[2020] WASAT 105

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	STRATA TITLES ACT 1985 (WA)
CITATION	**:**	COLEMAN and THE OWNERS OF PEACE STREET COMMUNITY (SURVEY-STRATA SCHEME 65005) [2020] WASAT 105
MEMBER	**:**	JUDGE D PARRY, DEPUTY PRESIDENT MS R PETRUCCI, MEMBER
HEARD	**:**	3 JULY 2020 FURTHER SUBMISSIONS FILED ON 7 AND 9 JULY 2020
DELIVERED	**:**	7 SEPTEMBER 2020
FILE NO/S	**:**	CC 825 of 2019
BETWEEN	**:**	JOANNE SAMANTHA COLEMAN Applicant AND THE OWNERS OF PEACE STREET COMMUNITY (SURVEY-STRATA SCHEME 65005) First Respondent LOUISE MCNAMARA Second Respondent CHRISTINE CAMILLERI Third Respondent CAROLENA GRAYSON Fourth Respondent ORY ZAIDENVORM Fifth Respondent

LINDA SCOTTI
Sixth Respondent

ELLEN FRYAR
Seventh Respondent

TROY DOWLING
Eighth Respondent

KATHY MARTIN
Ninth Respondent

Catchwords:

Strata Titles Act 1985 (WA) as it was prior to 1 May 2020 - Survey-strata scheme - Strata by-laws - Common property - Exclusive use of common property - Owner of lot with benefit of exclusive use by-law sought to make development application for physical development and change of use in exclusive use area - Development application signed by owner of lot with benefit of exclusive use by-law - Planning consent authority required owner's consent under cl 62(1)(b) of the deemed provisions in local planning schemes in Sch 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015* (WA) from strata company to enable development application to be made - Whether declaration should be made under s 91 of the *State Administrative Tribunal Act 2004* (WA) that strata company has or is deemed to have given owner's consent - Whether any proprietor of a lot in a strata scheme can give owner's consent for lodgement of a development application in relation to development of common property - Whether Tribunal has power to make and, if so, should make order under s 83(1) of the *Strata Titles Act 1985* (WA) for strata company to give owner's consent - Proper interpretation of exclusive use by-law - Words & phrases: 'develop', 'use'

Legislation:

Environmental Planning and Assessment Act 1979 (NSW), s 4(1) ('owner'), s 77(1)(a), s 77(1)(b)
Interpretation Act 1984 (WA), s 56(1)
Local Government Act 1919 (NSW), s 4 ('owner')

Planning and Development (Local Planning Schemes) Regulations 2015 (WA), Sch 2 (deemed provisions), cl 1 ('owner'), cl 62, cl 62(1), cl 62(1)(b), cl 62(2), cl 62(2)(a), cl 62(2)(b)
Planning and Development Act 2005 (WA), s 4(1) ('development')
State Administrative Tribunal Act 2004 (WA), s 5, s 15(1), s 37(1), s 37(3), s 38(1), s 91, s 91(1), s 91(2), s 91(5)
Strata Schemes Development Act 2015 (NSW), s 24(2)(a), s 24(3)
Strata Titles Act 1973 (NSW), s 20
Strata Titles Act 1985 (WA) (prior to 1 May 2020), s 3(1) ('common property', 'strata company', 'survey-strata scheme'), s 3AC, s 3C, s 3CA, s 4, s 6, s 6(1), s 6(2), s 17(1), s 17(2), s 35, s 35(1)(a), s 35(1)(b), s 35(1)(c), s 42, s 42(1)(c), s 42(6), s 42(8), s 48, s 48(2), s 81, s 81(1), s 81(2), s 83, s 83(1), s 83(4), s 85, s 97
Strata Titles Act 1985 (WA), s 13, Sch 5, cl 30(1)
Strata Titles Amendment Act 2018 (WA)

Result:

Order made pursuant to s 83(1) of the *Strata Titles Act 1985* (WA) (as it stood prior to 1 May 2020) requiring the first respondent, when requested by the applicant, to give owner's consent under cl 62(1)(b) of the deemed provisions in local planning schemes in Sch 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015* (WA) to enable the applicant's application for development approval dated 26 February 2019 (DA) to be made by affixing its common seal to the DA or to a fresh application for development approval for the same development as proposed in the DA

Category: B

Representation:

Counsel:

Applicant	:	Mr M Atkinson and Mr A Shaw
First Respondent	:	N/A
Second Respondent	:	In Person
Third Respondent	:	In Person
Fourth Respondent	:	In Person
Fifth Respondent	:	In Person
Sixth Respondent	:	In Person
Seventh Respondent	:	In Person
Eighth Respondent	:	In Person

Ninth Respondent	:	In Person

Solicitors:

Applicant	:	Atkinson Legal
First Respondent	:	N/A
Second Respondent	:	N/A
Third Respondent	:	N/A
Fourth Respondent	:	N/A
Fifth Respondent	:	N/A
Sixth Respondent	:	N/A
Seventh Respondent	:	N/A
Eighth Respondent	:	N/A
Ninth Respondent	:	N/A

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

Brikmakers and Shire of Chittering [2017] WASAT 26; (2017) 91 SR (WA) 1

Byrne v The Owners of Ceresa River Apartments Strata Plan 55597 [2016] WASC 153

Byrne v The Owners of Ceresa River Apartments Strata Plan 55597 [2017] WASCA 104; (2017) 51 WAR 304

Dunbar and Commissioner of Police [2007] WASAT 90; (2007) 51 SR (WA) 318

Grant and The Owners of Rosneath Farm Strata Plan 35452 [2006] WASAT 162

Jeblon Pty Ltd v North Sydney Municipal Council (1982) 48 LGRA 113

Land Surveyors Licensing Board of Western Australia and Neale [2007] WASAT 176

Paterson and The Owners of 27 Purdom Road Wembley Downs Survey-Strata Plan 30555 [2019] WASAT 40; (2019) 97 SR (WA) 91

The Owners of Del Mar Strata Plan 53989 and Dart Enterprises Pty Ltd [2020] WASAT 9; (2020) 99 SR (WA) 22

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REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 On 5 June 2019, Ms Joanne Coleman (Ms Coleman or applicant) commenced these proceedings in the Tribunal under s 83(1) of the *Strata Titles Act 1985* (WA) (ST Act). As the proceedings were commenced before the amendments to the ST Act under the *Strata Titles Amendment Act 2018* (WA) (ST Amendment Act) came into operation on 1 May 2020, the provisions of the ST Act as they were immediately prior to the amendments made by the ST Amendment Act apply to the determination of these proceedings.[1] All references to provisions of the ST Act in these reasons are to those in the ST Act immediately prior to 1 May 2020.[2]

2 These proceedings concern the proper interpretation of Sch 1 by-law 55, entitled 'Grant of Exclusive Use to Lot 8', (by-law 55)[3] of the survey-strata scheme known as 'Peace Street Community', which came into existence on the registration of survey-strata plan 65005 on 14 November 2014 (survey-strata plan) (survey-strata scheme). The survey-strata scheme is located at No. 176 Peace Street, Shadford (land), which is within the local government area of the Shire of Denmark (Shire). The survey-strata plan[4] and the 'Exclusive Use Area Plan - EU.8'[5] within the common property Lot CP19 in the survey-strata scheme (Lot CP19), to which by-law 55 applies, are reproduced as Attachments A and B, respectively, to these reasons.

3 The applicant became the owner of Lot 8 in the survey-strata scheme on 21 December 2017.

4 In these proceedings, the applicant seeks a declaration under s 91 of the *State Administrative Tribunal Act 2004* (WA) (SAT Act) or an order from the Tribunal under s 83(1) of the ST Act as follows:[6]

> (1) A declaration that the [first] [r]espondent has or is deemed to have approved the [a]pplicant's application for development approval to the [Shire] dated 26 February 2019 in respect of the exclusive use area marked 'EU.8' the subject of [Sch] 1 by-law 55; or

[1] Clause 30(1) of Sch 5 to the ST Act as amended by the ST Amendment Act.
[2] Other than in footnotes referring to the ST Act as amended by the ST Amendment Act.
[3] By-law 55 is set out at [36] below.
[4] Applicant's supporting documents (Exhibit 3) pages 3-6.
[5] Applicant's supporting documents (Exhibit 3) page 46.
[6] Application to the Tribunal dated 2 June 2019 (Exhibit 1) as amended in the applicant's minute of proposed orders dated 24 June 2019 [3] (Exhibit 2).

> (2) Alternatively, an order that the [first] [r]espondent approve the [a]pplicant's application for development approval to the [Shire] dated 26 February 2019 in respect of the exclusive use area marked 'EU.8' the subject of [Sch] 1 by-law 55; and
>
> (3) In either event an order that the [first] [r]espondent evidence such approval by affixing its common seal to the application for development approval and do all things necessary to enable the application for development approval to proceed.

5 The applicant contends that her application to the Tribunal is:[7]

> … about no more than a procedural, mechanical step of putting the common seal of the strata company on a development approval application, to give effect to an existing exclusive use by-law[.]

6 The first respondent in these proceedings is the strata company of The Owners of Peace Street Community (Survey-Strata Scheme 65005) (strata company). The strata company did not actively participate in the proceedings and, in its response filed with the Tribunal on 6 September 2019, stated that it does not take a position in relation to the application.[8]

7 The other respondents in these proceedings are:

- Ms Louise McNamara who owns Lot 1 in the survey-strata scheme (Ms McNamara or second respondent);
- Ms Christine Camilleri who owns Lots 2 and 3 in the survey-strata scheme (Ms Camilleri or third respondent);
- Ms Carolena Grayson who owns Lot 5 in the survey-strata scheme (Ms Grayson or fourth respondent);
- Mr Ory Zaidenvorm who owns Lot 6 in the survey-strata scheme (Mr Zaidenvorm or fifth respondent);
- Ms Linda Scotti who owns Lot 7 in the survey-strata scheme (Ms Scotti or sixth respondent);

[7] Exhibit 10 [1].
[8] Exhibit 8.

- Ms Ellen Fryar who owns Lots 11 and 12 in the survey-strata scheme (Ms Fryar or seventh respondent);
- Mr Troy Dowling who is a joint owner of Lot 16 in the survey-strata scheme (Mr Dowling or eighth respondent); and
- Ms Kathy Martin who is the other joint owner of Lot 16 in the survey-strata scheme (Ms Martin or ninth respondent).

8 The second to ninth respondents (together, 2nd to 9th respondents) were joined as respondents to the proceedings by the Tribunal on 8 August 2019, pursuant to s 38(1) of the SAT Act.

9 The 2nd to 9th respondents oppose Ms Coleman's application. They urge the Tribunal to dismiss the application on the basis that the Tribunal has no authority to make the order sought by the applicant or alternatively on the merits.

10 Ms Coleman's application falls within the Tribunal's original jurisdiction under s 15(1) of the SAT Act.

11 Under s 91(2) of the SAT Act, the Tribunal's power to make a declaration under s 91(1) of the SAT Act is exercisable only by a judicial member. For the reasons given below, Deputy President Judge Parry has determined not make a declaration under s 91 of the SAT Act. However, for the reasons also given below, we have determined that the Tribunal has power and that it is appropriate to make an order under s 83(1) of the ST Act broadly along the lines of, and not differing in substance from, orders 2 and 3 sought by Ms Coleman.[9]

Procedural history and evidence

12 Ms Coleman and Mr David D'Orazio, a town planner, provided witness statements which were filed and relied on by the applicant. Mr D'Orazio has practised as a town planner since October 2016 and is employed by the consultancy Formscape (Formscape).

13 The 2nd to 9th respondents did not call any witnesses to give evidence, although they relied on statutory declarations by Ms Fryar,

[9] See [102] below.

Ms Scotti and Mr Zaidenvorm, each dated 5 September 2019, as well as other documents. The 2nd to 9th respondents informed the Tribunal that they did not wish to cross-examine either of the applicant's witnesses.[10] On that basis, the Tribunal listed the matter for final hearing on 3 July 2020 'to allow the parties to make brief final submissions and to allow the Tribunal to make any enquiries of the parties if it wishes to do so'.[11]

14 In accordance with the Tribunal's usual practice in matters of this nature, the hearing was conducted on the basis that all of the documents filed with the Tribunal would be regarded as being in evidence,[12] subject to any objection. There was no objection to the admission of any of the documents into evidence. At the hearing, the Tribunal marked the following documents, to which we have had regard for the purpose of our determination in these proceedings, as exhibits:[13]

- application dated 2 June 2019 and attachments together with the declaration of service and s 77B certificate (Exhibit 1);
- applicant's minute of proposed orders and attached amended grounds dated 24 June 2019 (Exhibit 2);
- applicant's supporting documents dated 24 June 2019 (Exhibit 3);
- applicant's second bundle of documents dated 30 October 2019 (Exhibit 4);
- applicant's third bundle of documents dated 16 March 2020 (Exhibit 5);
- witness statement of Ms Coleman dated 20 April 2020 (Exhibit 6);
- witness statement of Mr D'Orazio dated 21 April 2020 (Exhibit 7);

[10] Exhibit 13.
[11] Order 1 made on 2 June 2020.
[12] Although forming part of 'exhibits', the parties' contentions and submissions in Exhibits 1, 2, 8, 10, 11, 12 and 13 are taken to be submissions, rather than evidence.
[13] Although forming part of 'exhibits', the parties' contentions and submissions in Exhibits 1, 2, 8, 10, 11, 12 and 13 are taken to be submissions, rather than evidence.

- first respondent's response dated 6 September 2019 (Exhibit 8);
- 2nd to 9th respondents' supporting documents dated 6 September 2019 (Exhibit 9);
- applicant's reply to responses filed by respondents pursuant to orders made on 4 October 2019 dated 30 October 2019 (Exhibit 10);
- 2nd to 9th respondents' minute of proposed orders dated 31 January 2020 (Exhibit 11);
- applicant's responsive submissions to 2nd to 9th respondents' amended grounds [pursuant to] order 2 [of the] orders made [on] 14 February 2020 dated 27 February 2020 (Exhibit 12);
- letter from Ms Fryar on behalf of the 2nd to 9th respondents dated 24 March 2020 (Exhibit 13); and
- corrected minutes of the Annual General Meeting (AGM) of the survey-strata scheme held on 30 March 2019 (corrected at the AGM held on 30 March 2020) (Exhibit 14).

15 At the conclusion of the hearing on 3 July 2020, the Tribunal, by order, allowed the applicant to file brief written submissions in relation to the corrected AGM minutes in Exhibit 14 and allowed the respondents to file brief submissions in reply.[14] The applicant filed written submissions on 7 July 2020 in which she does not object to the minutes being admitted into evidence, but submits that the changes made to the minutes at the following AGM on 30 March 2020 are 'not an accurate, or more accurate, record of what occurred at the 30 March 2019 AGM'.[15] At the hearing, Ms Fryar stated on behalf of the 2nd to 9th respondents that the corrected minutes do not have any particular relevance other than they set out the 2nd to 9th respondent's understanding as well as the 'owners in the company as a whole['s]' understanding of what occurred at the AGM on 30 March 2019.[16] Ms Fryar said that the corrected minutes make no changes to any

[14] Order 2 made on 3 July 2020.
[15] Applicant's submissions regarding AGM minutes ([pursuant to] order 2 of the orders made on 3 July 2020) [2].
[16] ts 45, 3 July 2020.

decision made at the AGM on 30 March 2019 and do not affect 'the pivotal issues upon which the case hinges'.[17] This understanding is also reflected in Mr Zaidenvorm's and Ms Fryar's joint response to the applicant's submissions filed with the Tribunal on 9 July 2020.

16 We find the corrected minutes of the AGM on 30 March 2019 to be relevant in that a motion (agenda item 16) was put to the meeting by Ms Coleman that 'the strata company confirm approval is granted to the owner of Lot 8 in accordance with [Sch 1] By-law 55 for the proposed alterations of the existing building and water storage as shown in Attachment "A" and being within the area of common property for the exclusive use of Lot 8' and 'the strata company be authorised to affix its seal to any documents or provide such other evidence of approval as required to facilitate the proposed alternations',[18] but was not passed.

17 On 10 July 2020, the Tribunal reserved its decision.

Issues for determination

18 The following three principal issues arise for determination in these proceedings:

(1) Should the Tribunal make a declaration under s 91 of the SAT Act that the strata company has, or is deemed to have, given owner's consent under cl 62(1)(b) of the deemed provisions in local planning schemes in Sch 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015* (WA) (LPS Regs) (deemed provisions) to enable the applicant's application for development approval dated 26 February 2019 for the '[p]roposed conversion of existing Outbuilding (Herb Drying Facility Shed) into a single house (Two Storey Dwelling)' (DA) to be made?

(2) Does the Tribunal have power under s 83(1) of the ST Act to order the strata company to give owner's consent under cl 62(1)(b) of the deemed provisions to enable the DA to be made?

(3) If the answer to issue (2) is 'yes', having regard to the proper interpretation of by-law 55, should the Tribunal

[17] ts 44-45, 3 July 2020.
[18] Corrected minutes of the AGM held on 30 March 2019 attached to the minutes of the AGM held on 30 March 2020 on the letterhead of Merrifield Real Estate (Exhibit 14) page 4.

order the strata company to give owner's consent under cl 62(1)(b) of the deemed provisions to enable the DA to be made by affixing its common seal to the DA or to a fresh application for development approval for the same development as proposed in the DA?

19 We will now discuss the legal framework relevant to these proceedings by reference to the ST Act, the deemed provisions and the SAT Act. Next, we will set out relevant provisions of the ST Act relating to exclusive use by-laws and the terms of by-law 55, and discuss the principles that we will apply in the interpretation of by-law 55. We will then make relevant findings of fact and set out the parties' main contentions. Finally, we will address each of the three principal issues for determination in turn.

Legal framework

ST Act

20 A survey-strata scheme is the manner of division of a parcel of land into lots, or lots and common property, under a survey-strata plan, and the manner of the allocation of unit entitlements among the lots, and the rights and obligations as conferred or authorised by the ST Act, between themselves, of proprietors, others having proprietary interests in, or the occupants of, the lots and the strata company.[19] A strata company, relevantly for a survey-strata scheme, is a body corporate constituted under s 32 of the ST Act by the proprietors of the lots upon the registration of the survey-strata scheme. The common property of a survey-strata scheme relevantly comprises any lot or lots shown on the survey-strata plan to be common property.[20]

21 In Western Australia, common property is 'held by the proprietors [in a survey-strata scheme] as tenants in common in shares proportional to the unit entitlements of their respective lots'.[21] In contrast, in New South Wales, common property 'vests in the owners corporation of the strata scheme' (being the equivalent of the strata company in Western Australia).[22] In Western Australia, the Registrar of Titles certifies in the certificate of title to a lot that the proprietor of the lot holds 'the share in the common property appurtenant to the lot in accordance with the unit entitlement of that lot as stated in the schedule

[19] Definition of 'survey-strata scheme' in s 3(1) of the ST Act.
[20] Definition of 'common property' in s 3(1) of the ST Act.
[21] Section 17(1) of the ST Act. See now s 13 of the ST Act as amended by the ST Amendment Act.
[22] Section 24(2)(a) of the *Strata Schemes Development Act 2015* (NSW) (SSD Act).

of unit entitlement registered in respect of the scheme'.[23] In contrast, in New South Wales, the Registrar-General is required to 'create a folio for the estate or interest of the owners corporation in the common property'.[24] The contrast between the ownership of common property by the proprietors of the lots (as tenants in common) in Western Australia and by the equivalent of the strata company in New South Wales underscores the applicant's argument made in these proceedings in the context of issue 1 that, as one of the co-owners of the common property in the survey-strata scheme, including Lot CP19, she can sign the DA and thereby herself give owner's consent under cl 62(1)(b) of the deemed provisions to the making of the DA.[25]

22 Section 35(1) of the ST Act sets out duties of the strata company. Relevantly, s 35(1)(a), (b) and (c) of the ST Act states as follows:

> (1) A strata company shall —
>
> (a) enforce the by-laws; and
>
> (b) control and manage the common property for the benefit of all the proprietors; and
>
> (c) keep in good and serviceable repair, properly maintain and, where necessary, renew and replace —
>
> (i) the common property, including the fittings, fixtures and lifts used in connection with the common property; and
>
> (ii) any personal property vested in the strata company,
>
> and to do so whether damage or deterioration arises from fair wear and tear, inherent defect or any other cause[.]

23 Section 83(1) of the ST Act sets out the general powers of the Tribunal to make orders in proceedings commenced under that enabling Act. Section 83 of the ST Act provides, in part, as follows:

> (1) The State Administrative Tribunal may, pursuant to an application of a strata company, an administrator, a proprietor, a person having an estate or interest in a lot or an occupier or other resident of a lot, in respect of a scheme, make an order for

[23] Section 17(2) of the ST Act. See now s 13 of the ST Act as amended by the ST Amendment Act.
[24] Section 24(3) of the SSD Act.
[25] ts 15, 3 July 2020.

> the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or function conferred or imposed by this Act or the by-laws in connection with that scheme on any person entitled to make an application under this subsection or on the council or the chairman, secretary or treasurer of the strata company.
>
> …
>
> (4) Nothing in subsection (1) empowers the State Administrative Tribunal to make an order under that subsection for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or function conferred or imposed on the strata company by this Act where that power, authority, duty or function may, in accordance with any provision of this Act, only be exercised or performed pursuant to a unanimous resolution, resolution without dissent or a special resolution.
>
> …

24 Section 83(1) of the ST Act relevantly authorises the Tribunal to determine issues in dispute between the parties in the proceedings commenced by Ms Coleman, who is a 'proprietor' in the survey-strata scheme, if the order sought from the Tribunal is 'for the settlement of a dispute' and the dispute relates to 'the failure to exercise or perform … a power, authority, duty or function conferred or imposed by [the ST Act] or the by-laws in connection with [the] [survey-strata] scheme on [the strata company] …'. Importantly, under s 83(1) of the ST Act, the purpose of the Tribunal's order must be to settle a dispute about the (exercise of or) failure to exercise or perform a power, authority, duty or function by (in this case) the strata company. Also importantly, the word 'may' in s 83(1) of the ST Act indicates that the power conferred on the Tribunal under this provision 'may be exercised or not, at discretion'.[26] Therefore, in considering Ms Coleman's application, the Tribunal must determine whether there is a dispute in these proceedings about a failure by the strata company to exercise or perform a power, authority, duty or function and, if so, whether, in the exercise of discretion under s 83(1) of the ST Act, it should make an order for the settlement of the dispute.

25 We also note that s 83(4) of the ST Act precludes the Tribunal from making an order under s 83(1) of the ST Act if the power,

[26] Section 56(1) of the *Interpretation Act 1984* (WA).

authority, duty or function that a strata company has failed to exercise or perform can only be exercised or performed pursuant to a unanimous resolution, resolution without dissent or a special resolution of the proprietors of the lots in the survey-strata scheme. As we discuss below, the power, authority or function that the strata company has failed to exercise or perform in this case, namely affixing its common seal to the DA, does not require any such resolution of the proprietors.

26 Finally, s 81(1) and (2) of the ST Act state as follows in relation to orders the Tribunal may make under Div 3 of Pt VI of the ST Act, which includes s 83:

> (1) The State Administrative Tribunal may make an order sought by the applicant and an order made may be expressed in terms different from the order sought, so long as it does not differ in substance from the order sought.
>
> (2) An order made may include such ancillary or consequential provisions as the State Administrative Tribunal thinks fit.

Deemed provisions

27 Clause 62 of the deemed provisions concerns the required form of an application for development approval, including the DA. Clause 62(1) and (2) of the deemed provisions state, in relevant part, as follows:[27]

> (1) An application for development approval must be —
>
> …
>
> (b) *signed by the owner of the land on which the proposed development is to be located*[.]
>
> (2) For the purposes of subclause (1)(b), a person or body may sign an application for development approval as the owner of freehold land if the person or body is one of the following —
>
> (a) a person who is referred to in the definition of ***owner*** in respect of freehold land in clause 1;
>
> (b) a strata company that —

[27] Emphasis in cl 62(1)(b) added; emphasis otherwise original. Before 1 May 2020, cl 62(2)(b) of the deemed provisions stated as follows:

> A strata company that is authorised by a management statement registered under the *Strata Titles Act 1985* section 5C to make an application for development approval in respect of the land[.]

Nothing in this case turns on the amendment to cl 62(2)(b) of the deemed provisions.

(i) is authorised to make an application for development approval in respect of the land under scheme by-laws registered under the *Strata Titles Act 1985*;

(ii) if the land is held under a leasehold scheme, has the written consent of the owner of the leasehold scheme to make the application;

(c) a person who is authorised under another written law to make an application for development approval in respect of the land;

(d) an agent of a person referred to in paragraph (a).

28 The signature on a development application by 'the owner of the land on which the proposed development is to be located', which is required by cl 62(1)(b) of the deemed provisions, is commonly known as 'owner's consent' to the making of the development application. The giving of owner's consent to the making of a development application is a condition precedent to the lodgement of the development application with the planning consent authority. Put another way, the planning consent authority cannot consider and determine a development application unless owner's consent to the making of the development application has been given on the development application form.

29 The term 'owner', in relation to land, which is used in cl 62(1)(b) of the deemed provisions, is relevantly defined in cl 1 of the deemed provisions as follows:[28]

owner, in relation to land, means —

(a) if the land is freehold land —

(i) a person whose name is registered as a proprietor of the land; and

(ii) the State, if registered as a proprietor of the land; and

(iii) a person who holds an interest as purchaser under a contract to purchase an estate in fee simple in the land; and

[28] Original emphasis.

(iv) a person who is the holder of a freehold interest in land vested in an executor or administrator under the *Administration Act 1903* section 8[.]

SAT Act

30 Finally, in terms of the legal framework relevant to these proceedings, as the applicant seeks a declaration,[29] we turn to the power of the Tribunal to make a declaration under s 91 of the SAT Act. The Tribunal 'may make a declaration concerning any matter in a proceeding instead of any orders it could make, or in addition to any orders it makes, in the proceeding'.[30] However, the power to make a declaration is 'exercisable only by a judicial member',[31] unless the enabling Act provides otherwise.[32] In the circumstances of this case, the ST Act, being the relevant enabling Act, does not provide otherwise.

31 A declaration made under s 91 of the SAT Act is 'binding, according to its terms, on … the parties to the proceeding; or … such of them as are specified in the declaration, and not otherwise'.[33]

32 A declaration under s 91 of the SAT Act will only be made where it would serve a practical or legal purpose. For example, in ***Dunbar and Commissioner of Police*** [2007] WASAT 90; (2007) 51 SR (WA) 318,[34] an application for a declaration under s 91 of the SAT Act was refused to the applicant who wanted to 'clear his name'.[35] This was because the Tribunal found that the applicant's licence as a security guard had already expired and therefore there was no practical or legal purpose that would be served by the Tribunal making a declaration as to whether the decision to revoke the licence prior to its expiry ought not to have been made.

33 Furthermore, a declaration will not be made in proceedings where no issue exists between the parties concerning the subject matter of the declaration.[36]

---

[29] See [4] above.
[30] Section 91(1) of the SAT Act.
[31] Section 91(2) of the SAT Act.
[32] See s 5 of the SAT Act.
[33] Section 91(5) of the SAT Act.
[34] Judge Chaney DP.
[35] ***Dunbar and Commissioner of Police*** [2].
[36] ***Land Surveyors Licensing Board of Western Australia and Neale*** [2007] WASAT 176 at [69]-[70] (Judge Chaney DP, Mr E A McKinnon and Mr R Affleck S Sess MM).

Exclusive use by-laws

34 Section 42 of the ST Act enables a strata company to make by-laws that are not inconsistent with the ST Act, including what are commonly known as 'exclusive use' by-laws conferring on a proprietor of a lot 'exclusive use and enjoyment of, or special privileges in respect of, the common property or any part of it'.[37] Section 42 of the ST Act relevantly provides as follows:

> (1) A strata company may make by-laws, not inconsistent with this Act, for —
>
> (a) its corporate affairs; and
>
> (b) any matter specified in Schedule 2A; and
>
> (c) other matters relating to the management, control, use and enjoyment of the lots and any common property.
>
> …
>
> (6) Without limiting the operation of any other provision of this Act, the by-laws for the time being in force bind the strata company and the proprietors and any mortgagee in possession (whether by himself or any other person) or occupier or other resident of a lot to the same extent as if the by-laws had been signed and sealed by the strata company and each proprietor and each such mortgagee, occupier or other resident respectively and as if they contained mutual covenants to observe and perform all the provisions of the by-laws.
>
> …
>
> (8) Without limiting the generality of any other provision of this section other than subsection (1), a strata company may, with the consent in writing of the proprietor of a lot, pursuant to a resolution without dissent (or unanimous resolution, in the case of a two-lot scheme) make, under this subsection only and not otherwise, a by-law in respect of that lot conferring on that proprietor the exclusive use and enjoyment of, or special privileges in respect of, the common property or any part of it upon such terms and conditions (including the proper maintaining and keeping in a state of good and serviceable repair of the common property or that part of the common property, as the case may be, and the payment of money by that proprietor to the strata company) as may be specified in the by-law and may, pursuant to a resolution without dissent (or unanimous resolution, in the case of a two-lot scheme), make

[37] Section 42(8) of the ST Act.

> a by-law amending or repealing any by-law made under this subsection.
>
> …
>
> (11) The proprietor for the time being of a lot in respect of which a by-law referred to in subsection (8) is in force —
>
> …
>
> (b) is, unless excused by the by-law, responsible for the performance of the duty of the strata company under section 35(1)(c) in respect of the common property, or the part of the common property, to which the by-law relates.

35 As the Tribunal[38] explained in ***The Owners of Del Mar Strata Plan 53989 and Dart Enterprises Pty Ltd*** [2020] WASAT 9; (2020) 99 SR (WA) 22 (***Del Mar***) at [35], by-laws may be made which, among other things, restrict the use of lots and common property, provided that they are not inconsistent with the ST Act.[39] Section 6 of the ST Act concerns restrictions to be placed on the use to which a parcel, or part of the parcel, may be put. Section 6(1) of the ST Act requires that the area the subject of a restriction of use be delineated on the plan lodged for registration, and that specific reference be made to s 6 by an appropriate endorsement on the plan. Section 6(2) of the ST Act provides that a proprietor, occupier or other resident of any lot that is part of the parcel cannot use, or permit to be used, the restricted area in any manner that contravenes the restriction.

36 In this case, by resolution without dissent duly passed at a meeting of the strata company held on 5 January 2015, a new by-law, by-law 55, was added to the Management Statement of the strata-scheme under s 42(1)(c) and s 42(8) of the ST Act. On 7 January 2015, the common seal of the strata company was affixed to the 'notification of change of by-laws' under s 42 of the ST Act, notifying Landgate that by-law 55 had been added.[40] On 9 February 2015, by-law 55 was registered by Landgate under instrument M878074.[41] By-law 55 states as follows:[42]

> 55. **Grant of Exclusive Use to Lot 8**
>
> (1) In this by-law:

[38] Ms R Petrucci M.
[39] See s 42(1)(c) and s 42(8) of the ST Act.
[40] Applicant's supporting documents (Exhibit 3) page 44.
[41] Applicant's supporting documents (Exhibit 3) page 45.
[42] Applicant's supporting documents (Exhibit 3) page 45 (original emphasis).

> (a) ***exclusive use area*** means the area marked 'EU.8' on the exclusive use area plan; and
>
> (b) ***exclusive use area plan*** means the exclusive use area plan - EU.8 attached hereto.
>
> (2) Pursuant to section 48(2) [sic] there is conferred on the proprietor of [L]ot 8 exclusive use of the exclusive use area.
>
> (3) The proprietor of [L]ot 8 shall have full use and enjoyment of the exclusive use area to the exclusion of the proprietors, occupiers or residents of other lots in the scheme with the right to use and develop the exclusive use area as he thinks fit including, without limiting generality, to modify, remove or replace any structure erected thereon and to add any new structures thereto without requiring any further approvals from the strata company or council.
>
> (4) Subject to sub-bylaw (3), the proprietor of [L]ot 8 shall be responsible for the performance of the duty of the strata company under section 35(1)(c) in respect of the exclusive use area pursuant to section 42(11)(b).
>
> (5) The proprietor of [L]ot 8 shall reimburse to the strata company any insurance premium or portion of any insurance premium payable by the strata company solely attributable to the erection of any building on the exclusive use area or any activity carried on within the exclusive use area.
>
> (6) The grant of exclusive use conferred by this by-law shall continue and enure as appurtenant to, and for the benefit of, [L]ot 8 until this by-law is repealed or the scheme is terminated, whichever occurs first.

37 The 'exclusive use area plan' referred to in by-law 55, which is entitled 'Exclusive Use Area Plan - EU.8', is reproduced as Attachment B to these reasons. By-law 55 has not been repealed or amended.

Principles applicable to the proper interpretation of strata by-laws

38 Before referring to the factual background and the contentions of the parties, it is useful to set out the principles applicable to the proper interpretation of strata by-laws as enunciated by the Supreme Court of Western Australia[43] in ***Byrne v The Owners of Ceresa River***

[43] Pritchard J.

Apartments Strata Plan 55597 [2016] WASC 153 (***First decision***) and subsequently by the Court of Appeal[44] in ***Byrne v The Owners of Ceresa River Apartments Strata Plan 55597*** [2017] WASCA 104; (2017) 51 WAR 304 (***Appeal decision***). The principles were summarised by the Tribunal in ***Del Mar*** at [46]-[48] as follows:[45]

> 46 Having considered *The Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207; (2007) 70 NSWLR 344 (*Tate*), her Honour Justice Pritchard in the *First decision* concluded at [71] that by-laws should be characterised as a statutory contract. Her Honour summarised the principles applicable to the construction of by-laws at [75] to [79] as follows (citations omitted):
>
> > 75. The ordinary principles of contractual construction should guide the construction of the By-Laws. They are that the rights and liabilities of parties under a term of a contract are determined objectively, by reference to the contract's text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose. However, in the case of the By-Laws, those principles are subject to four qualifications:
> >
> > 76. First, to the extent that their terms permit, the By-Laws should be construed so that they are not inconsistent with the ST Act (bearing in mind that a strata company has no power to make a by-law which is inconsistent with the ST Act).
> >
> > 77. Secondly, in interpreting a term of a contract which is ambiguous, it is possible in some circumstances to refer to objective extrinsic material to ascertain the meaning of the term. However, in the context of the By-Laws, caution should be exercised in going beyond the language of the By-Laws and their statutory context to ascertain their meaning, and a tight rein should be kept on having recourse to surrounding circumstances. (That reflects the fact that although (as I noted at [59] above) the by-laws of a strata company may be inspected by third persons, such persons would ordinarily have no access to the circumstances surrounding the making of those by-laws.)

[44] Murphy and Mitchell JJA and Beech J.
[45] Original emphasis.

78. Thirdly, the statutory context of the by-laws of a strata company should be taken into account by the Court in construing the By-Laws. That statutory context includes the fact that the function of the By-Laws is to regulate the rights and liabilities of the Respondent, the proprietors of the lots in the Complex and certain other parties with rights or interests in the lots and the common property in the Complex.

79. Fourthly, in ascertaining the meaning of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood its terms to mean. That will involve a consideration of the language used, the circumstances addressed by the contract, and the commercial purpose or objects to be secured by the contract. Unless a contrary intention is indicated, the court will approach the task on the assumption that the parties intended to produce a commercial result, so that the contract should be construed so as to avoid it making commercial nonsense or working a commercial inconvenience. However, in the case of the By-Laws, there is no basis for saying that they should be interpreted as a business document, with the intention that they be given business efficacy. That does not mean that the By-Laws may not have a commercial purpose, and be interpreted accordingly, but due regard must be paid to the statutory context in so doing.

47 In the *Appeal decision*, their Honours Murphy, Mitchell and Beech JJA [sic] observed at [139] that the parties in the appeal proceeding approached the proper construction of by-law 16 on the basis that the by-laws were a statutory contract to which, in general terms, the principles referred to in *Tate* applied. However, having stated that they considered and disposed of the appeal on that basis, their Honours went on to say at [139] that, in point of principle, it might be thought that the appeal before them concerned the proper construction of the management statement, lodged and registered with the Ceresa River strata plan and which had been amended since registration, and therefore the correct approach to construction of the management statement might be along the following lines:

(a) is to be construed objectively, by reference to what a reasonable person would understand the language of the instrument to mean;

(b) it is to be construed in the context of the registered strata plan;

> (c) it is to be construed in the relevant statutory context, being, first and foremost, the *Strata Titles Act*;
>
> (d) as the Management Statement is on the Torrens Register, unamended, rules of evidence assisting the construction of contracts inter partes, of a nature explained by *Codelfa Constructions Pty Ltd v State Rail Authority (NSW)* do not apply to its construction: *Westfield Management Ltd v Perpetual Trustee Co Ltd*; and
>
> (e) insofar as there are constructional choices properly open, a construction should be preferred which is consistent with the *Strata Titles Act*: s 42(1) of the *Strata Titles Act*.
>
> 48 Their Honours concluded at [140] that if the above approach to construction is the correct approach, the result of the appeal would have been the same. The approaches to construction of a management statement or of by-laws as set out in the *First decision* and the *Appeal decision* although different in part, are not inconsistent.

39 As the Tribunal said in ***Del Mar*** at [48], the approaches to construction of a management statement or by-laws as set out in the ***First decision*** and the ***Appeal decision***, although different in part, are not inconsistent. We will apply these principles in interpreting the meaning of by-law 55.

40 We turn, next, to set out the relevant facts.

Factual background

41 As noted earlier, Ms Coleman and Mr D'Orazio each provided a witness statement for the applicant. Neither witness was required for cross-examination. In making closing submissions on her own behalf and on behalf of the 2nd to 9th respondents generally, Ms Fryar said that certain facts in the witness statements were contradicted in the 2nd to 9th respondents' supporting documents.[46] However, as Ms Coleman and Mr D'Orazio were not cross-examined, and as Mr D'Orazio has relevant qualifications and experience as a town planner, we accept their evidence. We also note that, having regard to the narrow compass of the matter before the Tribunal in these proceedings, the key facts are quite limited and not in any real dispute.

[46] ts 24, 3 July 2020.

42 Having considered all the evidence before us, we make the following findings of fact which are relevant to the issues to be determined by the Tribunal in these proceedings:

- Mr David Coleman (Mr Coleman), the applicant's father, owned the land prior to registration of the survey-strata plan on 14 November 2014.

- On 23 December 1996, the Shire granted conditional development approval (then known as 'planning consent') to Mr Coleman for 'rural industry (herb drying shed)' on the land.[47] The herb drying shed was subsequently constructed by Mr Coleman and became known as 'the Dryer'.

- On 15 October 2014, the Shire granted conditional development approval to Mr Coleman for 'Retrospective Application: Existing Residential Development (Dwellings, Outbuildings and Water Supply Infrastructure) & Additions/Alterations to Existing Dwellings and Change of Use from "Outbuilding: Herb Drying Facility Shed" to "Dwelling"' in relation to the Dryer.[48] However, as the approved development had not been 'substantially completed' within two years, the development approval lapsed on 15 October 2016.[49]

- On 14 November 2014, the strata company came into existence on the registration of the survey-strata scheme and, since that time, the Dryer has been comprised within Lot CP19 in the survey-strata scheme.

- The by-laws of the survey-strata scheme are set out in the Management Statement registered with Landgate by notification on 24 November 2014 (instrument M834658) and amended by notifications on 7 January 2015 (instrument M878074) (the addition of by-law 55), 7 November 2017 (instrument N758648) and 25 October 2018 (instrument O015512).

[47] Applicant's third bundle of documents (Exhibit 5) page 3.
[48] Applicant's supporting documents (Exhibit 3) page 63.
[49] Applicant's supporting documents (Exhibit 3) page 64.

- Mr Coleman passed away on 9 May 2015 and the applicant became the registered proprietor of Lot 8 in the survey-strata scheme on 21 December 2017.

- On 27 September 2018, Ms Coleman signed a development application for the '[p]roposed conversion of existing Outbuilding (Herb Drying Facility Shed) [that is, the Dryer] into single house (Two Storey Dwelling)'[50] (2018 DA) and instructed Formscape to lodge the 2018 DA with the Shire together with a planning report prepared by Mr D'Orazio dated 26 September 2018 in relation to the proposed development (Formscape report).

- Formscape subsequently lodged the 2018 DA and accompanying Formscape report with the Shire.

- On 16 October 2018, the Shire emailed Formscape stating that execution of the 2018 DA by the strata company was required to enable the application to proceed.

- On 26 February 2019, the applicant signed a fresh development application, the DA, for approval to carry out the same development as proposed in the 2018 DA, and, on 28 February 2019, she delivered the DA to a representative of the strata company, together with the 2018 DA, plans of the proposed development and the Formscape report. On 3 March 2019, the applicant emailed copies of these documents to the other proprietors of lots in the survey-strata scheme.

- At the AGM of the survey-strata scheme held on 30 March 2019, the applicant moved the following motion (agenda item 16) which had been included in the agenda for the meeting at her request (applicant's motion):[51]

  > THAT the strata company confirm approval is granted to the owner of Lot 8 in accordance with [Sch] 1 By-law 55 for the proposed alterations of the existing building and water storage as shown in Attachment "A" and being within the area of

[50] Applicant's supporting documents (Exhibit 3) page 101.
[51] Applicant's supporting documents (Exhibit 3) page 112.

> common property for the exclusive use of Lot 8. And that the strata company be authorised to affix its seal to any documents or provide such other evidence of approval as required to facilitate the proposed alterations.

- A letter from the applicant's solicitor was read out at the AGM. The strata manager asked the owners present at the AGM whether they would affix the common seal to the DA and there was discussion before the applicant's motion was voted on. The applicant's motion was not passed.
- Each of the 2nd to 9th respondents acquired their lots in the survey-strata scheme after by-law 55 was adopted and registered on the survey-strata plan.

Parties' contentions

43 The applicant contends that the meaning of by-law 55 is clear on its face and that it 'could not have been expressed in wider terms'.[52] Mr M Atkinson, who appeared with Mr A Shaw on behalf of the applicant, submits as follows:

> The right to use and develop, granted by that by-law, together with the grant of exclusive use given to the proprietor of [L]ot 8, we say, could not have been expressed in wider terms. And it's apparent, on its face, without the need for reference to any extrinsic material. The proprietor of [L]ot 8 is given full use and enjoyment of the exclusive use area, to the exclusion of others. They're also given the right to use and develop the exclusive use area as he - now she, Ms Coleman - deems fit.
>
> And in an inclusive definition, without limiting generality, that included the right to modify, remove or replace [any] structures, and to add any new structures. And all of this could be done in the final clause of subparagraph (3) of by-law 55, without requiring any further approval from the strata company or council. The quid pro quo for these rights, in effect, appears in subparagraph (4), which is that the proprietor of [L]ot 8 was determined to be responsible for the performance of the duty of the strata company, effectively, to repair and maintain the exclusive use area.
>
> Now, if you look at … subclause (5) of this by-law - the obligation was placed upon the owner of [L]ot 8 to reimburse insurance premiums that were solely attributable to the erection of any building or any activity carried on within the exclusive [use] area, and the by-law was to

[52] ts 13, 3 July 2020.

> continue for the longest possible duration, which is until the scheme was terminated or the by-law was repealed.
>
> Now, this by-law was approved by the strata company at the meeting, and the evidence of that approval was also appearing at page 44 of the applicant's first bundle [Exhibit 3], which is the notification given to Landgate of the making of the by-law. So the strata company has approved all of the matters within the compass of that by-law, we say, and without requiring any further approvals, the owner of [L]ot 8, the applicant, now, is given the right to use and develop it.[53]

44 In making closing submissions on her own behalf and on behalf of the 2nd to 9th respondents generally, Ms Fryar responded as follows:[54]

> [W]hen I hear Mr Atkinson's submissions I interpret his submissions as an attempt to request that the [T]ribunal focus on the technical aspects of each small, little piece and creates a trail of breadcrumbs that he wants the [T]ribunal to follow without looking up, and the trail of breadcrumbs leads to his interpretation. We would argue that the [T]ribunal needs to take a much broader look at the implications of ratifying this concept that you can cede all of tenants of common rights of owners in a survey strata to decide and protect their interests away in perpetuity through the action of a by-law.

45 The 2nd to 9th respondents' main contentions can be summarised as follows:

- By-law 55 is confusing and ambiguously worded.
- The development application for a change in the use of the Dryer from a commercial use to a residential use requires approval from the strata company, which has not been given.
- The Dryer is the property of the strata company, not of the applicant.
- The applicant's interpretation of by-law 55 would result in the creation of a 'de facto' lot exempt from planning legislation and inconsistent with other by-laws.

46 We will now address each of the issues identified at [18] above.

[53] ts 13-14, 3 July 2020.
[54] ts 40, 3 July 2020.

Issue 1 - Should the Tribunal make a declaration under s 91 of the SAT Act that the strata company has or is deemed to have given owner's consent under cl 62(1)(b) of the deemed provisions to enable the DA to be made?

47 The applicant recognises that the genesis of this matter is cl 62(1)(b) of the deemed provisions, because it requires that the DA be 'signed by the owner of the land on which the proposed development is to be located'.[55] Ms Fryar also recognises this and endorses the strata company's position expressed at the first directions hearing before the Tribunal that the applicant's dispute is not with the council of owners, but rather with the Shire, and that it should be the Shire appearing as respondent before the Tribunal.[56]

48 The applicant submits that the strata company has refused to act in a way which is consistent with its obligations under by-law 55. In particular, she says, the strata company has refused to acknowledge that it has, by by-law 55, already, in effect, given owner's consent to the lodgement of the DA or that she, as a co-owner of the common property in the survey-strata scheme, has effectively signed the DA as 'the owner' of Lot CP19 and has thereby herself given owner's consent.[57] Because of this, and on the basis that the 2nd to 9th respondents dispute that the necessary 'internal strata approvals' were given by the making of by-law 55,[58] the applicant submits that she requires a declaration (or an order) from the Tribunal on which she can rely for the purposes of making the DA to the Shire.[59]

49 Ms Fryar submits that the applicant is not registered as a proprietor of the land referred to as 'EU.8', which forms part of Lot CP19 on the survey-strata plan, and in relation to which the DA proposes physical development and change of use. Rather, she submits, the strata company is the registered proprietor of the land, and although the applicant, as the registered proprietor of Lot 8, is a member of the strata company, it 'is only secondarily or even tertiar[l]y as a member of the [strata] company' that the applicant could be seen to be an owner of EU.8.[60] Ms Fryar's view is that 'ownership' requires the applicant to be a registered proprietor of EU.8.[61]

[55] ts 29, 3 July 2020.
[56] ts 29-30, 3 July 2020.
[57] ts 11, 3 July 2020.
[58] ts 12, 3 July 2020.
[59] ts 11-12, 3 July 2020.
[60] ts 32, 3 July 2020.
[61] ts 32, 3 July 2020.

50 Ms Fryar's submission would be correct in New South Wales, where, as indicated earlier, common property 'vests in the owners corporation of the strata scheme',[62] but is incorrect in Western Australia. The applicant is both the registered proprietor of Lot 8 in the survey-strata scheme and also, in consequence, the owner of a proportionate share as a tenant in common in the common property of the survey-strata scheme. This is the case in Western Australia, because s 17(1) of the ST Act provides as follows:[63]

> Common property shall be held by the proprietors as tenants in common in shares proportional to the unit entitlements of their respective lots.

51 The contrast between the ownership of common property by the proprietors of lots (as tenants in common) in Western Australia and by the equivalent of the strata company in New South Wales underscores the applicant's argument that, as one of the co-owners of the common property in the survey-strata scheme, including Lot CP19, she can sign the DA and thereby herself give owner's consent under cl 62(1)(b) of the deemed provisions. The applicant submits that she is authorised to give owner's consent to the lodgement of the DA by the combined effect of:[64]

- cl 62(1)(b) of the deemed provisions, which requires that a development application be signed by 'the owner of the land' on which the proposed development is to be located;
- cl 62(2)(a) of the deemed provisions, which provides, for the purposes of cl 62(1)(b) of the deemed provisions, that 'a person … may sign an application for development approval as the owner of freehold land if the person … is … a person who is referred to in the definition of ***owner*** in respect of freehold land in [cl 1 of the deemed provisions]';[65] and
- the definition of the term 'owner', in relation to land, in cl 1 of the deemed provisions, which includes, where

[62] Section 24(2)(a) of the SSD Act.
[63] See now s 13 of the ST Act as amended by the ST Amendment Act.
[64] ts 15, 3 July 2020.
[65] Original emphasis.

> the land is freehold land, in par (a)(i), 'a person whose name is registered as *a proprietor* of the land'.[66]

52 The applicant submits that, significantly, the definition of the term 'owner', in relation to land, in cl 1 of the deemed provisions uses the expression 'a person whose name is registered as *a* proprietor of the land' and not the words *'the* proprietor'.[67] The applicant submits that if it were '*the* proprietor' of the land who is required to sign the DA, then it would be reasonable to conclude that all co-owners of the land in EU.8 (or the strata company) would have to sign the application for development approval.[68] However, the applicant submits that the deemed provisions allow 'a proprietor' (any proprietor) of land to sign an application for development approval in relation to the land and that this occurred in the present case when Ms Coleman, being 'a proprietor' of the common property in the survey-strata scheme, signed the DA.

53 The applicant refers to the decision of the Tribunal[69] in ***Brikmakers and Shire of Chittering*** [2017] WASAT 26; (2017) 91 SR (WA) 1 ***(Brikmakers)*** to support her argument set out in the two preceding paragraphs.[70] In particular, the applicant refers to [44]-[54] of ***Brikmakers*** where the Tribunal said the following:[71]

> *Whose signature is required on the application for Planning Approval form?*
>
> 44 Clause 86(1) of the [d]eemed [p]rovisions [in the form for an application for development approval referred to in cl 62(1)(a) of the deemed provisions] requires:
>
> *The signature of the owner(s) is required on all applications. This application will not proceed without that signature. …*
>
> 45 This requirement must be read in conjunction with the definition of 'owner' which, as determined earlier, does not include the joined parties, who are the registered proprietors of certain minerals but not 'in relation to the land' relevant for the application.
>
> 46 As noted earlier, cl 62(1) [of the deemed provisions] refers to 'the owner of the land'. This does not necessarily mean, in the Tribunal's view, that each and every owner of every type of

[66] Emphasis added.
[67] Emphasis added.
[68] ts 16, 3 July 2020.
[69] Ms R Petrucci M.
[70] ts 17, 3 July 2020.
[71] Citations omitted. Original emphasis.

> ownership must sign the form. Rather, the Tribunal is of the view that if the [LPS Regs] intended the wording in cl 62(1) to mean *all* owners it could have expressly provided for it (for example, using a phrase such as 'the owner or owners of the land').

47 The issue of the requirement for the consent of an owner of land the subject for development approval was raised in *Pacesetter Homes Pty Ltd v State Planning Commission* (1993) 84 LGERA 71 (*Pacesetter*). That case concerned an application for subdivision and the area for which approval was sought included land which vested in the Crown pursuant to s 286 of the *Local Government Act 1993* (WA).

48 It was held in that case, that the consent of the Crown, as 'owner' of the relevant land was necessary as a precondition and the Crown had not consented.

49 The Tribunal agreed with the applicant's submission that nothing in *Pacesetter* displaces the position that the respondent was able to determine the application, even if the joined parties and the Crown had not signed the application for Planning Approval as neither of them is the 'owner' of the relevant land (that is, the land from which clay is to be extracted).

50 In *Australian Real Estate Investment Ltd v City of Armadale* [2003] WATPAT 24 (*Australian Real Estate*) the issue before the Town Planning Appeal Tribunal was whether every party who came within any aspect of the definition of 'owner' was required to sign the application for Planning Approval form. The tribunal in that case concluded that the proper approach was to read the definition of 'owner of land' disjunctively so that one only needs to meet one of the requirements to constitute an owner. That tribunal decided that where an owner in fee simple of the land had provided its consent it should not be necessary to obtain the further consent of someone with a lesser interest in the land. That tribunal concluded at [28] - [32]:

> > In any event, even if one has regard to the definition of owner one can see that there are some odd aspects to it.
> >
> > First, Counsel for the Appellant contended that the proper approach is to read the definition disjunctively so that one need only meet one of the requirements to satisfy owner. Further it was contended that the definition was in effect a cascading definition. That is a person who holds an estate in fee simple in possession has a greater interest in the land than for example a lessee or licensee from the Crown so that the devolution of the various interests ultimately leads to

> what might be described as an equitable interest as trustee or mortgagee in possession.
>
> …
>
> In that regard it seems to us that if the consent of the owner is required then an owner would be met if it is a person who holds an estate in fee simple in possession.
>
> It would be an odd circumstance where having obtained such consent it would then be necessary to obtain the consent of someone with a considerably lesser interest in the land.

51 The decision in *Australian Real Estate* means that an application required to be signed by the 'owner' of the land may validly be signed by a person who satisfies the definition of owner, notwithstanding that another person who is also an owner with some interest did not sign the application.

52 A similar approach was taken by the Court of Appeal in New South Wales in *Owners Strata Plan No 50411 & Ors v Cameron North Sydney Investments Pty Ltd* [2003] NSWCA 5 (*Owners Strata Plan No 50411*) where the Court held the consent of the strata company was not required for development within a lot, notwithstanding that on a literal reading of the definition, the strata company was also an 'owner'.

53 Similarly in this case, the joined parties are an owner of land (as evidenced by their interest in certain minerals as reflected in the certificates of title). However, the signature of one or both of the joined parties, in addition to that of the applicant, Mr Dwyer, was not required.

54 The Tribunal finds the owner of the relevant property (that is, the land from which clay was to be extracted), Mr Dwyer, signed the application for Planning Approval. This means neither the joined parties nor the Crown was required to sign the application for Planning Approval in order for the respondent to consider the application for Planning Approval under the PD Act and [d]eemed [p]rovisions.

54 The applicant also draws attention to cl 62(2)(b) of the deemed provisions, which allows a strata company to sign an application for development approval if it is authorised to make such an application in respect of the land under the survey-strata scheme by-laws registered under the ST Act. The applicant submits that the strata company in this case can sign the DA, because by-law 55 (implicitly) authorises the

strata company to make an application for development approval in respect of exclusive use area EU.8.[72]

55 In our view, the applicant is incorrect in her submission that the strata company has, by by-law 55, already, in effect, given owner's consent to the lodgement of the DA. Clause 62(1)(b) of the deemed provisions requires that the DA be 'signed' by the owner of the land on which the proposed development is to be located. By-law 55 does not constitute a signature on the DA by the owner of Lot CP19 in the survey-strata scheme.

56 In contrast, in our view, there is considerable strength in the applicant's submission that she, as a co-owner of the common property in the survey-strata scheme (under s 17(1) of the ST Act), has effectively signed the DA as 'the owner' of Lot CP19 and has thereby herself given owner's consent to its lodgement under cl 62(1)(b) of the deemed provisions. It is strongly arguable that the applicant is 'the owner' of the land the subject of the DA, for the purposes of giving owner's consent under cl 62(1)(b) of the deemed provisions, on the basis that she is 'a person whose name is registered as a proprietor of the land' under par (a)(i) of the definition of 'owner', in relation to land, in cl 1 of the deemed provisions.

57 We note that in ***Paterson and The Owners of 27 Purdom Road Wembley Downs Survey-Strata Plan 30555*** [2019] WASAT 40; (2019) 97 SR (WA) 91 (***Paterson***) at [53]-[66], the Tribunal,[73] in considering an application under s 85 of the ST Act by the proprietors of a lot in a two-lot survey-strata scheme for an order that the strata company consent to alterations to the common property, made 'a few short comments'[74] and expressed a 'concern'[75] about a development approval that had been granted by the planning consent authority to the proprietors of the lot allowing them to demolish the existing dwelling and construct a new dwelling on their lot and also to carry out works on the common property lot (CP Lot 3) raising the level of CP Lot 3 by up to 900 millimetres to meet the level of the new dwelling and replacing and widening the common driveway that was built on it.[76] It was common ground that the proprietor of the other (residential) lot in the survey-strata scheme did not give owner's consent to the lodgement of

[72] ts 16, 3 July 2020.
[73] Dr S Willey M.
[74] ***Paterson*** [53].
[75] ***Paterson*** [56].
[76] ***Paterson*** [55].

the development application under cl 62(1)(b) of the deemed provisions.[77] Although the Tribunal said that it was 'mindful'[78] that the jurisdiction it was exercising was (only) under the ST Act and that 'the [development] [a]pproval is not before me',[79] it was clearly concerned that the development approval was invalid (at least in relation to the development on CP Lot 3), because the development application had not been 'signed by the owner of the land on which the proposed development is to be located', in relation to the development on CP Lot 3, under cl 62(1)(b) of the deemed provisions. The Tribunal said the following in ***Paterson*** at [62]-[65]:

> 62 The point being that CP Lot 3 is not owned solely by the applicants. In *Jeblon Pty Ltd v North Sydney Municipal Council* (1982) 48 LGRA 113 Cripps J, at 120, rejected an argument that an application relating to common property could be made by just one proprietor.
>
> 63 The granting of a development approval which purports to authorise works on common property is not without significance or consequence. It is not difficult to imagine that the granting of a development approval to undertake works on common property would be used as leverage in subsequent discussions with other proprietors of lots. A development approval might be taken by less informed proprietors of other lots to be a fait accompli that the proposed works in the common property are authorised and provide their subsequent consent accordingly.
>
> 64 In fact, that is what has happened here. Without being critical of the applicants, they have relied on the Planning Approval in their dealings with the second respondent and in support of arguments before me as to why the Proposal is necessary. The applicants have presented their case on the basis that the Proposal is a necessary part of - and is required to comply with - the Planning Approval. That argument is available to the applicants because the City granted the Planning Approval.
>
> 65 In the context of applications proposing works on what is common property, planning authorities need to be alert to the question of landowner consent for the purposes of the deemed provisions. It is no answer to simply avoid the issue by including an advice note advising of the requirements of the ST Act.

[77] ***Paterson*** [55].
[78] ***Paterson*** [53].
[79] ***Paterson*** [66].

58 For the following three reasons, we would respectfully not follow ***Paterson*** at [53]-[66]. First, as Mr Atkinson submits, the Tribunal's 'comments'[80] about the development approval in that case were 'clearly [*obiter*] *dicta*, in that it was not an issue that arose on the case'.[81] Secondly, the rejection of the argument that a development application relating to common property could be made by just one proprietor by the New South Wales Land and Environment Court[82] in ***Jeblon Pty Ltd v North Sydney Municipal Council*** (1982) 48 LGRA 113 (***Jeblon***) at 120, which is the decision referred to and followed in ***Paterson*** at [62], turned on the meaning of the term 'owner' in s 77(1)(a) and (b) of the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act), which was defined under s 4(1) of the EP&A Act and s 4 of the *Local Government Act 1919* (NSW) (LG Act) in terms which were different to the definition of 'owner', in relation to land, in cl 1 of the deemed provisions.[83] The part of the decision in ***Jeblon*** which was referred to and followed in ***Paterson*** at [62] is therefore distinguishable in Western Australia.[84] Thirdly, as we said at [21] and [50] above, the legal position in Western Australia, where common property is owned by the proprietors of the lots (as tenants in common),[85] is different to that in New South Wales, where common property is owned by the equivalent of the strata company.[86] The part of the decision in ***Jeblon***

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[80] ***Paterson*** [53].

[81] ts 19, 3 July 2020. *Obiter dictum*: 'Judicial observations that do not form part of the essential reasoning of a case' (*LexisNexis Australian Legal Dictionary* (LexisNexis Butterworths, second edition, 2016) page 1067).

[82] Cripps J.

[83] At the time of the decision in ***Jeblon***, the term 'owner' was defined in s 4(1) of the EP&A Act as follows:
"owner" has the meaning ascribed thereto in the [LG Act][.]
The term 'owner' was defined in s 4 of the LG Act as follows:
" Owner," in relation to land, includes every person who jointly or severally, whether at law or in equity—
(a) is entitled to the land for any estate of freehold in possession ; or
(b) is a person to whom the Crown has lawfully contracted to grant the fee-simple under the Crown Lands Acts ; or
(c) is entitled to receive, or is in receipt of, or if the land were let to a tenant would be entitled to receive, the rents and profits thereof, whether as beneficial owner, trustee, mortgagee in possession, or otherwise ;
and includes every person who by virtue of this Act is deemed to be the owner :
Provided that the Crown shall be deemed to be the owner of—
(a) all Crown lands ; and
(b) all lands vested in a statutory body representing the Crown.

[84] This part of the decision in ***Jeblon*** was *obiter dictum* (see footnote 81). Cripps J said at 120 that '[i]t is unnecessary for me to decide this matter, but the matter having been argued, I propose to deal with this submission'.

[85] See now s 13 of the ST Act as amended by the ST Amendment Act.

[86] Section 20 of the *Strata Titles Act 1973* (NSW) (ST Act 1973), which was in operation at the time of the decision in ***Jeblon***, provided (to the same effect as s 24(2)(a) of the SSD Act, which repealed and replaced the ST Act 1973, now provides in New South Wales) that common property was 'vested in' the 'body corporate', which was constituted by the proprietors of the lots, although it also provided that '[t]he estate or interest of the body corporate in common property vested in it … shall be held by the body corporate as agent … for [the] proprietors as tenants in common in shares proportional to the unit entitlements of their respective lots'.

which was referred to and followed in ***Paterson*** at [62] is therefore also distinguishable in Western Australia for this reason.

59 However, notwithstanding the strength of the applicant's argument that she has effectively signed the DA as 'the owner' of Lot CP19 and has thereby herself given owner's consent to its lodgement under cl 62(1)(b) of the deemed provisions, we do not make a conclusive determination in relation to this submission in these proceedings, and Judge Parry declines to make a declaration under s 91 of the SAT Act in this matter, for the following four reasons.

60 First, the applicant did not, in her application to the Tribunal dated 4 June 2019 or as amended in her minute of proposed orders dated 24 June 2019, seek a declaration, and did not seek leave to amend her application for a declaration, to the effect that she has effectively signed the DA and thereby herself given owner's consent to its lodgement under cl 62(1)(b) of the deemed provisions. Rather, as indicated earlier, the declaration the applicant seeks is 'that the [first] [r]espondent has or is deemed to have approved the [a]pplicant's application for development approval'.

61 Secondly, in light of our decision under s 83(1) of the ST Act below, it is not necessary in this matter for the Tribunal to make a conclusive determination as to whether the registered proprietor of a lot in a strata scheme can give owner's consent to the lodgement of a development application in relation to common property under cl 62(1)(b) of the deemed provisions.

62 Thirdly, as indicated earlier, s 91(5) of the SAT Act provides that a declaration made under s 91(1) of the SAT Act is (only) binding, according to its terms, on the parties to the proceeding or such of them as are specified in the declaration. As indicated earlier, the applicant contends that she requires a declaration (or an order) from the Tribunal on which she can rely for the purposes of making the DA to the Shire. However, the Shire is not a party to these proceedings and consequently would not be bound by any declaration made by the Tribunal.

63 Finally, we recognise that the question of whether any proprietor of a lot in a strata scheme can sign an application for development approval in relation to common property as 'the owner of the land on which the proposed development is to be located' is a matter of wide significance in relation to planning and development in Western Australia. It is therefore appropriate that, before the Tribunal

expresses a concluded view on this issue, it should give notice to the Attorney General and the Minister for Planning so that the Attorney can consider whether to intervene under s 37(1) of the SAT Act and the Minister can determine whether to seek leave to intervene under s 37(3) of the SAT Act in order to address the Tribunal.

64 To conclude in relation to issue 1, Judge Parry has determined not to make a declaration under s 91 of the SAT Act in these proceedings.

65 We turn, next, to consider whether the Tribunal has power, under s 83(1) of the ST Act, to order the strata company to give owner's consent under cl 62(1)(b) of the deemed provisions to enable the DA to be made.

Issue 2 - Does the Tribunal have power under s 83(1) of the ST Act to order the strata company to give owner's consent under cl 62(1)(b) of the deemed provisions to enable the DA to be made?

66 The 2nd to 9th respondents contend that the Tribunal does not have power to decide the application under s 83(1) of the ST Act. The basis of the 2nd to 9th respondents' submission is that s 83(4) of the ST Act prevents the Tribunal from making an order with respect to the exercise or performance of a power, authority, duty or function conferred or imposed on the strata company by the ST Act where that power, authority, duty or function may only be exercised or performed pursuant to a unanimous resolution, resolution without dissent or a special resolution.

67 The 2nd to 9th respondents also submit that the application should have been made under s 97 of the ST Act, as that section sets out when a proprietor can challenge a resolution of the strata company, or alternatively under s 85 of the ST Act, which deals with the situation of a strata company unreasonably withholding its consent to a proposal by a proprietor in relation to common property.[87]

68 The applicant submits that she faces a 'roadblock' in consequence of the Shire's requirement that the DA be signed by the strata company as 'the owner of the land on which the proposed development is to be located', under cl 62(1)(b) and cl 62(2)(b) of the deemed provisions, and the strata company's failure to affix its common seal to the DA.[88] The applicant submits that the way to resolve this 'roadblock' is provided by s 83(1) of the ST Act, which enables the Tribunal to make

[87] Exhibit 11 at page 16.
[88] ts 20, 3 July 2020.

an order for the settlement of the dispute between herself and the strata company. An order of the Tribunal requiring the strata company to affix its common seal to the DA, the applicant submits, would allow the DA to be received by the Shire and for the Shire to then assess the DA, which includes allowing any of the 2nd to 9th respondents to make submissions to inform the Shire's decision-making process, should they wish to do so.[89]

69 Section 83 of the ST Act is a general power that authorises the Tribunal to make an order to resolve a dispute with respect to the exercise or performance of, or failure to exercise or perform, a power, authority, duty or function conferred or imposed by the ST Act or the by-laws in connection with a strata scheme. Section 83(1) of the ST Act provides for a wide range of persons upon whose application the Tribunal may make such an order. These comprise the strata company, an administrator, a proprietor of a lot, a person with an estate or interest in a lot, an occupier of a lot and a resident of a lot. As the proprietor of Lot 8, Ms Coleman is authorised to make an application under s 83(1) of the ST Act.

70 Furthermore, it is clear on the evidence that there is a relevant 'dispute' between Ms Coleman and the strata company (and the 2nd to 9th respondents) for the purposes of s 83(1) of the ST Act 'with respect to … the failure to exercise or perform a power, authority … or function conferred or imposed by the [ST Act] [and] [by-law 55] in connection with [the survey-strata] scheme …'. The relevant 'failure' is the strata company's failure to affix its common seal to the DA.

71 We do not accept the 2nd to 9th respondents' argument that s 83(4) of the ST prevents the Tribunal from making an order under s 83(1). This is because the exercise or performance of the power, authority or function that the strata company has failed to exercise or perform, namely affixing its common seal to the DA, does not require a unanimous resolution, resolution without dissent or a special resolution of the proprietors.

72 In our view, all the requirements set out in s 83(1) of the ST Act are satisfied in this case. Consequently, the Tribunal has power, under s 83(1) of the ST Act, to make an order requiring the strata company to give owner's consent under cl 62(1)(b) of the deemed provisions to enable the DA to be made by affixing its common seal to the DA. The applicant is entitled to invoke the jurisdiction of the Tribunal under

[89] ts 21, 3 July 2020.

s 83(1) of the ST Act rather than under any other provision of the ST Act that may also have been available.

73 Having determined that the Tribunal has power to make an order under s 83(1) of the ST Act in this case, we now turn to consider whether the Tribunal should order the strata company to give owner's consent under cl 62(1)(b) of the deemed provisions to enable the DA to be made by affixing its common seal to the DA in the circumstances of this case.

Issue 3 - Having regard to the proper interpretation of by-law 55, should the Tribunal order the strata company to give owner's consent under cl 62(1)(b) of the deemed provisions to enable the DA to be made?

74 The applicant contends that, having regard to the proper interpretation of by-law 55, the Tribunal should order the strata company to give owner's consent under cl 62(1)(b) of the deemed provisions to enable the DA to be made to the Shire. The 2nd to 9th respondents contend to the contrary and urge the Tribunal, in interpreting by-law 55 in this case, to take a broader look at the implications of the applicant's position, which they say would involve 'ratifying this concept that you can cede all of [the tenets] of common rights of owners in a survey-strata to decide and protect their interest away in perpetuity through the action of a by-law'.[90] We address the 2nd to 9th respondent's principal arguments below.

By-law 55 is erroneous, confusing and ambiguously worded

75 The 2nd to 9th respondents submit that by-law 55 is erroneous, confusing and ambiguously worded.

76 The error referred to by the 2nd to 9th respondents is in by-law 55(2), which erroneously states that 'the exclusive use of the exclusive use area' is conferred on the proprietor of Lot 8 '[p]ursuant to section 48(2) [of the ST Act]'. Section 48 of the ST Act concerns the recovery of books and records belonging to a strata company. By-law 55 is concerned with the grant of an exclusive use of common property, not with the recovery of books and records. It is obvious that the reference to 'section 48(2) [of the ST Act]' in by-law 55 is a typographical error, with the typist having inadvertently reversed the numerals '2' and '8'. It is plain that 'section 48(2)' should read 'section 42(8)', because by-law 55(2) confers 'exclusive use of the exclusive use area' and the source of

[90] ts 40, 3 July 2020.

power in the ST Act to make a by-law to this effect in s 42(8) (and s 42(1)(c)) of the ST Act.

77 In our view, by-law 55 is a product of its own words. While its breadth may be unusual, its meaning and effect is clear. By-law 55(2) states that 'there is conferred on the proprietor of [L]ot 8 exclusive use of the exclusive use area'. Such a by-law is authorised by s 42(1)(c) and s 42(8) of the ST Act. Furthermore, by-law 55(3) states in very broad terms that:

> The proprietor of [L]ot 8 shall have full use and enjoyment of the exclusive use area to the exclusion of the proprietors, occupiers or residents of other lots in the scheme with the right to use and develop the exclusive use area as he thinks fit including, without limiting generality, to modify, remove or replace any structure erected thereon and to add any new structures thereto without requiring any further approvals from the strata company or council.

78 By-law 55 is not confusing or ambiguously worded. Its meaning and effect is clear from its terms.

The strata company has not given approval for a change from commercial to residential use of the Dryer

79 The 2nd to 9th respondents argue that what is being sought by the applicant in the DA is not the use, repair and maintenance of the Dryer in exclusive use area EU.8, which, they say, is what is contemplated by s 42(8) of the ST Act, but rather significant physical works and a change of use whereby the Dryer, which was approved by the Shire as a commercial use, would be changed to a 'single house', which is a residential use.[91] Ms Fryar submits that such works and change of use cannot be undertaken without consent of the strata company.[92] Ms Fryar describes as an 'absurdity' the applicant's proposed interpretation that, under by-law 55, she does not require any approval from the strata company for the proposed development of a house on common property.[93] Ms Fryar considers it to be a further 'absurdity' if that house is not required to comply with the any of the requirements that the other residential lots in the survey-strata scheme have to comply with.[94] Ms Fryar said that:[95]

[91] ts 39 and 56, 3 July 2020.
[92] ts 39 and 56, 3 July 2020.
[93] ts 39 and 57, 3 July 2020.
[94] ts 39, 3 July 2020.
[95] ts 40, 3 July 2020.

> … [I]t must be made to comply with the by-laws that apply to common property lots rather than residential lots. It pays no duties to the Shire. It pays no duties to the strata. It is not on the contract for insurance even though it may reimburse insurance. It is not a contractual party. …

80 Ms Fryar submits that a decision has to be made by all of the owners in the survey-strata scheme in relation to each and every development that is proposed to take place on common property, because that is the mechanism by which the other tenants in common can ensure that their rights and liabilities are addressed and protected.[96]

81 However, by-law 55(3) expressly confers on the proprietor of Lot 8 (currently the applicant) 'the right to use and develop the exclusive use area as [she] thinks fit …'. As Mr Atkinson submits, this 'could not have been expressed in wider terms'.[97] The broad wording of by-law 55 clearly authorises the applicant to carry out the significant physical works and the change of use proposed in the DA as a matter of strata law. Furthermore, by-law 55(3) expressly states that the proprietor of Lot 8 has 'the right to use and develop the exclusive use area as [she] thinks fit … without requiring any further approvals from the strata company or council'.

82 Of course, by-law 55 does not authorise the carrying out of physical development or change of use as a matter of planning law. Hence, the applicant's need to lodge the DA with, and obtain approval of it from, the Shire.

83 Ms Fryar referred to the *Planning and Development Act 2005* (WA) (PD Act) to indicate that, whereas the term 'development' is defined (in s 4(1) of the PD Act), the term 'develop' is not. The fact that 'develop' is not defined in the PD Act is of no consequence. By-law 55 is made under s 42 of the ST Act and does not incorporate definitions from the PD Act. The expression 'right to use and develop' in by-law 55(3), in our view, involves the common and ordinary meanings of the words 'use' and 'develop'. The apposite ordinary meaning of the verb 'use' is 'to avail oneself of; apply to one's own purposes'[98] and the apposite ordinary meaning of the verb 'develop' is 'to build on (land)'.[99] The words 'use' and 'develop' in by-law 55(3) contemplate the carrying out of the proposed development the subject of the DA.

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[96] ts 40, 3 July 2020.
[97] ts 13-14, 3 July 2020.
[98] *Macquarie Dictionary* (6th edition, 2013) page 1621.
[99] *Macquarie Dictionary* (6th edition, 2013) page 407.

The Dryer is the property of the strata company, not of the applicant

84 Ms Fryar submits that any structure, such as the Dryer, that is erected on common property, including the exclusive use area EU.8, is the property or asset of the corporation of owners. She also submits that the 'quid pro quo' for exclusive use under by-law 55 is the requirement for the ongoing repair and maintenance of the common property under by-laws 55(4) and 55(5).[100] Ms Fryar submits that the order sought by the applicant would facilitate demolition of the structure erected on the exclusive use area, which is an asset of the corporation of owners and is of considerable value. Further, Ms Fryar submits, this would allow the applicant to evade the 'quid pro quo' in her repair and maintenance obligations.[101]

85 The applicant disagrees that the Dryer or any other structure on the exclusive use area EU.8 is the property or asset of the strata company. In any case, the applicant submits that by-law 55 is clear in its terms and grants to the proprietor of Lot 8 exclusive use of EU.8 and the right to use and develop that area.[102]

86 It is unnecessary to decide whether any structure on the exclusive use area EU.8 is the property of the strata company. In our view, assuming that the structures erected on exclusive use area EU.8 are the property of the strata company, by-law 55 clearly grants exclusive use and enjoyment to the proprietor of Lot 8 of the exclusive use area EU.8, 'to the exclusion of the proprietors, occupiers or residents of other lots in the scheme', as well as 'the right to use and develop the exclusive use area as [she] thinks fit including, without limiting generality, to modify, remove or replace any structures erected thereon …'. This plainly provides authorisation (as a matter of strata law, but not planning law) to demolish any structures located on EU.8, even if those structures are owned by the strata company. Furthermore, the 'quid pro quo' that the proprietor of Lot 8 has the responsibility to repair and maintain any structure in the exclusive use area, as provided in by-laws 55(4) and 55(5), would not be 'evaded' if the DA were approved and carried out, but would rather continue in relation to any structure on that land.

[100] ts 36, 3 July 2020.
[101] ts 37, 3 July 2020.
[102] ts 62, 3 July 2020.

Creation of a 'de facto' lot exempt from planning legislation and inconsistent with other by-laws

87 Ms Fryar submits that the applicant's proposed interpretation of by-law 55 results in a situation that is indistinguishable from the creation of a 'de facto' lot 'endowed with full proprietary and autonomous powers to make application to government authorities to demolish, alter or replicate whatever structure' the applicant wants.[103] Furthermore, she submits, the applicant's proposed interpretation of by-law 55 would result in a 'de facto' lot which would be exempt from planning and other legislation, 'immune' from the requirements of by-laws that bind the other residential lot proprietors in the survey-strata scheme, and pays no compensation to the other proprietors for the right to use and develop the exclusive use area.[104] Consequently, Ms Fryar submits, the applicant's interpretation of by-law 55 gives rise to 'an absurdity, a repugnance, a danger to the rule of law and due process, and it's inconsistent with other by-laws and [the ST Act] including the company's own by-laws'.[105]

88 In support of Ms Fryar's submissions referred to in the preceding paragraph, Ms McNamara stated that the 'conundrum' is whether by-law 55, in effect, forces the strata company or the strata council to sign the DA in circumstances where 'the decision had already been made by the other organ of the company which is the owners acting at the AGM [not to pass the applicant's motion]' and the proposed development is 'in contravention of every other by-law'.[106] Ms McNamara said 'the golden rule' needs to be applied in construing by-law 55, that is, by-law 55 cannot be interpreted in a way that is 'ridiculous'.[107] In Ms McNamara's view, the strata company or council signing the DA, on the basis that by-law 55 says it can, would be 'ridiculous'.[108]

89 Ms Fryar also submits that if the applicant's proposed interpretation of by-law 55 is accepted, then it would be open for the rest of the common property to be 'carv[ed] up … into another 17 exclusive use areas' through a by-law in the same terms of by-law 55.[109] The effect of this, according to Ms Fryar, would be to give each

[103] ts 41, 3 July 2020; Exhibit 11 at page 17.
[104] ts 41, 3 July 2020.
[105] ts 41, 3 July 2020.
[106] ts 55, 3 July 2020.
[107] ts 55, 3 July 2020.
[108] ts 55, 3 July 2020.
[109] ts 42, 3 July 2020.

proprietor of a lot in the strata scheme an extra lot 'for free' that would 'have all of these powers that make it indistinguishable from a regular lot and, indeed, have the sorts of benefits and evades all sorts of duties that other lots have', which, she submits, highlights the 'absurdity' of what the applicant seeks in these proceedings. She 'encourage[s] the [T]ribunal to take the bigger picture here' and 'consider the ramifications of a decision in this case'.[110]

90 Finally, Ms Fryar and Ms McNamara both refer to the decision of the Tribunal[111] in ***Grant and The Owners of Rosneath Farm Strata Plan 35452*** [2006] WASAT 162 (***Rosneath***), which concerned a survey-strata scheme and the validity of by-laws. The Tribunal found the by-law in question in that case to be invalid, because it purported to take away the power of the owners' council to make certain decisions and cede that power to a sub-committee.[112] Ms Fryar contends that if the applicant's interpretation of by-law 55 is preferred by the Tribunal, then the by-law would cede the power that should lie with the council of owners and the company of owners, in effect, 'to a sub[-]committee of one', being the proprietor of Lot 8 and the holder of the exclusive use by-law.[113] Such an interpretation, Ms Fryar submits, renders by-law 55 'illegal and offensive to many areas of jurisdiction'.[114]

91 The applicant submits that in light of the ***Appeal decision***, in which the Court of Appeal considered by-laws to be in the nature of a statutory contract, the decision in ***Rosneath*** must be treated 'with caution', because in that case the matter before the Tribunal proceeded on the premise that the by-laws were, in effect, delegated legislation. Furthermore, the applicant submits that ***Rosneath*** is not relevant in any event, as these proceedings concern an application under s 83(1) of the ST Act and not an application under s 97 of the ST Act challenging the validity of by-law 55.[115]

92 We do not accept Ms Fryar's submission that an interpretation of by-law 55 which accords with its broad expression creates a 'de facto' lot. Rather, by-law 55 grants to the owner of Lot 8 the right to use and develop the exclusive use area EU.8 and imposes on the owner of Lot 8 the obligations set out in by-laws 55(4) and 55(5). Conferring such an exclusive use right in relation to common property is authorised by

[110] ts 42, 3 July 2020.
[111] Mr C Raymond SM.
[112] ts 39, 3 July 2020.
[113] ts 39, 3 July 2020.
[114] ts 39, 3 July 2020.
[115] ts 62, 3 July 2020.

s 42(1)(c) and s 42(8) of the ST Act. Moreover, the exclusive use right under by-law 55 cannot be dealt with, disposed of or exercised independently of ownership of Lot 8.

93 We also do not accept the submission of the 2nd to 9th respondents that a broad interpretation of by-law 55 according to its terms results in EU.8 being exempt from planning or other legislation. Indeed, the genesis of this case is that the applicant requires approval of the DA in order to be able to lawfully carry out the proposed development under planning legislation and to that end requires the DA to be signed by 'the owner' of the land in Lot CP19. Nor do we accept the submission that owner's consent to the lodgement of the DA cannot be given by the strata company, because 'the decision had already been made by the other organ of the company which is the owners acting at the AGM [not to pass the applicant's motion]'.[116] Notwithstanding the fact that the applicant's motion was not passed by the proprietors at the AGM held on 30 March 2019, the Tribunal has jurisdiction and power under s 83(1) of the ST Act to require the strata company to give owner's consent under cl 62(1)(b) of the deemed provisions to enable the DA to be made by the applicant. Furthermore, although it was asserted by the 2nd to 9th respondents that a broad interpretation of by-law 55 is inconsistent with other by-laws and that the development proposed in the DA would be in contravention of other by-laws, no other by-laws were referred to or identified by the respondents which could be said to be inconsistent with a broad interpretation of by-law 55 or the carrying out of the proposed development.

94 As the applicant submits, ***Rosneath*** is distinguishable, because the validity of by-law 55 has not been challenged. Furthermore, and in any case, the ***Appeal decision*** confirms that the by-laws operate in the nature of a statutory contact between the strata company and the proprietors (and are not delegated legislation).

95 Furthermore, as the applicant also submits, if the orders she seeks from the Tribunal were made, it would not open the 'floodgate', as suggested by Ms Fryar, whereby the proprietors could simply 'carve up' the common property.[117] This is because a by-law made under s 42(8) of the ST Act requires resolution without dissent, which means that it

[116] ts 55, 3 July 2020.
[117] ts 62, 3 July 2020.

must be passed at a duly convened general meeting and no vote is cast against it.[118]

Determination of issue 3

96 In our view, by-law 55, properly interpreted, has the following construction:

- by-law 55(1) defines the exclusive use area by reference to the area marked 'EU.8' on the 'Exclusive Use Area Plan - EU.8';[119]
- by-law 55(2) confers on the proprietor of Lot 8 exclusive use of the exclusive use area EU.8 pursuant to s 42(8) of the ST Act;
- by-law 55(3) states and means that the proprietor of Lot 8 has 'full use and enjoyment' of the exclusive use area, to the exclusion of the proprietors, occupants and residents of other lots in the survey-strata scheme, and has 'the right to use and develop the exclusive use area as [she] thinks fit', 'without requiring any further approvals from the strata company or council';
- by-laws 55(4) and 55(5) impose obligations on the proprietor of Lot 8 in relation to the exclusive use area EU.8; and
- by-law 55(6) provides for the continuation of the exclusive use right for the benefit of Lot 8 until by-law 55 is repealed or the survey-strata scheme is terminated (which occurs first).

97 Furthermore, in our view, it is necessarily implicit in the conferral of 'the right to use and develop the exclusive use area as [she] thinks fit' and to do so 'without requiring any further approvals from the strata company or council' under by-law 55(3), that where, in order to use and develop the exclusive use area, the proprietor of Lot 8 requires a regulatory approval to do so lawfully, such as development approval from the Shire under the PD Act and the applicable local planning scheme, by-law 55, on its proper interpretation, as a matter of strata law, authorises the proprietor of Lot 8 to apply for development

[118] ts 62, 3 July 2020. See s 3AC of the ST Act.
[119] See Attachment B to these reasons.

approval and requires the strata company to give owner's consent to enable lodgement of the development application with the Shire. Under s 42(6) of the ST Act, '… the by-laws for the time being in force bind the strata company and the proprietors …'. Thus, when requested to do so by Ms Coleman, the strata company is required by by-law 55 to give owner's consent to the lodgement of the DA by affixing its common seal. A resolution of the proprietors to do so is not required and the fact that the proprietors, other than Ms Coleman, voted against the motion that the strata company be authorised to affix the common seal at the AGM on 30 March 2019 is of no consequence. This is because by-law 55 itself confers a right to use and develop the exclusive use area 'without requiring any further approvals from the strata company or council'. The strata company and the other proprietors are bound by by-law 55 and thus the strata company should have affixed its common seal to the DA under by-law 55 when Ms Coleman requested that it do so.

98 In our view, having regard to the proper interpretation of by-law 55, in order to resolve the dispute between the parties before us in these proceedings concerning the failure of the strata company to give owner's consent to the lodgement of the DA under cl 62(1)(b) of the deemed provisions, in the exercise of the Tribunal's discretion under s 83(1) of the ST Act, the strata company should be ordered to give owner's consent to enable the DA to be made by affixing its common seal to the DA or to a fresh application for the same development as proposed in the DA. The strata company can give owner's consent under cl 62(2)(b) of the deemed provisions.

99 We note, in reference to Ms Fryar's submission set out at [44] above, that in coming to this conclusion, we have not simply following Mr Atkinson's 'trail of breadcrumbs … without looking up …'.[120] Rather, when we look up, we see in this case a very broadly expressed and clearly worded exclusive use by-law, which is authorised by s 42(1)(c) and s 42(8) of the ST Act, was duly passed by resolution without dissent at a meeting of the strata company, notified by the strata company to Landgate and registered on the survey-strata plan, and has not subsequently been repealed or amended. Furthermore, contrary to Ms Fryar's and Ms McNamara's submissions, the outcome in this case is neither 'absurd' nor 'ridiculous'. Rather, it reflects the resolution without dissent made at the meeting of the strata company when by-law 55 was added. While that occurred before the 2nd to 9th respondents

[120] ts 40, 3 July 2020.

acquired their lots in the survey-strata scheme, they, and the strata company, are bound by by-law 55, under s 42(6) of the ST Act.

100 Finally, we note that an order by the Tribunal under s 83(1) of the ST Act requiring the strata company to affix its common seal to the DA does not mean that the strata company or the other proprietors consent, or are deemed to have consented, to the approval by the Shire of the DA under the PD Act and the applicable local planning scheme. Whether the development proposed in the DA is approved by the Shire is a decision for the Shire to make as a matter of planning law and planning assessment and, as part of that decision-making process, the 2nd to 9th respondents, the strata company and other person may object to the approval of the DA by the Shire. All the Tribunal's order under s 83(1) of the ST Act in these proceedings does is to facilitate the lodgement of the DA with the Shire and thus enable it to be assessed and determined by the Shire.

Conclusion

101 Judge Parry has determined not to make a declaration under s 91 of the SAT Act in this case. We have determined that the Tribunal has power under s 83(1) of the ST Act to order the strata company to give owner's consent under cl 62(1)(b) of the deemed provisions to enable the DA to be made by the applicant. We have also determined that, having regard to the proper interpretation of by-law 55, in the exercise of the Tribunal's discretion under s 83(1) of the ST Act, it is appropriate to order the strata company to give owner's consent under cl 62(1)(b) of the deemed provisions to enable the DA to be made by affixing its common seal to the DA or to a fresh application for the same development as proposed in the DA. Although the order of the Tribunal under s 83(1) of the ST Act is expressed in terms different from orders 2 and 3 sought by Ms Coleman,[121] it does not differ in substance from the orders sought by her and is therefore consistent with s 81(1) of the ST Act.

102 The Tribunal makes the following orders:

1. Pursuant to s 83(1) of the *Strata Titles Act 1985* (WA) (as it stood prior to 1 May 2020), The Owners of Peace Street Community (Survey-Strata Scheme 65005) shall, when requested by the applicant, give owner's consent under cl 62(1)(b) of the deemed provisions in

[121] See [4] above.

local planning schemes in Sch 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015* (WA) to enable the applicant's application for development approval dated 26 February 2019 (DA) to be made by affixing its common seal to the DA or to a fresh application for development approval for the same development as proposed in the DA.

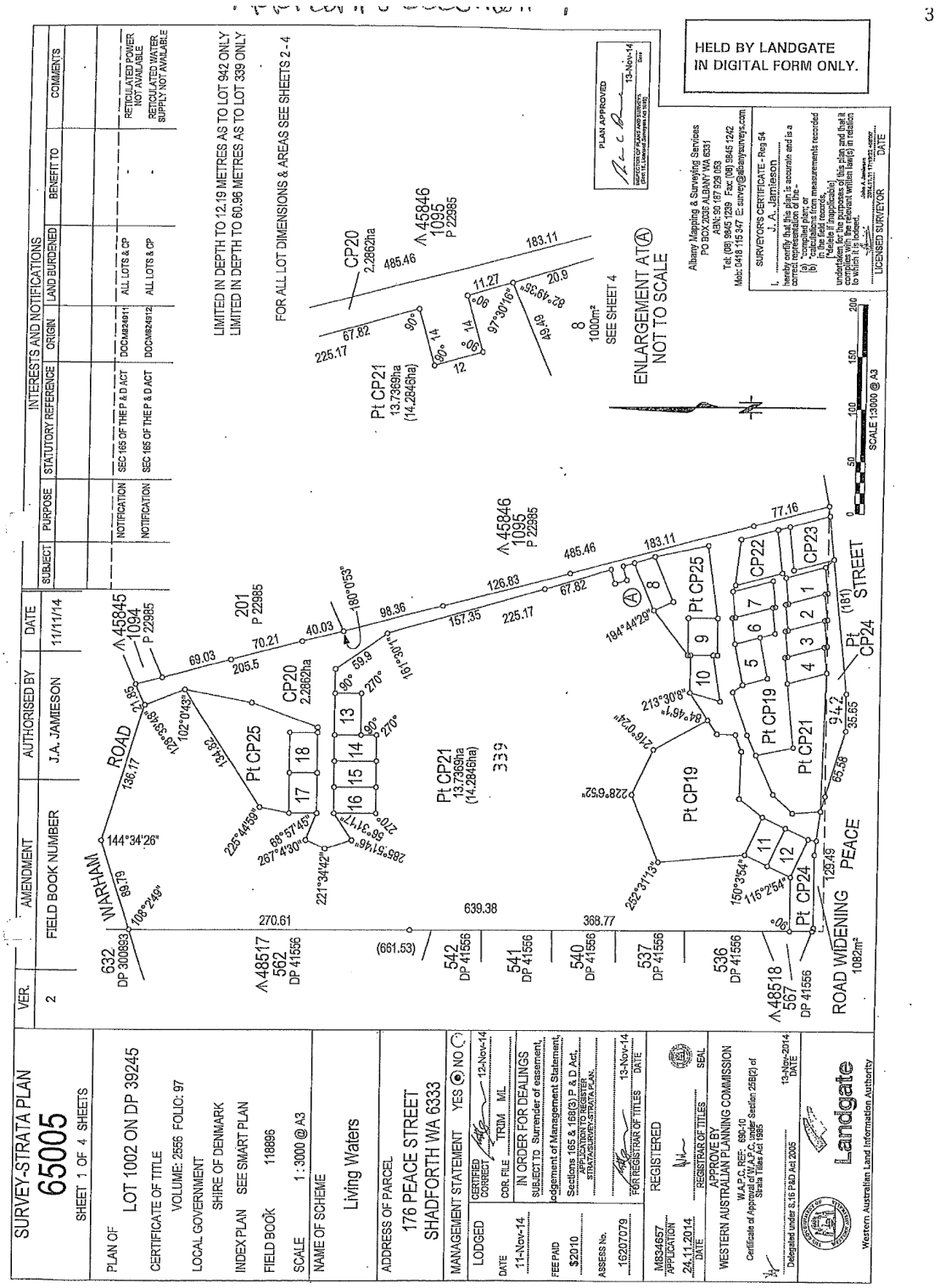
2. The application is otherwise dismissed.

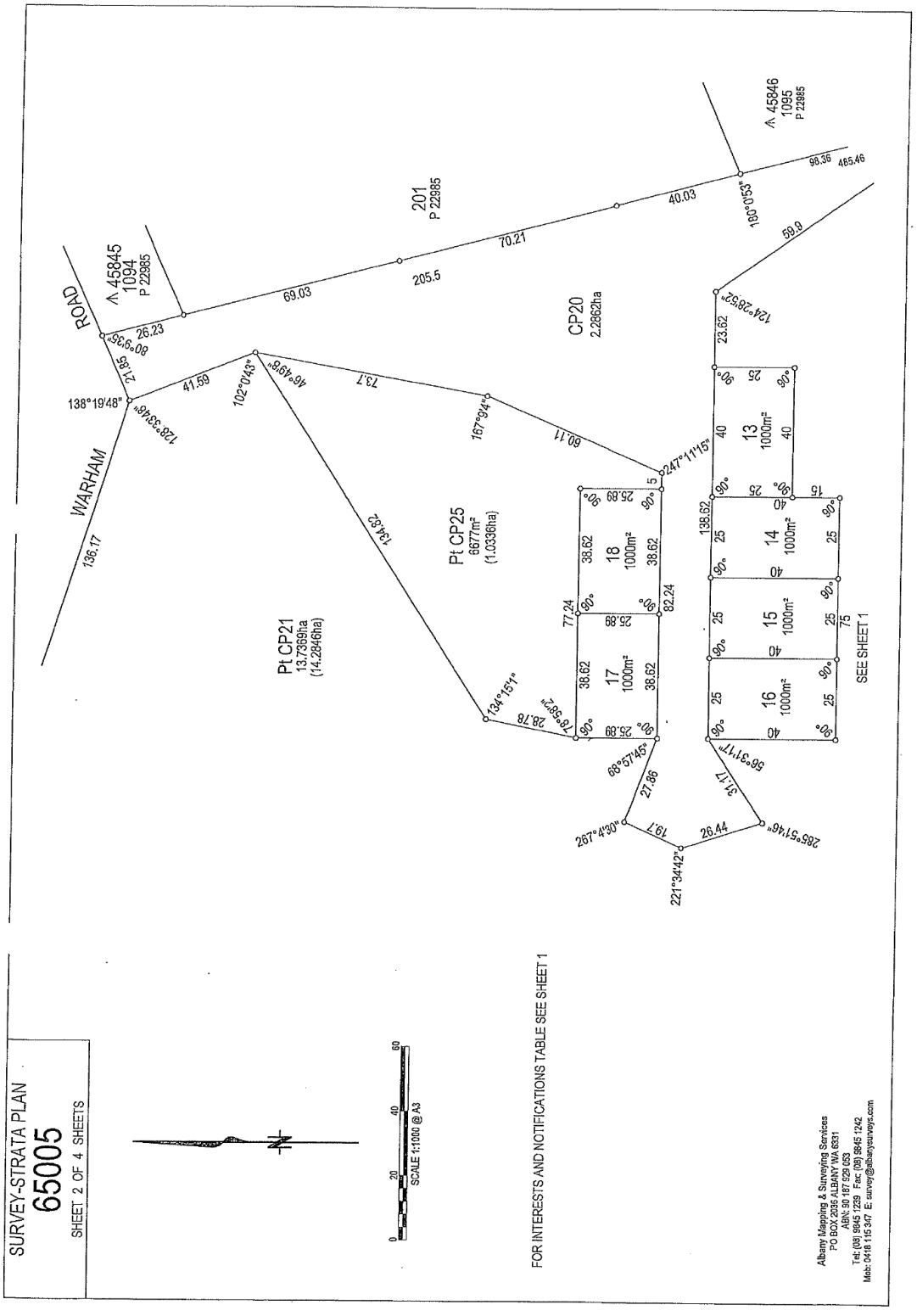
I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

JUDGE D PARRY, DEPUTY PRESIDENT

7 SEPTEMBER 2020

Attachment A - Survey-strata plan





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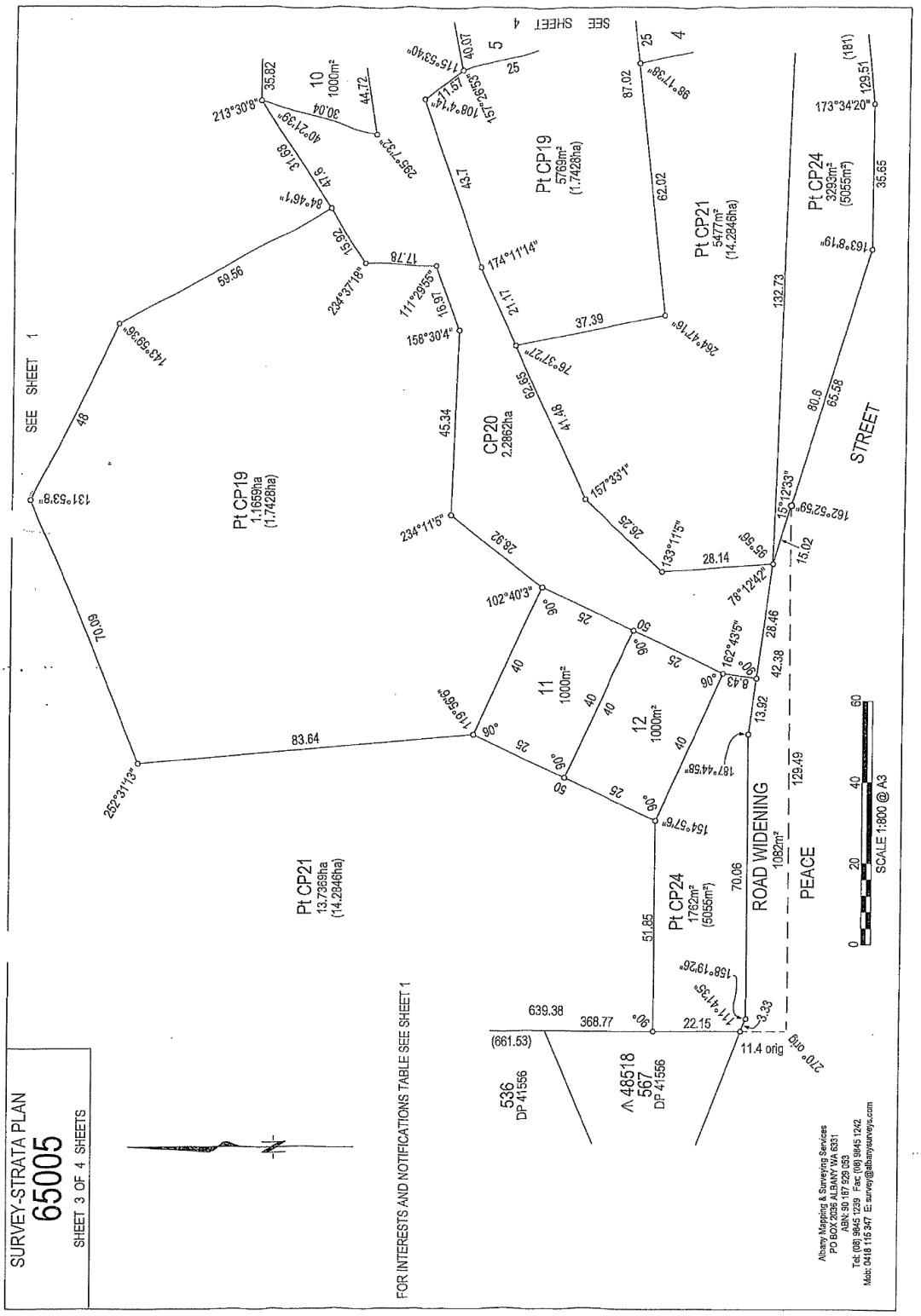

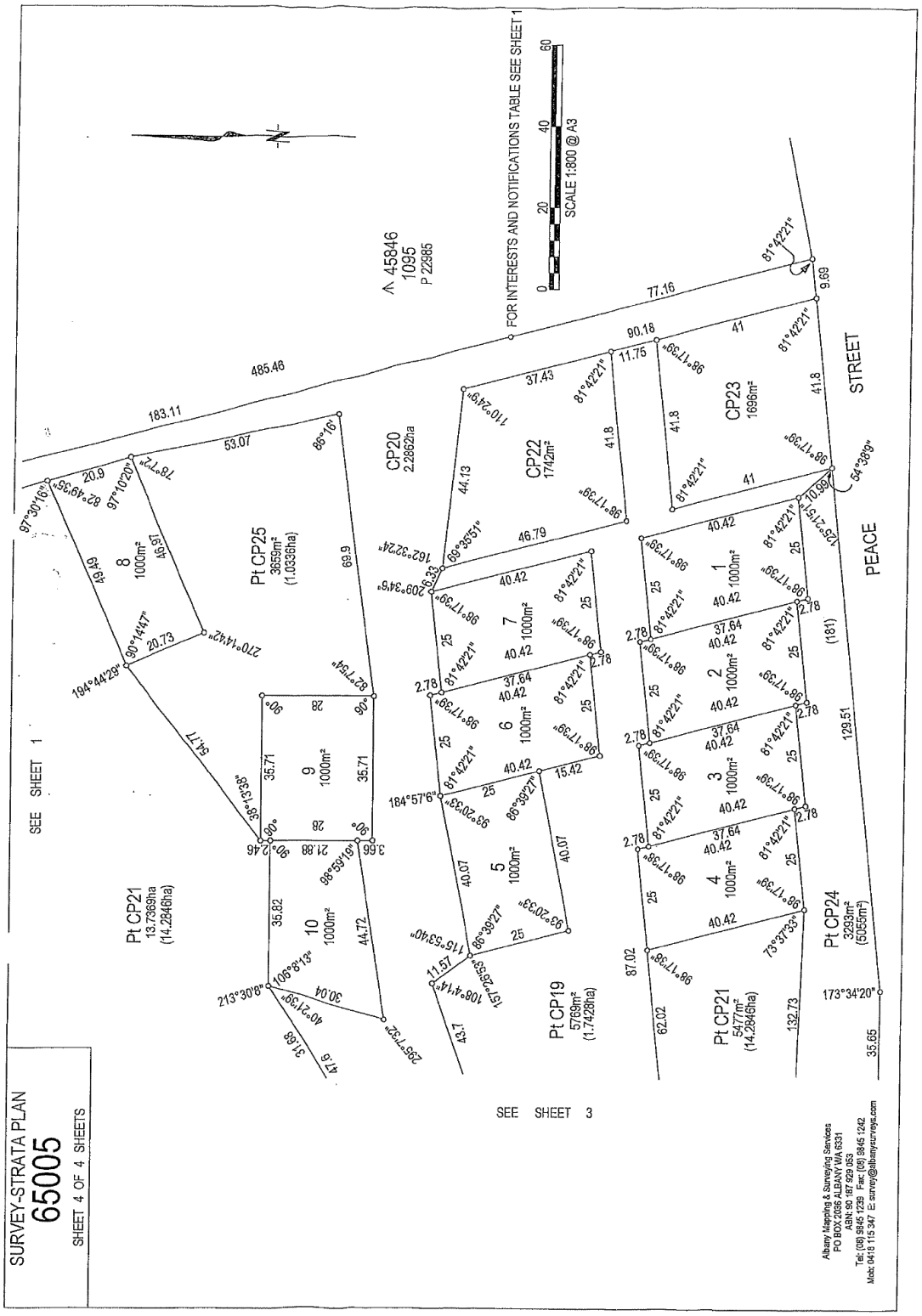

Attachment B - Exclusive Use Area Plan - EU.8