](#);
- the proposed future use of the subject site for a Marina did not form part of the development application but was a change of use that had not been previously approved under the local planning scheme and the Peel Region Scheme¹⁷, and required approval;
- as details of the proposed Marina had not been provided, the SAT found it was not in a position to consider the question of an approval for the Marina use[\[20\]](#);
- given the evidence and findings, the Tribunal found that the application was not motivated by an improper purpose;
- the application was for the first stage of a future Marina project and not for an 'Extractive Industry'[\[21\]](#);
- the current State and Commonwealth environmental approvals did not displace the statutory requirement to obtain approval for a change of use under the relevant planning provisions[\[22\]](#);
- for the SAT to exercise discretion to approve the application as involving only 'works' runs counter to the principles of orderly and proper planning[\[23\]](#). That involved a piecemeal approach.

By reason of the adoption of a piecemeal approach in the development application, and as the application was not consistent with orderly and proper planning, the application was refused.[\[24\]](#)

Orderly and proper planning

The SAT in its Reasons adopted the meaning of the phrase ‘orderly and proper planning’ explained by the Supreme Court in **Marshall v Metropolitan Redevelopment Authority**^[25], emphasising the requirement that ‘... 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’.^[26]

The Council role

An interesting side issue was the role of the Respondent’s Council in the planning process. Because the total Point Grey development, including the marina, had been approved in principle through the adoption of a Structure Plan in the Shire’s local planning scheme, and through the inclusion in the scheme of Special Development Zone provisions to control the development, and because of the State and Federal environmental approvals, the assumption of the Applicant was that the Council’s approval of the excavation as the first stage of the marina development would effectively be a formality. But the Council clearly sensed the inconsistency of the approach adopted with the requirement of orderly and proper planning. The Council’s refusals were ultimately accepted as correct by the SAT’s determination, though the terms in which the refusals were expressed were laymen’s terms, and not consistent with the language of planning and legal principles.

Lessons

The case involves an interesting interface between the environmental and planning approval processes. Some lessons arising from the case include:

- Environmental approvals for a development proposal do not predicate planning approval.
- Under the local and regional planning instruments operating in WA, the requirement for decision-makers to make their decisions in accordance with orderly and proper planning is pervasive.
- There are no shortcuts to achieving orderly and proper planning.

It remains open to the Applicant to make another attempt at planning approval, but any fresh application for the first stage of the Marina proposal will need to provide reasonable details of the Marina as completed, and not just site preparation works.

The information contained in this article should not be relied on without obtaining further detailed legal advice in the circumstances of each case. For further information or advice regarding the amendments to the Local Government Act, please contact Denis McLeod on 9383 3133 or dmcleod@mcleods.com.au.

Footnotes

^[1] [2019] WASAT 106. Reasons.

^[2] Reasons [49].

^[3] Reasons [19] and [20] and Appendix 2 to Application for Development Approval January 2019.

^[4] Reasons [17].

[5] Deemed cl.60 is one of the deemed provisions in Schedule 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015*, which under s.257B of the *Planning and Development Act 2005* (WA) are deemed to be part of the Shire's LPS 4. It is a typical development control clause requiring the planning authority's approval to be granted before development is commenced.

[6] Reasons [80]. Also Respondent's SIFC para.3.16 and Applicant's SIFC para.41.

[7] Reasons [123].

[8] Reasons [146] and [158].

[9] Reasons [21] and [22].

[10] Reasons [139]-[142].

[11] [1980] HCA 1; (1980) 145 CLR 485; (1980) 44 LGRA 346.

[12] [2019] WASAT 106.

[13] Reasons [107].

[14] From Rural Pursuit to Extractive Industry.

[15] Reasons [121].

[16] Applying **University of WA v City of Subiaco** (1980) 52 LGRA 360 and **Robertson and Shire of Murray** [2009] WASAT 171; (2009) 67 SR(WA) 66 at [52]-[55].

[17] Reasons [116].

[18] Reasons [118].

[19] Reasons [121].

[20] Reasons [122].

[21] Reasons [154].

[22] Reasons [117].

[23] Reasons [131].

[24] Reasons [141] and [142].

[25] [2017] WASC 226.



[26] **Marshall** supra at [179].