

Protection of views under the R-Codes in WA: case law overview

By Peter Wittkuhn

For most single houses in Western Australia, the exercise of discretions under the Residential Design Codes (**R-Codes**) has become vested in local government CEOs or officers authorised by CEOs, to the exclusion of elected Councils. This is what the recently-enacted section 257C of the *Planning and Development Act 2005* (**PD Act**) enabled, and regulations to activate this position took effect on 1 July 2024.

Some of the design principles provided for by the R-Codes raise sophisticated planning assessments, layered with somewhat complex legal interpretation. The protection of views is one such subject matter. Concerns about impacts on views tend to arise in cases where developments could be perceived as attempting to maximise the development potential of a lot. The analysis and recommendations of planning officers in such applications are apt to be subject to close scrutiny from elected members, irrespective of whether the elected Council, or a delegated officer is the decision-making body.

Now that all such discretions are exercised at local government officer level, and no longer by elected Councils (except in relation to heritage-protected places), a comprehensive understanding on the part of planning officers concerning views becomes even more imperative. Ultimately the CEO or authorised officer must take responsibility for any approvals which have the result of adversely affecting existing views of neighbouring and nearby properties. The option would no longer exist that planning officers merely make recommendations to Council, which may be accepted or rejected by Council.

Two 2023 State Administrative Tribunal decisions illustrate the very qualitative and contestable nature of the assessment required when dealing with the design principles bearing upon maintenance of views of significance. In each case, **Attree and City of Melville** [2023] WASAT 35 and **Ionic Projects Pty Ltd and City of Melville** [2023] WASAT 133, the local government's refusal of approval was upheld by the Tribunal, on grounds which included, but were not limited to, impact on views. This article reviews the operation of the R-Codes provisions relating to views, and explains how these provisions were applied in the case examples of **Attree** and **Ionic**. Both cases concerned single house proposals in Applecross.

The design principles and their interpretation in Warden

As is well-understood by WA planners, the need to qualitatively assess a residential development against a design principle, applies when the development does not meet the deemed-to-comply provisions applicable to the particular design element. In so far as the R-Codes invoke views, they do so via the design element of *building height*. The relevant design principles are:

'P6 Building height that creates no adverse impact on the amenity of **adjoining properties** or the streetscape, including road reserves and public open space reserves; and where appropriate maintains:

...

- *access to views of significance.*

In an earlier case of **Warden and Town of Mosman Park** [2019] WASAT 88, the Tribunal determined that clause P6's reference to 'access to views of significance' applied to *any affected property's* views of significance – not only to the views available from 'adjoining properties or the streetscape'. Whereas clause P6's focus on impact on *amenity* is confined to adjoining properties and the streetscape, the impact on *views of significance* is, as a matter of the proper interpretation of clause P6, not so confined. **Warden** also postulated a three-step test:

1. What is the existing access to views of significance, unaffected by the proposed development?
2. Is it appropriate that access to views of significance be maintained in the circumstances of the case?
3. If so, does the proposed development maintain access to views of significance?

In further development of the 'second' question, the Tribunal in **Warden** stated:

*'59 The requirement is not to maintain views but rather it is to "maintain access to views", where appropriate. The words used support the conclusion that the design principle **is not focused on maintaining views exactly as they exist** at a point in time prior to the development under consideration occurring. ...*

60 This is not to say that the design principle ... is only concerned with consideration of whether there is maintained some access to views, no matter how different that access may become, or how much existing views are affected. What level of access to views should be maintained, where appropriate, will be a question of fact and degree depending on the circumstances.'

It will occur immediately to an insightful town planner or allied professional, that the extent to which parts of an affected property's views 'survive' the development, is likely to be relevant to the acceptability of the proposal.

In the case of panoramic views, it might be suggested that a point of definition arises in relation to **Warden's** 'first question', that is, the question of *what* the views are pre-development. If the pre-development view is defined 'as' the panorama, then that definition has implications for **Warden's** 'second' and 'third' questions.

Jumping to the 'third' question – does the development maintain the view? – defining the panorama 'as' the view tends to lead to an assessment that obstruction of a part of the panorama means that the view is not maintained. This is precisely because, if the panorama no longer exists, then by definition the view no longer exists.

On the other hand, for the purpose of the second question – is it appropriate to maintain the view – defining the panorama 'as' the view tends to make a decision-maker wary that refusing applications which entail any degree of discontinuity to a nearby property's panorama, might make the achievement of design unduly difficult for a development site.

Attree

In **Attree**, the subject site was the front lot in a two-lot battleaxe subdivision. The subject lot was vacant, and a new three-

storey single house was under construction on the rear lot of the subdivision. The subdivision sloped down from front to rear. Behind the rear lot was a foreshore reserve, then the Swan River.

The subject development in **Attree** was designed so as to achieve views over the top of the approved three-storey single house on the rear lot. Utilising the steep slope of the site, together with cutting and filling, the subject development presented as two-storeys from the street, but was overall three-storeys deeper into the lot, plus a roof-top terrace. The topography of the immediate locality sloped upwards on the opposite side of the street as one moved further away from the river. The properties on the opposite side of the street enjoyed existing panoramic views of the Swan River, including a view to Kings Park. The proposed development would partially obstruct part of those views for two neighbours, but would not by any means obstruct the entirety of the available view.

The City of Melville had a Building Height local planning policy which provided deemed-to-comply heights substituting for those under the R-Codes. The subject development exceeded the local planning policy's deemed-to-comply heights. This brought into play the need to consider the R-Codes design principles (in lieu of the deemed-to-comply provisions) with regard to building height.

In accepting an aspect of the applicant's expert witness's evidence at [94], the Tribunal described 'the sweeping 130-degree panoramic views ... of Kings Park and the City as a view of significance': [94]. That aspect of the Tribunal's findings seems to suggest that the panorama *was* the view. On the other hand, within the same paragraph, the Tribunal stated that the 'views [in the plural] of significance ... *include* the panoramic or "whole views" of the Swan River, the Swan River generally, the Matilda Bay Yacht Club and Kings Park, the Jeff Joseph Reserve, and the City skyline'.

In **Attree**, the Tribunal found, with regard to **Warden's** 'second question', that it was appropriate to require maintain of access to views of significance: [97]. This was based on a number of considerations, including:

- Dwellings on the opposite side of the street from the subject lot could access views by virtue of their topographically higher location – and they were designed and built to take advantage of those views: [98];
- Although any development that might reasonably be expected to occur on the subject site would obstruct views to some extent, it was not necessary in order to achieve reasonable development that a development present as dominantly as the proposed development, in terms of its overall height: [100] and [101].

With regard to **Warden's** 'third question', the Tribunal found that the subject development did not 'maintain access to views of significance' in the required sense. Whilst only one part of the panoramic view would be interrupted, and not 'whole view', the extent of the interruption was significant because the connectivity of the panoramic view would be lost, with two separate views created on either side of the proposed development: [96].

The Tribunal emphasised at [72] that the extent of access to views which should be maintained where appropriate, will be a question of fact and degree depending on the circumstances of the case. It may well be an interesting question for further refinement in future cases as to whether a view should be defined 'as' the panorama in cases where there is indeed a pre-existing panoramic view. It is suggested, however, that what is more telling is the qualitative assessment of the view and the components that comprise it. It is suggested that the Tribunal's findings in **Attree** that the subject development would cause a discontinuity in the panoramic view, should not be elevated to a principle that, wherever a panoramic view would suffer a discontinuity, the impact should be considered unacceptable. The outcome in **Attree** should be seen as an

assessment having regard to the facts, circumstances and merits of the specific case.

Ionic

Ionic also involved panoramic views, however parts of the view were ‘glimpsed views’, including views of the Perth city skyline: [116]. An interesting feature of ***Ionic*** was that the subject application was an application under the deemed provisions clause 77 to *amend* an existing development approval. The existing development approval, if implemented, would have already had the effect of partially obstructing some city skyline views. The Tribunal considered at [117] that the starting point was the impact which the pre-existing development approval would have already had upon views if that development was to be implemented, and it was not appropriate to assess the existing views as if the existing development approval was ignored entirely.

The focus in ***Ionic*** was upon the impact on views on the city skyline. It was accepted that other aspects of views, to South Perth and Como (see [100]) would ‘survive’ the development. Despite this, and despite the fact that even the views of the Perth city skyline were to be treated as if already ‘glimpsed views’ only, the Tribunal was still persuaded that it was appropriate to maintain the views of the Perth city skyline from the affected property: [119]. The Tribunal noted at [102] that there was no dispute that panoramic views of the Perth city skyline are highly valued views and were ‘a view of significance’. Certain specific buildings which were distinctive of the Perth city skyline were mentioned in [101]. The achievability of reasonable residential development on the subject lot without imposing the degree of view-obstruction manifested by the subject development, together with the acknowledged iconic value of the skyline views, would appear to be the basis for the Tribunal’s position on the ***Warden’s*** ‘second question’ that it was appropriate to maintain the views.

The Tribunal found that the subject development would not maintain those views, because it represented a further incursion into the views through the re-orientation of structures on the roof terrace, with building height not responding sympathetically to the surrounding buildings: [119].

Practical learnings from the cases

Drawing together the learnings from ***Attree***, ***Ionic*** and other cases, it is suggested that the following practical guidance is applicable.

- There should be expert depiction of what are the views that are currently enjoyed by affected properties.
- There should be expert modelling of what the impact on views would be. This ideally requires the establishment of a three-dimensional model in space.
- In relation to (1) and (2), depictions or modelling should:
 - identify for each depiction/model from what location (e.g. specific room) the view is seen;
 - depict/model views from all material view sources, e.g. if a view is impacted from one part of a living room but maintained from another part of the living room, depiction/modelling should disclose that;

- depiction/modelling should state whether it is from a standing or a seated position.
- It is desirable to have expert modelling demonstrating whether it is the case that any reasonable single-house residential option on the development site, would have impacts on the views broadly equivalent to the impacts created by the specific proposed development. If it would be easy to design a single house which preserves neighbours' views and still delivers the main expectations that a proponent would reasonably expect from the development site, then the decision-maker is more likely to insist on maintenance of access to views for neighbours. On the other hand, if most reasonable design options would result in equivalent loss of views, the decision-maker will be less inclined to protect views.
- There should be expert assessment as to what the objectively-valued aspects of the existing views are – this is a qualitative question concerning things like whether iconic views are included; whether water or city skyline views are included; to what extent the view is already partially-obstructed. Assessments which identify the qualitative aspects will receive more weight than assessments which merely attempt to 'grade' views on a scale.
- Planning experts can be well-qualified to give the evidence required on these aspects – it is not essential to have a specialist views expert – indeed, the qualitative assessment of views as a discipline in its own right is sometimes based on principles that are not entirely in line with relevant WA R-Codes design principles. Therefore if engaging a view impact specialist on this qualitative aspect, ensure that the expert engages with the R-Codes design principles.
- Keep in mind that 'maintenance of access to views' does not mean that no degree of impact on views can be tolerated.
- On the other hand, neither does 'maintenance of access to views' mean that as long as *some* degree of access to views is maintained, the development should be considered acceptable.
- What is an acceptable or unacceptable impact is a matter of fact, degree and expert assessment.
- A development which would cause a significant discontinuity to an existing panoramic view may well be found to be unacceptable.
- Views from living areas will tend to attract greater protection than views from bedrooms.
- Views from a standing position will more readily be protected than views from a seated position.

Conclusion

It is not uncommon for planners and associated professionals to approach the question of impact on views from the mindset that 'there is no property in a view'. Whilst that is legally-correct, it is a mindset that can skew assessments away from properly considering the R-Codes qualitative design principles associated with maintenance of views. These come into play when a development exceeds the R-Codes' deemed-to-comply heights. This article has overviewed some of the conceptual and practical aspects of view impact assessments, which are of renewed importance in light of single house R-Codes decisions having been vested exclusively at officer level in Western Australia.



The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For any comments or questions on this article please contact Peter Wittkuhn by telephone on 08 9383 3133 or by email pwittkuhn@mcleods.com.au.

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