

Legal Update

BREAKFAST | 28 JUNE 2023

Surprises, shocks and head scratchers: recent planning decisions with unexpected outcomes

Presentation by Craig Slarke

to

LGPA

29 June 2023

Star and Garter Hotel and City of Kalgoorlie-Boulder

- Development approval for workforce accommodation.
- Condition limiting term to 5 years.
- Supreme Court challenge with respect to use classification.

Star and Garter Hotel and City of Kalgoorlie-Boulder

Only the time limited condition was in dispute at SAT.

SAT characterised the land use and considered whether it was consistent with zone objectives.

Star and Garter Hotel and City of Kalgoorlie-Boulder

Classification of land use is a critical element of development control – even if not in contest at SAT.

Star and Garter Hotel and City of Kalgoorlie-Boulder

The decision under review is the decision to refuse approval, or to grant approval with conditions.

There is no power to simply impose a condition – the condition must be associated with a decision to grant approval.

Star and Garter Hotel and City of Kalgoorlie-Boulder

“The grounds of review and the documents that explicated the grounds such as a statement of facts and contentions (as is common in the SAT) may have directed attention to the basis of Star & Garter's concerns. But it did not transform the application for review into something other than a review of the City's decision in respect of the Approval. The matters dealt with by the SAT were therefore squarely within the compass of the review application.”

Star and Garter Hotel and City of Kalgoorlie-Boulder

Lessons:

- (a) On reconsideration a local government can refuse an application it previously approved.
- (b) The SAT can refuse a development although the parties are only in dispute about conditions.

Star and Garter Hotel and City of Kalgoorlie-Boulder



Taylor and WAPC

Discretion to approve undersize lots – variation more than 5%.

Taylor and WAPC

- Design principle 5.1.1 P1.2 limits WAPC discretion.
- R-Codes part of local planning scheme.
- PD Act section 138(2).

Taylor and WAPC

- R-Codes concerned with development.
- Design principle relevant only if D-T-C not met.
- D-T-C are applicable after subdivision process completed.
- R-Codes clause 2.5.3 is not concerned with subdivision.

Taylor and WAPC

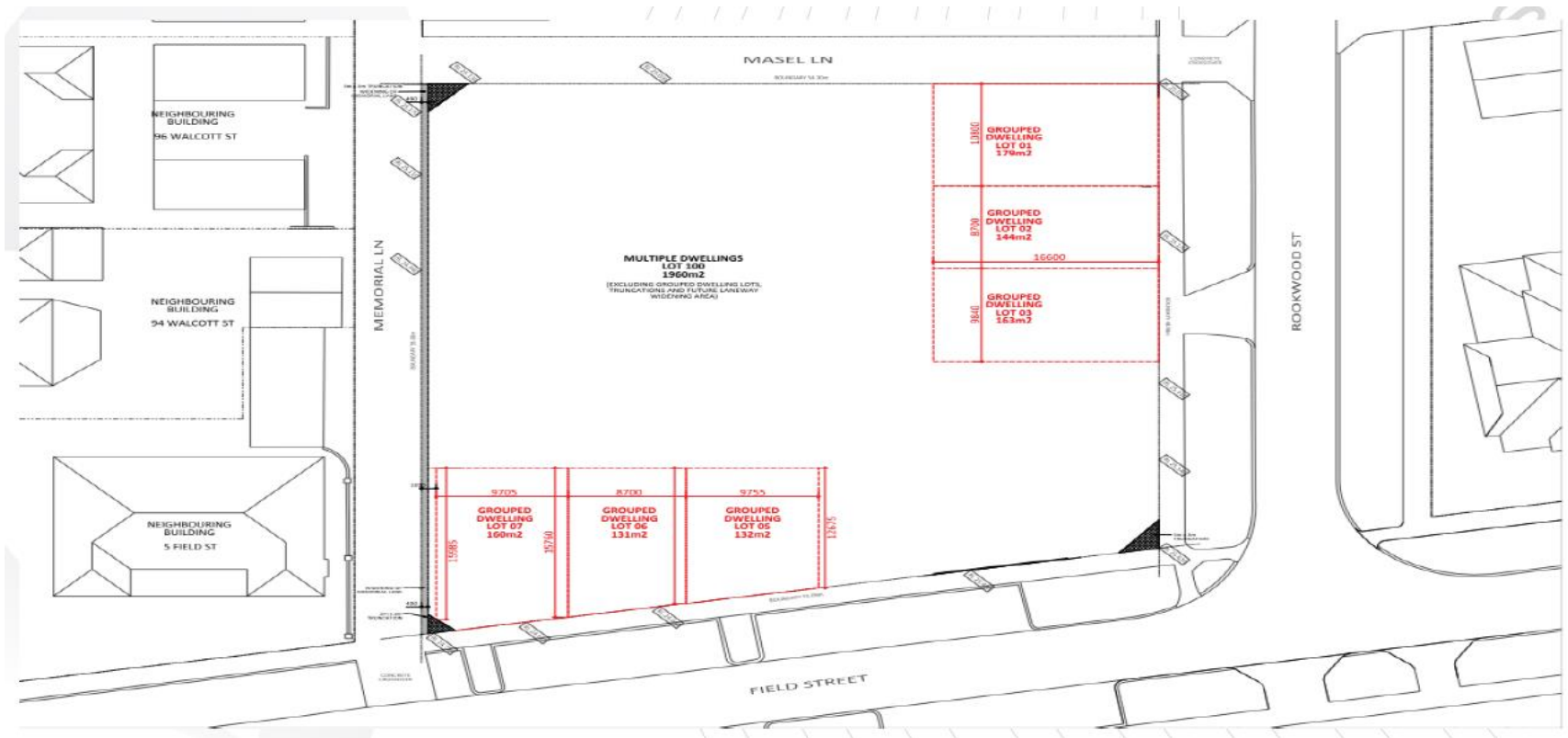
Clause is 'located within the R-Codes in a place that gives them no practical effect'.

Therefore, approving undersize lots is not in conflict with the local planning scheme.

Taylor and WAPC



General Nominees Pty Ltd and Metro Inner North JDAP



General Nominees Pty Ltd and Metro Inner North JDAP

'grouped dwelling':

A dwelling that is one of a group of two or more dwellings on the same lot such that no dwelling is placed wholly or partly vertically above or below another, except where special conditions of landscape or topography dictate otherwise, and includes a dwelling on a survey strata with common property.

General Nominees Pty Ltd and Metro Inner North JDAP

‘It follows from this construction of the definition of grouped dwelling that *if there is any dwelling* on a lot that has one or more dwellings vertically above or below it, all dwellings will be multiple dwellings, even if some of the dwellings occupy separate and distinct parts of the lot exclusively. Contrary to the developer’s contention, in my judgment, no question of fact or degree arises – if a proposed development on land zoned R40 or above *includes any multiple dwellings*, Volume 1 of the R-Codes has no application.’

General Nominees Pty Ltd and Metro Inner North JDAP

‘Unless otherwise provided for in the Scheme, the development of land for any of the residential purposes dealt with by the Residential Design Codes is to conform with the provisions of those Codes.’

General Nominees Pty Ltd and Metro Inner North JDAP

104 *The requirement to have 'due regard to [the R-Codes] to the extent that in the opinion of [the JDAP], those matters are relevant to the development ...', is inconsistent with, and prevails over, the requirement of cl 5.2.2 of the Stirling Scheme that a development must conform to the R-Codes. Thus, I do not accept the applicant's contention that cl 5.2.2 of the Stirling Scheme required the JDAP to assess the proposed development against vol 1 of R-Codes.*

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105 Further, as explained in the authorities, the requirement to have due regard is a flexible concept, and a requirement to have due regard to vol 1 of the R-Codes did not impose a requirement that each element of the proposed development be assessed against vol 1. The JDAP was not free to ignore vol 1 of the R-Codes and was required to actively engage with it intellectually. The product of such engagement might be the formation by the JDAP of the view that the application of one or more, or all, of its provisions, did not constitute the most suitable criteria for the assessment of the development and the nature of the development was such that some or all of the preferred planning criteria were to be found in vol 2 of the R-Codes.

General Nominees Pty Ltd and Metro Inner North JDAP



Reid v City of Gosnells

Proposed new Operations Centre.

Not a composite use.

Reid v City of Gosnells

‘Works that ... a local authority is authorised to undertake, construct or provide under this Act or any other Act.’

Reid v City of Gosnells



Commentary/observations (land use classification):



- *Star & Garter Hotel Pty Ltd v City of Kalgoorlie-Boulder* [2023] WASC 149, 11 [33], 20 [67] (Solomon J)
- *Harvis Capital Pty Ltd v Mid-West/Wheatbelt JDAP* [2020] WASC 205, 24–27 [79]–[87] (Allanson J)
- *Karrakup Springs Pty Ltd and Shire of Serpentine-Jarrahdale* [2023] WASAT 31, 16–17 [51]–[53]

Approach to expert evidence (SAT):



- SAT Info Sheet 11 – Guide for experts giving evidence
- *ALH Group Property Holdings Pty Ltd and Presiding Member of the Metro Central JDAP* [2018] WASAT 63, 34–35 [75]–[77], 38 [86], 41 [98]
- *Forrest and Forrest Pty Ltd and Minister for Aboriginal Affairs* [2023] WASAT 28, 101–102 [393]–[398]



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