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JURISDICTION	:	STATE ADMINISTRATIVE TRIBUNAL
CITATION	:	TAYLOR and WESTERN AUSTRALIAN PLANNING COMMISSION [2023] WASAT 16
MEMBER	:	JUDGE H JACKSON, DEPUTY PRESIDENT DR S WILLEY, SENIOR MEMBER
HEARD	:	12 DECEMBER 2022
DELIVERED	:	13 MARCH 2023
FILE NO/S	:	DR 174 of 2021
BETWEEN	:	IAN HARRY TAYLOR First Applicant JULIE TAYLOR Second Applicant AND WESTERN AUSTRALIAN PLANNING COMMISSION Respondent

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Catchwords:

Town planning – Application for subdivision – Preliminary issue – Whether approval of lots smaller by more than 5% than average and minimum lot sizes prescribed by the R-Codes, which are incorporated into a local planning scheme, would be inconsistent with the scheme – Statutory construction of R-Codes

Legislation:

City of Melville Local Planning Scheme No 6, cl 25, cl 25(1), cl 26, cl 26(1),

cl 27, Pt 4, cl 32
Interpretation Act 1984 (WA), s 32(1)
Planning and Development (Local Planning Schemes) Regulations 2015 (WA), Sch 1
Planning and Development Act 2005 (WA), s 3(1)(c), s 4, s 4(1), s 74(2)(b), s 77, s 77(1)(a), s 77(1)(b), s 77(2), s 77(2)(a), s 77(2)(b), s 87(4), s 135, s 138(1), s 138(2), s 138(3), s 141, s 142, s 145(1), s 145(4), s 146, s 157, s 164A, s 237A, s 239, s 241, s 241(1)(a), Div 1, Div 2, Pt 3, Pt 4, Pt 5, Pt 10, Div 3
Planning and Environment Act 1989 (VIC), s 3
State Planning Policy 7.3 - Residential Design Codes Volume 1, cl 1.1, cl 1.2, cl 1.3, cl 1.4, cl 2.1.2, cl 2.1.3, cl 2.1.4, cl 2.2.1, cl 2.2.2, cl 2.4, cl 2.5.1, cl 2.5.2, cl 2.5.3, cl 2.5.4, cl 3.1, cl 5.1.1, Pt 1, Pt 2, Pt 3, Pt 5, Table 1, Appendix 1
Strata Titles Act 1985 (WA), s 17
Transfer of Land Act 1893, s 166

Result:

The preliminary question posed is to be answered in the negative

Category: B

Representation:

Counsel:

First Applicant	:	Mr M Flint
Second Applicant	:	Mr M Flint
Respondent	:	MR I A Repper

Solicitors:

First Applicant	:	Flint Legal
Second Applicant	:	Flint Legal
Respondent	:	State Solicitor's Office

Cases referred to in decision:

Australian Unity Property Limited as responsible entity for the Australian Unity Diversified Property Fund v City of Busselton [2018] WASCA 38; (2018) 237 LGERA 333

Baker Investments Pty Ltd and City of Vincent [2016] WASAT 115; (2016) 90 SR (WA) 223
Bookara Holdings Pty Ltd and Western Australian Planning Commission [2015] WASAT 111
Bormolini and Western Australian Planning Commission [2014] WASAT 121; (2014) 86 SR (WA) 159
Boulter and City of Subiaco [2007] WASAT 71; (2007) 52 SR (WA) 84
Boynton and Western Australian Planning Commission [2018] WASAT 60
Cheema and Western Australian Planning Commission [2014] WASAT 104
Costa v Shire of Swan [1983] WAR 22; (1982) 52 LGRA 145
Dumbleton & Anor and Town of Bassendean [2005] WASAT 145
Fernandez v State of New South Wales [2019] NSWSC 1736
Goyder and Walsh [2009] WASAT 108; (2009) 64 SR (WA) 251
Hill and Western Australian Planning Commission [2013] WASAT 195
Hunter Quarries Pty Ltd v Alexandra Mexon as Administrator for the Estate of the Late Ryan Messenger [2018] NSWCA 178; (2018) 98 NSWLR 526
Kakulas and City of Stirling [2013] WASAT 168
Kelliher v Commissioner for Main Roads [No 2] [2015] WASC 478
Landpark Holdings Pty Ltd and Western Australian Planning Commission [2007] WASAT 130
Lee and Western Australian Planning Commission [2008] WASAT 100
Newco Mills Pty Ltd and Presiding Member of the Metro Outer Joint Development Assessment Panel [2021] WASAT 160
Re Shire of Mundaring; ex parte Solomon & Ors [2007] WASCA 132
Shire of Murray v IVO Nominees Pty Ltd [2020] WASCA 45; (2020) 243 LGERA 89
Singh bhnf Ambu Kanwar v Lynch [2020] NSWCA 152; (2020) 103 NSWLR 568
Stream Focus Pty Ltd v City of Armadale [2018] WASCA 196; (2018) 233 LGRA 299
University of Western Australia v City of Subiaco ; [1980] WASC 28; (1980) 52 LGRA 360
WA Developments Pty Ltd and Western Australian Planning Commission [2008] WASAT 260
Western Australian Planning Commission and Diggins [2008] WASAT 9

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The applicants own land at 46 Ardross Street, Applecross (**Land**).

2 By application dated 29 April 2021, they applied for permission to subdivide the Land into two lots by way of a survey strata scheme.[1]

3 The respondent refused the application for reasons that include that 'the proposed lots do not meet the minimum or average site area requirements for the R15 density code'.[2]

4 The parties agree that the proposed lots do not meet the minimum or average site area requirements for the R15 density code as provided by the R-Codes.

5 The question is whether that fact and s 138(2) of the *Planning and Development Act 2005* (WA) (**PD Act**)[3] means that the respondent was (and the Tribunal on review is) required to refuse the application.

Overview of the issue, the statutory provisions and the parties' positions

6 The Land is located within the City of Melville (**City**) and is subject to the City's Local Planning Scheme No. 6 (**LPS6** or **Scheme**).

7 Clause 25 of LPS6 provides that the R-Codes, as modified by cl 26, 'are to be read as part of this Scheme.'

8 That is permitted by s 77, which allows (but does not mandate) a local government, in preparing or modifying a local planning scheme, to 'include in the scheme a provision that a specified State planning policy, with such modifications as may be set out in the scheme, is to be read as part of the scheme …'

9 The R-Codes are properly described as *State Planning Policy 7.3 – Residential Design Codes Volumes 1 and 2*.

10 The parties agree, and we so find, that the R-Codes are a State planning policy (**SPP**) made pursuant to Part 3 of the PD Act and that, pursuant to s 77, the City is entitled to incorporate them into the Scheme and has in fact has done so by cl 25.

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[1] Agreed Section 24 Bundle dated 21 February 2022 (**Agreed Bundle**), pages 6 – 30.
[2] Agreed Bundle, pages 4 – 5.
[3] Unless otherwise stated, all sections referred to are sections of the PD Act.

11 It will be necessary to set out the various relevant provisions of the R-Codes in more detail below. For present purposes, however, it is sufficient to note that:

(a) the deemed-to-comply provisions of cl 5.1.1 require compliance with Table 1 which provides for average and minimum site areas for certain types of development on land with various different R-Codings;

(b) Table 1 provides that for single houses or grouped dwellings on land with an R-Code of R15 the minimum site area is 580m^2 and the average site area is 666m^2; and

(c) the design principles for cl 5.1.1 provides, amongst other things, that the respondent may approve the creation of a lot, survey strata or strata lot of a lesser minimum and/ or average site area than that specified in Table 1 provided that the variation is no more than 5% less in area than that specified in Table 1.

12 The proposed subdivision would, if approved, create two lots of 539m^2 (Lot 1) and 440m^2 (Lot 2) with common property of 93m^2. The total area of 1072m^2 means that the average site area for two lots is 536m^2.

13 Each lot is therefore, more than 5% smaller than each of the minimum size (580m^2) and the average size (666m^2) provided for by Table 1.

14 Section 138(2) of the PD Act provides as follows:

> Subject to subsection (3), in giving its approval under section 135 or 136 the Commission is to have due regard to the provisions of any local planning scheme that applies to the land under consideration and is not to give an approval that conflicts with the provisions of a local planning scheme.[4]

[4] Section 138(3) sets out several exceptions to the rule in s 138(2) that the respondent is not to approve subdivision that conflicts with the provisions of a local planning scheme. The preliminary issue does not extend to a consideration of those exceptions. That is due to the status of the proceedings as a Class 1 matter. The parties have agreed that, if we decide that subdivisional approval would 'conflict' with the provisions of the Scheme, the matter will go to a hearing as to, amongst other things, one or more of the exceptions under s 182(3) applies. That hearing will proceed without the benefit of legal representation. The Tribunal's approach, therefore, is consistent with the principle that, ordinarily, Class 1 matters ought not to involve legal representation unless it involves a question of law or the matter raises complex or significant planning issues: s 237A & s 239.

15 The respondent refused to approve the proposed subdivision and the applicant seeks the Tribunal's review of that refusal. By order made 25 February 2022, the following was identified as a preliminary issue:

> Whether approval of the application for subdivision would conflict with the provisions of the … [Scheme] for the purposes of s 138(2) …

16 The respondent submits that:

(a) the R-Codes have been incorporated into, and form part of, the Scheme;

(b) the proposed subdivision is inconsistent with, and therefore in conflict with, the R-Codes; and

(c) the proposed subdivision is therefore impermissible.

17 The applicant acknowledges and agrees that the R-Codes have been incorporated into, and form part of, the Scheme but submits that:

(a) the incorporation of the R-Codes by cl 25 of the Scheme is limited in its scope to the concept of 'development', which does not include subdivision; and

(b) in any event, the R-Codes are concerned with development, which (again) does not include subdivision. That is, to the extent that cl 5.1.1 of the R-Codes is concerned with the respondent's role in approving subdivisions, the clause is for guidance only.

The agreed facts

18 There are no factual issues in contest that inform the preliminary issue. The following facts are agreed as between the parties and we find as follows.

19 The Land is formally identified as Lot 518 (No. 46) Ardross Street, Applecross on Plan 1751, Certificate of Title 1522/289 and has an area of 1072.86m^2.

20 A single dwelling has existed on the Land since at least 1953.

21 The Land contains an existing two storey brick and tile single dwelling. At the rear of the dwelling exists a detached garage/ carport and area of private open space containing several mature trees between 1 – 3m in height.

22 The Land has frontage to Ardross Street and is accessed by a single crossover to that road.

23 The Land was subject to a previous survey strata subdivision application for two lots, which was approved by the respondent in 1999 under the then applicable scheme, which assigned an R17.5 density coding to the Land and immediately surrounding lots.

24 The 1999 approval was not acted on and lapsed in October 2002.

25 The boundaries of the approved 1999 subdivision generally reflect those shown on the proposed subdivision.

26 The Land is surrounded on all sides by land that has all been subdivided and/or developed from the original parent lot size of 1072m^2.

27 The Land is also adjacent to two of three lots on the western side of Ardross Street that have been subdivided and/or developed from the original parent lot size of 1072m^2.

The proposed subdivision

28 The proposed subdivision would, if approved, create two lots and common property:

(a) proposed Lot 1 will front Ardross Street and will retain the existing dwelling; and

(b) proposed Lot 2 is located behind and to the north east of Lot 1 and will be accessed via the common property access leg which will run along Lot 1's northern boundary.

29 At an average site area of 536m^2, the variation from the average lot size (666m^2) for R15 coded land is almost 20%. The variation from the minimum lot (580m^2) size for Lot 1 (539m^2) exceeds 7%. For Lot 2 (440m^2), the variation exceeds 24%. The proposed subdivision therefore involves a variation of greater than 5% to the average and minimum lot sizes set out in the R-Codes.

30 For the purposes of consultation under s 142, the City recommended the proposed subdivision be refused due to the failure to meet the requirements of the R-Codes and the requirements and objectives of the respondent's *Development Control Policy 2.2 – Residential Subdivision*.

31 On 5 August 2021, the respondent refused the proposed subdivision for the following reasons:

a) The proposed subdivision does not comply with the objectives or provisions of the Western Australian Planning Commission's *State Planning Policy 3.1 – Residential Design Codes* and *Development Control Policy 2.2 – Residential Subdivision*, or the *City of Melville Local Planning Scheme No. 6*, because:

(a) the proposed lots do not meet the minimum or average site area requirements for the R15 density code; and

(b) the width of the proposed common property access leg is insufficient.

b) The proposed subdivision is inconsistent with the Western Australian Planning Commission's *Development Control Policy 1.1 – Subdivision of Land – General Principles* and *Development Control Policy 2.2 – Residential Subdivision*, because it would result in a form of development that:

(a) would prejudice the objectives of the local planning framework;

(b) does not respond to the current planning context; and

(c) will not be consistent with the long-term character intended for the area.

c) Approval of the subdivision would set an undesirable precedent for the subdivision of other lots of a similar size and configuration in this locality, would undermine the objectives and provisions of the *City of Melville Local Planning Scheme No. 6* and facilitate development out of keeping with the local context and desired future character of the area.

Procedural History

32 Following the refusal, the applicant sought review of that decision by an application lodged in the Tribunal on 20 August 2021.

33 By an order made 25 February 2022, the following was identified as a preliminary issue:

> Whether approval of the application for subdivision would conflict with the provisions of the … [Scheme] for the purposes of s 138(2) …

34 Contemporaneous orders also listed the preliminary issue to be determined 'entirely on the documents' on the basis of written submissions to be filed by the parties.

35 The respondent filed written submissions on 18 March 2022. The applicant filed written submissions on 3 June 2022. The respondent filed responsive written submissions on 10 June 2022.

36 Having considered the parties written submissions and the issues arising, and in light of both the difficulties involved in the proper construction of the R-Codes and the breadth of the likely consequences of the determination, the Tribunal identified several matters about which it sought further submissions and the preliminary issue was listed for oral hearing on 12 December 2022.

The statutory regime

37 In dealing with the preliminary issue, it is unnecessary for us to traverse the applicable planning framework in close detail. The question before us is one of statutory construction. In order to resolve the preliminary issue, we will need to consider, primarily, the PD Act, LPS6 and the R-Codes.

Strata Titles Act 1985 (WA)

38 In addition, it is necessary to have regard to the *Strata Titles Act 1985* (WA) (**STA**) because, as noted above, the proposed subdivision is a survey strata subdivision.

39 Thankfully, that task can be completed quickly. Section 17(1) of the STA provides that each of Div 1, Div 2 (aside from s 141) and Div 3 of Pt 10 of the PD Act apply to the subdivision of land by a survey-strata scheme. Section 17(3) of the STA provides that registration of the scheme plan can only occur if the respondent's approval of it (the scheme plan) is unconditional.

PD Act

40 Two Parts of the PD Act have relevance to the preliminary issue – Parts 5 and 10.

41 Part 5 of the PD Act deals with local planning schemes.

42 Section 77(1)(a) provides that local governments are to, when preparing or amending a local planning scheme, have due regard to any SPP affecting its district.

43 As we have stated, s 77(1)(b) provides that a local government, when preparing or amending a local planning scheme, 'may include in the scheme a provision that a specified [SPP], with such modifications as may be set out in the scheme, is to be read as part of the scheme …'

44 Where a local planning scheme includes a provision pursuant to s 77(1)(b), s 77(2) provides that:

> (a) the scheme is to have effect as if the [SPP], as from time to time amended, or any subsequent policy by which it is repealed under [the PD Act], were set out in full in the scheme; and
>
> (b) the [SPP] is to have effect as part of the scheme subject to any modifications set out in the scheme.

45 Section 87(4) provides that a local planning scheme, once gazetted, has 'full force and effect as if it were enacted by the [PD Act]'. That is, a gazetted scheme (assuming that it 'can properly be described' as such) 'has the force of law as if it were enacted within' the PD Act.[5]

46 Part 10 of the PD Act is headed 'Subdivision and development control'.

47 Section 135 provides that a person is not to subdivide or amalgamate a lot without the approval of the WAPC.

48 As the Court of Appeal has noted, the process of subdivision occurs in three stages.[6]

49 At the first stage, the respondent may give its approval to the subdivision of lots 'subject to conditions which are to be carried out before the approval becomes effective'.[7]

50 It does so by endorsing its approval on a plan of subdivision subject to conditions specified in a written approval. The respondent's determination (i.e. whether to approve the application for subdivision and, if so, on what conditions if any) is made following consultation under s 142 with the relevant local government and any relevant public

[5] ***Costa v Shire of Swan*** [1983] WAR 22; (1982) 52 LGRA 145 (***Costa***) at [29].
[6] ***Stream Focus Pty Ltd v City of Armadale*** [2018] WASCA 196; (2018) 233 LGRA 299 (***Stream Focus***), at [2] – [4].
[7] PD Act, s 138(1).

authority or utility services provider. Any subdivisional conditions imposed are conditions precedent.

51 The second stage involves the developer carrying out the works that are necessary to satisfy the subdivisional conditions. In doing so, s 157 provides that, unless the respondent expressly provides otherwise, the developer is taken to have approval under a relevant planning scheme for the carrying out of necessary works required by the conditions.[8]

52 If the respondent is satisfied that the applicant has complied with the subdivisional conditions, or that they will be complied with at the time a certificate of title is created or registered, it will endorse its approval on a diagram or plan of survey.[9] Once that has occurred, the Registrar of Titles may create or register a new title for the new lots.[10] That is the third stage of the process.

53 The preliminary issue is concerned with the first stage of the subdivisional process.

54 Section 138(2) provides that in giving its approval under s 135, the respondent is to have due regard to the provisions of a local planning scheme that applies to the land under consideration and, subject to s 138(3), 'is not to give an approval that conflicts with the provisions of a local planning scheme'.

The Scheme/LPS6

55 Under LPS6, the Land is zoned 'Residential' with a density code of R15.

56 Part 4 of LPS6 is headed 'General development requirements'.

57 Clause 25(1) of LPS6 is located within Part 4 and is in the following terms:

> The R-Codes, modified as set out in clause 26, are to be read as part of this Scheme.

58 Clause 26 of LPS6 (which is also located within Pt 4) provides for the modification of the R-Codes in three circumstances, none of which are *directly* relevant here, although cl 26(1) deals with

[8] ***Stream Focus*** at [3].
[9] PD Act, s 145(4).
[10] PD Act, s 146 and *Transfer of Land Act 1893*, s 166.

subdivision and each party refers to it in their submissions. It provides as follows:

> Where on the Scheme Maps, an area is identified as having two density codes in the form of a split R-Code, when considering an application for development approval, or when making a recommendation to the [respondent] in respect of subdivision, the local government is to apply the lower of the two R-Codes…'[11]

59 We note also, for completeness, that by cl 27 of the Scheme, *SPP 3.6 – Infrastructure Contributions*, as modified by cl 27, is also 'to be read as part of' the Scheme.

60 As noted above, s 87(4) provides that a gazetted scheme has the force of law as if it were enacted within the PD Act. Notwithstanding that provision, the construction of planning schemes is subject to principles that reflect its provenance. So, as her Honour President Pritchard said in ***Newco Mills***:[12]

> [31] The construction of a local planning scheme, which constitutes subsidiary legislation, involves determining the objective meaning of the terms used, by the application of recognised rules of interpretation to the text, understood as a whole and in its context. The meaning must emerge from the statutory text, understood in its context, but also having regard to the statutory purpose being pursued.
>
> [32] It is well established that planning schemes should be construed broadly rather than pedantically, and with a sensible practical approach. That approach recognises that planning schemes are not usually drafted by parliamentary counsel and are often expressed in terms which lack the precision of a statute. That approach also recognises that the terms of planning schemes are regularly referred to, often without the assistance of professional legal advice, by planners, government officials, landowners and prospective landowners, to identify the permissible uses of land to which a scheme applies. For that reason, the Court of Appeal has cautioned against placing a counter-intuitive judicial gloss on the plain language of planning schemes because to do so would reduce the capacity of the range of persons who use such schemes to comprehend their meaning. Nevertheless, the exercise of construction remains one of identifying the objective meaning from a consideration of the legislative text, understood

[11] Underlining added.
[12] ***Newco Mills Pty Ltd and Presiding Member of the Metro Outer Joint Development Assessment Panel*** [2021] WASAT 160 (***Newco Mills***).

> as a whole and in the context in which, and purpose for which, it was enacted.[13]

R-Codes[14]

61 As noted above, the R-Codes are an SPP made by the Governor pursuant to Pt 3 of the PD Act.[15]

62 Clause 1.2 of the R-Codes states that the purpose of the R-Codes is to 'provide a comprehensive basis for the control of **residential development** throughout Western Australia'.[16] Equally, cl 1.4 provides that the R-Codes 'apply to all residential development throughout Western Australia'.

63 '**residential development**' is defined in Appendix 1 of the R-Codes as:

> **Development** of permanent accommodation for people, and may include all **dwellings**, the residential component of **mixed-use development**, and **residential buildings** proposing permanent accommodation.

64 The term '**development**' is defined in Appendix 1 as 'defined under the [PD Act]' which, at s 4 of the PD Act, is as follows:

> ***development*** means the development or use of any land, including —
>
> (a) any demolition, erection, construction, alteration of or addition to any building or structure on the land;
>
> (b) the carrying out on the land of any excavation or other works;
>
> (c) in the case of a place to which a protection order made under the *Heritage Act 2018* Part 4 Division 1 applies …

65 It is convenient here to note three matters. First, the PD Act definition of 'development' is inclusive and, therefore, not exhaustive.

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[13] ***Newco Mills*** at [31] – [32]. Internal citations omitted. See also ***Australian Unity Property Limited as responsible entity for the Australian Unity Diversified Property Fund v City of Busselton*** [2018] WASCA 38; (2018) 237 LGERA 333 (***Australian Unity***); at [77] and [82] – [84] (Buss P, Murphy JA and Mitchell JA); ***Re Shire of Mundaring; ex parte Solomon & Ors*** [2007] WASCA 132 at [25] (Steytler P, McLure JA and Pullin JA).

[14] At all relevant times, in relation to this application, the gazetted version of the R-Codes has been the 2021 version, incorporating amendments gazetted on 2 July 2021. Shortly before these reasons were finalised, a further version of the R-Codes was released, subject to a note indicating that they will not be gazetted until 1 September 2023. While the layout of the R-Codes will change under the new version, with consequential changes to the relevant clause numbers, there does not appear to be any material change to the relevant text of the R-Codes and we do not, therefore, refer to the 2023 version in any further detail.

[15] R-Codes, cl 1.1.

[16] Bold text in the original. The use of bold text in the R-Codes indicates that the bolded term is defined in the Appendix; see cl 1.4.

Secondly, in contrast to other Australian jurisdictions, the definition of development in the PD Act does not expressly include subdivision. This is a matter returned to in more detail below. Thirdly, the PD Act includes a separate definition of 'subdivision', which is also inclusive and only includes 'amalgamation'.

66 Returning to the R-Codes, cl 1.3 sets out the general objectives of the R-Codes.

67 Part 2 of the R-Codes is headed 'R-Codes Volume 1 approval process'.

68 Clause 2.1.2 provides that where 'development approval is required under a **scheme** a development application shall be lodged with the relevant **decision-maker** for assessment and making a determination.'

69 '**decision-maker**', is defined in Appendix 1 as:

> That body, organisation or authorised person legally vested with the power to make decisions, pursuant to relevant legislation, in respect of **residential development** in accordance with the R-Codes.

70 It is necessary to note the primacy of 'residential development' to the definition of 'decision maker' which, again, requires consideration of the scope of the defined term 'development'.

71 Also in Part 2 of the R-Codes is cl 2.5.3 which provides:

> The **decision-maker** shall not vary the minimum or average **site area** per **dwelling** requirements set out in **Table 1** (except as provided in the R-Codes Volume 1 or the scheme).

72 Part 3 of the R-Codes is headed 'Accompanying information'. Clause 3.1 is headed 'Applications for development approval' with the remainder of Pt 3 setting out detailed information that must be provided by applicants.

73 We pause here to note that, while various provisions within Pt 2 and Pt 3 of the R-Codes (cl 2.1.2, cl 2.1.3, cl 3.1) refer to 'development approval' processes and decision-making, others refer to 'proposals' for residential development (cl 2.2.1, cl 2.2.2, cl 2.4, cl 2.5.1, cl 2.5.2), with the term 'proposal' being undefined.

74 Part 5 of the R-Codes sets out the design elements that apply to the relevant development, being the subject of the 'proposal'/ 'development approval' process.

75 The Pt 5 provisions are divided into five subheadings, namely: 5.1 Context; 5.2 Streetscape; 5.3 Site planning and design; 5.4 Building design; and 5.5 Special purpose dwellings.

76 Each subheading is followed by text which contains relevant objectives and a table, which sets out the 'deemed-to-comply' requirements (**DTC**) and 'design principles'.

77 If a DTC requirement is satisfied, there is no requirement for the decision-maker to look to the design principles: see cl 2.1.4 and cl 2.5.4.

78 Clause 2.5.1 provides that, if a DTC requirement is not satisfied, then:

> Subject to clauses 2.5.2 and 2.5.3, the **decision-maker** is to exercise its judgement to consider the merits of proposals having regard to objectives and balancing these with the consideration of design principles provided in the R-Codes Volume 1.

79 Clause 2.5.3, to which cl 2.5.1 is subject, provides that 'the **decision-maker** shall not vary the minimum or average **site area** per **dwelling** requirements set out in **Table 1**'.

80 Clause 5.1.1 of the R-Codes relates to the 'Site area' of a lot the subject of a 'proposal'/ 'development approval' application.

81 The DTC provisions of cl 5.1.1 follow a 'Note' as follows:

> **Note:** The minimum and average **site areas** stipulated in **Table 1** are not subject to variation except as set out in clause 5.1.1 below.

82 That *appears* to be a reference to, or perhaps more accurately, mirror or replicate, the provisions of cl 2.5.3 set out above.

83 The following are the (relevant) DTC provisions for cl 5.1.1 'Site area':

> C1.1 **Development** which complies with the **dwelling** type and **site area** requirements set out in **Table 1** and the following provisions.
>
> C1.2 …

C1.3 …

C1.4 Subject to clause 5.1.1 C1.3 only, the following variations to the minimum and average **site area** set out in **Table 1** may be made:

…

ii. in the case of a **single house**, **grouped dwelling** or **multiple dwelling** the area of a **lot**, **survey strata lot** or **strata lot** approved by the [respondent];

…

84 Table 1 provides that the minimum and average site area per dwelling for R15 land is 580m^2 and 666m^2 respectively.

85 The design principles for cl 5.1.1 are as follows:

P1.1 **Development** of the type and density indicated by the density code designated in the **scheme**.

P1.2 The [respondent] may approve the creation of a **lot**, **survey strata lot** or **strata lot** of a lesser minimum and/ or average **site area** than that specified in **Table 1**, and the [respondent] in consultation with the local government may approve the creation of a survey strata lot or strata lot for a **single house** or a **grouped dwelling** of a lesser minimum site area than that specified in Table 1 provided that the proposed variation would be no more than five per cent less in area than that specified in Table 1 and:[17]

- …

[17] Clause P1.2 is in two parts or limbs. The first grants power to the respondent to approve the creation of a (smaller) 'lot, survey strata lot or strata lot'. There is no requirement for consultation with the relevant local government. By contrast, the second limb grants power to the respondent to approve a (smaller) lot but only in relation to a 'survey strata lot or a strata lot', not in relation to a 'lot'. In addition, the second limb requires the respondent to act 'in consultation with' the local government. There is, plainly, very considerable overlap between the two limbs, without any explanation as to when one limb is to apply, rather than the other. Neither party was able to provide any material assistance in this regard when the issue was raised at the oral hearing and an opportunity was provided for the filing of further written submissions. Given our ultimate decision and the basis for it, we are of the view that it is not necessary to address the issue any further. We note further that the overlap is removed by the 2023 version of the R-Codes, which effectively deletes the first limb.

R-Codes Explanatory Guidelines[18]

86 The version of the 2002 R-Codes contained extensive explanatory guidance material in section 1 of that document. In 2013, much of that material was removed and placed in a separate *Explanatory Guidelines* document. Since then, changes have been made to both the R-Codes and the *Explanatory Guidelines*.

87 As is noted below, on the question raised by the preliminary issue, the current iteration of the *Explanatory Guidelines* contains two opposing statements.

88 Section 1 of the *Explanatory Guidelines* relevantly provide as follows:

> The purpose of these guidelines is to explain and assist interpretation and application of the R-Codes Volume 1.
>
> The R-Codes are introduced by reference into a **scheme** and it is a requirement for all **residential development** to comply with the R-Codes. The guidelines are designed to be read with the R-Codes Volume 1 provisions to provide clarification and to guide proponents, **decision-makers** and other relevant stakeholders regarding the design, assessment and implementation of residential development in Western Australia.
>
> Together with other state planning policies and [the respondent's] operational (development control) policies, the R-Codes also guide the assessment of residential subdivision proposals by the [respondent] although they are not intended to prescribe subdivision design and standards.[19]
>
> …

89 Section 4 of the *Explanatory Guidelines* includes explanations of various design elements of the R-Codes. Relevantly, section 4.5 of the *Explanatory Guidelines* is concerned with Site area.

90 Under the heading 'Variations to minimum and average site area requirements', section 4.5 of the *Explanatory Guidelines* says:

> The minimum and average **site areas** for **single houses** and **grouped dwellings** stipulated in **table 1** may not be varied, except where an application for subdivision approval is made to the [respondent] and the

[18] A new version of the *Explanatory Guidelines* has been released to accompany the 2023 version of the R-Codes. Given the 2023 R-Codes are not yet gazetted, what follows is limited to the version of the *Explanatory Guidelines* that concern the 2021 version of the R-Codes.
[19] Underlining added.

> application satisfies certain criteria, **clause 5.1.1 P1.2** of the R-Codes Volume 1, provides for a maximum lot size variation of 5 per cent to be considered. This provides some flexibility to accommodate minor reductions to minimum and average site areas while providing a maximum of 5 per cent to make clear that flexibility is limited. The subdivision of land is also subject to other WAPC policies …[20]

91 Under the heading Land title implications, the *Explanatory Guidelines* state that:

> There are several implications as to the use of the R-Codes Volume 1 in the subdivision process:
>
> – The minimum site area requirements under 5.1.1 of the R-Codes Volume 1 are intended to be guidelines for the [respondent] in considering subdivision applications.
>
> – The R-Codes Volume 1, as a consequence, include a provision which permits the approval for **development** on any green title lot, strata lot or survey strata lot previously approved by the [respondent] even when the lot does not meet the minimum site area or **frontage** …[21]

92 The underlined passages, in our view, provide opposing perspectives as to the effect of the 5% limit in cl 5.1.1 P1.2 of the R-Codes. The passage in section 1 and the latter passage in section 4 describes the 5% limit as a guideline while the earlier passage from section 4 appears to suggest that the 5% limit cannot be exceeded.

93 ***Landpark***[22] was determined in 2007, when the 2002 R-Codes were in force. As noted above, the above passages were at that stage contained in the R-Codes themselves. At para 24, the Tribunal in ***Landpark*** said that:

> The absence of conflict between approval of a subdivision application that proposes allotments with areas less than that contemplated by the residential density code that applies to the land under a local planning scheme and the scheme is recognised in the Codes.

94 That statement was then followed by the passage quoted above which starts '[t]here are several implications …'

95 The 2002 iteration of the R-Codes did ***not*** include a passage equivalent to that quoted above from the current version of the

[20] Underlining added.
[21] Underlining added.
[22] ***Landpark Holdings Pty Ltd and Western Australian Planning Commission*** [2007] WASAT 130 (***Landpark***), at [24] – [28].

Explanatory Guidelines which appears to suggest that the 5% limit on variations cannot be exceeded. The Tribunal in ***Landpark*** did not, therefore, have to address the apparent inconsistency. Indeed, the Tribunal did not address the 5% limit on variations at all, notwithstanding that the 2002 R-Codes contained (at cl 3.1.3) a provision which was, in location and text, very similar to cl 5.1.1 P1.2.

96 We will address ***Landpark*** in more detail below because the applicant relied upon it and, while the respondent did not seek to 'reopen' the decision, it sought to distinguish it on the basis of differences in both the scheme text and the text of the R-Codes.[23]

Respondent's submissions on the preliminary issue

97 The respondent's submissions are, effectively, in three parts.

Cl 5.1.1 of the R-Codes is concerned with the exercise of subdivisional power by the Respondent

98 The respondent submits that the design principles P1.2 and P1.3 of cl 5.1.1 are unambiguously directed to the exercise by the respondent of its powers of subdivision.[24]

99 That is, the respondent submits that those parts of cl 5.1.1 of the R-Codes are not addressed to the exercise by a local government, Development Assessment Panels (**DAPs**) or similar of its functions to determine applications for development approval but to the respondent's functions under Div's 2–4 of Part 10 of the PD Act.

100 In support of that submission, the respondent also relies on other provisions of the R-Codes, including that of cl 2.5.3 which, as noted above, provides that the minimum or average site area per dwelling requirements of Table 1 cannot be varied by the relevant decision maker except in accordance with the R-Codes and the scheme.[25]

101 The respondent also submits that the R-Codes, when read as a whole support this first proposition.[26] With respect, this part of the respondent's written submissions is not easy to follow. It starts with an acknowledgment that 'the R-Codes are generally addressed towards the control of residential development' in circumstances where the

[23] Respondent's Submissions on Preliminary Issue dated 18 March 2022 (**Respondent's Submissions**), para 11 and paras 96 – 101.
[24] Respondent's Submissions, para 70.
[25] Respondent's Submissions, para 77.
[26] Respondent's Submissions, paras 80 – 89.

respondent has previously submitted that '"development" does not include subdivision.'[27] But the respondent then notes that there is an 'inextricable link between subdivision and development standards'[28] such that:

(a) a site area that has been approved by the respondent will satisfy the DTC provisions of cl 5.1.1; and

(b) the respondent is therefore required, in considering an application for subdivision, to have regard to the expectation that development of residential land with a certain R-Coding will require lots of not less than the minimum lot size and the respondent will 'not, therefore, generally approve an allotment of a lesser size …'[29]

102 With respect, the balance of this aspect of the first limb of the respondent's submission appears to be more accurately described as an attempt to overcome the respondent's initial acknowledgement that the R-Codes are, primarily addressed towards residential development, which term the respondent submits does not include subdivision.

The Terms of cl 5.1.1 Limit the Respondent's Power to Vary Minimum and Average Lot Sizes

103 The respondent submits that by the terms of cl 5.1.1 of the R-Codes it (the respondent) is not permitted to vary the minimum and average lot size by more than 5 per cent. That is, the respondent submits that the express terms of P1.2 of cl 5.1.1 impose an absolute limit on the scope of the respondent's discretion to vary.[30]

Section 77 and cl 25 of LPS6 Prevent Departure from the Terms of cl 5.1.1

104 The respondent submits that nothing outside the R-Codes permits it (the respondent, and, therefore, the Tribunal on review) to 'depart from' the terms of P1.2 of cl 5.1.1 of the R-Codes. That is because:

(a) to do so would involve a conflict between any approval and the terms of the Scheme, which by s 77 and cl 25 of LPS6 include the R-Codes; and

[27] Respondent's Submissions, para 14.
[28] Respondent's Submissions, para 81 citing ***Landpark*** at [28].
[29] ***Landpark*** at [28].
[30] Respondent's Submissions, paras 71 – 74.

(b) such a conflict is prohibited by s 138(2).[31]

105 There are at least four aspects to this submission.

106 Firstly, the respondent says that the effect of s 77(1)(b) of the PD Act is to elevate a SPP (such as the R-Codes) beyond its status as 'just' a policy.

107 In that regard it is said that, absent s 77 of the PD Act, the R-Codes, as an SPP, 'would in any event weigh heavily in the exercise of the discretion of the planning decision-maker who is to give them due regard.' On that basis, it is said that s 77 and cl 25 'elevate the R-Codes to something more than a document of "due regard" into one of legislative effect.'[32]

108 The respondent accordingly submits that a statement in ***Baker Investments***[33] should not be followed. The statement (at para 127) was as follows:

> After all, any policy (even a SPP) which is incorporated into a town planning scheme remains just that, *policy*, and therefore *by definition* as the Tribunal said in ***Bookara Holdings Pty Ltd and Western Australian Planning Commission*** [2015] WASAT 111, at [23]:
>
> > … provides a guideline of the principles that the respondent [or this Tribunal] can be expected to apply when making decisions[;]… it does not provide a binding set of principles that must be applied in all cases: ...[34]

109 In ***Baker Investments*** the R-Codes had been incorporated into the relevant scheme by cl 19(1) which provided that the R-Codes 'are to be read as part of [the scheme]' which was said to be reflected in the terms of cl 25 of the Model Provisions; i.e. in the terms of cl 25 of the Scheme in this case.[35]

110 The Tribunal in ***Baker Investments*** relied on three cases in its reasons on this point and the respondent addressed each of them in its written submissions.

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[31] Respondent's Submissions, paras 71 – 76.
[32] Respondent's Submissions, para 116.
[33] ***Baker Investments Pty Ltd and City of Vincent*** [2016] WASAT 115; (2016) 90 SR (WA) 223 (***Baker Investments***).
[34] Emphasis in original.
[35] ***Baker Investments*** at [121].

111 As the respondent notes, two of them – ***Bookara***[36] and ***Kakulas***[37] – did not involve the incorporation of policy into a scheme pursuant to s 77 of the PD Act. On that basis the respondent submits that they cannot support the proposition in question contained in ***Baker Investments***.[38]

112 The third case relied upon in ***Baker Investments*** was ***Dumbleton***.[39]

113 In that case cl 3.3.2(d) of the relevant scheme provided that:

> Unless otherwise provided for in the Scheme, the development of land for any of the residential purposes dealt with by the [R-Codes] shall conform to the provisions of those codes.[40]

114 The Tribunal in ***Dumbleton*** held that cl 3.3.2(d) did ***not*** have the effect of mandating approval of an application that satisfied the provisions of the R-Codes.[41]

115 In ***Baker Investments*** the Tribunal held that that conclusion (i.e. the conclusion in ***Dumbleton***) was underpinned 'in large measure' by the status of the R-Codes as a 'policy'.[42] The respondent's submissions reject that contention. The respondent submits that the reasons in ***Dumbleton*** were silent as to the R-Codes status as 'policy'.[43]

116 Finally, the respondent submits that the Tribunal's reliance on s 241(1)(a) to support its conclusion in ***Baker Investments*** is flawed. At para [128] the Tribunal in ***Baker Investments*** said as follows:

> … s 241(1)(a) of the PD Act enjoins the Tribunal 'to have due regard to relevant planning considerations' including 'any State planning policy which may affect the subject matter of the application'. Arguably, such a provision would have been largely unnecessary if SPPs were to be given the elevated, self-executing status that the applicant argued for here.

117 The respondent submits that such reasoning does not follow for two reasons:

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[36] ***Bookara Holdings Pty Ltd and Western Australian Planning Commission*** [2015] WASAT 111 (***Bookara***).
[37] ***Kakulas and City of Stirling*** [2013] WASAT 168 (***Kakulas***).
[38] Respondent's Submissions, paras 107 – 109.
[39] ***Dumbleton & Anor and Town of Bassendean*** [2005] WASAT 145 (***Dumbleton***).
[40] ***Dumbleton*** at [13].
[41] ***Dumbleton*** at [20] – [23].
[42] ***Baker Investments*** at [127].
[43] Respondent's Submissions, para 114.

(1) it wrongly assumes that s 77(2) of the PD Act will necessarily have the result that all SPPs are incorporated into the relevant scheme when, in fact, the section merely empowers a local government to incorporate into the scheme those SPPs it selects for the purpose; and

(2) s 241(1)(a) merely provides for additional matters to which the Tribunal must have regard in exercising its discretion; it does not detract from or limit any express provision of a scheme that imposes a constraint on the power to approve an application.

118 Secondly, the respondent (in apparent anticipation of an argument relied upon by the applicant) submits that the heading to Part 4 of the Scheme – 'General development requirements' – ought not to be understood as precluding subdivision from the provisions of the R-Codes as incorporated into the Scheme by cl 25.[44]

119 Thirdly, the respondent submits that the terms of cl 25 and cl 26 of the Scheme do not limit the scope of the application of the R-Codes to 'development' (and thereby exclude subdivision). In fact the terms of cl 26 expressly anticipate the application of the R-Codes to the subdivisional process.[45]

120 Fourthly, the respondent seeks to distinguish ***Landpark***[46] which, as noted above, held that there was no 'conflict between approval of a subdivision application that proposes allotments with areas less than that contemplated by the residential density code that applies to the land under a local planning scheme and the scheme'[47] and also held that the terms of the R-Codes themselves recognise that absence of conflict.

121 The respondent sought to distinguish ***Landpark*** on the basis of material differences in the scheme provisions by which the R-Codes are applied/incorporated[48], and on the basis of material differences in the R-Codes themselves.[49]

122 In ***Landpark***, cl 6(3) of the scheme stated that '… the use or development of land for any of the residential purposes dealt with by the [Codes] shall conform to the provisions of those Codes'.[50]

[44] Respondent's Submissions, para 92.
[45] Respondent's Submissions, para 93.
[46] Respondent's Submissions, para 96.
[47] ***Landpark*** at [24].
[48] Respondent's Submissions, paras 97 – 98.
[49] Respondent's Submissions, paras 99 – 100.
[50] ***Landpark*** at [22].

In ***Landpark*** the Tribunal held that the phrase 'use or development' excluded subdivision and that there was therefore no conflict between the subdivisional proposal and the terms of the relevant scheme because there was no requirement for subdivision to comply with the terms of the R-Codes.[51]

123 By contrast, the respondent submits in the current case, cl 25(1) of the Scheme incorporates the whole of the R-Codes, which include provisions concerned with subdivisions and lot size (site area), into the Scheme.

124 As to the terms of the R-Codes themselves, the respondent's written submissions assert that while cl 5.1.1 P1.2 'directly address the respondent in its decision-making as to the creation of a lot (i.e. subdivision)', the 2002 iteration of the R-Codes was concerned only with 'development'.[52] That submission relied upon the Tribunal's reasons in ***Landpark*** at para 19, which quoted the Performance Criteria to cl 3.1.1 of the 2002 R-Codes.

125 However, a difficulty arises in this regard for the respondent because, in fact, the 2002 R-Codes contained, at cl 3.1.3, Performance Criteria in quite similar terms to cl 5.1.1 P1.2:

> The Commission may approve the creation of a lot of a lesser area and the Commission or a Council may approve a minimum site area of a Grouped Dwelling on a site area less than that specified on Table 1 provided that the proposed variation would meet the following criteria:
>
> - be no more than 5 per cent less in area than that specified on Table 1; and
>
> - …

126 That is, the 2002 R-Codes explicitly dealt with subdivision, although that fact was not referred to at all by Parry SM (as he then was) in the ***Landpark*** decision. That appears somewhat surprising given that he quoted, at para 25, part of the Acceptable Development provisions of cl 3.1.3, being the 'equivalent' provisions to the DTC provisions of the current version.

127 The existence of the relevant Performance Criteria in cl 3.1.3 of the 2002 R-Codes did not become apparent to the Tribunal (or, indeed, to the parties) until prior to the oral hearing in December 2022, when

[51] ***Landpark*** at [23] – [24].
[52] Respondent's Submissions, para 100.

the respondent helpfully provided a folder of materials which included copies of all previous versions of the R-Codes.

128 The short point is that the respondent's written submission that the R-Codes in place at the time of ***Landpark*** only addressed 'development' and not 'subdivision' is incorrect.

Applicants' submissions

129 The applicants' put both a primary and secondary position.

Applicant's Primary Position

130 The applicant's primary position is that the incorporation of the R-Codes by cl 25 of LPS6 does not include any part of the R-Codes that concern subdivision. [53]

131 Central to the applicant's case is the proposition that the term 'development' does not include subdivision.[54] In that regard the applicant relies upon ***Landpark***.

132 The applicant's case (as per the above) is supported by the following submissions.

133 First, it is said that for the following reasons, properly construed, Part 4 of the Scheme is (or should be) limited to development, so as not to include subdivision:

(a) The heading to Part 4 of LPS6:

(1) forms part of the Scheme;

(2) provides context for the provisions within it; and

(3) 'most significantly, has the effect that the provisions within it are dealing [only] with requirements of development'.[55]

(b) While cl 26 of the Scheme refers in its terms to subdivision, that reference is to the City's role in making recommendations to the respondent under s 142 of the PD Act, rather than to the respondent's decision-making function itself such that, in effect,

[53] Applicants' Submissions on Preliminary Issue dated 3 June 2022 (**Applicants' Submissions**), para 8.
[54] Applicants' Submissions, paras 18 – 19.
[55] Applicants' Submissions, paras 10 – 17.

cl 26 does not diminish the strength of the submission in paragraph (a) above.[56]

(c) Clause 27, which incorporates the SPP 3.6 *Infrastructure Contributions*, which in turn applies to both subdivision and development, 'can [and presumably ought to] be restricted to development (and not subdivision) requirements.[57] The applicant's written submissions do not explain why this is so, and at the oral hearing Mr Flint confirmed that the applicant relies in this regard upon the matters referred to in paragraphs (a) and (b) above – the heading to Part 4 of the scheme and cl 26.

(d) Clause 32 of the Scheme contains Table 7, which sets out requirements 'relating to development that are additional to those set out in the R-Codes'[58] which, the applicant submits, reinforces that Part 4 of the Scheme is concerned with development, not subdivision.

(e) The heading to Part 4 of the Scheme, as well as the terms of cl 25 itself, are both model scheme provisions. Schedule 1 of the *Planning and Development (Local Planning Schemes) Regulations 2015*, which set out the model scheme provisions, includes a note which states that Part 4 sets out general requirements 'which apply to land use and development within the Scheme area …' Several mentions are made to development, but not to subdivision.[59]

134 Secondly, the effect of s 77(2) of the PD Act and cl 25 of LPS6 is that the R-Codes, modified by cl 26, 'are set out in full in LPS6 and [apply] to development requirements', which term does not 'include subdivision'.[60]

135 Thirdly, the current application is 'analogous' to ***Landpark*** and, therefore, no conflict arises between the approval of the application for subdivision (not development) and the terms of the Scheme because 'cl 25(1) does not operate to specify the R-Codes as requirements of subdivision'.[61]

[56] Applicants' Submissions, paras 22 – 25.
[57] Applicants' Submissions, para 26.
[58] Underlining added.
[59] Applicant's Submissions, para 31.
[60] Applicant's Submissions, paras 38 – 39.
[61] Applicant's Submissions, para 44.

Applicant's Secondary Submission

136 The applicant's secondary position proceeds on the assumption that, contrary to its primary case, cl 25 of the Scheme *does* provide for the incorporation of the R-Codes as a whole (i.e. including any subdivision requirements). In such a case, the Applicant submits that, nonetheless, approval of the application would not result in conflict with the R-Codes.[62]

137 That is so because, it is submitted, cl 5.1.1 of the R-Codes does no more than provide 'guidance' for the respondent in considering applications for subdivisional approval.

138 The applicant's written submissions rely entirely, in this regard, upon ***Landpark***. At the oral hearing, and in response to a query from the Tribunal as to the weight, if any, to be given to the location of cl 5.1.1 P1.2 as a Design Principle, Mr Flint for the applicant agreed with the submissions of the respondent to the effect that its location was of no significance and confirmed that para's 47 – 50 of his written submissions were concerned solely with the applicant's reliance on ***Landpark***.

139 The applicant's written submission in this regard acknowledges, but does not address, cl 2.5.3. At the oral hearing Mr Flint advised that the applicant did not 'take the point' that that clause is addressed to the 'decision maker' in contrast to cl 5.1.1 P1.2, which is expressly addressed to the respondent by name.

Respondent's submissions in reply

140 The respondent also filed written Submissions in Reply,[63] much of which was by way of restatement or clarification of things said it its original submissions.

141 It is therefore necessary only to note the final material submission (at paras 4 – 5) to the effect that cl 5.1.1 C1.4ii of the R-Codes has the effect that, where the respondent has:

(a) approved a subdivision that varies the minimum and/or average site area by less than 5% under cl 5.1.1 P1.2; or

[62] Applicant's Submissions, para 46.
[63] Respondent's Submissions in Reply on Preliminary Issue dated 10 June 2022.

(b) approved a subdivision application that varies the minimum and/or average site area by greater than 5% as a result of departing from policy in:

(i) an area where the applicable scheme does not provide that the R-Codes are to be read as part of the scheme; or

(ii) circumstances where one of the exceptions in s 138(3) of the PD Act applies,

development of a dwelling will be deemed to comply with cl 5.1.1 and therefore the decision-maker on the development application will not need to apply discretion via the design principles[64] (and, in the context of single house, no development application will be required if the house is deemed to comply in all aspects).[65]

Disposition

When Incorporated into a Scheme, the R-Codes are Not 'just a policy'

142 Section 77(2) is clear in its terms and in its application. Section 77(1)(b) provides that a scheme may provide that a specified SPP 'is to be read as part of the scheme' and s 77(2)(a) provides that if that occurs, the scheme has effect as if the SPP were *set out in full* in the scheme and s 74(2)(b) provides that the SPP is then to have effect as it were part of the scheme subject to any modifications set out in the scheme.

143 In addition, cl 25(1) of LPS6 is, in our view, plainly a clause of the nature anticipated and authorised by s 77 of the PD Act.

144 As a result, in our view it is clear, and we find, that s 77 of the PD Act and cl 25 of the Scheme combine so that the R-Codes form part of, and are to be read as part of, the Scheme at Part 4 thereof.

145 In our view it is also uncontroversial, and we find, that the words of a local planning scheme, such as LPS6, have 'full force and effect as if enacted by' the PD Act.[66] Accordingly, when incorporated into LPS6 by cl 25, the R-Codes also have full force and effect, as if enacted by the PD Act.

[64] R-Codes, cl 2.5.1, cl 2.5.2 and cl 2.5.4.
[65] R-Codes, cl 2.2.1.
[66] PD Act, s 87(4). ***Costa*** at [25] – [29].

146 For those two reasons we are of the view that the Tribunal was wrong when it said in ***Baker Investments*** that despite being incorporated into a scheme the R-Codes remain 'just that, [a] policy'.[67] Section 77 of the PD Act and cl 25(1) of the Scheme have the effect of converting the R-Codes from 'just a policy' into subsidiary legislation operating with legislative effect as part of LPS6.

147 We also agree with the respondent that the authorities cited by the Tribunal in ***Baker Investments*** (namely ***Bookara***, ***Kakulas*** and ***Dumbleton***) do not support the conclusions there reached. In the context of LPS6, the R-Codes are not just a policy.

148 It follows that we respectfully decline to follow the reasoning in ***Baker Investments*** in this regard.

'Development' does not, in all cases, exclude 'subdivision'

149 In this case the respective position taken by each party was that in Western Australia, 'development' does not include 'subdivision.

150 The leading authority for that proposition is ***Landpark***, which was delivered by Parry SM *ex tempore*, and which included the following statement:

> In contrast to the situation in every other Australian planning jurisdiction (see ***Boulter and City of Subiaco*** [2007] WASAT 71 at [61]), in the Shire of Busselton and in Western Australia generally "development" does not include subdivision. The subdivision of land does not, therefore, involve the use or development of any land for the purposes of cl 6(3) of TPS 20. Consequently, approval of the proposed subdivision does not conflict with the provision.[68]

151 The only authority cited for the finding is ***Boulter***,[69] in which, at the paragraph cited above, Parry SM had said previously:

> Subdivision control in Western Australia is regulated by Div 2, Div 3 and Div 4 of Pt 10 of the PD Act, whereas development control is regulated by Div 5 of the PD Act and local and region planning schemes. This split planning system is unique to Western Australia among Australian planning systems. In the other States and the Northern Territory, "development" relevantly includes subdivision of land so that development approval is required for subdivision and there is a single system of development/subdivision control and assessment which is generally administered by local governments …

[67] ***Baker Investments*** at [127].
[68] ***Landpark*** at [23].
[69] ***Boulter and City of Subiaco*** [2007] WASAT 71; (2007) 52 SR (WA) 84 (***Boulter***).

152 It is correct to say that the PD Act creates a separate regime for subdivision under Divisions 2, 3 and 4 of Pt 10 of the PD Act, while development control is addressed under Div 5 of Part 10. That 'split planning system' is also reflected in the terms of, for example, s 164A of the PD Act which provides for, in some circumstances, the 'integration' of subdivision and development. The inclusion of s 164A in the PD Act emphasises the fact that, but for that section the two processes would, otherwise, be separate.

153 It is also the case that in ***UWA v Subiaco***,[70] Burt CJ said that the statutory definition of development in the predecessor to the PD Act encompassed both 'use' and 'development' with the latter concept comprising activities which result in some 'physical alteration to the land which has some degree of permanence'.[71]

154 Plainly, the re-arrangement of title boundaries and the creation of new certificates of titles does not constitute activities which result in some physical alteration to the land. But, equally plainly, the works carried out in satisfaction of the conditions of subdivisional conditions may do so, which is a matter acknowledged by s 157.

155 In addition, while the statutory definition of 'development' does not expressly include subdivision, as it does in, for example, s 3 of the *Planning & Environment Act 1989* (Vic), the definition in the PD Act is inclusive and, therefore, consistent with s 157(1), works carried out pursuant to subdivisional conditions are not excluded from the statutory definition of 'development'.

156 It is also self-evident, as was recognised in ***Landpark***, that there is 'in practice, an inextricable link' between subdivision and development standards such that the respondent will not ordinarily grant subdivisional approval for lots that will be unsuitable for development approval.[72] In ***Bormolini***,[73] Parry SM described the connection between subdivision and development of land as 'close and fundamental'.

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[70] ***University of Western Australia v City of Subiaco*** ; [1980] WASC 28; (1980) 52 LGRA 360.
[71] See, more recently, ***Shire of Murray v IVO Nominees Pty Ltd*** [2020] WASCA 45; (2020) 243 LGERA 89 at [39] – [41].
[72] ***Landpark*** at [28].
[73] ***Bormolini and Western Australian Planning Commission*** [2014] WASAT 121; (2014) 86 SR (WA) 159 at [31].

157 In our view the foregoing provides a proper basis to find that the term 'development', when used in a planning instrument may, in some circumstances, encompass subdivision.

158 Put another way, we are of the view that the term 'development' ought not to be understood as excluding the concept of subdivision, and each and every aspect of it, each and every time it is used within the planning framework.

159 So much appears to have been accepted by Parry SM in ***WA Developments***.[74] In that case, despite stating that 'development' does ***not*** include subdivision, he said that the principle of 'sustainable use and development' – which is expressed in s 3(1)(c) of the PD Act as a purpose of that Act – applies to the process of subdivision such that it was a matter for consideration by the respondent and, on review by the Tribunal, when exercising powers of subdivision.

160 Section 3(1)(c) of the PD Act says that it is a purpose of the PD Act to 'promote the sustainable use and development of land in the State'.[75] It was the phrase 'use and development' which in ***Landpark*** Parry SM held did ***not*** encompass subdivision. But in ***WA Developments***, despite citing ***Landpark***, Parry SM held that the purpose applied to the process of determining applications for subdivision.[76]

161 Despite the position taken by the respondent (as noted above at para 149) that ***Landpark*** is authority for the proposition that 'development does not include subdivision', the respondent emphasised in its submissions the inextricable link between subdivision and development. And at the oral hearing Mr Repper, who appeared for the respondent, asked rhetorically: 'what is the purpose of subdivision if not to regulate and facilitate development of land?'

162 We agree. And while the PD Act establishes and implements a bifurcated system for the approval of subdivision and development, in our view that does not have the result that each and every use of the term 'development' in that Act, in planning schemes or other planning instruments is intended to exclude subdivision.

163 Rather, it seems to us that in some cases the term development is intended to operate more broadly. In particular, the phrase 'use and

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[74] ***WA Developments Pty Ltd and Western Australian Planning Commission*** [2008] WASAT 260 (***WA Developments***) at [37].
[75] Underlining added.
[76] ***WA Developments*** at [37] – [45].

development [of land]' may well be intended to comprehensively encompass all aspects of the matters addressed by the PD Act, planning schemes and other planning instruments, including subdivision.

Part 4 of the Scheme does not exclude 'subdivision'.

164 As noted above, the applicant's submissions include that the heading to Part 4 of the Scheme – 'General development requirements' – was concerned only with development and, therefore, excluded subdivision. Similar submissions were made to the effect that cl 25 – cl 27 of the Scheme also do not provide for subdivision. The effect of those submissions, if they were to be accepted, would be to exclude such parts (if any) of the R-Codes that concern subdivision from incorporation into the Scheme.

165 We accept that the heading to Part 4 forms part of the Scheme.[77] We also accept that, as the heading, it provides a 'focus'[78] and 'context'[79] for the proper construction of Part 4 by, for example, assisting in identifying the relevant statutory purpose.[80]

166 Nonetheless, in our view, the clear meaning of cl 25(1) is that the R-Codes as a whole are to be read as part of the Scheme. That is, after all, what cl 25(1) says.

167 Putting to one side the foregoing discussion about the distinction between development and subdivision, it would, in our view, be an unusual result if the clear, and clearly broad, terms of a provision were read down by reference to the heading of the part of the Scheme to which the clause belongs. None of the authorities relied upon by the applicant go so far.[81]

168 Secondly, to accept the applicants' submission, and to limit the application of the R-Codes, would be to apply cl 25(1) of LPS6 in a manner that is inconsistent with the clear words of s 77(2)(a), which require that the Scheme is to be read as if the R-Codes are 'set out in full in the [S]cheme'. If there are provisions of the R-Codes which address the topic of subdivision, then s 77(2)(a) requires them to form part of the Scheme.

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[77] *Interpretation Act 1984* (WA), s 32(1).
[78] ***Fernandez v State of New South Wales*** [2019] NSWSC 1736 at [141].
[79] ***Hunter Quarries Pty Ltd v Alexandra Mexon as Administrator for the Estate of the Late Ryan Messenger*** [2018] NSWCA 178; (2018) 98 NSWLR 526 at [72].
[80] ***Singh bhnf Ambu Kanwar v Lynch*** [2020] NSWCA 152; (2020) 103 NSWLR 568 (***Singh***) at [31].
[81] ***Singh*** at [31].

169 Thirdly, consistent with the reasons enunciated in the previous subsection, we are of the view that the words of the heading to Part 4, 'General development requirements', may comfortably include within their scope provisions which deal with the subdivision of land and the resulting site requirements of lots that are to accommodate development; i.e. such matters ought to be accepted as falling within the scope of 'general development requirements'.

170 It follows that we do not accept the applicants' submissions that the heading to Pt 4 of the Scheme has the effect of only applying to such parts of the R-Codes that relate to development in its narrow sense, i.e. development that does not include subdivision. The R-Codes are set out in full in the Scheme. If the R-Codes include some provisions directed at subdivision, then they are not excluded by the heading to Part 4 of the Scheme.

171 The applicant also made submissions concerning cl 26, cl 27 and cl 32 to the Scheme.

172 We accept the applicant's submission that the reference in cl 26 to subdivision is limited to the local government's role in making recommendations to the respondent about an application for subdivision, and does not specify a requirement as to subdivision that is directed to the respondent as decision maker.

173 In our view, however, that distinction does not support the contention that Part 4 of the Scheme is not concerned with subdivision. Plainly, on its face, cl 26 *is* concerned with subdivision, even if its scope is somewhat narrow.

174 Equally, the fact that cl 27 incorporates SPP 3.6 – *Infrastructure Contributions*, the subject matter of which addresses subdivision, supports the conclusion that Part 4 of the Scheme is not limited as to its subject matter as the applicant submits.

175 Finally, we are of the view that cl 32 of the Scheme, the heading of which is 'Additional site and development requirements'[82] and which deals with matters that do not include subdivision, ought to be seen in the same way as the heading to Part 4, which is addressed above.

176 For those reasons, we are of the view that the clause might properly include within its scope provisions regarding subdivision

[82] Underlining added.

without that fact appearing at odds with the relevant context provided by the heading to the relevant Part and the surrounding clauses.

177 For these reasons we are of the view that there is nothing in Part 4 of the Scheme that requires any part of the R-Codes that concerns subdivision to be excluded or otherwise carved out from the incorporation of the R-Codes into the Scheme.

Properly Construed, the R-Codes Do Not Limit the Respondent's Power to Vary Lot Size to No More than 5% of the Table 1 Values

178 For the preceding reasons, we are of the view that the R-Codes, in their entirety, form part of the Scheme and must be given their full force and effect, as if they were enacted by the PD Act.

179 That means that cl 5.1.1 P1.2, which on its terms limits the respondent's discretion to vary the minimum or average lot size to no more than 5%, must be given its full force and effect.

180 On the respondent's case, the result is that there is an absolute limit on the power of the respondent, and the Tribunal on review, to approve the subdivision of lots; that is, there is no power to approve lots that are smaller than the minimum and average lots sizes set out in Table 1 by more than 5%.

181 When cl 5.1.1 P1.2 is read in isolation the respondent's submissions have considerable strength.

182 We agree with the respondent's submissions that cl 5.1.1 P1.2 is unambiguously directed to the exercise by the respondent of its powers to determine subdivisional applications.

183 We also agree with the respondent that cl 5.1.1 P1.2 is expressed in clear and unambiguous language; it very clearly states that the respondent's power to vary the minimum and average lot sizes must not be exercised in a manner that exceeds the sizes set out in Table 1 by more than 5%.[83]

184 However, it cannot be ignored that there are at least three matters of context and legislative purpose which militate against the respondent's submission that we should find that the application is inconsistent with the terms of the scheme.

[83] The lack of clarity discussed in footnote 16 above does not concern the issue in question here.

185 As noted above, it is well established that the meaning of a provision in a planning scheme 'must emerge from the statutory text, understood in its context, but also having regard to the statutory purpose being pursued'.[84]

186 The first matter of context and purpose is that the R-Codes are, clearly, directed to the question of development approvals under local planning schemes, rather than subdivisional approval under Divs 2 – 4 of Part 10 of the PD Act. So much is acknowledged by the respondent in its submissions.[85]

187 That is, while we have set out above our view that the term 'development' ought not to be seen as necessarily excluding 'subdivision' each and every time it is used, it is clear that where cl 1.2 of the R-Codes speaks of the R-Codes providing a 'comprehensive basis for the control of residential development', it is speaking of development in its narrow sense; i.e. excluding subdivision.

188 That is particularly evident from Parts 2 and 3 of the R-Codes. So, for example, cl 2.1.2 is concerned with circumstances where 'development approval is required under a scheme', and cl 2.1.1 sets out as a flow diagram the process for obtaining, or avoiding the need for, a development approval.

189 The second matter of context and purpose is that cl 2.1, cl 2.2, cl 2.4 and cl 2.5.4 all make clear that the 'design principles' contained within Part 5 of the R-Codes only apply where the DTC provisions are not met/ satisfied. If the DTC provisions are satisfied, then the Design Principles are not engaged at all.

190 The third matter of context and purpose is that the DTC provisions of cl 5.1.1 are directed to applications for development approval under a scheme, rather than applications for subdivisional approval under Divisions 2 – 5 of Part 10 of the PD Act.

191 The terms of C1.4ii strongly support such a construction. That clause provides:

> C1.1 **Development** which complies with the **dwelling** type and **site area** requirements set out in **Table 1** and the following provisions.

[84] ***Newco Mills*** at [31].
[85] Respondent's Submissions, para 80.

…

C1.4 Subject to clause 5.1.1 C1.3 only, the following variations to the minimum and average **site area** set out in **Table 1** may be made:

…

ii. in the case of a **single house, grouped dwelling** or **multiple dwelling;** the area of a **lot**, **survey strata lot** or **strata lot** approved by the **WAPC**.

192 In our view the clause, properly construed, provides that development may occur on a lot which is less than the minimum and average site areas set out in Table 1 if, and only if, the lot in question has previously been approved by the WAPC.

193 That sub-clause implicitly recognises that the respondent can approve lots that are smaller than the minimum and average lot sizes in Table 1.[86] But the clause does not provide the basis for that power, it merely allows development (in the narrow sense) to occur in relation to such lots following subdivisional approval.

194 So much follows from the fact that the sub-clause forms part of the DTC provisions; if the DTC provisions are satisfied, there is no decision-making power at all if the application is for a single house and decision-making discretion does not arise in relation to this element in all other cases.

195 At this point it is necessary for cl 2.5.3 to be considered. It also provides context for the true effect of P1.2 of cl 5.1.1 and on its face, it might be said to provide support for the respondent's case. It provides:

> The **decision-maker** shall not vary the minimum or average **site area** per **dwelling** requirements set out in **Table 1** (except as provided in the R-Codes Volume 1 or the scheme).

196 Three things can be said about cl 2.5.3:

197 First, it forms part of cl 2.5, which is headed 'Exercise of judgement' and which follows cl 2.4, which in turn explains that a decision maker is to exercise its judgement: (1) when (and only when) a proposal does not meet one or more DTC provisions; and (2) only in relation to those elements of the proposal which don't meet the DTC

[86] The respondent's submission, contained in its Reply Submissions and summarised at para 141 above, are to that effect.

provisions. Read in context the scope of cl 2.5 is therefore limited accordingly.

198 Secondly, cl 2.5.3 is directed to the 'decision-maker' which is in contrast with P1.2 of cl 5.1.1 which names the respondent ('WAPC') as the object of the clause.

199 We accept that the definition of 'decision-maker' in Appendix 1 of the R-Codes is expressed so broadly that it is possible to read the respondent as included within it, but if that was the intention the (apparently deliberate) use of the term 'WAPC' in cl 5.1.1 (both in P1.2 and P1.3 as well as C1.4ii) would be unnecessary.

200 The drafting history of the R-Codes supports this view. The 2002 version of the R-Codes, at cl 2.3.4(3), contains a version of the current cl 2.5.3 which is for all intents and purposes identical to the current clause save that the earlier version refers to a 'Council' rather than to the 'decision-maker'. The later wording was incorporated in 2013, after the creation of DAPs in 2011. Mr Repper also submitted at the oral hearing that the wording change was intended to capture redevelopment authorities, which we accept.

201 In our view, however, the drafting change was not intended to capture the respondent. In our view the contrast between 'decision maker' in cl 2.5.3 and 'WAPC' in cl 5.1.1 is significant and strongly suggests that cl 2.5.3 is directed to the body charged with determining an application for development approval, rather than the respondent exercising its powers to determine applications for subdivision.

202 In our view, cl 2.5.3 acknowledges the possibility that, despite non-compliance with the DTC provisions of cl 5.1.1, approval might be granted for development on a smaller lot than allowed for by Table 1 through the exercise of discretion. So much seems to follow given its role as an exception to what is set out in cl 2.5.1.

203 Thirdly, and for the same reason as immediately above, the words in parentheses in cl 2.5.3 (i.e. 'except as provided in the R-Codes Volume 1 or the scheme') appear to be a reference to the DTC provisions cl 5.1.1 C1.3 and C1.4, rather than the design principle cl 5.1.1 P1.2.

204 That is, in our view, cl 2.5.3 appears to allow an application for development approval under a scheme to be approved by a decision-maker despite being on a lot that is smaller than the Table 1

requirements but only if the calculation includes adjustments under cl 5.1.1 C1.3 and/ or if an exception in cl 5.1.1 C1.4 is satisfied.

205 That is so, in our view, because of both the status of cl 2.5.3 as an exception to cl 2.5.1 (which follows on, both logically and contextually, from cl 2.4) as well as the use of the term 'decision-maker' rather than WAPC.

206 To that extent, cl 2.5.3 appears to simply reiterate, and play the same role as the *Note* to the DTC provisions of cl 5.1.1, which provides that the 'minimum and average site areas stipulated in Table 1 are not subject to variation except as set out in clause 5.1.1 below'. In our view some significance flows from the fact that the design principles (P1.1 to P1.3) are not 'below' that *Note* but the DTC provisions are.

207 The above matters of context and purpose are such that, in our view, cl 5.1.1 P1.2 plays no real, active role within the R-Codes. To be clear, that is because:

(a) The R-Codes as a whole are concerned not with applications for subdivision but for development approval;

(b) Applications for development approval are assessed by first having regard to the DTC provisions and only if the DTC provisions are not met are the design principles relevant;

(c) The DTC provisions for site area are concerned with development applications where the subdivisional process has already been completed and the resulting lot size is already known; and

(d) Cl 2.5.3, properly construed, is concerned with the power to approve development applications and is not concerned with the respondent's subdivisional decision-making power.

208 In such circumstances, cl 5.1.1 P1.2 appears to have no active or operational work to do under the R-Codes.

209 We have not placed any weight on the *Explanatory Guidelines* in construing cl 5.1.1 P1.2. That is for two reasons. First, as Guidelines, they merely represent the subjective view of the respondent. They cannot assist in the proper construction of the text's objective meaning.

210 But in any event, the terms of the *Explanatory Guidelines* are inherently inconsistent. As noted above, the *Explanatory Guidelines* contain two statements which state, in effect, that the R-Codes provide no more than guidance for the Respondent in the exercise of its subdivisional powers[87] but elsewhere they refer to cl 5.1.1 P1.2 in terms that suggest the 5% limit on the respondent's discretion is absolute.[88]

211 Before concluding our reasons in this regard it is necessary to consider the principle that planning schemes must be construed 'broadly rather than pedantically, and with a sensible practical approach'.[89]

212 It might be said that allowing matters of context to 'prevail' over the clear words of the text is contrary to that principle.

213 Of course, that principle was never intended to operate in isolation. As the Court of Appeal said in ***Australian Unity***, although schemes must be construed broadly, sensibly and not pedantically:

> … the exercise remains one of identifying the objective meaning from a consideration of the legislative text, understood as a whole and in the context in which and purpose for which it was enacted.[90]

214 Indeed, the point being made by the Court of Appeal in ***Australian Unity*** was that, perhaps more so than many other types of legislation:

> [t]he terms of planning schemes are regularly referred to, often without the assistance of professional legal advice, by planners, government officials, landowners and prospective landowners to identify the permissible uses of land to which the scheme applies. Placing a counter-intuitive judicial gloss on the plain language of a planning scheme reduces the capacity of those persons to comprehend its meaning.[91]

215 We are confident that our construction of cl 5.1.1 P1.2 is consistent with the approach required by the above principles. While the terms of the clause are clear and unambiguous, they are located with the R-Codes in a place that gives them no practical effect.

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[87] See the underlined passages at paras [88] and [91] above.
[88] See the passage at para 90 above.
[89] ***Re Shire of Mundaring; ex parte Solomon & Ors*** [2007] WASCA 132 at [25] (Steytler P, McLure JA, Pullin JA). Also, ***Newco Mills*** at [32] quoted above at para 60.
[90] ***Australian Unity*** at [84].
[91] ***Australian Unity*** at [82].

216 We are satisfied that the construction we have given cl 5.1.1 P2.1 is not 'counter-intuitive' or overly technical. The common users of the R-Codes – the planners and government officials – understand that the R-Codes are concerned with applications for development approval and understand the role played by the DTC's and the Design Principles in the assessment of such applications.

217 We are also comforted in this regard that a version of cl 5.1.1 P1.2 has been in the R-Codes since at least 2002 and that since ***Landpark*** the R-Codes have been viewed as providing mere guidance to the respondent in the exercise of its subdivisional powers. Our decision, therefore, represents no material change in that regard.

To Approve The Proposed Subdivision Would Not 'Conflict' with the Scheme

218 The next issue is whether the grant of subdivisional approval would be one 'that conflicts with the provisions of a local planning scheme' contrary to s 138(2).

219 In ***Kelliher***, Pritchard J (as her Honour then was) construed 'conflict' in s 138(2) as meaning 'inconsistent with'. That is, the sub-section requires that the respondent 'is not to give approval to a subdivision that is inconsistent with the provisions of a town planning scheme'.[92] Somewhat surprisingly, that appears to be the only attempt to give meaning to the phrase by either this Tribunal or the Court.

220 The ordinary meaning of 'conflict' is the clash of opposing or incompatible principles.[93]

221 A review of previous decisions of this Tribunal supports the conclusion that for a finding to be reached that a proposed subdivision will 'conflict' with scheme provisions it must be shown that the conflict must be more than a clash of objectives or principle. Rather, the proposed subdivision must be inconsistent with operative scheme provisions that are framed in final or absolute terms.

222 So, for example:

(a) In ***Cheema***,[94] the scheme prohibited further subdivision of the particular land;

[92] ***Kelliher v Commissioner for Main Roads [No 2]*** [2015] WASC 478 at [249].
[93] *New Shorter Oxford Dictionary; Macquarie Dictionary.*
[94] ***Cheema and Western Australian Planning Commission*** [2014] WASAT 104.

(b) In ***Hill***[95] and ***Diggins***,[96] the scheme prohibited subdivision unless it was consistent with a plan which, in the facts of those cases, did not exist (***Hill***) or which prohibited further subdivision (***Diggins***);

(c) In ***Lee***,[97] the scheme prohibited subdivision in the absence of sewer, which was not available; and

(d) In ***Boynton***,[98] the scheme's zoning prohibited group dwellings which would have been the necessary result of the proposed subdivision.

223 By contrast, the approach taken in this State since ***Landpark*** has been that the R-Codes allow for variation from the prescribed lot sizes and, therefore, a subdivision which departs from the prescribed lot sizes is not 'inconsistent' with a local planning scheme that incorporates the R-Codes.

224 That approach has been taken despite the Tribunal finding in ***Boulter*** that 'the subdivision approval predetermines, to a considerable degree, the likely form of development of the site and creates a reasonable expectation for the approval … of the nature proposed'.[99] In ***Goyder***,[100] Chaney P described that passage as a 'statement of planning logic' and went on to say:

> Subdivision of land involves a process of close assessment by, and consultation with, relevant authorities. Approval to subdivide land is given under s 135 of the PD Act by the Commission. Section 138(2) of the PD Act requires the Commission to have due regard to any local planning scheme that applies to the land, and not to give an approval that conflicts with a scheme. A grant of subdivision is made in contemplation that the subdivided land will be used for a purpose consistent with the local planning scheme. If a lot of land falls within a particular zone under a local planning scheme, then there is a reasonable expectation that the land is capable of development in accordance with the planning controls applicable to the particular zone …[101]

225 Such an approach appears to us, with respect, to properly reflect the distinction made explicit in s 138(2) between having regard to the

[95] ***Hill and Western Australian Planning Commission*** [2013] WASAT 195.
[96] ***Western Australian Planning Commission and Diggins*** [2008] WASAT 9.
[97] ***Lee and Western Australian Planning Commission*** [2008] WASAT 100.
[98] ***Boynton and Western Australian Planning Commission*** [2018] WASAT 60.
[99] ***Boulter*** at [64].
[100] ***Goyder and Walsh*** [2009] WASAT 108; (2009) 64 SR (WA) 251 (***Goyder***).
[101] ***Goyder*** at [39].

scheme provisions and being bound to refuse something which is inconsistent with the scheme.

226 Read as a whole and in context, the R-Codes make very plain the preference for new lots created by subdivision to be not less than certain, stated, sizes. As a matter of orderly and proper planning, to give 'due regard' to them (as is required by s 138(2) of the PD Act) requires that, in the absence of sound planning policy or another cogent reason, subdivisional approval ought not to be granted which would create lots smaller than the stated sizes.

227 In our view, for the reasons set out above, the incorporation of the R-Codes into the Scheme does not alter that result.

228 Accordingly, to grant subdivisional approval which will allow lots to be created that vary by more than 5% from the Table 1 minimum and average lot sizes will not be a decision that is in conflict (is inconsistent) with the R-Codes, and therefore, the Scheme.

Conclusion

229 In our view, the R-Codes do not impose an absolute limit of 5% on the power of the respondent to vary the minimum and average lot sizes from those in Table 1.

230 For the reasons set out above, that conclusion is not altered by the fact that the R-Codes as a whole is incorporated into the Scheme.

231 The result, therefore, is that there is no 'conflict' between the Scheme, which incorporates the R-Codes, and a decision to grant subdivisional approval for the creation of lots that are more than 5% smaller than the average and minimum sizes set out in Table 1.

232 Accordingly, the question posed – whether approval of the application for subdivision would conflict with the provisions of the … [Scheme] for the purpose of s 138(2) – must be answered in the negative.

233 We will hear from the parties as to the form of orders necessary to progress the matter having regard to these reasons.

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

RM
Associate to Deputy President Judge Jackson

13 MARCH 2023

JURISDICTION	:	STATE ADMINISTRATIVE TRIBUNAL
ACT	:	PLANNING AND DEVELOPMENT ACT 2005 (WA)
CITATION	:	TAYLOR and WESTERN AUSTRALIAN PLANNING COMMISSION [2023] WASAT 16 (S)
MEMBER	:	MR R POVEY, MEMBER
HEARD	:	8 AUGUST 2023
DELIVERED	:	26 OCTOBER 2023
FILE NO/S	:	DR 174 of 2021
BETWEEN	:	IAN HARRY TAYLOR Applicant JULIE TAYLOR Second Applicant AND WESTERN AUSTRALIAN PLANNING COMMISSION Respondent

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Catchwords:

Town planning - Application for subdivision - Two-lot subdivision - Survey strata subdivision - Land coded R15 - R-Codes minimum and average site area requirements - Whether appropriate to depart from policy - Orderly and proper planning - Planning precedent - Whether proposed subdivision is unobjectionable - 'Rounding Off' subdivision and settlement pattern

Legislation:

City of Melville Local Planning Scheme No. 6, cl 9(2), cl 16(2)
City of Melville Local Planning Strategy, cl 3.3.4
Metropolitan Region Scheme
Planning and Development (Local Planning Schemes) Regulations 2015 (WA), reg 65
Planning and Development Act 2005 (WA), s 3(1), s 135, s 135(1), s 138(3), s 241(1)(a), s 251(1)
Planning and Development Regulations 2009 (WA), reg 21
State Administrative Tribunal Act 2004 (WA), s 27(2)
State Planning Policy 7.3 Residential Design Codes Volume 1, cl 5.1(a), cl 5.1.1, cl 5.3.2
Strata Titles Act 1985 (WA)

Result:

Application for review allowed
Subdivison approval granted subject to conditions

Category: B

Representation:

Counsel:

Applicant	:	Mr S Allerding (acting as Agent)
Second Applicant	:	Mr S Allerding (acting as Agent)
Respondent	:	Mr J Algeri (acting as Agent)

Solicitors:

Applicant	:	Allerding & Associates (as Agents)
Second Applicant	:	Allerding & Associates (as Agents)
Respondent	:	Altus Planning (as Agents)

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

Clive Elliot Jennings and Co Pty Ltd v Western Australian Planning Commission (2002) 122 LGERA 433
De Abreu and Western Australian Planning Commission [2019] WASAT 57

Goldin v Minister for Transport Administering the Ports Corporatisation and Waterways Management Act 1995 (2002) 121 LGERA 101
Landpark Holdings Pty Ltd and Western Australian Planning Commission [2007] WASAT 130
Marshall v Metropolitan Redevelopment Authority [2015] WASC 226
Martin v Western Australian Planning Commission [2018] WASC 42
Nicholls and Western Australian Planning Commission [2005] WASAT 40
Ridgecity Holdings Pty Ltd and City of Albany [2006] WASAT 187
Taylor and Western Australian Planning Commission [2023] WASAT 16

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

234 This decision deals with an application for subdivision of land at No 46 (Lot 518) Ardross Street, Applecross (**Land**). Mr Ian Taylor and Mrs Julie Taylor (**applicants**) seek approval to subdivide the Land into two lots by way of a survey strata scheme (**proposed subdivision**). On 5 August 2021, the Western Australian Planning Commission (**WAPC, Commission or respondent**) refused the proposed subdivision of the Land, and it is this decision that is the subject of this Application for Review brought under s 251(1) of the *Planning and Development Act 2005* (WA) (**PD Act**).

235 On 25 February 2022, a preliminary issue was identified and an oral hearing on this issue occurred on 12 December 2022. The preliminary issue was determined by the Tribunal[102] on 13 March 2023 in ***Taylor and Western Australian Planning Commission*** [2023] WASAT 16 (***Taylor***).[103] In summary, the answer to the preliminary issue in ***Taylor*** requires the proposed subdivision now be determined by the Tribunal on its merits.

236 In these reasons, I will firstly describe the conduct of the proceedings, then set out the planning framework, including the power to approve subdivision. Next, I will describe the Land, the proposed subdivision and the locality. Finally, I will consider and determine the one issue (with four parts) arising in this proceeding.

237 For the reasons given below, I have determined the 'correct and preferrable decision at the time of the decision upon the review', under s 27(2) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**) in the exercise of planning discretion, is to approve the proposed subdivision, subject to conditions.

Conduct of the proceedings

238 This matter has a long history, summarised below.

239 On 5 May 2021, the respondent received an application for subdivision of the Land.

[102] DP Jackson and SM Willey.
[103] See [9] - [10].

240 On 5 August 2021, the respondent refused the application for the following reasons:[104]

1. The proposed subdivision does not comply with the objectives or provisions of the Western Australian Planning Commission's *State Planning Policy 3.1 - Residential Design Codes and Development Control Policy 2.2 - Residential Subdivision*, or the *City of Melville Local Planning Scheme No. 6*, because:

   a) the proposed lots do not meet the minimum or average site area requirements for the R15 density code; and

   b) the width of the proposed common property access leg is insufficient.

2. The proposed subdivision is inconsistent with the Western Australian Planning Commission's *Development Control Policy 1.1 - Subdivision of Land - General Principles and Development Control Policy 2.2 - Residential subdivision,* because it would result in form of development that:

   a) would prejudice the objectives of the local planning framework;

   b) does not respond to the current planning context; and

   c) will not be consistent with the long-term character intended for the area.

3. Approval of the proposed subdivision would set an undesirable precedent for the subdivision of other lots of a similar size and configuration in this locality, would undermine the objectives and provisions of the *City of Melville Local Planning Scheme No.6* and facilitate development out of keeping with the local context and desired future character of the area.

241 On 19 August 2021, the applicants lodged an Application for Review with the Tribunal. Following mediation at the Tribunal, which resulted in the applicants being granted leave to amend the plan of subdivision (now the subject of this review), and the filing of a Statement of Issues, Facts and Contentions (**SIFC**) by each party and an agreed s 24 Bundle of Documents, on 25 February 2023, a preliminary issue was identified and orders made for written submissions (and submissions in reply) on the preliminary issue.

242 The preliminary issue was:[105]

[104] Amended Agreed s 24 Bundle of Documents, page 5, Exhibit 4.

> Whether approval of the application for subdivision would conflict with the provisions of the City of Melville's Local Planning Scheme No 6 for the purposes of s 138(2) of the Planning and Development Act 2005 (WA).

243 Following written submissions, an oral hearing on the preliminary issue was held on 12 December 2022. As mentioned, on 13 March 2023, the Tribunal delivered its reasons in ***Taylor***, answering the preliminary question in the negative. As a result, orders were made by the Tribunal on 24 March 2023 programming this matter for final hearing (**hearing**) to enable the Tribunal to consider and determine the merits of the proposed subdivision.[106]

244 Prior to hearing the preliminary issue, the parties filed an 'Applicant and Respondent's Agreed Statement of Issues and Facts' (**ASIF**)[107] which the parties continue to rely on. On 27 April 2023, the respondent filed its contentions,[108] followed by the applicants, on 19 May 2023.[109]

245 The hearing was conducted on 8 August 2023. At the hearing, I heard evidence from two town planning experts, Mr Arran Sutherland, a town planner employed with the Department of Planning, Lands and Heritage, called on behalf of the respondent and Mr Stephen Allerding,[110] a town planner and director of Allerding and Associates, called on behalf of the applicants. Mr Sutherland and Mr Allerding also filed witness statements with the Tribunal which they adopted as their evidence-in-chief and were cross-examined.

246 At the commencement of the hearing, together with the representatives of the parties, the town planning experts and one of the applicants, I conducted a view of the Land and its surrounds.

Planning Framework

247 The relevant planning framework which I have considered in determining the application includes:

(a) PD Act;

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[105] Tribunal's order 1 dated 25 February 2022.
[106] The preliminary issue in ***Taylor*** does not specifically address s 138(3) of the PD Act which identifies six exceptions to the rule in s 138(2) of the PD Act - see footnote 4 of ***Taylor***. Ultimately because of ***Taylor***, it is not necessary to do so, and this is addressed at [15] - [19].
[107] ASIF, Exhibit 2.
[108] Respondent's Contentions, Exhibit 3.
[109] Applicant's Contentions Document, Exhibit 7.
[110] Mr Allerding acted as advocate and town planning expert witness for the applicant at the hearing.

(b) *Strata Titles Act 1985* (WA) (**ST Act**);

(c) *Planning and Development Regulations 2009* (WA) (**PD Regulations**);

(d) *Planning and Development (Local Planning Schemes) Regulations 2015* (WA) (**LPS Regulations**);

(e) *Metropolitan Region Scheme* (**MRS**);

(f) *City of Melville Local Planning Scheme No 6* (**LPS 6**);

(g) *State Planning Policy 1 State Planning Framework* (**SPP 1**);

(h) *Statement of Planning Policy 3 Urban Growth and Settlement* (**SPP 3**);

(i) *State Planning Policy 4.2 Activity Centres for Perth* (**SPP 4.2**);[111]

(j) *State Planning Policy 7.3 Residential Design Codes Volume 1* (**R-Codes**);[112]

(k) *Development Control Policy 2.2 – Residential Subdivision* (**DC 2.2**);

(l) *Operational Policy 1.1 – Subdivision of land – general principles* (**OP 1.1**);

(m) *Liveable Neighbourhoods 2009* (**LN 2009**);

(n) *Draft Liveable Neighbourhoods 2015* (**DLN 2015**);

(o) *Central Sub-regional Planning Framework* (**CSRPF**);

(p) *City of Melville Local Planning Strategy* (**LP Strategy**); and

(q) *City of Melville Local Housing Strategy* (**LH strategy**).

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[111] SPP 4.2 is the version in force from July 2023. Although, Mr Allerding's witness statement was prepared and filed with the Tribunal before the current version was published and in force, at the time of the hearing Mr Allerding was aware of the July 2023 version and his oral evidence at the hearing was given on the basis of this version.

[112] Although the parties were aware of an amended version of the R-Codes was come into operation on 1 September 2023, (and referred to it at the hearing) on the day after the hearing (9 August 2023) the State Government announced deferral of the gazettal of the amended R-Codes. Nothing turns on this in this case because the version of the R-Codes applicable at the time of the hearing continues to apply at the time of making this decision and the provisions of the amended R-Codes relevant to this case are in substance the same as the current R-Codes.

The power to approve subdivision[113]

248 Before turning to the issue for determination, it is necessary to briefly set out the sections of the PD Act (and associated PD Regulations) relevant to subdivision in this case, taking into account the Tribunal's decision in ***Taylor***.

249 The power to approve subdivision is contained in s 135(1) of the PD Act:

> (1) A person is not to —
>
> (a) subdivide any lot; or
>
> (b) amalgamate any lot with any other lot, whether within the same district or otherwise; or
>
> (c) lay out, grant or convey a road,
>
> without the approval of the Commission.

250 Section 138(3) of the PD Act provides:

> The Commission may give an approval under section 135 or 136 that conflicts with the provisions of a local planning scheme if —
>
> (a) the local planning scheme was not first published, or a consolidation of the local planning scheme has not been published, in the preceding 5 years and the approval is consistent with a State planning policy that deals with substantially the same matter; or
>
> (b) the approval is consistent with a region planning scheme that deals with substantially the same matter; or
>
> (c) in the opinion of the Commission —
>
> (i) the conflict is of a minor nature; or
>
> (ii) the approval is consistent with the general intent of the local planning scheme;
>
> or
>
> (d) the local planning scheme includes provisions permitting a variation of the local planning scheme that would remove the conflict; or

[113] The proposed subdivision is a survey strata subdivision. The operation of the ST Act in this case was addressed in ***Taylor*** at [38] - [39]. Further, the parties agree, and I accept, the form of subdivision (being a survey strata subdivision) is not a factor relevant to the merits in this case, ts 22 - 23, 8 August 2023.

(e) in the case of an application under section 135, the local government responsible for the enforcement of the observance of the scheme has been given the plan of subdivision, or a copy, under section 142 and has not made any objection under that section; or

(f) the approval is given in circumstances set out in the regulations.

251 However, in ***Taylor*** at [228], the Tribunal held that:

> Accordingly, to grant subdivisional approval which will allow lots to be created that vary by more than 5% from the Table 1 minimum and average lot sizes will not be a decision that is in conflict (is inconsistent) with the R-Codes, and therefore, the Scheme.

252 As result, it is not necessary for me to consider if any of the exceptions in (a) to (f) of s 138(3) of the PD Act apply in this case. Accordingly, the proposed subdivision is to be determined on its merits.

253 His Honour Chaney J observes in ***Martin v Western Australian Planning Commission*** [2018] WASC 42 at [33] (***Martin***) the discretion that arises under s 135 of the PD Act 'is unfettered save that it must be exercised having regard to the scope and purpose of the PD Act'.

254 For completeness, the overarching scope of the PD Act is '[a]n Act to provide for a system of land use planning and development in the State and for related purposes'.[114]

255 The applicants say, and I accept, the purpose of the PD Act set out in s 3(1), relevant in this case, is:[115]

…

(c) promote the sustainable use and development of land in the State.

256 Further, in ***Martin***[116] Chaney J identifies reg 21 of the PD Regulations being the matters to be considered on an application for subdivision. The regulation provides:

Matters to be considered on application for subdivision

[114] PD Act, page 1.
[115] ts 25, 8 August 2023.
[116] Also at [33].

> When considering a section 135 application, the Commission must have regard to all relevant matters including but not limited to these -
>
> (a) the size, shape and dimensions of each lot;
>
> (b) the services available to each lot;
>
> (c) drainage of the land;
>
> (d) access to each lot;
>
> (e) the amount of public open space to be provided;
>
> (f) any relevant planning scheme;
>
> (g) any relevant regulations made by the Minister under the Act;
>
> (h) any relevant local laws relating to town planning.

257 Certain aspects of the proposed subdivision such as servicing, drainage of the land, access to each lot, public open space or any local law are not in contention in this proceeding. In this case, it is the proposed lot sizes, relevant planning scheme (LPS 6) and relevant regulations made by the Minister under the Act that are relevant considerations to be given regard pursuant reg 21 of the PD Regulations. I also observe the list of matters in reg 21 is not exhaustive, rather the Commission 'must have regard to all relevant matters'.

The Land

258 The details of the Land are set out in the ASIF, and I find, are as follows.[117]

259 The Land is formally identified as Lot 518 (No 46) Ardross Street, Applecross on Plan 1751, Certificate of Title 1522 Folio 289 and has an area of 1072.86m^2.

260 The Land contains an existing two storey brick and tile single dwelling. At the rear of the dwelling exists a detached garage/carport and area of private open space containing several mature trees between 1 metre to 3 metres in height. A single dwelling has existed on the Land since at least 1953.

261 The Land has frontage to Ardross Street and is accessed by a single crossover to that street.

[117] ASIF, paras 8 - 20, Exhibit 2.

262 The Land was subject to a previous survey strata subdivision application for two lots, which was approved by the respondent in 1999 under the then applicable scheme, which assigned an R17.5 density coding to the Land and immediately surrounding lots. The 1999 approval was not acted on and lapsed in October 2002.

263 The boundaries of the approved 1999 subdivision generally reflect those shown on the proposed subdivision.

264 Also, historically, there have been changes to the local planning scheme affecting the Land:

(a) In September 1985, the *City of Melville Local Planning Scheme No 3* was gazetted and the Land was zoned 'Residential' with a density coding of R17.5.

(b) In December 1999, the *City of Melville Local Planning Scheme No 5* was gazetted and the Land remained zoned 'Residential', but the density coding changed (down coded) to R15.

(c) In May 2016, when the current local planning scheme, LPS 6, was gazetted and the Land (and the immediate surrounds) remained zoned 'Residential' with a density code of R15, which is the current density coding of the Land.

265 The Land is zoned 'Urban' under the MRS.

The proposed subdivision

266 The details of the proposed subdivision, I find, are as follows.[118]

267 The proposed subdivision will create two survey strata lots, with both lots accessed by a 3.0-metre-wide common property lot along the northern boundary where the current driveway exists.

268 Proposed Lot 1 is 531m² in area, 15.01 metres wide and with a depth of 31.44 metres. Proposed Lot 1 has direct frontage to Ardross Street and intends to retain the existing dwelling.

269 Proposed Lot 2 is 440m² in area, 20.12 metres wide, and with a depth and 21.87 metres. Proposed Lot 2 is to be created as a standalone survey strata lot without a dwelling.

[118] ASIF, paras 28 - 35, Exhibit 2.

270 The common property lot is to be 101m² in area. The common property lot is 31.44 metres long, 3.0 metres wide, and is to facilitate access to both lots.

271 The application was referred to the City of Melville (**City**) (by the respondent as part of its assessment), who recommended the proposed subdivision application be refused on the basis that the proposal failed to meet the requirements and objectives of the DCP 2.2 and the R-Codes and the applicable R15 density code.

272 Referral (also by the respondent, as part of its assessment) occurred to Western Power and the Water Corporation, both raising no objections, subject to standard servicing conditions and advice.

Locality

273 The extent of the locality, agreed by the parties, and I find, includes an 'immediate' and a 'broader' locality as follows.[119]

274 The immediate locality[120] is the area bounded by Kintail Road to the north (and includes lots on the northern side of Kintail Road), Glenelg Street to the north-east, to the south as far as the northern boundary of Gairloch Reserve (which abuts residential development) and Kinross Road (stopping at Simpson Street), and to the west MacLeod Road (and includes the lots fronting MacLeod Road on its western side).

275 The Land is surrounded on all its common boundaries (including diagonally behind) by properties that have been subdivided and/or developed from their original parent lot size of approximately 1072m^2.

276 The Land is adjacent to two of three lots on the western side of Ardross Street that have been subdivided and/or developed from their original parent lot size of approximately 1072m^2.

277 The immediate locality includes residential lots to the south of MacDonald Road and those commercial, retail and residential developments within the Applecross Village Neighbourhood Centre (**The Village**) that are sited along the northern side of MacDonald Road.

[119] ASIF, paras 22 - 27, Exhibit 2.
[120] The locality plan is at Amended Agreed s 24 Bundle of Documents, page 58, Exhibit 4.

278 Mr Sutherland's evidence is that the extent of the immediate locality is 'too narrow in scope and arbitrary in nature'.[121] However, he says this is the case because to the south there is 'a larger area that contains a number of properties that share similar characteristics as the subject [L]and …'.[122]

279 I do not agree the immediate locality should be differently defined. This is because the area Mr Sutherland identifies is included in the broader locality and Mr Sutherland's evidence is there will be 'minimal streetscape impact' caused by the proposed subdivision.[123] Mr Sutherland's reason to include lots to the south appears, in my view, to stem from a concern about precedent. The question of precedent, I accept, is best addressed considering the context of the broader locality.

280 The broader locality (as identified on the Locality Plan) is the area generally within 400 metres of The Village and comprises a range of residential density codes ranging from R15 to R40.[124]

281 The Village is an established 'Neighbourhood Centre'[125] and comprises commercial and retail land uses, and residential development with an assigned R40 density code. The Village is located approximately 40 metres north of the Land and is situated between Kintail Road, MacLeod Road, MacDonald Road and Gairloch Street.[126]

282 The Village is bound by 'Mixed Use' zoned lots with an assigned R40 density code along the western and eastern boundaries.

283 Mr Sutherland's evidence identifies a number of variations to the broader locality, although he says he generally agrees with its delineation.[127] Most notably, Mr Sutherland asserts the area to the north of MacDonald Road (which includes The Village) should be excluded, although no reason is given to explain his position.[128] In my view, this area to the north is relevant to the broader locality because of the very close proximity of the Land to The Village (being approximately 40 metres), as well as consideration of the proposed

[121] Witness Statement of Arran Sutherland, para 32, Exhibit 6.
[122] Ibid.
[123] Witness Statement of Arran Sutherland, para 125, Exhibit 6.
[124] Identified on the Locality Plan, Amended Agreed s 24 Bundle of Documents, page 58, Exhibit 4.
[125] Designated in the LP Strategy, Amended Agreed s 24 Bundle of Documents, page 73, Exhibit 4. Neighbourhood Centre roles and characteristics are detailed in SPP 4.2, Witness Statement of Arran Sutherland, page 178, Exhibit 6.
[126] ASIF, para 26, Exhibit 2.
[127] Witness Statement of Arran Sutherland, paras 34 - 37, Exhibit 6.
[128] Witness Statement of Arran Sutherland, para 36, Exhibit 6.

subdivision against aspects of the relevant planning framework such as SPP 4.2 and Liveable Neighbourhoods.

284 Considering the principles outlined by the Tribunal in ***Ridgecity Holdings Pty Ltd and City of Albany*** [2006] WASAT 187 (at [42]) I accept the immediate and broader locality as identified by the parties is relevant in this case.[129] I will return to this later, as the immediate locality is relevant when considering the impact of the proposed subdivision on the immediate streetscape and neighbours,[130] while the wider locality is relevant to the question of precedent.[131]

Issue for determination

285 The parties agree one issue (with four parts) arises for determination, being:[132]

Should the proposed subdivision be approved in the exercise of the Tribunal's planning discretion, having regard to:

(a) Whether it is appropriate to depart from the minimum and average site areas that apply to subdivision of the land pursuant to LPS 6 and the R-Codes.

(b) Whether approval of the proposed subdivision would set an adverse precedent for the further subdivision of other lots of similar size in the locality.

(c) Whether approval of the proposed subdivision would be consistent with the principles of orderly and proper planning.

(d) Whether approval of the proposed subdivision is objectionable.

286 Before turning to the issue, it is necessary at this point to identify an area of agreement between the parties. It is agreed the proposed subdivision will not the impact the streetscape of Ardross Street and that there would be little perceptible change the local community would experience should it be approved. This concession was correctly made, in my view, by the respondent's representative at the hearing.[133] Consideration of the impact of the proposed subdivision on the locality is one factor, in my view, relevant to the merits of this case.

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[129] Amended Agreed s 24 Bundle of Documents, page 58, Exhibit 4.
[130] See [53].
[131] See [86] - [101].
[132] Respondent's Contentions, para 6, Exhibit 3 and Applicant's Contentions Document, para 2, Exhibit 7.
[133] ts 13, 8 August 2023.

287 I will now consider parts (a) to (d) in turn, before considering and determining the issue.

(a) Whether it is appropriate to depart from the minimum and average site areas that apply to subdivision of the land pursuant to LPS 6 and the R-Codes

288 The proposed subdivision seeks to vary the minimum and average site areas for R15 coded lots set out in Table 1 of the R-Codes (**Table 1**). This variation is illustrated below:[134]

	Minimum site area		Average site area
Required	580m^2		666m^2
Proposed	**Lot 1** 531m^2	**Lot 2** 440m^2	536m^2

289 The parties agree that the percentage variations to the standards set out in Table 1 are as follows:[135]

(a) Lot 1 – a variation to the minimum site area of 8.4%.

(b) Lot 2 – a variation to the minimum site area of 24.1% and to the average site area of 19.5%.

290 The respondent contends these variations are significant when read in the context of design principle P1.2 of cl 5.1.1 of the R-Codes that provides guidance to the WAPC in respect to determining applications for subdivision.[136] The respondent says the size variations in the proposed subdivision effectively results in a doubling of the density for the Land.

291 The respondent submits that the proposed subdivision does not achieve the objectives and principles set out in various planning instruments.[137] These are:

[134] Respondent's Contentions, para 7, Exhibit 3.
[135] Respondent's Contentions, para 8, Exhibit 3 and ts 20, 8 August 2023.
[136] Respondent's Contentions, para 9, Exhibit 3.
[137] Respondent's Contentions, para 11, Exhibit 3.

The R-Codes

(a) The objective in cl 5.1(a) addressing context, being 'to ensure residential development meets community expectations, regarding appearance, use and density'.

(b) Clause 5.3.2 relates to landscaping. The respondent submits that the construction of a new dwelling will reduce the area available for landscaping and planting of trees.

292 In respect to cl 5.1(a), 'residential development' is a term defined in the R-Codes and does not include subdivision. While I accept residential development will flow from the proposed subdivision, as the Tribunal observed in ***Taylor*** [at 207] the R-Codes 'as a whole are concerned not with applications for subdivision but for development approval'. In any event, in respect to this objective, the respondent accepts the proposed subdivision will have a minimal impact on appearance of the street and on the community. The respondent's concern essentially relates to density, which I will return to address later when considering orderly and proper planning at [102] - [128].

293 As to cl 5.3.2, and the consideration of landscaping, as observed at the view, a large portion of the backyard of the Land is already occupied by a garage/outbuilding and an area used for storage.[138] I accept a future development of the rear portion of the Land may result in removal of several mature trees which vary in height from 1 to 3 metres.[139] However, the subdivision itself does not, in my view, impede landscaping as part of a future development.

294 At the hearing, Mr Allerding was cross-examined on cl 5.1.1 and certain aspects of design principle P1.2.[140] This design principle purports to limit the Commission's power to approve a variation of the minimum site area to no more than 5%. However, in ***Taylor*** at [208], the Tribunal held that cl 5.1.1 P1.2 'appears to have no active or operational work to do under the R-Codes'. Deputy President Jackson and Senior Member Willey go on to observe '… the R-Codes since at least 2002 and that since ***Landpark***[141] the R-Codes have been viewed as providing mere guidance to the respondent in the exercise of its

[138] ts 10, 8 August 2023 and ASIF, para 14, Exhibit 2.
[139] See earlier at [27].
[140] ts 71-72, 8 August 2023.
[141] ***Landpark Holdings Pty Ltd and Western Australian Planning Commission*** [2007] WASAT 130 (***Landpark***).

subdivisional powers'.[142] Therefore, the fact the proposed subdivision does not meet cl 5.1.1 P1.2 (and where relevant, the associated criteria) does not mean the proposed subdivision must be refused. This case is to be considered on its merits.

OP 1.1

295 OP 1.1 provides general principles for the subdivision of land. The respondent submits that cl 2 (policy objectives) seeks to ensure all lots have regard to the Commission's policies and the relevant local planning scheme.

296 I accept this submission, and that the proposed subdivision is to be considered on its merits against relevant provisions of the planning framework identified earlier at [14].

DC 2.2

297 DC 2.2 addresses residential subdivision. The respondent submits the objectives in cl 3 are relevant as they seek to facilitate a consistent and coordinated approach to the creation of residential lots that reflect the statutory provisions of local planning schemes.[143]

298 DC 2.2 also contains policy measures in cl 4. The applicants submit that under cl 4.1 (general requirements) applications for subdivision are to be assessed against 'state and local planning frameworks, including Liveable Neighbourhoods'.[144] The applicants further submit this would encompass other relevant policies, including SPP 4.2.[145] I accept Liveable Neighbourhoods and SPP 4.2 are relevant considerations in this case because of the proximity of the Land to The Village.

299 The respondent submits cl 4 is relevant, saying the Commission 'will not permit reductions in site areas for battle-axe lots (such as is proposed)'.[146] I do not accept this submission because to do so, it seems to me, would be an inflexible application of policy.[147]

[142] ***Taylor*** at [217].
[143] Amended Agreed s 24 Bundle of Documents, page 331, Exhibit 4.
[144] ts 28, 8 August 2023 and Amended Agreed s 24 Bundle of Documents, page 331, Exhibit 4.
[145] ts 28, 8 August 2023.
[146] Respondent's Contentions, para 11 d) ii, Exhibit 3.
[147] See also ***Landpark*** at [45].

300 Similarly, Mr Sutherland's evidence, as to the scope of discretion afforded in considering subdivision, which I do not accept given my earlier observations at [20] - [24], is:[148]

> The [proposed subdivision] does not comply with the minimum and average site area requirements of the R-Codes and proposes substantial variations which are beyond the scope of discretion afforded to the [Commission] under its planning framework.

301 I will address the proper approach to the application of policy in this case a little later at [81] - [84].

302 Clause 4 also contains provisions, at cl 4.2.4, that addresses variations to average lot size greater than the 5% criteria, which is the case here.[149] This clause requires the proposal to meet all five criteria. It is uncontroversial that the proposed subdivision cannot meet all the criteria. However, for the same reason as above, this does not mean the proposed subdivision must be refused.

303 Mr Allerding's evidence, which I accept,[150] is there are no issues regarding the capability and suitability of the proposed lot configuration to accommodate development, other than the fact the lot sizes are inconsistent with the current residential density code applicable to the Land.[151]

304 The applicants accept the proposed subdivision does not meet the minimum or average site areas applicable to the Land under LPS 6 and the R-Codes. The applicants submit that to determine the appropriateness of departing from the minimum and average site areas it 'essentially requires' consideration of the remaining parts of the issue (b) to (d).[152]

305 Mr Allerding's evidence is that because the Tribunal affirmed in its determination in ***Taylor*** that the application is not bound to the 5% variation originally asserted by the respondent, it is necessary to consider the planning framework more broadly beyond just an assessment of the site areas in the proposed subdivision. Mr Allerding says this requires consideration of the practical circumstances of the case which he asserts will assist to determine whether the proposed lot sizes are objectionable or would not represent a proper planning

[148] Witness Statement, Arran Sutherland, para 178, Exhibit 6.
[149] Amended Agreed s 24 Bundle of Documents, page 333, Exhibit 4.
[150] The respondent does not identify concerns as to these aspects in their contentions (Exhibit 3).
[151] Witness statement of Stephen Allerding, para 21, Exhibit 9.
[152] Applicant's Contentions Document, para 3, Exhibit 7.

outcome.[153] I accept this evidence because, in my view, it is consistent with the approach required by OP 1.1 (under cl 2) and DC 2.2 (under cl 4) which identify a range considerations to be taken into account when considering an application for subdivision, not only the proposed lot size.

306 The evidence of Mr Sutherland is that it is not appropriate to depart from the minimum and average site area requirements in Table 1 for three reasons, summarised below.

307 **First**, he identifies the extent of the variations is significant in numeric scale, he says this is especially when viewed against cl 5.1.1 P1.2 of the R-Codes that provide for a 5% variation only and that the variations in DC 2.2 do not apply because the Land is not located on a street corner.[154] He also points to OP 1.1, which he says requires subdivision of land to be consistent with the provisions of the relevant local planning scheme, as well as the policies and plans of the WAPC and the orderly and proper planning and the character of the area.[155]

308 While I accept that the Land is not located on a street corner and therefore the variations provided in DC 2.2 do not automatically apply, it remains necessary to consider other relevant policies and plans of the WAPC as well as the question of the orderly and proper planning and the character of the locality. It is accepted the proposed subdivision will not impact the character of the locality.[156] Orderly and proper planning is the consideration in part (c), which I will address later at [102] - [128].

309 **Second**, Mr Sutherland asserts approval of the proposed subdivision would be contrary to LPS 6 and the LP Strategy and that the Commission has concluded the local planning framework is currently sufficient to accommodate the dwelling targets established by the CSRPF.[157]

310 In respect to the current local planning framework, I observe it was established in 2016 and is now beyond its five-year period for review.[158] The Commission's correspondence to the City (dated 27

[153] Witness Statement of Stephen Allerding, para 46, Exhibit 9.
[154] Witness Statement of Arran Sutherland, paras 110 - 117, Exhibit 6.
[155] Witness Statement of Arran Sutherland, para 116 c), Exhibit 6.
[156] See [53].
[157] Witness Statement of Arran Sutherland, paras 118 - 124, Exhibit 6.
[158] The five-year review period for local planning schemes arises under reg 65 of the LPS Regulations.

May 2022), responding to the Report of Review of LPS 6, addresses the provision of residential dwellings in the City directly:[159]

> Council is advised the dwelling targets required by the [CSRPF] have not been achieved within this five-year review timeframe (though the scheme has such capacity), and therefore the City should prioritise the following matters:
>
> a) the review of the density code allocation across the scheme area, where justified by the City's local planning strategy;
>
> b) outstanding structure plans; and
>
> c) investigate and pursue possible development incentives to encourage more residential development[.]

311 In my view, given the age of the current local planning framework, the proposed subdivision (which creates one additional lot) cannot be said to be contrary to these observations which encourage more residential development (in appropriate locations) as dwelling targets in the City have not been met.

312 **Third**, Mr Sutherland accepts the proposed subdivision, because of its configuration and retention of the existing dwelling, will result in minimal streetscape impact. However, he holds the view this is not sufficient justification to significantly depart from the minimum and average site areas requirements of the R-Codes.[160]

313 While there is agreement the proposed subdivision does not meet the requirements of the R-Codes, the question at the heart of this matter to be answered is whether, considering all the circumstances and the evidence, it is appropriate in this case to depart from the minimum and average lot areas pursuant to LPS 6 and the R-Codes.

314 In respect to the correct application of 'policy', his Honour, Barker J, observes in ***Clive Elliot Jennings and Co Pty Ltd v Western Australian Planning Commission*** (2002) 122 LGERA 433 (***Clive Elliot Jennings***) at [24]:

> In some cases, the Commission may have adopted a set of planning principles which it, for the sake of convenience, has called a "policy" and which is stated to be relevant to subdivision applications. In such cases, the document is not a "policy" given force by the *Town Planning and Development Act*, but, nonetheless, it may be relevant to the

[159] Witness Statement of Arran Sutherland, pages 380 - 381, Exhibit 6.
[160] Witness Statement of Arran Sutherland, para 125, Exhibit 6.

> exercise of its discretion to approve or reject a particular plan of subdivision lodged with it. If the Commission has adopted such a "policy", and it is relevant to the application, the policy will be expected to guide the exercise of discretion. However, the existence of such a "policy" is not intended to replace the discretion of the Commission in the sense that it is to be inflexibly applied regardless of the merits of the particular case before it. Notwithstanding this understanding, the relevant consideration in many applications will by why the "policy" should not be applied; why the planning principles that find expression in the "policy" are not relevant to the particular application. Good public administration demands no less an approach.

315 These principles in ***Clive Elliot Jennings*** are settled as the proper approach to the application of 'policy' in a town planning decision-making context. Further, in relation to the exercise of discretion when considering an application for subdivision, in ***Clive Elliot Jennings*** at [22], Barker J observes:

> The range of considerations that may go to inform the discretion of the Commission as to whether or not a subdivision should be approved may be numerous, indeed[.]

316 Additionally, the Tribunal in ***Taylor*** observed:[161]

> Read as whole, and in context, the R-Codes make very plain the preference for new lots created by subdivision to be not less than certain stated sizes. As a matter of orderly and proper planning, to give 'due regard' (as is required by s 138(2) of the PD Act) requires that, in the absence of sound planning policy or another cogent reason, subdivisional approval ought not be granted which would create lots smaller than the stated sizes.

317 The R-Codes, I accept, is a relevant consideration in the determination of this matter. This is also because the Tribunal is required, by s 241(1)(a) of the PD Act, to have due regard to the R-Codes as it is plainly a 'State planning policy which may affect the subject matter of the application'. However, the R-Codes is not, in my view, the only State planning policy relevant in this instance.[162]

318 It is necessary, in my view, to now turn to parts (b) to (d) of the Issue for determination and consider if there is in fact a sound planning policy basis or another cogent reason in this case to depart from the policy position of the average and minimum lot sizes in the R-Codes.

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[161] ***Taylor*** at [226].

[162] Relevant State planning policies are identified earlier at [14].

(b) Whether approval of the proposed subdivision would set an adverse precedent for the further subdivision of other lots of similar size in the locality

319 The respondent contends there are numerous examples of lots in the immediate and wider locality that have a similar site area to the Land and contain an existing dwelling with a single crossover and are located adjacent to subdivided or redeveloped lots.[163]

320 The respondent says that approval of the proposed subdivision in circumstances where the residential density under LPS 6 is significantly compromised would create an adverse precedent for approval of similarly subdivided lots.[164] The respondent identifies five other sites in the broader locality where a precedent may occur.[165]

321 Mr Algeri, the respondent's representative, agrees with the applicant that 'the core question in this matter comes down to precedents'.[166]

322 The applicants contend the proposed subdivision is an internalised 'rounding off'[167] of the existing subdivision of all surrounding lots and that it is not extending subdivision that may potentially act as a precedent for the subdivision of other lots in the locality generally.[168]

323 Further, when considering precedence, the applicants contend consideration of the full circumstance of the merits of each case is required and submits the specific characteristics of the Land includes:[169]

1) Being physically surrounded on all boundaries by existing subdivided lots which includes lots along Ardross Street in a battleaxe/house behind house configuration like the proposed subdivision.

2) Being less than 50 metres from the edge of The Village.

[163] Respondent's Contentions, para 12, Exhibit 3.
[164] Respondent's Contentions, para 13, Exhibit 3.
[165] Respondent's Contentions, para 14, Exhibit 3.
[166] ts 101, 8 August 2023.
[167] At the hearing, Mr Allerding also expressed this as, 'filling in the missing tooth', ts 22, 8 August 2023.
[168] Applicant's Contentions Document, para 9, Exhibit 7.
[169] Applicant's Contentions Document, para 8, Exhibit 7.

3) Previously receiving subdivision approval, notwithstanding it was not acted upon, and the form of subdivision proposed is essentially the same as previously approved.

324 As to the fact the Land previously received subdivision approval (in 1999), this approval lapsed in 2002 and the subdivision was never implemented. I also accept this approval was granted under a different residential density coding (being R17.5) that applied to the Land at that time and under the 1991 version of the R-Codes.[170] The circumstances in ***Landpark***,[171] where the Tribunal observed the subject land in that case had historically been subdivided and later amalgamated, are distinguishable, in my view, from this case. In this case a subdivision, though approved, was never implemented and I do not place weight on the historic approval.

325 The evidence of Mr Sutherland considers the test used by the Tribunal[172] in ***Nicholls and Western Australian Planning Commission*** [2005] WASAT 40 (***Nicholls***) at [74] as to circumstances in which precedent is a relevant consideration in a planning assessment, namely:

(1) That the proposed development or subdivision is not in itself unobjectionable; and

(2) That there is more than a mere chance or possibility that there may be later undistinguishable applications.

326 The first element of this test is the basis for part (d) of the Issue for determination and I will address this at [129] - [146]. The second element of the test involves consideration of the chance or possibility there may be later undisguisable applications, which will I turn to now.

327 The evidence of Mr Sutherland identifies the characteristics he says would make a similar subdivision undistinguishable, being:[173]

(1) An 'original' un-subdivided lot.

(2) Contains an existing dwelling which can be retained with little to no modification.

[170] ASIF, paras 16 - 21, Exhibit 2.
[171] ***Landpark*** at [47].
[172] SM Parry (as he then was) adopted the criteria stated by Lloyd J in ***Goldin v Minister for Transport Administering the Ports Corporatisation and Waterways Management Act 1995*** (2002) 121 LGERA 101.
[173] Witness Statement of Arran Sutherland, para 144, Exhibit 6.

(3) Have potential to utilise an existing crossover and driveway for the purposes of vehicular access to a rear lot.

(4) Are surrounded by existing subdivided lots on at least two sides.

328 Applying these criteria, Mr Sutherland identifies three sites (in addition to the Land) in the locality, being:[174]

(1) 14 Tain Street (Lot 887), Applecross.

(2) 28 Gairloch Street (Lot 479), Applecross.

(3) 39 Gairloch Street (Lot 549), Applecross.

329 Mr Sutherland's oral evidence is that the three sites varies from the five sites identified in the respondent's contentions (referred to earlier at [87]) because his analysis shows the existing dwelling on those sites would prevent subdivision in a similar manner to the proposed subdivision, and in one case he identifies it would not be able to accommodate a shared crossover.[175] I accept this evidence.

330 The planning experts were cross-examined on these three sites. Mr Allerding's evidence is that there are differences which make the three sites distinguishable from the Land. He says, and I accept, none of these sites is within 200 metres of The Village. He also says, and I accept, that only one of them (No 28 Gairloch Street) is surrounded on all its boundaries by subdivided properties.[176]

331 I accept that No 28 Gairloch Street has the common characteristics with the Land, as Mr Sutherland identifies.[177] It is, however, located beyond 200-metres of The Village (which is the walkable catchment identified in SPP 4.2 where an increase in residential density is recommended to apply).[178] Under cross-examination on this point, Mr Sutherland accepts this is a distinguishing feature.[179]

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[174] Witness Statement of Arran Sutherland, para 145, Exhibit 6 and shown on Attachment AS14 as lots with indistinguishable characteristics (identified with a black border).
[175] ts 66 - 67, 8 August 2023. The two sites excluded by Mr Sutherland are No 14 Gairloch Street, Applecross and No 5 Alness Street, Applecross.
[176] ts 69, 8 August 2023.
[177] See [94].
[178] Witness Statement of Arran Sutherland, page 178, Exhibit 6. SPP 4.2 recommends an average residential density of 25+ dwellings per gross Urban Zone hectare within the walkable catchment of a neighbourhood centre, as in this case.
[179] ts 89, 8 August 2023.

332 Mr Sutherland, under cross-examination, also concedes that No 39 Gairloch Street can be distinguished from the Land because one site located diagonally to the rear of this lot (in Ardross Street) is not subdivided and therefore it is not surrounded by subdivided lots.[180] I accept this is the case.

333 Mr Sutherland was also asked about No 14 Tain Street and whether it is also not fully surrounded by subdivided lots. Mr Sutherland concedes this site has subdivided lots only to the north and south, but none at the east (rear).[181] I accept this evidence and, therefore in my view, this site is distinguishable from the Land.

334 Considering this evidence, I conclude the three sites identified by Mr Sutherland in the broader locality are distinguishable from the Land, as none share all the same characteristics. Therefore, in my view, there this is little likelihood of the proposed subdivision giving rise to precedent in the immediate or broader locality if approved.

(c) Whether approval of the proposed subdivision would be consistent with the principles of orderly and proper planning

335 When considering orderly and proper planning, the principles outlined by her Honour, Pritchard J in ***Marshall v Metropolitan Redevelopment Authority*** [2015] WASC 226 (***Marshall***) at [179] - [182], are relevant:

> 179 … The ordinary meaning of the word 'proper' includes 'suitable for a specified or implicit purpose or requirement; appropriate to the circumstances or conditions; of the requisite standard or type; apt, fitting; correct, right'. The ordinary meaning of the word 'orderly' includes 'characterised by or observant of order, rule, or discipline'. In other words, to be orderly and proper, the exercise of a discretion within the planning context should be conducted in an orderly way - that is, in a way which is disciplined, methodical, logical and systematic, and which is not haphazard or capricious.
>
> 180 The planning discretion should be directed to identifying the 'proper' use of land - that is, the suitable, appropriate, or apt or correct use of land. In order to do so, the exercise of discretion would clearly need to have regard to any applicable legislation, subsidiary legislation and planning schemes (such as region schemes, town planning schemes, local planning schemes) and policy instruments. The State Administrative Tribunal has

[180] ts 88 - 89, 8 August 2023.
[181] ts 89, 8 August 2023.

> observed that 'at the heart of orderly and proper planning' is a public planning process which permits the assessment of individual development applications against existing planning policies 'so that the legitimate aspirations found in the planning framework may be translated into reality'.
>
> 181 However, there is no reason in principle why planning legislation and instruments will be the only matters warranting consideration in determining what is a 'proper' planning decision. The matters which warrant consideration will be a question of fact to be determined having regard to the circumstances of each case.
>
> 182 While the exercise of discretion will involve a judgment about what is suitable, appropriate, or apt or correct in a particular case, that judgment must (if it is to be 'orderly') be an objective one. If the exercise of discretion is to be an orderly one, the planning principles identified as relevant to an application should not be lightly departed from without the demonstration of a sound basis for doing so, which basis is itself grounded in planning law or principle. A broad range of considerations may be relevant in that context.

(Footnotes omitted)

336 The respondent submits that ***Marshall*** at [182] is relevant.[182] I agree and accept that 'if the exercise of discretion is to be an orderly one, the planning principles identified as relevant to an application should not be lightly departed from without the demonstration of a sound basis for doing so'.[183] However, as Pritchard J observes, I also accept '[a] broad range of considerations may be relevant in that context'.[184]

337 The respondent contends that approval of the subdivision would not accord with the principles of orderly and proper planning, essentially for two reasons.

338 First, there have been conscious decisions about residential densities in this locality made by the City in the formulation of LPS 6 (gazetted in 2016) and more recently when considering a request to

[182] ts 106, 108 - 109, 8 August 2023.
[183] This is consistent with the observations of DP Jackson and SM Willey in ***Taylor*** at [226], referred to earlier at [83].
[184] In considering an application for subdivision (such as in the present case), this also reflects the observations of Barker J in ***Clive Elliot Jennings***, identified earlier at [82].

initiate an amendment to LPS 6 to increase densities in nearby Kintail Road (which was declined by the City in March 2020).[185]

339 Second, the LP Strategy (endorsed by the WAPC in 2016) outlines that the majority of the suburban areas in the City will experience little change with higher density encouraged in specific areas namely in and around District Centres and specified transport nodes and corridors.[186]

340 As a result, the respondent contends, the community should rightly expect that the residential outcomes resulting from the R15 density coding of the Land will be maintained.[187]

341 The applicants contend LPS 6 is seven years old and now overdue for review. Similarly, the applicant says the amendment to LPS 6 considered in 2020 was within the 5-year life of LPS 6 and City staff identified the proposal had merit and that, as the amendment was never initiated, it was not considered by the WAPC or the Minister for Planning.[188]

342 The applicants submit that the proposed subdivision, because of the various factors in its design, will mean the community will experience little, if any, discernible change.[189] As mentioned, this aspect is accepted by the respondent.[190]

343 Further, the applicants submit the proposed subdivision is consistent with and/or contributes to several of the aims of LPS 6 (at cl 9(2)) and is consistent with achieving the objectives of the Residential zone under cl 16(2).[191]

344 The applicants submit the proposed subdivision is consistent with achieving the objectives of the Residential zone at cl 16(2) because it will contribute to housing choice to meet the needs of the community and the form of the proposed subdivision encourages the retention of, and compatibility with, a high quality streetscape appearance in Ardross Street.[192]

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[185] Respondent's Contentions, paras 16 and 27, Exhibit 3.
[186] Respondent's Contentions, paras 17 - 18, Exhibit 3.
[187] Respondent's Contentions, paras 21 - 22, Exhibit 3.
[188] Applicant's Contentions Document, paras 11 - 13, Exhibit 7.
[189] Applicant's Contentions Document, para 16, Exhibit 7.
[190] See [53].
[191] Applicant's Contentions Document, para 17, Exhibit 7.
[192] Applicant's Contentions Document, para 18, Exhibit 7.

345 Mr Sutherland's oral evidence in respect to this objective is that he says retaining the existing single dwelling will provide housing choice in the locality, because the subdivision will facilitate the same type of housing that is already available.[193]

346 On one level, I accept this is the case, however when considered against the planning policy provisions of SPP 4.2, Liveable Neighbourhoods and the current LP Strategy (each of which I will come to next), it is, in my view, appropriate for increases in residential densities to be located in, and in close proximity to, activity centres, such as the neighbourhood centre in this case, The Village.

347 As to the LP Strategy, the applicant submits it identifies the suitability of increased densities around activity centres (relevant because of the proximity of the Land to The Village) under cl 3.3.4 which addresses neighbourhood and local centres in the following terms:[194]

> …
>
> Gaps and opportunities that would improve performance outcomes of activity centres are:
>
> • Increase the density and diversity of housing in and around activity centres to improve land efficiency, housing variety and support centre facilities. A more rigorous pursuit of higher-density housing should be incorporated within and immediately adjacent to activity centres to establish a sense of community and increase activity outside normal business hours. Targets for residential density as set out in SPP 4.2 should be applied throughout the City of Melville activity centre network, with regard to the capacity of each centre to meet set targets[.]

348 The evidence of Mr Allerding identifies the four planning documents (beyond the R-Codes) which he says supports the proposed subdivision.[195]

349 First, Liveable Neighbourhoods[196] says, and I accept, anticipates higher residential densities within walking distance of local and neighbourhood centres.[197]

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[193] ts 51, 8 August 2023.
[194] Applicant's Contentions Document, para 19, Exhibit 7 and LP Strategy, Amended Agreed s 24 Bundle of Documents, page 83, Exhibit 4.
[195] Witness Statement of Stephen Allerding, para 71, Exhibit 9.
[196] Both in the current and draft forms.
[197] Witness Statement of Stephen Allerding, paras 58 - 61, 69 - 70, Exhibit 9.

350 Second, SPP 4.2 encourages increased residential densities around local and neighbourhood centres. Mr Allerding identifies that for neigbourhood centres (such as The Village) a residential density target of 25+ dwellings per gross urban zone hectare is supported within a 200-metre walkable catchment.[198] It is agreed the Land is located within a 200-metre catchment, being approximately 40 metres from The Village.[199]

351 Third, Mr Allerding says the proposed subdivision is consistent with a number of the aims of LPS 6 and also consistent with several objectives of the Residential zone (referred to earlier at [110] - [111]).

352 Fourth, the LP Strategy supports increased densities in activity centres and the implementation of density targets set out in SPP 4.2 (referred to earlier at [114]).

353 Apart from the design aspects of the proposed subdivision, which (as indicated earlier) are not the concern for the respondent, Mr Allerding says that the departure from the minimum and average site areas 'are justifiable and consistent with the density of development of both the immediately adjoining lots and is a rounding off of subdivision of all adjoining lots'.[200]

354 Under cross-examination Mr Sutherland accepts achievement of higher densities around activity centres, which are advocated in SPP 4.2 and Liveable Neighbourhoods, 'would be a proper planning outcome, as a general principle'.[201]

355 In closing submissions, the respondent concedes, 'that indications are that it [being the residential density coding of the Land] might be heading, and perhaps should be heading, in the direction of an increased density', but submits 'that process needs to be followed'.[202]

356 When considering process, Mr Sutherland asserts what he is not in agreement with is the way the proposed subdivision has been put forward. He says what is advocated for in the policy framework is an approach which involves a holistic review of an area through a strategy,

[198] Witness Statement of Stephen Allerding, para 55, Exhibit 9.
[199] ASIF, para 26, Exhibit 2.
[200] Witness Statement of Stephen Allerding, para 71, Exhibit 9.
[201] ts 83, 8 August 2023.
[202] ts 110, 8 August 2023.

a review of a strategy, or a preparation of new scheme, or review of a scheme or a scheme amendment.[203]

357 I accept this is the process for making changes to the planning framework, such as a change to a residential density coding in a local planning scheme and I also accept this is for good reason. First, it provides the opportunity for the planning authorities at State and Local level to review the needs of a community against broader State planning objectives and policies. Second, it allows the community the opportunity, through public advertising of proposed Scheme changes, to have their say on the aspects that affect them and their community, and for these comments to be considered by the relevant planning authorities, and ultimately by the Minister for Planning (when deciding changes to a local planning scheme).

358 However, as Dr Stephen Willey observes in 'Planning and Environmental Law in Western Australia'[204] there is no public advertising that occurs as part of the subdivision process.[205] In any event, my decision in this matter must necessarily focus on this Application for Review and consider whether the proposed subdivision is consistent with the principles of orderly and proper planning (in the context of producing the correct and preferable decision at the time of the decision upon the review),[206] understanding the unfettered discretion available to the Commission in determining subdivision applications, and hence to the Tribunal on review.

359 Considering the evidence before me, this ultimately is a case where the respondent is not concerned with the form of the proposed subdivision per se, because the design aspects (apart from lot size) are uncontroversial. It is also accepted by the respondent the community is unlikely to be affected to an observable extent.

360 The residential density resulting from the proposed subdivision is, in my view, consistent with the provisions of SPP 4.2, Liveable Neighbourhoods and the aspirations in the LP Strategy.

361 The respondent's principal concern in respect to orderly and proper planning, supported by the evidence of Mr Sutherland, centres on an adherence to usual planning processes, which relate to making changes to planning schemes. However, in the somewhat unusual

[203] ts 86, 8 August 2023.
[204] Published 2021, Thomson Reuters.
[205] At pages 236 - 237.
[206] As required by s 27(2) of the SAT Act.

circumstances of this case, which I accept, involves creation of one additional lot which completes (or rounds off) an existing pattern of subdivision and where the Land itself is in very close proximity to a neighbourhood centre (The Village), approval of the proposed subdivision is, in my view, plainly an orderly and proper planning outcome, notwithstanding the average or minimum site areas prescribed in the R-Codes are not met.

(d) Whether approval of the proposed subdivision is objectionable

362 The respondent contends the proposed subdivision is objectionable for three reasons.[207] I observe the three reasons are the earlier parts (a) to (c) of the Issue for determination.

363 First, the respondent says it is not appropriate to depart from the minimum and average site areas that apply to subdivision of the Land pursuant to LPS 6 and the R-Codes. I have considered this at [55] - [85] and will return to this when determining the issue overall at [147] - [160].

364 Second, the respondent submits the subdivision would set an adverse precedent for the further subdivision of lots of similar size in the locality. I considered this earlier at [86] - [101] and concluded it would not.

365 Third, the respondent says approval of the proposed subdivision would be inconsistent with the principles of orderly and proper planning. I considered this earlier at [102] - [128] and concluded that approval would not be inconsistent with the principles of orderly and proper planning.

366 The applicants contend the proposal is not objectionable for three reasons.[208]

367 First, Liveable Neighbourhoods and SPP 4.2 anticipate and encourage increased resident density within walking distance of local and neighbourhood centres, at a density which the applicant submits is similar to the proposed subdivision.

368 Second, the proposed subdivision is a logical 'rounding off' of existing subdivision in the immediate locality, notwithstanding the

[207] Respondent's Contentions, para 30, Exhibit 3.
[208] Applicant's Contentions Document, paras 21 – 23.

zoning of the Land under LPS 6 and the R15 density coding which applies.

369 Third, the design treatments of the proposed subdivision mean the community will experience little, if any, discernible change. As mentioned, the respondent concedes this is the case.[209]

370 The evidence of Mr Sutherland is that Liveable Neighbourhoods is a policy that would normally apply to 'greenfield' areas and 'brownfields' as well. But he says, '[t]his is just a small [infill] subdivision, in my eyes, so it doesn't apply'.[210]

371 However, the evidence of Mr Allerding, is that the City acknowledges they do not have 'greenfield' or large 'brownfield' sites, and he says the LH Strategy states the City would seek to use Liveable Neighbourhoods 'as a guide to best practice'.[211] This, in my view, supports the applicant's submission that Liveable Neighbourhoods is relevant in this case.

372 Similarly, the evidence of Mr Sutherland is that SPP 4.2 is not a policy that applies to the proposed subdivision.[212] However, Mr Allerding's evidence is that the City's LP Strategy identifies SPP 4.2 as follows:[213]

> Targets for residential density as set out in SPP 4.2 should be applied throughout the City of Melville activity centre network, with regard to the capacity of each centre to meet set targets.

373 This, in my view, also supports the applicants' submission that SPP 4.2 is relevant in this case.

374 Under cross-examination, Mr Sutherland accepts that SPP 4.2 is relevant but only insofar as 'it would have been taken into consideration as part of the preparation of the [LP] [S]trategy and its recommendations'.[214]

375 Mr Sutherland's approach, in my view, ignores DC 2.2 (at cl 4.1.1) which says '[a]pplications for residential subdivision to be assessed against (among other things):

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[209] See [53].
[210] ts 55, 8 August 2023.
[211] ts 55, 8 August 2023 and Witness Statement of Arran Sutherland, page 291, Exhibit 6.
[212] Witness Statement of Arran Sutherland, para 154, Exhibit 6.
[213] Witness Statement of Stephen Allerding, para 30, Exhibit 9 and Amended Agreed s 24 Bundle of Documents, page 83, Exhibit 4.
[214] ts 84, 8 August 2023.

state and local planning frameworks, including Liveable Neighbourhoods.

376 Earlier, I accepted the planning framework includes SPP 4.2.[215]

377 Mr Allerding was cross-examined on SPP 4.2 (in the context of the LP Strategy) which resulted in the following exchange.[216]

MR ALGERI: [respondent's representative]

> … Mr Allerding, you're talking about – you're continuing on the same theme of densities around activity centres. But, other than in a relative sense, this subdivision is not really introducing higher density, or not even as high as some of the documents even suggest it could be. Do you accept that point?

MR ALLERDING: Yes.

378 Under further cross-examination, Mr Allerding accepts a future LP Strategy may recommend a higher residential density, however he identifies the evidence of Mr Sutherland that this may not be for 'quite a number of years' and he therefore concludes the proposed subdivision is a step in the right direction.[217] In the circumstances of this case, I agree.

379 Considering the analysis in parts (a) to (c), the submissions of the parties and the evidence before me, and in particular the context of the Land, there is nothing, in my view, that renders approval of the proposed subdivision objectionable from a town planning perspective.

Should the proposed subdivision be approved in the exercise of the Tribunal's planning discretion?

380 When considering the exercise of the Tribunal's discretion, the applicants submit the circumstances of the present case has parallels with the Tribunal's[218] decision in ***Landpark***.

381 ***Landpark*** also relates to a subdivision involving the creation of two lots. Although the locational context (being on Caves Road,

[215] See [65].
[216] ts 53, 8 August 2023.
[217] ts 54, 8 August 2023. Mr Sutherland's evidence is that 'The approval of the [proposed subdivision] would result in the introduction of a density that is currently not intended for the area, and is not flagged for introduction in the near future', Witness statement Arran Sutherland, para 134, Exhibit 6.
[218] SM Parry (as he then was).

approximately halfway between Busselton and Dunsborough) is different from the present case some factual circumstances, I accept, are similar. The concerns raised by the respondent in ***Landpark*** and in the issues for determination in that case are also similar.[219]

382 The extent of lot size variation under the R-Codes in ***Landpark*** was significant. As an R2.5 coded parcel of land, the subdivided lots in ***Landpark*** required a minimum site area requirement of 4000m^2, however lots of only 1972m^2 were proposed.[220] Like in the present case, in ***Landpark*** the applicant argued that the proposal was a 'rounding off' of the subdivision pattern in the locality.[221] Historically, the lots had been subdivided, and subsequently amalgamated.[222]

383 Also, in that case, the evidence of the respondent's expert planning witness was 'that the planning merits do not warrant a departure from the Commission's Policy because "the policies are soundly based and should be consistently applied throughout the State to ensure that their integrity is not undermined"'. The Tribunal considered the application of policy and observed that 'this approach in essence would require an inflexible approach of policy in a manner not permitted by law'.[223]

384 Notwithstanding the lot size variation in ***Landpark***, the Tribunal, after considering all the circumstances and the evidence, exercised discretion to approve the subdivision, subject to conditions.

385 The respondent, alternatively, submits the Tribunal's[224] decision in ***De Abreu and Western Australian Planning Commission*** [2019] WASAT 57 (***De Abreu***) should be relied on when considering the exercise of its discretion in this case. ***De Abreu*** involved an application for subdivision and the respondent submits it has many similarities with the current case, being a subdivision with lot sizes smaller than those prescribed and located in the City. The history of the land in that case also involved historical changes to the residential density coding.[225]

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[219] ***Landpark*** at [12] and [14].
[220] Additionally, a minimum frontage of 40 metres was required, whereas frontages of 34.6 metres and 34.7 metres were proposed. ***Landpark*** at [20].
[221] ***Landpark*** at [48] - [49].
[222] In the present case, subdivision approval had been granted, but not acted upon and since lapsed.
[223] ***Landpark*** at [53].
[224] SM Spillane.
[225] ts 107, 8 August 2023.

386 In ***De Abreu***, the Tribunal was not satisfied that any of the criteria set out in cl 5.1.1 P1.2 of the R-Codes apply and as a matter of orderly and proper planning could find no cogent reason why, in the circumstances of that case, a variation to the average lot size should be allowed and the subdivision approved.[226]

387 However, in my view, ***De Abreu*** can be distinguished from the present case because the form of subdivision proposed in ***De Abreu*** was not considered would 'facilitate and encourage high quality design and streetscapes' and/or 'maintain compatibility with general streetscape'.[227] Further, in ***De Abreu*** at [97], the Tribunal observed:

> Consideration of a proposed subdivision application against the criteria is not simply a mathematical exercise and in the Tribunal's view, particularly in respect of the criterion under consideration, the physical changes proposed are important.

388 The criterion under consideration involved lot frontage and its impact on the streetscape. However, in this case, when considering the criterion of lot size, I accept the principle in ***De Abreu*** that consideration is not simply a mathematical exercise and that the physical changes are important. In the present case, as already mentioned,[228] it is uncontroversial the physical changes to the streetscape or those likely to be experienced by the local community, because of the proposed subdivision are minimal.

Findings

389 In the present case, after considering the earlier analysis in the four sub-parts (a) to (d) of the Issue for determination and the evidence before me, I find the proposed subdivision should be approved for four reasons:

390 First, in the specific (and somewhat unusual) circumstances of this case it is, in my view, appropriate to depart from the minimum and average site areas that apply to the Land under LPS 6 and the R-Codes because:

(i) the Land is already surrounded by subdivided lots which have a similar pattern of subdivision and the proposed subdivision is reflective of the settlement pattern in the immediate locality (where residential lots have been subdivided);

[226] ***De Abreu*** at [139].
[227] ***De Abreu*** at [130].
[228] At [53].

(ii) the Land is in close proximity to a neighbourhood activity centre, The Village, located approximately 40 metres north;

(iii) the proposed subdivision has a form that will not cause detriment to the streetscape and will minimise impact on the community; and

(iv) the proposed lot sizes can accommodate residential development.

391 Second, approval of the proposed subdivision would not set an adverse precedent for similar subdivision in the broader locality because, on the evidence before me, none of the lots in the locality have the same characteristics as the Land and therefore further applications for subdivision would be distinguishable from this case.[229]

392 Third, approval of the proposed subdivision would be consistent with the principles of orderly and proper planning because the Land is in close proximity to The Village and an increased residential density in this location is supported by SPP 4.2, Liveable Neighbourhoods and as an aspiration in the LP Strategy and further, the form of the subdivision will not have a detrimental impact on the streetscape or the locality.[230]

393 Fourth, approval of the proposed subdivision is not objectionable because it will not set an adverse precedent and its form will not have a detrimental impact on the locality, because the Ardross Street streetscape will be maintained.[231]

Conclusion

394 For the reasons outlined, after considering the relevant planning framework, the submissions of the parties and the evidence before me, I have found the correct and preferrable decision in this case is to approve the proposed subdivision, subject to conditions. This is because approval would not set an adverse precedent and the subdivision itself is not objectionable.

395 I have also determined, in the specific (and somewhat unusual) circumstances of this case, that approval of the proposed subdivision is consistent with the principles of orderly and proper planning, and it is

[229] See [86]-[101].
[230] See [102]-[128].
[231] See [129]-[146].

in these circumstances appropriate to depart from the minimum and average site areas that apply to the Land pursuant to LPS 6 and the R-Codes.

Conditions

396 In the event the Tribunal determined the proposed subdivision should be approved, the respondent provided six without prejudice draft conditions.[232] The six conditions are agreed[233] and, in my view, appropriate in this case.

397 For these reasons, the Tribunal makes the following orders.

Orders

The Tribunal orders:

1. The application for review is allowed.

2. The decision of the respondent on 5 August 2021 to refuse the proposed subdivision at No 46 (Lot 518) Ardross Street, Applecross is set aside, and a decision is substituted that approval is granted for the proposed subdivision under the *Planning and Development Act 2005* (WA) as shown on the approved plan (drawing number 21037-APS01, version 2.0, dated 2 September 2021), subject to the following conditions:

   (a) Arrangements being made to the specification of Western Power for the provision of an electricity supply to the survey strata lots shown on the approved plan of subdivision, which may include the provision of necessary service access rights either as an easement under Section 136C and the Tenth Schedule of the Transfer of Land Act 1893 for the transmission of electricity by underground cable, or (in the case of approvals containing common property) via a portion of the common property suitable for consumer mains. (Western Power).

   (b) (i) Arrangements being made to the Water Corporation for the provision of a suitable water

[232] Respondent's Without Prejudice Draft Conditions, Exhibit 5.
[233] Applicant's Response to the Draft Without Prejudice Conditions, Exhibit 8.

supply service to each lot shown on the approved plan of subdivision. (Water Corporation).

(ii) Additionally, arrangements are to include the provisions of a suitable water supply service to each lot in the scheme (plan). (Western Australian Planning Commission).

(c) (i) Arrangements being made with the Water Corporation for the provision of a sewerage service to each lot shown on the approved plan of subdivision. (Water Corporation).

(ii) Additionally, arrangements are to include the provision of a suitable sanitary drainage service to each lot on the strata scheme (plan) by a Licensed Plumbing Contractor. (Western Australian Planning Commission).

(d) Other than buildings, outbuildings and/or structures shown on the approved plan for retention, all buildings, outbuildings and/or structures present on Lot 2 at the time of subdivision approval being demolished and materials removed from the lot(s). (Local Government)

(e) The land being filled, stabilised, drained and/or graded as required to ensure that:

(i) lots can accommodate their intended development; and

(ii) finished ground levels at the boundaries of the lot(s) the subject of this approval match or otherwise coordinate with the existing and/or proposed finished ground levels of the land abutting; and

(iii) stormwater is contained on-site, or appropriately treated and connected to the local drainage system. (Local Government)

(f) The existing dwelling being retained is to comply with the requirements of the Residential Design Codes. (Local Government)

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

MR R Povey, MEMBER

26 OCTOBER 2023