

IN THE CALLED IN STATE ADMINISTRATIVE PROCEEDINGS DR 95 OF 2022

BETWEEN:

RUAH COMMUNITY SERVICES LTD

AND

THE CITY OF PERTH

CITY OF PERTH'S SUBMISSIONS TO THE MINISTER FOR PLANNING

Date of Document:
Prepared on behalf of:

6 July 2022
The City of Perth

[REDACTED]

[REDACTED]

Introduction

1. This document sets out the City of Perth's (**City**) submissions to the Minister for Planning (**Minister**) in the State Administrative Tribunal (**SAT**) former matter DR 95 of 2022: RUAH Community Services Ltd v City of Perth, which the Minister considers would be appropriate to be determined by the Minister under section 246(1) of the *Planning and Development Act 2005* (WA) (**PD Act**). [REDACTED]
[REDACTED]
[REDACTED]
2. The scheme of these submissions is as follows:
 - (a) Overview
 - (b) Inadequacy of information in the application
 - (c) Exercise of call in power
 - (d) Characterisation of the use
 - (e) What planning principles should the Minister have regard to in making this decision?
 - (f) What public interest matters should the Minister have regard to?
 - (g) Planning merits – alternative outcome
 - (h) Conclusion

Overview

Planning Issues

3. Insufficient information is supplied with the application submitted by [REDACTED] dated 17 February 2022 (**Application**) for a proper determination to be made on the planning merits, in view of the interpretation of the use classification provisions of the City of Perth City Planning Scheme No. 2 (**CPS 2**) referred to later in these submissions. In particular, there is insufficient information on the amenity impacts.
4. There is a threshold question as to the characterisation of the use. The proposed use at 247-249 James Street, Northbridge (**Property**) is properly classified as an 'unlisted use'. It is inconsistent with the aims of CPS 2 and the Application should be refused on the grounds of amenity, orderly and proper planning and social impacts.
5. Even if the proposed use is properly characterised within the 'Community and Cultural' use group, the Application may and should be refused on the grounds of amenity, orderly and proper planning and social impacts.

Legal Issues

6. There are substantive legal issues regarding the process followed by the Minister and the interpretation of the CPS 2.
7. As to the process, first, this is a local planning issue that does not, in planning terms, constitute a regional or State level issue. In calling in the review, there is a serious question as to whether the Minister has exceeded her power under the PD Act.
8. Further, the planning system presupposes that planning decisions of this kind will be made by elected local governments or their delegates. It is only in extraordinary circumstances that the system should be allowed to deviate from the norm and take decision-making away from local governments. Those circumstances are set out in section 246(1) of the PD Act and should not be applied to create a low bar for denying local communities to have planning decisions made by their elected representatives.
9. If there is a matter of regional importance, it is for the planning system to reduce the concentration of social services in particular areas to avoid stigmatising the clients of those services and creating social friction.
10. Secondly, the Minister has gone beyond power because insufficient time has been allowed for the City to obtain independent planning advice regarding the planning merits (or lack thereof) of the proposed use on the subject site. The City has therefore been denied a proper hearing, contrary to the rules of natural justice.
11. In any event, it would have been preferable for the matter to have been called in under section 246(2)(b) of the PD Act which would have enabled the SAT to conduct a proper hearing, at the end of which a recommendation could have been made to the Minister. This type of call in would be more appropriate in these circumstances (if any such call in power should even be exercised in the present case).

12. It is contrary to the public interest and good planning and government that one section of the population should be overtly favoured over others.

Inadequacy of information in the Application

13. The Application describes the subject site. It then states that the use will change to ‘the services...that currently operate from 29-35 Shenton Street Northbridge’. Further information was during the planning assessment by the City as to what constitutes those services. Unfortunately, no information was supplied regarding the potential amenity impacts of the proposed use. In light of the interpretation of the use classification provisions of CPS 2 referred to later in these submissions, an approval based on the information provided in the Application would be beyond power because the facts and considerations relevant to the exercise of the planning power are insufficient for a proper determination to be made. No reasonable planning authority, be it the City, the SAT or the Minister, can approve an application validly in these circumstances.

Exercise of Call In Power

14. A pre-condition for this exercise of the power to call in under section 246(1) of the PD Act is the requirement for the Minister to consider ‘...that the application raises issues of such State or regional importance that it would be appropriate for the application to be determined by the Minister’.
15. This matter does not meet the statutory pre-condition set out above. This matter concerns the determination of a change of use application for a building. It should not be considered an issue of State or regional importance as it does not impact or affect any area beyond its immediate local surrounds.
16. In any event, there is an alternative means of call in which enables the SAT to conduct a proper hearing, at the end of which a recommendation is made to the Minister: section 246(2)(b) of the PD Act. That this option was not used regrettably gives rise to the procedural fairness issues raised in these submissions. That option would have afforded the City and local residents, landowners and businesses the transparency and fairness which they are entitled to expect from the planning system. In contrast, the approach taken, is artificially short and opaque. It is designed to favour one party, and one section of the population, at the expense of a number of others, given our understanding that RUAH has scheduled works to begin at its existing premises in August of this year.
17. If there had been a SAT proceeding, there could have been a mediation. Over 80% of SAT matters are settled or partially settled in mediation and often local interested parties have the opportunity to speak at mediation. It is an inclusive process. However, in the SAT proceedings in this case, before the call in, RUAH opposed mediation, which again shows a regrettable aversion to due process, inclusiveness and transparency.

Characterisation of the use

18. The proposed use at the Property cannot be properly characterised as a ‘community centre’ or within the ‘Community and Cultural’ use group category. These terms should be read and construed against their context in CPS 2 and their purpose.

19. 'Community and Cultural' use is a 'preferred' use: Schedule 3 of CPS 2. Subject to a presently irrelevant exception, an application for approval for a use of land that falls within a preferred use cannot be refused by reference to that proposed use: clause 32 of CPS 2.
20. The 'Community and Cultural' use group focuses on provision of facilities and services for the community's benefit.
21. The description of uses within the 'Community and Cultural' use group, in Schedule 2 of CPS 2, is as follows:

Premises used to provide social, cultural or recreational facilities and services, generally on a non-profit basis, for the benefit of the community including: community centre, exhibition centre, public library, place of worship.
22. This definition is of general application in the City. That is, the 'community' referred to in this definition is the whole community of the City.
23. The Application is unfortunately vague when it comes to defining the proposed use, which is stated in the Application to be a 'community use'. The 'Community and Cultural' use group definition includes the use of 'community centre'. Other examples are given - exhibition centre, public library, place of worship - but they clearly do not fit the concept set out in the Application.
24. The term 'community centre' is a specific use within the more general use group category of 'Community and Cultural'. It is defined in Schedule 4 of CPS 2 as meaning:

[P]remises accommodating services (such as health or social services) or facilities (such as meeting or recreation facilities) primarily for the benefit of those who live or work in the surrounding locality.
25. 'Community centre' narrows the application of the term 'community' to a centre for the benefit of those living or working locally.
26. The terms 'working' and 'living' should be given their ordinary meaning. Therefore, 'living' does not encompass those who exist in or frequent an area. 'Living' in a home in a locality is distinguishable from experiencing homelessness in a locality, which is not captured under this usage.
27. A person experiencing homelessness may be existing in the area one day and somewhere else the next. They cannot be said, within the ordinary meaning of homelessness, to be living or working in the area.
28. In other words, the word 'live' as used in CPS 2 does not encompass existing in or frequenting a locality, to some greater or lesser extent, by spending parts of days or nights there on streets, in public places or on private areas. To say that people experiencing homelessness 'live' in an area is to describe a completely different idea to that described by saying that people with homes in the area 'live' in the area. Nothing could be further removed from the concept of 'living' in a home and existing as a person experiencing homelessness in the area.
29. There is no doubt that those experiencing homelessness need to be supported by very specialised services. However, there is no discernible planning rationale to support a meaning of

‘Community and Cultural’ use in CPS 2 which does not distinguish between those who need such support and those who do not. This is particularly so in the context of a CPS 2 use group which is accorded the special status of clause 32 in a precinct.

30. The point may be underscored by the contrasting way in which CPS 2 deals with uses which raise far less controversial planning considerations, such as offices, healthcare and education, which are not accorded the special status of clause 32 in the Northbridge Precinct as none of them are ‘preferred’. Approval must be obtained under CPS 2 for those uses.
31. The intention behind the special status of the ‘Community and Cultural’ use group is clearly the provision of facilities of the kind exemplified in the definition of ‘community centre’, not specialised facilities of the kind proposed in this case.
32. For these reasons, the construction of the ‘Community and Cultural’ use group which makes most sense from a planning perspective is that the word ‘community’ refers to those who ordinarily live or work in the area for whom the provision of services and facilities in a precinct raises no special planning issues.
33. From the above, it may be concluded that the provision of services for people experiencing homelessness, however such services may be described, does not fit within the ‘Community and Cultural’ use group category.
34. There is no other use group category that would accommodate the provision of services for those experiencing homelessness. Uses which are not referred to in the use group categories are taken to be ‘unlisted uses’: clauses 15(4), 16(1) of CPS 2.
35. Approval of an unlisted use requires an absolute majority of councillors to be satisfied that it is consistent with particular planning considerations: clause 34 of CPS 2.

What planning principles should the Minister have regard to in making this decision?

If the use classification is ‘unlisted use’

36. While the City acknowledges that pursuant to section 247(1) of the PD Act the Minister may have regard to any other matter affecting the public interest when making the determination, the Minister should give the appropriate weight to key planning principles under the PD Act, in particular, clause 67 of Schedule 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015* (WA) (otherwise referred to as the **Deemed Provisions**).
37. As the proposed use is properly characterised as ‘unlisted use’, clause 34 of CPS 2 applies. This clause states that ‘[t]he local government cannot grant development approval for a development which involves an unlisted use unless...it is satisfied, by an absolute majority, that the proposed development is consistent with the matters listed in clause 67 of the Deemed Provisions’. Therefore, the Minister should have regard to the matters set out in clause 67 of the Deemed Provisions when making this decision.
38. Clause 67(2) of the Deemed Provisions sets out the matters to which the local government is to have due regard to when considering an application for development approval, to the extent that the local government considers them relevant.

39. The relevant matters for this Application are clauses 67(2)(a), 67(2)(n) and 67(2)(y) of the Deemed Provisions. [REDACTED]
40. Clause 67(2)(a) refers to 'the aims and provisions of this Scheme and any other local planning scheme operating within the Scheme area'. The proposed use is inconsistent with the Statement of Intent for the Northbridge Precinct which states:
- The Northbridge Precinct will continue to evolve as a diverse, interesting and dynamic inner city precinct and will be promoted as an attractive destination for the local population and interstate and overseas visitors This Precinct will remain Perth's primary entertainment and night life area and provide a variety of residential and visitor accommodation and commercial services.
41. Further, the proposed use is inconsistent with the objectives and intentions set out in clause 6 of CPS 2, in particular in subclause (3):
- (a) 'to recognise and reinforce the role of Perth as the capital of Western Australia and the administrative, financial and, political centre of the State';
 - (b) 'to cater for the diversity of demands, interests and lifestyles by facilitating and encouraging the provision of a wide range of choices in housing, business, employment, education, leisure, visitor accommodation and attractions, transport and access opportunities';
 - (c) 'to protect and enhance health, safety and general welfare of the local government's inhabitants and the social, physical and cultural environment of the local government...?'
42. Clause 67(a)(n) refers to 'the amenity of the locality including the following – (i) environmental impacts of the development; (ii) character of the locality; (iii) social impacts of the development'. Clauses 67(a)(n)(ii) and 67(a)(n)(iii) are of most relevance. 'Amenity' is defined in clause 1 of the Deemed Provisions as 'all those factors which combine to form the character of an area and include the present and likely future amenity'.
43. How amenity is determined was considered in the cases *Tempora Pty Ltd v Shire of Kalamunda* (1994) 10 SR (WA) 296 and *Sunbay Developments Pty Ltd and Shire of Kalamunda* [2006] WASAT 74. In *Tempora* the Town Planning Appeal Tribunal stated, at page 304, that '[t]he determination of the amenity of the locality is a question of fact and consists of three parts: the existing amenity, the manner in which the proposed use will affect the existing amenity and the degree of impact on the locality'. Justice Barker in *Sunbay Developments* confirmed that approach stating at [21] '[t]he general approach to the assessment of amenity impact set out in *Tempora v Shire of Kalamunda* is sensible and should be followed'. It was also stated in *Tempora*, at page 305, that '**[t]he views of the residents that refine and explain the objective analysis of amenity or which raise new matters of amenity, not canvassed by the experts, must be given great weight'** (Emphasis added).
44. The buildings and land uses in the vicinity of the Property include cafes and restaurants, residential apartments, and other businesses. This amenity is not consistent with the provision of specialised services for people experiencing homelessness.
45. Under clause 67(2)(y), the City must have regard to 'any submissions received on the application'. In the Minutes for the Ordinary Council Meeting held on 31 May 2022, the City

noted that while this proposal was not advertised (as purportedly there was no requirement to), the City received 71 submissions from the public with respect to the proposal. Of that, 64 were objecting to the proposal, four supported the proposal and three were seeking further information.

46. The overwhelming majority of submissions from the public either objected or strongly objected to this proposal. The Minister should also take into account these submissions when making a decision on this proposal.

If the use classification is 'Community and Cultural'

47. Clause 32 of CPS 2 states that when a use group category is a preferred use then 'in considering an application involving a use from that category in the precinct, the local government...cannot otherwise refuse the application by reference to the proposal to begin or continue the preferred use'. This clause does not exclude the power of the determining authority to refuse a development application. Rather, it allows for a refusal for reasons not based on the nature of the use. For example, a community centre cannot be refused simply because it is a community centre, as would be the case if that use were prohibited, but can be refused on some other basis. Some other bases for refusal could include, for example, amenity or orderly and proper planning or other matters for consideration under clause 67 of the Deemed Provisions.

What public interest matters should the Minister have regard to?

48. Pursuant to section 247(1) of the PD Act, the Minister 'may make the determination having regard to any other matter affecting the public interest'. The Minister should take into account the views of the community and their concerns about the personal and economic impact the proposed use will have on home and business owners in the area. A summary of the submissions from the community and the full text of the submissions referenced above are annexed to these submissions.
49. It is contrary to the public interest and good planning and government that one section of the population should be overtly favoured over another, as explained earlier in these submissions.

Planning Merits – Alternative Outcome

50. In the event that approval is given for the change of use classification and for RUAH to provide its services from 247-249 James Street, Northbridge, the City submits that the following conditions should be attached to the approval:
1. This approval is limited to a trial period of six months from the date of approval [note: the applicant must reapply at the end of the six months if it wishes to continue the use];
 2. The centre only operates Monday – Friday from 8:30am to 2pm (excluding public holidays);
 3. The operator will submit a business plan that includes how the operator will:
 - (a) control noise and disturbances associated with the activities or customers on site;
 - (b) arrange for the removal of unwanted or unattended personal belongings of customers of the site within the immediate vicinity of the property;
 - (c) accommodate persons waiting to access services within the building not outside of it;

- (d) ensure that customers, or people associated with customers, do not congregate outside the property during operational hours;
 - (e) establish and maintain a complaints management service, that enables and facilitates easy access (by the community) to a designed contact person, including after-hours and emergency contact details;
4. The approved Business Management Plan will be implemented on an ongoing basis and will be to the satisfaction of the City;
 5. A Waste Management Plan will be implemented; and
 6. Signs will be installed on the building, which is clearly visible from the adjoining footpath, and provides detail on the approved opening hours; an after-hours contact service for users of the centre; and general and emergency contact details for the public.

Conclusion

51. The City has been afforded an insufficient opportunity to prepare these submissions.
52. There is insufficient detail in the Application to determine fully the relevant planning considerations, in view of the interpretation of the use classification provisions of CPS 2 referred to earlier in these submissions. In these circumstances, the Application cannot be approved.
53. In any event, the proposed use should be characterised as an ‘unlisted use’ and the Application refused.
54. Even if the use falls within the ‘Community and Cultural’ use group, the Application should be refused at least because of its amenity and social impacts and on the basis that it is inconsistent with orderly and properly planning.
55. The Application is overwhelmingly opposed by the local population. RUAH should not be favoured by central government overriding both the elected local government and the independent State organ statutorily charged with resolving planning disputes.
56. There are no valid matters of regional or State importance which justify the Minister overruling the decision of the community’s local elected representatives in respect of what is, in fact, a local planning issue.
57. It would accordingly not be in the public interest for the Minister to approve the Application.
58. If the Application is approved, it should be limited to six months in view of the unknown and potentially deleterious amenity impacts.