

## MINISTER FOR ENVIRONMENT; WATER

Your Ref: Petition 136  
Our Ref: 42-17241

Hon Kate Doust MLC  
Deputy Chair  
Standing Committee on Environment and Public Affairs  
Parliament House  
PERTH WA 6000

Dear Mrs Doust *Kate*

### **PETITION NO 136: KWINANA AIR QUALITY BUFFER ZONE EXTENSION (MANDOGALUP)**

I refer to your letter dated 26 September 2012 seeking further information on Petition No 136 regarding the Kwinana Air Quality Buffer Zone Extension (Mandogalup), following my letter to the Standing Committee Chair dated 23 April 2012.

The Department of Environment and Conservation (DEC) has provided the following advice to me.

On 10 October 2011, the State Administrative Tribunal (SAT) handed down its decision in relation to an application by the Wattelup Road Development Company Pty Ltd for a review of the Western Australian Planning Commission's refusal of a residential subdivision application in Hammond Park.

In making its decision to dismiss the application for review, the SAT considered that, in balancing the planning considerations in the circumstances of this case, "the precautionary principle warrants refusal of the proposed subdivision, unless and until adequate air quality monitoring is undertaken and reviewed in relation to the site demonstrating that the proposed subdivision would be acceptable in relation to the health and amenity impacts of dust." A copy of the SAT decision ([2011] WASAT 160) is attached.

The SAT found that "adequate air quality monitoring would require prior consultation with DEC, monitoring for a period of at least 12 months and assessment and reporting in relation to relevant health and amenity standards and chemical composition of dust."

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Further to my response to the Standing Committee on 23 April 2012, DEC was advised on 4 July 2012 that the developer had installed and commissioned an air quality monitoring station at Wattleup, and sampling for Total Suspended Particles (TSP) had begun on 3 July 2012. However, DEC has not yet received the final monitoring plan as promised by the developer in an email on 22 December 2011. DEC is also unaware of the current status of PM<sub>10</sub> monitoring and testing of the chemical composition of the dust.

As the proposed development is not a prescribed premises under the *Environmental Protection Act 1986*, there is no statutory requirement by DEC for such monitoring. Given the SAT decision, DEC will continue to request the final sampling plan and status reports from the developer, but has no legislative power to do so.

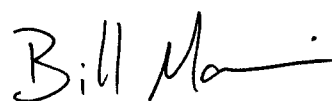
DEC does not consider it is appropriate to use monitoring or modelling alone as the primary buffer definition criteria. Many other factors should be considered in determining buffer distances such as long-term goals for the Kwinana Industrial Area, cumulative impacts from current and proposed industries in the industrial strip, and public amenity issues arising from the insufficient separation of incompatible land-uses.

Using monitoring in this manner is considered problematic as it only gives an indication of air quality over the monitoring period and does not reflect future plans for growth within the industrial strip. Meteorological conditions vary from year to year, and monitoring for 12 months may not adequately portray the true impact the public may experience at that location.

I am concerned about the implications that buffer changes will have for residential encroachment in relation to industry. DEC currently investigates a significant number of residential complaints which are a direct result of residential buffer encroachment, buffer erosion or poor planning in different parts of the State. Any changes to the buffer should be carefully considered to mitigate future impacts on sensitive receptors encroaching on industry.

I trust this further information is of assistance to the Committee.

Yours sincerely



**HON BILL MARMION MLA  
MINISTER FOR ENVIRONMENT; WATER**

Att 30 OCT 2012

**PUBLIC**

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**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**STREAM** : DEVELOPMENT & RESOURCES

**ACT** : PLANNING AND DEVELOPMENT ACT 2005 (WA)

**CITATION** : WATTLEUP ROAD DEVELOPMENT COMPANY  
PTY LTD and WESTERN AUSTRALIAN  
PLANNING COMMISSION [2011] WASAT 160

**MEMBER** : JUDGE D R PARRY (DEPUTY PRESIDENT)  
MS M CONNOR (MEMBER)  
MR P CURRY (SESSIONAL MEMBER)

**HEARD** : 19, 20 AND 21 SEPTEMBER 2011

**DELIVERED** : 10 OCTOBER 2011

**FILE NO/S** : DR 8 of 2011

**BETWEEN** : WATTLEUP ROAD DEVELOPMENT COMPANY  
PTY LTD  
Applicant

AND

WESTERN AUSTRALIAN PLANNING  
COMMISSION  
Respondent

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*Catchwords:*

Town planning - Residential subdivision - Site 1.2 kilometres to 1.7 kilometres from land used for drying or disposing of bauxite residue resulting from alumina production forming edge of the Kwinana Industrial Area - Site proximate to sand quarry - Site zoned Urban under *Metropolitan Regional Scheme* - Urban Deferred classification under *Metropolitan Regional Scheme* 'lifted' in October 2008 - Definition of off-site buffer under *State Planning Policy No 4.1 - State*

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*Industrial Buffer Policy* - Approximately two thirds of site is within defined buffer - Weight to be given to defined buffer in light of significant methodological concerns about a dust emissions study report utilised for the purpose of establishing the buffer - Air quality - Dust - Health and amenity impacts - Lack of adequate monitoring of air quality for health and amenity purposes - Precautionary principle

*Legislation:*

*City of Cockburn Town Planning Scheme No 3*, cl 4.2.1, cl 4.3.1, cl 6.2.9, cl 6.2.10

*Environmental Protection Act 1986 (WA)*

*Metropolitan Region Scheme*

*Planning and Development Act 2005 (WA)*, s 135, s 138(2), s 251(1), s 253(2)(a)

*State Administrative Tribunal Act 2004 (WA)*, s 31

*Result:*

Subdivision approval refused

*Category:* B

**Representation:**

*Counsel:*

Applicant : Mr PJ McQueen with Ms CN Gleeson  
Respondent : Ms CA Ide

*Solicitors:*

Applicant : Lavan Legal  
Respondent : State Solicitor's Office

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

Landpark Holdings Pty Ltd and Western Australian Planning Commission  
[2007] WASAT 130

Telstra Corporation Ltd v Hornsby Shire Council [2006] NSWLEC 133; (2006)  
146 LGERA 10  
WA Developments Pty Ltd and Western Australia Planning Commission [2008]  
WASAT 260

**REASONS FOR DECISION OF THE TRIBUNAL:**

***Summary of Tribunal's decision***

- 1 This case concerned an application for review of the refusal of a residential subdivision application in Hammond Park. The site is approximately 1.2 to 1.7 kilometres north-east of the edge of a property used for drying and disposal of bauxite residue resulting from alumina production in the Kwinana Industrial Area. The site is also located proximate to a large sand quarry. The Urban Deferred classification of the site under the *Metropolitan Region Scheme* was lifted on 31 October 2008.
- 2 The resolution of the matter ultimately involved the balancing, in the exercise of planning discretion, of the following two considerations:
  - (a) A finding that the proposed subdivision is consistent with the long-term strategic and statutory planning framework for the site, which would usually be a powerful and compelling consideration in favour of approval of the proposal; and
  - (b) The precautionary principle which, in the circumstances of this case, was an overwhelming consideration in favour of refusal of the proposed subdivision.
- 3 The Tribunal found that there is a threat of serious or irreversible environmental damage for residents of the proposed subdivision in relation to dust from the residue disposal area and the sand quarry. The Tribunal also found that there is scientific uncertainty as to the environmental damage. The conditions precedent to the satisfaction of the precautionary principle were therefore established. Consequently, a precautionary measure may be taken to avert the anticipated threat of environmental damage, provided that it is proportionate to the threat. The Tribunal determined that precluding subdivision until adequate air quality monitoring at the site demonstrates acceptability is proportionate to the threat, appropriate and cost-effective. The Tribunal found that adequate air quality monitoring would require prior consultation with the Department of Environment and Conservation, monitoring for a period of at least 12 months and assessment and reporting in relation to relevant health and amenity standards and chemical composition of dust.
- 4 The Tribunal found that no weight should appropriately be placed on the definition by the Western Australian Planning Commission of an

off-site buffer from the residue disposal area affecting the site, because of significant methodological concerns in relation to the scientific assessment utilised for the purpose of establishing the buffer. The Tribunal observed that it would seem sensible for the air quality monitoring and assessment in relation to the site referred to in the previous paragraph to inform the confirmation or variation of the buffer by the Western Australian Planning Commission. The Tribunal also suggested that, in light of the significant methodological concerns raised in the evidence and the inadequate duration of the monitoring that underlay the scientific assessment used by the Western Australian Planning Commission to define the buffer, the buffer should not be reflected in the town planning framework at this stage, and that any amendment of the planning framework in this respect should await the results of the air quality monitoring and assessment at the site.

- 5           Balancing the planning considerations, the Tribunal found that the precautionary principle warranted refusal of the proposed subdivision, unless and until adequate air quality monitoring is undertaken and reviewed in relation to the site demonstrating that the proposed subdivision would be acceptable in relation to the health and amenity impacts of dust. The Tribunal therefore affirmed the Western Australian Planning Commission's decision to refuse subdivision approval.

### ***Introduction***

- 6           This proceeding involves an application brought by Wattleup Road Development Company Pty Ltd (applicant), pursuant to s 251(1) of the *Planning and Development Act 2005* (WA) (PD Act), for review of the decision of the Western Australian Planning Commission (Commission) to refuse an application for subdivision approval of land known as Lot 121, Lot 122 and Lot 801 Wattleup Road, Hammond Park (site).

### ***Site***

- 7           The three lots comprising the site are each relatively long and narrow, with a north-south orientation. Lot 121 is located immediately east of Lot 122. Lot 801 is located approximately 345 metres to the east of the eastern boundary of Lot 121. Lot 801 is separated from Lot 121 by three similarly shaped and oriented properties.
- 8           The southern portions of the site lots and of adjoining and adjacent lots are within the land reserved for the western extension of Rowley Road and currently in the process of being publicly acquired. Because of the variable width of the proposed Rowley Road road reserve,

the length of the lots forming the site, excluding the road reserve, varies from approximately 300 metres to approximately 320 metres. The width of each of the lots forming the site is approximately 115 metres. The total area of the lots comprising the site is approximately 10.8 hectares.

***Zoning and structure planning***

9 The site is zoned Urban under the *Metropolitan Region Scheme* (MRS). Until 31 October 2008, the site was zoned Urban Deferred under the MRS. The site is zoned Development under the *City of Cockburn Town Planning Scheme No 3* (TPS 3). Under cl 4.2.1 of TPS 3, the objective of the Development zone is:

To provide for **future residential, industrial or commercial** development in accordance with a comprehensive **Structure Plan** prepared under the Scheme.

(emphasis original)

10 Clause 4.3.1 of TPS 3 states that:

The **Zoning Table** indicates, subject to the provisions of the Scheme, the uses permitted in the Scheme Area in the various zones.

(emphasis original)

11 In relation to the uses permitted in the Development zone, the Zoning Table refers to 'Note 3' which states as follows:

Development and use of land is to be in accordance with an approved Structure Plan prepared and adopted under **clause 6.2.9**.

(emphasis original)

12 Clause 6.2.9 of TPS 3 enables the 'adoption' of a proposed structure plan by the City of Cockburn (City or Council). While cl 6.2.10 of TPS 3 requires the City to forward a proposed structure plan that proposes the subdivision of land to the Commission for the Commission's endorsement within in seven days of the Council's determination under cl 6.2.9, Note 3 of the Zoning Table requires that development and use of the land in the Development zone is to be in accordance with an approved structure plan prepared and adopted under cl 6.2.9, not one that also been endorsed under cl 6.2.10. Furthermore, the objective of the Development zone refers to future residential, industrial or commercial development to be provided 'in accordance with a comprehensive **Structure Plan** prepared under the Scheme'. Under TPS 3, 'development' does not include subdivision: see *Landpark Holdings Pty Ltd and Western Australian Planning Commission* [2007] WASAT 130 at [23]