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**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

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

**CITATION** : JTA LE ROUX PTY LTD and THE OWNERS OF  
BUNKER BAY RESORT STRATA SCHEME 40074  
[2023] WASAT 13

**MEMBER** : MS N OLDFIELD, MEMBER

**HEARD** : DETERMINED ON THE DOCUMENTS

**DELIVERED** : 7 MARCH 2023

**FILE NO/S** : CC 590 of 2021

**BETWEEN** : JTA LE ROUX PTY LTD  
Applicant

AND

THE OWNERS OF BUNKER BAY RESORT  
STRATA SCHEME 40074  
Respondent

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*Catchwords:*

*Strata Titles Act 1985 (WA) - Mixed residential and tourist resort strata scheme  
- Residential lot - Whether works constitute structural alterations to a lot -  
Resolution of scheme dispute - Exercise of discretion*

*Legislation:*

*Strata Titles (General) Regulations 2019 (WA), reg 73, reg 74(1)(a),  
Strata Titles Act 1985 (WA) (prior to 1 May 2020), s 7, s 7B, s 7(2)  
Strata Titles Act 1985 (WA), s 3(1), s 14(8), s 39, s 44, s 86, s 87, s 90,*

s 90(2)(b), s 197(1), s 197(1)(a)(vi), s 197(2), s 197(2)(d), s 200, s 200(1),  
s 200(2), s 200(2)(1), s 200(2)(n), Pt 7, Div 2, Sch 1, Sch 2

*Result:*

Application allowed

*Category:* B

**Representation:**

*Counsel:*

Applicant : N/A  
Respondent : N/A

*Solicitors:*

Applicant : Thomson Geer - Perth  
Respondent : Dentons Australia

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

Blazey and Hunter [2020] WASAT 155

Boris and The Owners of Observation Rise Strata Plan 24414  
[2020] WASAT 124

Owners of Ellement 996 Strata Plan 53042 and Tobias [2022] WASAT 49

Redset Nominees Pty Ltd and The Owners of Spinnakers Apartments Strata  
Plan 53824 & Ors [2021] WASAT 96

The Owners of 5 Thor Street Innaloo Strata Plan 72475 and Maul [No 2]  
[2020] WASAT 81

The Owners of Arbor North Strata Plan 67510 and Sun [2020] WASAT 28

Walsh and The Owners of Riverside Villas - Strata Plan 27929  
[2013] WASAT 184

## REASONS FOR DECISION OF THE TRIBUNAL:

### *Introduction*

- 1 JTA Le Roux Pty Ltd (**Applicant**) is the registered proprietor of Lot 2 on Strata Plan 40074. The Respondent is The Owners of Bunker Bay Resort Strata Scheme 40074 (**Strata Company**). Strata Plan 40074 is a mixed residential and tourist resort development, comprising 153 villa lots for short-stay accommodation, 26 residential lots and lots for a café, health spa and 'central facilities' such as a swimming pool (**strata scheme**).<sup>1</sup>
- 2 The Applicant built a residence at Lot 2 (**Residence**). Parts of the Residence were not constructed in accordance with the plans approved by the Strata Company, specifically an external storeroom, two boundary walls, the colours of weatherboards and window frames and the locations of an underground water tank, outdoor spa and roof-top antennae. The Applicant sought retrospective approval by the Strata Company of the changes, but was unsuccessful.<sup>2</sup>
- 3 Accordingly, the Applicant applied to the Tribunal seeking orders either there be exemptions from the statutory requirement for approval of structural alterations, or the Strata Company be taken to have passed resolutions for approval.

### *Issues for Determination*

- 4 In relation to each part of the Residence that is not in accordance with the approved plans, the issues are as follows:
- 1) Can the difference between that which was approved and that which was done, be characterised as a 'structural alteration of the lot'?
  - 2) If the answer to question 1 is 'yes', should that alteration be exempted from the normal requirement for approval by the Strata Company?
  - 3) If the answer to question 1 is 'no', should the Tribunal order that the Strata Company be taken to have passed a resolution approving the change?

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<sup>1</sup> Respondent's Statement of Facts, Issues and Contentions lodged 1 June 2022 (**RSFIC**), paras 3 - 4.

<sup>2</sup> RSFIC, paras 33 - 34, Applicant's Response to Respondent's Statement of Issues, Facts and Contentions and Submissions lodged 5 August 2022 (**ARRS**), paras 8 - 9.

*Proceedings in the Tribunal*

5 The parties to this proceeding are limited to the Applicant and the Strata Company. Each registered proprietor of a lot in the strata scheme was notified of the proceedings and given an opportunity to be joined as a party to the proceedings, but none sought to be joined.

6 At the request of both parties, orders were made for this matter be determined on the documents. This matter was initially reserved for decision on 14 September 2022. Subsequently the Tribunal gave leave for the parties to lodge further evidence and submissions and the matter was again reserved for decision on 20 January 2023.

*Statutory Framework*

7 Division 2 of Pt 7 of the *Strata Titles Act 1985 (WA) (ST Act)* addresses structural alterations of lots in strata schemes. Section 87 relevantly provides:

...

- (2) The owner of a lot in a strata scheme, other than a 2-lot scheme, must not cause or permit the structural alteration of the lot except –
  - (a) with the prior approval, expressed by resolution without dissent, of the strata company and, for a leasehold scheme, the prior written approval of the owner of the leasehold scheme; or
  - (b) if —
    - (i) the prior written approval to the structural alteration has been given by the owner of each lot in the scheme, and, for a leasehold scheme, the owner of the leasehold scheme; and
    - (ii) all approvals are either unconditional or are subject to the same conditions; and
    - (iii) a copy of each approval is served on the strata company.
- (3) If an application is made under this section for approval for the structural alteration of a lot, the owner of any other lot in the strata scheme or the owner of the leasehold scheme may refuse to give approval on a ground permitted by subsection (5), but not otherwise.

- (4) If an application is made to a strata company under this section —
- (a) notice of the proposed resolution on the application must contain or be accompanied by a statement, in the approved form, of the effect of paragraphs (c) and (d); and
  - (b) if a vote on the resolution is taken at a general meeting, the chairperson must, before the vote is taken, read out the statement referred to in paragraph (a); and
  - (c) the vote for a lot may be cast —
    - (i) against a resolution to approve the application; or
    - (ii) in support of a resolution to refuse approval of the application,  
  
on a ground permitted by subsection (5), but not otherwise; and
  - (d) a vote referred to in paragraph (c) is of no effect unless the person casting the vote discloses as a ground for the person's vote 1 or more of the grounds permitted by subsection (5).
- (5) The grounds on which approval may be refused are —
- (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>3</sup>

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<sup>3</sup> Regulation 74(1)(a) provides that approval may also be refused on the grounds 'the proposal will contravene a specified by-law or specified by-laws of the strata company' - *Strata Titles (General) Regulations 2019 (WA) (ST Regulations)*.

8 Section 90 provides that a lot owner may apply to the Tribunal for orders dispensing with the need for approval of a structural alteration. The terms of s 90 are as follows:

- (1) The Tribunal may, on the application of an owner of a lot in a strata titles scheme, by order, exempt a particular structural alteration to the lot from the application of this Division.
- (2) An order may be made under this section —
  - (a) whether or not the necessary approval for the alteration has been sought; and
  - (b) even if there has been a valid refusal to give the necessary approval.
- (3) An order can only be made under this section if the Tribunal is satisfied —
  - (a) 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; and
  - (b) to the extent that the structural alteration has already been carried out, it will not cause any significant inconvenience or detriment to the owners of other lots.

9 The phrase 'structural alteration of the lot' is defined in s 86 to mean:

- (a) the erection of a structure within the lot; or
- (b) an alteration of a structural kind to, or extension of, a structure within the lot.

10 'Structure' is defined to include anything classified as a structure by the regulations. Regulation 73 states:<sup>4</sup>

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

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<sup>4</sup> ST Regulations, reg 73.

- (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.

11 Section 197(1) of the ST Act provides the Tribunal broad jurisdiction to resolve 'scheme disputes' which includes disputes between scheme participants in relation to scheme documents,<sup>5</sup> a resolution of a strata company<sup>6</sup> and 'any other matter arising under this Act or the scheme by-laws.'<sup>7</sup> 'Scheme participants' are defined to include the strata company for a strata title scheme<sup>8</sup> and a member of the strata titles scheme<sup>9</sup> (which is defined to mean lot owners for the time being).<sup>10</sup>

12 Section 200(1) of the ST Act states the Tribunal may make 'any order it considers appropriate to resolve the dispute or proceeding' under that Act, which may include orders that a strata company must do or refrain from doing particular action<sup>11</sup> and that a strata company be taken to have passed or not passed a specified resolution as required by the relevant by-laws or the Act.<sup>12</sup>

### *Strata scheme by-laws*

13 The by-laws of the strata scheme are contained in the management statement lodged with Landgate on 26 May 2001,<sup>13</sup> which was amended pursuant to notifications of changes to by-laws lodged with Landgate on 3 October 2002<sup>14</sup> and 3 May 2004<sup>15</sup> (**By-Laws**). The By-Laws relevant to this matter are as follows:

#### **1. THEME AND MANAGEMENT OF DEVELOPMENT**

1.1 It is intended that the strata scheme satisfies the following provisions:

- (a) the strata scheme be developed and remain as a mixed residential/tourist resort in a manner substantially consistent with the Development Approval;

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<sup>5</sup> ST Act, s 197(1)(a)(i).

<sup>6</sup> ST Act, s 197(1)(a)(iv).

<sup>7</sup> ST Act, s 197(1)(a)(vi).

<sup>8</sup> ST Act, s 197(2)(a).

<sup>9</sup> ST Act, s 197(2)(d).

<sup>10</sup> ST Act, s 3(1) and s 14(8).

<sup>11</sup> ST Act, s 200(2)(l).

<sup>12</sup> ST Act, s 200(2)(n).

<sup>13</sup> Respondent's Bundle of Documents (**RBOD**), pages 63 - 150.

<sup>14</sup> RBOD, pages 151 - 153.

<sup>15</sup> RBOD, pages 154 - 167.

...

- (j) all of the buildings on the Parcel including buildings on the Residential Lots shall conform to essential design principles and be constructed of materials and finishes that combine to create a substantially uniform appearance[.]

...

- 1.3 By-laws 1.1 and 1.2 have been made at the request of the Local Authority under section 42(2d) of the Act and as such will require the consent of the Local Authority before any repeal of or amendments to those By-laws can take effect.

...

## **5. DEVELOPMENT OF EACH LOT**

- 5.1 The development or redevelopment of each lot must comply with:

- (a) the Development Approval ...

- 5.2 This By-law cannot be repealed or amended without the consent of the Western Australian Planning Commission.

## **6. BUILDING AND IMPROVEMENTS**

- 6.1 Subject to these By-laws, no building or improvement (including without limitation any radio masts, television antennae, satellite disks, fence, pergola, screen, awning or outbuilding of any kind) may be constructed or made on a lot other than in accordance with:

- (a) the Design and Specifications;

- (b) the Schedule of Finishes; and

- (c) the Approvals.

- 6.2 No building or improvement (including without limitation any radio masts, television antennae, satellite disks, fence, pergola, screen, awning or outbuilding of any kind) may be constructed or made on a lot unless that building, or improvement receives the consent of the strata company in accordance with sections 7 and 7B of the Act.

14

The By-Laws include the following definitions:

...



"**Approvals**" means all the necessary approvals, licences and permits obtained by the proprietor from any authority, including the Local Authority, for the construction of any building on a lot.

"**By-laws**" means these by-laws.

"**Design and Specifications**" means the building designs and specifications to be determined by the strata company from time to time, which in the strata company's opinion, complements and is in harmony with the theme of the Resort and the natural environment in and around the Resort and the Parcel.

"**Development Approval**" means the development approvals issued by the Local Authority dated 19 June 1998 and 4 April 2000 or any subsequent development approvals from time to time issued by the Local Authority in relation to the strata scheme.

"**Parcel**" means the whole of the land comprised in Certificate of Title 2165 Folio 55.

"**Residential Lots**" means lots 1 to 10 and lots 14 to 24 on the Strata Plan inclusive and upon the re-subdivision of lots 11 and 12 on the Strata Plan includes those lots on the Strata Plan that have a residential zoning.

"**Resort**" means all of the buildings and improvements constructed or to be constructed upon the Strata Plan including the common property, but excluding all buildings and improvements on the Residential Lots.

"**Schedule of Finishes**" means the finishes to be determined by the strata company from time to time, being finishes that, in the strata company's opinion, complements and are in harmony with the design and theme of the Resort and the natural environment in and around the Resort and the Parcel.

15 The Design and Specifications to which the By-Laws refer<sup>16</sup> relevantly contain the following principles:

**DESIGN GUIDELINES**

The purpose of the following Design Guidelines policy is to guide the development of all Bunker Bay Permanent Stay Lots ... so as:

- i. to ensure that all development is undertaken in a manner consistent with the:
  - Design Principles
  - Building Forms and Mass
  - Building Elements

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<sup>16</sup> RSFIC, para 18, ARRS, para 5, RBOD, pages 208 - 210.

- Roof Forms
- Building Materials
- Articulation
- Detailing
- Orientation of Dominant Elements

as found in the body of buildings within Bunker Bay Resort.

- ii. to ensure that all buildings proposed are "of a design that substantially complies with one of the designs" approved within Building Licence No. 13031.
- iii. to ensure that building setbacks comply with the building setback principles used in the placement of buildings on all Permanent Stay Lots as shown ...
- iv. to ensure that site planning enables development to minimize overshadowing of adjoining properties with open space areas and maintains reasonable expectations of visual privacy as established with the existing designs.
- v. to ensure that roof forms, height and ridge orientation do not vary from the roof forms, height and ridge orientation of the building design already approved for the Lot.
- vi. to ensure that building pad levels and respective ground floor levels do not increase above levels approved within Building Licence No. 13031.

## **BUILDING DESIGN**

### Design Principles

- All buildings to be designed to sit complementarily within the common property domain in a consistent integration with the adjoining buildings within the Resort.
- All buildings attempt to achieve outdoor living spaces with a sense of privacy.
- All buildings to be designed to achieve a strong interior to exterior integration.

### Building Forms

- To be an interplay of planes, masses, solids, voids and varying roof forms to create a sense of lightness and openness.
- To utilize similar shapes, stepping planes, roof elements, predominantly full height joinery elements and courtyard enclosure in keeping with the building forms of the Resort.

Building Elements

- To utilize strong wall planes, pavilion style individually roofed elements incorporating courtyards and to create spaces with "tent fly" openness in keeping with the building elements of the Resort.

Building Materials

Schedule of Finishes:

Walls:

- Sand finished rendered brickwork
- Random rubble capstone
- Diamond cut limestone
- Western red cedar, external cladding
- Painted rendered brickwork

Courtyard Walls:

- Local granite, random rubble
- T-tree brushwood fencing

Paving:

- Stone pavers, 'Lumeah' (or similar approved)

Roof:

- 'Colourbond' custom orb roof sheeting – "Woodland Grey"

Doors and Windows:

- Steel, aluminium or timber framed external (to reflect rhythm of existing design)

Garages and Carports:

- To be shown on the Building License approved drawings.

Permitted Fencing

- Boundary fencing is discouraged and will only be permitted where shown on the Building License approved drawings.

Aerials, Air Conditioners Other Services

- Aerials, air conditioner condensers and all other building services items are to be located such that they are not visible from any part of the Resort.

**Note:**

The Body Corporate is the sole arbiter in determining compliance with these Design Guidelines. Any variation to the above Design Guidelines is at the sole discretion of the Body Corporate.

16 The parties are agreed the 'Schedule of Finishes' above is that adopted by the Strata Company for the purposes of the By-Laws.<sup>17</sup>

17 As noted above, the By-Laws define 'Development Approvals' to mean those issued by the Shire of Busselton on 19 June 1998 and 4 April 2000. The document dated 19 June 1998 approved commencement of development of the short-stay units and associated tourist resort facilities and infrastructures.<sup>18</sup> The document dated 4 April 2000 approved the commencement of development of 26 proposed permanent dwellings with 42 conditions, including:<sup>19</sup>

...

5. Plans submitted with the building licence are to show finished ground levels and finished floor levels to the satisfaction of the Director, Technical Services and Director, Planning and Building Services. The finished floor levels will be further scrutinised at the building licence stage to ensure amenity issues are maintained, particularly in relation to screening the development from the beach area to the satisfaction of the Director, Planning and Building Services.

6. The colour of the roofing material being in accordance with the Council's adopted policy on "The Use of Reflective Building Materials" (copy attached). In this regard, Council actively discourages the use of building materials that have a solar radiation or reflective value greater than 50% (i.e. zincalume, off-white). Colour tonings should complement the locality and not be of undesirable impact. Details to be submitted with building licence application.

...

13. Council will not support the creation of vacant strata titled lots and will not endorse any certificate or diagrams required to effect the creation of vacant strata lots.

...

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<sup>17</sup> RSFIC, para 22, ARRS para 5.

<sup>18</sup> RBOD, pages 168 - 178.

<sup>19</sup> RBOD, pages 179 - 207.

28. Radio masts, TV antenna and satellite disks shall be designed and located such that they do not detract from the local visual amenity or cause offence to neighbouring properties to the satisfaction of Director, Planning and Building Services. The building licence application is to show all details of such structures. Any such structures not approved as part of the initial application/approval shall be subject of a separate application.

...

40. The proposed units shall form an integral component of the overall development in terms of type, style and character of building, the landscaping of the building and shall be managed on an integrated basis with the overall resort to the satisfaction of the Director, Planning and Building Services.

...

42. Although a series of housing designs are approved (as per the attached approved plans), the designs chosen for individual lots will be limited to those not requiring the removal of significant vegetation beyond that of the approved site works plans to the satisfaction of the Director, Planning and Building Services.

### *Consideration*

18 It is most convenient to deal with the evidence and contentions of the parties in the context of each separate item of works to which the application relates.

19 Before doing so it may be noted the Strata Company in its submissions complained there are irregularities in the records of the Strata Company which suggest no part of the Residence was approved in accordance with the ST Act because the extraordinary general meeting at which the construction of the Residence was allegedly approved either did not take place, or did not take place in accordance with legislative requirements (**the Allegation**).<sup>20</sup> This is denied by the Applicant's submissions, which states the Strata Company approved construction of the Residence at an extraordinary general meeting on 19 December 2018 and the minutes of that meeting were confirmed at the annual general meeting on 13 November 2019.<sup>21</sup>

20 The jurisdiction of the Tribunal is limited to the terms of an application made pursuant to an enabling Act. The application of the Applicant is not sufficiently broad to encompass the Allegation, and

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<sup>20</sup> RSFIC, paras 24 - 29.

<sup>21</sup> ARRS, para 6.

even if it were, there is insufficient evidence upon which I could make a determination. Therefore, the Allegation is not part of the present proceedings and will need to be the subject of separate proceedings should the parties so desire to tread that path. Accordingly for the purposes of this matter it is assumed construction of the Residence was approved by the Strata Company on 19 December 2018 (**Approval**).

## Weatherboards

21 The Applicant states:<sup>22</sup>

The original plans for the [Residence], approved by the Strata Company, included a reference to weatherboards forming part of the construction of the walls ... as being the colour 'Woodland Grey Half'.

During the construction of the [Residence], the weatherboards in question were painted in a different colour, 'White Duck Quarter' ... the reason for the change in colour ... was in order to match in with or complement the colour schemes of neighbouring residences. There are a number of other residences, including residences in close proximity to Lot 2 and clearly visible from either Bunker Bay Lane or adjacent pathways, which have large areas of external walls that are white or off-white in colour, or that are distinctly lighter in colour than 'Woodland Grey Half' and substantially similar in colour to 'White Duck Quarter'.

The colour 'White Duck Quarter' complements and is in harmony with the theme of the Strata complex, in particular the neighbouring residences, and the natural environment.

The change of colour of the weatherboards has no impact on the interests of the owners of any other lot in the use and enjoyment of their lots and the common property. Alternatively, any impact that use of the colour 'White Duck Quarter' for the weatherboards may have on the owners of any other lot in the use and enjoyment of their lots and the common property is no different from the impact of any other white or off-white colour schemes of other residences that are visible from common property.

The change of colour of the weatherboards does not cause any inconvenience or detriment to the owners of other lots.

22 The Applicant lodged plans and photographs which indicate weatherboards have been installed on each side of the Residence and the colour of both the weatherboards and the rendered walls is white.<sup>23</sup>

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<sup>22</sup> Applicant's Amended Orders and Grounds lodged 27 April 2022 (AAOG), at paras 4.1 - 4.2 and paras 4.7 - 4.10.

23 The Strata Company countered the colour of the weatherboards, in being other than 'Woodland Grey Half' breached:<sup>24</sup>

- 1) section 7(2) of the ST Act 'as it then applied' because the Strata Company had not given its prior approval;
- 2) by-law 5.1 in that the development approvals issued by the local authority in relation to the strata scheme prevent 'the use of "off-white" building materials which do not "complement the locality"' and require buildings to appear as an 'integral component of the overall development in terms of type, style and character of building, the landscaping of the building and shall be managed on an integrated basis with the overall resort';
- 3) by-law 6.1 because the weatherboards do not comply with any of the approved designs described in Building Licence 13041 and does not 'sit complementarily in a consistent integration with the adjoining buildings';
- 4) by-law 1.1(a) because the weatherboards have not been built 'in a manner substantially consistent' with the development approvals;
- 5) by-law 1.1(j) because the weatherboards do not 'conform to the essential design principles and be constructed of materials and finishes that combine to create a substantially uniform appearance';
- 6) by-law 6.2 because the Strata Company did not approve the painting of the weatherboards in the colour 'White Duck Quarter'.

24 The Strata Company made no response, either in evidence or submissions, to the claims of the Applicant regarding the colour of other residences in the strata scheme and that 'White Duck Quarter' was a colour consistent with those residences.

25 In relation to the application generally the Strata Company submitted:<sup>25</sup>

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<sup>23</sup> AAOG, plans D1 and D2, Applicants Bundle of Documents lodged 5 August 2022 (ABOD), photographs 3 - 7.

<sup>24</sup> RSFIC, paras 53 - 54.

<sup>25</sup> RSFIC, paras 65 - 67.

- 1) The alterations the subject of this matter is contrary to the by-laws of the strata scheme and have an adverse effect on the rights and interests of lot owners.
- 2) If the Tribunal were to approve those alterations, that would cause a detriment to the lot owners who have complied with the by-laws, had approval of their proposed development refused and who have a statutory right to the enforcement of the by laws.
- 3) The Tribunal ought to not make orders dispensing with approval of the alternations because that would effectively authorise the Applicant's breaches of the by-laws, undermine the by-laws and set a precedent for other lots to be developed other than in accordance with the by-laws.

(the **General Objections**)

26 The General Objections have been made by the Strata Company in relation to each departure from the Approval to which this application relates. It is incontrovertible that by-laws exist for the benefit of lot owners, and it is generally in their interest that by-laws be fairly enforced. However, there may be situations in which strict enforcement of a by-law may be unfair or unreasonable and for this purpose the ST Act provides the Tribunal with authority to make orders departing from the requirements of a by-law if appropriate to do so.<sup>26</sup> When a lot owner seeks from the Tribunal orders permitting a departure from a by-law, a response which points only to the by-laws from which an applicant seeks to depart or which refers only to the overall interest of lot owners generally in the enforcement of by-laws, fails to engage with the question to be answered by the Tribunal.

27 The Applicant identified 11 lots in the strata scheme as containing buildings of a similar colour to the Residence:

- 1) Lot 4, which is next door but one to the Residence.<sup>27</sup> The photographs depict it to contain a building of white rendered walls, white weatherboard and limestone blocks.<sup>28</sup>

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<sup>26</sup> For example, an exemption from the requirement to obtain approval for a structural alteration even if the approval had been validly refused - ST Act, s 90(2)(b).

<sup>27</sup> ABOD index to bundle of photographs (IBP) and photograph 2.

<sup>28</sup> ABOD IBP and photographs 22 - 27.



- 2) Lot 5, which is next door to Lot 4 and appears to include a building at least partly constructed of limestone blocks.<sup>29</sup>
- 3) The building on Lot 6 (next door to Lot 5) appears to have white rendered walls.<sup>30</sup>
- 4) Lot 182 is located on the opposite side of the road, facing the Residence. The most visible portion of the house in the photograph is white. A section, which may be an adjoining garage, appears to be dark grey.<sup>31</sup>
- 5) The photographs of Lot 183 (next door to Lot 182) depict the two-storey portion of the house constructed of limestone blocks, behind a white painted rendered boundary wall.<sup>32</sup>
- 6) The photographs of Lot 185 depict light grey weatherboards behind a white painted post, sections made of wood or metal painted white and a natural stone pier in colours grey and brown.<sup>33</sup>
- 7) Lots 14, 16, 17, 20 and 21 are located on the other side of the development. The photographs of those lots suggest each of the houses on those lots is white or off-white.<sup>34</sup>

28 The strata scheme includes 26 residential lots.<sup>35</sup> Seven of those lots remain vacant land.<sup>36</sup> Of the 19 residential lots on which houses have been constructed, the Applicant has identified 11 which are white or light coloured. There is no evidence as to the colour of the remaining buildings in the strata scheme and the submissions of the Respondent do not indicate the reasons, given the presence of other white or light-coloured dwellings, why it is considered inappropriate for the Residence to be painted 'White Duck Quarter'.

29 In the circumstances, I am satisfied the colour of the Residence is consistent with the colour of other structures in the strata complex. Although the Development Approvals suggest white may not have been part of the original colour palette of the development, the number of

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<sup>29</sup> ABOD IBP and photographs 2 and 32.

<sup>30</sup> ABOD IBP and photographs 2 and 36.

<sup>31</sup> ABOD IBP and photographs 2 and 28.

<sup>32</sup> ABOD IBP and photographs 2, 29 - 31.

<sup>33</sup> ABOD IBP and photographs 38 - 39.

<sup>34</sup> ABOD IBP and photograph 2, 42 - 47.

<sup>35</sup> RSFIC, para 4.

<sup>36</sup> ABOD photograph 2.

white or light-coloured residences indicates that colour scheme has not been followed and 'White Duck Quarter' is in keeping with the overall development as it currently stands.

30 The Applicant seeks orders approving the colour pursuant to s 200 of the ST Act. The Respondent contends the remedy under s 200 is not available to the Applicant because the installation of weatherboards is a structural alteration and s 90 is intended to 'cover the field' in relation to the approval of structural alterations<sup>37</sup>.

31 Pursuant to s 90 of the ST Act, the Tribunal may exempt a structural alteration to a lot from compliance with the approval requirements<sup>38</sup> even if approval had been validly refused. The Tribunal may provide such an exemption if it is satisfied the structural alteration is reasonable in the circumstances and will not cause any significant detriment or inconvenience to other lot owners.

32 The ambit of the term 'structural alteration of a lot' has been considered by the Tribunal on several occasions<sup>39</sup>. The concepts surrounding the meaning of 'structure' for the purpose of s 87 and s 90 might be summarised as follows:

- 1) The definition of 'structure' in s 86 and reg 73 is inclusive rather than exhaustive.
- 2) The ordinary meaning of 'structure' applies - being something that is 'built up' in a manner similar to that of a building.
- 3) A 'structure' may but does not necessarily include something which impacts upon plot ratios of, or easements pertaining to, a strata scheme.
- 4) It is not necessary for a structure to be fixed to the ground.

33 The Tribunal has in the past determined a brick wall<sup>40</sup>, a fence composed of metal posts and panels<sup>41</sup>, a metal gate<sup>42</sup>, a concrete slab<sup>43</sup>,

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<sup>37</sup> RSFIC, para 68.

<sup>38</sup> As contained in ST Act, Pt 7 Div 2.

<sup>39</sup> Including *The Owners of Arbor North Strata Plan 67510 and Sun* [2020] WASAT 28 (*Sun*), *The Owners of 5 Thor Street Innaloo Strata Plan 72475 and Maul [No 2]* [2020] WASAT 81 (*Maul*) and *Redset Nominees Pty Ltd and The Owners of Spinnakers Apartments Strata Plan 53824 & Ors* [2021] WASAT 96 (*Redset*).

<sup>40</sup> *Maul*.

<sup>41</sup> *Blazey and Hunter* [2020] WASAT 155 (*Blazey*).

<sup>42</sup> *Maul* and *Blazey*.

<sup>43</sup> *Walsh and The Owners of Riverside Villas - Strata Plan 27929* [2013] WASAT 184.

a retractable pergola<sup>44</sup>, a garage<sup>45</sup> and a temporary portable gazebo<sup>46</sup> to be structural alterations of a lot. The installation of a power outlet with cabling to a switchboard was not considered a structural alteration of a lot<sup>47</sup>. Whether a thing may be characterised as a 'structure' within the meaning of s 87 and s 90 depends upon the particular circumstances in each instance. In this instance, I am satisfied:

- 1) It would be incorrect in this instance to characterise the 'structural alteration' as the weatherboards. There is nothing in the materials to indicate the installation of the weatherboards was in breach of the by-laws - the only objection raised by the Respondent relates to the colour in which the weatherboards were painted.
- 2) The paint upon the weatherboards is not a structure for the purposes of s 90.
- 3) Therefore s 90 has no application to the unapproved colour of the paint.

34 The question then becomes whether, as contended by the Applicant, it would be appropriate to order the Strata Company be taken to have passed a resolution approving the painting of the weatherboards in the colour 'White Duck Quarter'.

35 By-laws 6.1 and 6.2 provide no 'building or improvement' may be 'constructed or made on a lot' unless in accordance with the by-laws or the Strata Company gave approval. The by-laws do not define 'building or improvement'. The submissions and evidence of the Strata Company are based upon an assumption that each of the works to which this application relates was a 'building or improvement' pursuant to by-law 6.2.<sup>48</sup> The submissions of the Applicant stated the Applicant agreed the change in colour from 'Woodland Grey Half' to 'White Duck Quarter' required the approval of the Strata Company under by-law 6.2 as an 'improvement' made on Lot 2.<sup>49</sup> On this basis I therefore accept the change in the colour of the paint of the weatherboards was an 'improvement' within the meaning of by-law 6.2 and accordingly the Applicant was obliged to obtain the consent of the Strata Company.

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<sup>44</sup> *Boris and The Owners of Observation Rise Strata Plan 24414* [2020] WASAT 124.

<sup>45</sup> *Redset*.

<sup>46</sup> *Sun*.

<sup>47</sup> *Redset*.

<sup>48</sup> See for example RSFIC, para 54(f) and RBOD, pages 215 - 216.

<sup>49</sup> ARRS, para 87(d), also ARRS, para 40(d)(i).

36 By law 6.2 provides the approval of the strata company must be 'in accordance with [the former] sections 7 and 7B' of the ST Act. Section 7(2) stipulated that there should not be the erection or extension of a structure, or an alteration of a structural kind, to a lot without the prior approval, by way of resolution without dissent, of the relevant strata company. I take this to mean that approval by the Strata Company pursuant to by-law 6.2 must be by resolution without dissent.

37 It is clear this matter satisfies the meaning of a 'scheme dispute' under s 197(1) of the ST Act, in that:

- 1) the parties are 'scheme participants', because the Applicant is a member of the strata scheme<sup>50</sup> and the Strata Company is the strata company of the strata scheme; and
- 2) there is a dispute between the parties within the ambit of s 197(1)(a)(vi) being a dispute 'arising under this Act or the scheme by-laws' in relation to each of the item of works to which the application refers.

38 The discretion of the Tribunal under s 200(1) is broad and includes the orders listed at s 200(2). The factors which the Tribunal may take into account when exercising the discretion under s 200 includes the provisions of the SAT Act, principles of reasonableness, fairness and equity, the interests of the parties and due consideration of all the information at its disposal.<sup>51</sup>

39 I am satisfied the Design and Specifications and Development Approvals are not now reflective of the actual colours of buildings in the strata scheme and the paint colour 'White Duck Quarter' is consistent with other residences in the strata scheme. In those circumstances and in view of the absence of any explanation for the opposition of the Strata Company beyond the General Objections, it appears to me appropriate to order, pursuant to s 200(2)(n), that the Strata Company be taken to have passed a resolution without dissent for the purposes of by-law 6.2 approving the painting of the weatherboards 'White Duck Quarter'.

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<sup>50</sup> ST Act, s 3(1), s 14(8) and s 197(2)(d).

<sup>51</sup> *Owners of Ellement 996 Strata Plan 53042 and Tobias* [2022] WASAT 49, at [82] - [83].

## Window Frames

40 The Applicant states:<sup>52</sup>

The original plans for the [Residence], approved by the Strata Company, included a reference to the aluminium window frames ... as being 'black'.

During the construction of the [Residence], white window frames were installed, rather than black ... the reason for the change in colour ... was in order to match in with the colour schemes of neighbouring residences. There are a number of other residences, including residences in close proximity to Lot 2 and clearly visible from either Bunker Bay Lane or adjacent pathways, which have window frames and/or door frames that are white or off-white in colour.

The white aluminium window frames complement and are in harmony with the theme of the Strata complex, in particular the neighbouring residences, and the natural environment.

The change of colour of the window frames has no impact on the interests of the owners of any other lot in the use and enjoyment of their lots and the common property. Alternatively, any impact that the colour of the window frames may have on the owners of any other lot in the use and enjoyment of their lots and the common property is no different from the impact of any of the other white window and door frames of other residences that are visible from common property.

The change of colour of the window frames does not cause any inconvenience or detriment to the owners of other lots.

41 The Applicant lodged photographs which establish the colour of the window frames of the Residence are white.<sup>53</sup>

42 The Strata Company countered the colour of the window frames, in being other than black in colour breached:<sup>54</sup>

- 1) section 7(2) of the ST Act 'as it then applied' because the Strata Company had not given its prior approval;
- 2) by-law 5.1 in that the development approvals issued by the local authority in relation to the strata scheme prevent 'the use of "off-white" building materials which do not "complement the locality"' and require buildings to appear as an 'integral component of the overall development in terms of type, style

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<sup>52</sup> AAOG, paras 5.1 - 5.2, para 5.4 and paras 5.7 - 5.10.

<sup>53</sup> ABOD, photographs 3, 5 - 9, 13, 15 - 16.

<sup>54</sup> RSFIC, paras 55 - 56.

and character of building, the landscaping of the building and shall be managed on an integrated basis with the overall resort';

- 3) by-law 6.1 because the window frames do not comply with any of the approved designs described in Building Licence 13041 and does not 'sit complementarily in a consistent integration with the adjoining buildings';
- 4) by-law 1.1(a) because the window frames have not been built 'in a manner substantially consistent' with the development approvals;
- 5) by-law 1.1(j) because the window frames do not 'conform to the essential design principles and be constructed of materials and finishes that combine to create a substantially uniform appearance'; and
- 6) by-law 6.2 because the Strata Company did not approve the installation of white window frames.

43 The Strata Company made no response, either in evidence or submissions, to the claims of the Applicant regarding the colours of window frames and door frames in the strata scheme and the consistency (or otherwise) of the Residence with the same. I am mindful of the General Objections raised by the Respondent.

44 Photographs lodged by the Applicant depict the buildings on Lots 4, 5, 6, 8, 14, 182, 183 and 185 as having white window or door frames.<sup>55</sup> There are however photographs which suggest the buildings at Lots 3 and 16 possess black window frames.<sup>56</sup> There is nothing which indicates the colour of the window or door frames of other residential or short-stay buildings in the strata scheme.

45 The Respondent objects only to the colour of the window frames of the Residence. There is no complaint as to any other aspect of their construction or installation. For the same reasons as described in relation to the weatherboards, I am satisfied:

- 1) A change in colour does not constitute a 'structural alteration' within the meaning of s 90.

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<sup>55</sup> ABOD IBP and photographs 22 - 24, 27 - 34, 36 - 40, 46 - 47.

<sup>56</sup> ABOD IBP and photographs 21, 44 - 45.

- 2) The change in colour of the window frames was an 'improvement' which required approval of the Strata Company pursuant to by-law 6.2.<sup>57</sup>
- 3) The white window frames of the Residence are consistent with other residences in the strata scheme and in keeping with the overall development.
- 4) It is appropriate to order pursuant to s 200(2)(n) the Strata Company be taken to have passed a resolution without dissent approving the installation of the white coloured window frames.

### Lean-to Store

46 The Applicant states:<sup>58</sup>

At the time of constructing the residence on Lot 2, the Applicant also constructed a small lean-to storage shed (0.99m x 2.92m, being approx. 2.92sqm in area) adjacent to an existing wall of the residence on Lot 2, close to the north-western boundary between Lot 2 and the adjoining Lot 1, which was not shown on the approved plans for the residence (Lean-to Store) ...

The Lean-to Store is currently being used as a small garden shed to house lawn and garden equipment and supplies for the spa ...

The Lean-to Store has been constructed in materials matching and complementing the materials and style of the residence on Lot 2 ...

The Lean-to Store is located within the front, rear and side boundaries of Lot 2.

47 The documents lodged by the Strata Company indicate no disagreement with the Applicant's physical description of the Lean-to Store.

48 The Applicant lodged plans which depicted the location of the Lean-to Store as described above.<sup>59</sup> Photographs lodged by the Applicant show a small rectangular structure affixed to the side of the Residence apparently constructed of identical materials and in identical colours to the Residence.<sup>60</sup> The Lean-to Store is partly visible over the boundary wall and appears unremarkable.

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<sup>57</sup> See also ARRS, para 49(a).

<sup>58</sup> AAOG, at paras 1.1, 1.2, 1.4 and para 1.6.

<sup>59</sup> AAOG, plans A1, A2, A3.

<sup>60</sup> ABOD, photographs 3 - 5, 7.

49 The Applicant states the Lean-to Store is a reasonable structural alteration to Lot 2, which has no impact upon other owners' use and enjoyment of their lots of or the common property and does not cause lot owners any inconvenience or detriment.<sup>61</sup>

50 The Strata Company countered that construction of the Lean-to Store breached:<sup>62</sup>

- 1) section 7(2) of the ST Act 'as it then applied' because the Strata Company had not given its prior approval;
- 2) by-law 5.1 in that the development approvals issued by the local authority in relation to the strata scheme prevent 'the use of "off-white" building materials which do not "complement the locality"' and require buildings to appear as an 'integral component of the overall development in terms of type, style and character of building, the landscaping of the building and shall be managed on an integrated basis with the overall resort';
- 3) by-law 6.1 because the Lean-to Store does not comply with any of the approved designs described in Building Licence 13041 and does not 'sit complementarily in a consistent integration with the adjoining buildings';
- 4) by-law 1.1(a) because the Lean-to Store has not been built 'in a manner substantially consistent' with the development approvals;
- 5) by-law 1.1(j) because the Lean-to Store does not 'conform to the essential design principles and be constructed of materials and finishes that combine to create a substantially uniform appearance';
- 6) by-law 6.2 because the Strata Company did not approve the construction of the Lean-to Store,

and for the reasons outlined in the General Objections the application was therefore opposed.

51 The colour of the Lean-to Store appears identical to the colour of the external walls of the Residence (comprising weatherboards and rendered walls). For the reasons discussed above, the evidence does

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<sup>61</sup> AAOG, paras 1.8 - 1.10.

<sup>62</sup> RSFIC, at para 48.



not support a finding the colour of the Lean-to Store is inconsistent with other structures in the strata scheme. The Respondent has provided no basis upon which it is claimed the construction of the Lean-to Store is unreasonable or may cause detriment or inconvenience to other lot owners, save for the General Objections.

52 I am satisfied the Lean-to Store is a 'structural alteration' of a lot within the meaning of s 90 of the ST Act and the evidence establishes the installation of the same is reasonable in the circumstances and will not cause a significant detriment or inconvenience to other lot owners.

### **North-Western Boundary Wall**

53 The Applicant stated:<sup>63</sup>

At the time of constructing the [Residence], the Applicant constructed a boundary wall on the north-western boundary between Lot 2 and the adjoining Lot 1 (North-Western Boundary Wall) which was not shown on the plans of the residence approved by the Respondent...

A survey carried out by Survcon Surveying Services dated 9 October 2021 (Survcon Survey) shows that the North-Western Boundary Wall is located within the side boundary of Lot 2. The Survcon Survey also confirms that the footings for the North-Western Boundary Wall are within the side boundary of Lot 2...

The materials and colour of the North-Western Boundary Wall are the same as those for the residence that were approved by the Respondent.

The North-Western Boundary Wall is a reasonable structural alteration.

The North-Western Boundary Wall has no impact on the interests of the owners of any other lot in the use and enjoyment of their lots and the common property.

The North-Western Boundary Wall does not cause any inconvenience or detriment to the owners of other lots.

54 In support of its contentions the Applicant lodged photographs<sup>64</sup> which indicate the North-Western Boundary Wall is constructed of rendered masonry. The top of the wall and the vertical surface facing the Residence is painted white. The finish of the vertical surface facing the adjoining Lot 1 is unclear. In photographs which appear to have been taken in sunny conditions, the surface appears

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<sup>63</sup> AAOG, paras 2.1 and 2.4 and paras 2.6 - 2.9.

<sup>64</sup> ABOD, photographs 3, 5 - 12.

white. In photographs which appear less sunny, the surface appears to be grey or mottled white/light grey/dark grey.

55 The photographs lodged by the Applicant indicate that:

- 1) Lot 4 has two side boundary fences composed of brushwood and a limestone wall (the location of which is unclear).<sup>65</sup>
- 2) Lot 8 has a side boundary wall of mottled grey coloured rendered masonry.<sup>66</sup>
- 3) Lot 14 has a side boundary wall which is comprised partly of light-coloured rendered masonry and partly of irregularly shaped rocks predominantly light coloured but with some darker.<sup>67</sup>
- 4) Lot 16 has a side boundary wall half of which comprises irregularly shaped rocks in mixed browns and greys. The material comprising the other half of the wall is unclear but appears a solid dark colour.<sup>68</sup>
- 5) Lot 183 has a front boundary wall composed of rendered masonry painted white.<sup>69</sup>

56 The Strata Company stated the Applicant constructed the North-Western Boundary Wall:

- 1) contrary to the Approval;
- 2) despite the Strata Company's rejections at general meetings on 3 April 2020 and 4 November 2020 of the Applicant's application for approval to install fencing or walls; and
- 3) despite the Strata Company on 25 January 2021 issuing a notice stating the Applicant's application for retrospective approval had been rejected and accordingly requiring it to remove all unauthorised structures.<sup>70</sup>

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<sup>65</sup> ABOD IBP and photographs 22 - 24, 27.

<sup>66</sup> ABOD IBP and photograph 40.

<sup>67</sup> ABOD IBP and photographs 46 - 47.

<sup>68</sup> ABOD IBP and photograph 44.

<sup>69</sup> ABOD IBP and photographs 29 - 30.

<sup>70</sup> RSFIC, paras 30 - 35.

57 The Strata Company states the Applicant has therefore breached:<sup>71</sup>

- 1) section 7(2) of the ST Act 'as it then applied' because the Strata Company had not given its prior approval;
- 2) by-law 5.1 in that the development approvals issued by the local authority in relation to the strata scheme require buildings to appear as an 'integral component of the overall development in terms of type, style and character of building, the landscaping of the building and shall be managed on an integrated basis with the overall resort';
- 3) by-law 6.1 because contrary to the Design and Specifications:
  - a) the height of the wall beyond the building line is not acceptable;
  - b) the wall changes the original idea of a natural and non-invasive connection between the blocks and the beach; and
  - c) the wall does not 'sit complementarily in a consistent integration with the adjoining buildings';
- 4) by-law 1.1(a) because the North-Western Boundary Wall has not been built 'in a manner substantially consistent' with the development approvals;
- 5) by-law 1.1(j) because the North-Western Boundary Wall does not 'conform to the essential design principles and be constructed of materials and finishes that combine to create a substantially uniform appearance';
- 6) by-law 6.2 because the Strata Company did not approve the construction of the North-Western Boundary Wall,

and for the reasons outlined in the General Objections the application was opposed.

58 The Applicant claims the Survcon Survey established the North-Western Boundary Wall is entirely within Lot 2, but did not file the relevant document. The Strata Company has not claimed the North-Western Boundary Wall is outside Lot 2 and lodged a report

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<sup>71</sup> RSFIC, paras 49 - 50.

from Licensed Surveyor Steven Mayo of RM Surveys dated 30 May 2022 which states the North-Western Boundary Wall is within the boundaries of Lot 2 (**Mayo Report**).<sup>72</sup> Accordingly, I accept the North-Western Boundary Wall does not encroach on other lots or common property.

59 Neither party lodged plans or drawings relating to the original Approval or the applications for strata approval which were unsuccessful. Accordingly, it is difficult to ascertain whether the original Approval included boundary fencing and the extent of any similarity between the North-Western Boundary Wall as now constructed and the applications which were refused.

60 The Strata Company lodged a report from architect James Alexander of Alexander Planning Consultants dated 11 March 2020 responding to a proposal by the Applicant to erect boundary fencing (**Alexander Report**).<sup>73</sup> The Alexander Report states:

[Lot 2] is one of the blocks permitted to have boundary fence [sic]. The design requirements are documented on drawing 9942 WD/LOT-P2 rev A / Site Plan and Location Plan. The drawing clearly shows the extent, heights and materials for the block.

- The annotation on the drawing permits 2m fence from the road up to the back building line.
- Past the building line the height of the fence is dropped to 1.2m and material stipulated is brushwood. Although brushwood is not a recommended material now, due to the Fire Regulations, we can clearly see that the intension was to minimise the visual impact of the fence and the interference with the natural environment as a minimal as possible.

...

#### ANALYSIS OF PROPOSED FENCE DESIGN

We observe that the following changes were made to the originally submitted and subsequently approved design (Approval dated 06.12.2018):

The approved drawings as listed in our Report dated 06.12.2018., show the ground level of back of [Lot 2] at considerably lower level than the level of the house - which is 6.086. The drawings appear to indicate maintaining the existing gound levels[.]

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<sup>72</sup> RBOD, pages 219-224.

<sup>73</sup> RBOD, pages 212 - 214.

The construction drawing A - 200 rev B marked For Construction shows retaining walls raising at the back of the block considerably which in turn affects the heights of the fences between the adjoining blocks and the height of the boundary walls onto the beach.

#### MATERIALS OF FENCING

The proposed materials - rendered brick, painted - are ... in general terms conform to the GKA Guidelines...and are acceptable. We suggest that darker colours - brown/grey are used - to match the originally intended, but now not recommended for Fire reasons brushwood fencing.

#### EXTENT AND HEIGHTS OF FENCING

The extent and height of 1.8m fencing is acceptable up to the back building line ... The height of 1.8m beyond the building line is not acceptable ...

Furthermore a retaining wall has been proposed to raise the back of the block by 1.2m, completely changing the interface between the block and the beach.

Raising the level of the block creates the walls on boundary as viewed from Lot P3 ... that are very high ranging from 2.360, 2.828 up to 3.170

Finally the back boundary fence, which is now not a dune fence but the retaining wall, creates the height on the dune side up to 1.2m from the original ground line.

The proposed fencing changes the intention of the original idea of the natural and non-invasive connection between the blocks and the beach - the ocean, then the beach, dunes, vegetation, dune fencing, covenant areas of vegetation, then hardscaping of the residences.

#### RECOMMENDATION

Following the analysis above, we do not recommend that the Strata Company supports the current proposed fencing to [Lot 2].

The design of the fencing of [Lot 2], as submitted, creates a precedence of walled compound which in our opinion does not follow the original architect's guidelines. [sic]

61 The Applicant's submissions state that following the Strata Company's rejection in November 2020:<sup>74</sup>

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<sup>74</sup> ARRS, paras 7(e) and 7(f).

- 1) the Applicant met with the Strata Company and the author of the Alexander Report on site;
- 2) the parties reached an agreement regarding appropriate adjustments to the fencing design proposed by the Applicant (**Alleged Agreement**); and
- 3) the Applicant erected the North-Western Boundary Wall in accordance with the Alleged Agreement.

62 No evidence has been filed regarding the Alleged Agreement by the Applicant. The Respondent did not lodge or seek leave to lodge evidence or submissions denying the existence or effect of the Alleged Agreement.

63 The elevation drawing lodged by the Applicant dated 2 December 2020 shows the North-Western Boundary Wall reducing in height at both the front and rear. At the rear, the fence line steps down with the declining ground level and reduces from a height of 1.8 metres to 1.2 metres.<sup>75</sup>

64 The photographs lodged by the Applicant confirm the North-Western Boundary Wall steps down beyond the building line at the front and rear, no retaining is evident, ground levels seem consistent with that of the adjoining lots on each side, there is no rear wall and ground levels at the rear appear consistent with ground levels moving from Lot 2 into the beach area.<sup>76</sup>

65 The submissions of the Strata Company cited the Alexander Report as a basis upon which the application to erect the North-Western Boundary Wall was opposed, but did not in its submissions address the differences between the plans reviewed by Mr Alexander and the wall which was eventually constructed. The North-Western Boundary Wall appears to have been constructed to address the concerns raised in the Alexander Report, except the recommended colour of brown/grey.

66 On the evidence provided, I am satisfied on the balance of probabilities the North-Western Boundary Wall is consistent with the approvals and the Design and Specifications save for the colour which is consistent with the overall colour scheme of the Residence and

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<sup>75</sup> AAOG, attachment B1.

<sup>76</sup> ABOD, photographs 3, 5 - 13, 18 - 19.

which (as discussed above) now appears to be consistent with other buildings and walls in the strata scheme.

67 I am satisfied the North-Western Boundary Wall is a 'structural alteration' of a lot within the meaning of s 90 of the ST Act and for the reasons given the installation of the same is reasonable in the circumstances and will not cause a significant detriment or inconvenience to other lot owners.

### **South-Eastern Boundary Wall**

68 The claims of the parties in relation to the South-Eastern Boundary Wall are virtually identical to the claims in relation to the North-Western Boundary Wall and might be summarised as follows:

- 1) The Applicant claimed the South-Eastern Boundary Wall is a reasonable structural alteration which has no impact upon (nor causes any inconvenience or detriment) to any lot owners because it is located within the boundaries of Lot 2, is of materials and colour previously approved by the Strata Company and the owners of the adjoining Lot 3 stated they were happy with the plans for the erection of the wall.<sup>77</sup>
- 2) The Strata Company opposed the application on the basis of the General Objections, because the construction of the South-Eastern Boundary Wall breached s 7(2) of the ST Act and by-laws 1.1(a), 1.1(j) 5.1, 6.1 and 6.2 because that wall was contrary to the development approvals and the Design and Specification.<sup>78</sup>
- 3) The Applicant disagreed with the position of the Strata Company on the basis that the South-Eastern Boundary Wall had been constructed in accordance with the Alleged Agreement so there was no breach of the by-laws.<sup>79</sup>

69 I accept as accurate the Mayo Report which assessed the South-Eastern Boundary Wall as being located entirely inside Lot 2.

70 The Strata Company cites in support of its opposition, the Alexander Report. However, the drawing<sup>80</sup> and photographs<sup>81</sup> filed by

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<sup>77</sup> AAOG, paras 3.1 - 3.9.

<sup>78</sup> RSFIC, paras 51 - 52.

<sup>79</sup> ARRS, paras 25 - 31.

<sup>80</sup> AAOG, plan C.

<sup>81</sup> ABOD, photographs 3, 5 - 13, 18 - 19.

the Applicant indicate the plans for the construction of the South-Eastern Boundary Wall were altered to address the concerns identified in the Alexander Report. Save for the colour, that wall appears to be consistent with the approvals and the Design and Specifications.

71 For this reason and on the basis of my earlier conclusions regarding the colour scheme of the Residence and consent from the owners of Lot 3,<sup>82</sup> I am satisfied the erection of the South-Eastern Boundary Wall is reasonable in the circumstances and will not cause a significant detriment or inconvenience to other lot owners.

### **Underground Water Tank**

72 The Applicant stated:<sup>83</sup>

The original plans for the [Residence], approved by the Strata Company, included an underground rainwater tank (**Underground Tank**) that was proposed to be installed adjacent to the north-east corner of the residence.

During construction of the residence, the Underground Tank was relocated away from the residence and its footings, on the advice of the structural engineer engaged for the construction project. It was relocated to be situated centrally within the yard area of Lot 2 ...

The changed location of the Underground Tank was approved by the City of Busselton.

The Underground Tank (that is, that has actually been installed) is the same tank that was approved by the Respondent. The departure from the approved plans is only in relation to the location of the Underground Tank.

The Underground Tank is located within the front, rear and side boundaries of Lot 2, as confirmed by the Survcon Survey.

The changed location of the Underground Tank is a reasonable structural alteration.

The Underground Tank is located entirely underground and is entirely hidden from view. The changed location of the tank therefore has no impact on the interests of the owners of any other lot in the use and enjoyment of their lots and the common property.

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<sup>82</sup> ABOD, document 4.

<sup>83</sup> AAOG, paras 6.1 - 6.12.



The changed location of the Underground Tank does not cause any inconvenience or detriment to the owners of other lots.

73 The plan lodged by the Applicant identifies the location of the Underground Tank as under the lawn to the side of the spa.<sup>84</sup> Photographs lodged by the Applicant suggest it may be difficult or impossible to identify the location of the Underground Tank by sight alone without the plan.<sup>85</sup>

74 The Strata Company stated the Underground Tank had been installed other than in accordance with the original Approval and therefore the Applicant had breached s 7(2) of the ST Act and by-law 6.2 because the Strata Company had not given prior approval<sup>86</sup>. The Strata Company opposed the application based only upon the General Objections. It lodged no submissions or evidence opposing the Applicant's physical description of the Underground Tank.

75 I accept the assessment of the Mayo Report the Underground Tank was not found to have encroached outside of Lot 2. On the basis of the material lodged by the Applicant, I am satisfied on the balance of probabilities the change in location of the Underground Tank was a structural alteration within the meaning of s 90 of the ST Act, the alteration was reasonable having regards the merits of the alteration and the interests of the other lot owners and would not cause any significant inconvenience or detriment to other lot owners.

## Outdoor Spa

76 The Applicant stated:<sup>87</sup>

The original plans for the [Residence], approved by the Strata Company, included an outdoor spa (**Spa**) that was proposed to be installed adjacent to the north-west corner of the residence.

During construction of the residence, the Spa was relocated away from the north-west corner of the residence, to be situated centrally at the north-eastern end of the outdoor paved area ... The changed location was to allow for better vision of the Spa from the residence, for the purposes of supervision of children who may use the Spa from time to time.

The changed location of the Spa was approved by the City of Busselton.

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<sup>84</sup> AAOG, plan A1.

<sup>85</sup> ABOD, photographs 3, 16 - 17.

<sup>86</sup> RSFIC, paras 57 - 58.

<sup>87</sup> AAOG, paras 8.1 - 8.12.

The Spa (that is, the spa that has actually been installed) is the same type and model of spa that was approved by the Respondent. The departure from the approved plans is only in relation to the location of the Spa.

The Spa is within the front, rear and side boundaries of Lot 2, as confirmed in the Survon Survey ...

The changed location of the Spa is a reasonable structural alteration.

The changed location of the Spa has no impact on the interests of the owners of any other lot in the use and enjoyment of their lots and the common property.

The changed location of the Spa does not cause any inconvenience or detriment to the owners of other lots.

77 The Strata Company stated the Outdoor Spa (**Spa**) had been installed other than in accordance with the original Approval and therefore the Applicant had breached s 7(2) of the ST Act and by-law 6.2 because the Strata Company had not given prior approval.<sup>88</sup> The Strata Company opposed the application based solely upon the General Objections. It lodged no submissions or evidence opposing the Applicant's physical description of the Spa.

78 Photographs filed by the Applicant show the Spa integrated into the paving and close to the living/dining area of the Residence.<sup>89</sup> The Applicant's annotation to photograph 3 indicates the Spa was originally to have been located close to the North-Western Boundary Wall. It appears likely the Spa in its original location would have been significantly less visible from inside the Residence, as compared to the current location of the Spa.

79 I accept the assessment of the Mayo Report the Spa was not found to have encroached outside of Lot 2. On the basis of the material lodged by the Applicant, I am satisfied on the balance of probabilities the change in location of the Spa was a structural alteration within the meaning of s 90 of the ST Act, the alteration was reasonable having regards the merits of the alteration and the interests of the other lot owners and would not cause any significant inconvenience or detriment to other lot owners.

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<sup>88</sup> RSFIC, paras 59 - 60.

<sup>89</sup> ABOD, photographs 1, 17; AAOG, plan A1.

## Television antennae

80 The Applicant stated:<sup>90</sup>

The Applicant has installed a small 'Foxtel' type antenna and satellite dish on the roof of the residence (**Antennae**). It is agreed that the Antennae is partly visible from some locations outside of Lot 2.

...

A number of other lots within Strata Plan 40074 contain antennae that are the same or materially similar to the Antennae, all of which are visible from some locations outside of those lots, including from some locations on common property.

The antennae is a reasonable structure, for the purposes of receiving television broadcasts.

The Antennae has no impact on the interests of the owners of any other lots in the use and enjoyment of their lots and the common property. Alternatively, any impact that the antennae may have on the owners of any other lots in the use and enjoyment of their lots and the common property is no different from the impact of any other numerous other antennae that are visible from common property and other lots.

The Antennae does not cause any other form of inconvenience or detriment to the owners of other lots. [sic]

81 The Strata Company stated the Antennae had been installed other than in accordance with the original Approval and therefore the Applicant had breached s 7(2) of the ST Act and by-law 6.2 because the Strata Company had not given prior approval. Further, the installation of the Antennae breached:

- 1) By-law 5.1 because there was non-compliance with those parts of the development approvals which required:
  - a) 'TV antenna and satellite disks shall be designed and located such that they do not detract from the local visual amenity or cause offence to neighbouring properties';
  - b) Buildings to form 'an integral component of the overall development in terms of type, style and character'; and

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<sup>90</sup> AAOG, paras 7.1 - 7.2 and paras 7.6 - 7.9.

- c) A separate application to approve 'TV antennae and satellite disks' not approved as part of the initial approval;
- 2) By-law 6.1 because the Antennae do not 'substantially comply with any of the approved designs' described in the building licence and do not 'sit complimentarily within the common property domain in a consistent integration with the adjoining buildings in the Resort'.

82 The Strata Company did not otherwise comment on the claims or evidence of the Applicant and is taken to oppose the application by reason of the General Objections only.

83 The photographs of the Applicant indicate:

- 1) The Antennae on the roof of the Residence are clearly visible from the beach. From that location no antennae or satellite dishes are visible on the house next door.<sup>91</sup>
- 2) A television antenna and satellite dish for Lot 3 are visible from common property.<sup>92</sup> The size of the satellite dishes on the rooves of the houses of the Applicant and Lot 3 appear similar.
- 3) A television antenna for Lot 5 is visible from on common property and the beach.<sup>93</sup>
- 4) A television antenna for Lot 6 is visible from the beach.<sup>94</sup>
- 5) A television antenna for Lot 16 is visible from the road.<sup>95</sup>
- 6) A television antenna and satellite dish (the latter which appears similar in size to the Applicant's satellite dish) for Lot 17 are visible from the road.<sup>96</sup>
- 7) Two television antennae for Lot 21 are visible from common property.<sup>97</sup>
- 8) A television antenna for Lot 183 is visible from the road.<sup>98</sup>

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<sup>91</sup> ABOD, photograph 20.

<sup>92</sup> ABOD IBP and photograph 21.

<sup>93</sup> ABOD IBP and photographs 22, 33 - 35.

<sup>94</sup> ABOD IBP and photograph 37.

<sup>95</sup> ABOD IBP and photograph 45.

<sup>96</sup> ABOD IBP and photograph 43.

<sup>97</sup> ABOD IBP and photograph 41.

84 The Applicant sought orders the Strata Company be taken to have passed a resolution approving the installation of the Antennae pursuant to s 200(1) and s 200(2)(n) of the ST Act, which the Respondent contends is not an available remedy because the installation of Antennae is a structural alteration.<sup>99</sup> The submissions of the Applicant might be summarised as citing the decision in *Sun* as support for statements that the Antennae do not fall within the ordinary meaning of 'structure' or 'structural' and do not fall within the meaning of 'structural alteration of a lot' for the purposes of s 86 of the ST Act.<sup>100</sup> The Applicant does not explain the basis upon which it has reached this conclusion. Similarly, the Respondent's submissions appear to cite *Sun* as the basis for stating the Antennae is a structural alteration of a lot, without further explanation.<sup>101</sup>

85 The decision of *Sun* considered the meaning of 'structure' under s 7 of the ST Act as it stood before the amendments which came into effect on 1 May 2020, the relevant parts of which were similar to s 87 of the current ST Act. The works in that decision which were determined to both be a 'structure' within s 7(2) consisted of:

- a) a large portable gazebo erected in the courtyard of a lot with a hard plastic roof and shade cloth attached; and
- b) plastic lattice attached to the gate and all the fencing surrounding the courtyard, covering approximately three-quarters of the height of the fence.

86 There is no photographic or witness evidence regarding the construction or installation of the Antennae. The further submissions of the Applicant state the following:<sup>102</sup>

- a) The television antenna and satellite dish are fixed to the roof of the Residence with mounting brackets and secured through the roof sheeting to timber battens forming part of the roof structure.
- b) Cables from the television antenna and satellite dish on the roof are run to a communications rack in a storeroom below a staircase in the Residence, which involves conduit containing

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<sup>98</sup> ABOD IBP and photographs 30 - 31.

<sup>99</sup> AAOG, paras 7.1 - 7.11, ARRS, paras 66 - 68, RSFIC, para 68.

<sup>100</sup> AAOG, para 7.2, ARRS, paras 66-67.

<sup>101</sup> RSFIC, para 68.

<sup>102</sup> Applicant's Supplementary Submissions dated 21 December 2022, paras 8 - 11.

the cables penetrating the roof and the first-floor concrete slab. The roof penetration is sealed to prevent the ingress of moisture.

87 The meaning of 'structure' and 'structural' may vary significantly depending on context. In the context of s 87 and the antecedent s 7, it is plain from prior decisions of this Tribunal that 'structural alteration of a lot' does not mean only works which affect the physical integrity of existing structures. Rather, 'structure' in this context connotes works of sufficient significance to the relevant strata scheme so that lot owners ought to have the opportunity to consider and accept or reject the proposed works.

88 Section 39 of the ST Act provides on registration of a strata scheme the default by-laws are those contained in Sch 1 and Sch 2, unless and until the strata company makes additional or replacement by-laws.<sup>103</sup> Nowhere in those Schedules is there a prohibition on the erection of television antennae or satellite dishes. It appears to me likely that for many strata developments, the placement of television aerials is uncontroversial and will have minor or no impact upon lot owners. For those developments which have a particular context which means the location or appearance of television aerials may be problematic, they have the option of passing a by-law to manage the issue, such as requiring lot owners to seek approval of the proposed works.

89 If the installation of a television aerial were considered to be a 'structural alteration of a lot' for the purposes of s 87, that could in effect require every lot owner in a strata scheme to seek approval before erecting the same. In my view such an interpretation goes beyond what was intended by s 87. Accordingly, whilst the installation of the Antennae on the Residence is not insignificant, neither do I consider the works so significant as to fairly be characterised as a 'structural alteration' for the purposes of s 90.

90 I am satisfied the erection of the Antennae was an 'improvement' which required approval of the Strata Company pursuant to by-law 6.2.<sup>104</sup>

91 The evidence establishes seven residences (excluding the Residence) have television antennae and two residences (excluding the Residence) have satellite dishes which are visible from common

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<sup>103</sup> ST Act, s 44.

<sup>104</sup> By-law 6.1.

property or public areas. The Strata Company has not explained the basis on which other lot owners' television antennae or satellite dishes were approved and the difference between those and the Antennae which causes it to object to the Antennae.

92 I am satisfied the evidence establishes the Antennae are consistent with other residences in the strata scheme, in keeping with the overall development and it is appropriate to order the Strata Company taken to have passed a resolution without dissent approving the installation of the Antennae.

***Conclusion***

93 For the reasons set out above, I have determined it is appropriate there be orders in favour of the Applicant:

1. Pursuant to s 90 in relation to the Lean-to Store, North-Western Boundary Wall, South-Eastern Boundary Wall, Underground Tank and Spa; and
2. Pursuant to s 200(2)(n) in relation to the weatherboards, window frames and Antenna.

94 I will hear from the parties as to the appropriate form of orders to give effect to these reasons.

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

MS N Oldfield, MEMBER

7 MARCH 2023