
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : WHITE and DUNCAN [2021] WASAT 145

MEMBER : MS C BARTON, MEMBER

HEARD : 27 AUGUST 2021

DELIVERED : 12 NOVEMBER 2021

FILE NO/S : CC 323 of 2021

BETWEEN : KIRSTY-ANN WHITE
First Applicant

DAVID JOHN ELLIS
Second Applicant

AND

CHRISTOPHER DUNCAN
Respondent

Catchwords:

Strata titles - Survey-strata scheme - Resolution of scheme dispute - Structural alterations - Residential development to which the R-Codes apply - Application of R-Codes - Calculation of open space - Calculation of plot ratio - Whether alfresco area is a structure - Whether structural alterations conform to open space requirements - Whether structural alterations conform to plot ratio restrictions - Whether approval of strata company required for structural alterations

Legislation:

Interpretation Act 1984 (WA), s 6, s 18, s 19(1)(b), s 19(2), s 44(1)
State Planning Policy 3.7 - (R-Codes) Residential Design Codes Volume 1,
cl 5.1.4, cl 5.1.5, Appendix 1
Strata Titles (General) Regulations 2019 (WA), reg 7, reg 7(1), reg 7(1)(b),
reg 7(2), reg 7(2)(a), reg 8, reg 8(1), reg 8(1)(a), reg 8(2), reg 8(3), reg 73,
Strata Titles Act 1985 (WA), s 3, s 86, s 88(2), s 88(2)(a), s 89(1), s 197(4),
s 199(1), s 201
Town of East Fremantle Town Planning Scheme No 3, Sch 1

Result:

Application dismissed

Category: B

Representation:

Counsel:

First Applicant : Mr John Park
Second Applicant : Mr John Park
Respondent : In Person

Solicitors:

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

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

Bethane v Mohammadi [2018] WASCA 98
City of Fremantle v Imago Holdings Pty Ltd [2020] WASCA 61
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28;
(1998) 194 CLR 355

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 Ms Kirsty-Ann White and Mr David John Ellis (**applicants**) have brought proceedings for the resolution of a scheme dispute under s 197(4) of the *Strata Titles Act 1985* (WA) (**ST Act**).¹ The applicants and the respondent, Mr Christopher Duncan (**respondent**), are the owners of lots in a three-lot scheme on Survey Strata Plan 6309 (**Scheme**).

2 The proceedings were commenced on 10 March 2021, following the grant of development approval by the Town of East Fremantle (**Town**) to the respondent's application for structural alterations to Lot 1 of the Scheme (**Lot 1**).²

3 The proposed structural alterations include the construction of a meals room and an alfresco area, together an area totalling 33.93 m² (**proposed additions**).

4 The applicants, who are the owners of Lot 3 of the Scheme, contend that the proposed additions do not conform to the open space requirements and plot ratio restrictions under the ST Act and the *Strata Titles (General) Regulations 2019* (WA) (**Regulations**). Consequently, it is the applicants' position that the respondent is required to obtain approval for the proposed additions from the strata company of the Scheme (**Strata Company**) under s 88(2)(a) and s 89(1) of the ST Act. It is common ground that the respondent has not obtained the Strata Company's approval.³

5 The respondent says that he does not require the approval of the Strata Company under s 88(2)(a) and s 89(1) of the ST Act because the proposed additions are fully compliant with the open space requirements and plot ratio restrictions for Lot 1 calculated in accordance with *State Planning Policy 3.7 - Residential Design Codes Volume 1* (**R-Codes**).

The issues for determination

6 The following issues arise for determination:

- 1) whether the proposed additions, on completion of the work, conform to the open space requirements for Lot 1;

¹ *Strata Titles Act 1985* (WA) as amended from 1 May 2020.

² Development application P145/20 dated 7 December 2020.

³ Applicants' Statement of Issues, Facts and Contentions (**SIFC**) at para 24; respondent's SIFC at para 24.

- 2) whether the proposed additions, on completion of the work, conform to the plot ratio restrictions for Lot 1; and
- 3) whether the respondent is required to apply to the Strata Company for approval of the proposed additions by resolution without dissent in accordance with s 88(2)(a) and s 89(1) of the ST Act.

Principles of statutory construction

7 The starting point in relation to statutory construction is consideration of the text of the provision, in its statutory context, including the statute's purpose or object. The provision must be construed so that it is consistent with the language and purpose of all the provisions of the statute: ***Bethane v Mohammadi*** [2018] WASCA 98 (***Mohammadi***) at [32]; ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355 at [69].

8 In ***City of Fremantle v Imago Holdings Pty Ltd*** [2020] WASCA 61 at [66], the Western Australian Court of Appeal referred to the following passage from ***Mohammadi***:

... the objective discernment of the statutory purpose is integral to contextual construction. The statutory purpose may be discerned from an express statement of purpose in the statute, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose must be discerned from what the legislation says, as distinct from any assumptions about the desired or desirable reach or operation of relevant provisions[.]

9 Section 18 of the ***Interpretation Act 1984*** (WA) (***Interpretation Act***) provides the following guidance:

In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.

10 Although the ST Act does not expressly refer its purpose or object, its long title states that it is '[a]n Act to provide for the subdivision of land by strata titles schemes, the creation of strata titles and the governance and operation of strata titles schemes'.

- 11 Definitions contained in a written law apply to the construction of the text of the written law that contain those definitions.⁴ Further, words and expressions used in subsidiary legislation have the same respective meanings as in the written law under which the subsidiary legislation is made.⁵
- 12 Extrinsic material may be used to confirm the ordinary meaning conveyed by the text of the statutory provision taking into account its context in the statute and the purpose or object underlying the statute.⁶ Consequently, it is not necessary for the provision to be ambiguous or obscure before regard is given to extrinsic material. Material that the Tribunal may have regard to includes relevant parliamentary debates, second reading speeches and explanatory memoranda.⁷

The statutory framework

- 13 Section 88(2) of the ST Act provides that, except with the prior approval of the strata company, the owner of a lot in a survey-strata scheme must not cause or permit the structural alteration of the lot if, on completion of the work, the structures on the lot will not conform to the open space requirements or plot ratio restrictions for the lot.
- 14 The expression 'lot in a survey-strata scheme' in s 88(2) of the ST Act is defined in s 3 of the ST Act to mean 'land that is shown as a lot consisting of 1 or more parts on the plan for that scheme'.
- 15 An application for approval of the structural alterations of a lot to the strata company must set out the details of the proposal and such other information that is prescribed.⁸ The approval of the strata company must be expressed by resolution without dissent.⁹
- 16 The expression 'structural alteration of a lot' is defined in s 86 of the ST Act to mean the erection of a structure within the lot, or an alteration of a structural kind to, or extension of, a structure within the lot. A 'structure' includes anything classified as a structure by the Regulations.¹⁰

⁴ Section 6, Interpretation Act.

⁵ Section 44(1), Interpretation Act.

⁶ Section 19(1)(b), Interpretation Act.

⁷ Section 19(2), Interpretation Act.

⁸ Section 89(1), ST Act.

⁹ Section 88(2)(a), ST Act.

¹⁰ Section 86, ST Act.

Calculation of open space

17 The expression 'open space' is defined in s 3 of the ST Act to mean the area of a lot that is not occupied by a building, calculated in accordance with the Regulations. A 'building' is defined in s 3 to include a 'structure'.

18 A 'structure' is defined in reg 73 of the Regulations, which provides:

Term used: structure

For the purposes of the definition of *structure* in section 86, the things classified as a structure are any dwelling, shop, factory, commercial premises, garage, carport, shed or other building 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.

19 Regulation 7 of the Regulations provides for the calculation of open space as follows:

Calculation of open space

(1) For the purposes of the definition of *open space* in section 3(1), to calculate the open space of a lot in a strata titles scheme, the open space of the parcel that is the subject of the strata titles scheme is to be apportioned between lots -

- (a) in accordance with the scheme by laws; or
- (b) if the scheme by laws do not provide for that apportionment, in accordance with the pro rata entitlements of each lot.

(2) The open space of the parcel that is the subject of the strata titles scheme is calculated as follows-

- (a) if the parcel is residential development to which the R Codes apply - in accordance with the R Codes;
- (b) if paragraph (a) does not apply - in accordance with the relevant local planning scheme;

- (c) if neither paragraph (a) nor (b) applies - in the same way as it would be determined by the local government if a development application (within the meaning given in *the Planning and Development Act 2005* section 4(1)) were made for approval of a structural alteration of the lot.

- (3) The pro rata entitlements of a lot are calculated on the proportion that the area of a lot bears to the area of the parcel[.]

20 The expression 'open space' is defined in Appendix 1 to the R-Codes as follows:

Generally that area of a **lot** not occupied by any *building* and includes:

- open areas of accessible and useable flat roofs and outdoor living area above *natural ground level*;
- areas beneath eaves;
- *verandahs*, *patios* or other such roofed structures not more than 0.5m above natural ground level, *unenclosed* on at least two sides, and covering more than 10 per cent of the *site area* or 50m² whichever is the lesser;
- unroofed open structures such as *pergolas*;
- uncovered *driveways* (including access aisles in car parking areas) and uncovered car parking spaces;

but excludes:

- non-accessible roofs, *verandahs*, balconies and outdoor living areas over 1m above natural ground level; and/or
- covered car parking spaces and covered walkways, areas for rubbish disposal, stores, outbuildings or plant rooms.

21 The deemed-to-comply requirements in cl 5.1.4 of the R-Codes provide that:

- C4 **Open space** provided in accordance with *Table 1* (refer *Figure Series 6*). The site of the *grouped dwelling*, for the purpose of calculating the open space requirement, shall include the area allocated for the exclusive use of that *dwelling* and the proportionate share of any associated *common property*.

22 Table 1 of the R-Codes lists the general site requirements for all single house(s) and grouped dwellings; and multiple dwellings in areas coded less than R40. The minimum total (% of site) for R12.5 is 55%.

23 Appendix 1 to the R-Codes defines 'site' in the case of a grouped dwelling as:

... the area occupied by the *dwelling* together with any area allocated (whether by way of strata title or otherwise) for the exclusive use or benefit of that dwelling[.]

Calculation of plot ratio

24 The expression 'plot ratio' is defined in s 3 of the ST Act, in relation to a lot or a parcel, to mean the ratio of the gross total of the areas of all floors in any building on the lot or parcel to the area of the lot or parcel, and is to be calculated in such manner as is prescribed.

25 The term 'parcel' means the land subdivided by a strata titles scheme, while the expression 'lot in a survey-strata scheme' means land that is shown as a lot consisting of one or more parts on the plan for the scheme.¹¹

26 Regulation 8 of the Regulations provides for the calculation of plot ratio as follows:

Calculation of plot ratio

(1) For the purposes of the definition of plot ratio in section 3(1), to calculate plot ratio in relation to a parcel, the gross total of the areas of all floors in any building on the parcel is to be calculated as follows-

- (a) if the parcel is residential development to which the R Codes apply - in the same way as plot ratio area is calculated under the R Codes;
- (b) if paragraph (a) does not apply - in the same way as floor area is calculated under the relevant local planning scheme.

(2) For the purposes of the definition of plot ratio in section 3(1), to calculate plot ratio in relation to a lot, the gross total of the areas of all floors in any building on the lot is to be calculated by apportioning the gross total of the areas of all floors in any building on the parcel (calculated as provided by subregulation (1)) between

¹¹ Section 3, ST Act.

lots in accordance with the pro rata entitlements of each lot.

- (3) The pro rata entitlements of a lot are calculated on the proportion that the area of a lot bears to the area of the parcel.

27 The expression 'plot ratio' is defined in Appendix 1 to the R-Codes to mean '[t]he ratio of the gross plot ratio area of buildings on a development site to the area of land in the site boundaries'. The R-Codes also define 'plot ratio area' to mean, subject to certain qualifications, '[t]he gross total area of all floors of buildings on a development site, including the area of any internal and external walls'. However, the R-Codes are silent on how plot ratio is to be calculated for a site coded less than R40.

The conduct of the hearing and expert evidence

28 The Tribunal made standard orders for the filing of expert witness statements. The Tribunal also made an interim order under s 201 of the ST Act that the respondent must not cause any structural alterations to Lot 1 until the determination of the proceedings.

29 The applicants relied on the evidence of Mr Keith Bowyer who is a licensed surveyor with RM Surveys and has over 40 years of surveying experience. Mr Bowyer was engaged by the applicant to prepare an independent report on the open space requirements and plot ratio restrictions for the proposed additions to Lot 1.¹²

30 The respondent engaged Mr Gregory Ireland to provide a report on the compliance of the proposed additions to Lot 1 with the ST Act.¹³ Mr Ireland is a licensed surveyor and has worked in the private sector for some 40 years, including 30 years' specialising in land subdivision and tenure.

31 The applicants contend that the evidence of Mr Ireland should not be given any weight because he is not an independent witness. The applicants point to the fact that Mr Ireland assisted the respondent with the Tribunal proceedings prior to giving evidence as an expert.¹⁴

32 It is anticipated that experts engaged by a party will act with independence when giving evidence before the Tribunal. Mr Ireland agreed to be bound by the duties for the provision of expert evidence and gave his

¹² Witness statement of Keith Bowyer dated 15 June 2021, Exhibit 3.

¹³ Witness statement of Gregory Ireland dated 13 July 2021, Exhibit 2.

¹⁴ Applicants' outline of submissions for final hearing dated 3 August 2021 at para 5.

evidence in an honest and forthright manner and, therefore, I found him to be a reliable witness. However, Mr Ireland said that he was the respondent's friend¹⁵ and assisted the respondent by preparing the technical aspects of the respondent's SIFC¹⁶. For this reason, I find Mr Ireland not to be an independent witness. Consequently, to the extent that there are differences of opinion between Mr Bowyer and Mr Ireland, I prefer the evidence of Mr Bowyer.

The Tribunal's consideration

33 The parties agreed, and I find, that they are occupiers of lots in the Scheme. Consequently, I find, that the parties are 'scheme participants' for the purposes of s 197(1) of the ST Act. There was no dispute, and I find, that the Scheme comprises three lots and a common property lot known as lot 4 with an area of 328m² (**common property**).

34 I have been asked to determine whether the proposed additions, on completion of the work, will conform to the open space requirements and plot ratio restrictions for Lot 1 as calculated under reg 7 and reg 8 of the Regulations, respectively. If the proposed additions do not comply, the respondent must obtain the Strata Company's approval for the structures by resolution without dissent in accordance with s 88(2)(a) and s 89(1) of the ST Act.

35 There was no dispute, and I find, that the proposed additions comprise an alfresco area of 13.6m² and a meals room of 20.3m².

Open space requirements

36 To calculate the open space of a lot in a strata title scheme, reg 7(1) of the Regulations provides that the open space of the parcel that is the subject of the scheme is to be apportioned between lots in accordance with the scheme by-laws, or if the scheme by-laws do not provide for that apportionment, in accordance with the pro rata entitlements of each lot (**open space requirements**).

37 The open space of the parcel that is the subject of the scheme is to be calculated in accordance with reg 7(2) of the Regulation.

38 To determine whether the proposed additions will conform to the open space requirements for Lot 1 for the purposes of s 88(2) of the ST Act

¹⁵ ts 34, 27 August 2021.

¹⁶ ts 96, 27 August 2021.

it is necessary to calculate the open space that will be available to Lot 1 on completion of the works (**available open space**).

Pro rata entitlement of Lot 1

39 There was no dispute, and I find, that there are no Scheme by-laws which deal with the calculation of open space for the purposes of reg 7(1) of the Regulations. Consequently, I find that to calculate the open space of a lot, the open space of the parcel that is the subject of the Scheme is to be apportioned between lots in accordance with the pro rata entitlements of each lot.¹⁷

40 I further find, based on reg 7(3) of the Regulations, that the pro rata entitlements of Lot 1 are to be calculated on the proportion that the area of Lot 1 bears to the area of the parcel. There was no dispute, and I find, that the area of the parcel is 1,037m² and the area of Lot 1 is 226m².¹⁸ The experts agreed, and I find, that the pro rata entitlement of Lot 1 is 21.8%.¹⁹

Application of the R-Codes

41 There was no dispute, and I find, that the parcel is residential development coded R12.5.²⁰ Consequently, for the purposes of reg 7(2) of the Regulations, I find that the R-Codes apply to the calculation of the open space of the parcel that is the subject of the Scheme (as provided by reg 7(2)(a) of the Regulations).²¹

Open space requirements of the parcel

42 A 'parcel' is defined in s 3 of the ST Act to mean 'the land subdivided by a strata titles scheme'. In this case, the parcel that is the subject of the Scheme has an area of 1,037m², including 328m² of common property which comprises open space.

43 Clause 5.1.4 of the R-Codes refers to Table 1 for the purposes of determining the open space of the 'site' for grouped dwellings in areas coded less than R40. It provides for the proportionate share of any associated common property when calculating the open space requirement for the site of the grouped dwelling.

¹⁷ Regulation 7(1)(b) of the Regulations.

¹⁸ Exhibit 4.

¹⁹ Exhibit 4, 'Calculation Part 2', witness statement of Keith Bowyer dated 15 June 2021 at Table 2; witness statement of Gregory Ireland dated 13 July 2021 at para 39.

²⁰ Witness statement of Keith Bowyer dated 15 June 2021 at para 7. Witness statement of Gregory Ireland dated 13 July 2021 at para 25.

²¹ Regulation 7(2)(a) of the Regulations.

- 44 Table 1 of the R-Codes refers to the open space requirement as a minimum total '(% of site)'. 'Site' is defined in Appendix 1 to the R-Codes to mean, in the case of a grouped dwelling, the area occupied by the dwelling together with any area allocated for the exclusive use or benefit of that dwelling. I find that the definition of 'site' in the R-Codes, in the case of a grouped dwelling, is different to the meaning of a 'parcel' in reg 7(2)(a) of the Regulations because a 'parcel' is defined in s 3 of the ST Act as the land subdivided by a strata titles scheme. I further find that the definition of 'site' in the R-Codes is consistent with the meaning of a 'lot' for the purposes of the ST Act and Regulations because they both comprise the area of the dwelling and any area that is within its exclusive use or benefit.
- 45 The experts agreed that the open space requirements of the parcel that is the subject of the Scheme should be calculated in accordance with Table 1 of the R-Codes which specifies 55% open space for grouped dwellings in areas coded R12.5.²² Both Mr Bowyer and Mr Ireland calculated the open space requirements for the parent parcel that is the subject of the Scheme is 570.35m² (being 55% of 1037m²).²³
- 46 Although I accept that the figure of 570m² is the correct open space requirement for a green title lot, I find that the experts' analysis for determining the open space requirement for the parcel that is the subject of the Scheme is misconceived. Table 1 of the R-Codes provides for the open space of a 'site' (or lot) and not a 'parcel' as required by reg 7(2)(a) of the Regulations. To calculate the open space of the parcel that is the subject of the Scheme, I find that the reference to 55% in Table 1 of the R-Codes must be applied to each lot in the Scheme because cl 5.1.4 of the R-Codes provides that the open space requirement for the site of a grouped dwelling includes the area allocated for the exclusive use of that dwelling. The three lots in the Scheme total an area of 709m² and, therefore, the open space requirements of the three lots, calculated in accordance with the R-Codes, is 389.95m².
- 47 Clause 5.1.5 of the R-Codes provides that the site of the grouped dwelling, for the purpose of calculating the open space requirement, must include the proportionate share of any associated common property. The common property lot that is to be apportioned between the lots of the Scheme has an area of 328m².
- 48 Consequently, apportioning the figure of 55% of the common property lot to the lots in the Scheme in accordance with their respective

²² ts 32, 27 August 2021.

²³ Witness statement of Keith Bowyer dated 15 June 2021 at para 17; Witness statement of Gregory Ireland dated 13 July 2021 at para 25.

unit entitlements, I find that the open space requirements of the parcel that is the subject of the Scheme for the purposes of reg 7(2)(a) of the Regulations is a total area of 570.35m². Ultimately, my calculation of the open space of the parcel is consistent with the figure arrived at by the experts.

Open space requirements for Lot 1

49 In Mr Bowyer's opinion the open space requirements for Lot 1 is 124m² (calculated from the pro rata entitlement for Lot 1 of 21.8% of 570.35m²).²⁴

50 In contrast, Mr Ireland is of the opinion that the open space requirements for Lot 1 is 124m² plus 21.8% of the respondent's pro rata entitlement of the common property.²⁵ Consequently, Mr Ireland calculated this entitlement to be an additional 71.5m² (based on the area of the parcel's common property of 328m²).²⁶

51 I accept the evidence of Mr Bowyer, and I find, that the open space requirements for Lot 1, calculated under reg 7 of the Regulations, is 124m².

Lot 1 - available open space and the alfresco area

52 The respondent seeks to rely on the definition of 'open space' in Appendix 1 to the R-Codes to include the proposed alfresco area, which is unenclosed on two sides, in the calculation of the available open space for Lot 1. The expression 'open space' is defined in Appendix 1 of the R-Codes to include 'verandahs, patios or other such roofed structures not more than 0.5m above natural ground level, unenclosed on at least two sides, and covering more than 10 per cent of the site area or 50m² whichever is the lesser'.

53 The expression 'open space' is defined in s 3 of the ST Act to mean the area of a lot that is not occupied by a building, calculated in accordance with the Regulations. A 'building' is defined in s 3 of the ST Act to include a 'structure'. The meaning of the term 'structure' for the purposes of s 88(2) of the ST Act is defined in reg 73 of the Regulations. A 'structure' includes:

- 1) any improvement (whether free standing or annexed to or incorporated with any existing building on the lot) the

²⁴ Witness statement of Keith Bowyer dated 15 June 2021 at para 18, Table 2.

²⁵ ts 60, 27 August 2021; ts 66, 27 August 2021.

²⁶ Witness statement of Gregory Ireland dated 13 July 2021 at paras 40-41.

construction of which is required to be approved by the local government, or any other authority; or

- 2) 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.

54 Generally, the construction of an alfresco area would require a building permit from a local government authority but there was no evidence before me in relation to this matter.

55 In Mr Ireland's opinion, the alfresco area is not a 'structure' for the purposes of reg 73 of the Regulations and, therefore, the area of the proposed additions is 20.3m² (not 33.9m²).²⁷ Mr Ireland formed this opinion because the proposed alfresco area is unenclosed on two sides for the purposes of the definition of 'open space' in Appendix 1 to the R-Codes.²⁸ Mr Ireland also relied on the calculations set out in the Town's assessment and approval of the proposed additions which showed that the total site coverage, not including the alfresco area, was 111.53m².²⁹ Consequently, Mr Ireland calculated the total building footprint for Lot 1 to be 111.5m².³⁰ Deducting the area of 111.5m² from the area of Lot 1 (226m²), Mr Ireland concluded that the open space balance area is 114.5m².³¹

56 Ultimately, Mr Ireland calculated that the available open space for Lot 1 as totalling 185m² (by adding 114.5m² to the proportion of the common property open space entitlement of 71.5m²).³² In Mr Ireland's opinion, the excess open space area of 61m² demonstrates that the proposed additions do not breach the open space requirement for Lot 1 of 124m².

57 The expression 'open space' is defined in s 3 of the ST Act to mean 'the area of a lot that is not occupied by a building, calculated in accordance with the Regulations'. The R-Codes are referred to in reg 7(2)(a) of the Regulations for the purposes of calculating the open space of a 'parcel' but not in relation to calculating the open space of a 'lot' under reg 7(1) of the Regulations. For this reason, I do not accept the respondent's contention that the alfresco area is to be included in calculating the available open space for Lot 1. Because the expression 'open space' is defined in s 3 of the ST Act, it would be inconsistent with the rules of statutory construction to

²⁷ Mr Ireland did concede under cross-examination that the alfresco area is a structure for the purposes of the ST Act: ts 55, 27 August 2021.

²⁸ Witness statement of Gregory Ireland dated 13 July 2021 at para 15-18.

²⁹ Witness statement of Gregory Ireland dated 13 July 2021 at para 19-20.

³⁰ ts 33, 27 August 2021.

³¹ Witness statement of Gregory Ireland dated 13 July 2021 at para 42.

³² Witness statement of Gregory Ireland dated 13 July 2021 at para 43; ts 68, 27 August 2021.

apply the definition of 'open space' in Appendix 1 to the R-Codes when calculating the available open space of Lot 1 for the purposes of determining if the proposed additions will conform to the open space requirements of Lot 1 under s 88(2) of the ST Act.

58 Consequently, I accept the evidence of Mr Bowyer, and I find, that the building footprint of the proposed additions, including the alfresco area, total an area of approximately 33.9m².

59 I further find, based on the evidence of Mr Bowyer, which I accept, that the total building footprint area of Lot 1, including the proposed additions, is 126.6m².³³ I accept Mr Bowyer's calculations, and I find, that the area of open space on Lot 1, on completion of the work, will be 99.4m².³⁴

Apportionment of common property

60 The applicants contend that Mr Ireland has 'imported' into the method for calculating the available open space of Lot 1, the terms as defined in the R-Codes in substitution for the terms used and defined in the ST Act and Regulations.³⁵ Specifically, the applicants say that Mr Ireland has applied the definition of 'site' in Appendix 1 to the R-Codes instead of the definition of 'lot', the latter being a term referred to in reg 7(1) of the Regulations. They say that in calculating the available open space for the 'site', Mr Ireland has relied on the area occupied by the dwelling on Lot 1, the area allocated for the exclusive use or benefit of the dwelling on Lot 1, and the proportionate share of any associated common property of the parcel (as provided in cl 5.1.4 of the R-Codes).³⁶

61 The question which arises from the competing expert evidence is whether the available open space of Lot 1 includes an amount apportioned from the open space that forms the common property of the parcel.

62 On a proper construction of the ST Act and Regulations, I find that the available open space of a lot in a strata titles scheme is intended to include an amount apportioned from the common property of the parcel. This interpretation is supported by reg 7(1) of the Regulations which provides that to calculate the open space of a lot, the open space of the parcel that is the subject of the strata titles scheme is to be apportioned between lots. Consequently, I find that the common property of the parcel that is the

³³ Witness statement of Keith Bowyer dated 15 June 2021 at para 13.

³⁴ Witness statement of Keith Bowyer dated 15 June 2021 at para 19.

³⁵ Applicants' outline of submissions for final hearing dated 3 August 2021 at para 17.

³⁶ Applicants' outline of submissions for final hearing dated 3 August 2021 at para 18(b).

subject of the Scheme should be apportioned to Lot 1 when calculating the available open space for Lot 1.

63 I find that Lot 1 has a unit entitlement of 31. Applying the unit entitlement of Lot 1, I find that 101.68m² of the common property area of 328m² should be apportioned to Lot 1. Consequently, I find that the available open space for Lot 1 is 201.08m² (being the sum of 99.4m² and 101.68m²).

64 It follows that, with the proposed additions, the available open space of Lot 1 will exceed its open space requirements of 124m² calculated under reg 7(1) of the Regulations.

65 Accordingly, I find that the respondent's proposed additions, on completion of the work, will conform to the open space requirements for Lot 1.

Plot ratio restrictions

66 I next turn to consider whether the proposed additions, on completion of the work, will conform to the plot ratio restrictions for Lot 1 for the purposes of s 88(2) of the ST Act.

67 Regulation 8(2) of the Regulations provides that to calculate plot ratio in relation to a lot, the gross total of the areas of all floors in any building on the lot is to be calculated by apportioning the gross total of the areas of all floors in any building on the parcel between lots in accordance with the pro rata entitlements of each lot.

68 The gross total of the areas of all floors in any building on the parcel is to be calculated in accordance with reg 8(1) of the Regulations. If the parcel is residential development to which the R-Codes apply, the plot ratio area is to be calculated under the R-Codes.³⁷ If the R-Codes, do not apply, the calculation of plot ratio area is to be calculated in the same way that floor area is calculated under the relevant local planning scheme.³⁸

Application of the R-Codes

69 There was no dispute, and I find, that the parcel that is the subject of the Scheme is residential development to which the R-Codes apply because the parcel is zoned Residential under the *Town of East Fremantle Town Planning Scheme No 3 (TPS 3)* with a density coding of R12.5.

³⁷ Regulation 8(1)(a) of the Regulations.

³⁸ Regulation 8(1)(b) of the Regulations.

There was also no dispute, and I find, that the R-Codes do not specify plot ratio controls for parcels coded less than R40.³⁹

70 Consequently, on a proper construction of reg 8(1)(a) of the Regulations, I find that the R-Codes apply but cannot be used to calculate the plot ratio area of the parcel that is the subject of the Scheme because the R-Codes do not specify plot ratio controls for parcels coded less than R40.

71 The applicants' contend that reg 8(1)(b) of the Regulations should be applied if reg 8(1)(a) of the Regulations does not apply and, therefore, plot ratio area for the parcel must be calculated in the same way as floor area is calculated under TPS 3, the relevant local planning scheme.⁴⁰ In support of this contention, the applicants relied on the evidence of Mr Bowyer. In Mr Bowyer's opinion, the floor area of any building on the parcel is 264.4m².⁴¹ I do not accept the applicants' contention because the R-Codes apply to residential development coded less than R40 and, therefore, reg 8(1)(a) of the Regulations applies to the parcel that is the subject of the Scheme.

Floor area of Lot 1

72 There was no dispute, and I find, that the gross total area of all floors in any building on Lot 1 is 91.2m².⁴²

Pro rata entitlement of Lot 1

73 I find, based on reg 8(3) of the Regulations, that the pro rata entitlements of Lot 1 are to be calculated on the proportion that the area of Lot 1 bears to the area of the parcel. The parties agreed, and I find, that the area of the parcel is 1,037m².⁴³ The parties further agreed, and I find, that the area of Lot 1 is 226m².⁴⁴ It follows, and I find, that the pro rata entitlement of Lot 1 is 21.8%.⁴⁵

Plot ratio restrictions for Lot 1

74 Pursuant to reg 8(2) of the Regulations, the plot ratio in relation to a lot is calculated by apportioning the gross total of all floor areas of any building on the parcel between lots in accordance with the pro rata

³⁹ Applicants' SIFC at para 49; respondent's SIFC at para 38; ts 75, 27 August 2021.

⁴⁰ Regulation 8(1)(b) of the Regulations.

⁴¹ ts 91, 27 August 2021.

⁴² Exhibit 4, 'Calculation Part 1', witness statement of Gregory Ireland dated 13 July 2021 at para 22, witness statement of Keith Bowyer dated 15 June 2021 at para 10.

⁴³ Exhibit 4.

⁴⁴ Exhibit 4.

⁴⁵ Exhibit 4, 'Calculation Part 2'.

entitlements of each lot (calculated as provided by reg 8(1)(a) of the Regulations).

75 I find that it is not possible to calculate plot ratio restrictions for Lot 1 under reg 8(2) of the Regulations because there is no mechanism under the R-Codes to calculate the plot ratio of the parcel that is the subject of the Scheme. I find that it is only possible to calculate plot ratio restrictions under reg 8(2) of the Regulations for residential development that is coded R40 or higher.

76 Consequently, I find that the respondent's proposed additions, on completion of the work, will conform to the plot ratio restrictions for Lot 1 because there are no plot ratio restrictions for residential development coded less than R40.

Conclusion

77 The proposed additions shown on plans approved by the Town on 17 February 2021 in respect of development application P145/20 will, on completion of the work, conform to the open space requirements and plot ratio restrictions for Lot 1 for the purposes of s 88(2) of the ST Act. For this reason, it is unnecessary for the respondent to apply to the Strata Company for approval of the proposed additions under s 89(1) of the ST Act.

78 Accordingly, I am not able to grant the orders sought by the applicants and will dismiss their application. The applicants made submissions in relation to an order for costs under s 87(1) of the SAT Act. In light of the outcome of the proceeding, I find that the applicants are not entitled to an order for costs in their favour.

Orders

The Tribunal orders:

1. The application is dismissed.

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

MS C BARTON, MEMBER

12 NOVEMBER 2021