

**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**ACT** : STRATA TITLES ACT 1985 (WA)

**CITATION** : RECHICHI and JOHNSTON [2021] WASAT 79

**MEMBER** : DR B MCGIVERN, MEMBER

**HEARD** : 9 MARCH 2021

**DELIVERED** : 1 JUNE 2021

**FILE NO/S** : CC 1339 of 2020

**BETWEEN** : TERESA RECHICHI  
Applicant

AND

IAN JOHNSTON  
First Respondent

LISA GANNON  
Second Respondent

ANOUSHKA WALSTER  
Third Respondent

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*Catchwords:*

Jurisdiction under *Strata Titles Act 1985* (WA) - Four-lot single tier strata scheme - Owner of one lot wanting to erect second storey to dwelling - Application to exempt proposed works from need to obtain strata company approval - Proposed removal and relocation of boundary structure into common property air space - Not 'structural alteration of a lot' - Tribunal lacks jurisdiction to make orders

*Legislation:*

*Strata Titles (General) Regulations 2019* (WA), reg 6(1), reg 6(4), reg 73, reg 74, reg 75, reg 75(2)(h)

*Strata Titles Act 1985* (WA) (post 1 May 2020), s 3, s 3(1), s 3(2), s 3(2)(b), s 3(2A), s 10, s 12, s 14(8), s 27, s 27(a), s 28, s 28(5), s 35, s 35(3), s 86, s 87, s 89, s 89(1), s 90, s 90(2), s 90(3), s 166, s 183, s 197, s 197(1)(b), s 199, s 200, s 204(b), s 209, Pt 4, Pt 7, Div 2, Pt 13, Sch 2A, cl 1, cl 2, cl 3, cl 3AB, cl 21A,

*Strata Titles Act 1985* (WA) (prior to 1 May 2020), s 7, s 7A, s 28, s 83(6), s 86(1), s 103F

*Strata Titles Amendment Act 2018* (WA)

*Result:*

Tribunal lacks jurisdiction to make the orders sought  
Application dismissed

*Category:* B

**Representation:***Counsel:*

Applicant	: N/A
First Respondent	: N/A
Second Respondent	: N/A
Third Respondent	: N/A

*Solicitors:*

Applicant	: N/A
First Respondent	: N/A
Second Respondent	: N/A
Third Respondent	: N/A

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

Commissioner of Police v Thayli Pty Ltd [2020] WASC 43

Hapgood-Strickland and Watson [2021] WASAT 15

Maber & Anor and The Owners of Strata Plan 11391 [2007] WASAT 99

Tipene and The Owners of Strata Plan 9465 [2016] WASAT 101  
Tipene and The Owners of Strata Plan No 9495 [2013] WASAT 186  
Tipene v The Owners of Strata Plan 9485 [2015] WASC 30

## REASONS FOR DECISION OF THE TRIBUNAL:

### *Introduction*

1 In broad terms, this dispute concerns the proposed construction of a second storey to the applicant's residence (**Proposed Works**) in a four lot single tier strata scheme. The owners of the other lots in the Scheme, who are the respondents, object to those works being carried out. The applicant seeks orders from the Tribunal that would have the effect of authorising the Proposed Works without the respondents' approval, and facilitating the registration of any necessary amendments to the strata scheme.

2 Specifically, the orders sought by the applicant (**Proposed Orders**) are set out in the application lodged with the Tribunal on 16 October 2020, as follows:

#### SAT Order 1

SAT Order to be made under Section 90(2) (b) of the Strata Titles Act 1985 for the development of a two storey extension to 1/13 Caledonian Ave Maylands WA 6051.

...

#### SAT Order 2

SAT Order to give all necessary consents to enable registration and lodgement of the re-subdivision, re-valuation, and re-surveying and the Strata Company to execute all there alterations and carry out all necessary documentation related to these.

3 In these reasons, unless otherwise stated, any reference to a statutory provision is a reference to the *Strata Titles Act 1985* (WA) (**ST Act**) as amended from 1 May 2020<sup>1</sup>, and any reference to a regulation is a reference to the *Strata Titles (General) Regulations 2019* (WA) (**Regulations**). The ST Act as it stood prior to 1 May 2020 will be referred to as the **Prior ST Act**.

4 Pursuant to orders made on 9 March 2021, the question of whether the Tribunal has jurisdiction to make either or both of the orders sought in the application is to be determined as a preliminary issue, entirely on the documents. For the reasons that follow, that question has been determined in the negative.

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<sup>1</sup> Pursuant to the *Strata Titles Amendment Act 2018* (WA), significant amendments came into effect on 1 May 2020.

*Issues to be determined*

5 To arrive at a decision about the Tribunal's jurisdiction in relation to the application, the following issues must be determined:

- a) What is the nature of the strata scheme and the Proposed Works in question?
- b) What is the nature and source/s of the Tribunal's jurisdiction to make the orders sought in connection with the Proposed Works?
- c) Do the Proposed Works constitute a structural alteration to the applicant's lot (**Lot 1**) within the meaning of s 90?
- d) If not, does the Tribunal otherwise have jurisdiction to make the orders sought in connection with the Proposed Works?

6 Those issues are to be determined entirely on the documents filed in the Tribunal before 9 March 2021, relevantly including:

- a) the application filed with the Tribunal on 16 October 2020, with supporting documents including:
  - i) a written statement in support of the application;
  - ii) a letter dated 8 September 2020 from the applicant addressed to the Scheme strata manager (**Proposal Letter**) enclosing drawings and pictures produced by the applicant's intended builder, Summit Homes Group (**Summit Drawings**);
  - iii) a letter from the City of Bayswater and notice of determination (**Development Approval**) dated 25 September 2020;
  - iv) minutes of the Annual General Meeting of the strata company held on 7 October 2020; and
  - v) a search of strata plan 28165 (**Strata Plan**) and the record of certificate of title for Lot 1;



- b) an email from the applicant dated 16 December 2020 attaching a report from Juliana Torres of Shift Architecture dated 1 December 2020 (**Shift Report**); and
- c) a joint written response to the application filed by the respondents on 6 January 2021.

***What is the nature of the Scheme and the Proposed Works?***

7 The strata scheme in question, known as 13 Caledonian Avenue, Maylands (**Scheme**), was created upon the registration, on 5 January 1995, of the Strata Plan and is described on the Strata Plan as follows:

THREE SINGLE STOREY AND ONE TWO STOREY BRICK AND TILE RESIDENTIAL UNITS AND OUTBUILDINGS SITUATED ON LOT 422 PORTION OF SWAN LOC. 2039 ON PLAN 2646(1)[.]

8 The Scheme is situated on a parcel of land that is longer than it is wide, with four lots situated one behind the other, and a common property driveway which runs along the south eastern parcel boundary and along the length of the first three lots. The first three lots each comprise a single storey residence and outdoor space. Lot 1 is the first of these lots, facing the street and is differently configured to Lots 2 and 3. The fourth lot occupies the full width of the parcel at the rear and comprises a double storey residence, an outdoor area and a shed.

9 Since it is clear from the Strata Plan that no part of any lot in the Scheme is above or below another lot, the Scheme is a single tier strata scheme within the meaning of cl 3 of Sch 2A. Accordingly:

- a) the special provisions for such strata schemes contained in Sch 2A apply to it; and
- b) if there is any inconsistency between Sch 2A and other provisions of the ST Act, the schedule prevails.<sup>2</sup>

10 The nature and scope of the Proposed Works may be discerned from the Proposal Letter, Summit Drawings and Shift Report. In summary, those materials describe a second storey extension that is proposed to be:

- a) situated above part (but not all) of the existing dwelling on Lot 1 (the proposed second storey having a floor

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<sup>2</sup> ST Act, Sch 2A cl 1.

area of 59.29m<sup>2</sup> with the current dwelling occupying a floor area of 96m<sup>2</sup>);

- b) constructed from a timber or steel frame, with rendered panels;
- b) set back from both the front and rear aspects of the existing dwelling, but towards the front aspect; and
- c) accessible via a newly constructed, internal staircase.

11 Necessarily, the Proposed Works will involve the removal of a substantial part of the existing roof and ceiling, and the construction of a new roof at a different height.

***What is the nature and source/s of the Tribunal's jurisdiction?***

12 The Tribunal only exercises jurisdiction conferred on it by statute. Any determination of the scope of that jurisdiction therefore requires the Tribunal to engage in the construction of the relevant enabling act (in this case, the ST Act).

13 The meaning given to written laws is to be approached in accordance with the general principles of construction, relevantly summarised in ***Commissioner of Police v Thayli Pty Ltd*** [2020] WASC 43 as follows:

29 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The importance of construction of legislation is to begin in the text itself by regard to its context and purpose. Statutory context within immediate provisions and the whole of an Act is to be considered from the beginning of the task.

...

31 [Further], context includes the existing state of the law, the history of the legislative scheme and the mischief to which the statute is directed.

14 By way of overview, the ST Act includes a number of provisions, in various Parts, that deal with the resolution of specific disputes. It also contains, in Pt 13, broad jurisdiction to resolve strata disputes and to make orders in proceedings under the ST Act.

15 In circumstances where an application is commenced under a subject-matter specific provision, questions may arise as to the relationship between that provision, the relief sought by the applicant, and any other powers conferred on the Tribunal to resolve strata disputes. This is such a dispute.

### **Specific jurisdiction under the ST Act**

16 Subject-matter specific provisions deal with (amongst other things) orders that may be made, and limitations in respect of making orders, concerning the core subject matter to which they are directed. They will usually be silent on additional, incidental orders that may be sought or required.

17 In this case, the application is made under s 90, which:

- a) is contained in Pt 7 of the ST Act, and pursuant to which the Tribunal may exempt a particular structural alteration to a lot from the application of Pt 7 Div 2 of the ST Act; and
- b) does not explicitly deal with the subject matter of Proposed Order 2.

18 Incidental matters may arguably:

- a) be more squarely dealt with in other specific provisions under the ST Act, such as, in this case:
  - i) the amendment of scheme plans where it considers an objection to such amendment to be unreasonable under s 35(3);
  - ii) the variation of a strata scheme on the damage or destruction of a building under s 166;
  - iii) confirming a resolution to terminate a strata scheme: s 183;and/or
- b) fall under broader powers of the Tribunal to resolve strata scheme disputes (as to which, see discussion of the broad jurisdiction conferred under Pt 13 below).



19 The question in a case such as the present is whether the primary dispute falls within the ambit of the specific provision under which it is commenced and:

- a) if so, the relationship between that subject matter and the scope of any relief sought by the applicant; and
- b) if not, then whether the dispute can be dealt with under some other provision or provisions of the ST Act.

20 In this case, it is necessary to consider the jurisdiction arising under, and the relationship between, each of: s 90, the provisions identified in [18](a) above, and the provisions contained in Pt 13 of the ST Act (in particular, s 197 and s 200).

### **Broad jurisdiction under Pt 13 of the ST Act**

21 The amendments to the ST Act which commenced on 1 May 2020 included, as one of the major reforms, the introduction of Pt 13 (headed 'Tribunal proceedings'), under which:

- a) the Tribunal has, under s 197, a very broad power to resolve 'scheme disputes'; and
- b) in 'a proceeding under [the] Act', the Tribunal may:
  - i) under s 199, make a declaration concerning a matter in the proceeding instead of, or in addition to, any order the Tribunal may make; and
  - ii) under s 200, make any order it considers appropriate to resolve the dispute or proceeding.

22 The latter provisions are, in essence, remedial. Although the power to make orders or declaration is very broad, the merits of the substantive matters in the dispute are the underlying basis for doing so, and must be considered and determined before the appropriate relief can be decided upon.

23 In terms of dealing with the substantive merits, as noted above, the Tribunal has jurisdiction under s 197 is to resolve 'scheme disputes'. Relevantly in that regard:

- a) pursuant to s 3(1), the term 'scheme dispute' takes its meaning from s 197 itself which, by reference to both subject matter and parties, relevantly describes various classes of dispute as being within<sup>3</sup> and outside<sup>4</sup> its scope;
- b) the classes of dispute specified as being scheme disputes under s 197(1) relevantly include:
  - (a) a dispute between scheme participants about -
    - (i) the scheme documents, including the validity of scheme by-laws; or
    - ...
    - (iv) a resolution or decision of a strata company or the council of a strata company, including its validity; or
    - ...
    - (vi) any other matter arising under this Act or the scheme by-laws;
  - (b) a dispute between an applicant for the registration of a strata titles scheme or amendment of a strata titles scheme and a person whose consent to the application is required, or who may object to the application, relating to the consent or objection[.]
- c) 'scheme participants' is defined in s 197(2) to include each of:
  - i) the strata company for a strata titles scheme;
  - ii) a member of the strata titles scheme (in turn defined<sup>5</sup> to mean owners for the time being of lots in the scheme); and
- d) pursuant to s 12, 'scheme documents' relevantly include a scheme plan.

24 Properly construed, the Tribunal's jurisdiction to resolve scheme disputes under s 197 is so broad as to include and incorporate (at least

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<sup>3</sup> ST Act, s 197(1).

<sup>4</sup> ST Act, s 197(3).

<sup>5</sup> ST Act, s 3(1) read with s 14(8).

in disputes between scheme participants) the jurisdiction conferred under other more specific provisions (relevantly, s 90 and s 35) of the ST Act. That view is supported by the following:

- a) Pursuant to s 209, a proceeding before the Tribunal under the ST Act comes within the Tribunal's original jurisdiction, unless otherwise provided.
- b) Matters in the Tribunal's review jurisdiction are identified in s 27 and s 28, and each of those provisions include<sup>6</sup> the following terms:

Part 13 does not apply to a proceeding under this section (which is a proceeding within the Tribunal's review jurisdiction).

- c) The express exclusion of the application of Pt 13 to matters within the Tribunal's review jurisdiction suggests that Pt 13 is otherwise intended to apply.
- d) Reading the Act as a whole, the provisions of Pt 13 are to be understood as being of general application (subject to their own terms) to matters within the Tribunal's original jurisdiction.
- e) The express terms of s 197(1)(a) make it clear that, unless excluded by the terms of s 197(3), any dispute between scheme participants 'arising under the Act' falls within the Tribunal's jurisdiction to resolve scheme disputes.
  - i) It is clear on the face of that provision that disputes arising under other parts of the ST Act are caught (the provision could, but does not, refer to disputes, for example, 'under this Part').
  - ii) Similarly, although s 197(3) excludes a range of matters from being a 'scheme dispute' there is no general 'carve out' provision which would exclude an application brought under any other more specific provision (which might operate in a similar manner to s 83(6) of the Prior

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<sup>6</sup> ST Act, s 27(a) and s 28(5).

ST Act<sup>7</sup>). Rather, particular classes of matter are identified, as 'not [being] scheme disputes' including by reference to disputes under other Parts of the ST Act (again, the implication being that it is necessary to exclude those Parts, which would otherwise be scheme disputes).

25 Nevertheless, it also follows from reading the ST Act as a whole that the broad jurisdiction of the Tribunal to deal with a dispute under s 197, and its discretionary power to make orders under s 200, is subject to any specific limit imposed by the ST Act in connection with the subject matter.

26 Accordingly:

- a) where a dispute is properly characterised as being a dispute about subject matter falling under a specific provision or provisions of the ST Act (in this case, s 90), then the jurisdiction of the Tribunal to deal with that dispute is limited by the terms of that provision / those provisions; and
- b) where the subject matter of the dispute in question and/or the relief sought falls outside the scope of any specific provisions, then the Tribunal must decide:
  - i) whether the Act, properly construed, evinces an intention to 'cover the field' of the subject matter within the constraints of the specific provisions; or
  - ii) whether it has 'residual' power to deal with it under its broad jurisdiction in Pt 13.

27 In this case, therefore, the analysis of the Tribunal's jurisdiction must begin with s 90, pursuant to which the application is brought. If the subject matter of the dispute between the parties, and specifically the power to make either or both of the Proposed Orders, falls within the parameters of that section then the Tribunal will have jurisdiction to determine the matter. If the subject matters of dispute falls outside the scope of s 90, then the question will be whether it may nevertheless be dealt with under Pt 13 (or other specific provision/s in the ST Act).

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<sup>7</sup> Which provided, in relation to the general powers of the Tribunal to make orders under s 86(1) that: 'Nothing in this Part affects the generality of subsection (1), but an order in respect of any matter referred to in any other section of this Part shall not be made under this section'.



***Do the Proposed Works constitute a structural alteration to Lot 1?***

28 As noted above, the application is brought pursuant to s 90, which gives the Tribunal jurisdiction to exempt 'a particular structural alteration to [a] lot' from the application of Pt 7 Div 2 of the ST Act.

29 Division 2 of Pt 7 of the ST Act deals with the structural alteration of lots.

- a) Pursuant to s 86, 'structural alteration of a lot' means 'the erection of a structure *within the lot*', or 'an alteration of a structural kind to, or extension of, a structure *within the lot*' (emphasis added).
- b) Relevantly, under s 87(2), the owner of a lot in a strata scheme must not cause or permit the structural alteration of the lot without the prior approval, expressed by resolution without dissent of the strata company.
- c) The grounds upon which approval may be refused are, however, circumscribed by s 87(5), as follows:
  - (a) that the carrying out of the proposal will breach the plot ratio restrictions or open space requirements for the lot; or
  - (b) in the case of a lot that is not a vacant lot, that the carrying out of the proposal -
    - (i) will result in a structure that is visible from outside the lot and that is not in keeping with the rest of the development; or
    - (ii) may affect the structural soundness of a building; or
    - (iii) may interfere with a statutory easement;or
  - (c) any other ground specified in the regulations.<sup>8</sup>

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<sup>8</sup> Regulation 74 specifies additional grounds for refusal being that that the carrying out of the proposal: (a) will contravene a specified by-law or specified by-laws of the strata company; or (b) may interfere with a short form easement or restrictive covenant or any other easement or covenant affecting the parcel that is shown on the scheme plan or registered against the parcel.

30 An application may be made to the Tribunal under s 90 to exempt  
a structural alteration from these requirements whether or not the  
necessary approval for the alteration has been sought, and even if such  
approval has been validly refused.<sup>9</sup>

31 The Tribunal may make such an order if it is satisfied that 'the  
structural alteration of the lot is reasonable, having regard to the merits  
of the alteration and the interests of all of the owners of the lots in the  
use and enjoyment of their lots and the common property'.<sup>10</sup>

32 Section 86 defines 'structure' by reference to the Regulations, and  
reg 73 in turn provides that a 'structure' includes any:

[B]uilding or improvement (whether free standing or annexed to or  
incorporated with any existing building on the lot) -

- (a) the construction or erection of which is required to be approved  
by the local government or any other authority; or
- (b) the area of which is to be taken into account for the purposes of  
determining the plot ratio restrictions or open space  
requirements for the lot.

33 It is uncontentious that the Proposed Works involve the  
construction of a building improvement that requires local government  
approval (and this is supported by the Development Approval).  
They therefore involve 'an alteration of a structural kind' and as such  
constitute a 'structural alteration'.

34 However, the broad power of the Tribunal to consider the  
reasonableness of a proposal under s 90 is only enlivened if the work is  
properly characterised as the 'structural alteration of a lot' which in turn  
requires that the Proposed Works be 'within'<sup>11</sup> Lot 1.

### **Relevance of the *Tipene Decisions* – what is a 'lot'?**

35 The question of the Tribunal's jurisdiction to approve, or exempt  
from approval, structural alterations was considered under the Prior ST  
Act in series of related actions<sup>12</sup> before this Tribunal and the Supreme  
Court (the *Tipene Decisions*).

<sup>9</sup> Section 90(2).

<sup>10</sup> Section 90(3).

<sup>11</sup> See [13](a) above.

<sup>12</sup> *Tipene and The Owners of Strata Plan No 9495* [2013] WASAT 186 (*Tipene No 1*); *Tipene v The Owners of Strata Plan 9485* [2015] WASC 30 (*Tipene No 2*); and *Tipene and The Owners of Strata Plan 9465* [2016] WASAT 101 (*Tipene No 3*), together the *Tipene Decisions*.

36 The factual circumstances, as well as the legislative framework,  
underpinning each of the *Tipene Decisions* may be distinguished from  
the present application, as outlined briefly below.

37 Each of the applications was determined under s 103F of the Prior  
ST Act (being the statutory forerunner of s 90), and by reference to s 7  
of the Prior ST Act (being a forerunner of s 87).<sup>13</sup>

38 In *Tipene No 1* and *Tipene No 2*:

- a) the works proposed by the applicant involved the demolition of a building in a strata scheme and the construction of a new building in its stead;
- b) both the Tribunal in the first instance, and the Supreme Court on appeal from that decision, concluded that the Tribunal did not have jurisdiction under s 103F to approve the demolition of a strata building;
- c) specifically, in *Tipene No 2* Corboy J held that s 7 and s 103F of the Prior ST Act did not permit an alteration or extension of a structure that would affect the boundary of a lot,<sup>14</sup> stating that:

[104] [A] change in the boundaries of a lot or lots is, in effect, a re-subdivision within a scheme. Section 8 provides for such re-subdivisions. ... Accordingly, s 7 and s 103F are subject to a limitation implied from the STA [ST Act] read as a whole that an alteration or extension of a structure cannot affect the boundaries of a lot or lots.

[105] It may be that lot owners can approve an alteration that temporarily affects the boundaries of a lot or lots under s 7. However, it is unnecessary to decide that question.

39 In *Tipene No 3*:

- a) the applicant had revised its plans and sought, instead of demolishing the building, to undertake extensive remodelling which included the removal and

<sup>13</sup> Section 103F of the Prior ST Act was in similar in effect, but not identical to, s 90 of the ST Act. Notably, s 103F differed as to the nature of the order that could be made (deeming approval under s 7 or s 7A of the Prior ST Act), and as to the grounds for making such an order (essentially, that such approval had been unreasonably withheld). That in turn required consideration of the basis for approval under s 7 or s 7A of the Prior ST Act.

<sup>14</sup> *Tipene No 2* at [93].

repositioning of the roof and external walls of the building;

b) Senior Member Aitken:

- i) observed that in a strata scheme lot boundaries are determined principally by reference to structures, with the boundaries depicted on a floor plan either being constituted by the walls of a building, or by their location relative to a building (or the boundary of the parcel);<sup>15</sup>
- ii) held that a proposal to permanently remove the walls and roof of a building and construct them in different locations would, therefore, have the effect of destroying the structures that define the cubic spaces that form each lot part and those part lots will cease to exist;<sup>16</sup> and
- iii) held that the Tribunal lacked jurisdiction under the Prior ST Act to approve (or exempt from approval) such alterations.

40 Of particular relevance, the *Tipene Decisions* included observations concerning the nature of a 'lot'. Those observations remain relevant given the key determinants and features of a 'lot' under the ST Act as it now stands, which may be discerned from the following:

- a) the definition of 'lot' in s 3 which, pursuant to cl 2 of Sch 2A, should be read in connection with a single tier strata scheme to mean:

... 1 or more cubic spaces forming part of the parcel subdivided by the strata scheme, the base of each such cubic space being designated as 1 lot or part of 1 lot on the floor plan forming part of the scheme plan, being in each case, but subject to clause 3AB, cubic space the base of whose vertical boundaries is as delineated on a sheet of that floor plan and which has horizontal boundaries as ascertained under subsection (2)[.]

- b) a floor plan on a strata plan:

<sup>15</sup> *Tipene No 3* at [64]-[66].

<sup>16</sup> *Tipene No 3* at [85].



- i) shows the floor area of a lot or part lot - that is, the area occupied on a horizontal plane by the base of the cubic space - by depicting the base lines of the vertical boundaries of the space;<sup>17</sup> and
- ii) does not depict the horizontal boundaries of a lot or part lot - instead, those boundaries are determined in accordance with s 3(2).

41 Taking the above wording into account, in my view the following observations made in the *Tipene Decisions* apply with equal force to the present application:

- a) a lot in a strata scheme is a statutory construct created in relation to a three-dimensional space. The interest of a lot owner is, in addition to a shared interest in any common property,<sup>18</sup> an interest in the cubic space comprising the lot rather than in land *per se*;<sup>19</sup>
- b) further, a lot may comprise a number of cubic spaces, as opposed to being a 'single super cube';<sup>20</sup> and
- c) certain features of the land (physical structures or surveyed boundaries)<sup>21</sup> define the cubic space of each lot or part lot. A floor plan is intended to *depict* certain of the (physical) features that define a cubic space; it does not *constitute* the definitional features of the space.<sup>22</sup>

### What are the boundaries of Lot 1?

42 In this instance, Sheet 1 of the floor plan on the Strata Plan (annexed) shows Lot 1 having a total floor area of 288m<sup>2</sup>, comprising four part lots which, when interpreted with the Summit Drawings, are:

- a) the existing single storey dwelling, occupying a floor area of 96m<sup>2</sup> (**Dwelling Part Lot**);

<sup>17</sup> Definitions of 'floor area of a cubic space' and 'floor plan': ST Act, s 3.

<sup>18</sup> Pursuant to s 3(1) and s 10, the common property of a strata scheme is that part of the land which does not does not form part of a lot.

<sup>19</sup> *Tipene No 2* at [72]-[73] and [77], per Corboy J; *Tipene No 1* at [55]-[56], per Spillane SM.

<sup>20</sup> *Tipene No 3* at [87], per Aitken SM.

<sup>21</sup> ST Act, s 3(2) and s 3(2A).

<sup>22</sup> See further, *Tipene No 2* at [77], per Corboy J.

- b) a walled front yard (facing onto Caledonian Avenue) with a floor area of 56m<sup>2</sup> (**Yard Part Lot**);
- c) a paved driveway area of 62m<sup>2</sup> which is partly covered by a car port (**Driveway Part Lot**); and
- d) a narrow 12m<sup>2</sup> area running along the south-eastern side of the residence (**Path Part Lot**).

43 As appears from the definition of 'lot' in [31] above, the precise boundaries of each of the four constituent part lots of Lot 1 are ('subject to cl. 3AB'<sup>23</sup>) to be ascertained:

- a) in the case of vertical boundaries, by reference to the floor plan; and
- b) in the case of horizontal boundaries, in accordance with s 3(2). This in turn provides (at s 3(2)(a)(ii)) that, if a floor or ceiling joins a vertical boundary of a cubic space, then the horizontal boundary of that cubic space is the upper surface of that floor and the under surface of that ceiling.

44 Clause 3AB relevantly provides that:

- (1) If this clause applies, the boundaries of a cubic space referred to in paragraph (a) of the definition of *floor plan* in section 3(1) are, regardless of the exact location of the lines referred to in that paragraph -
  - (a) the external surfaces of the building occupying the area represented on that floor plan -
    - (i) including any thing that -
      - (I) is attached to and projects from the building; and
      - (II) is prescribed by the regulations to be included as part of a lot;

but

<sup>23</sup> As to the application of cl 3AB, the Scheme, being a four lot strata scheme registered before 1 January 1998, is an 'existing small strata scheme' within the meaning of cl 21A. Following the reasoning in *Hapgood-Strickland and Watson* [2021] WASAT 15, at [21]-[24] and [53]-[65], cl 3AB applies to the Scheme. Given the primacy of the Boundary Description (see [45]-[47] below), it is not worth repeating that analysis here in full.

- (ii) excluding any thing that is prescribed by the regulations not to be included as part of a lot;

or

- (b) despite paragraph (a), if 2 lots -
  - (i) have a common or party wall, the centre plane of that wall; or
  - (ii) have buildings on them that are joined, the plane or planes at which they are joined.

...

- (3) Nothing in this clause applies to a boundary of a lot or a part of a lot that is external to a building.
- (4) If this clause applies it -
  - (a) displaces the operation of section 3(2)(a); but
  - (b) does not affect the operation of section 3(2)(b).

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By its own terms, cl 3AB:

- a) does not apply to a boundary of a lot or a part of a lot that is 'external to a building'; and
- b) does not affect the operation of s 3(2)(b), which in turn provides that:

The boundaries of a cubic space referred to in ... the definition of *floor plan* in subsection (1) ... are such boundaries as are described on a sheet of the floor plan relating to that cubic space (those boundaries being described in the manner required by the regulations by reference to a wall, floor or ceiling in a building to which that plan relates or to structural cubic space within that building)[.]

(Emphasis added).

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Relevant to the above:

- a) 'building' is defined in s 3(1) to include a 'structure', so that what is 'external to a building' includes what is external to any structure;

- b) as to the requirements for boundary descriptions, reg 6(4) provides 'if a cubic space is within a building that is a single tier building, the boundaries of the cubic space must be described in a manner that unambiguously defines the cubic space and its location in relation to the relevant building'.<sup>24</sup>

47 In this case, Sheet 1 of the floor plan contains the following  
**(Boundary Description):**

THE STRATUM OF THAT PORTION OF THE LOTS EXTERNAL TO THE BUILDING EXTENDS BETWEEN 5 METRES BELOW AND 15 METRES ABOVE THE UPPER SURFACE OF THE GROUND FLOOR OF THE RESPECTIVE ADJOINING UNITS.

EXTERNAL FACES OF BUILDINGS, AS PER APPROVED BUILDING PLANS, ARE BOUNDARIES OF PART LOTS[.]

48 Applying those provisions, I find that:

- a) the vertical boundaries of Lot 1 are:
- i) those shown on Sheet 1 (only) of the floor plan, noting that as a consequence no portion of any of the four constituent part lots extends over any other (that is, the vertical boundaries of the various part lots do not overlap or cross one another); and
  - ii) insofar as they comprise a building wall, then the external face of that wall;
- b) the horizontal boundaries of Lot 1 are:
- i) for those portions of any part lot that are external to a structure, the horizontal boundaries are 15 metres above and 5 metres below the ground floor of the adjoining unit; and
  - ii) for those portions of any part lot that have a roof or floor attaching to a vertical boundary wall, then the under surface of the floor or upper surface of that roof;

<sup>24</sup> 'Single tier building' is defined in reg 6(1) to include 'a building that is part of a single tier strata scheme'.



- c) because floors and ceilings join, and extend between, the perimeter walls of the dwelling building (as it now stands):
  - i) no portion of the Dwelling Part Lot is external to a building;
  - ii) the horizontal boundaries of the Dwelling Part Lot are the under surface of the floors and the upper surface of the roof (being the external faces of the horizontal elements of the building); and
- d) there is no further part lot shown on the Strata Plan for Lot 1 capable of comprising a further cubic space above the Dwelling Part Lot.

It follows that the air space above the Lot 1 dwelling building which attaches to the land (parcel) is:

- a) not a portion of the Dwelling Part Lot;
- b) not a portion of any of the Yard Part Lot, Driveway Part Lot or Path Part Lot; and
- c) not within Lot 1 (or any other lot), and therefore common property.

### **Conclusion in relation to s 90**

Accordingly, insofar as the Proposed Works are intended to erect any structure above the existing height of the Lot 1 dwelling roof, I find that they:

- a) are structural alterations which would have the effect of extending the dwelling, and the Dwelling Part Lot, of Lot 1 into Scheme common property; and
- b) are not, therefore, structural alterations to a lot (not being within a lot).

Given that both s 87 and s 90 are, by their terms, directed to structural alterations to a lot, the finding above leads to the conclusion that the Proposed Works:

- a) could not, without more, be the subject of approval under s 87; and
- b) do not fall within the jurisdiction of the Tribunal under s 90.

52 There is arguably some tension between those conclusions (particularly at subparagraph (a) above) and the fact that:

- a) s 89(1) provides that any application to a strata company for approval of a structural alteration of a lot must set out details of the proposal and 'such other information as may be prescribed'; and
- b) reg 75 prescribes the requisite information and includes, at reg 75(2)(h):

[W]hether the structural alteration of the lot changes the boundaries of the lot and whether the applicant has sought advice from a licensed surveyor about the effect of the structural alteration.

53 It might be argued that the information prescribed in reg 75(2)(h) suggests an ability of a strata company to approve structural alterations that would change the boundaries of a lot. Any such suggestion must, however, give way to the express language of the ST Act.

54 In any event, the requirement for information is not inconsistent with the conclusion that such works could not be approved under s 89, or made exempt from approval under s 90. Such information may in fact properly alert the strata company and/or Tribunal to the impediment.

55 The conclusions at [51] above are sufficient to determine, and are the reasons for determining, the question of jurisdiction by reference to s 90.

56 The remaining issue is whether, if not by reference to s 90, the Tribunal otherwise has jurisdiction to make the Proposed Orders. That is, given that I have found that the Proposed Works fall outside the scope of s 90, the questions that remain are:

- a) what is the *subject matter* (as opposed to scope) of s 90; and

- b) is the subject matter of the dispute between the parties intended to be covered by s 90, or does it fall to be determined under the broad jurisdiction of the Tribunal under s 197, on some other specific provision/s of the ST Act?

***Are there other sources of jurisdiction to make the Proposed Orders?***

57 The conclusions at [51] above depend partially, but not solely, on the question of whether a boundary wall is to be destroyed (because, as identified, the Proposed Works involve the erection of a structure beyond the bounds of Lot 1).

58 The fact that the Proposed Works would necessarily include the destruction of an existing boundary of Lot 1 (being the roof of the current dwelling) is, however, significant.

59 This is not a case involving the temporary removal and *replacement* of an existing boundary. Rather, in common with ***Tipene No 3***, the proposal is to remove a significant proportion of the boundary structure and to *relocate* it. The consequence of doing so is that the Scheme itself would need to be reconstituted (and an acknowledgement of that consequence is implicit in the terms of the application and, in particular, in the terms of the Proposed Order 2).

60 As noted earlier in these reasons, the ST Act makes various provision for the variation (including termination) of strata schemes, including giving the Tribunal power to make orders in connection with:

- a) the amendment of scheme plans where it considers an objection to such amendment to be unreasonable: s 35(3);
- b) the variation of a strata scheme on the damage or destruction of a building:<sup>25</sup> s 166;
- c) confirming a resolution to terminate a strata scheme: s 183 (noting that no order can be made deeming a strata company to have passed a termination resolution: s 204(b)); and

<sup>25</sup> Of note, s 166 applies when 'a scheme building is damaged or destroyed'. In ***Tipene No 2***, Corboy J (at [107]) construed that phrase (in s 28 of the Prior ST Act) as conferring jurisdiction that was contingent on a building having been damaged or destroyed, and did not include power to authorise any activity that will result in such damage or destruction.

- d) a scheme dispute between an applicant for the registration of a strata titles scheme or amendment of a strata titles scheme and a person whose consent to the application is required, or who may object to the application, relating to the consent or objection: s 197(1)(b).

61 However, following from the analysis above, the need in this case for any such variation arises from a proposed structural alteration affecting a lot. In a case where the subject matter of the dispute giving rise to the need (or potential need) to vary a strata scheme:

- a) the power to make orders in connection with that variation is subject to the Tribunal having power to authorise the structural alteration itself; and
- b) in any event, even if the Tribunal had that power, there could in the circumstances be no basis for its exercise.

62 Accordingly, in answer to the questions posed at [56] above, I find that:

- a) the subject matter of Pt 7 Div 2 (and s 90 within it) is structural alterations affecting lots in a strata scheme;
- b) Pt 7 Div 2 deals comprehensively with, and is intended to cover the field of, structural alterations affecting strata scheme lots. Specifically, I note:
  - i) the specificity of the processes and information required of applicants and strata companies in connection with proposed structural alterations within a lot;
  - ii) the significant consequences that would flow from structural alterations extending beyond a lot; and
  - iii) it would be inconsistent, in my view, to construe the ST Act as making careful provision for structural alterations within a lot, while intending that the more significant implications of structural alterations extending beyond a lot could be dealt with as a general



matter and with no specific guidance or procedural requirements;<sup>26</sup>

- c) the limits of s 90 circumscribe the jurisdiction of the Tribunal, including under s 197 and s 200, to make orders dealing with structural alterations affecting strata scheme lots; and
- d) accordingly, the Tribunal does not have jurisdiction to make the Proposed Orders.

### ***Orders***

The Tribunal orders:

1. The Tribunal does not have jurisdiction to make the orders sought in the application.
2. The application is dismissed.

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<sup>26</sup> This reasoning is consistent with the approach of Chaney J in *Maber & Anor and The Owners of Strata Plan 11391* [2007] WASAT 99 at [29]-[30].

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

DR B MCGIVERN, MEMBER

1 JUNE 2021