

Application for review before the Hon. Minister for Planning  
pursuant to section 246(2)(a) of the *Planning and Development  
Act 2005*

BETWEEN:

**RUAH COMMUNITY SERVICES LTD**

Applicant

and

**CITY OF PERTH**

Respondent

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APPLICANT'S SUBMISSIONS IN RESPONSE TO SUBMISSIONS TO THE  
HONOURABLE MINISTER FROM MEMBERS OF THE PUBLIC

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Date of Document: 8 August 2022

Filed on behalf of: The Applicant

Date of Filing: 8 August 2022

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Response to Memorandum of Advice by [REDACTED] dated 24 May  
2022**

- 1 The letter from Mr Anthony Kannis (Director General of the Department of Planning, Lands and Heritage) dated 3 August 2022 to the solicitors for the parties attaches a number of attachments to submissions to the Honourable Minister from members of the public that had not previously been provided to the parties.

- 2 The only attachment that had not previously been provided that the Applicant wishes to make submissions on is the Memorandum of Advice from [REDACTED] [REDACTED] dated 24 May 2022 (**Advice**) that was provided by [REDACTED] [REDACTED] attached to his e-mail to the Honourable Minister dated 29 June 2022.
- 3 The Advice is in respect of the correct classification of the proposed use under the *City of Perth City Planning Scheme No. 2 (CPS2)*.
- 4 The Applicant relies on its previous submissions as to the correct classification of the proposed use under *CPS2*.<sup>1</sup>
- 5 The Applicant makes the submissions in respect of the Advice set out at [6] - [12] *below*.
- 6 At the outset it needs to be clearly understood that the services currently provided at 29-35 Shenton Street, Northbridge, and proposed to be provided at 247-249 James Street, Northbridge, are, and will be, provided to:

6.1 People currently experiencing homelessness.

In this context 'homelessness' is as defined by the Australian Bureau of Statistics in the following terms:

*When a person does not have suitable accommodation alternatives they are considered homeless if their current living arrangement is in a dwelling that is inadequate; or has no tenure, or if their initial tenure is short and not extendable; or does not allow them to have control of, and access to space for social relations.*

It is critical to note that those currently experiencing homelessness is not at all limited to those 'sleeping rough'. 'Rough sleeping' has been defined as

*living without shelter or improvised dwellings such as sleeping on the streets and parks, in tents, in caves, in cars and in squats or on buses and trains and in buildings not designed for residential use.*<sup>2</sup>

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<sup>1</sup> See the Applicant's Submissions dated 5 July 2022 at [54]-[81] and the Applicant's Responsive Submissions dated 25 July 2022 at [9].

<sup>2</sup> *The Western Australian Strategy to End Homelessness* (Western Australian Alliance to End Homelessness) at p. 6.

Approximately 85% to 90% of the clients using the services currently provided, and therefore of the services proposed to be provided, are experiencing homelessness.<sup>3</sup>

Some of the clients that are experiencing homelessness are temporarily accommodated at locations in Leederville, Northbridge, East Perth and Perth.<sup>4</sup>

- 6.2 People, whilst not currently experiencing homelessness, who have recently been housed, sometimes for the first time in their life, and who need support and practical help to ensure they maintain their tenancy and remain housed.<sup>5</sup>

Whilst not currently experiencing homelessness, some of these people do reside other than on a temporary basis at the locations specified in [9] of the witness statement of [REDACTED] dated 22 July 2022.

- 7 At [22] of the Advice the author states:

*The scheme is to be read and construed in light of the text, context, subject matters and purpose of its provisions. Primary significance must be accorded to the meaning of the language used in the scheme provisions: Certain Lloyds' Underwriters v Cross (2012) 248 CLR 378 at [23] – [26].*

- 8 However, in the context of local planning schemes, regard must also be had to the following principles of interpretation:

- 8.1 Town planning schemes 'should be construed broadly rather than pedantically and with a sensible practical approach'<sup>6</sup>.
- 8.2 *[T]he terms of planning schemes are regularly referred to, often without the assistance of professional legal advice, by planners, government officials, landowners and prospective landowners to identify the permissible uses of land to which the scheme applies. Placing a counter-intuitive judicial gloss on the plain language of a planning*

<sup>3</sup> See the witness statement of [REDACTED] dated 25 July 2022 at [5].

<sup>4</sup> See the witness statement of [REDACTED] dated 25 July 2022 at [9].

<sup>5</sup> See the witness statement of [REDACTED] dated 25 July 2022 at [6].

<sup>6</sup> *Rando and City of Gosnells* [2019] WASAT 6 (*Rando*) at [55] (see the Applicant's Submissions dated 5 July 2022 at [58]). See also the Applicant's Submissions dated 5 July 2022 at [57].

*scheme reduces the capacity of those persons to comprehend its meaning.*<sup>7</sup>

- 8.3 *Legislative purpose is to be ascertained from what the legislation says, rather than any assumption about a desired or desirable reach or operation of the relevant provisions. Discerning legislative purpose is an objective exercise of statutory construction and is not a quest to ascertain what those who promoted or passed the legislation may have had in mind in [sic] when it was enacted. Nor is it appropriate for, in this instance, the Tribunal to construct its own idea of a desirable policy and impute that into the legislature to then be characterised as a statutory purpose.*<sup>8</sup>

9 At [27]-[38] of the Advice the author:

9.1 Firstly, asks the question whether the term 'community' in the 'Community and Cultural' use group definition 'is intended to mean the public generally or whether some sections of the public are intended to be excluded'<sup>9</sup>.

9.2 Secondly, undertakes an analysis with the conclusion that the term 'community' in the 'Community and Cultural' use group definition excludes 'persons affected by alcohol and drug abuse, deviant behaviour or homelessness'<sup>10</sup>.

In the course of coming to his conclusion, the author states that 'There is no discernible planning rationale to support a meaning of the scheme which does not distinguish between'<sup>11</sup> ordinary members of the public and 'persons affected by alcohol and drug abuse, deviant behaviour or homelessness'.

9.3 Concludes that

*the construction of the Community and Cultural use group which makes most sense from a planning perspective is that the words "the community" refer to ordinary members of the public for whom the provision of services and facilities in a precinct raises no special planning issues.*<sup>12</sup>

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<sup>7</sup> *Australian Unity Property Ltd v City of Busselton* [2018] WASCA 38 at [82] (see the Applicant's Submissions dated 5 July 2022 at [57])

<sup>8</sup> *Rando* at [55].

<sup>9</sup> At [27].

<sup>10</sup> At [35].

<sup>11</sup> At [36].

<sup>12</sup> At [38].

- 10 With respect to the author, the analysis and conclusions at [27]-[38] are flawed for reasons including the following:
- 10.1 They are not so much a matter of interpretation but of redrafting. The alleged distinction in *CPS2* between different elements of the community is a fiction.
  - 10.2 They are not consistent with a broad, sensible and practical approach to interpretation of a local planning scheme.
  - 10.3 They certainly involve a 'gloss' on the planning language of *CPS2*. The analysis and conclusions are certainly not apparent upon a plain reading of *CPS2* and would not allow comprehension by those who regularly use local planning schemes.
  - 10.4 They involve imputing what is considered to be desirable planning policy to be the purpose of the relevant provisions. Phrases such as 'no discernible planning rationale'<sup>13</sup> and 'the construction of the Community and Cultural use group which makes most sense from a planning perspective'<sup>14</sup> emphasise this imputation.
  - 10.5 The term 'social services' appears in the definition of the 'Community and Cultural' use group and has been defined by the State Administrative Tribunal as referring to

*organised systems relating to companionship or relations with others or in a community or designed to remedy or alleviate certain unfavourable conditions of life in a community.*<sup>15</sup>

It is, therefore, clearly erroneous to exclude from the definition of the 'Community and Cultural' use group an element of the community (i.e. 'persons affected by alcohol and drug abuse, deviant behaviour or homelessness') who could clearly benefit from 'social services' as defined *above*.

- 11 At [39]-[51] of the Advice the author undertakes an analysis with respect to the definition of the use 'community centre' in *CPS2* and concludes that the word 'live' in 'community centre' is used

*in its ordinary sense of residing or dwelling in a home. This means residing in premises which the persons concerned are entitled to use or occupy as homes.*

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<sup>13</sup> At [36].

<sup>14</sup> At [38].

<sup>15</sup> *West Australian Shalom Group Inc. and City of Swan* [2018] WASAT 36 at [124].

45. *In this context, the word “live” does not encompass the altogether different activity of 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, without having any right to remain there, especially overnight, and without any definite connection to the area.*

46. *People who exist in that way in, or frequent a locality, for the time being, do not share the connection with the locality that those who reside or work in the locality share. To exist in or frequent places in this way is not to “live” in those places, in the ordinary sense of the word “live”.*

47. *In other words, to say that homeless people “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 in an area than “living” homeless in the area.*

- 12 With respect to the author, the analysis and conclusions at [39]-[51] are flawed for reasons including the following:
- 12.1 No authority whatsoever is cited for the proposition that ‘live’ in the definition of the use ‘community centre’ means ‘residing or dwelling in a home’.<sup>16</sup>
  - 12.2 Whilst still experiencing homelessness, not all of the Applicant’s clients are sleeping rough. Indeed, some are temporarily accommodated in ‘bricks and mortar’ facilities in the surrounding locality.<sup>17</sup>
  - 12.3 An interpretation of ‘community centre’ that does not encompass the provision of ‘social services’ to people experiencing homelessness is neither sensible nor practical, nor would it allow comprehension by those who regularly use local planning schemes.

**Response to submission from [REDACTED] dated 6 July 2022**

- 13 The Applicant acknowledges that the submission from [REDACTED] was provided to the Chief Executive Officer of the Applicant under cover of an undated letter from the Honourable Minister’s Acting Chief of Staff and should have been responded to in the Applicant’s Responsive Submissions dated 25 July 2022.

<sup>16</sup> See the Applicant’s Submissions dated 5 July 2022 at [71]-[75] as to why the Applicant’s clients do ‘live ... in the surrounding locality’.

<sup>17</sup> See [6.1] above.

- 14 The Applicant mistakenly thought that the submissions provided under cover of the undated letter from the Honourable Minister's Acting Chief of Staff were the submissions from the public originally made to the City of Perth. Additionally, the Applicant's legal representatives, [REDACTED], were not copied in on the undated letter from the Honourable Minister's Acting Chief of Staff.
- 15 It was only when the letter from Mr Kannis dated 3 August 2022 was received on 4 August 2022 was the error realised.
- 16 In the circumstances the Applicant seeks the Honourable Minister's leave to make the short response below to [REDACTED] submission.
- 17 The Applicant responds [REDACTED] submission in the following terms:
- 17.1 The Applicant supports the City of Perth's position that its policy entitled 'Non-Residential Uses in or Adjacent to Residential Areas' does not apply.
- In any event, the 'main Policy Statement' which [REDACTED] asserts is not complied with is not a 'standard or requirement' of the policy for the purposes of clause 36 of *CPS2*.
- 17.2 At pp.4-7 of his submission [REDACTED] asserts non-compliance with nine (9) sub-clauses of clause 67(2) of the Deemed Provisions<sup>18</sup>.
- In respect of eight of those alleged non-compliances [REDACTED] asserts that the individual non-compliance should result in the refusal of the application, without any disclosed reasoning nor balancing exercise taking into account all relevant considerations.
- Such an approach is clearly erroneous.
- Clause 67(2) of the Deemed Provisions requires the 'local government ... to have due regard to the [listed] matters to the extent that, in the opinion of the local government, those matters are relevant to the development the subject of the application'. The exercise of discretion is a balancing exercise having regard to all relevant considerations. There is no basis for the view that a 'non-compliance' with one of the considerations listed in clause 67(2) of the Deemed Provisions of itself should result in refusal of the application under consideration.
- 17.3 Great care should be taken in placing reliance on the submission of [REDACTED] [REDACTED] It is clearly not independent and objective advice – [REDACTED]

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<sup>18</sup> See the Applicant's Submissions dated 5 July 2022 at [93].

[REDACTED] uses the term 'submissions'<sup>19</sup>. Additionally, as an example, no reference is made to factors that clearly weigh in favour of approval of the application.<sup>20</sup>



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<sup>19</sup> At p.2

<sup>20</sup> See the Applicant's Responsive Submissions dated 25 July 2022 at [11.5].