JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	PLANNING AND DEVELOPMENT ACT 2005 (WA)
CITATION	**:**	ROBERTSON and CITY OF ALBANY [2019] WASAT 3
MEMBER	**:**	DEPUTY PRESIDENT, JUDGE PARRY MS M CONNOR (MEMBER)
HEARD	**:**	14-16 AUGUST, 4 SEPTEMBER (VIEW) AND 12-14 SEPTEMBER 2018 - FURTHER DOCUMENTS AND SUBMISSIONS FILED ON 1, 2, 15, 16 AND 18 OCTOBER 2018
DELIVERED	**:**	10 JANUARY 2019
FILE NO/S	**:**	DR 354 of 2017
BETWEEN	**:**	GRAEME ROBERTSON Applicant AND CITY OF ALBANY Respondent

Catchwords:

Town planning - Development application - Extractive industry - Limestone quarry - Nullaki Peninsula - Proximate to Bibbulmun Track and Nullaki campsite - Nullaki Peninsula Conservation Zone - Whether proposed development is capable of approval under *City of Albany Local Planning Scheme No. 1* - Whether proposed development is consistent with orderly and proper planning - Sustainable development - Principles of sustainable development - Whether proposed development would have unacceptable impact on amenity and character

of locality as Conservation Zone - Whether proposed development would have unacceptable impact on natural environment - Whether traffic generation would exceed capacity of road system or have adverse impact on traffic flow and safety - Whether proposed variation of development standards and requirements would have adverse impact upon inhabitants of locality - Whether Bushfire Management Plan adequately addresses bushfire risk - Words & phrases: 'non defined activities'

Legislation:

City of Albany Local Planning Scheme No. 1, cl 1.4.2, cl 1.6(c), cl 1.7, cl 1.7.1, cl 1.7.1(b)(i), cl 5.2, cl 5.2.3(b), cl 5.5.14, cl 10.2, Sch 12 (CZ1), cl 2.1, cl 3, cl 3.1, cl 3.2, cl 3.3, cl 3.4, cl 4, cl 4.2.18, cl 4, cl 4.3, cl 4.5, cl 4.6(i), cl 4.6(v), cl 4.7(i)
City of Albany Town Planning Scheme No. 3
Environmental Protection (Noise) Regulations 1997 (WA)
Environmental Protection Act 1986 (WA), s 38
Planning and Development (Local Planning Schemes) Regulations 2015 (WA), Sch 2 (deemed provisions), cl 2, cl 67, cl 67(b)
Planning and Development Act 2005 (WA), s 3(1)(c), s 87(1), s 87(2), s 252(1)
State Administrative Tribunal Act 2004 (WA), s 3, s 27(2), s 35(1), s 61(2), s 61(4)(g), s 62(3)

Result:

Conditional development approval granted

Summary of Tribunal's decision:

Mr Graeme Robertson sought review by the Tribunal of the refusal by the City of Albany of a development application for an extractive industry, in particular limestone extraction, on a property situated on the Nullaki Peninsula. The site is zoned 'Conservation' and forms part of the 'Nullaki Peninsula Conservation zone' under the local planning scheme. The site is also proximate to the Bibbulmun Track and the Nullaki campsite.
The Tribunal determined that the proposed development is capable of development approval under the local planning scheme. The Tribunal also determined that the proposed development merits conditional development approval. The Tribunal found that the proposed development is consistent with orderly and proper planning, because it is broadly consistent with the objectives and provisions of the local planning scheme in relation to the zoning of the site, only limited weight should be given to a draft amendment to the local planning scheme which (if gazetted) would prohibit the proposed development in the circumstances of this case and the proposed development is consistent with the

objective of the *Planning and Development Act 2005* (WA) to 'promote the sustainable use and development of land in the State' and a corresponding aim of the scheme. The Tribunal also found that the impacts of the proposed development on the amenity and character of the locality, including on the recreational amenity of the Bibbulmun Track and Nullaki campsite, and on the natural environment, are acceptable.
The Tribunal concluded that the correct and preferable decision is to grant development approval for the proposed development subject to 45 conditions.

Category: B

Representation:

Counsel:

Applicant	:	Mr K de Kerloy and Mr P Keeves
Respondent	:	Mr DF Nicholson

Solicitors:

Applicant	:	Herbert Smith Freehills
Respondent	:	McLeods

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

APP Corporation Pty Ltd and City of Perth [2008] WASAT 291
City of Kwinana v Lamont [2014] WASCA 112
Hanson Construction Materials Pty Ltd and Town of Vincent [2008] WASAT 71
Marshall v Metropolitan Redevelopment Authority [2015] WASC 226
Moore River Company Pty Ltd and Western Australian Planning Commission [2007] WASAT 98
Mount Lawley Pty Ltd and Western Australian Planning Commission [2007] WASAT 59
Nicholls and Western Australian Planning Commission [2005] WASAT 40; (2005) 149 LGERA 117
Paintessa Developments Pty Ltd and Town of East Fremantle [2014] WASAT 81; (2014) 85 SR (WA) 312
Puma Energy Australia and City of Cockburn [2016] WASAT 36; (2016) 89 SR (WA) 1
R v PLV [2001] NSWCCA 282; (2001) 51 NSWLR 736

Robertson and City of Albany [2018] WASAT 138

Telstra Corporation Limited v Hornsby Shire Council [2006] NSWLEC 133; (2006) 146 LGERA 10; (2006) 67 NSWLR 256

Terra Spei Pty Ltd and Shire of Kalamunda [2015] WASAT 134

WA Developments Pty Ltd and Western Australian Planning Commission [2008] WASAT 260

Wattleup Road Development Co Pty Ltd v State Administrative Tribunal [No 2] [2016] WASC 279

Wattleup Road Development Company Pty Ltd and Western Australian Planning Commission [2011] WASAT 160

Wattleup Road Development Company Pty Ltd and Western Australian Planning Commission [2014] WASAT 159

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 Mr Graeme Robertson (applicant) seeks review, under s 252(1) of the *Planning and Development Act 2005* (WA) (PD Act), of the decision of the City of Albany (City or Council) to refuse development approval under the *City of Albany Local Planning Scheme No. 1* (LPS 1 or Scheme) for an extractive industry, in particular limestone extraction, at Lot 9005 Rock Cliff Circle and Eden Road, Nullaki (site).

2 The hearing of the application for review took place over six days in Perth, during which the parties made opening statements, called witnesses and tendered documents. The parties subsequently made their closing submissions in writing with the benefit of the transcript of the evidence. The Tribunal also conducted a view of the site and locality, and the wider area, accompanied by the parties' legal representatives and expert witnesses. The view included walking along part of the Bibbulmun Track, visiting the Nullaki campsite, driving along the proposed transport route, visiting Anvil Beach lookout and viewing the location of the site from the Ocean Beach lookout to the west and the Hay River Bridge to the north.

Site and locality

3 The site is situated on the Nullaki Peninsula, approximately 40 kilometres west of the Albany city centre. The Nullaki Peninsula comprises an area of about 6,500 hectares, bounded by the Southern Ocean to the south, Wilson Inlet to the north and an opening between the ocean and the inlet to the west. The town of Denmark is situated to the north-west of Wilson Inlet. Ocean Beach is situated to the south of Denmark, on the western shore of the opening between the Southern Ocean and Wilson Inlet.

4 The Nullaki Peninsula includes about 2,500 hectares of privately-owned land, which is zoned 'Conservation' under LPS 1 and, in particular, comprises Conservation Zone CZ1 'Nullaki Peninsula Conservation zone' (CZ1) under Sch 12 of LPS 1, and Conservation Reserve, which is vested in the City for the purposes of Landscape Protection and Recreation. The Nullaki Peninsula is aptly described by Ms Melanie Price, who is an environmental scientist called to give evidence by the applicant, as 'an iconic and scenic area on the South

Coast' of the State.[1] The Nullaki Peninsula generally comprises remnant open heath coastal vegetation.

5 However, parts of the privately-owned land on the Nullaki Peninsula have historically been and continue to be used for farming activities and the part of the site where limestone extraction is proposed in the development application was used as a limestone quarry from about 2002 to 2006 and then rehabilitated. The limestone extracted from the site during this period was used to construct roads on the Nullaki Peninsula and that extractive industry took place without development approval.

6 In accordance with objective (c) of the CZ1 zone set out in cl 2.1 of Sch 12 of LPS 1 ('Provide for limited wilderness retreat subdivision and development in a manner that is compatible with the conservation values of the Nullaki Peninsula') and a Subdivision Guide Plan adopted by the City in September 2007 and subsequently endorsed by the Western Australian Planning Commission (Commission), the land in the Nullaki Peninsula Conservation zone CZ1 (other than the site) has been progressively subdivided into 51 lots, with areas of about 30-40 hectares. To date, about 20 dwellings and a number of caretaker's dwellings and associated infrastructure, including driveways, have been constructed on these lots.

7 The site has an area of approximately 437 hectares and is the south-eastern-most privately owned land on the Nullaki Peninsula in general and in the Nullaki Peninsula Conservation zone CZ1 in particular. The site adjoins a Conservation Reserve vested in the City to the south (separating the site from the Southern Ocean) and to the east and south-east. The Subdivision Guide Plan contemplates the subdivision of the site into lots of about 30-50 hectares. Subdivision approval for the site was granted by the Commission, but lapsed. More recently, a subdivision application of the site was refused by the Commission on bushfire grounds.

8 The Bibbulmun Track is a walking track nearly 1,000 kilometres in length between Kalamunda in the Perth Hills and Albany. According to an extract from the Bibbulmun Track Foundation website, which is in evidence, it takes six to eight weeks on average to walk the whole of the

[1] Witness statement of Melanie Price dated 11 May 2018 (Exhibit 26) [29].

Bibbulum Track, although 'many people choose to walk on the Track for much shorter periods'.[2]

9 The Bibbulmun Track adjoins a small section of the northern boundary of the site at its eastern end and a section of the eastern boundary of the site at its northern end, before turning south-east towards the Nullaki campsite. The Nullaki campsite is one of 49 campsites located along the route of the Track and is situated about 300 metres from the eastern boundary of the site. South of the Nullaki campsite, the Bibbulmun Track runs adjacent to the eastern boundary of the site, generally 200 metres to 300 metres from that boundary, although in one part almost touching the boundary. The area proposed for limestone extraction in the development application is about 400 metres from the closest point of the Bibbulmun Track and about 1.5-1.6 kilometres from the Nullaki campsite.

Proposed development

10 The proposed development involves the extraction of approximately 1,000,000 tonnes of limestone from the site, initially at the rate of about 20,000 tonnes per year and ultimately at the rate of about 50,000 tonnes per year. The proposed limestone extraction area is in the south-eastern part of the site (proposed limestone pit or extraction area). The proposed limestone pit is set back a little over 200 meters from the coastal Conservation Reserve to the south and, at its closest point, is about 60 metres from the eastern boundary of the site. The development application originally proposed that the limestone pit would have an area of 10 hectares and that the extraction of limestone would take place in four stages. The development application also originally proposed the location of a stockpile area in the north-eastern part of the site, close to the realigned and constructed Lee Road extension. However, the development application was amended to reduce the area of the proposed limestone pit from 10 hectares to eight hectares (with extraction taking place in three, rather than four stages) and to delete the separate stockpile area. Stockpiles of extracted material are now proposed to be located within the limestone pit itself.

11 The proposed development (including the movement of trucks in and out of the site) is to operate during only four months of the year, from 1 December to 31 March, and during that period is to be restricted to the hours of 7.00 am to 5.00 pm on Monday to Friday and 8.00 am to 5.00 pm on Saturday, with no operation on Sunday or public holidays. Although

[2] Exhibit 47 page 2.

the proposed limestone pit has an area of eight hectares, a maximum of three hectares would be open for extraction and storage of extracted material at any one time. The proposed development also includes progressive rehabilitation of the limestone pit. As indicated earlier, part of the site was used as a limestone quarry between 2002 and 2006. As also indicated earlier, that part of the site is included within the proposed limestone pit in the development application.

12 The form, location and staging of the proposed development was designed by Mr Lindsay Stephens, who is an environmental and quarrying consultant with 45 years' experience and who holds academic qualifications in geology, geomorphology and botany. Mr Stephens was called to give evidence by the applicant. As Mr Stephens explained in evidence, he completed detailed field work on the site in May 2016 and selected the area of the proposed limestone pit, 'because limestone had been extracted from an existing quarry on the same site' and evidence 'demonstrates that rehabilitation of the disturbed areas is of a high standard',[3] and because the pit and associated facilities could be located and designed so as to 'minimise or negate impact on the local community and environment'.[4] Mr Stephens gave the following evidence, which was not questioned or contradicted, and which we accept:[5]

> I was asked to go and look at the pit, the resource and see if they could have a limestone resource there. I looked at the site. I - the highest grade limestone is actually on the ridges, and the squall limestone tends to be of lower grade. The reason that the higher grade limestone is on the ridge is because it's more - it has a higher calcium carbonate content, it's more resistant to erosion, so it gets left as a ridge.
>
> So to maximise the resource you actually want to take all the ridges, but that's not - you have to make decisions. So then I looked at the site. So knowing that we needed to take part of the ridge at least, but you have to leave the ridge in place, so that from a visual amenity point of view. So the pit was selected to sit behind the ridge, and I creeped it on - crept it on to the top of the ridge to about the extent that you could manage the visual management without seeing the quarry and the operations, but leaving the ridge in place. So I tried to maximise the resource, but, at the same time, minimise the impact.
>
> The reason for leaving the eastern and northern faces and the ridges in place was to minimise noise, dust, visual.

[3] Witness statement of Lindsay Stephens dated 11 May 2018 (Exhibit 27) [15].
[4] Witness statement of Lindsay Stephens dated 11 May 2018 (Exhibit 27) [17].
[5] ts 295, 16 August 2018.

…

> So it was quite deliberate to establish the quarry in that location, so you could come in from the left-hand side or the southern edge behind the ridge. That was done very deliberately. It wasn't just an afterthought. It was done deliberately. And that's generally in the context of it. And that's how you typically operate a quarry like this.

13 The proposed development also includes a sealed haul road for trucks accessing the proposed extraction area which would traverse an existing firebreak along the eastern boundary of the site. At the northern end of the proposed haul road, where it would intersect with the proposed realignment and construction of Lee Road (currently an unmade public road in the vicinity of the site), the haul road would be 74 metres south of where the Bibbulmun Track turns south-east away from the eastern boundary of the site and towards the Nullaki campsite. The section of the Bibbulmun Track to the south of the Nullaki campsite is generally set back 200 metres to 300 metres from the location of the proposed haul road. However, as indicated earlier, at one point, the Bibbulmun Track almost touches the eastern boundary of the site, along which the proposed haul road would run.

14 The transport route from the constructed haul road on the site proposed in the development application is via Lee Road, Browns Road, Lake Saide Road and Lower Denmark Road. Lee Road is currently only constructed to a gravel finish to a point approximately 1.25 kilometres east of the site's eastern boundary, although the gazetted road reserve of Lee Road extends to the eastern boundary of the site. It is common ground between the parties - and the Tribunal concurs - that from a flora preservation perspective, it would be preferable to realign Lee Road to the south, as it approaches the eastern boundary of the site, rather than to construct Lee Road along the currently gazetted road reserve to the eastern boundary of the site. The proposed realignment of the Lee Road road reserve would also mitigate the impact of Lee Road on the Bibbulmun Track, by relocating its western end further to the south, that is away from the Bibbulmun Track where it adjoins the eastern boundary of the site at its northern end.

15 The development application proposes the sealing of the entirety of the transport route, at the applicant's cost, after the first year of commercial operation of the development. Furthermore, the City commissioned an independent traffic and road safety report from Cardno (WA) Pty Ltd (Cardno), which is a consultancy specialising in land development engineering, environmental engineering, transport

planning, traffic engineering and project management (Cardno report). The Cardno report was prepared by Mr Sam Laybutt, who is a traffic engineer with 10 years' experience and a Senior Road Safety Auditor and who is employed as Team Leader - Transport Engineering and Road Safety by Cardno. Mr Laybutt gave evidence that, if the proposed development were to be approved, 'a series of road upgrades would be required to accommodate the volume and characteristics of the traffic generated by the proposed development and its haulage operations'.[6] Mr Laybutt identified specific road upgrades that would be required in relation to Lee Road, Browns Road, Lake Saide Road and Lower Denmark Road. Mr Laybutt gave a 'very preliminary order of magnitude cost estimate for constructing the full recommended road upgrades … in the region of $2.5 million to $3.0 million'.[7] At the Tribunal's direction, Mr Fred Wallefeld, who is a civil engineer with over 10 years' experience and who was called to give evidence by the applicant, conducted a conferral with Mr Laybutt, and Mr Wallefeld and Mr Laybutt prepared and filed a joint statement in which they agree that the 'upgrades to the proposed haulage route are necessary to accommodate the traffic generated by the proposed development'.[8] The draft, 'without prejudice' conditions of approval, filed by the City at the direction of the Tribunal, require that the agreed upgrades to the transport route be carried out by the applicant at his cost, and the applicant accepts those conditions.[9]

16 It is common ground that the necessary upgrades to the transport route to accommodate the traffic generated by the proposed development would require the removal of some native vegetation. Mr Laybutt undertook a detailed consideration of the amount of vegetation that would need to be removed in order to carry out the road upgrades that he recommends (and the applicant agrees to). At the Tribunal's direction, Mr Laybutt and Mr Stephens conferred and provided a joint statement in which they agree that 'the likely clearing of native vegetation for the haul road and parking bay on [the site] is anticipated to be around 1.0 [hectare]'[10] and that 'the amount of clearing of native vegetation along the public road transport route is likely to be around 1.6 hectares, based on the road requirements suggested by Sam Laybutt in his witness statement'.[11]

[6] Witness statement of Sam Laybutt dated 10 May 2018 (Exhibit 2) [48].
[7] Witness statement of Sam Laybutt dated 10 May 2018 (Exhibit 2) [54].
[8] Joint statement of Fred Wallefeld and Sam Laybutt dated 17 May 2018 (Exhibit 22) [7].
[9] See conditions 14-16 in Attachment A to these reasons.
[10] Joint statement of Lindsay Stephens and Sam Laybutt dated 30 August 2018 (Exhibit 38) [9].
[11] Joint statement of Lindsay Stephens and Sam Laybutt dated 30 August 2018 (Exhibit 38) [6].

Advertising and determination of proposed development by the Council

17 The proposed development was advertised by the City to landowners in the area and notified the government agencies. Six submissions were received in support of the proposed development, largely on the basis of the lack of adequate local production of agricultural limestone within the Great Southern Region and contending that the proposal would have minimal environmental impacts. Sixty-nine public submissions objected to the development application on a range of grounds, principally relating to contentions of non-compatibility with the Conservation zone and adverse impacts on amenity, environment and traffic. A number of submissions were also received by the City from government agencies and public bodies.

18 At its meeting on 26 September 2017, the Council unanimously refused to grant development approval for the proposed development for the following reasons:[12]

> (1) The proposal does not satisfy the following matters to be considered as identified in Schedule 2, Part 9, Clause 67 of the *Planning and Development (Local Planning Schemes) Regulations 2015*, namely;
>
> (a) the aims and provisions of this Scheme and any other local planning scheme operating within the Scheme area;
>
> (b) the requirements of orderly and proper planning including any proposed local planning scheme or amendment to this Scheme that has been advertised under the *Planning and Development (Local Planning Schemes) Regulations 2015* or any other proposed planning instrument that the local government is seriously considering adopting or approving[;]
>
> (n) the amenity of the locality including the following -
>
> (i) environmental impacts of the development;
>
> (ii) the character of the locality;
>
> (iii) social impacts of the development;
>
> (y) any submissions received on the application;
>
> (za) the comments or submissions received from any authority consulted under clause 66[.]

[12] Exhibit 10 tab 20.

(2) The proposal does not comply with the general objectives of the Conservation Zone, and also the objectives contained within Schedule 12 - Conservation Zone Provisions No. CZ1 of Local Planning Scheme No.l.

Planning framework

19 As indicated earlier, the site is zoned 'Conservation' and, in particular, is within CZ1 'Nullaki Peninsula Conservation zone' in Sch 12 of LPS 1. The objectives of the Conservation zone are stated in cl 4.2.18 of LPS 1 as follows:

(a) Provide for residential uses upon large lots adjoining significant environmentally sensitive areas such as coastal or conservation areas where there is a demonstrated commitment to protecting, enhancing and rehabilitating the flora, fauna and landscape qualities of the particular site; and

(b) Require innovative subdivision design and development controls to:

(i) Minimise visual impacts from subdivisional infrastructure, particularly roads;

(ii) Restrict access to any sensitive areas such as beaches, conservation areas or National Parks that adjoin the zone;

(iii) Prevent land uses and development that would adversely impact on the ecological values of the site for conservation purposes; and

(iv) Provide for the safety of future residents from the threat of wild fire [sic].

20 Clause 4.3.1 and cl 4.3.2 of LPS 1 state as follows:

4.3.1 The Zoning Table (Table 1) indicates, subject to the provisions of the Scheme, the uses permitted in the Scheme area in the various zones. The permissibility of any of the uses is determined by cross reference between the list of use classes on the left hand side of the Zoning Table and the list of zones at the top of the Zoning Table.

4.3.2 The symbols used in the cross-reference in the Zoning Table have the following meanings:

'P' Means that the use is permitted by the Scheme providing the use complies with the relevant development standards and the requirements of the Scheme;

'D' Means that the use is not permitted unless the Local Government has exercised its discretion by granting planning approval;

'A' Means that the use is not permitted unless the Local Government has exercised its discretion by granting planning approval after giving special notice in accordance with clause 9.4;

'X' Means a use that is not permitted by the Scheme.

21 However, the Zoning Table of LPS 1 does not prescribe the permissibility of land uses in the Conservation zone in the manner contemplated in cl 4.3.1 and cl 4.3.2 of the Scheme. Rather, the Zoning Table states as follows in relation to the Conservation zone:

> All land use and development to comply with clause 5.5.14 and Schedule 12.

22 Clause 5.5.14 of LPS 1 contains general provisions in relation to development in the Conservation zone which are not relevant to the proposed development.

23 The objectives of the CZ1 zone are stated in cl 2.1 in Sch 12 as follows:

> The purpose of CZ1 is to:
>
> (a) Protect, enhance and rehabilitate the flora, fauna and landscape qualities of the Nullaki Peninsula;
>
> (b) Provide for controlled public access to the Peninsula, the Wilson Inlet Foreshore and Anvil Beach; and
>
> (c) Provide for limited wilderness retreat subdivision and development in a manner that is compatible with the conservation values of the Nullaki Peninsula.

24 Clause 3 of Sch 12 of LPS 1 in relation to the CZ1 zone concerns land use and states as follows:

> 3.1 Within Conservation Zone Area No. 1 the following uses shall be permitted subject to the Special Approval of the Local Government:
>
> • Caretakers [sic] Accommodation (maximum floor area 150m^2), which is to be co-located with the main dwelling or located between the main dwelling and the main access point to the lot and utilised shared access. As a

> minimum, applications for development of caretakers' [sic] accommodation must -
>
> (a) Meet the objectives of the zone, and
>
> (b) Be subject to the prior or concurrent approval of the Development Area for the main dwelling, and
>
> (c) Demonstrate provision of security and management benefit to the property, and
>
> (d) Comply with all provisions relevant to Development Areas [sic] and the development of a dwelling, and
>
> (e) Be contained within a maximum one hectare combined Development Area as per provisions 4.1 and 4.2.
>
> (f) Subdivision or strata titling to provide separate title to caretakers [sic] accommodation will not be permitted.
>
> (g) [sic] Single House
>
> 3.2 The following uses may be permitted subject to the Special Approval of the Local Government:
>
> • Home Occupation; and
>
> • Other incidental or non defined activities considered appropriate by the Local Government which are consistent with the objectives of the Zone.
>
> 3.3 The following uses are not permitted with [sic] the Conservation Zone Area No. 1:
>
> • Holiday Accommodation;
>
> • Tourist Accommodation; and
>
> • Relocated Dwelling[.]

25 It is common ground - and clearly the case - that reference to 'Single House' as par (g) of cl 3.1 involves a formatting error and that 'Single House' should be identified as a second bullet point within cl 3.1, rather than as par (g). Further, it is common ground - and clearly the case - that the proposed extractive industry development does not fall within cl 3.1. Issue 1 in this proceeding is whether the proposed development is

capable of approval under LPS 1 and turns on the proper interpretation of cl 3.2 and cl 3.3 of Sch 12 of LPS 1 in relation to the CZ1 zone.

26 Clause 4 of Sch 12 of LPS 1 in relation to the CZ1 zone sets out various development standards and requirements, which include the following:

> 4.3 The Development Area refers to the area within which all development on each lot (including the main dwelling, caretaker's accommodation, sheds, water storage, low fuel area and effluent disposal areas) must be confi[n]ed and is not to exceed one hectare.
>
> …
>
> 4.5 Prior to the issue of development approval, the Local Government shall require landowners to submit a comprehensive professional assessment of the selected Development Area and proposed access way/driveway in accordance with the Environmental Protection Authority *Guidance Statement No. 51 - Terrestrial Flora and Vegetation and No. 56 Terrestrial Fauna Surveys for Environmental Impact Assessment in Western Australia* to determine the presence of rare, endangered and/or threatened flora or fauna species, and an archaeological assessment for the presence of potential Aboriginal sites. Should such species or sites be identified, the Local Government shall require the selection of an alternative Development Area or the modification of the Development Area so as to protect said sites or rare, endangered and/or threatened species.
>
> 4.6 The selected development area on a lot shall be sited in consultation with the Local Government and shall achieve the following criteria:
>
> (i) Provide for minimum setbacks of:
>
> …
>
> • 200 metres from the coastal foreshore reserve;
>
> …
>
> (v) Be located off significant ridgelines and preferably within sheltered well vegetated swales;
>
> …
>
> 4.7(i) Applications for approval of development areas shall be accompanied by a photographic assessment demonstrating that the proposed development area and the buildings proposed

> thereon, will blend in with the visual landscape in terms of height and rooflines, colouring/toning and form and scale, and will not dominate a land based view when viewed from Anvil Beach Lookout, a public roadway, a foreshore node or the foreshore, the coastal walk trail and/or the Ocean Beach Lookout.
>
> …

27 Clause 67 of the deemed provisions in local planning schemes (including LPS 1) set out in Sch 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015* (WA) (LPS Regs) (deemed provisions) states, in part, as follows:

> In considering an application for development approval the local government is to have due regard to the following matters to the extent that, in the opinion of the local government, those matters are relevant to the development the subject of the application -
>
> (a) the aims and provisions of this Scheme and any other local planning scheme operating within the Scheme area;
>
> (b) the requirements of orderly and proper planning including any proposed local planning scheme or amendment to this Scheme that has been advertised under the *Planning and Development (Local Planning Schemes) Regulations 2015* or any other proposed planning instrument that the local government is seriously considering adopting or approving;
>
> (c) any approved State planning policy;
>
> …
>
> (g) any local planning policy for the Scheme area;
>
> …
>
> (m) the compatibility of the development with its setting including the relationship of the development to development on adjoining land or on other land in the locality including, but not limited to, the likely effect of the height, bulk, scale, orientation and appearance of the development;
>
> (n) the amenity of the locality including the following -
>
> (i) environmental impacts of the development;
>
> (ii) the character of the locality;
>
> (iii) social impacts of the development;

(o) the likely effect of the development on the natural environment or water resources and any means that are proposed to protect or to mitigate impacts on the natural environment or the water resource;

…

(s) the adequacy of -

(i) the proposed means of access to and egress from the site; and

(ii) arrangements for the loading, unloading, manoeuvring and parking of vehicles;

(t) the amount of traffic likely to be generated by the development, particularly in relation to the capacity of the road system in the locality and the probable effect on traffic flow and safety;

…

(w) the history of the site where the development is to be located;

(x) the impact of the development on the community as a whole notwithstanding the impact of the development on particular individuals;

(y) any submissions received on the application;

(za) the comments or submissions received from any authority consulted under clause 66;

(zb) any other planning consideration the local government considers appropriate.

28 Clause 2 of the deemed provisions states as follows:

Where a local planning strategy for the Scheme area has been prepared by the local government in accordance with the *Planning and Development (Local Planning Schemes) Regulations 2015* Part 3 the local planning strategy sets out the long-term planning directions for the Scheme area.

29 Furthermore, cl 1.4.2 of LPS 1 states as follows:

The Scheme is to be read in conjunction with the Albany Local Planning Strategy (ALPS).

30 The site and the Nullaki Peninsula generally is identified as a 'Conservation' area in the *Albany Local Planning Strategy* (ALPS).

The site is additionally identified in the ALPS as an area of remnant vegetation. The site is not identified in the ALPS as a site for limestone extraction or any other form of extractive industry.

31 On 31 October 2017, the Council resolved to prepare and advertise Amendment No. 29 to LPS 1 (Amendment 29). Amendment 29 is an omnibus amendment of LPS 1, which includes the following proposed amendments to Sch 12 in relation to the CZ1 zone:

> Amend the text at schedule 12, clause 3.2, dot point 2 by deleting the text "or non defined".
>
> Amend the text at schedule 12, by deleting clause 3.3 and replacing with the following text:
>
> > "3.3 All other land uses, other than those listed in cl.3.1 and 3.2 above, are 'X' not permitted with CZ1."

32 Advertising of Amendment 29 took place between 12 January 2018 and 1 March 2018. At its meeting on 27 March 2018, the Council adopted Amendment 29 and submitted it to the Commission and, ultimately, to the Minister for Planning (Minister) for the approval of the Minister under s 87(1) of the PD Act.

33 When listing this matter for hearing, Judge Parry directed that there be evidence from an officer of the Commission in relation to the status of Amendment 29. In accordance with this order, the City filed a witness statement of Ms Cate Gustavsson, who is an officer of the Department of Planning, Lands and Heritage (DPLH) and holds the position of Senior Planning Officer in the Great Southern Regional Land Use Planning team of DPLH. Ms Gustavsson was not required for cross-examination. In her witness statement, Ms Gustavsson said that she is the reporting officer for Amendment 29 and that Amendment 29 was scheduled to be considered by the Statutory Planning Committee of the Commission at its meeting to be held on 14 August 2018. Ms Gustavsson also gave the following evidence:[13]

> The [Statutory Planning Committee] will consider the amendment documents and make any recommendations to the Minister for Planning in respect of the amendment that the Commission considers appropriate; and then submit the documents and the recommendations to the Minister for Planning.

[13] Witness statement of Cate Gustavsson dated 2 August 2018 (Exhibit 17) [8].

34 The hearing of this matter commenced on 14 August 2018 and proceeded for three days. The matter was then adjourned to a view on 4 September 2018, and for the conclusion of the evidence and final submissions on 12 and 13 September 2018.

35 At the commencement of the reconvened hearing on 12 September 2018, we asked Mr D F Nicholson, counsel for the City, whether there was any further information available in relation to Amendment 29 and, in particular, whether the recommendation of the Statutory Planning Committee, referred to in Ms Gustavsson's witness statement, was available. Mr Nicholson indicated that the City's officers had been 'informally' advised that the Statutory Planning Committee had considered Amendment 29 at its meeting on 14 August 2018 and had made a recommendation in relation to it to the Minister, but 'because it was dealt with as a confidential matter … they didn't publish minutes of the recommendation that was made'.[14] Mr Nicholson invited the Tribunal to make an order, under s 35 of the *State Administrative Tribunal Act 2004* (WA) (SAT Act), requiring the Commission to provide to the Tribunal the minutes of the recommendation of the Statutory Planning Committee to the Minister in relation to Amendment 29. That application was joined in by Mr K de Kerloy, counsel with Mr P Keeves on behalf of the applicant, who also made an application for an order, under s 35 of the SAT Act, for any letter to the Minister concerning the recommendation to also be provided by the Commission to the Tribunal.

36 On 12 September 2018, we made the following orders:

> (1) Pursuant to s 35(1) of the *State Administrative Tribunal Act 2004* (WA) the Western Australian Planning Commission is to file with the Tribunal by 10.00 am on 13 September 2018 the following documents, marked for the urgent attention of Judge Parry's Associate:
>
> (a) minutes of the recommendation of the Statutory Planning Committee to the Minister for Planning in relation to Amendment 29 to the City of Albany Local Planning Scheme No 1;
>
> (b) any letter to the Minister for Planning concerning such recommendation; and

[14] ts 469, 12 September 2018.

> (c) if known, the date by or on which the Minister is expected to consider any such recommendation.
>
> (2) The Western Australian Planning Commission has leave to seek any variation to the preceding order at the commencement of the hearing of this matter at 10.00 am on 13 September 2018.

37 At 10.00 am on 13 September 2018, Dr S J Willey appeared on behalf of the Commission and produced the document required by par (a) of order 1 made on 12 September 2018 to the Tribunal. Dr Willey indicated that no document existed in terms of par (b) of order 1 made on 12 September 2018. Dr Willey submitted that the information sought by par (c) of order 1 made on 12 September 2018 does not 'fall within the scope of section 35, and in any event, we have no instructions when the Minister is likely to consider this matter in terms of for final approval or otherwise'.[15]

38 Dr Willey also, in effect, made an application for the order made under s 35(1) of the SAT Act on 12 September 2018 to be varied so that the document produced in accordance with par (a) of that order may be viewed by the Tribunal only and is not be provided to the parties, their legal representatives or witnesses. This application was made on the basis that the minutes of the recommendation of the Statutory Planning Committee to the Minister is 'exempt matter' and therefore 'protected matter' for the purposes of s 3 of the SAT Act. That application was dismissed: ***Robertson and City of Albany*** [2018] WASAT 138. However, on the basis that the publication of the recommendation of the Statutory Planning Committee to the Minister is 'confidential information' and 'information the publication of which would be contrary to the public interest' (within the meaning and for the purposes of s 61(4)(g) of the SAT Act), Judge Parry ordered, under s 61(2) and s 61(4)(g) of the SAT Act, that the part of the proceeding concerning the recommendation by the Commission to the Minister concerning Amendment 29 'is to be held in private and only the parties' legal representatives and town planning expert witnesses may be present'.

39 On 14 September 2018, Judge Parry made a corresponding non-publication order, under s 62(3) and s 61(4)(g) of the SAT Act, that the recommendation by the Commission to the Minister concerning Amendment 29 'is not to be published by the Tribunal or any party other than in the parties' addenda to their closing submissions in writing'.

[15] ts 575, 13 September 2018.

40 In determining 'the correct and preferable decision at the time of the decision upon the review' under s 27(2) of the SAT Act, we have had regard to the recommendation by the Statutory Planning Committee of the Commission to the Minister. In accordance with the non-publication order, we will not refer to that recommendation in these reasons.

Issues for determination

41 The following seven issues arise for determination in this review:

1. Whether the proposed development is capable of approval under LPS 1.

2. Whether the proposed development is consistent with orderly and proper planning.

3. Whether the proposed development would have an unacceptable impact on the amenity and character of the locality as a Conservation zone.

4. Whether the proposed development would have an unacceptable impact on the natural environment.

5. Whether the traffic generated by the proposed development would exceed the capacity of the road system in the locality or have an adverse affect on traffic flow and safety.

6. Whether the proposed variation of development standards and requirements applicable under Sch 12 of LPS 1 would have an adverse impact upon the inhabitants of the locality or the likely future development of the locality for the purposes of cl 5.2.3(b) of LPS 1.

7. Whether the Bushfire Management Plan submitted by the applicant adequately addresses bushfire risk.

42 However, it is common ground between the parties - and we agree - that for reasons discussed below, issue 5 (traffic impact) and issue 7 (bushfire risk) have been satisfactorily addressed by expert evidence and draft conditions of approval proposed by the City on a 'without prejudice' basis and agreed to by the applicant.

43 We will now address each of the issues in turn.

Is the proposed development capable of approval under LPS 1?

44 The City submits that 'the proposed development is not capable of approval under the relevant provision (cl 3) governing use permissibility within CZ1 as it is not a use specified as permissible within that zone'.[16] The City also submits that this interpretation is supported by 'the legislative history of the Nullaki Peninsula Conservation Zone' as part of the 'context' within which the provisions of cl 3 of Sch 12 in relation to CZ1 are to be interpreted.[17] In contrast, the applicant submits that the proposed development is capable of development approval under LPS 1, because it is a 'non defined activity' within the meaning of the second bullet point to cl 3.2 of Sch 12 in relation to CZ1 and, in any case, because it is not included in the specified uses which 'are not permitted with [sic] the Conservation Zone Area No. 1' in cl 3.3 of Sch 12 in relation to CZ1.

45 As indicated earlier, under cl 3.1 of Sch 12 in relation to CZ1, 'Caretakers [sic] Accommodation (maximum floor area 150m^2)' and 'Single House' are 'uses [which] shall be permitted subject to the Special Approval of the Local Government' within CZ1. The proposed development is clearly not a use which 'shall be permitted subject to the Special Approval of the Local Government' under cl 3.1.

46 As also indicated earlier, cl 3.2 and cl 3.3 of Sch 12 of LPS 1 in relation to CZ1 state as follows:

> 3.2 The following uses may be permitted subject to the Special Approval of the Local Government:
>
> - Home Occupation; and
> - Other incidental or non defined activities considered appropriate by the Local Government which are consistent with the objectives of the Zone.
>
> 3.3 The following uses are not permitted with [sic] the Conservation Zone Area No. 1:
>
> - Holiday Accommodation;
> - Tourist Accommodation; and
> - Relocated Dwelling[.]

[16] City's closing submissions [5].
[17] City's closing submissions [55].

47 The principles in relation to the proper interpretation of provisions of local planning schemes were set out by the Tribunal in ***Paintessa Developments Pty Ltd and Town of East Fremantle*** [2014] WASAT 81; (2014) 85 SR (WA) 312 as follows at [20]-[21]:

> Under s 87(4) of the PD Act, [a local planning scheme] 'has full force and effect as if it were enacted by [the Planning Act]'. The Court of Appeal has recently said the following in relation to statutory interpretation:
>
> > The High Court of Australia has iterated, and reiterated, that the starting point and ending point for the task of statutory construction is the statutory text. The context, including legislative history and extrinsic materials, has utility only to the extent that it assists in fixing the meaning of the statutory text: *Thiess v Collector of Customs* [2014] HCA 12 [22] (the court); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 87 ALJR 98, 107 [39] (the court); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27, 46-47 [47] (Hayne, Heydon, Crennan & Kiefel JJ). The duty of a court is to give the words of the statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, but not universally, that meaning will correspond with the grammatical meaning of the provision: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 [78]. (*City of Kwinana v Lamont* [2014] WASCA 112 at [47]).
>
> In giving the words of a planning scheme the meaning that the maker of the scheme is taken to have intended them to have, the terms of the planning instrument:
>
> > … will ordinarily be construed in a manner which acknowledges that planning schemes are largely the work of town planners, not parliamentary counsel; ergo, they should be read as a whole and applied in a practical and commonsense, and not an overly technical way, and in a fashion which will best achieve their evident purpose.
>
> (*Chiefari v Brisbane City Council* [2005] QPELR 500 at 502 (Wilson J); referred to by the Tribunal in *Galloway and Associates and City of Melville* [2007] WASAT 238 at [41]).

48 Applying these principles of interpretation, in our view, the proposed development is capable of approval under LPS 1. We accept the City's submission that the proposed development is not a 'non defined

activity' within the meaning of cl 3.2 of Sch 12 of LPS 1 in relation to CZ1. The applicant submits that:[18]

> Where the activity (i.e. extraction of lime) is not mentioned in cl 3 of CZ1, it falls within the phrase 'non defined activities' and is properly characterised as a non defined activity. Accordingly, it is to be dealt with under cl 3.2 of CZ1.

49 However, as the City submits, reading the expression 'non defined activities' in the context of the Scheme as a whole, this expression clearly refers to activities which are 'not "defined" in the manner set out in cl 1.7 of LPS 1'.[19] In particular, cl 1.7.1 of LPS 1 states as follows:

> Unless the context otherwise requires, words and expressions used in the Scheme have the same meanings as they have:
>
> (a) In the *Planning and Development Act 2005*; or
>
> (b) If they are not defined in that Act:
>
> (i) In the Dictionary of defined words and expressions in Schedule 1; or
>
> (ii) In the *Residential Design Codes*.

50 The 'Dictionary of defined words and expressions in Schedule 1' of LPS 1 (referred to in cl 1.7.1(b)(i) of the Scheme) includes the following 'land use definition' in Pt 2 of that Schedule:

> **industry - extractive** means an industry which involves the extraction, quarrying or removal of sand, gravel, clay, hard rock, stone or similar material from the land and includes the treatment and storage of those materials, or the manufacture of products from those materials on, or adjacent to, the land from which the materials are extracted, but does not include industry - mining[.]

51 The proposed development plainly falls within the defined meaning of the term 'industry - extractive'. It is, therefore, not a 'non defined activity' within the meaning of cl 3.2 of Sch 12 of the Scheme in relation to the CZ1 zone.

52 However, in our view, the proposed development is capable of approval under LPS 1, because it is not included in the specified 'uses [which] are not permitted with[in] the Conservation Zone Area No. 1' in the bullet points in cl 3.3 of Sch 12 in relation to CZ1. As the applicant

[18] Applicant's closing submissions [28].
[19] City's closing submissions [24].

submits, it is contextually relevant to contrast the specified and limited list of 'uses [which] are not permitted' in CZ1, set out in cl 3.3 of Sch 12 in relation to CZ1, with the terms of the equivalent clauses concerning 'not permitted' land use in Sch 12 of LPS 1 in relation to each of the other two nominated Conservation zones under LPS 1, namely CZ2 'Rainbows End, Big Grove Conservation zone' (CZ2) and CZ3 'Torbay Beach Road, Kronkup Conservation zone' (CZ3). In relation to CZ2, following cl 3.1 (which states that 'Single House' is a '"P" permitted [use]' in that zone) and cl 3.2 (which states that five specified uses 'are "D" discretionary uses' in that zone), cl 3.3 states as follows:

> All other land uses, other than those listed in 3.1 and 3.2 above, are 'X' not permitted within CZ2.

53 Similarly, in relation to CZ3, following cl 3.1 (which states that 'Single House' is a '"P" permitted [use]' in that zone), cl 3.2 (which states that five specified uses 'are "D" discretionary uses' within that zone) and cl 3.3 (which states that the Council 'may permit chalet/cottage units' on Lot 5 as shown on the Subdivision Guide Plan), cl 3.4 states as follows:

> All other land uses, other than those listed in 3.1-3.3 above, are 'X' not permitted within CZ3.

54 Clause 3.3 of Sch 12 in LPS 1 in relation to CZ1 is expressed in significantly different terms to cl 3.3 of Sch 12 in relation to CZ2 and cl 3.4 of Sch 12 in relation to CZ3, because it specifically nominates only three land uses which 'are not permitted' in CZ1, whereas the equivalent clauses in relation to CZ2 and CZ3 expressly prohibit '[a]ll other land uses, other than those listed in [the earlier provisions of cl 3]'. As the applicant submits:[20]

> The absence of any similar statement in CZ1 [to the statement in cl 3.3 in relation to CZ2 and cl 3.4 in relation to CZ3] supports the conclusion that it was not intended to generally prohibit all other land uses or activities except for the land uses or activities specified in cll 3.1 and 3.2 of CZ1 of Schedule 12.

55 The City's proposed interpretation of cl 3 of Sch 12 of LPS 1 in relation to CZ1, under which the proposed development is not capable of development approval under LPS 1, ultimately involves 'reading in[to]' cl 3.3 of Sch 12 in relation to CZ1 the prohibition of 'industry - extractive' or 'all other uses, other than those listed in cl 3.1 and cl 3.2' as in the 'catch all' prohibitions in cl 3.3 of CZ2 and cl 3.4 of CZ3. However, as

[20] Applicant's closing submissions [11].

Spigelman CJ observed in ***R v PLV*** [2001] NSWCCA 282; (2001) 51 NSWLR 736 at [88]:[21]

> … There are many cases in which words have been *read down*. I know of no case in which words have been *read up*.

56 There is no basis on which to in effect 'read in' (or 'read up') the prohibition of the proposed land use on the site in cl 3.3 of Sch 12 of LPS 1 in relation to CZ1.

57 The City submits that, rather than seeking to 'read in' any additional prohibition or prohibitions in cl 3.3, its 'suggested interpretation of use permissibility' arises by 'reading clauses 3.1, 3.2 and 3.3 in accordance with their terms and by reason of the absence of any other enabling provision permitting the approval of additional uses'.[22] The City's essential submission is that because the proposed use does not fall within cl 3.2 (or cl 3.1), it is not capable of being approved within CZ1. Referring to the definition of the word 'may' in *The Macquarie Dictionary* as 'to have permission to' and 'to be possible', the City submits as follows:[23]

> [I]n accordance with that ordinary grammatical meaning the respondent submits that the intent of clause 3.2 was to set out the uses that were possible or capable of being approved within CZ1, in addition to the uses already stipulated in clause 3.1 as uses that "shall be permitted", and excluding uses specifically not permitted under cl.3.3 to the extent [that] they could be considered to fall within the scope of cl.3.2.

58 We do not accept the City's submission for each of two reasons. First, the City's proposed interpretation of cl 3 necessarily requires, in effect, reading into cl 3.3 a further land use prohibition or prohibitions. Secondly, the City's submission misconstrues the meaning of cl 3.2. That provision identifies 'uses [which] may be permitted subject to the Special Approval of the Local Government'. It does not state or mean that uses which are not referred to in that clause (and are not uses which 'shall be permitted subject to the Special Approval of the Local Government' under cl 3.1 or uses which are 'not permitted' under cl 3.3) are incapable of development approval under LPS 1. The evident purpose of cl 3.2 is *to enable* specified uses to be permitted subject to 'the Special Approval' of the Council, *not to prohibit* the approval of other uses. Furthermore, 'Special Approval' is not the only pathway to development approval recognised by the Scheme. As indicated earlier,

[21] Original emphasis.
[22] City's closing submissions [47].
[23] City's closing submissions [46] (original emphasis).

the Zoning Table of LPS 1 does not prescribe the permissibility of land uses in the Conservation zone in the manner contemplated in cl 4.3.1 and cl 4.3.2 of the Scheme, stating rather that 'All land use and development [is] to comply with clause 5.5.14 and Schedule 12'. However, it is contextually relevant to note that cl 4.3.2 refers to and prescribes the meanings of the following symbols used in relation to other zones in the Zoning Table:

> …
>
> 'P' Means that the use is permitted by the Scheme providing the use complies with the relevant development standards and the requirements of the Scheme;
>
> 'D' Means that the use is not permitted unless the Local Government has exercised its discretion by granting planning approval;
>
> 'A' Means that the use is not permitted unless the Local Government has exercised its discretion by granting planning approval after giving special notice in accordance with clause 9.4;
>
> …

59 Thus, the Scheme recognises the granting of development approval by pathways other than 'Special Approval' of the Council. The fact that the proposed extractive industry use may not be permitted subject to the Special Approval of the Council under cl 3.2 of Sch 12 of LPS 1 in relation to CZ1 does not mean that the proposed use cannot be granted development approval under the Scheme, as development approval other than by 'Special Approval' is recognised by the Scheme.

60 Finally, as indicated earlier, the City refers to the 'legislative history of the Nullaki Peninsula Conservation Zone' as part of the 'context' within which the provisions of cl 3 of Sch 12 of LPS 1 in relation to CZ1 are to be interpreted.[24] The Nullaki Peninsula Conservation Zone was first introduced as Amendment No. 130 (Amendment 130) to the then *City of Albany Town Planning Scheme No. 3* (TPS 3), which was the precursor to LPS 1. In its original proposed and advertised form, Amendment 130 included the following part '2':[25]

> Include a Conservation zone within the Use Class/Zoning Table No 1 and show Residential Dwelling House, Caretakers [sic] House/Flat as "P" uses, Home Occupation as an "AA" use and all other uses as "X" uses.

[24] City's closing submissions [55].
[25] Exhibit 10 tab 26 page 1.

61 Amendment 130 in both its original proposed and advertised form and in its gazetted form, also included inserting Sch 5 in relation to Conservation Zones into TPS 3. In its original proposed and advertised form, cl 3 of Sch 5 contained the following provision in relation to land use in the Conservation Zone Area 1 (which is now CZ1):[26]

> 3.1 Within Conservation Zone Area 1. the following uses are permitted:
>
> - Residential Dwelling House.
> - Caretakers [sic] Accommodation (maximum floor area 150m^2).
>
> 3.2 The following uses may be permitted subject to the Special approval [sic] of Council:
>
> - Home Occupation.
> - *Extractive Industry*
> - Other incidental or non defined activities considered appropriate by Council which are consistent with the objectives of the Zone.

62 However, the gazetted form of Amendment 130 omitted 'Extractive Industry' from the list of uses which 'may be permitted subject to the Special approval of Council' in cl 3.2 of Sch 5. The circumstances in which the use was omitted are referred to in the City's following submission:[27]

> It is also relevant to the interpretation of clause 3 that the initial form of Amendment 130 included the use of "Extractive Industry" as a use that "may be permitted" in the Conservation Zone, however this provision was not supported by the Department of Environmental Protection or by [the Commission] "due to potential adverse impacts on the landscape, flora and fauna". The final form of Amendment 130 as gazetted was modified in accordance with [the Commission] requirements to omit the use of "Extractive Industry" as a use that may be permitted.

63 In particular, the Minister required the following modifications to be made to Amendment 130 for the following reasons before it was gazetted:[28]

[26] Exhibit 10 tab 26 pages 6-7 (emphasis added).
[27] City's closing submissions [59].
[28] Exhibit 10 tab 28 page 3.

NO	MODIFICATION	REASON
10	Provision 3.2 - modify to delete reference to extractive industry as a use that may be permitted or alternatively specifically identify extractive industry sites on the Subdivision Guide Plan and utilise provisions to continue such industries to these specific sites.	Such allowance presents concerns due to potential adverse impacts on the landscape, flora and fauna. If sites are specifically identified impacts can be determined.
11	Include new Provision 3.3 to read: "No development within Conservation Zone Area No 1 may proceed without the Special Approval of Council."	Requested by Council to ensure comprehensive assessment of all development.

64 The Minister also required the following modification to be made to part '2' of Amendment 130 for the following reason before it was gazetted:[29]

2	General Conservation Zone Provisions Modify part "2" to read: "Include a Conservation Zone within the Use Class/Zoning Table and under the Conservation Zone column include the terminology "Refer to Schedule 5."	This will apply to all Conservation zones not only the current proposal and will provide the flexibility to control various uses on a case by case basis, depending on the circumstances prevalent for each Conservation Zone.

65 The City submits as follows:[30]

> What is of significance then is that industry – extractive was specifically required to be removed as a use that "may be permitted", in the absence of any extractive industry sites identified on the Subdivision Guide Plan. That legislative history clearly militates against an interpretation of clause 3.2 that would now permit approval of industry-extractive as a use that may be permitted. The legislative history demonstrates that was not the legislative intent as the use of 'industry – extractive' was removed as

[29] Exhibit 10 tab 28 page 2.
[30] City's closing submissions [60].

> a use that may be permitted in the absence of extractive industry sites being shown on the Subdivision Guide Plan.

66 The City also submits that:[31]

> [The] legislative intent apparent from [Amendment 130 as gazetted] was to limit uses that could be approved to the uses of Residential Dwelling House, Caretakers [sic] Dwelling [sic] and Home Occupation, namely that uses that 'are permitted' and 'may be permitted', with the addition of incidental or non defined activities considered appropriate by Council which are consistent with the objectives of the Zone.

67 However, as the Court of Appeal said in ***City of Kwinana v Lamont*** [2014] WASCA 112 at [47], '[t]he context, including legislative history and extrinsic materials, has utility only to the extent that it assists in fixing the meaning of the statutory text' (citations omitted). As the Court of Appeal also said there, the duty of the Tribunal 'is to give the words of the statutory provision the meaning that the legislature is taken to have intended them to have' and 'the starting point and ending point for the task of statutory construction is the statutory text'.

68 Clause 3 of Sch 12 of LPS 1 in relation to CZ1 must be interpreted in accordance with its terms, read in context. Those terms are different to Amendment 130 to TPS 3. In particular, although Amendment 130 as gazetted appears to have prohibited extractive industry development on the site (by providing in cl 3.3 of Sch 5 of TPS 3 that '[n]o development within Conservation Area No 1 may proceed without the Special Approval of Council' and by not including 'Extractive Industry' in cl 3.1 of Sch 5 of TPS 3, which prescribed uses which 'are permitted', or in cl 3.2 of Sch 5 of TPS 3, which prescribed uses which 'may be permitted subject to the Special approval [sic] of Council', in that area), cl 3.3 of Sch 12 of LPS 1 does not prohibit all land uses, other than those listed in cl 3.1 and 3.2, but rather prohibits only three specified land uses, namely Holiday Accommodation, Tourist Accommodation and Relocated Dwelling, in the CZ1 zone. The proposed land use does not fall within cl 3.1, cl 3.2 or cl 3.3 of Sch 12 of LPS 1 in relation to CZ1. Consequently, it is capable of development approval under LPS 1. In particular, as the proposed use does not fall within cl 3.3, it is not a prohibited use on the site under the Scheme.

[31] City's closing submissions [58].

Is the proposed development consistent with orderly and proper planning?

69 As indicated earlier, cl 67(b) of the deemed provisions states as follows:

> In considering an application for development approval the local government is to have due regard to the following matters to the extent that, in the opinion of the local government, those matters are relevant to the development the subject of the application -
>
> …
>
> (b) the requirements of orderly and proper planning including any proposed local planning scheme or amendment to this Scheme that has been advertised under the *Planning and Development (Local Planning Schemes) Regulations 2015* or any other proposed planning instrument that the local government is seriously considering adopting or approving;
>
> …

70 In ***Marshall v Metropolitan Redevelopment Authority*** [2015] WASC 226 at [179]-[182], Pritchard J considered the meaning of the expression 'orderly and proper planning' and emphasised that an assessment as to whether a proposed development is consistent with orderly and proper planning requires an objective, disciplined, methodical, logical and systematic approach. Her Honour said the following (citations omitted):

> 179 The starting point for determining the meaning of the phrase 'orderly and proper planning' in s 66(1)(d) of the MRA Act is the ordinary and natural meaning of those words. 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 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.

71 The City contends that approval of the proposed development would be contrary to orderly and proper planning for the following two reasons:[32]

> [1] the nature and form of the proposed development is inconsistent with the nature and form of development contemplated by the planning framework; and
>
> [2] the proposed development is likely to impair the effective achievement of the planning objective of Amendment No 29 to LPS 1, which is relevantly to prohibit approval of any uses other than those referred to in clauses 3.1 and 3.2 … .

72 On the evidence before the Tribunal, we consider that the proposed development is consistent with orderly and proper planning, because it is broadly consistent with the objectives and provisions of LPS 1 in relation to the zoning of the site, we consider that only limited weight should be given to the inconsistency between the proposed development and Amendment 29 in the circumstances of this case and the proposed development is consistent with the objective of the PD Act to 'promote the sustainable use and development of land in the State' and a

[32] City's closing submissions [86].

corresponding aim of the Scheme. We have come to these findings for the reasons that follow.

Objectives of the Conservation zone

73 The Scheme sets out objectives for the Conservation zone generally and also for the individual Conservation zone identified in Sch 12. As indicated earlier, cl 4.2.18 of LPS 1 sets out the following objectives of the Conservation zone:

> (a) Provide for residential uses upon large lots adjoining significant environmentally sensitive areas such as coastal or conservation areas where there is a demonstrated commitment to protecting, enhancing and rehabilitating the flora, fauna and landscape qualities of the particular site; and
>
> (b) Require innovative subdivision design and development controls to:
>
> (i) Minimise visual impacts from subdivisional infrastructure, particularly roads;
>
> (ii) Restrict access to any sensitive areas such as beaches, conservation areas or National Parks that adjoin the zone;
>
> (iii) Prevent land uses and development that would adversely impact on the ecological values of the site for conservation purposes; and
>
> (iv) Provide for the safety of future residents from the threat of wild fire [sic].

74 Objective (a) of the Conservation zone indicates that the primary focus of development in the zone is 'residential uses upon large lots'. However, as found earlier, extractive industry is capable of development approval in the CZ1 zone. Furthermore, the circumstances of the site and the location of the proposed development are highly unusual, because the site is a uniquely large property within, and located at the south-eastern end of, the CZ1 zone, and the proposed limestone pit is located in the south-eastern part of the site, with the consequence that the nearest residential property is some 2.3 kilometres away from the proposed pit area.

75 Although objective (b)(i) of the Conservation zone is concerned with '[minimising] visual impacts from subdivisional infrastructure, particularly roads', rather than development more broadly, for reasons set

out at [108]-[128] below, the proposed development does minimise visual impacts not only of the proposed haul road on the site, but also of the development more broadly, particularly and significantly, the proposed limestone pit.

76 The proposed development is consistent with objective (b)(ii) of the Conservation zone to '[r]estrict access to any sensitive areas such as beaches, conservation areas or National Parks that adjoin the zone', because the site is fenced and access to the site would be controlled.

77 For the reasons set out at [132] below, the proposed development is broadly consistent with objective (b)(iii) of the Conservation zone to '[p]revent land uses and development that would adversely impact on the ecological values of the site for conservation purposes'.

78 Furthermore, the proposed development is consistent with objective (b)(iv) of the Conservation zone to '[p]rovide for the safety of future residents from the threat of wild fire [sic]'. This is because the proposed development includes providing a secondary emergency access for the 51 wilderness retreat lots on the Nullaki Peninsula, which currently only have one point of access and egress via Eden Road. As Mr Samuel Williams, who is a consultant town planner with 20 years' experience and who was called by the applicant, described Eden Road, 'it's one long cul de sac' and 'it does not meet the requirements of [*State Planning Policy 3.7 - Planning in Bushfire Prone Areas* SPP 3.7]'.[33] The proposed development includes sealing the firebreak on the northern boundary of the site as well as the firebreak on the eastern boundary in its northern part to where it meets the proposed realigned constructed Lee Road at the eastern boundary of the site. The applicant proposes to provide an easement in gross benefiting the City over the sealed firebreaks abutting the north-eastern and northern boundaries of the site. Therefore, although these parts of the site would remain in private ownership, they would provide a secondary emergency accessway linking the proposed realigned and constructed Lee Road with Rock Cliff Circle, which would be of great benefit in terms of providing for the safety of residents on the Nullaki Peninsula. As Mr William Burrell, who is a consultant town planner with over 40 years' experience and who was also called by the applicant, said in evidence:[34]

[33] ts 585, 13 September 2018.
[34] ts 596, 13 September 2018.

> And the benefit I see from the development of the pit is that you will end up with a circulating system.
>
> You would be able to come in from either direction, and there will be choices, and those choices actually can - even if you can't get out along the roads themselves, you can at least get to a water's edge and find sanctuary as a result of that improved access. So I would see the pit producing - other than the single cul-de-sac, it produces a circulating system, and that's a clear benefit for fire safety. Not fire safety for the pit itself, but fire safety for all the community on the Nullaki.

Objectives of the CZ1 zone

79 As indicated earlier, the objectives of the CZ1 zone are set out in cl 2.1 of Sch 12 of LPS 1 as follows:

> The purpose of CZ1 is to:
>
> (a) Protect, enhance and rehabilitate the flora, fauna and landscape qualities of the Nullaki Peninsula;
>
> (b) Provide for controlled public access to the Peninsula, the Wilson Inlet Foreshore and Anvil Beach; and
>
> (c) Provide for limited wilderness retreat subdivision and development in a manner that is compatible with the conservation values of the Nullaki Peninsula.

80 The City called Mr Joe Algeri, who is a consultant town planner with over 25 years' experience, to give evidence. There was a disagreement between Mr Williams and Mr Burrell, on the one hand, and Mr Algeri, on the other hand, as to whether objectives (b) and (c) of the CZ1 zone are relevant to the proposed development. Mr Burrell considers that objective (c) is relevant to the proposed development, because the word 'development' in the phrase '[p]rovide for limited wilderness retreat subdivision and *development* …'[35] is to be read independently of the words 'limited wilderness retreat subdivision' and:[36]

> … development is a very broad term. It includes clearing, clearing for a house, clearing for driveways, public roads, extractive industries, clearing for agricultural pursuits as well as actively improving the landscape and amenity of the area to achieve the lifestyle advantages that this subdivision was proposing.

[35] Emphasis added.
[36] ts 556, 12 September 2018.

81 Mr Williams expressed the opinion that objective (c) of the CZ1 zone is relevant because:[37]

> … I read this that it's stating it's a limited wilderness retreat. So it's limited in its environmental values. It's not a high class or high quality conservation land. And I also believe that the word development covers what the lime pit extractive industry application is.
>
> …
>
> I believe it makes allowance for development of other uses to be considered, such as a lime pit.

82 In our view, objective (c) of CZ1 is not relevant to the proposed development. As Mr Algeri said, Mr Burrell's opinion in relation to objective (c) involves a misreading of that provision. Objective (c) uses the composite expression 'limited wilderness retreat subdivision and development'. As Mr Algeri said:[38]

> … if the term … [']development['] was meant to be more expansive, then, (c) should have been drafted without the words "limited wilderness retreat". So if it had read "provide for subdivision and development in a manner that is compatible with the conservation values of the Nullaki Peninsula, then, I would read that wholly differently. … But in my reading of (c) is it's referring to subdivision and development in the context of limited wilderness retreat. And I don't read it any other way, your Honour. So, again, I don't believe (c) would be relevant.

83 Furthermore, contrary to Mr Williams' evidence, the word 'limited' is not a reference to 'limited in its environmental values', but rather limited in terms of the scale of wilderness retreat subdivision and development so that such development is compatible with the conservation values of the Nullaki Peninsula.

84 In relation to objective (b) of the CZ1 zone ('Provide for controlled public access to the Peninsula, the Wilson Inlet Foreshore and Anvil Beach'), Mr Williams expressed the opinion that this objective is relevant to the proposed development for the following reason:[39]

> Because the objectives of the [C]onservation zone is to continue to provide for public access, controlling public access. And if a lime pit is going to be on the peninsula, you still need to control public access because you will have to - they will (indistinct) have to have controlled

[37] ts 559, 12 September 2018.
[38] ts 557, 12 September 2018.
[39] ts 558, 12 September 2018.

> public access to the lime pit because the public will be permitted, through truck companies, onto the peninsula.

85 In our view, objective (b) of CZ1 is not relevant to the proposed development, because, as Mr Algeri explained:[40]

> Your Honour, my reading of (b) is that it - there's an objective to promote public access to the peninsula, Wilson Inlet and Anvil Beach. But it uses the words controlled, in my mind, so that that access is simply not unfettered, that it is controlled in some manner. But I don't interpret the word control meaning that there should be some sort of limitation more broadly on access to the peninsula. And I don't understand how that could then be relevant to this application insofar as there will be a private style of development on the land and use of the existing firebreak. I just don't see how that's relevant in any way.

86 Objective (a) of the CZ1 zone is certainly relevant to the proposed development and a key question in this review is whether the proposed development is broadly consistent with the objective to '[p]rotect, enhance and rehabilitate the flora, fauna and landscape qualities of the Nullaki Peninsula'.

87 In relation to flora, the City called and relied on the evidence of Mr Andrew Mack, who is an environmental consultant with over 20 years' experience. Mr Mack expressed the opinion that the 'flora survey data [utilised in the evidence presented by the applicant] is outdated and incomplete'[41] and that the 'clearing of vegetation, its impacts on the ecology and the broader impacts in terms of amenity in my opinion do not present as development that is compatible with the conservation values of the Nullaki Peninsula and the CZ1 area'.[42] Although Mr Mack acknowledged that the proposed development would take place in stages, with a maximum of three hectares open for extraction and storage at any one time, and that the proposed limestone pit would be progressively rehabilitated through the lifetime of the development, he considers that 'you would never get a total rehabilitation' and 'in that sense, there is going to be some permanent change to the environment in this area', with the consequence that the environmental impact of the proposal is 'unacceptable'.[43]

88 The 'flora data' obtained for the purposes of the development application and utilised in the evidence presented by the applicant

[40] ts 560, 12 September 2018.
[41] Witness statement of Andrew Mack dated 11 May 2018 (Exhibit 30) [7.40].
[42] Witness statement of Andrew Mack dated 11 May 2018 (Exhibit 30) [7.41].
[43] ts 337, 16 August 2018.

comprises two survey reports prepared by Ms Kathryn Kinnear and Dr Karlene Bain of the environmental consultancy Bio Diverse Solutions, which is located in Albany.[44] The first Bio Diverse Solutions survey report (dated 19 April 2016) concerns a vegetation community survey undertaken over a 770 hectare area including the site. The report states that this comprised 'broad vegetation mapping, assessment of vegetation condition, weed mapping and disease mapping across the survey area'. The vegetation type and condition mapping was carried out on 6 April 2016 by Dr Bain, who is a botanist. The report states that '[t]he vegetation was assessed in detail using longitudinal transects that strategically targeted the range of diverse ecotypes present on site, as identified using aerial photographs and visual observation'. Flora species 'were systematically recorded and collections of plant specimens were made where further identification was required'. The report acknowledges that '[t]hreatened species were not specifically targeted during survey work', but states that these 'were included in species lists where they were encountered'.

89 The second survey report by Bio Diverse Solutions (dated 4 April 2017) involved a level 1 flora and vegetation survey carried out on 22 March 2017 in relation to the proposed realigned route of Lee Road to the eastern boundary of the site. The survey report states that '[t]he vegetation was assessed in detail using longitudinal transects that strategically targeted the range of diverse ecotypes present onsite, as identified using aerial photographs and visual observation'. As in relation to the earlier survey of the 770 hectare area including the site, flora species were 'systemically recorded and collections of plant specimens were made where further identification was required'.

90 Ms Price, who is an environmental scientist with over 20 years' experience, including the past seven years in the Albany area, independently assessed the two Bio Diverse Solutions survey reports. Ms Price gave the following evidence:[45]

> I am not aware of any environmental standards which would regard surveys conducted and reported on in April 2016 to be out of date in relation to the current application for approval. The land and the vegetation surveyed sits within a stable environment which would not be expected to alter significantly in only a couple of years. In my opinion the surveys conducted by Ms Kinnear in 2016 are a reliable guide to the vegetation and flora of the surveyed area as it exists today.

[44] Exhibit 32.
[45] Witness statement of Melanie Price dated 11 May 2018 (Exhibit 26) [46].

91 Ms Price also gave the following evidence:[46]

> So having reviewed the vegetation documentation, which did include flora surveys, it does appear to me [to] be adequate and comprehensive. I think the author of that document did make the point that there hadn't been some seasonality for, say, threatened flora, but I think the threatened flora that was mentioned later on was potentially orchids, which is probably unlikely that you would find orchids at this site because it doesn't contain suitable habitat, so the risk of that is relatively low.
>
> So in - in that instance, I do believe that the vegetation surveys that I've read are adequate to inform this proposal in terms of their breadth and scope and scale[.]

92 Similarly, Mr Martin Bowman, who is an environmental scientist with 36 years' experience and who was also called by the applicant, gave the following evidence:[47]

> In my belief, the flora surveys are adequate to address the question of impact to the flora and vegetation … of the Nullaki Peninsula. They are extensive over the area, and one factor that I do note - and this has been referred to by my colleague, Ms Price - that the vegetation type in which the pit is to be located is very extensive throughout the Nullaki Peninsula and the reserves to the east. That degree of representation elsewhere is a factor which supports the adequacy of the flora survey.

93 Although Mr Mack maintained that 'a more comprehensive study aligning with a level 2 survey under guidance statement 51 or a detailed survey under the new guidance the EPA has published in 2016'[48] is required in relation to flora 'prior to the grant of [development] approval',[49] in light of the evidence of Ms Price and Mr Bowman set out in the preceding three paragraphs, we find that the flora survey work undertaken for the purposes of the development application is not 'outdated and incomplete' and is certainly adequate to assess whether to grant development approval for the proposed development. We make these findings because Ms Price and Mr Bowman are qualified and experienced environmental scientists who have each independently reviewed the Bio Diverse Solutions reports and the City did not question Ms Price's evidence that '[t]he land and the vegetation surveyed sits within a stable environment which would not be expected to alter significantly in only a couple of years'[50], or Mr Bowman's evidence that

[46] ts 358. 16 August 2018.
[47] ts 357, 16 August 2018.
[48] ts 336, 16 August 2018.
[49] ts 338, 16 August 2018.
[50] Witness statement of Melanie Price dated 11 May 2018 (Exhibit 26) [46].

'the vegetation type in which the pit is to be located is very extensive throughout the Nullaki Peninsula and the reserves to the east'.[51] Although Mr Mack is also a qualified and experienced environmental consultant and maintained that further survey work in relation to flora is required prior to the grant of development approval, he also gave evidence that 'further survey work would be required both from a flora and fauna perspective to support the clearing permit'.[52] A 'clearing permit' is a separate regulatory requirement under the *Environmental Protection Act 1986* (WA) (EP Act) to development approval under the PD Act. At points in his evidence, Mr Mack appeared to conflate development assessment and approval (under the PD Act) and environmental assessment and approval (under the EP Act). For example, Mr Mack sought to refer to the Environmental Protection Authority (EPA) 'guidance on the social impact factor'[53] in relation to the planning assessment of impact on amenity. In our view, although further survey work may be required for assessment of the proposed development under the EP Act, the surveys provided for the purpose of the development application are comprehensive and adequate for the purposes of development assessment.

94 Evidence given by Ms Price and Mr Bowman satisfies the Tribunal that the proposed development is broadly consistent with the objective to '[p]rotect, enhance and rehabilitate the flora … qualities of the Nullaki Peninsula'. They both emphasised the relatively limited scale of the proposed development in the context of a 437 hectare site (and more broadly an area of approximately 6,500 hectares on the Nullaki Peninsula) comprising 'vegetation … areas of similar communities, all of which are in excellent condition' (to quote Ms Price).[54] Although the proposed development would remove the vegetation on and then rehabilitate eight hectares of the site (and also remove one hectare of vegetation for the haul road), this is, as Ms Price said, 'a very small proportion of the total vegetated area' on the site.[55]

95 Furthermore, as Ms Price said, the removal of vegetation in the proposed limestone pit would have a 'transient'[56] and 'temporary impact'.[57] Ms Price gave evidence that the flora quality in the area of the proposed limestone pit 'would materially be of a similar quality after

[51] ts 357, 16 August 2018.
[52] ts 258, 15 August 2018.
[53] ts 279, 15 August 2018.
[54] Witness statement of Melanie Price dated 11 May 2018 (Exhibit 26) [17].
[55] Witness statement of Melanie Price dated 11 May 2018 (Exhibit 26) [17].
[56] ts 237, 15 August 2018.
[57] ts 343, 16 August 2018.

rehabilitation'[58] to its quality before the development is carried out, and that 'there will be no adverse long-term impacts as long as the rehabilitation is carried out'.[59] Ms Price also gave the following evidence:[60]

> … I don't agree that there would be a significant adverse impact due [to] the fact that that vegetation might not be exactly the same as it was before. I would say in that environment that the rehabilitation will return all the key species that were there. There seems to be adequate topsoil that would be available to re-establish those species. And, therefore, the value in terms of flora and fauna diversity and its values to fauna habitat wouldn't be diminished after it has been rehabilitated.

96 Mr Bowman echoed Ms Price's evidence.

97 We accept Ms Price's and Mr Bowman's evidence in relation to this matter, because of their relevant qualifications and experience and also because, as they each observed, the evidence on the site demonstrates that the area used as a limestone quarry between 2002 and 2006 has been successfully rehabilitated in the interim. Ms Price gave the following evidence:[61]

> I understand limestone extraction activities have previously occurred on the same property. When I visited the Site, I observed the former pit, and observed that the area had successfully revegetated and rehabilitated.

98 Mr Bowman gave the following evidence:[62]

> … I have seen examples at the pit site where the rehabilitation is visually indistinguishable from the surrounding vegetation. Also, on the cliff face - sorry, the cut that was established to enable a firebreak to be construct[ed], the revegetation is extremely vigorous there. I believe that the reason for that revegetation success and the potential thereof is because this particular vegetation community is a very, very robust community, consisting of plants that are able to withstand what is a very harsh environment. It's elevated. It's windswept. It is subject to sand blow, saltation, and it is naturally able to regenerate against extreme weather events. Those factors combine to create a vegetation type which is, as I said, robust and able to regrow very effectively.

99 Furthermore, the fact that the proposed limestone pit is in the same area that was used for limestone extraction between 2002 and 2006

[58] ts 344, 16 August 2018.
[59] ts 346, 16 August 2018.
[60] ts 344, 16 August 2018.
[61] Witness statement of Melanie Price dated 11 May 2018 (Exhibit 26) [40].
[62] ts 357, 16 August 2018.

supports our finding that the proposed development is broadly consistent with the objective to '[p]rotect, enhance and rehabilitate the flora … qualities of the Nullaki Peninsula'. The area proposed for extraction is not pristine and unaffected by human development. It was historically used for the very purpose that is the subject of the proposed development. In this regard, we note that the proposal was referred to the EPA for assessment under s 38 of the EP Act and that, on 17 August 2017, the EPA published its decision not to assess the proposal on the basis that it 'is unlikely to have a significant impact on the environment and does not warrant formal assessment' for reasons including that:[63]

> The extent of the clearing footprint is relatively small and the potential impacts have been reduced by utilising cleared and degraded areas. The proposal will impact 11.22 ha [now 9 ha on the site] of native vegetation which are common communities in the region.

100 We are also satisfied that the proposed development is broadly consistent with the objective to '[p]rotect, enhance and rehabilitate the … fauna … qualities of the Nullaki Peninsula'. Ms Price undertook a level 1 fauna survey of the area of the proposed limestone pit and accessway on the site in August 2018. This fauna survey involved a targeted species assessment of the proposed limestone pit, haul road and the proposed realignment of Lee Road to the eastern boundary of the site to determine the status of habitat and presence of significant species. The desktop investigation identified the possible presence of five conservation significant fauna species on the site, namely Forest Red-Tailed Black-Cockatoo, Baudin's Black-Cockatoo, Carnaby's Black-Cockatoo, Western Ringtail Possum and Main's Assassin Spider.

101 Ms Price's site survey found that the vegetation 'is not likely to provide roosting or breeding habitat [for the Black Cockatoos] due to the absence of suitable tree species'.[64] Although some foraging species were found, they occur in low numbers and 'therefore do not represent a significant resource'. In addition, the survey report states that, because of the proposed rehabilitation, 'there is likely to be no net loss of foraging habitat in the medium to long term'.[65]

102 In relation to terrestrial fauna, no dreys or other signs of the Western Ringtail Possum were noted in the daytime survey and the nocturnal survey did not detect the presence of the species on site.

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[63] Exhibit 34 page 216.
[64] Exhibit 31 page 2.
[65] Exhibit 31 page 2.

103 In relation to the Main's Assassin Spider, this animal's favoured habitat of suspended leaf litter 'was generally absent compared to the Sandpatch Windfarm area where the species are commonly found'.[66] Suspended leaf litter was found in only two locations in the area proposed to be cleared and of the seven samples undertaken, none of this species were detected. The report concludes that it is 'unlikely that the spider is present within the area proposed to be cleared'.[67]

104 We are satisfied by Ms Price's fauna survey and the evidence she gave that the proposed development would not have any significant adverse impact on fauna, including endangered fauna.

105 Mr Mack said that he does not have 'concern in relation to the work that was undertaken' by Ms Price in the fauna survey and that it 'appears to be comprehensive and appears to align with her conclusions … that those species are unlikely to be present in the area that she looked [at]'.[68] However, Mr Mack expressed the opinion that 'the fauna survey effort should have gone further or should - is required to go further and look at all the species that are potentially located out there'.[69] Later, Mr Mack said that 'further survey work would be required both from a flora and fauna perspective to support the clearing permit'.[70]

106 Although further survey work may be required for a clearing permit under the EP Act, in our view, both the flora and fauna surveys undertaken for the purposes of the development application are comprehensive and adequate for the purposes of development assessment. Together with the evidence of Ms Price and Mr Bowman, the flora and fauna surveys undertaken satisfy the Tribunal that the proposed development is broadly consistent with the objective to '[p]rotect, enhance and rehabilitate the flora [and] fauna … qualities of the Nullaki Peninsula'.

107 The most significant adverse impact of the proposed development in terms of objective (a) of the CZ1 zone is in relation to 'landscape qualities of the Nullaki Peninsula'. However, for the reasons which follow, we consider that the proposed development is still broadly consistent with the objective to '[p]rotect, enhance and rehabilitate the … landscape qualities of the Nullaki Peninsula'.

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[66] Exhibit 31 page 2.
[67] Exhibit 31 page 2.
[68] ts 246, 15 August 2018.
[69] ts 246, 15 August 2018.
[70] ts 258, 15 August 2018.

108 The Tribunal heard concurrent expert evidence in relation to the visual impact of the proposed development from the following six witnesses:

- Mr Lindsay Stephens, who, as indicated earlier, is the designer of the proposed development and an environmental and quarrying consultant with over 45 years' experience, called by the applicant;
- Mr Samuel Williams, who, as indicated earlier, is a consultant town planner with 20 years' experience, called by the applicant;
- Mr Jonathan Small, who is a civil engineer with 15 years' experience and employed by TABEC Civil Engineering Consultants, called by the applicant;
- Mr Joe Algeri, who, as indicated earlier, is a consultant town planner with over 25 years' experience, called by the City;
- Mr Grant Boonzaaier, who is a Geographic Information Systems (GIS) and spatial analysis with 20 years' experience and who holds the position of Senior GIS Technical Officer with the City, called by the City; and
- Ms Felicity Walker, who is a spatial analyst with 2 years' experience in that field and 15 years' experience as a geophysicist and who is employed by Talis Consultants Pty Ltd, called by the City.

109 In their respective witness statements, Mr Small, Mr Boonzaaier and Ms Walker unfortunately each used different methodologies or different data sets to assess the visual impact of the proposed development. The different methodologies and data sets were explained to the Tribunal in the concurrent expert evidence session. It is unnecessary to describe the different methodologies and data sets used by these expert witnesses in these reasons, because once the differences were explained and understood through this process, it became clear that the evidence of all of the witnesses as to the extent of visual impact of the development is essentially consistent, although the parties have different perspectives on the significance of the visual impact of the development in the context of the applicable planning framework.

110 The evidence of all of the expert witnesses on visual impact demonstrates that the following statement by Mr Stephens in his evidence is correct:[71]

> … the pit has been designed to mitigate [visual impact], so you won't see the pit floor and you won't see the active faces and any exposure of a face will occur only after it's rehabilitated.

111 This is because Mr Stephens has carefully designed the proposed quarry to commence on the southern side of the extraction area, at approximately 140 metres AHD, with the higher topography and landform within the rest of the pit area and ultimately to its northern, eastern and western edges providing a visual screen to the quarry itself and to any active face of the quarry until after that face has been rehabilitated (particularly the eastern face, part of which might ultimately be seen from some viewing locations to the north and west). Furthermore, because of intervening topography and landform and vegetation, and the angle of view, the proposed limestone pit would not be visible from the ocean. Consequently, because of the careful and site-responsive siting and design of the proposed development, the limestone pit would not be visible at all from anywhere outside the site (other than potentially part of the eastern face, which could not be seen until after the relevant section has been rehabilitated).

112 As Mr Stephens said in evidence:[72]

> … that's why it was selected to start at a low elevation in the south of the site, so that you're not starting at 150, 160 metres. You're starting down at 140, well below the ridge. So that you can create that first area prior to digging the material. That was quite deliberate.

113 The visual impact evidence also shows that the proposed development would remove part of a prominent ridgeline on the site, which can now be seen from various points off the site, within the landscape of the Nullaki Peninsula, and that there would therefore be a permanent change to the landscape of the Nullaki Peninsula to that extent. This is the most significant adverse impact of the proposed development in the context of the zoning and applicable planning framework.

114 We accept the evidence of Mr Algeri that the Nullaki Peninsula 'to the naked eye and to the lay person … would appear as though it is

[71] ts 475, 12 September 2018.
[72] ts 299, 16 August 2018.

largely in its natural state', although it may not be 'a pristine [state] or one that's wholly [remnant] or wholly intact in terms of what would have been there originally' and although the Nullaki Peninsula is being developed in accordance with the Subdivision Guide Plan and subdivision approvals.[73] It is also correct, as Mr Algeri said, that, in terms of the proposed change to the landform, including the removal of part of a prominent ridgeline on the site, 'the site [is proposed to be] extensively manipulated',[74] particularly because a 'fairly prominent ridge has been sliced off and is central to the pit area'.[75]

115 However, we find, on the evidence, that even from the closest viewing position from which the proposed change in the landform on the site could be seen, namely the Bibbulmun Track as it turns south at the north-eastern corner of the site, and from the lookout near to the Nullaki campsite, which is at a distance of 1.5 to 1.6 kilometres, the change in the landscape and topography of the site would be barely perceptible. This is clearly borne out by a depiction of the area of ridge proposed to be removed superimposed on a photograph taken at the lookout near the Nullaki campsite prepared by Mr Stephens. The accuracy of this depiction was not questioned or contradicted and we accept it. As Mr Stephens said in evidence, from this viewing position:[76]

> For the **Nullaki Campsite Lookout**, there might be a slight change to the ridgeline (Figure 10). That change will be so small that it will be similar to the height of the existing vegetation on the ridge and at a distance of 1.6 km and only if the vegetation around the lookout is kept trimmed to expose the view.

116 Furthermore, as Mr Algeri fairly acknowledged, as a result of the landform and topography on the site to the north and west of the proposed limestone pit, which would be retained:[77]

> [t]here are areas close to the pit area where [the change in the landform as a result of the development] will not be visible at all, particularly to the immediate north. But as we start to extend more than three to four kilometres away, it will be visible to the north, west and east as per all the various viewshed diagrams. …

117 As Mr Algeri acknowledged in this passage, from the north, the change in the landform as a result of the removal of part of the ridgeline

[73] ts 570, 13 September 2018.
[74] ts 571, 13 September 2018.
[75] ts 549, 12 September 2018.
[76] Further witness statement of Lindsay Stephens dated 7 September 2018 (Exhibit 39) (original emphasis).
[77] ts 549, 12 September 2018.

on the site would only be seen from a distance of three to four kilometres or greater.

118 We find that, from viewing positions which are three to four kilometres to the north of the site, the change in landscape and topography on the site proposed in the development application would be scarcely perceptible, because of intervening topography and landform and vegetation, and because of the distance involved.

119 During the view, Mr Nicholson and Mr Boonzaaier also referred to the potential visual impact of the development from the Hay River Bridge to the north of the site. Mr Stephens provided photographs taken at the Hay River Bridge in the direction of the site on which he depicted the 'predicted change to the view scape' as a consequence of the change to the landform and topography on the site which would result from the proposed development. This depiction was not questioned or contradicted and we accept it as accurate. It is also consistent with a viewshed profile prepared by Mr Boonzaaier from the viewing position at the Hay River Bridge to the site. This evidence shows that the change in landscape and topography on the site as a result of the proposed development would be imperceptible by the human eye from the Hay River Bridge. However, interestingly, the photographs taken by Mr Stephens from the lookout near the Nullaki campsite and from the Hay River Bridge, on which he depicted the change in the viewscape as a result of the proposed limestone pit, both clearly show the visual 'scar' (as it was referred to by both Mr Stephens and Mr Algeri) of the current firebreak along the eastern boundary of the site (albeit in the significant distance from the Hay River Bridge). We will discuss the (positive) visual impact of the proposed development on the firebreak shortly.

120 The most significant public viewing position from which the location of the site can be seen is the Ocean Beach lookout, which is 11.3 kilometres to the west of the site. Mr Stephens provided a photograph of the view from the Ocean Beach lookout in the direction of the site on which he depicted the section of ridge on the site proposed to be removed. Again, the accuracy of this depiction was not questioned or contradicted and we accept it. As Mr Stephens said in evidence, '[t]he actual ridge could only be discerned using a telephoto lens' and '[e]ven on the telephoto image there is no [discernible] difference to the ridgeline'.[78] We accept Mr Stephens' evidence that, from the Ocean Beach lookout, 'it would not be possible to detect any change to the

[78] Further witness statement of Lindsay Stephens dated 7 September 2018 (Exhibit 39) page 3.

ridgeline'[79] on the site with the human eye, given the significant distance and the angle of view.

121 As indicated earlier, the proposed development includes a haul road along the eastern boundary of the site which would connect the proposed limestone pit area and the proposed realigned and constructed extension of Lee Road where it meets the eastern boundary of the site. The haul road would traverse the route of an existing firebreak. As Mr Stephens said, 'the [firebreak in the location of the proposed] haul road is the biggest visual scar on the ridgeline' in the locality of the site.[80] Mr Algeri agreed with Mr Stephens that 'the [firebreak in the location of the proposed] haul road to the pit is … quite a notable visual scar on the landscape'.[81] The photographic evidence - which was borne out on the view - clearly indicates that the visual 'scar' of the current firebreak in the location of the proposed haul road has a significant detrimental impact on visual amenity from the Bibbulmun Track, where it turns south at the north-eastern corner of the site and as it continues south along the eastern boundary of the site until it turns to the south-east towards the Nullaki campsite, from the lookout near the Nullaki campsite and from the north as one approaches the area of the site along existing public roads. As indicated earlier, it can be seen from as far away (albeit in the far distance) as the Hay River Bridge. The firebreak in the location of the proposed haul road has a significant detrimental impact on visual amenity from these public viewing positions, because the firebreak is highly prominent, due to the topography of the site, in particular because the firebreak is situated on land which rises up, and due to the light-coloured limestone of which it is comprised, juxtaposed against the green open heath coastal vegetation of the Nullaki Peninsula, and is a highly discordant visual element when viewed in the context of that vegetation and the absence of any other apparent physical development in the viewscape.

122 The proposed development involves widening the unformed road along the firebreak and sealing it with bitumen. As indicated earlier, the widening of the haul road requires the clearing of vegetation and Mr Laybutt and Mr Stephens jointly estimate that approximately one hectare of native vegetation along the route of the proposed haul road would need to be removed.

[79] Further witness statement of Lindsay Stephens dated 7 September 2018 (Exhibit 39) page 3.
[80] ts 420, 16 August 2018.
[81] ts 425, 16 August 2018.

123 Mr Stephens provided a photograph of the firebreak taken from the location where the Bibbulmun Track turns south at the north-eastern corner of the site and a version of the photograph on which he included colour 'to represent bitumen seal'.[82] Mr Stephens gave the following evidence:[83]

> The existing fire break is a scar on the ridge that is visible from a number of locations. Sealing of the haul road with grey bitumen to be located on the fire break will provide a significant improvement in the visual impact of the fire break/haul road.

124 Mr Algeri initially disagreed with Mr Stephens' evidence. Mr Algeri correctly observed that Mr Stephens' depiction of the sealed haul road does not show the removal of vegetation to widen the road and does not show shoulders of the road, which Mr Algeri anticipated would comprise unsealed limestone. Mr Algeri gave the following evidence:[84]

> … in my view, the change would be negligible. You will have a darker centreline, but there will still need to be shoulders on each side. So I don't think that will be a significant effect one way or another as a result of the sealing of that haul track.
>
> …
>
> You will have one thick white line being replaced by two thin - thin white lines on each side of the sealing.

125 However, having heard evidence from Mr Small and Mr Stephens as to what could be done to mitigate the visual impact of unpaved shoulders of a road, such as the haul road, Mr Algeri properly made the following concession under cross-examination:[85]

> I - having heard the responses from the others this morning, I accept at face value that that is something that you can do in terms of the shoulders. Being not – not being a road engineer of any description, I can't comment on the utility of how shoulders operate in terms of any other functionality in terms of drainage, etcetera, etcetera. So if there is a case for bare shoulders to be revegetated and/or covered in some ways, then, I would accept that that scar could be removed.

126 The 'responses from the others this morning' Mr Algeri referred to included the following evidence of Mr Small:[86]

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[82] Further witness statement of Lindsay Stephens dated 7 September 2018 (Exhibit 39) figure 13.
[83] Further witness statement of Lindsay Stephens dated 7 September 2018 (Exhibit 39) page 4.
[84] ts 481-482, 12 September 2018.
[85] ts 551, 12 September 2018.
[86] ts 492, 12 September 2018.

> … typically a road would have, with a seal like that, would have gravel shoulders if it was, like, a council standard road but being a limestone, sort of, private track - we've actually built one in the last few weeks since we were last in here.
>
> We've respread topsoil on the shoulders and that promotes growth of vegetation. There's also spray sealing the different, sort of, products which is possible that have seeds in them which encourages growth. I'm just - I just want to make the point that there are different treatments available to rehabilitate and reinstate the shoulders.

127 When asked by the Tribunal whether this might affect 'the utility of the shoulders as shoulders', Mr Small responded 'No, because the purpose is to stabilise the shoulder' and 'vegetation is good for that'.[87] Mr Stephens also observed that:[88]

> … what rapidly happens with any limestone or anything else on a road like this is that it rapidly gets colonised by small plants. … The point being that that slightly changes the colour and reduces the visual impact.

128 We find on this evidence (particularly if the development were conditioned to require the haul road to be constructed with gravel shoulders and topsoil to be spread on or spray sealing applied to the shoulders to encourage growth of vegetation[89]), that the proposed development in relation to the haul road would have a significant positive impact on the landscape qualities and visual amenity of the Nullaki Peninsula, by effectively removing the visual 'scar' on the landscape formed by the firebreak.

129 Mr Mack expressed the opinion that the 'permanent change to the environment as a result of the [proposed] development in that you are going to be removing or changing the topography and the landscape, removing peaks' is 'unacceptable' in terms of the impact of the development on the natural environment.[90] However, Ms Price, while acknowledging that 'the landscape there will be changed in its shape and form', disagreed with Mr Mack's evidence. In relation to the impact of the change in the landform proposed in terms of landscape qualities of the Nullaki Peninsula and the impact of the development on the natural environment, Ms Price gave the following evidence:[91]

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87 ts 492, 12 September 2018.
88 ts 501, 12 September 2018.
89 See condition 14(i) in Attachment A to these reasons.
90 ts 337, 16 August 2018.
91 ts 348, 16 August 2018.

> But, what my understanding is, there's going to be a tiered shape, which isn't actually that dissimilar to some of the cliff and coastal structure that's there already.

130 Ms Price's evidence in the quotation immediately above was not questioned or contradicted, and we accept it. We find that although permanent change to the landform and topography of the site would take place as a result of the proposed development, the development would have an acceptable impact on the natural environment in terms of landform, because the change in landform would be barely perceptible from the closest viewing position outside the site and scarcely perceptible or imperceptible from further away and because the post-development landform and topography of the site would not be dissimilar to some natural cliff and coastal structures and would be rehabilitated in a manner consistent with the natural state of the site.

131 For the reasons given above, we find that the proposed development is broadly consistent with objective (a) of the CZ1 zone to '[p]rotect, enhance and rehabilitate the flora, fauna and landscape qualities' of the Nullaki Peninsula.

132 We also find that the proposed development is broadly consistent with objective (b)(iii) of the Conservation zone to '[p]revent land uses and development that would adversely impact on the ecological values of the site for conservation purposes', because:

- it involves removal of vegetation on only a relatively small part of the site, which is similar in its composition and quality to the vegetation on the rest of the site and on the Nullaki Peninsula generally;
- there would be progressive rehabilitation in a manner consistent with the natural state of the site;
- the area of the proposed limestone pit has been previously used for limestone extraction and successfully rehabilitated;
- the development would not have any significant adverse impact on fauna, including endangered fauna; and
- although there would be permanent change to the landform and topography of the site, the resulting landform is not dissimilar to some natural landforms.

Development standards and requirements

133 A further consideration in relation to whether the proposed development is consistent with orderly and proper planning is whether it is generally compliant with development standards and requirements set out in cl 4 of Sch 12 in relation to the CZ1 zone.

134 It is common ground that the proposed development does not comply with cl 4.3 of Sch 12 in relation to the CZ1 zone which, as indicated earlier, states as follows:

> The Development Area refers to the area within which all development on each lot (including the main dwelling, caretaker's accommodation, sheds, water storage, low fuel area and effluent disposal areas) must be confi[n]ed and is not to exceed one hectare.

135 The 'Development Area' in this case is eight hectares plus the area of the haul road (including clearing up to an additional one hectare on the sides of the existing firebreak to create the haul road). However, cl 5.2 of LPS 1 confers a discretion upon the Council (and the Tribunal on review) to allow variations to development standards and requirements prescribed in the Scheme. Clause 5.2 of LPS 1 states as follows:

> 5.2.1 Except for development in respect of which the *Residential Design Codes* apply, if a development is the subject of an application for planning approval and does not comply with a standard or requirement prescribed under the Scheme, the Local Government may, despite that non-compliance, approve the application unconditionally or subject to such conditions as the Local Government thinks fit.
>
> 5.2.2 In considering an application for planning approval under this clause, where, in the opinion of the Local Government, the variation is likely to affect any owners or occupiers in the general locality or adjoining the site which is the subject of consideration for the variation, the Local Government is to:
>
> (a) Consult the affected parties by following one or more of the provisions for advertising uses pursuant to clause 9.4; and
>
> (b) Have regard to any expressed views prior to making its determination to grant the variation.
>
> 5.2.3 The power conferred by this clause may only be exercised if the Local Government is satisfied that:

> (a) Approval of the proposed development would be appropriate having regard to the criteria set out in clause 10.2; and
>
> (b) The non-compliance will not have an adverse effect upon the occupiers or users of the development, the inhabitants of the locality or the likely future development of the locality.

136 Clause 10.2 of LPS 1 (referred to in cl 5.2.3(a) of the Scheme) has been replaced by cl 67 of the deemed provisions: ***Puma Energy Australia and City of Cockburn*** [2016] WASAT 36; (2016) 89 SR (WA) 1 at [47]; see generally [36]-[47]. In light of our findings in relation to each of the issues for determination, we are satisfied that the proposed development 'would be appropriate having regard to' the matters for consideration in cl 67 of the deemed provisions for the purposes of cl 5.2.3(a) of the Scheme.

137 We are also satisfied that the non-compliance with the development standard in cl 4.3 of Sch 12 in relation to CZ1 'will not have an adverse effect upon the occupiers or users of the development, the inhabitants of the locality or the likely future development of the locality' for the purposes of cl 5.2.3(b) of the Scheme. This is because the proposed limestone pit would be progressively rehabilitated and would not be visible from outside the site until it is rehabilitated, for reasons given below in relation to issue 3 we are satisfied that the development would have an acceptable impact on the amenity and character of the locality and although the development involves permanent change to the landform and topography of the site, the change will be barely perceptible from the closest off-site viewing positions from which it could be seen and would be scarcely perceptible or imperceptible from more distant viewing positions. Furthermore, as found earlier, insofar as the proposed development involves the haul road, its construction would have a significant positive impact on the landscape qualities and visual amenity of the Nullaki Peninsula.

138 It is also relevant, in our view, in assessing whether the non-compliance will not have an adverse effect upon the occupiers or users of the development, the inhabitants of the locality or the likely future development of the locality, to consider that if the site were developed in the form of 11 wilderness retreat lots, as contemplated by the Subdivision Guide Plan, development on the 11 lots (which would be compliant with cl 4.3) would involve (permanent) development in the form of buildings and other structures up to 11 hectares in area, as well as driveways, which

Mr Williams and Mr Algeri agree could be up to an additional 11 hectares in area. In contrast, the proposed 'Development Area' on the site is only 9 ha plus the area of the existing firebreak which would be formed into the haul road and the only permanent development proposal is the haul road, which would have a significant positive impact on the amenity of the locality by effectively removing the visual 'scar' formed by the existing firebreak. Therefore, development of the site for wilderness retreat residential development would involve greater (and more permanent) physical development on the site than the proposed development.

139 As indicated earlier, cl 4.5 of Sch 12 in relation to CZ1 requires the landowner to submit 'a comprehensive professional assessment of the selected Development Area and proposed access way/driveway in accordance with the *Environmental Protection Authority Guidance Statement No. 51 - Terrestrial Flora and Vegetation and No. 56 - Terrestrial Fauna Surveys for Environmental Impact Assessment in Western Australia* to determine the presence of rare, endangered and/or threatened flora or fauna species …'. Mr Mack expressed the opinion that 'the biological survey work completed for the site fails to satisfy Clause 4.5 and does not include consideration of the "proposed access way/driveway" referred to in the Clause'.[92] However, in light of the evidence of Ms Price and Mr Bowman, we are satisfied that the Bio Diverse Solutions survey reports and Ms Price's fauna survey are generally compliant with this requirement and provide a satisfactory basis on which to assess the development application and to find (as we do below) that the proposed development would have an acceptable impact on the natural environment in relation to flora and fauna.

140 Although there was initially some confusion as to whether the proposed limestone pit partly transgressed the requirement for a 200 metre setback from the coastal foreshore reserve under cl 4.6(i) (second bullet point) of Sch 12 in relation to CZ1, the 'Concept Final Contour Plan' dated 21 August 2018 prepared by Mr Stephens,[93] which now forms part of the development application, clearly shows that the proposed development is set back more than 200 metres from the coastal foreshore reserve.

141 Furthermore, we are satisfied that the plethora of photographs and depictions of the proposed development and its visual impact in the

[92] Witness statement of Andrew Mack dated 11 May 2018 (Exhibit 30) [7.15].
[93] This plan, which is referred to in condition 2 of Attachment A, is reproduced at the end of these reasons.

evidence presented to the Tribunal satisfy the requirement in cl 4.7(i) of Sch 12 for:

> … a photographic assessment demonstrating that the proposed development area and the buildings proposed thereon, will blend in with the visual landscape in terms of height and rooflines, colouring/toning and form and scale, and will not dominate a land based view when viewed from Anvil Beach Lookout, a public roadway, a foreshore node or the foreshore, the coastal walk trail and/or the Ocean Beach Lookout.

142 We find that the 'photographic assessment' evidence demonstrates that the proposed development 'will blend in with the visual landscape' and 'will not dominate a land based view when viewed from Anvil Beach Lookout, a public roadway, a foreshore node or the foreshore, the coastal walk trail and/or the Ocean Beach Lookout'. The site cannot be seen from Anvil Beach lookout (which the Tribunal visited on the view) and, as found earlier, the development would be imperceptible from the Ocean Beach lookout (which the Tribunal also visited on the view). As we found earlier, the proposed limestone pit could not be seen from outside the site (other than potentially part of the eastern face, and that would only be after it is rehabilitated). As we also found earlier, the change to the landform and topography of the site would be barely perceptible from the Bibbulmun Track and Nullaki campsite lookout and would be scarcely perceptible or imperceptible from more distant viewing positions.

143 There is a dispute between the parties as to whether cl 4.6(v) of Sch 12 of LPS 1 in relation to the CZ1 zone, which requires the development area '[b]e located off significant ridgelines and preferably within sheltered well vegetated swales', is relevant to the proposed development and, if so, whether the development complies with this provision.

144 Mr Burrell expressed the opinion that cl 4.6(v):[94]

> … was written primarily for buildings, and outbuildings, and structures associated with the approved structure plan under the [C]onservation zone, and houses and structures generally should be fitted into the landform, hunkered down, as it were, and coloured accordingly, and that hasn't been achieved in reality.
>
> …
>
> In other words, not highly visible from Denmark and other vantage points to the north.

[94] ts 582, 13 September 2018.

145 Mr Williams gave the following evidence:[95]

> I understand the intent of the clause in the [S]cheme there, and as I agree with what Mr Burrell stated with respect with why it was there, to protect the landscape attributes that people experience looking at the Nullaki, and like what we experienced when we were standing at the Ocean Beach looking towards the Nullaki. My opinion or take on this is that [C]ouncil have exercised some discretion in their [S]cheme with respect to this clause, and maybe established precedence, because when we were standing on the Nullaki you could see some houses.

146 Mr Algeri did not significantly disagree with the evidence of Mr Burrell and Mr Williams in relation to this aspect. He said that 'the intention here is to make sure that a single house is located off a significant ridgeline'.[96] However, Mr Algeri went on to say the following:[97]

> But in terms of the broader term of development, I think that would equally apply to any other form of development, that it should achieve the same objective.
>
> Obviously, if it's on a ridgeline there's a greater chance that it will be visible either close or far away, so to that extent this particular development is unusual insofar as it doesn't have any specific physical buildings, but it is a development nonetheless, and it's a development which is on the ridgeline and, in fact, it's taking some of the ridgeline away. So to that extent I just can't see how the proposal would be consistent. It's on a ridgeline and, in fact, taking some of that ridgeline off.

147 As the town planning expert witnesses agreed, cl 4.6(v) is primarily directed to regulating the siting of buildings and other structures, as buildings and structures are physical development that can potentially be seen, particularly if located on significant ridgelines. However, we accept Mr Algeri's evidence that the proposed development is 'development' and therefore that 'it should achieve the same objective'. In our view the proposed development does achieve the objective and is generally compliant with the provision. This is because, for reasons set out earlier, the proposed change in the landform and topography of the site would be barely perceptible from the closest viewing positions and scarcely or not perceptible from viewing positions further afield.

[95] ts 583, 13 September 2018.
[96] ts 583, 13 September 2018.
[97] ts 583, 13 September 2018.

148 For the foregoing reasons, we do not accept the City's submission that the nature and form of the proposed development is inconsistent with the nature and form of development contemplated by the planning framework reflected in LPS 1. Rather, we find that the proposed development is broadly consistent with the objectives and provisions of LPS 1, particularly in consequence of the physical characteristics of the site (its large size, location in the south-eastern part of the CZ1 zone and landform and topography to be retained) and the careful, site-responsive design of the proposed development.

Amendment 29

149 Furthermore, although Amendment 29 would have the effect of prohibiting the proposed use, for the reasons given below, in the particular circumstances of this case, we consider that only limited weight (and, contrary to the City's submission, not significant weight) should be given to the inconsistency of the proposed development with Amendment 29 in the determination of this review.

150 In ***Terra Spei Pty Ltd and Shire of Kalamunda*** [2015] WASAT 134, the Tribunal held at [198]-[206] as follows:

> 198 Clause 67(b) of the deemed provisions gives legislative force and expression to the so-called '*Coty* principle' which derives its name from the decision of the Land and Valuation Court of New South Wales in *Coty (England) Pty Ltd v Sydney City Council (1957) 2 LGRA 117* (*Coty*). As the Tribunal said in *Nicholls and Western Australian Planning Commission* [2005] WASAT 40; (2005) 149 LGERA 117 (*Nicholls*) at [40], the *Coty* principle 'has been followed or applied in a large number of cases, including in each Australian State'. As the Tribunal said in *Nicholls* at [41], the *Coty* principle was established in the following two paragraphs of Hardie J's decision in *Coty* at 125 - 126:
>
> > It is important, in the public interest, that whilst the respondent Council's local scheme is under consideration this Court should, in the exercise of its appellate jurisdiction under cl 35 of the County Ordinance, avoid, as far as possible, giving a judgment or establishing any principle which would render more difficult the ultimate decision as to the form the scheme should take. It is also important, in the public interest, that during that period this Court should, in the exercise of the jurisdiction referred to, arrive at its judgment, so far as possible, in consonance with the town planning decisions which have been embodied in the local scheme in the course of preparation.

> An approval in this case for a new, large and permanent industrial building on the land the subject of this application would, in my opinion, having regard to the circumstances of the case and the special features and town planning difficulties of the area, cut across to a substantial degree the considered conclusion of the respondent Council and its town planning committee that the whole of the block should be zoned "Residential - Class C". Further, it would make the ultimate decision more difficult in that the erection of the new factory would so disturb the existing balance and proportion of residential and non-residential development and user in the block that the Minister would be faced with the task of making a decision on a set of facts substantially different from that existing when the Council dealt with the matter.

199 In *Nicholls* at [45], the Tribunal held as follows:

> It appears that, when a draft planning instrument or policy or a draft amendment to a planning instrument or policy is raised for consideration in relation to a subdivision or development application, the planning consent authority or appeal tribunal must undertake four stages of inquiry. The four stages are as follows:
>
> (1) In jurisdictions where there is no statutory requirement to take into consideration a draft planning instrument or policy or a draft amendment to a planning instrument or policy once it has reached a certain specified stage, the authority or tribunal must consider whether the draft constitutes a seriously-entertained planning proposal. If it determines that it is a seriously-entertained planning proposal, it is a relevant matter for consideration in relation to the planning assessment.
>
> (2) If the draft is a relevant matter for consideration, the authority or tribunal must consider the extent to which the application before it is consistent with the planning objective or planning approach embodied or reflected in the draft. In particular, the authority or tribunal must consider whether the approval of the application is likely to impair the effective achievement of the planning objective or planning approach embodied or reflected in the draft or is likely to render more difficult the

ultimate decision as to whether the draft should be made or its ultimate form.

(3) The authority or tribunal must consider the weight to be accorded to the consistency or otherwise between the application and the draft.

(4) The authority or tribunal must weigh its conclusions in relation to the foregoing matters in the balance along with all other relevant considerations relating to the application, and determine whether, in light of all relevant considerations, it is appropriate in the exercise of planning discretion to grant approval to the application and, if so, subject to what conditions.

200 Clause 67(b) of the deemed provisions is a 'statutory requirement to take into consideration a draft planning instrument … or a draft amendment to a planning instrument … once it has reached a certain specified stage' adverted to at [45(1)] of *Nicholls*. The stage specified in cl 67(b) of the deemed provisions when a proposed local planning scheme or an amendment to the applicable local planning scheme becomes a relevant matter for consideration is 'that [it] has been advertised' under the LPS Regulations. Consequently, the first stage of the four stage inquiry described in *Nicholls* at [45] has been overtaken in relation to development assessment under a local planning scheme in Western Australia in the case of a draft local planning scheme or a draft amendment to the applicable local planning scheme.

201 If there is a relevant proposed local planning scheme or a relevant amendment to the applicable local planning scheme that has been advertised under the LPS Regulations, then it is no longer necessary or appropriate to inquire as to whether the proposed local planning scheme or amendment to the applicable local planning scheme is a 'seriously-entertained planning proposal' in order for it to be a relevant matter for consideration in the exercise of planning discretion. (Indeed, the expression 'seriously-entertained' is now otiose in development assessment under a local planning scheme in Western Australia in relation to such a planning proposal). Rather, any relevant proposed local planning scheme or amendment to the applicable local planning scheme 'that has been advertised' under the LPS Regulations is automatically a relevant matter for consideration in the exercise of planning discretion and is to be given 'due regard' under cl 67 of the deemed provisions.

202 The first stage of the four stage inquiry described in *Nicholls* at [45] has also been overtaken in relation to development assessment under a local planning scheme in Western Australia by cl 67(b) of the deemed provisions in the case of 'any other proposed planning instrument that the local government is seriously considering adopting or approving'. Although the words 'is seriously considering adopting or approving' clearly hark back to the well-known expression in planning law of a 'seriously-entertained planning proposal', given that there is now a legislative expression of the concept, it is the legislative expression ('is seriously considering adopting or approving') that must be applied, not the former expression ('seriously-entertained planning proposal').

203 The term 'planning instrument' is unfortunately not defined in the deemed provisions. The term 'planning instrument' is defined in reg 77 of the LPS Regulations for the purposes of Pt 9 of the LPS Regulations which contains repeal and transitional provisions. That definition is as follows:

> *planning instrument* means any of the following instruments -
>
> (a) a consolidation of a local planning scheme;
>
> (b) an activity centre plan;
>
> (c) a development contribution plan;
>
> (d) a local development plan;
>
> (e) a local planning policy;
>
> (f) a local planning scheme;
>
> (g) a local planning strategy;
>
> (h) a structure plan;
>
> (i) an amendment to an instrument referred to in paragraph (b) to (h)[.]

204 However, the definition of 'planning instrument' for the purposes of Pt 9 of the LPS Regulations, while contextually relevant, does not apply for the purposes of cl 67(b) of the deemed provisions for two reasons. First, reg 77 states that the definition applies '[i]n this Part' and does not extend the definition to the deemed provisions. Secondly, cl 67(b) of the deemed provisions specifically refers to 'any other proposed planning instrument that *the local government* is seriously considering adopting or approving' (emphasis added), whereas a local government does not have any role in adopting or approving an activity centre plan,

a development contribution plan or a structure plan. In terms of the list of 'planning instruments' in reg 77 of the LPS Regulations, the only planning instruments that a local government has the role of adopting (other than a local planning scheme or an amendment) or approving are a local development plan and a local planning policy. However, deriving contextual assistance in the interpretation of the expression 'planning instrument' in cl 67(b) of the deemed provisions from reg 77 of the LPS Regulations (of which the deemed provisions are Sch 2), in our view, the expression 'planning instrument' in cl 67(b) of the deemed provisions refers to a local development plan and a local planning policy.

205 In relation to the third stage of the four stage inquiry described by the Tribunal in *Nicholls* at [45] ('the weight to be accorded to the consistency or otherwise between the application and the draft'), having reviewed authorities in Western Australia and New South Wales, the Tribunal said in *Nicholls* at [59] that the authorities 'together identify the four principal criteria which should be utilised to determine the weight which should appropriately be given to a draft planning instrument or policy or a draft amendment to such an instrument or policy in a planning assessment or appeal'. The Tribunal then said:

> These criteria are:
>
> (1) The degree to which the draft addresses the specific application.
>
> (2) The degree to which the draft is based on sound town planning principles.
>
> (3) The degree to which its ultimate approval could be regarded as 'certain'.
>
> (4) The degree to which its ultimate approval could be regarded as 'imminent'.

206 These four criteria have been referred to and applied in many decisions of this Tribunal in the decade since *Nicholls*. The four criteria remain the principal criteria to be applied when the planning consent authority or the Tribunal on review is required under cl 67(b) of the deemed provisions to have 'due regard' to a proposed local planning scheme or amendment to the applicable local planning scheme that has been advertised under the LPS Regulations or to any other proposed planning instrument that the local government is seriously considering adopting or approving. However, the list of criteria or considerations in relation to weight is not closed. Other considerations may be relevant in a particular case.

151 As the Tribunal held in ***Terra Spei Pty Ltd and Shire of Kalamunda*** at [202], the first stage of the four-stage inquiry described in ***Nicholls and Western Australian Planning Commission*** [2005] WASAT 40; (2005) 149 LGERA 117 at [45] 'has been overtaken in relation to development assessment under a local planning scheme in Western Australia' in the case of a draft local planning scheme by cl 67(b) of the deemed provisions. Amendment 29 is a relevant matter for consideration in relation to the planning assessment of the proposed development, because it has been advertised under the LPS Regs.

152 In relation to the second stage of the four-stage inquiry described in ***Nicholls and Western Australian Planning Commission*** at [45] ('the extent to which the application before [the planning consent authority] is consistent with the planning objective or planning approach embodied or reflected in the draft [planning scheme]'), the proposed extractive industry use is inconsistent with the planning objective or planning approach embodied or reflected in Amendment 29, because, if gazetted, the draft would prohibit all land uses other than those listed in cl 3.1 and cl 3.2 of Sch 12 in the CZ1 zone, including extractive industry use, on the site. Approval of the proposed development would impair the effective achievement of the planning objective or planning approach embodied or reflected in Amendment 29 and render more difficult the ultimate decision as to whether the draft should be made, or its ultimate form, *in relation to industry extractive use on a relatively small portion of the site for the lifetime of the proposed development*. Approval of the proposed development would, as the City submits, 'cut across' the planning objective of Amendment 29 'relevantly to prohibit approval of any uses other than those referred to in clauses 3.1 and 3.2', which includes extractive industry, although, in the particular circumstances of this case, to a lesser extent than the City submits. The proposed development involves use of only a relatively small portion of the site for extractive industry and for a period limited by the resource available within the proposed limestone pit area, which is anticipated to be about 20 years.

153 Furthermore, given the uniquely large size of the site in the CZ1 zone and the location of the proposed limestone pit in the south-eastern part of the site and at the south-eastern edge of the CZ1 zone, we do not consider that approval of the proposed development is likely to impair the effective achievement of the planning objective or planning approach embodied or reflected in the draft, or is likely to render more difficult the ultimate decision as to whether the draft should be made, or its ultimate form, *in relation to the rest of the CZ1 zone beyond the site*. The rest of

the CZ1 zone comprises approximately 2,000 hectares of land subdivided into 51 wilderness retreat lots, with a minimum lot area of 30 hectares and average minimum lot area of 40 hectares, in accordance with the Subdivision Guide Plan and cl 1.2 of Sch 12 of LPS 1 in relation to CZ1. These 51 lots are distinctly different in size and location to the subject 437 hectare lot located at the south-eastern end of the CZ1 zone and are well separated from the proposed limestone pit by the buffer provided by the remainder of the site. Approval of the proposed development is not likely to impair the effective achievement of the planning objective or planning approach embodied or reflected in Amendment 29 and is not likely to render more difficult the ultimate decision as to whether Amendment 29 should be made *in relation to the other 51 lots comprising the CZ1 zone*.

154 In relation to the third stage of the four-stage inquiry described in ***Nicholls and Western Australian Planning Commission*** at [45] ('the weight to be accorded to the consistency or otherwise between the application and the draft'), as the Tribunal said in ***Nicholls and Western Australian Planning Commission*** at [59], there are four principal criteria which should be utilised.

155 In relation to the first of those criteria ('The degree to which the draft addresses the specific application'), the draft certainly addresses the specific application, because it would prohibit the proposed development (together with all other land uses other than those referred to in cl 3.1 and cl 3.2) on the site.

156 There is a difference of opinion between the expert town planning witnesses, and consequently a dispute between the parties, as to the second criterion which should be utilised to determine the weight which should appropriately be given to Amendment 29, namely '[t]he degree to which the draft is based on sound town planning principles'.

157 Mr Algeri gave evidence that Amendment 29 is based on sound town planning principles in the following two respects:[98]

> [First,] there's a harmonisation, if we can use that word, between all the respective conservation zones. So it's bringing this particular zone in consistency with the others. And - so that's one thing. The second thing is that the construction of all of clause 3 of schedule 12 becomes clearer. There's no potential void. You're either a use that's specifically permitted

[98] ts 5, 14 September 2018.

> or may be permitted. And then everything else is non-permitted. So it takes away any particular doubt.

158 When asked in cross-examination whether Amendment 29, as it pertains to the CZ1 zone, is based on sound town planning principles, Mr Burrell gave the following evidence:[99]

> Schemes in their preparation should have regard to the pre-existing use character of an area and I always made that point, that agricultural pursuits and extractive industries were on that land prior to the preparation of the amendment to produce CZ1.

159 As indicated earlier, the site was historically used for the extraction of limestone between 2002 and 2006. Furthermore, as also indicated earlier, there is evidence of successful rehabilitation of the part of the site used for extractive industry. It is unclear what, if any, significance has been accorded to the historical use of the site for extractive industry and of its proven capacity for rehabilitation following such use in the proposed prohibition by Amendment 29 of that use on the site.

160 We accept Mr Algeri's opinion that it accords with sound town planning principles to clearly identify the land uses which are capable of approval and the land uses which are not capable of approval in a particular zone and so '[take] away any particular doubt'. However, we are not satisfied, on the evidence before the Tribunal, that it accords with sound town planning principles to 'harmonise' the CZ1 zone with the CZ2 and CZ3 zones in terms of prohibiting all land uses other than those referred to in cl 3.1 and cl 3.2, because the CZ2 and CZ3 zones have distinctly different characteristics compared with the CZ1 zone.

161 As Mr Burrell said in relation to the CZ2 and CZ3 zones:[100]

> … those conservation zones are quite different. They're much denser. They're almost semi-urban, and I think the density and impact that [extractive] industries would have in those zones is quite detrimental, and that's not the case here.

162 Mr Williams gave the following evidence in relation to the lots comprising the CZ3 zone:[101]

> I would call them special rural lots in the locality of Kronkup, and it's also in close proximity to the Woodbury Boston Primary School.

[99] ts 8, 14 September 2018.
[100] ts 9, 14 September 2018.
[101] ts 600, 13 September 2018.

163 As Mr Williams also said in evidence, the total area of each zone and minimum lot size for subdivision, in relation to the CZ2 and CZ3 zones, are quite different to the CZ1 zone. The CZ2 zone has a total area of about 119 hectares and the CZ3 zone has a total area of about 49 hectares, whereas the CZ1 zone has a total area of about 2,500 hectares, and the minimum lot area the City will recommend for subdivision in the CZ2 zone is eight hectares[102] and the City 'will not recommend approval to the further breakdown of lots' in the CZ3 zone,[103] whereas in the CZ1 zone the minimum lot size 'should be no less than 30 hectares and the average minimum lot size should be no less than 40 hectares'.[104]

164 Therefore, as Mr Williams said, there is a difference in 'scale' between the minimum subdivisional lot size contemplated by LPS 1 in the CZ1 zone and in the CZ2 and CZ3 zones, and the minimum lot size of 30 hectares and average minimum lot size of 40 hectares in the CZ1 zone enables 'other uses to be exercised [carried out] … [with] significantly less impact on adjoining lots' than would the lot sizes in the CZ2 and CZ3 zones.[105] Mr Burrell made a similar point when he said:[106]

> You wouldn't expect to see an extractive industry approved in either of those two zones [CZ2 or CZ3] and, compared to CZ1, it's (indistinct) low density, extremely low density and, coming back to the fundamental question of scale, what's being proposed is like a pimple on a pumpkin.

165 Given the significant difference in minimum lot size contemplated by the Scheme in the CZ1 zone, on the one hand, and the CZ2 and CZ3 zones, on the other hand, and the 'almost semi-urban'[107] nature of the CZ2 and CZ3 zones, we accept Mr Burrell's and Mr Williams' evidence that there is far greater potential for a range of land uses to be carried out in an acceptable manner in the CZ1 zone than in the CZ2 and CZ3 zones. We are, therefore, not satisfied that 'harmonisation' of the CZ1 zone with the CZ2 and CZ3 zones in terms of prohibiting all land uses other than those referred to in cl 3.1 and cl 3.2 accords with sound town planning principles. We have come to this view, notwithstanding Mr Williams' concession in cross-examination that Amendment 29 'is based on sound town planning principles'.[108]

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[102] Clause 1.2 of Sch 12 of LPS 1 in relation to CZ2.
[103] Clause 1.2 of Sch 12 of LPS 1 in relation to CZ3.
[104] Clause 1.2 of Sch 12 of LPS 1 in relation to CZ1.
[105] ts 601, 13 September 2018.
[106] ts 12, 14 September 2018.
[107] Mr Burrell, ts 9, 14 September 2018.
[108] ts 14, 14 September 2018.

166 In addition to relying on Mr Algeri's evidence set out at [157] above, the City also submits that Amendment 29 is based on sound town planning principles, because it 'reflects and is consistent with the intent of the objectives' of the Conservation zone set out in cl 4.2.18 of LPS 1 and the objectives of the CZ1 zone. We note that Mr Algeri did not express an opinion to this effect. In any case, as we found earlier, the proposed extractive industry development on the site is broadly consistent with relevant objectives of the Conservation zone and of the CZ1 zone.

167 Finally, in relation to the consideration as to the degree to which Amendment 29 is based on sound town planning principles, the City submits that the Statutory Planning Committee's recommendation (on behalf of the Commission) to the Minister 'evidences that the proposed amendment is based on sound town planning principles', because the recommendation is 'by the top strategic planning authority in the State' and was made having regard to the City's supporting report, public submissions and deputations made in relation to the amendment by both parties to this review proceeding. However, notwithstanding the Commission's strategic planning function, in light of the evidence before the Tribunal, we are not satisfied that it accords with sound town planning principles to prohibit all land uses, other than those specified in cl 3.1 and cl 3.2, on the basis that this would 'harmonise' the three Conservation zones under the Scheme.

168 In relation to the considerations as to the degree to which the ultimate approval of Amendment 29 in a form which prohibits extractive industry use on the site could be regarded as 'certain' and 'imminent', there is agreement between the expert town planning witnesses, and consequently between the parties, that finalisation of Amendment 29 is relatively 'imminent', but disagreement between the expert witnesses, and hence between the parties, as to whether its approval by the Minister in a form which prohibits the proposed use of the site is relatively 'certain'. In relation to whether approval of Amendment 29 by the Minister is in a form which prohibits the proposed use on the site is relatively certain, Mr Williams referred to a letter from the Minister to Hon Jim Chown MLC dated 15 June 2018. The letter from the Minister to Mr Chown states as follows:[109]

[109] Exhibit 11 tab 14.

Dear Mr Chown

NULLAKI PENINSULA - DEVELOPMENT APPLICATION - REQUEST TO DEFER
DECISION: MR GRAEME ROBERTSON

Thank you for your letter of 26 April 2018 regarding the development application lodged by your constituent, Mr Graeme Robertson, for a lime extraction operation.

The importance to the State of lime production for the agricultural industry is acknowledged.

Amendment 29 to the City of Albany Local Planning Scheme No.1 (Scheme) includes, among other things, updated Scheme provisions for land zoned Conservation, CZ1. The proposed update to these provisions is to bring the permitted uses of CZ1 into line with other Conservation areas zoned CZ2 and CZ3. It also provides the nexus to the objectives of the Conservation zone which include the prevention of land uses and development which would have an adverse impact on the ecological values of the site. Additionally, it provides for residential uses on large lots where a demonstrated commitment exists to the protection, enhancement and rehabilitation of the flora, fauna and landscape qualities.

Mr Robertson's appeal to the State Administrative Tribunal (SAT) against the City's decision not to approve his limestone extraction pit is scheduled for consideration in June 2018. The outcome of the SAT's deliberations will be reported to the Western Australian Planning Commission (WAPC) for consideration in preparing its recommendations on Amendment 29.

I will await the WAPC's recommendation prior to making a determination on this amendment.

Yours sincerely

HON RITA SAFFIOTI MLA
MINISTER FOR PLANNING

169 Mr Williams, in his evidence, and the applicant, in his closing submissions, emphasised the penultimate and final paragraphs of the Minister's letter to Mr Chown. Mr Williams was asked the following question in cross-examination:[110]

> Now, would you agree that all this letter says is that the Minister is going to await the WAPC's recommendations prior to making a determination?

[110] ts 17, 14 September 2018.

Mr Williams responded as follows:[111]

> Not necessarily, because she said she was going to await the SAT's decision that would be reported to the West[ern] Australian Planning Commission. So I - and this is, again, my speculating and has - so I don't agree with what you've said, because I think she would be saying, "Well, as I was waiting on SAT to advise the WAPC, then perhaps the WAPC haven't been informed by the SAT, so I will wait for the SAT to make their decision, [as] well."

170 As the Minister said in the penultimate paragraph of her letter, this review proceeding was listed for final hearing in June 2018. That hearing was vacated and relisted on the applicant's application in order for him to be able to obtain a Bushfire Management Plan for the proposed development. The proceeding was then listed for final hearing from 14 to 17 August 2018 and, ultimately, the hearing continued on 4 September 2018 (view) and 12 to 14 September 2018 (with further documents and final submissions being filed in October 2018). As it turned out, contrary to the Minister's expectation that '[t]he outcome of the SAT's deliberations will be reported to the Western Australian Planning Commission (WAPC) for consideration in preparing its recommendations on Amendment 29', the hearing of this review proceeding was still taking place when the Commission considered Amendment 29 and made its recommendation to the Minister. However, it appears from the sequence of events anticipated by the Minister in the final two paragraphs of her letter that, as Mr Williams said in evidence, she considers that the 'outcome of the SAT's deliberations' in this case is relevant to and will inform the strategic planning decision as to whether extractive industry use should be prohibited on the site. This inference is further supported by the fact that, some four months after the Commission's recommendation was made to the Minister, it appears that the Minister has not yet made a decision in relation to Amendment 29 under s 87(2) of the PD Act. Section 87(2) of the PD Act states as follows:

> The Minister may, in relation to a local planning scheme or amendment submitted to the Minister under subsection (1) -
>
> (a) approve of that local planning scheme or amendment; or
>
> (b) require the local government concerned to modify that local planning scheme or amendment in such manner as the Minister

[111] ts 17-18, 14 September 2018.

> specifies before the local planning scheme or amendment is resubmitted for the Minister's approval under this subsection; or
>
> (c) refuse to approve of that local planning scheme or amendment.

171 Although the Minister's determination as to whether to approve Amendment 29 in a form which prohibits extractive industry use on the site is a matter entirely for her and although, as the City points out in its submissions, Amendment 29 is an omnibus amendment comprising 169 items, of which only two items are relevant to the proposed development, given that it appears that the Minister considers that our determination and reasons in this proceeding are relevant to and will inform the strategic planning decision, and given that we conclude below that the proposed development merits conditional development approval, we consider that only limited weight should be given to the inconsistency between the proposed development and Amendment 29 in the circumstances of this case.

Sustainable use and development

172 There is one further aspect of orderly and proper planning raised in the evidence. Section 3(1)(c) of the PD Act states that a purpose of the Act is to:

> [P]romote the sustainable use and development of land in the State.

173 Furthermore, cl 1.6(c) of LPS 1 states that an aim of the Scheme is to:

> Promote the sustainable management of all natural resources including water, land, minerals and basic raw materials to prevent land degradation and integrate land and catchment management principles with land use planning decisions.

174 The PD Act does not define or indicate what is meant by the expression 'sustainable use and development'.[112] However, in ***Mount Lawley Pty Ltd and Western Australian Planning Commission*** [2007] WASAT 59 at [47], the Tribunal recognised that '[s]ustainability is now a core element of orderly and proper planning'. In ***Mount Lawley Pty Ltd and Western Australian Planning Commission*** and subsequent decisions, the Tribunal gave meaning and effect to the expression

[112] Contrast the EP Act which states in s 4A that the object of that Act is 'to protect the environment of the State' having regard to five stated and defined sustainability principles in the Table to that provision, namely '[t]he precautionary principle', '[t]he principle of intergenerational equity', '[t]he principle of the conservation of biological diversity and ecological integrity', '[p]rinciples relating to improved valuation, pricing and incentive mechanisms' and '[t]he principle of waste minimisation'.

'sustainable use and development' by reference to the *Western Australian State Sustainability Strategy - a vision for quality of life in Western Australia* (September 2003), State planning policies which built upon the foundation of the Sustainability Strategy (and which the Tribunal is required to have 'due regard' to under s 241(1) of the PD Act), local planning policies, and decisions of other environmental courts and tribunals (ECTs).

175 In terms of guidance from other ECTs, the seminal decision followed by the Tribunal is the decision of the New South Wales Land and Environment Court in ***Telstra Corporation Limited v Hornsby Shire Council*** [2006] NSWLEC 133; (2006) 146 LGERA 10; (2006) 67 NSWLR 256. In that decision, Preston CJ LEC observed at [108] as follows:

> Ecologically sustainable development, in its most basic formulation, is 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs': World Commission on Environment and Development, *Our Common Future* (1987), p 44 (also known as the Brundtland Report after the Chairperson of the Commission, Gro Harlem Brundtland). More particularly, ecologically sustainable development involves a cluster of elements or principles. Six are worth highlighting.

176 The six main principles of sustainable development referred to by Justice Preston in ***Telstra Corporation Limited v Hornsby Shire Council*** are as follows (citations and further discussion omitted):

- 'First, from the very name itself comes the principle of sustainable use - the aim of exploiting natural resources in a manner which is 'sustainable' or 'prudent' or 'rational' or 'wise' or 'appropriate'' ([109]);[113]

- 'Secondly, ecologically sustainable development requires the effective integration of economic [, social] and environmental considerations in the decision-making process' ([110] and [112]);[114]

- 'Thirdly, there is the precautionary principle' ([113]);[115]

[113] See ***Mount Lawley Pty Ltd and Western Australian Planning Commission*** at [48] and ***Hanson Construction Materials Pty Ltd and Town of Vincent*** [2008] WASAT 71 at [56].
[114] See ***Moore River Company Pty Ltd and Western Australian Planning Commission*** [2007] WASAT 98 at [113]-[115], [133], [143]-[145] and [229].
[115] See ***WA Developments Pty Ltd and Western Australian Planning Commission*** [2008] WASAT 260 at [42]-[45] and ***Wattleup Road Development Company Pty Ltd and Western Australian Planning Commission***

- 'Fourthly, there are principles of equity [, namely] … inter-generational equity … [and] intra-generational equity' ([116] and [117]);[116]

- 'Fifthly, there is the principle that conservation of biological diversity and [ecological] … integrity should be a fundamental consideration' ([118]);[117] and

- 'Sixthly, ecologically sustainable development involves the internalisation of environmental costs into decision-making for economic and other development plans, programmes and projects likely to affect the environment' ([119]).

177 We will briefly refer to two decisions of the Tribunal in relation to sustainable use and development of land.

178 ***Mount Lawley Pty Ltd and Western Australian Planning Commission*** involved an application for review of the Commission's decision to refuse to grant development approval to carry out sand extraction and earthworks on a part of Mount Lawley Pty Ltd's land at Ellenbrook. The site of the proposed development was reserved under the *Metropolitan Region Scheme* as 'Primary Regional Roads' for the proposed Perth-Darwin National Highway. Mount Lawley Pty Ltd intended to use the sand to achieve the approved site levels for a residential subdivision on an adjoining part of its land. The Commission argued that the proposed development would have a detrimental impact on the State's ability to develop the highway, principally because the sand extraction would require the State to import 50,000 cubic metres of fill, thereby increasing the cost of construction by $600,000. To attain the site levels approved in the adjoining residential subdivision, Mount Lawley Pty Ltd required approximately 272,000 cubic metres of fill. The development application proposed the extraction of 101,000 cubic metres from the highway reserve. Mount Lawley Pty Ltd could obtain a further 68,000 cubic metres of fill from the residential subdivision area. The remaining 103,000 cubic metres of fill would have to be imported from elsewhere. The joint traffic engineering expert evidence showed

[2011] WASAT 160 at [21], [51], [63], [66] and [71] (see also ***Wattleup Road Development Company Pty Ltd and Western Australian Planning Commission*** [2014] WASAT 159 at [59] and ***Wattleup Road Development Co Pty Ltd v State Administrative Tribunal [No 2]*** [2016] WASC 279 at [53]).

[116] See ***APP Corporation Pty Ltd and City of Perth*** [2008] WASAT 291 at [68] and [88] (inter-generational equity) and ***Mount Lawley Pty Ltd and Western Australian Planning Commission*** at [48] (intra-generational equity).

[117] See ***Moore River Company Pty Ltd and Western Australian Planning Commission*** at [114] and [125] and ***WA Developments Pty Ltd and Western Australian Planning Commission*** at [15] and [36].

that, if the development application for sand extraction was refused, the need to import an additional 101,000 cubic metres of fill to carry out the residential subdivision would result in the residents of Ellenbrook being subjected to an additional 11,222 semi-trailer movements. The engineering expert witnesses also agreed that, as a result of these additional truck movements, the local roads would be subjected to greater loading than they would normally be designed to carry and may wear out prematurely, which would result in a cost to local government. The experts also agreed that, if Main Roads WA would be required to import an additional 50,000 cubic metres of fill, the necessary truck movements would be via the regional road reservation, rather than via the local road network.

179 The Tribunal decided to grant development approval for sand extraction and earthworks, principally for the following reasons at [48]:

> Sustainability requires the integration of the social, economic and environmental consequences of land use and development in order to deliver a better quality of life now and for future generations. The proposed development involves orderly and proper planning, and in particular, the sustainable use and development of land. It involves the 'wise use and management' ([*State Planning Policy No. 1 - State Planning Framework Policy* (SPP 1)] cl 3 A1) of 101,000 cubic metres of fill, reduce[s] the need for transport (SPP 1 cl 3 A2) and avoids social, economic (avoiding damage to streets within the local government's care, control and management) and environmental detriments which would flow from 11,222 heavy vehicle truck movements passing along the local streets and close to residences. It does not compromise 'the logical and efficient provision and maintenance of infrastructure, including the setting aside of land for future transport routes' and 'protecting key infrastructure, including … roads from inappropriate land use and development' (SPP 1 cl 3 A4). Although the consequence of approval of the development application is that [Main Roads WA] would ultimately need to import an additional 50,000 cubic metres of fill when it comes to construct the [highway], this is half the volume of fill the applicant can extract and, as noted earlier, the respondent will be able to utilise the road reservation and avoid local roads to do so.

180 ***Hanson Construction Materials Pty Ltd and Town of Vincent*** [2008] WASAT 71 involved an application for review of the refusal of development approval for an extension of the approved hours of operation of an existing concrete batching plant in East Perth, so as to permit 24-hour operation from Monday to Saturday, excluding public holidays, until the expiry of the development approval for daytime operations in June 2012. The land is located adjacent to the Perth Central Business District (CBD) and with a frontage to the regional freeway

system. The Tribunal approved the proposed development, in part, because it found that it was consistent with orderly and proper planning, having regard to sustainable development principles. The Tribunal reasoned as follows at [56]:

> … The proposed extension of hours of operation promotes sustainable use and development of land, because the location of the site, proximate to the CBD and abutting the regional freeway system, minimises travel distances, and hence carbon emissions, and reduces traffic pressures on minor roads, and enables construction activities to take place in the CBD at night when there is generally reduced traffic on the roads, resulting in shorter travel times and thereby reduced carbon emissions.

181 It is common ground between the parties that the limestone which is proposed to be extracted from the site is 'suitable as lime for agriculture and neutralisation of acidity',[118] in addition to use for road base. As Mr Bowman said in evidence, which was not questioned or contradicted, and which we accept:[119]

> Soils in Western Australia are notoriously poor and low in nitrogen. As nitrogenous fertilisers are added, soil acidity increases, and that causes problems for plant growth, and acidified water run-off into local estuaries and streams. One solution is to add lime to the soil.

182 Similarly, the *State Planning Strategy 2050* states as follows at page 53 in relation to 'agriculture and food':[120]

> To counteract soil acidity, which poses a major risk for sustained agricultural production, there is a need for strategic planning to secure basic raw materials, particularly lime and gypsum resources.

183 Specifically in relation to the Lower Great Southern Region of the State, the *Lower Great Southern Strategy*, which was published by the Commission in May 2016, states as follows at page 57:[121]

> Limestone access is particularly important since agricultural limestone and lime sand are required to neutralise environmental impacts by minimising farm soil acidity.

184 However, on the evidence before the Tribunal, there is only limited locally-produced agricultural limestone available in the Lower Great Southern Region. According to unchallenged evidence of Mr Williams, local production is limited to a relatively small limestone pit operated by

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118 Exhibit 4 [38].
119 Witness statement of Martin Bowman dated 11 May 2018 (Exhibit 29) [40].
120 Exhibit 13.1 page 211.
121 Exhibit 11 tab 2.

the Shire of Denmark, which is in a Class 'A' Reserve and subject to community opposition, and a limestone pit in Bornholm, which is within the City's district and 'is very close to reaching the end of its lifespan'.[122] As Mr Williams also said:[123]

> … a lot of limestone in the Great Southern actually comes from Redgate, which is near Margaret River.

185 In a letter to the City in relation to the proposed development dated 15 July 2016, the Manager, Land Use Planning and Policy at the Department of Agriculture and Food, WA (DAFWA) states as follows:[124]

> Soil acidity is a major degradation problem across Western Australian [sic], especially in the South Coast Region with the dominance of light textured and highly leached sand plain soils. Soil acidity is estimated to cost broadacre agriculture approximately $498 million per year in WA. It is one of the few soil constraints that can be treated with appropriate management. Bulk lime, in the form of limesand, crushed limestone or dolomite is currently the cheapest way to ameliorate acid soils.

186 The letter refers to statistics indicating that the amount of lime used to treat acidifying soils in Western Australia increased by 600% between 2004 and 2016. The letter also indicates that the increase in use of lime to treat land degradation is likely to continue, including in the South Coast Region:[125]

> A report prepared for South Coast Natural Resource Management Inc. – "*Lime Situation Report 2015 South Coast NRM Region*" (*Fry, 2015*) estimated the agricultural lime required in the South Coast Region over the next 10 years to be approximately 8 million tonnes. If most soils are remediated in the next 5 years, this will require close to a million tonnes per year. To maintain South Coast soils at target pH would require approximately 20 million tonnes over the next 30 years and 30 million tonnes of the next 50 years.

187 The letter from DAFWA then states as follows:[126]

> Current lime supply on the South Coast from existing extraction sites is limited and often the quality from many of the regional sources is low (in the form of carbonate available within the liming agent and the particle size of the product). If used at a rate required to ameliorate South

[122] ts 34, 14 September 2018.
[123] ts 34, 14 September 2018.
[124] Exhibit 11 tab 7 page 2.
[125] Exhibit 11 tab 7 page 2.
[126] Exhibit 11 tab 7 page 2.

> Coast soils, based on recent investigation and analysis of demand, current pits may only have enough lime resources to last a few more years.

188 The letter also states that the quality of the lime available from the proposed limestone pit on the site is 'high' and is 'in the better or higher quality range for the region'.[127]

189 As indicated earlier, in addition to the limited local supply, limestone used by farmers in the Great Southern Region comes from the Margaret River area. This requires trucks to travel from that area to the Great Southern and then return, with consequent carbon emissions. In contrast, as Mr Bowman said in his evidence, 'the reduced transport requirements from the proposed [s]ite would have positive greenhouse benefits' in terms of reduced carbon emissions.[128]

190 In our view, the proposed development is consistent with the objective of the PD Act to 'promote the sustainable use and development of land in the State' and the aim of the Scheme to '[p]romote the sustainable management of all natural resources … to prevent land degradation …'. This is because the proposed development would reduce carbon emissions by reduced travel distances to supply lime to farmers in the Great Southern Region and would mitigate the significant environmental problem of land degradation through soil acidification by the supply of lime. The proposed development is therefore consistent with the sustainable development principles of sustainable use and effective integration of economic, social and environmental considerations in the decision-making process. Furthermore, the proposed development is also consistent with the sustainable development principle that conservation of biological diversity and ecological integrity should be a fundamental consideration, because, for reasons discussed in relation to issue 4 below, the development would have an acceptable impact on the natural environment.

Adverse planning precedent

191 Finally, we note that the City relies on a detailed submission made by DPLH against approval of the proposed development for reasons including that approval of the application would set 'an undesirable precedent' for other lots in the Conservation zone. The City did not raise the issue of adverse planning precedent in the agreed statement of issues. In any case, adverse planning precedent cannot be a relevant consideration in the factual circumstances of this case. As the Tribunal

[127] Exhibit 11 tab 7 page 3.
[128] Witness statement of Martin Bowman dated 10 May 2018 (Exhibit 29) [41].

said in ***Nicholls and Western Australian Planning Commission*** at [74], in order for adverse planning precedent to be a relevant consideration in a planning assessment, the following two criteria must be established:

> (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.

192 In the circumstances of this case, the site is uniquely large in size in the CZ1 zone and the proposed limestone pit is uniquely sited at the south-eastern edge of CZ1, with the consequence that there is not more than a mere chance or possibility that there may be later indistinguishable applications.

Does the proposed development have an unacceptable impact on the amenity and character of the locality as a Conservation zone?

Impact on the visual amenity of the locality

193 The City submits that the proposed development is likely to adversely impact on 'the unique character and special amenity of the locality as a Conservation Zone and "wilderness retreat subdivision"'.[129] There is no question on the evidence that the Nullaki Peninsula in general, and the CZ1 zone in particular, has a unique character and special amenity, which was described in Mr Algeri's witness statement as 'naturally scenic with an undulating coastal terrain'.[130] As Mr Algeri also correctly observed, the proposed extraction area 'is broadly located on a prominent ridgeline that rises from the southern coastline of the Nullaki Peninsula' and from the highest point of the area proposed to be quarried 'there are panoramic 360 degree views of the peninsula, the inlet, the southern ocean and the mainland'. As Mr Algeri also said (and was evident on the view), 'there is no clear visible development in close proximity, in any direction; it appears as the natural environment all around is intact'.[131]

194 The City submits that, having regard to the unique and special amenity of the locality, as correctly described in Mr Algeri's evidence, the proposed development 'would have an adverse impact on the visual amenity of the locality'. In particular 'it would result in the permanent removal of [a] portion of a significant, widely visible ridgeline in the

[129] City's closing submissions [104].
[130] Witness statement of Joe Algeri dated 18 May 2018 (Exhibit 23) [98].
[131] Witness statement of Joe Algeri dated 18 May 2018 (Exhibit 23) [18].

context of a conservation zone specifically intended to protect landscape qualities'.[132] The City also submits that the sight of heavy haulage traffic on the haul road 'which is widely visible in the locality' is also 'likely to be [an] incongruous visual element within the wilderness retreat Conservation Zone'.[133]

195 In our view, the visual impact of the proposed development is acceptable, even though it is located in a Conservation zone. This is because, as indicated earlier, as a result of careful, site-responsive design (that is, commencing the extraction on the southern side of the proposed limestone pit and leaving intervening topography and landform in place), the proposed limestone pit would not be visible from outside the site, at least until the visible area is rehabilitated. The evidence indicates that, ultimately, part of the eastern face of the proposed quarry may be visible (at a distance) from the west and north-west. However, by the stage that this part of the development could potentially be visible, it would be rehabilitated. In its closing submissions, the City referred to evidence of Mr Boonzaaier that, from the Ocean Beach lookout, 'there might be an observation during a short period' of the limestone pit during the carrying out of the development.[134] However, as indicated earlier, Ocean Beach is 11.6 kilometres from the relevant part of the site. Mr Stephens provided an 'eye view' image from the Ocean Beach lookout approximating to a 50 millimetre lens (full frame) 'which is what is rated as being the most similar to what the eye sees'. As Mr Stephens said, in evidence '[it is] not possible for the eye to discern the pit or the impact of removing the small portion of the top of the ridge' from this location.[135] The 'eye view' image clearly bears this out. This is hardly surprising given the significant distance involved.

196 The City also noted in its submissions that, although a significant amount of evidence was presented in relation to what, if any, of the proposed development or of the area of ridgeline proposed to be removed could be seen from various viewing locations on the Nullaki Peninsula and adjacent to it, no specific evidence was presented in relation to the visual impact from the section of the Bibbulmun Track which proceeds through the Conservation Reserve to the south-east of the site. However, the area of the site to the immediate east of the proposed limestone pit ranges in level from about 150 to 164 metres AHD. Given that the extraction is proposed to commence from the south of the extraction area

[132] City's closing submissions [116].
[133] City's closing submissions [116].
[134] ts 537, 12 September 2018.
[135] Further witness statement of Lindsay Stephens dated 7 September 2018 (Exhibit 39) figure 6.

at approximately 140 metres AHD, it is highly unlikely that any of the quarrying activity or machinery associated with development would be able to be seen from the Bibbulmun Track to the south-east of the site. The aerial photographs also indicate that the Bibbulmun Track proceeds through a vegetated area in that location. It is likely that any view of the site from the Bibbulmum Track to the south-east will be impacted by intervening vegetation.

197 As we found earlier, the most significant adverse impact of the proposed development is the permanent removal of the section of prominent ridgeline within the extraction area. However, as we also found earlier, the removal of this portion of the ridge would be barely perceptible from the closest viewing positions, that is from the Bibbulmun Track as it turns south at the north-eastern corner of the site and from the lookout near the Nullaki campsite. As we also found earlier, the change in the ridgeline would be barely perceptible or imperceptible from other viewing positions. Furthermore, as indicated earlier, we accept Ms Price's evidence, which was not questioned or contradicted, that the landform of the extraction area following completion of the development and rehabilitation would not be dissimilar to some natural landforms in the area.

198 Furthermore, as we found earlier, the proposed development would have a significant positive impact in terms of visual amenity of the locality by removing the visual 'scar' of the firebreak, through sealing the haul road, particularly if the development were conditioned to require the applicant to use gravel and spread topsoil on or apply spray sealing to the shoulders of the haul road to encourage growth of vegetation on the shoulders.[136] As indicated earlier, the City submits that the sight of heavy haulage traffic on the haul road is 'likely to be [an] incongruous visual element within the wilderness retreat Conservation Zone'.[137] The development involves a maximum of 14 trucks in and 14 trucks out of the site per day during one third of the year (with no activity for two-thirds of the year). We do not consider that the sight of a limited number of trucks for a limited part of the year involves an unacceptable visual impact when viewed from or in the context of the Conservation zone.

199 Finally, in relation to visual amenity, the City submits that the removal of up to one hectare of native vegetation for the construction of the haul road and up to 1.6 hectares of native vegetation along the public road transport route to enable the necessary upgrades to the transport

[136] See condition 14(i) in Attachment A to these reasons.
[137] City's closing submissions [116].

route would have an unacceptable impact on the visual amenity of the locality. However, in relation to the up to one hectare of native vegetation which would need to be removed for the construction of the haul road, as indicated earlier, the development can be conditioned to require the spreading of topsoil on or applying spray sealing to the shoulders to encourage growth of vegetation. Furthermore, as Mr Stephens observed (and as can be seen on photographs in evidence), natural regrowth of vegetation along the area disturbed for the construction of the firebreak has taken place (even without spreading topsoil or applying spray sealing). In relation to the up to 1.6 hectares of native vegetation which would need to be removed along public roads to facilitate the necessary upgrades of those roads, those roads are not in the Conservation zone, but rather in rural areas, and the removal of native vegetation to facilitate the upgrading of rural roads to enable heavy haulage trucks to pass along those roads is neither unexpected nor unreasonable.

Impact on the recreational amenity of the Bibbulmun Track and Nullaki campsite

200 The City also submits that the proposed development would have an adverse impact on the recreational amenity of walkers along the Bibbulmun Track, including those staying overnight at the Nullaki campsite. The City relies on the evidence of Mr Mack that, given the location of the haul road and the steepness of the site in that area, 'there are likely to be noise impacts experienced on the Bibbulmun Track and at the Shelter'.[138] The City also relies on the evidence of Mr Algeri that:[139]

> In the absence of a dust and noise report I am not convinced that the proposed development would not adversely impact on the quiet and peaceful use of the track by walkers who will be walking adjacent to the haul road for a section of some 400m. In addition, the Bibbulmun Track will then need to traverse the extended section of Lee Road. Unfortunately, the extraction that will occur in the summer months of December to March is likely to coincide with the peak walking season which I understand to be spring/summer.

201 Objections to the proposed development were made to the City by the Bibbulmun Track Foundation (Foundation), the Curtin University Sustainability Policy Institute (CUSP Institute) and The Beeliar Group - Professors for Environmental Responsibility (Beeliar Group), on a basis

[138] Witness statement of Andrew Mack dated 11 May 2018 (Exhibit 30) [6.3.10].
[139] Witness statement of Joe Algeri dated 18 May 2018 (Exhibit 23) [104].

that the proposed development would have adverse impacts on the Bibbulmun Track and Nullaki campsite. The Foundation states in its submission that the Track and campsites situated in remote locations offer 'a "wilderness" experience and an opportunity to immerse oneself in the natural environment'. Among other concerns about the proposed development, the Foundation states that traffic on the haul road and extraction operations would have 'a detrimental impact on the quiet and peaceful use and enjoyment of the Bibbulmun Track and the campsite by walkers', the noise and dust from the operations and traffic 'would change a natural experience to a more industrial one and adversely affect the amenity of the area' and the proposal 'would be detrimental to the area and set a bad precedent for other development applications on the peninsula'.[140] The Foundation also states that if the proposal were approved, the Bibbulmun Track would have to be realigned and the Nullaki campsite relocated, at considerable cost. The CUSP Institute considers that the proposed development would have a 'deep impact on the biodiversity of the area through extraction, noise, vibration, and dust pollution as well as on the recreational and tourist activities on the Bibbulmun Track, including the [Nullaki] campsite'.[141] The Beeliar Group considers that the proposed development and the transport of lime by trucks would be 'antithetical to achieving' the principles of sustainable development.[142]

202 In our view, the impact of the proposed development on users of the Bibbulmun Track and the Nullaki campsite is acceptable for the reasons which follow. In terms of noise, the applicant tendered a witness statement by Mr Tim Reynolds, who is an acoustics engineer employed by Herring Storer Acoustics. Mr Reynolds was not required for cross-examination. Mr Reynolds gave evidence, which, given his qualifications and the lack of challenge, we accept, that, assuming that the Nullaki campsite is 'noise sensitive premises: highly sensitive area' for the purposes of the *Environmental Protection (Noise) Regulations 1997* (WA) (Noise Regs), noise modelling indicates that 'the highest noise received at the campsite from a truck, in the worst case location [on the haul road] was calculated at 40 dB(A)'[143] and that:[144]

[140] Exhibit 10 tab 8.
[141] Exhibit 10 tab 9.
[142] Exhibit 10 tab 12.
[143] Witness statement of Tim Reynolds dated 21 May 2018 (Exhibit 33) page 3.
[144] Witness statement of Tim Reynolds dated 21 May 2018 (Exhibit 33) page 4.

> [E]ven with the addition of a +5 dB(A) penalty for a tonal component, the worst case noise received at the camp site would comply with the assigned L_{A10} noise level of 45 dB(A) for a "highly sensitive area".
>
> Thus, regardless of the interpretation or status of the Nullaki campsite, noise received at the campsite would for the worst case noise level, comply with the most stringent criteria applicable under the [Noise Regs].

203 Mr Mack observed in his evidence that Mr Reynolds had assumed in his witness statement that there would only be 20 truck movements (10 entering and 10 exiting) per day and that Mr Reynolds said in his witness statement that:[145]

> With only 10 trucks per day (ie 20 movements, with 10 entering and 10 existing), noise received at the camp site would need to comply with the assigned L_{A1} noise level.

204 The assigned L_{A1} noise level for 'noise sensitive premises: highly sensitive area' is 55 dB(A), whereas the L_{A10} is 45 dB(A).

205 However, Mr Reynolds' noise modelling indicates that the noise generated by a truck on the haul road would comply with the L_{A10} assigned level of 45 dB(A) at the Nullaki campsite. The fact that the proposed development involves 28 truck movements, rather than 20 truck movements a day, does not alter the noise level of a truck on the haul road at the Nullaki campsite, unless more than one truck would be traversing the haul road at the same time. However, the haul road would not be wide enough for trucks to pass one another in opposite directions and it is unlikely that more than one truck would use the haul road at the same time in the same direction as a truck is likely to leave the limestone pit once it is loaded.

206 Mr Mack also observed in his evidence that Mr Reynolds did not model the impact of extraction operations in the proposed limestone pit on the Nullaki campsite. However, the extraction area is located 1.5 to 1.6 kilometres from the Nullaki campsite. In its *Guidance for the Assessment of Environmental Factors - Separation Distances between Industrial and Sensitive Land Uses* (No. 3, June 2005) (EPA Guidelines), the EPA states at page 3 that:[146]

> [I]n recognition that a site-specific study may not be necessary in all situations [to determine the separation distance that should be maintained

[145] Witness statement of Tim Reynolds dated 21 May 2018 (Exhibit 33) page 4.
[146] Exhibit 11 tab 6.

> between an industry and sensitive land uses], generic separation distances have been developed.

207 Appendix 1 to the EPA Guidelines identifies the potential impacts and the generic buffer distance required (in the absence of a site-specific scientific study) for various industries. In relation to 'extractive industry' involving 'quarrying (including blasting), crushing and screening', the relevant impacts identified are noise, dust and risk, and the relevant buffer distance identified is 1,000 metres. The distance between the proposed extraction area and the Nullaki campsite exceeds this generic buffer distance.[147]

208 The Bibbulmun Track itself is also generally well separated from the proposed limestone pit. At its closest point, the Bibbulmun Track is more than 400 metres from the extraction area. Furthermore, as Mr Stephens said in evidence, 'any solid barrier will reduce the noise' and 'we would design the pit so that the crusher is located right at the base of the highest face', [148] with the consequence that the active face of the pit would itself mitigate noise impact on the Bibbulmun Track and the Nullaki campsite. Similarly, as Mr Stephens observed, the design of the quarry is such that the face would provide a barrier for dust. Furthermore, as Mr Stephens also said, limestone 'is actually not dusty when you dig it out because the soil is quite moist'[149] and 'there should be no dust risk for the Bibbulmun Track', because the haul road will be sealed and trucks will be covered.[150] Condition 34 proposed on a 'without prejudice' basis by the City, and accepted by the applicant, requires that 'all loads leaving the site are to be enclosed or completely covered by a secured impermeable tarpaulin or some other effective mechanism used to prevent dust nuisance'.[151] The following further agreed conditions would also serve to mitigate noise and dust impacts and assist in ensuring that the impact of the proposed development on the Bibbulmun Track and Nullaki campsite is acceptable:

> **NOISE**
>
> 29. All activity at the site is to comply with the *Environmental Protection (Noise) Regulations 1997* (WA). The applicant will

[147] In his closing submissions, the applicant incorrectly referred to the relevant generic buffer distance as 300m - 500m (depending on the size), which is the buffer distance for 'extractive industry' involving 'sand and limestone extraction' with 'no grading or milling works'. However, the proposed development includes crushing and screening and consequently the generic buffer distance is 1,000 metres.
[148] ts 271, 15 August 2018.
[149] ts 275, 15 August 2018.
[150] ts 276, 15 August 2018.
[151] Exhibit 52.

undertake a noise compliance audit when operations commence to ensure compliance with the *Environmental Protection (Noise) Regulations 1997* (WA), to the reasonable satisfaction of the City of Albany.

30. Standard high pitched reversing beepers are to be removed from all excavation vehicles used on the site and alternative warning measures such as flashing lights or broadband reversing alarms known as 'croakers' (subject to compliance with the relevant Australian Standard and any Worksafe codes) are to be fitted to these vehicles instead.

31. No blasting of material is permitted as part of extraction operations, unless a separate written approval has been obtained from the City of Albany.

DUST

32. The developer shall prevent the generation of visible particulates (including dust) from access ways, trafficked areas, stockpiles and machinery from crossing the boundary of the subject site by using where necessary appropriate dust suppression techniques including but not limited to the installation of sprinklers, utilisation of water tankers, mulching, or by the adoption and implementation of any other suitable land management system in accordance with the Department of Environment and Conservation's dust management guidelines dated March 2011 and the City of Albany Prevention and Abatement of Sand Drift Local Law 2000.

33. Verification of the efficacy of the measures to control dust proposed in the Excavation and Management Plan submitted by the applicant will be subject to auditing as part of the annual Compliance Report and the City may require alternate actions if the measures prove ineffective.

209 We also accept the evidence of Ms Price that 'it's not outside the experience of the whole Bibbulmun Track as a whole and, therefore, I don't think it's unacceptable impact' for walkers to see or hear a truck going by on a road.[152] Similarly, Mr Bowman gave evidence, which we accept, that 'in the course of walking the Bibbulmun Track, there are a range of experiences', and that 'at some stage … that actually follows existing roadways where trucks would be driving along'.[153] It is correct, as Mr Mack observed, that in assessing the impact of trucks using the haul road upon walkers on the Bibbulmun Track we are 'talking about a section of this track which has not been subject to the increased levels of

[152] ts 265, 15 August 2018.
[153] ts 266, 15 August 2018.

truck and vehicle noise associated with this proposal'.[154] However, even on the Nullaki Peninsula, walkers along the Bibbulmun Track are required to cross public roads, such as Lee Road.

210 As indicated earlier, Mr Algeri said in his witness statement that the period during which the proposed quarrying would occur, that is December to March, 'is likely to coincide with the peak walking season [of the Bibbulmun Track] which I understand to be spring/summer'.[155] However, the Foundation's website, setting out frequently asked questions and answers, responds to the question 'Is it too hot to walk in the summer?' with the answer 'Yes it is!'.[156] It then states as follows:[157]

> **It is strongly recommended that you do not carry out any extended walk between December and the start of March anywhere on the Track.**

211 Indeed, the website goes on to say:[158]

> Please plan to walk outside of these months [between December and the start of March] and avoid putting your life at risk and the lives of those that may need to rescue you.

212 Mr Algeri pointed out that 'Albany can be up to 10 degrees cooler than Perth' and observed that 'it would make sense if you're going to do a walking trail' while on summer holidays in the Albany/Denmark area to walk along part of the Bibbulmun Track.[159] However, given the explicit statement in the Foundation's website, it is unlikely that there will be a significant number of walkers using the Bibbulmun Track and the Nullaki campsite at the time of year when the proposed extractive industry is operating between December and March.

213 Furthermore, although the Foundation's submission states that: '[m]any Bibbulmun Track walkers are still in camp between 7 am and 9 am and many arrive at the Nullaki campsite by noon',[160] as indicated earlier, the Nullaki campsite is 1.5 to 1.6 kilometres from the proposed limestone pit and the noise of trucks operating on the haul road received at the Nullaki campsite complies with the 'most stringent criteria applicable under the [Noise Regs]' in Mr Reynolds' words.[161] Although

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154 ts 278, 15 August 2018.
155 Witness statement of Joe Algeri dated 18 May 2018 (Exhibit 23) [104].
156 Exhibit 47 page 3.
157 Exhibit 47 page 3 (original emphasis).
158 Exhibit 47 page 3.
159 ts 591, 13 September 2018.
160 Exhibit 10, tab 8.
161 Witness statement of Tim Reynolds dated 21 May 2018 (Exhibit 33) page 4.

the Bibbulmun Track would cross the proposed Lee Road realigned route and that road would be 135 metres from the Nullaki campsite at its closest point, the Bibbulmun Track crosses public roads in other locations and the Noise Regs do not apply in relation to noise from public roads. Furthermore, there would be no noise from trucks affecting users of the Nullaki campsite between 5.00 pm and 7.00 am on Monday to Friday (and until 8.00 am on Saturday) with no operations and hence no noise on Sundays or public holidays.

214 We find that the visual impact of the proposed development on the Bibbulmun Track is acceptable. Contrary to the City's submission, the active extraction area would not be visible from the Bibbulmun Track. We accept Mr Williams' evidence that '[g]iven the distance of the lime pit from the Bibbulmun [T]rack and the contours that conceal the pit [as shown in a photograph referred to by Mr Williams] it will be physically impossible to see the lime pit from the Bibbulmun [T]rack'.[162] Furthermore, for the most part, the haul road would not be visible from the Bibbulmun Track. The haul road would be visible from the Bibbulmun Track as it turns south at the north-eastern corner of the site and until it turns south-east towards the Nullaki campsite and from one point where the Bibbulmun Track almost touches the eastern boundary of the site. However, the Bibbulmun Track is generally set back 200 metres to 300 metres from the haul road and the intervening land is vegetated.

215 There is no basis on the evidence for the statement in the Foundation's submission that, if the proposed development is approved, the Bibbulmun Track would have to be realigned and the Nullaki campsite relocated. Furthermore, in relation to The Beeliar Group's submission, as we found earlier, approval of the proposed development is consistent with sustainable development principles, because it would result in reduced carbon emissions by avoiding the need for the transport of limestone from the Margaret River area to the Great Southern Region and would mitigate soil degradation through acidification in the region and because, as we find below, the proposed development would have an acceptable impact on the natural environment.

Impact on surrounding residents

216 Finally, Mr Mack expressed the opinion that it is 'likely that surrounding residents will experience a loss of amenity due to the

[162] Witness statement of Samuel Williams dated 11 May 2018 (Exhibit 25) [33].

proposal as a result of the noises emanating from the site and haulage'.[163] We do not accept this evidence. The nearest residence to the proposed limestone pit is 2.3 kilometres away, over double the generic separation distance in the EPA Guidelines. As indicated earlier, noise from vehicles on public roads is not subject to the Noise Regs. Furthermore, the public roads comprising the transport route to and from the site are in rural areas. Noise generated by trucks is neither unexpected nor unreasonable in rural areas.

217 Furthermore, as indicated earlier, the proposed development would have a significant positive impact on the amenity of the locality comprising the Conservation zone, because it would provide a secondary emergency accessway for residents in the 51 wilderness retreat lots comprising the remainder of the CZ1 zone by linking Rock Cliff Circle with Lee Road and because it would effectively remove the visual 'scar' on the landscape formed by the firebreak (particularly if the development were conditioned to require the haul road to be constructed with gravel shoulders and topsoil to be spread on or spray sealing applied to the shoulders to encourage growth of vegetation).

218 We are satisfied that the proposed development would have an acceptable impact on the amenity and character of the locality as a Conservation zone and generally.

Would the proposed development have an unacceptable impact on the natural environment?

219 The City submits that the proposed development would have an unacceptable impact on the natural environment, in particular on the conservation values of the Nullaki Peninsula, because of the clearing of eight hectares of native vegetation for the quarry and up to a further one hectare of native vegetation to facilitate construction of the haul road, all of which is within the CZ1 zone, and because of the removal of a portion of the prominent ridgeline within the extraction area. The City relies on the evidence of Mr Mack that the impact of the proposed development on the natural environment is 'unacceptable', because 'there is going to be some permanent change to the environment as a result of the [proposed] development in that you are going to be removing or changing the topography and the landscape, removing peaks' and 'you would never get a total rehabilitation' of the native vegetation.[164]

[163] Witness statement of Andrew Mack dated 11 May 2018 (Exhibit 30) [6.3.10].
[164] ts 337, 16 August 2018.

The City also relies on the evidence of Mr Mack that the proposed development would have a detrimental impact on native fauna.

220 We do not accept Mr Mack's opinion, and the City's submission, that the proposed development would have an unacceptable impact on the natural environment. As Ms Price said in her evidence, the removal of vegetation in the extraction area will be 'transient'[165] and 'temporary'.[166] The vegetation in the area of the proposed limestone pit is, as Ms Price said, 'fairly typical vegetation for that coastal area', although it has been 'possibly impacted by previous fire history at the site, which meant that it wasn't quite as thick and dense as in some other parts of the coast that I've surveyed'.[167] No more than three hectares in the pit area will be open for extraction at any one time and the cleared area will be progressively rehabilitated with native vegetation using retained topsoil on the site. Furthermore, as Mr Bowman said in evidence, the vegetation on site comprises a 'very, very robust community, consisting of plants that are able to withstand what is a very harsh environment'.[168] Moreover, as Ms Price said, 'the species that are common there at the moment are generally very successfully rehabilitated and they're readily available in terms of either collecting seed from the site or planting seedlings'.[169] Indeed, as indicated earlier, there is evidence on site of successful rehabilitation of the area quarried in the period from 2002 to 2006.

221 It is also significant, in our view, that, as Mr Price observed, the footprint of the proposed limestone pit and hence vegetation to be removed is relatively 'small in the context of the vegetation on the whole of the Nullaki Peninsula'[170] and, indeed, is relatively small even in the context of the site itself, which comprises about 437 hectares of similar vegetation. As Ms Price said in unchallenged evidence, the vegetation in the area proposed to be quarried is 'quite similar'[171] to the vegetation on the Nullaki Peninsula generally. The area proposed to be quarried is only about 2.1% of the area of the site and is a little more than 0.01% of the area of the Nullaki Peninsula. On the evidence of Ms Price and Mr Bowman, which was not questioned or contradicted, and we accept, the proposed extraction area contains vegetation of the same general

[165] ts 237, 15 August 2018.
[166] ts 343, 16 August 2018.
[167] ts 234, 15 August 2018.
[168] ts 357, 16 August 2018.
[169] ts 256, 15 August 2018.
[170] ts 237, 15 August 2018.
[171] ts 349, 16 August 2018.

nature and quality as the remaining about 97.9% of the site and the remaining about 99.99% of the Nullaki Peninsula.

222 In relation to potential impact on fauna, as Ms Price said, based on her fauna survey of the proposed limestone pit and accessway in August 2018, 'there doesn't appear to be any conservation significant fauna that would be detrimentally impacted by the proposed development'[172] and 'the value in terms of flora and fauna diversity and its values to fauna habitat wouldn't be diminished after it has been rehabilitated'.[173]

223 In relation to the up to one hectare of native vegetation to be removed for the construction of the haul road, as indicated earlier, the evidence of Mr Small is that topsoil can be spread on or spray sealing can be applied to the shoulders of the haul road to encourage growth of vegetation and the evidence on site indicates that vegetation has naturally rehabilitated in the disturbed areas at the edges of the existing firebreak track. In relation to the up to 1.6 hectares of native vegetation required to be removed to facilitate the upgrading of the public roads forming the transport route from the site, as we found earlier, clearing of native vegetation to facilitate the upgrading of roads in rural areas so as to accommodate trucks is neither unexpected nor unreasonable.

224 The most significant adverse environmental impact of the proposed development involves the permanent removal of part of a prominent ridgeline which is within the proposed limestone pit area. As indicated earlier, Mr Mack expressed the opinion that the 'permanent change to the environment as a result of the [proposed] development in that you are going to be removing or changing the topography and the landscape, removing peaks' is 'unacceptable' in terms of the impact of the development on the natural environment.[174] The City submits, on Mr Mack's evidence, that this permanent change is 'an unacceptable environmental impact having regard to the conservation values of the Nullaki Peninsula'.[175]

225 However, as we found earlier, the change in landform and topography on the site would be barely perceptible from the closest viewing positions off the site (the Bibbulmun Track and the lookout near the Nullaki campsite to the north-east) and would be scarcely perceptible or imperceptible from the other viewing locations which are located

[172] ts 350, 16 August 2018.
[173] ts 344, 16 August 2018.
[174] ts 337, 16 August 2018.
[175] City's closing submissions [144].

further away. Furthermore, on Ms Price's unchallenged evidence, the post-development landform, namely 'a tiered shape … isn't actually that dissimilar to some of the cliff and coastal structure that's there already'.[176]

226 The City submits that the two flora surveys by Ms Kinnear and Dr Bain do not satisfy the requirement in cl 4.5 of Sch 12 of LPS 1 in relation to the CZ1 zone that landowner submit '… a comprehensive professional assessment of the selected Development Area and proposed access way/driveway in accordance with the *Environmental Protection Authority Guidance Statement No. 51 - Terrestrial Flora and Vegetation* … to determine the presence of rare, endangered and/or threatened flora … species'.[177] The City relies on the evidence of Mr Mack in support of this submission. However, as indicated earlier, Mr Mack's evidence is that 'further work is required to determine [the presence of rare, endangered and/or threatened flora species], *particularly, relating to the need for a clearing permit to be applied for*'.[178]

227 Although the Department of Water and Environment Regulation may require further flora survey work to be undertaken in order to obtain a clearing permit under the EP Act, we are satisfied on the evidence of Ms Price, who provided an independent assessment of the two flora surveys prepared by Ms Kinnear and Dr Bain, that those documents generally satisfied the requirement in cl 4.5 of Sch 12 of LPS 1 in relation to the CZ1 zone. As Ms Price said in evidence:[179]

> So having reviewed the vegetation documentation, which did include flora surveys, it does appear to me [to] be adequate and comprehensive. I think the author of that document did make the point that there hadn't been some seasonality for, say, threatened flora, but I think the threatened flora that was mentioned later on was potentially orchids, which is probably unlikely that you would find orchids at this site because it doesn't contain suitable habitat, so the risk of that is relatively low.
>
> So in - in that instance, I do believe that the vegetation surveys that I've read are adequate to inform this proposal in terms of their breadth and scope and scale.

228 Finally, in relation to this issue, the applicant proposes the following condition of development approval, should the Tribunal determine that the proposed development merits the grant of approval:

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176 ts 348, 16 August 2018.
177 City's closing submissions [145].
178 ts 337, 16 August 2018 (emphasis added).
179 ts 358, 16 August 2018.

> During the operation of the extractive industry, the operator shall spend 60 cents per tonne of limestone sold per financial year, up to a maximum of $30,000, such funds to be used to maintain and protect the environmental attributes of the Nullaki Peninsula, including, but not limited to, maintaining:
>
> (a) the conservation values of the Nullaki Peninsula;
>
> (b) the applicant's vermin proof fence;
>
> (c) the five electronic gates providing property access for Lot owners within the Nullaki Peninsula from public roads through the vermin proof fence across three public roads;
>
> (d) the proposed fire escape egress along the northern perimeter of Lot 9005; and
>
> (e) strategic firebreaks across the Nullaki Peninsula.
>
> The applicant shall include evidence of the allocation and expenditure of the funds in the annual compliance report required to be prepared in accordance with condition 43.

229 Although it was not explicitly put in these terms, the condition proposed by the applicant involves, in effect, the application of the sixth principle of sustainable development referred to by Justice Preston in ***Telstra Corporation Limited v Hornsby Shire Council*** [119], namely 'the internalisation of environmental costs into decision-making for economic and other development plans, programs and projects likely to affect the environment'. The Tribunal has not, to date, applied the sixth principle of sustainable development in planning review proceedings.

230 For the reasons set out earlier, we consider that the proposed development would have an acceptable impact on the natural environment. Therefore, the condition proposed by the applicant is not strictly necessary in order for the development to be approved. However, as the condition was proposed by the applicant and as Mr Mack, Ms Price and Mr Bowman each consider that the condition would have environmental benefits, we will impose it.

Would the traffic generated by the proposed development exceed the capacity of the road system in the locality or have an adverse affect on traffic flow and safety?

231 As indicated earlier, Mr Wallefeld and Mr Laybutt agree that, if the proposed haulage route is upgraded in the manner proposed by Mr Laybutt and agreed by Mr Wallefeld, then the traffic generated by the

proposed development would not exceed the capacity of the road system and would not have an adverse affect on traffic flow and safety.

232 The City formulated 'without prejudice' conditions of approval requiring the applicant to carry out or fund the necessary improvement works to the public road system.[180] As also indicated earlier, these conditions are agreed to by the applicant.

Would variation of development standards and requirements applicable under Sch 12 of LPS 1 have an adverse impact upon the inhabitants of the locality or the likely future development of the locality for the purposes of cl 5.2.3(b) of LPS 1?

233 For the reasons given at [139]-[147] above, the proposed development is generally compliant with all of the development standards and requirements in cl 4 of Sch 12 of LPS 1 in relation to the CZ1 zone, other than cl 4.3 which imposes a development standard that the Development Area 'must be confined and is not to exceed one hectare'. However, for reasons given at [136]-[138] above, we are satisfied that the non-compliance with the development standard in cl 4.3 will not have an adverse effect upon the inhabitants of the locality or the likely future development of the locality for the purposes of cl 5.2.3(b) of LPS 1.

Is the Bushfire Management Plan submitted by the applicant adequate to address bushfire risk?

234 The applicant submitted a Bushfire Management Plan dated 6 May 2018 prepared by Mr Peter Bidwell, who is employed by the bushfire consultancy Working on Fire, to the City. The City sought comments from the Department of Fire & Emergency Services (DFES) in relation to the Bushfire Management Plan under SPP 3.7 and the *Guidelines for Planning in Bushfire Prone Areas*. On 27 June 2018, DFES informed the City that it had assessed the Bushfire Management Plan and the planning report submitted with the development application and advised as follows:[181]

> As the proposed development is not considered a high-risk land use it should be noted that future referral to DFES is not required.

[180] Conditions 14-16 in Attachment A to these reasons.
[181] Exhibit 10 tab 40 page 3.

235 The City accepts - and we concur - that bushfire risk is satisfactorily addressed by conditions 35 and 36 of the 'without prejudice' conditions which state as follows:[182]

> 35. A revised Bushfire Management Plan shall be submitted for approval of the City of Albany acting reasonably, prior to commencement of operations.
>
> 36. The Bushfire Management Plan as approved by the City of Albany shall be implemented to the reasonable satisfaction of the City of Albany.

Conclusion

236 We have determined that the proposed development is capable of development approval under the Scheme, that it is consistent with orderly and proper planning and that its impacts on the amenity and character of the locality and upon the natural environment are acceptable. Consequently, the 'correct and preferable decision at the time of the decision upon the review' under s 27(2) of the SAT Act is to grant conditional development approval.

237 As indicated earlier, in accordance with the Tribunal's programming orders, the City provided a set of draft, 'without prejudice' conditions of development approval. The applicant initially contested a number of the proposed conditions. However, during the course of the proceedings, the parties had discussions in relation to the conditions and ultimately 44 conditions of development approval were agreed. We have amended condition 14(i) to require the applicant to use gravel and spread topsoil on or apply spray sealing to the shoulders of the haul road to encourage growth of vegetation on the shoulders. We also impose the condition proposed by the applicant requiring the operator to spend 60 cents per tonne of limestone sold per financial year (up to a maximum of $30,000) 'to maintain and protect the environmental attributes of the Nullaki Peninsula'. We consider that the conditions set out below will appropriately regulate the approved development.

[182] Exhibit 52.

Orders

For these reasons, we make the following orders:

1. The application for review is allowed.

2. The decision of the City of Albany made on 26 September 2017 to refuse development approval for extractive industry at Lot 9005 Rock Cliff Circle/Eden Road, Nullaki is set aside and in its place a decision is substituted that development approval is granted subject to the conditions in Attachment A.

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

MF

Associate

10 JANUARY 2019

Attachment A

GENERAL

1. Except to the extent inconsistent with any other conditions set out hereunder, all development on the site shall comply with the Excavation and Rehabilitation Management Plan dated August 2018 and any subsequent amendments to that Management Plan as may be agreed in writing between the applicant and the City of Albany from time to time.

2. Excavation, storage and extraction activities shall be contained within an eight hectare area in the location depicted in the plan and entitled "Lot 9005 Eden Road, Nullaki Peninsula Concept Final Contour Plan" drawn by Landform Research dated 21 August 2018 which is annexed to these conditions. A maximum of three hectares will be open for extraction and storage of extracted material at any one time. The perimeter of the area to be worked must be pegged and clearly marked to ensure that all earthworks are contained within the approved area.

3. If the development, the subject of this approval, is not substantially commenced within a period of 24 months from the date of approval, the approval shall lapse and be of no further effect. Where an approval has lapsed, no further development shall be carried out without the further approval of City of Albany having first been sought and obtained.

4. Except as otherwise approved by the City of Albany, the hours of operation of the extractive industry, including the movement of trucks in or out of the site, shall be restricted to:

    a. the period of 1 December to 31 March; and

    b. the hours of 7.00am - 5.00pm Monday to Friday, and 8.00am - 5.00pm Saturday, with no operation of the extractive industry permitted on Sundays or Public Holidays.

5. The applicant shall ensure that the site is kept in a neat and tidy condition at all times. When vehicles and equipment are not in use they shall be located in such a manner as to minimise their view from outside the site to the reasonable satisfaction of the City of Albany.

ENVIRONMENTAL

6. The site shall be suitably rehabilitated and re-contoured on a per hectare basis, including re-battering of banks and reseeding and

stabilising of former extraction areas, in accordance with the Excavation and Rehabilitation Management Plan to the reasonable satisfaction of the City of Albany.

7. The applicant shall enter into a deed of agreement with the City of Albany providing for payment prior to commencement of operations of a refundable bond/bank guarantee of $24,000 (calculated at $3000.00 per hectare of excavation area) for remediation and rehabilitation work (if required) and authorising the City to enter onto the subject site to carry out rehabilitation and remediation works in the event of the applicant's failure to undertake such works in accordance with the Excavation and Rehabilitation Management Plan. The deed of agreement shall be prepared by the City's solicitors at the cost of the applicant.

8. The applicant shall control declared weeds throughout the site to the reasonable satisfaction of the City of Albany.

9. The excavation activities are to be restricted to a level no lower than 2 metres above the highest known water table.

10. The applicant shall not undertake any washing of excavated material on the development site.

11. Prior to the commencement of operations the applicant shall undertake and submit to the City of Albany a targeted Spring flora survey of the selected development area and the proposed access way/driveway to determine the presence of rare, endangered and/or threatened flora species. Should such species be identified the applicant shall prepare an alternative footprint that minimises visual impact and preserves the identified threatened flora, to the reasonable satisfaction of the City of Albany.

TRAFFIC AND ENGINEERING

12. The applicant shall submit a detailed design for the internal haul road for the approval of the City of Albany, acting reasonably. The design shall be accompanied by a Risk Management Plan which outlines residual road safety risks resulting from any applicable design constraints (e.g. width, grade) and the controls to manage these risks.

13. Prior to the commencement of operations the applicant shall submit a Traffic Management Plan for the approval of the City of Albany. The Traffic Management Plan shall address vehicle use and movements associated with the development both on site and off site and shall implement suitable operating procedures so as to ensure that trucks are not using the haulage route while the school bus is operating. The applicant shall comply, and shall

ensure its contractors comply, with the Traffic Management Plan as approved by the City of Albany.

14. Prior to the commencement of haulage of limestone from the site the following upgrades to the road network shall be undertaken at the full cost to the applicant, to the reasonable satisfaction of the City of Albany:

    (a) Lower Denmark Road/Lake Saide Road intersection - widening of intersection to accommodate left turns for RAVs.

    (b) Lake Saide Road SLK 0.0 - 2.75 - clear vegetation on the inside of curves.

    (c) Lake Saide Road SLK 2.75 - 3.85 - widen to 7.6m.

    (d) Lake Saide Road SLK 3.85 - 5.55 - widen to 5.8m with isolated narrow sections, restrict operating speeds to 40km/h. Clear vegetation for sight lines.

    (e) Lake Saide Road/Browns Road intersection - widen intersection to accommodate RAV4 turning movements. Clear vegetation for sight lines.

    (f) Browns Road SLK 0.0 - 0.47 - widen to 5.8m except for bridge, restrict operating speeds to 40km/h. Clear vegetation for sight lines.

    (g) Browns Road/Lee Road intersection - widen intersection to accommodate RAV4 turning movements. Clear vegetation for sight lines.

    (h) Lee Road SLK 0.0 to end of road - construct and widen to 5.8m, restrict operating speeds to 40km/h. Clear vegetation for sight lines.

    (i) Sealing of the entire internal haulage road on the subject site using gravel to construct its shoulders and spreading topsoil on or applying spray sealing to the shoulders to encourage growth of vegetation on the shoulders.

15. Prior to the end second year of commercial operations, the applicant shall seal the following road sections in accordance with Austroads design guidelines and to the reasonable satisfaction of the City of Albany:

    (a) Lake Saide Road - SLK 2.75 to 5.55

    (b) Browns Road - SLK 0.0 to 0.47

(c) Lee Road - SLK 0.0 to site boundary.

16. The applicant shall not transport more than 20,000 tonnes of extracted material from the site in any 12 month period prior to undertaking the following further road upgrades:

    (a) Lake Saide Road SLK 0.0 - 2.75 - widen seal to a minimum 6.0m and formation to 8.0m. Clear vegetation for sight lines.

    (b) Lake Saide Road SLK 3.85-5.55-widen to 7.6m, seal, restrict operating speeds to 40km/h. Clear vegetation for sight lines.

17. Extraction from the excavation site shall not exceed 50,000 tonnes in any 12 month period. Laden truck movements from the site shall not exceed fourteen (14) per day.

18. Prior to commencement of operations, the applicant shall engage an accredited and suitably qualified independent expert to undertake, in consultation with Main Roads WA, a review of the load bearing capacity of Brown Roads Bridge for Restricted Access Vehicles, or vehicles with greater than standard axle loadings associated with the extractive industry use. The review shall be submitted to and approved by the City of Albany prior to commencement of operations. If the review requires upgrade works to be undertaken by the applicant, the upgrade works shall be undertaken to the reasonable satisfaction of the City of Albany prior to commencement of operations.

19. Where damage is caused to the road pavement and/or bitumen seal as a result of heavy haulage operations from the subject site, such damage shall be rectified at the applicant's expense and to the reasonable satisfaction of the City of Albany.

20. The applicant shall liaise with school bus operator to establish a traffic schedule to avoid potential conflicts with school bus operations and document this in the Traffic Management Plan. No truck movements shall be undertaken during the times that the school bus services the area, unless otherwise agreed in writing by the City of Albany, acting reasonably.

21. At the completion of each stage of excavation, the landowner shall ensure that all excavation faces, non operational stockpiles and bund walls are safe and stable.

22. The crossover from Lee Road to the internal haul road is to be constructed in accordance with City of Albany standard industrial crossover specifications and to be located and maintained to the reasonable satisfaction of the City of Albany.

23. Turning radius of crossover to be of a size suitable for large trucks and the width of the crossover shall be sufficient to accommodate two trucks (one entering and one exiting the site) to the reasonable satisfaction of the City of Albany.

24. Any crossovers to residences or businesses along the proposed haulage route are to be formed and provided with 2 metres of bitumen, and the entire internal haulage road on the applicant's land shall be constructed using road base quality material and bitumen sealed.

25. A maximum speed limit of 20 kilometres per hour shall be applied to all internal roads, driveways and vehicle accessways and signs in this regard shall be displayed at the entrances to the site.

26. The applicant shall pay a contribution to road maintenance calculated in accordance with the Heavy Vehicle Cost Recovery Policy Guideline for Sealed Roads published by the Western Australian Local Government Association as amended from time to time.

HAZARDOUS CHEMICALS

27. No onsite fuel storage or major servicing of equipment shall take place on the site.

28. The applicant shall:

    (a) implement measures to avoid the risks of spills or leaks of chemicals including fuel, oil or other hydrocarbons; and

    (b) ensure that no chemicals or potential liquid contaminants are disposed of on site.

NOISE

29. All activity at the site is to comply with the *Environmental Protection (Noise) Regulations 1997* (WA). The applicant will undertake a noise compliance audit when operations commence to ensure compliance with the *Environmental Protection (Noise) Regulations 1997* (WA), to the reasonable satisfaction of the City of Albany.

30. Standard high pitched reversing beepers are to be removed from all excavation vehicles used on the site and alternative warning measures such as flashing lights or broadband reversing alarms known as 'croakers' (subject to compliance with the relevant Australian Standard and any Worksafe codes) are to be fitted to these vehicles instead.

31. No blasting of material is permitted as part of extraction operations, unless a separate written approval has been obtained from the City of Albany.

DUST

32. The developer shall prevent the generation of visible particulates (including dust) from access ways, trafficked areas, stockpiles and machinery from crossing the boundary of the subject site by using where necessary appropriate dust suppression techniques including but not limited to the installation of sprinklers, utilisation of water tankers, mulching, or by the adoption and implementation of any other suitable land management system in accordance with the Department of Environment and Conservation's dust management guidelines dated March 2011 and the City of Albany Prevention and Abatement of Sand Drift Local Law 2000.

33. Verification of the efficacy of the measures to control dust proposed in the Excavation and Management Plan submitted by the applicant will be subject to auditing as part of the annual Compliance Report and the City may require alternate actions if the measures prove ineffective.

34. The landowner shall ensure that all loads leaving the site are to be enclosed or completely covered by a secured impermeable tarpaulin or some other effective mechanism used to prevent dust nuisance.

FIRE RISK MANAGEMENT

35. A revised Bushfire Management Plan shall be submitted for approval of the City of Albany acting reasonably, prior to commencement of operations.

36. The Bushfire Management Plan as approved by the City of Albany shall be implemented to the reasonable satisfaction of the City of Albany.

TEMPORARY BUILDINGS/STRUCTURES

37. A building permit is to be obtained for the construction or placement of any permanent or temporary structures on site such as a site office where required under *Building Act 2011* (WA).

38. Any buildings/structures associated with the excavation activities such as a site office, toilet facilities or sea containers used for storage are to be located so that they are screened from view from outside the site to the reasonable satisfaction of the City.

STATUTORY REQUIREMENTS

39. If required, a licence from the Department in accordance with the *Environmental Protection Act 1986* (WA) and *Environmental Protection Regulations 1987* (WA) in respect of:

    (a) the site as a prescribed premises for quarrying operations; and

    (b) the use of the crusher on the site for quarrying operations,

    must be obtained prior to the commencement of the quarrying or crushing operations on site.

40. The applicant shall comply with the relevant clauses and provisions of the City of Albany Local Laws relating to the Extractive Industries.

41. The applicant is to comply with the requirements of the *Environmental Protection Act 1986* (WA) and the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (WA) prior to the clearing of any native vegetation.

42. Approval of the Commissioner of Main Roads under the *Road Traffic (Vehicles) Act 2012*, in consultation with the City of Albany, must be obtained prior to the use of Restricted Access Vehicles on any road accessing the site.

COMPLIANCE REPORT

43. The applicant shall submit an annual compliance report to the City of Albany by 30 May each year. The annual compliance report shall include:

    (a) an internal compliance audit of all the development and licence approval conditions and Management Plan requirements undertaken by a suitably qualified person to the reasonable satisfaction of the City;

    (b) details of all community complaints and complaint responses;

    (c) annual tonnage of extracted material in the previous calendar year;

    (d) log of cartage trucks to and from the site recorded on a daily basis during period of operation; and

    (e) other information reasonably requested by the City relevant to management of any impact arising from the operation of the extractive industry.

44. In the event the City:

    (a) is not satisfied with any audit contained in an annual compliance report; or

    (b) receives a complaint from a member of the public indicating that the applicant has failed to adequately implement measures contained in a Management Plan,

    then the City acting reasonably may by notice in writing require the applicant to take the action stipulated in the notice in order to ensure the approved Management Plans are complied with. The applicant shall promptly comply with any notice issued by the City pursuant to this condition.

EXPENDITURE BY APPLICANT TO MAINTAIN AND PROTECT ENVIRONMENTAL ATTRIBUTES OF THE NULLAKI PENINSULA

45. During the operation of the extractive industry, the operator shall spend 60 cents per tonne of limestone sold per financial year, up to a maximum of $30,000, such funds to be used to maintain and protect the environmental attributes of the Nullaki Peninsula, including, but not limited to, maintaining:

    (a) the conservation values of the Nullaki Peninsula;

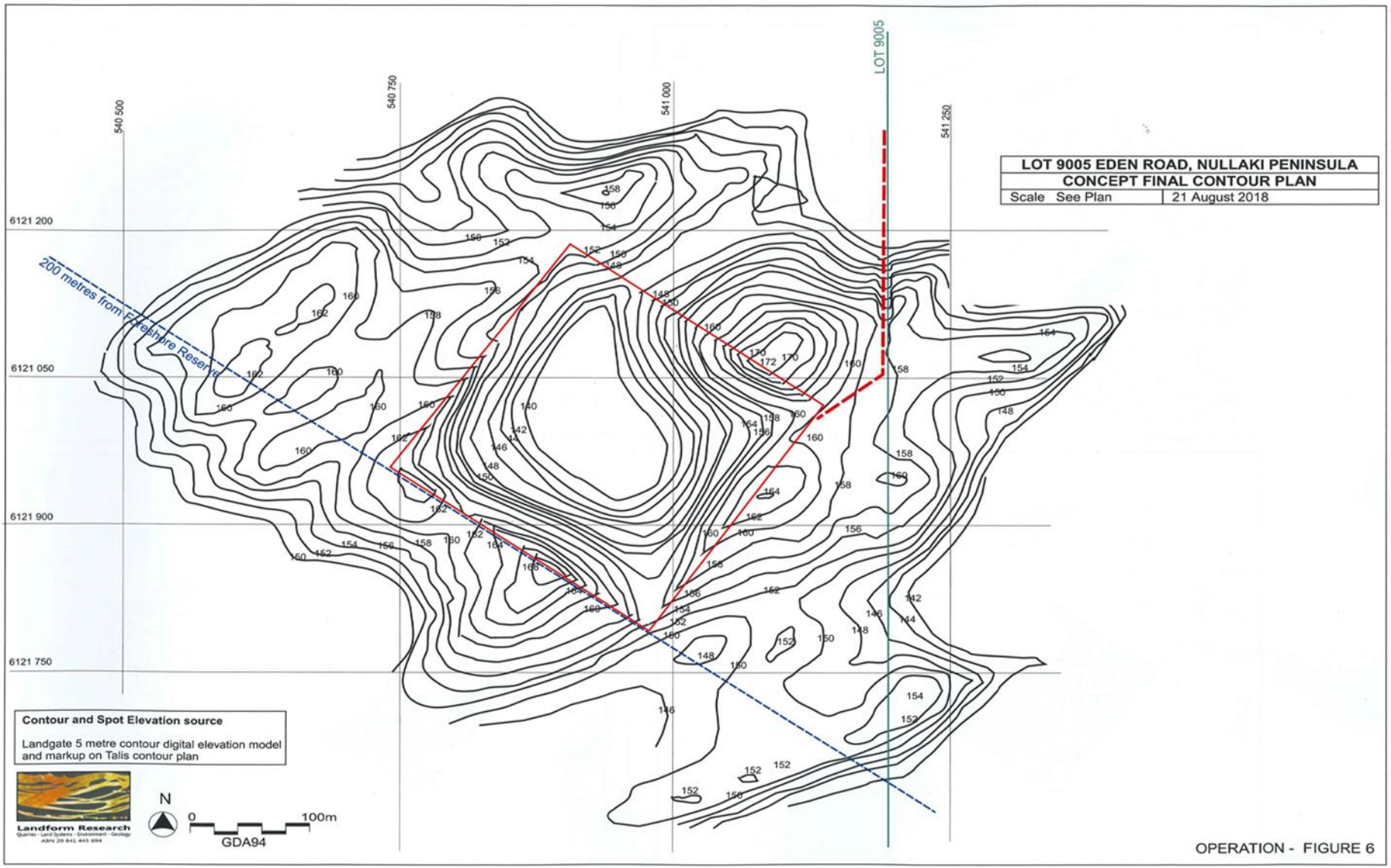
    (b) the applicant's vermin proof fence;

    (c) the five electronic gates providing property access for Lot owners within the Nullaki Peninsula from public roads through the vermin proof fence across three public roads;

    (d) the proposed fire escape egress along the northern perimeter of Lot 9005; and

    (e) strategic firebreaks across the Nullaki Peninsula.

    The applicant shall include evidence of the allocation and expenditure of the funds in the annual compliance report required to be prepared in accordance with condition 43.


LOT 9005
540 500
540 750
541 000
541 250
6121 200
6121 050
6121 900
6121 750
200 metres from Firebreak Reserve
LOT 9005 EDEN ROAD, NULLAKI PENINSULA
CONCEPT FINAL CONTOUR PLAN
Scale See Plan
21 August 2018
Contour and Spot Elevation source
Landgate 5 metre contour digital elevation model and markup on Talis contour plan
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OPERATION - FIGURE 6