

Tree canopy and deep soil area requirements in Western Australia

By Peter Wittkuhn

Introduction

Achieving a greener future is an organisation-wide endeavour for local governments. One new and significant tool in Western Australia is the inclusion of 'Tree canopy and deep soil area' provisions in the May 2019 edition of the WA R-Codes. Provisions along these lines can be found in the planning instruments of some other jurisdictions already.

The WA State Administrative Tribunal has jurisdiction to deal with a wide range of appeals against administrative decisions, by State agencies and local government under various laws. One particular jurisdiction is the jurisdiction to determine appeals against refusals of development approvals under local planning schemes. Those decisions are made either by the local government or by a Development Assessment Panel.

Kemstone Investments and City of Joondalup [2020] WASAT 115 is a decision of the Tribunal on an appeal against a refusal of development approval by the Council of the City of Joondalup. The proposed development comprised of six multiple dwellings.

The Tribunal upheld the Council's refusal.

A key question in the appeal was the 'Tree canopy and deep soil areas' provisions of the *Residential Design Codes (R-Codes)*. **Kemstone** is the first decision of the Tribunal to grapple with these new (to WA) provisions.

Statutory framework

The local planning scheme in question contained a clause that provided that the R-Codes were to be read as part of the Scheme.

The R-Codes have evolved in their various editions over the years – the current version has applied since it was gazetted on 24 May 2019. The 2019 version takes on a range of new design elements including, significantly:

'Tree canopy and deep soil areas'.

The **Kemstone** case concerned a split coded site: R20/40. The R-Codes Volume 2 applied.

The R-Codes prior to October 2002 were primarily based on specific metrics – heights, setbacks etc – with discretionary powers to allow relaxation if good cause was shown.

The R-Codes in their various editions since October 2002 have involved broader and more qualitative concepts that have variously been referred to over the years as 'Performance Criteria', 'Design Principles' or 'Element Objectives'. There have also been 'deemed-to-comply' provisions mainly based around specific metrics – but the R-Codes encourage alternative performance solutions to achieve the broader, more qualitative standards.

Volume 2 of May 2019 doesn't quite embrace the deemed-to-comply model. As well as the broader, qualitative 'Element Objectives', the volume has 'Acceptable Outcomes', but it explains these 'Acceptable Outcomes' as follows:

'Performance-based policy

This is a performance-based policy. Applications for development approval need to demonstrate that the design achieves the objectives of each design element. While addressing *Acceptable Outcomes* is likely to achieve the Objectives, they *are not a deemed-to-comply pathway* and the proposal will be assessed in context of the entire design solution to ensure the Objectives are achieved. Proposals may also satisfy the Objectives via alternative means or solutions.'

Priming discussion before considering *Kemstone*

The R-Codes' Element Objectives for 'Tree canopy and deep soil areas' might be summarised as seeking to achieve the following:

- To retain trees;
- To improve/offset reduction of trees;
- To provide deep soil areas.

But it is not as simple as that.

For example, the obligation to retain trees is not absolute – it is expressed in terms of '*site planning that maximises retention ...*'. The Objective takes a recognised discipline – site planning – and tells us something that that discipline is now expected to 'maximise'. It is suggested that, by making *site planning* the focus of the Objective, it takes as part of its frame of reference the body of principles, practices and conventions that is implicit in that recognised discipline, and says that, to the extent that retention of existing trees is able to be accommodated *for this site* within those principles, practices and conventions, then retention of existing trees is to be observed to the maximum extent possible.

But where there is an existing healthy and appropriate tree that is right in the middle of a development site, and there is no way on any mainstream site planning principle, practice or convention that the tree will be capable of being retained, then it is suggested that, the Objective would not be interpreted as requiring the tree's protection.

With regard to the second Objective, IMPROVE/OFFSET, the question arises as to its relationship with the first Objective, ie, the Retention Objective. Can a developer be expected both to retain *and* to improve? Or to retain but also offset? Or to improve *and* offset? And in the second Objective, is the comparison with the pre-development condition applicable only to offsetting, or also to improving?

And what do we make of the rather question-begging adjective 'adequate' that is applicable both to 'improve' and 'offset'?

One person's idea of what is 'adequate' may differ from another's. An interesting observation about the second Objective is the reference to 'long term' improvement – with the words 'long term' actually parenthesised as if to underscore that any obligation to improve tree canopy need not be achieved instantaneously as part of the establishment of the development. A question arises to what extent would this implication represent a true and faithful interpretation of the Objective.

Another intriguing question is: 'is a developer whose site has little or no pre-development tree canopy, "better off" than a developer whose site has a lot of pre-development tree canopy?' I mean 'better off' in this context, in the sense of 'subject to a less demanding requirement'.

Are the Objectives likely to be interpreted as focused on achieving a minimum conventional standard of tree canopy for all new developments? Or as maintaining the level of tree canopy as much as reasonably possible for sites that are well-treed in their pre-development state, and encouragement given for bare blocks to make *some* net improvements over the long term?

The third and last Objective is in a sense a subsidiary Objective to the first two – deep soil areas are necessary because they sub-serve the Retention, Improvement or Offsetting Objectives.

Another thing to note is the express contemplation that we will see more and more incorporation of means of growing trees on infrastructure *built into* the building.

In **Kemstone** each of these Objectives was under consideration.

Retention objective in Kemstone

This concerned an existing **mature** site cypress tree. The Tribunal found that 'retention of the cypress tree was never seriously contemplated by the applicant': [40]. There was also a finding that there was 'insufficient justification provided' for the removal of the cypress: [41]. Nevertheless the Tribunal found that it was unnecessary to consider this issue further, because of conclusions reached on other Objectives: [41].

There are a couple of intriguing questions:

- How 'inevitable' was it that the tree would need to be removed to accommodate any significant multiple dwelling development?
- In finding 'insufficient justification' for the removal, was the Tribunal influenced by the idea that, with some modification of the development, the cypress should have been capable of being retained?

Improve/offset objective in Kemstone

The applicant relied on 'Acceptable Outcomes'. The Acceptable Outcomes draw in tables which establish concepts of:

- Large trees;
- Medium trees;
- Small trees.

– and provide various options for different combinations of these according to site area.

By reference to the requirements of those tables, the applicant proposed two 'medium' trees and four 'small' trees: [42]. This seems to have complied with the 'improve/offset' Objective.

Deep soil area objective in Kemstone

The applicant contended that it had complied with, and had in fact exceeded, the Acceptable Outcomes as to deep soil areas.

The Tribunal held that the development did *not* comply with Acceptable Outcomes. The Tribunal referred in particular to Table 3.3(b), which includes columns headed 'Required DSA per tree (m²)' and 'Recommended minimum DSA width (m)'.

The Tribunal considered that these two metrics were relevant to the adequacy of DSAs. The main DSAs proposed in **Kemstone** were triangular areas.

From the development plans published on the local government's website it can be noted that there were areas proposed as deep soil areas which were basically right-angle triangles at two corners of the irregularly-shaped lot. At their widest points, they were wider than 3 metres, but a point would be reached along the triangle where the width dipped below 3 metres. The areas of the right-angled triangles where the width was less than 3 metres, were excluded from by the Tribunal from consideration. On that basis, the Tribunal calculated the DSA as approximately 21.88m² (see [48]) whereas the applicant had calculated it at 43m² by not regarding three metres as a constraint. The required area for an 'Acceptable Outcome' was 29m². The Tribunal Member's critical finding was:

'61 I find that the DSAs are unsatisfactory and do not meet O 3.3.3. They are unsatisfactory because they are 'squeezed' and are symptomatic of my overarching concern with the Proposed Development in that it simply asks too much of the Land (as it sits within its town planning context) in terms of proposed built form. While satisfying the requirements of table 3.3b cannot be applied as a mandatory standard, there should nevertheless be some cogent reasons put forward to provide a level of assurance that the relevant element objectives will still be achieved.'

Conclusions

In a case concerning an irregularly shaped site where proposed deep soil areas were triangular in shape, the WA State Administrative Tribunal in **Kemstone** only had regard to the portions of the triangular areas that satisfied the minimum width. The Tribunal's consideration of the Element Objectives, as distinct from the Acceptable Outcomes, was quite limited on the matter of deep soil areas. This may be in part because the applicant's case was simply that the Acceptable Outcomes requirement was satisfied. However, the Element Objective was in any event expressed as '... deep soil areas ... with sufficient area and volume to sustain healthy plant and tree growth'. The area and width metrics incorporated by the Acceptable Outcomes provisions are almost inevitably going to be relevant even to an ostensibly more qualitative test in the form of Element Objectives.

The Tribunal decision offers somewhat less insight into the 'retention' and 'improve/offset' objectives. The improve/offset objective was satisfied by the 'Acceptable Outcomes' route. The Tribunal's discussion of the 'retention' objective ended up



being 'obiter dicta' - not binding because the applicant failed on other grounds. Nevertheless, what we can see from the discussion of retention is that the Tribunal is likely to want to see that some real and genuine effort has been made in the site planning to retain healthy and approximate trees, at least if doing so would be within the reasonable compass of conventional, enlightened design principles.

Nevertheless, many questions remain for future elucidation, such as the interrelationship between retention, improvement and offsetting; whether the pre-development tree-state of *the specific site* is the main reference point, or alternatively a more universal standard.

A key message, however, is that the Tribunal will not fail to spot a development application that is overdeveloped for its site and demands too much from the land. A likely indicator of overdevelopment of a site, will be a heavily-compromised attempt at achieving tree canopy which manifests as a design afterthought.

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

Liability limited by a scheme approved under Professional Standards Legislation