

C1072

LEGISLATIVE COUNCIL

Question Without Notice

30 August 2023

Hon Ben Dawkins MLC to the Minister representing the Minister for Planning:

I refer to my letter to you of 23 August 2023 to alleging corruption in wapc and shire of Harvey and I seek leave to table that letter.

I refer also to the decision of Naylor and Ors v shire of Harvey and the finding by member Willey that 'there is a legitimate argument between the residents of Lakewood shores and the terms of tps12 and the ownership and ongoing management of the community open space' and I seek leave to table that decision.

And I ask

1. Other than relying on 2 year old response from a previous minister to a lawyer, what is the ministers process for investigating fresh allegations of institutionalised corruption in his portfolio, made in parliament by an mp?
2. What is the ministers process for investigating fresh concerns like those raised by judicial officers such as member Willey ?

Answer

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : LOCAL GOVERNMENT ACT 1995 (WA)

CITATION : NAYLER and SHIRE OF HARVEY [2022] WASAT 9

MEMBER : DR S WILLEY, SENIOR MEMBER

HEARD : 10 JANUARY 2022

DELIVERED : 28 JANUARY 2022

FILE NO/S : DR 248 of 2021

BETWEEN : RONALD NAYLER
First Applicant

RONALD SCANTLEBURY
Second Applicant

GLENYS ATANACKOVIC
Third Applicant

AND

SHIRE OF HARVEY
Respondent

Catchwords:

Practice and procedure - Local government - Rates - Whether rates imposed in accordance with the Local Government Act - Application to extend time - Relevant factors to consider in application to extend time - Length of delay in lodging - Delay not satisfactorily explained - Applicants' case unarguable - Scope of Tribunal's jurisdiction - Application to extend time refused

Legislation:

Associations Incorporation Act 1987 (WA)

Commercial Arbitration Act 2012 (WA)

Interpretation Act 1984 (WA), s 46

Local Government (Financial Management) Regulations 1996 (WA), reg 56, reg 56(3)(n), Pt 5

Local Government Act 1995 (WA), s 1.3(2)(c), s 3.18(3)(a), s 3.18(3)(b), s 3.18(3)(c), s 6.18(2), s 6.32, s 6.32(1)(b)(i), s 6.37, s 6.37(1), s 6.37(1)(a), s 6.37(2), s 6.37(4), s 6.41(1), s 6.41(2), s 6.50(1), s 6.50(2), s 6.76, s 6.77, s 6.78, s 6.79, s 6.81, s 6.82, 6.82(1), s 6.82(2), s 6.82(3), Pt 6, Div 6

Planning and Development Act 2005 (WA), s 68, s 74, s 211

Shire of Harvey Town Planning Scheme No 12, cl 1.7, cl 4.1, cl 4.2.1, cl 4.3.1, cl 5, cl 7.5, Pt IV, Pt VI

State Administrative Tribunal Act 2004 (WA), s 5, s 9(c), s 20(1)(b), s 32(2)(b), s 32(4), s 50, s 147

State Administrative Tribunal Rules 2004 (WA), r 9, r 10

Town Planning and Development Act 1928 (WA)

Valuation of Land Act 1978 (WA)

Result:

Application dismissed

Category: B

Representation:

Counsel:

First Applicant	: B Dawkins
Second Applicant	: B Dawkins
Third Applicant	: B Dawkins
Respondent	: CA Slarke

Solicitors:

First Applicant	: Your Local Lawyer
Second Applicant	: Your Local Lawyer
Third Applicant	: Your Local Lawyer
Respondent	: McLeods

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

Burns v Grigg [1967] VR 871, 872
Carter and Whitby MLA [2021] WASAT 168
Citygate Properties Pty Ltd and City of Bunbury [2009] WASAT 142
Citygate Properties Pty Ltd and City of Bunbury [2010] WASAT 182
CSBP Limited and City of Kwinana [2015] WASAT 42
Esther Investments Pty Ltd v Markalinga Pty Ltd (1989) 2 WAR 196
Gallo v Dawson [1990] HCA 30; (1990) 64 ALJR 458
Goedhart and Western Australian Planning Commission [2006] WASAT 49
Leese v Shire of Harvey [2021] WASC 478
Manfredi and City of Rockingham [2011] WASAT 155
O'Connor and Town of Victoria Park [2005] WASAT 161
Polo Enterprises Australia Pty Ltd v Shire of Broome [2015] WASCA 201;
(2015) 49 WAR 134
Scolaro and Shire of Waroona [2014] WASAT 37
Shire of Cue [2016] WASAT 91
Shire of Yalgoo [2016] WASAT 136
Smith and City of Stirling [2006] WASAT 6
Smith and City of Wanneroo [2008] WASAT 182
The Match Group v Metropolitan South-West Joint Development Assessment
Panel [2014] WASCA 50; (2014) 200 LGERA 227
Van Oijen and Shire of Cuballing [2019] WASAT 62

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 These reasons relate to an application to extend time pursuant to
r 10 of the *State Administrative Tribunal Rules 2004* (WA) (**SAT Rules**).

2 The substance of the application is that Ronald Nayler, Ronald
Scantlebury and Glenys Atanackovic (together the **Applicants**) seek a
review of a decision of the Shire of Harvey (**Respondent, Shire** or
Council) to impose a specific area rate (**Specified Rate**) under the *Local
Government Act 1995* (WA) (**LG Act**) on land that they own
in Binningup.

3 The application for review is made pursuant to s 6.82 of the LG Act
(**Application**). Section 6.82 provides for a referral to the Tribunal of a
question of general interest as to whether a rate of service charge was
imposed in accordance with the LG Act.

4 The Application was made on 10 November 2021. The reviewable
decision, being the Respondent's decision to impose the Specified Rate,
was made by the Respondent on 20 August 2021 and notice given on
23 August 2021.

5 By reason of r 9 of the SAT Rules, the Application was required to
be lodged on or about 20 September 2021. The Application was
therefore lodged approximately 50 days outside the 28-day period
established by r 9 of the SAT Rules. Accordingly, the Applicants require
an extension of time pursuant to r 10 of the SAT Rules.

6 For the reasons that follow, on balance and in the exercise of
discretion, I refuse to extend time for the purposes of r 10 of the
SAT Rules.

Background

7 The relevant background to this dispute was recently canvassed, in
part, by Smith J in *Leese v Shire of Harvey* (*Leese*).¹

8 The Applicants each own land in what is known as the Lakewood
Shores Golf Course Estate in Binningup (**Lakewood Shores**).
The development of Lakewood Shores was governed by what is
commonly referred to as a 'guided development scheme', being the *Shire*

¹ *Leese v Shire of Harvey* [2021] WASC 478, [8] (Smith J).

of Harvey Town Planning Scheme No 12 (**TPS 12**), made in 1987 pursuant to the then *Town Planning and Development Act 1928* (WA). TPS 12 continued as a local planning scheme pursuant to s 68 of the *Planning and Development Act 2005* (WA) (**PD Act**).

9 The following background is drawn from *Leese*.²

10 TPS 12 came into effect on 18 August 1987 and provided for the subdivision and development of Lakewood Shores.

11 Part VI of TPS 12 provides for the development of an 18-hole golf course by Binningup Nominees Pty Ltd, the developer of Lakewood Shores (**Developer**), and Pt IV provides for a Community Association (defined in cl 1.7 as the Peppertree Lakes Community Association or any other name and incorporated under the *Associations Incorporation Act 1987* (WA)) which, pursuant to cl 4.1 of TPS 12, is to take and hold the title to the estate in fee simple of **Community Open Space Land** in the Scheme Area.

12 Clause 4.2.1 of TPS 12 also specifically provides that the title of the estate in fee simple in all Community Open Space Land shall be vested in the Community Association. Pursuant to cl 4.3.1, every owner of land within the Scheme Area has a responsibility to contribute to the cost of maintaining the areas of Community Open Space Land within the Scheme Area.

13 Despite the fact that TPS 12 has been in existence since 1987, the Community Open Space Land has not been transferred to the Community Association.

14 The minutes of the Council of the Shire dated 28 July 2020,³ record that:

- a) the golf course remains the Developer's responsibility and all designated public open space has been ceded to the Shire as recreation reserves;
- b) the Community Open Space Land was never transferred to the Community Association and has remained the responsibility of the Developer. Further, it is understood the transfer did not occur due to the problematic scheme

² *Leese*, [9]-[13].

³ The Council minutes are found at pages 40-48 of the Respondent's Bundle of Documents for the Question of Leave (**Bundle**).

provisions associated with the collection and enforcement of levies and restriction of access;

- c) the Shire became aware in early April 2020 that the Developer was ceasing the management of the Community Open Space Land and golf course;
- d) the Developer no longer wished to manage the Community Open Space Land and has offered to gift the land to the Shire; and
- e) the Shire's draft 2020-2021 budget has listed for consideration an allocation of \$20,000 towards the maintenance of the subject lots (being the Community Open Space Land).

15 The Council minutes also record that resolutions were passed that:⁴

- (a) the general rates for the Shire for the 2021-2022 financial year would be 8.8742 cents in the dollar on gross rental valuations and 0.5476 cents in the dollar on unimproved valuations; and
- (b) that there would be a number of specified area rates, including the Specified Rate (of 1.1175 cents in the dollar) on gross rental valuations on properties within Lakewood Shores with the condition that Council conduct a community consultation with the ratepayers in the 2021-2022 year to consider if the Specified Rate should be ongoing.

16 The reviewable decision the subject of the Application is therefore the decision to impose the Specified Rate on land within Lakewood Shores.

17 The Respondent's draft 2020-21 budget included an allocation of \$20,000 for the maintenance of the Community Open Space Land. The Respondent imposes a specified area rate on other estates within its municipal area where the maintenance is to a standard 'higher than normal throughout the Shire'.⁵

⁴ Bundle, pages 43-44.

⁵ Bundle, page 29.

18 The Respondent is in the process of repealing TPS 12, as is permissible subject to s 74 of the PD Act. However, the Respondent has given an undertaking not to do so until the matter has been the subject of arbitration pursuant to cl 7.5 of TPS 12. Likewise, the Respondent has agreed not to transfer the Community Open Space Land while the matter is being arbitrated.⁶

The Application, orders sought and grounds

19 The Application seeks the following orders:

1. That [the Developer] be urgently joined to these proceedings as they need to be restrained and forced to comply with the orders herein to prevent further damage to ratepayers and landowners within the TPS area and Lakewood Shores.
2. That the [Community Association] be joined to these proceedings as an interested party (not as a respondent) so they can speak to their preparedness to accept the community open space land and other aspects of TPS 12 not yet enforced or undertaken by the respondents.
3. Urgent Ex-parte Injunction to prevent the improper transfer of land (community open space) by [the Developer] and [the Shire] (both parties to be restrained). This land transaction can be prevented by application of the doctrine of proprietary estoppel along with appropriate damages payable to the Community Association.
4. Reversal/refund of inappropriate specified area rate to all affected ratepayers in Lakewood Shores plus interest, plus general damages and pecuniary penalty/exemplary/punitive damages (to be paid to rate payers) against [the Shire] for unconscionably representing/imposing unjustified rates and taking money from ratepayers for the same.
5. All past and future maintenance costs for the community open space lots to be invoiced to [the Developer].
6. Community open space to remain registered in the ownership of [the Developer] until [the Community Association] is ready to receive the land.
7. Declaration: Declaration under section 91 of the SAT Act that the Golf Course must be maintained and reopened at the expense of [the Developer].

⁶ ts 4, 10 January 2022.

8. Golf Course to continue to be maintained at the expense of [the Developer] (as per Council Minutes and TPS 12) so that the cost and damage of its current state of disrepair does not further impact the landowners within TPS 12 (landowners have already had to undertake fuel reduction (mowing) activities at their own expense).

Note: To the extent necessary the Member is to use their injunctive powers and their power to make ancillary orders under section 73 of the SAT Act. This is necessary to prevent further damage and loss to the landowners and ratepayers within the TPS area (Lakewood Shores).

Note: The Member is to utilise their powers under section 50(3) of the SAT Act to refer matters raised herein (including matters under ACL) to a more appropriate court which may include a referral to itself via section 211 of the [PD Act] where [the Tribunal] can, via the Minister for Planning look at a failure by the Shire to enforce the TPS.

Note: The Member is to use his powers under section 147 of the SAT Act to advise the Minister and in turn the Minister for Planning of the need to urgently execute the terms of [TPS 12] including the construction of the 18-hole golf course and clubhouse, maintenance and operation of the same and appropriate transfer of community open space (when appropriate).

20

The Application includes the following grounds:

Unjustified specified area rate imposed on rate payers as a result Shire of Harvey and Binningup Nominees colluding to;

- a) Transfer community open space land (promised in writing to the community association under TPS 12 to the Shire. This also constitutes misleading and deceptive conduct, unconscionable conduct, false and misleading representations about land and wrongly accepting payment under 18, 20, 30(1)(b) and 36 of the [Australian Consumer Law (ACL)]. Both the Shire and [the Developer] are in breach of all of these sections jointly and severally, except for section 36 for which [the Developer] is solely responsible[.]
- b) Pass on maintenance costs for the community open space to innocent rate payers, cost that under TPS 12 must be borne by [the Developer]. This constitutes misleading and deceptive conduct and unconscionable conduct under sections 19 and 21 of the [ACL] with respect to the charging of unjustified specified area rate and who was responsible for upkeep of community open space. The representations by the Shire suggesting that the

ratepayers needed to pay the additional rate for the maintenance of land that (prior to transfer to the community association) can only be charged to [the Developer] also constitutes a false and misleading representation under section 29(1)(l) of the ACL; and c) Non-compliance and non-enforcement of numerous aspects of TPS 12 by Shire and [the Developer] including failing to construct, maintain and operate 18-hole golf course and club house.

Rates and objections under the LG Act

Specified area rates

21 Division 6 of Pt 6 of the LG Act deals with rates and service charges. Subdivision 2 of Div 6 deals with the categories of rates and service charges. The power to impose rates derives from s 6.32 which provides that a local government, when adopting the annual budget, is to impose a general rate on rateable land which may be imposed uniformly and differentially. A local government may also impose a specified area rate: s 6.32(1)(b)(i).

22 With respect to specified area rates, s 6.37(1) provides that a local government may:

impose a specified area rate on rateable land within a portion of its district for the purpose of meeting the cost of the provision by of it a specific work, service or facility if the local government considers that the ratepayers of residents of that area –

- (a) have benefitted or will benefit from; or
 - (b) have access to or will have access to; or
 - (c) have contributed or will contribute to the need for,
- that work, service or facility.

23 A local government must use the money from a specified area rate for the purpose for which the rate is imposed in the financial year in which the rate is imposed or place the money in a reserve account: s 6.37(2).

24 A local government must use the money from a specified area rate only to meet the cost of providing the specific work, service or facility and is to repay money borrowed in connection thereof: s 6.37(4).

The imposition of rates

25 Subdivision 3 of Div 6 deals with the 'imposition of rates and charges'.

26 Part 5 of the *Local Government (Financial Management) Regulations 1996* (WA) (**LGFM Regs**) prescribes the form and content of rates notices.

27 A local government is required to give to an owner of land a rate notice stating the date the notice was issued and must include the details prescribed by reg 56 of the LGFM Regs: s 6.41(1) of the LG Act. Regulation 56(3)(n) requires, *inter alia*, the rates notice to 'include a brief summary of the objection and review rights under Sub 7 of Pt 6 of the LG Act'.

28 The rate notice is required to be given 'as soon as practicable' after the rate record has been completed: s 6.41(2).

29 Rates and charges become due and payable on such date as determined by the local government: s 6.50(1) of the LG Act. However, the date determined by a local government under s 6.50(1) is not to be earlier than 35 days after the rate notice was issued: s 6.50(2) of the LG Act.

Review rights and referrals

30 Subdivision 7 of Pt 6 of the LG Act deals with objections and review rights. Section 6.76 of the LG Act provides a right for a person to object to a rate record of a local government on the ground that there is an error in the rate record with respect to the identity of the owner or that the land or part thereof is not rateable land. A person dissatisfied with the decision of a local government on an objection may, within 42 days, apply to the Tribunal for a review: s 6.77.

31 Section 6.79 allows the Tribunal to consider new grounds in addition to those stated in the notice of objection. Section 6.80 of the LG Act provides that an objection and associated review with respect to a valuation of rateable land should only proceed in accordance with the *Valuation of Land Act 1978* (WA). The Applicants' dispute does not relate to valuation.

32 Section 6.81 of the LG Act provides that the lodgement of an objection does not affect the liability to pay rates imposed under the LG Act pending the determination of the objection.

33 Section 6.82(1), which is the focus of these reasons, is in the following terms:

Where there is a question of general interest as to whether a rate or service charge was imposed in accordance with this Act, the local government or any person may refer the question to the State Administrative Tribunal to have it resolved.

34 If the Tribunal considers that the rate or service charge has not been properly made or imposed, the Tribunal may make an order quashing the rate: s 6.82(3) of the LG Act.

35 I now turn to consider s 6.82 in more detail.

Referrals under s 6.82

36 As I have set out above, s 6.82 of the LG Act allows for a 'question of general interest' to be 'referred' to the Tribunal. Whilst the word 'review' is not referred to in s 6.82, it forms part of the Tribunal's review jurisdiction. This was made clear by DP Chaney, as his Honour then was, in *Citygate Properties Pty Ltd and City of Bunbury (Citygate Properties)*.⁷

37 His Honour stated that s 6.82 is:

... designed to provide a capacity for review of a limited aspect of the decision to impose a rate, namely any question of general interest as to whether the rate was imposed in accordance with the LG Act. It is an alternative method of challenging the decision to impose a rate from those more specific grounds identified in s 6.76 for which the different procedure of objection is provided. Because the right of review relates only to the role of the question of general interest in the imposition of the rate, the words chosen more appropriately described the process. The process involves a review of the decision to impose the rates albeit on a limited basis.⁸

38 Applications under s 6.82 of the LG Act have generally applied to a broad district or area within a municipality.⁹ However, the Tribunal has also found that applications which are expressed to relate to only one

⁷ *Citygate Properties Pty Ltd and City of Bunbury* [2009] WASAT 142, [36].

⁸ *Citygate Properties*, [35].

⁹ For example, the matters in *Shire of Yalgoo* [2016] WASAT 136; *City of Kalgoorlie-Boulder* [2017] WASAT 56 and *Shire of Cue* [2016] WASAT 91, all related to a general question of whether rates struck absent the approval of the Minister for Local Government, when such approval was required, were imposed in accordance with the LG Act.

ratepayer, may nevertheless fall within the scope of s 6.82 of the LG Act.¹⁰

39 In *Smith* the Tribunal considered that it should approach applications made under s 6.82 in a manner which accords with Parliament's intent in establishing a right of review.¹¹ I am also mindful that s 1.3(2)(c) provides that the LG Act is intended to result in greater accountability of local governments to their communities.¹²

40 I will return to discuss s 6.82 later in these reasons.

Applicable legal principles in relation to applications to extend time

41 As I set out in *Van Oijen and Shire of Cuballing*, the criteria which the Tribunal considers in relation to applications to extend time are well known and settled.¹³ These considerations were discussed by Kennedy J in *Esther Investments Pty Ltd v Markalinga Pty Ltd*¹⁴ which were then endorsed by then Barker P in *O'Connor and Town of Victoria Park*.¹⁵ The considerations are:

- a) the length of the delay;
- b) the reason for the delay;
- c) whether there is an arguable case; and
- d) any questions of prejudice to the respondent.

42 I will address these principles in detail later in these reasons.

Applicants' submissions on leave to extend time

43 The Applicants' made a number of submissions which are summarised below.

¹⁰ For example, in *Smith and City of Stirling* [2006] WASAT 6 (*Smith*), the Tribunal held that it has jurisdiction to consider an application on the basis that a specified area rate 'did not benefit me as a ratepayer': at [19]-[23].

¹¹ *Smith*, [23].)

¹² *Polo Enterprises Australia Pty Ltd v Shire of Broome* [2015] WASCA 201; (2015) 49 WAR 134, [60] (Martin CJ, Newnes JA and Murphy JA).

¹³ *Van Oijen and Shire of Cuballing* [2019] WASAT 62, [65]; see also *O'Connor and Town of Victoria Park* [2005] WASAT 161, [40] (*O'Connor*).

¹⁴ *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196, 198 (Kennedy J).

¹⁵ *O'Connor*, [39] (Barker P).

Length of the delay

44 In terms of the length of the delay, the Applicants make the following submissions:

- a) The Application is potentially only 47 days out of time, having regard to when [the rates notice] was actually received by the Applicants.
- b) In *CSBP Limited and City of Kwinana*, the Tribunal found that a delay of 71 days was 'not substantial, particularly where there was no evidence that the local government would suffer significant prejudice by reason of the delay'.¹⁶

And:

- c) The rates notices were invalid as they did not comply with s 20(1)(b) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**) in that the rates notice did not include information relating to a 'right of appeal' under s 6.82 of the LG Act.

Reason for the delay

45 In terms of the reason for the delay, the Applicants make the following submissions:

- a) The Applicants were unaware of the 'appeal right' under s 6.82 of the LG Act. It was only after legal advice was obtained that s 6.82 was considered.
- b) There is much correspondence between the Respondent and landowners of Lakewood Shores where the decision to impose a Specified Rate was queried. The Respondent was on notice that the issue was one of concern for many residents within Lakewood Shores.
- c) To apply to the Tribunal in the ordinary course is uneconomic as the application fee is far more than the Specified Rate.

And:

¹⁶ *CSBP Limited and City of Kwinana* [2015] WASAT 42, [22].

- d) TPS 12 was not available to review on the Respondent's webpage.

Whether there is an arguable case

46 In terms of whether there is an arguable case, the Applicants make the following submissions:

- a) Leaving the attempted acquisition of the Community Open Space Land aside, the Specified Rate is 'outright unlawful'. It is 'disingenuous' for the Respondent to say that the Specified Rate is justified under s 6.37 of the LG Act.
- b) Other cases before the Tribunal have looked at whether a specified area rate is in breach of s 6.37 as a basis for considering whether a question of general interest arises under s 6.82 of the LG Act.¹⁷
- c) The Developer of Lakewood Shores is solely responsible for covering the cost of the maintenance of the Community Open Space Land under TPS 12.
- d) TPS 12 is made under the PD Act and therefore has statutory force. It is true that the Tribunal will need to read TPS 12 to determine who is to maintain (or pay for the maintenance of) the Community Open Space Land up to the time that the Community Association is ready to acquire it. The reading and interpretation of a statutory document is not beyond the Tribunal's jurisdiction. Rather, it is within the Tribunal's jurisdiction to consider any legal argument so long as it relates back to the provision under which the Application is made (s 6.82).
- e) Indeed, TPS 12 will need to be considered when the substantive matter in this case is heard. The damning significance of TPS 12 in this case is that imposing the Specified Rate on ratepayers for the costs of maintaining the Community Open Space Land when TPS 12 requires those costs to be paid by the Developer, is not in accordance with 6.37 of the LG Act and is therefore

¹⁷ *Citygate Properties*, [50]-[51].

reviewable under s 6.82 on the basis that the Specified Rate is not in accordance with the LG Act.

- f) Section 6.37(1)(a) requires that to impose a specified area rate to recoup the cost of works from ratepayers, the ratepayers 'have benefited or will benefit from' the provision of the work undertaken. The ratepayers have not benefited from the provision of the work undertaken and will not benefit from the provision of it because the work must, by law, be undertaken by the Developer under TPS 12.
- g) It is nonsensical to suggest that a ratepayer can benefit from paying the Shire to provide work that is supposed to be provided and paid for by a third party. Doing so is suffering a detriment (paying costs owed by others) not receiving a benefit. The Specified Rate must therefore be quashed by the Tribunal.
- h) If more argument is needed, then the work provided (by reason of the Specified Rate) is also contrary to s 3.18(3)(b) and (c) of the LG Act which prohibits duplication of services (TPS 12 already requires that the Developer maintain the Community Open Space Land) and prohibits ineffective and inefficient management by the Shire (charging ratepayers costs owed by Developer is both ineffective and inefficient).
- i) In any case, the Specified Rate is 'outright unlawful', as TPS 12 requires the Developer and not the ratepayers to maintain the Community Open Space Land, the Tribunal should use its discretion to quash a Specified Rate which is otherwise unlawful under the PD Act/TPS 12.
- j) The Tribunal can also rely of 6.18(2) of the LG Act to quash the Specified Rate. The Applicants hereby appeal to the Tribunal to use its discretion to quash an unlawful specified rate, it should not be necessary for the Applicants to reference the precise precedent or power of the Tribunal to do this. This aspect of the Tribunal's jurisdiction is no doubt already known to the Tribunal and, failing that, is part of its inherent jurisdiction.

- k) Noting that if there are grounds for an extension of time which have been missed by the Applicants and its representative then s 32(4) of the SAT Act allows the Tribunal to inform itself of these otherwise omitted grounds even if they have not been pleaded or have been pleaded unsatisfactorily.
- l) The points raised as to the invalidity of the Specified Rate in these submissions are 'no doubt at the very least arguable' and can be determined at the substantive hearing. It would be 'catastrophic' and 'unconscionable' for the Tribunal not to allow an extension of time in these circumstances. Whilst the Shire and its representatives are intent of applying every technical defence possible (contrary to their obligations as model litigants), the Tribunal is bound to operate in accordance with 32(2)(b) of the SAT Act and to 'act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms'.
- m) There are approximately 150 ratepayers who are owed in excess of \$30,000 for the 'unlawful and improper' Specified Rate who must be refunded immediately. Equity and good conscience demand that this matter proceed (extension of time granted) when the merits are strong (as outlined herein). Technicalities and legal forms favoured by the Shire and its representatives are a lesser consideration against the public interest, hardship and injustice apparent in this case by around 150 ratepayers, mostly retired, many on the aged pension and many facing hardship.

Respondent's submissions

47 The Respondent made detailed submissions in relation to the application to extend time. Those submissions included the following.

48 The Respondent notes that, while it is not clear from the Application, the reviewable decision is to impose the Specified Rate with respect to the maintenance of landscaping of Community Open Space Land within Lakewood Shores for the 2021/2022 financial year.¹⁸

¹⁸ See Council minutes at Bundle pages 40-48.

49 Rate notices confirming the imposition of the Specified Rate were issued by post on Friday 20 August 2021.¹⁹ Notice of the decision to impose the Specified Rate was therefore given on or about Monday 23 August 2021.

50 A referral under s 6.82 of the LG Act falls within the review jurisdiction of the Tribunal.²⁰

51 An application for review made under s 6.82(1) of the LG Act must be made within 28 days of the day on which notice of the decision to impose the specified area rate was given.²¹ Therefore, the Application ought to have been made by on or about 20 September 2021.

52 The Application is dated 10 November 2021. Therefore, the Respondent considers that the Application was lodged approximately 51 days out of time.

53 Ultimately, the Respondent submits that leave should not be granted to commence the review out of time because the length of the delay is not insignificant, has not been adequately explained and, more fundamentally, because the Applicants do not have an arguable case. No question of prejudice to the Respondent is raised.

Section 6.82 of the LG Act

54 The Respondent submits that the financial management of local governments is dealt with in Pt 6 of the LG Act. Within that Part, rates and service charges are addressed in Div 6. The provisions concerning the decision to impose a specified area rate are set out in s 6.37(1).

55 The question that may be referred pursuant to s 6.82(1) is whether the rate or service charge (in this case the Specified Rate) was imposed in accordance with the LG Act. The referral process involves a review of the decision to impose the rate, albeit on a limited basis.²²

56 A referral under s 6.82(1) of the LG Act will generally focus upon the decision made to impose the rate, and the reasons for it.²³

¹⁹ See Bundle pages 49-54 for the notices sent to the Applicants.

²⁰ *Citygate Properties*, [36].

²¹ Rule 9, SAT Rules.

²² *Citygate Properties*, [35].

²³ *Citygate Properties*, [29].

57 This calls for consideration to be given to the requirements of
s 6.37(1) in relation to the decision to impose a Specified Rate.
The Tribunal has done so in a number of cases.²⁴

58 Additionally, whether a rates notice has been served in accordance
with the requirements of the LG Act may go to the question of whether
rates have been imposed in accordance with the LG Act.²⁵

59 The Respondent submits that, as the scope of the review is limited
to a question of general interest as to whether the Specified Rate was
imposed in accordance with the LG Act, the review is necessarily
confined to matters which arise under the LG Act, and more particularly,
to matters arising from Div 6 of Pt 6. No other Division of the LG Act
addresses the imposition of a specified area rate.

The grounds for review

60 The Respondent observes that the Applicants' grounds for review²⁶
assert that the Specified Rate is 'unjustified' on, essentially, three
grounds:

- a) firstly, the transfer to the Respondent of Community
Open Space Land within the Scheme Area of TPS 12
constitutes misleading and deceptive conduct,
unconscionable conduct, false and misleading
representations, and wrongful acceptance of payment, in
breach of Australian Consumer Law (ACL)]
(Ground 1);
- b) secondly, the maintenance costs for the Community
Open Space Land must be borne by the Developer
pursuant to TPS 12, and to charge a Specified Rate with
respect to the cost of maintenance amounts to
misleading and deceptive conduct and unconscionable
conduct under ACL **(Ground 2)**; and
- c) thirdly, the Respondent has failed to comply with or
enforce various aspects of TPS 12 **(Ground 3)**.

²⁴ See *Citygate Properties Pty Ltd and City of Bunbury* [2010] WASAT 182 (*Citygate Properties 2010*);
Manfredi and City of Rockingham [2011] WASAT 155 (*Manfredi*); *Smith*.

²⁵ *Van Oijen and Shire of Cuballing* [2019] WASAT 62, [59].

²⁶ Set out at [20].

61 The orders sought by the Applicants²⁷ flow from these three grounds.

The Application does not fall within s 6.82 of the LG Act

62 The Respondent submits that none of the grounds for review involve a question of general interest as to whether the Specified Rate was imposed in accordance with the LG Act.

63 Grounds 1 and 3 do not, in any way, concern the decision to impose the Specified Rate.

64 With respect to Ground 1, the Respondent notes that the decision to accept a transfer of the Community Open Space Land was made by the Council of the Respondent at its meeting held on 28 July 2020;²⁸ almost one year prior to the reviewable decision in this case. The Respondent denies that the decision to accept a transfer of the Community Open Space Land is in any way unlawful²⁹ but, in any event, a decision by a local government to accept a transfer of land is not a reviewable decision for the purposes of the SAT Act.

65 To the extent that Ground 3 raises a question as to whether the Respondent has failed to enforce or implement TPS 12, the Respondent notes that the Applicants are entitled to make a representation to the Minister for Planning pursuant to s 211 of the PD Act.

66 Ground 2 concerns the decision to impose the Specified Rate, but the Applicants' complaint is that the decision to impose the Specified Rate is in some way in breach of TPS 12 and ACL. The Respondent submits that the Tribunal does not have jurisdiction to deal with such matters in a review pursuant to s 6.82(1) of the LG Act.

67 The Respondent considers that Ground 2 does not engage at all with whether the decision to impose the Specified Rate was made in accordance with s 6.37(1), or with any other LG Act provision.

²⁷ See page 5 of the Application; set out at [19].

²⁸ See Council minutes at Bundle, pages 18-28.

²⁹ Although the transfer of the Community Open Space Land is, in the Respondent's opinion, irrelevant to the review.

68 The Respondent submits that the fact that the orders sought by the Applicants are all plainly outside the scope of the Tribunal's powers³⁰ underscores the misconceived nature of the Application.

69 The Respondent is of the view that the Application is misconceived, and it follows that the Applicants have not demonstrated that they have an arguable case. To the contrary, the Application has no prospect of success.

Length of delay

70 The Respondent notes that the Tribunal has previously described a delay of just over five weeks to be 'borderline'³¹ and a delay of between 81 and 87 days as 'considerable'.³²

71 At approximately 51 days, the Respondent submits that the Applicants' delay is beyond 'borderline' and can properly be described as considerable. Whatever adjective is chosen to describe the delay, it is not insignificant. In the context of a 28-day time limit, the Respondent considers that a 51-day delay is 'material'.

Reason for delay

72 The Respondent notes that the Applicants reply on four matters in terms of the reasons for the delay. The first is that two of the Applicants (Mr Nayler and Mr Scantlebury) raised concerns about the Specified Rate in a timely way.³³

73 The Respondent makes the following submissions in relation to the Applicants' explanation for the delay:

- a) the Applicants (and all residents of Lakewood Shores) were advised by letter dated 1 July 2021 that the Specified Rate would be applied for 2021/2022.³⁴ This was a consequence of the Council resolution, made on 22 June 2021, that the affected ratepayers of Lakewood Shores be advised of the new rate prior to the rate notice being issued;³⁵

³⁰ Except to the extent that the third order proposed may involve quashing the Specified Rate pursuant to s 6.82(3).

³¹ *O'Connor and Town of Victoria Park*, [41].

³² *Goedhart and Western Australian Planning Commission* [2006] WASAT 49, [16] (*Goedhart and WAPC*).

³³ Copies of the communications between the Applicant and the Respondent are at Bundle pages 55 to 139.

³⁴ See Bundle pages 35-39.

³⁵ See Council minutes at Bundle pages 29 to 33. The Council resolution is at page 33.

- b) Mr Scantlebury raised a series of concerns with respect to the Specified Rate through the period from 23 July 2021 to 17 September 2021. The Respondent in each case responded to Mr Scantlebury's concerns;
- c) Mr Scantlebury was formerly the Executive Manager of Corporate Services at the Shire. His communications with the Respondent reveal his familiarity with Council processes and relevant legislation;
- d) some of the concerns raised by Mr Scantlebury could properly be described as questions of general interest as to whether the Specified Rate was imposed in accordance with the LG Act. However, none of those concerns have been raised by the Applicants in the Application;
- e) Mr Nayler's e-mail to the Respondent of 8 September 2021 is a generalised objection to the merits of the Specified Rate. It does not fall within s 6.82;
- f) none of the Applicants' communications with the Respondent from July to September 2021 regarding the Specified Rate raise the matters which the Applicants now seek to raise in the Application; and
- g) the communications between the Applicants and the Respondent regarding the Specified Rate prior to 20 September 2021 do not provide any explanation as to the reason why the Application was not commenced until 10 November 2021. The mere fact that two of the Applicants engaged with the Respondent in relation to matters which are not the subject of the Application is not something which goes to delay.

74 The second reason for the delay referred to is an allegation of deceptive conduct by the Respondent in relation to TPS 12. The precise nature of the alleged deceptive conduct is not described, nor how it is said to be relevant to the delay in commencing the Application. The Respondent submits that it is therefore not possible for the Respondent to address the second reason for delay.

75 The third reason for the delay is to the effect that the Applicants suffer from financial hardship and were unable to obtain legal representation until October 2021.

76 The Respondent submits that it is unable to comment on the Applicants' financial position. However, the Respondent notes that there is no requirement for a party to be legally represented in the Tribunal. Mr Scantlebury is evidently a competent and relevantly experienced person and could reasonably be expected to be capable of commencing a Tribunal review. The bare assertion of financial hardship does not, of itself, provide an adequate explanation for the delay.

77 The fourth reason raised by the Applicants is 'representative error'. This reason appears to apply from sometime in October, and therefore accounts for only a portion of the delay.

78 The Respondent submits that the reasons given for the Applicants' delay are not adequate to fully explain it.

79 Finally, the Respondent submits that, even if the Tribunal is satisfied that the length of the delay is adequately explained by the Applicants, the fact that the review is fundamentally misconceived means that leave to commence out of time should not be granted.

Submissions on s 6.37

80 While it does not emerge with any clarity in the materials put forward in the Application, it became apparent through the Applicants' submissions, that the actual case advanced by the Applicants is that the criteria for the imposition of a Specified Rate under s 6.37 of the LG Act were not met. I have set out the Applicants' submission in this regard above at [46](f) and (g).

81 Mr Dawkins, counsel for the Applicants, confirmed that this was the Applicants' argument.³⁶ Because of the opaqueness of that argument in the materials before the Tribunal, I allowed the Respondent to file reply submissions specifically on s 6.37 of the LG Act.

82 The Respondent's reply submissions include the following.

83 The Respondent submits that a relevant 'benefit' for the purposes of s 6.37(1) will include a benefit (whether direct or indirect) which is rationally found to be additional to or greater than that which other

³⁶ ts 15, 10 January 2022.

ratepayers or residents receive arising out of the identified 'specific work, service or facility'.³⁷

84 Furthermore, the Respondent submits that in imposing a specified area rate, it is not necessary for a local government to undertake a detailed economic or strategic analysis to support or justify its opinion as to benefit. Rather, what is required is that the local government turn its mind to the question of benefit, and that it reach an opinion which is not unreasonable and has some rational basis.³⁸

85 The type of benefit which might justify the imposition of a specified area rate is not necessarily financial nor is it necessarily direct. A specified area rate might be imposed on the basis of aesthetic or amenity improvements.³⁹

86 Section 6.37 of the LG Act does not require that the local government must own the asset the subject of the 'work, service or facility' being provided.⁴⁰

87 In this instance, the Shire's maintenance of the Community Open Space Land is, plainly, the provision of a specific 'work' or 'service'.

88 The Respondent submits that, it is not in dispute (and cannot reasonably be disputed) that residents and ratepayers of Lakewood Shores will benefit from the Community Open Space Land being maintained at a higher than general standard.

89 The Applicants' complaint is not that the Community Open Space Land should not be properly maintained; the complaint is that the Shire should not be the entity maintaining it.

90 The Respondent submits that the benefit which the residents and ratepayers of Lakewood Shores obtain from the maintenance of the Community Open Space Land by the Respondent, that is additional to or greater than that which other residents or ratepayers receive, is that the landscaping in the Community Open Space Land is maintained to a standard higher than other open space that is maintained by the Respondent.

³⁷ *Citygate Properties 2010*, [82].

³⁸ *Citygate Properties 2010*, [93].

³⁹ *Citygate Properties 2010*, [105].

⁴⁰ *Manfredi*, [70].

91 That is because the Community Open Space Land is classified as 'manicured turf', as opposed to 'general' or 'rural' 'turf'. The Respondent's tender requirements for the maintenance of the Community Open Space Land were included in the Bundle. These requirements include, *inter alia*, all turfed areas to be maintained in a 99% weed free condition and kept free of pests and diseases⁴¹ and turfed areas are to '100% covered with actively growing turf that is in good health, with a smooth and manicured appearance'.⁴²

92 The Respondent submits that it plainly turned its mind to the question of benefit. Furthermore, there was a rational, and not unreasonable basis, for the Council forming the view that the works or services involved in maintaining the Community Open Space Land, to a 'higher standard of presentation', was a benefit arising to the ratepayers or residents of Lakewood Shores greater than other residents or ratepayers would receive (where open space is maintained to a general or rural turf standard).

93 The Respondent considers that the Applicants' submissions, to the effect that there is no relevant benefit for the purposes of s 6.37 of the LG Act, are unarguable for the following reasons.

94 First, there is a relevant benefit to the residents of Lakewood Shores for the purposes of the LG Act.

95 Second, the Applicants' submissions require the Tribunal to consider and, in effect, declare the proper construction of TPS 12 as to the maintenance of the Community Open Space Land. The jurisdiction under s 6.82 does not permit an inquiry of that scope or nature. The only reviewable decision is the decision to impose the Specified Rate. There is no reviewable decision as to the maintenance of the Community Open Space Land under TPS 12. The observations of the Court of Appeal in *The Match Group v Metropolitan South-West Joint Development Assessment Panel (The Match Group)* are apposite.⁴³

96 Third, even if the Tribunal is able to construe and make a determination regarding TPS 12 in the context of the review, the case sought to be made by the Applicants has no prospect of success. That is evident from the decision in *Leese*.

⁴¹ Bundle, page 98.

⁴² Bundle, page 99.

⁴³ *The Match Group v Metropolitan South-West Joint Development Assessment Panel* [2014] WASCA 50; (2014) 200 LGERA 227, [18]-[23] (Pullin JA, Newnes JA, Murphy JA).

97 In *Leese*, the Supreme Court dismissed the *ex parte* application for an urgent interlocutory injunction and, in doing so, concluded that a *prima facie* case for relief was not made out. The applicant in the Supreme Court proceeding, Mr Leese, is also aggrieved by the decision to impose a specified area rate.

98 The Court set out the following from an affidavit from Mr Leese:

On 27th July 2021 the Shire of Harvey approved the imposition of a Specified Area Rate payable by me on 5 lots. The rationale given for the Specified Area Rate was to recoup maintenance costs on the Community Open Space which the Town Planning Scheme requires must be paid by the Developer not the individual land owners[.]⁴⁴

99 The Court stated:

Although Mr Leese complains in his affidavit about the imposition of a specified area rate for landscaping on the basis that such rates must be paid by the developer of the land not individual landowners, there is nothing in TPS 12 that supports this proposition. To the contrary, there are provisions in TPS 12 that arguably require individual owners to pay for the maintenance of the Community Open Space.⁴⁵

100 Fourth, there is a lacuna in the logic of the Applicants' submissions. The postulated lack of benefit relies on the assertion that the maintenance of the Community Open Space Land must be undertaken by the Developer. But the very reason the Respondent commenced maintaining the Community Open Space Land is because the Developer had ceased doing so.⁴⁶

101 The Respondent notes that the Applicants' submission requires that it be assumed:

- a) before the Respondent commenced maintenance of the Community Open Space Land, it was being maintained by the Developer; and
- b) had the Shire not commenced maintenance, the Developer would have continued to maintain the Community Open Space Land, because only then could it potentially be argued that the Respondent's

⁴⁴ *Leese*, [8].

⁴⁵ *Leese*, [26].

⁴⁶ The Developer ceased maintaining the Community Open Space Land in around April 2020: Bundle, page 18. The Respondent received complaints from the local community about the lack of maintenance. An email chain between Mr Scantlebury and the Shire refers to the complaints: Bundle, page 82.

maintenance of the Community Open Space Land brings with it no benefit.

102 However, the Respondent considers that neither of the assumptions required by the Applicants' submission reflects reality. The commencement of maintenance of the Community Open Space Land by the Respondent is, plainly, a benefit to the ratepayers and residents of Lakewood Shores - even without taking into account the special benefit derived from the higher standard of maintenance carried out by the Respondent.

Applicants' further responsive submissions

103 On 18 January 2022, the Applicants sent a further submission by email which canvassed many issues. For present purposes, it is only necessary to refer to the following points.

- a) It is critical that the Tribunal interpret TPS 12 to resolve the issues between the residents of Lakewood Shores and the Shire (and the Developer). Attempts are being made to 'steal the land from the Community Association'.
- b) Section 211 of the PD Act allows the Tribunal to interpret planning schemes.
- c) The President of the Tribunal should, pursuant to s 147 of the SAT Act, write to the Minister for Planning to invite the Minister for Planning to 'enliven the Tribunal's jurisdiction'.
- d) The use of the word 'arguable' by Smith J in *Leese* means that the Applicants do have an arguable case.
- e) If the Tribunal declines to 'interpret' TPS 12 in this application, it should adjourn the matter and refer it to Smith J under s 50 of the SAT Act. This should not be necessary as the Tribunal interprets planning schemes 'all the time'.

And:

- (f) The Applicants will appeal any decision of the Tribunal that does 'not allow some way of the unlawful rates being refunded'.

Consideration

104 I turn now to consider the relevant principles that arise in the context
of applications to extend time under the SAT Rules.

The length of the delay

105 I agree with the Respondent and find that a delay of 47 or 51 days
is 'material'. The term 'considerable' was adopted in *Goedhart and
WAPC* in relation to a delay of 81 days.⁴⁷ That term is also apt. While
the delay cannot be said to be 'excessive', as was the case in *Scolaro and
Shire of Waroona*,⁴⁸ it is not of no consequence either.

106 I find that the length of the delay is material but not, of itself, fatal.
However, it is a factor that goes against the Applicants' application to
extend time.

Reason for the delay

107 The Applicants' case is that the delay is explained, in effect, by two
factors. The *first* is that legal advice was only obtained on the
Specified Rate in November 2021. I find that the delay is, in part,
explained by the fact that legal advice was not obtained until
November 2021.

108 I say 'in part' because the residents had been on notice that the
Respondent intended to impose the Specified Rate since 1 July 2021
when the Respondent wrote to the affected landowners. Furthermore,
the Respondent had made it clear at its meeting of 28 July 2020 that it
intended to accept the transfer of the Community Open Space Land from
the Developer.

109 It is also the case that Mr Scantlebury, through his work experience
at the Shire, would, I find, have had an awareness of the operations of
the Respondent and the relevant legal framework under the LG Act.⁴⁹

110 In addition, it is also the case that Mr Scantlebury raised a series of
concerns with the Respondent in relation to the Specified Rate through
the period from 23 July 2021 to 17 September 2021. It may therefore be
concluded that Mr Scantlebury, at least, was aware of the issues that

⁴⁷ *Goedhart and WAPC*, [16].

⁴⁸ *Scolaro and Shire of Waroona* [2014] WASAT 37, [10]; see also *Smith and City of Wanneroo* [2008] WASAT 182, [13].

⁴⁹ That is plain from the email queries from Mr Scantlebury which were included in the Bundle.

arose with respect to Specified Rate and the need to obtain advice or otherwise act promptly.

111 The *second* factor is that the Applicants say that the Respondent failed to comply with s 20(1)(b) of the SAT Act because the rates notices did not expressly refer to an 'appeal right' under s 6.82 of the LG Act. The Respondent accepts that the rates notice 'did not comply with s 20(1)(b)' of the SAT Act.

112 In this regard, I do not agree with the Applicants' submissions nor, for that matter, the Respondent's concession.

113 The relevant rates notices, which I have reviewed, complied with reg 56(3)(n) of the LGFM Regs in that they included 'a brief summary of the objection and review rights under Sub 7 of Pt 6 of the LG Act'. In particular, attention was expressly drawn in the rates notices to the right to object under s 6.76 of the LG Act and consequent appeal rights. Furthermore, as was observed by Chaney DP in *Citygate Properties*, inconsistencies between enabling Acts and the SAT Act are anticipated, and addressed, by s 5 of the SAT Act which provides that the enabling Act prevails in the case of inconsistencies.⁵⁰

114 Furthermore, while s 6.82 of the LG Act does arise in the Tribunal's review jurisdiction, it is not in the same species of review rights provided under Sub 7 of Pt 6 of the LG Act. For example, the right of review under s 6.77 of the LG Act is directed to 'any person' 'dissatisfied with the decision of a local government on an objection by that person under s 6.76' may 'apply' to the Tribunal 'for a review of the decision'. The 'review' right provided by s 6.78, in the context of refusals to extend time in which to lodge objections against the rate record under s 6.76, is similar.

115 Section 6.79B provides that, in effect, if the Tribunal considers that in determining a matter under either s 6.77 or s 6.78, is of general interest or significance, it is to prepare written reasons for its order which are to be published.

116 Section 6.82 is different. Section 6.82 is not directed to individual objections. That is made plain by s 6.82(2). Rather, s 6.82 is directed to a 'question of general interest as to whether a rate or service charge was imposed in accordance with the [LG Act]'. Where such general questions do arise, 'the *local government* or *any person* may *refer* the question to

⁵⁰ *Citygate Properties*, [31]; In this regard, see also, s 46, Interpretation Act.

the [Tribunal]'. Such reasoning is, I consider, consistent with the analysis of Chaney DP in *Citygate Properties* where he stated:

... The section is designed to provide a capacity for review of a limited aspect of the decision to impose a rate, namely any question of general interest as to whether the rate was imposed in accordance with the LG Act. It is an alternative method of challenging the decision to impose a rate from those more specific grounds identified in s 6.76 for which the different procedure of objection is provided. Because the right of review relates only to the role of the question of *general interest in the imposition of the rate*, the words chosen more appropriately described the process. The process involves a review of the decision to impose the rates albeit on a limited basis.⁵¹ (Emphasis added)

117 In my view, given the potential breath of referrers under s 6.82, and also because the language used in s 6.82 is itself directed to the *referral* of a *question of general interest*, rather than *applying* for a *review* of a specific decision, it is not necessary for rates notices to include reference to s 6.82 for the purposes of s 20(1)(b) of the SAT Act.

118 While I accept that the rates notices did not direct attention to s 6.82 of the LG Act, and that may account for some delay in the making of the Application to the Tribunal, I do not accept that that failure amounts to non-compliance with s 20(1)(b) of the SAT Act. The rates notices, I consider, complied with the requirements of LGFM Regs.

119 Having regard to:

- a) the relevant history of this matter and the Applicants' long awareness that the Respondent was going to accept the Community Open Space Land and impose the Specified Rate for its maintenance; and
- b) the experience of the Applicants, in particular Mr Scantlebury, as a former Executive Manager of the Shire,

in an overall sense, I find the Applicants' explanation for the delay is less than satisfactory.

Whether there is an arguable case

120 It is apparent that the grounds, which I have set out at [20], raise no general question as to whether the Specified Rate was applied in

⁵¹ *Citygate Properties*, [35].

accordance with the LG Act. I therefore accept the Respondent's submissions at [62] that the grounds - as set out in the Application - raise no question of general interest under the s 6.82 of the LG Act and therefore do not set out an arguable case.

121 The orders sought⁵² by the Applicants are also misconceived. The Applicants seek many orders which are beyond the powers of the Tribunal.

122 However, that is not the end of the matter. As has been discussed, although it is expressed with no clarity, the substantive argument raised by the Application is whether the requirements for the imposition of a specified area rate, as required in s 6.37 of the LG Act, have been met.

123 That is, the Applicants' case is that the relevant 'ratepayers or residents' within the area the subject of the Specified Rate will, relevantly, 'have or will benefit from', 'have access to or will have access to' or 'have contributed or will contribute to the need for' the upkeep and maintenance of the Community Open Space Land (being the purpose of the Specified Rate).

124 The Applicants' argument, as I understand it, is that because, they say, under the terms of TPS 12 the Developer is to maintain the Community Open Space Land pending its transfer to the Community Association pursuant to cl 4.2.1, the imposition of the Specified Rate is not consistent with the LG Act. That is, there is no benefit for the Applicants in the Respondent agreeing to pay for the upkeep, and to charge a specified area rate as a consequence, when a third party (the Developer) is liable under TPS 12 to pay for that upkeep and maintenance.

125 Viewed through the lens of the LG Act, it seems to me that the Applicants' case is that the relevant criteria required to impose the Specified Rate under s 6.37 were not met. As a result, the Applicants' submit that the Specified Rate was not imposed in accordance with the LG Act.

126 At first blush, such an argument may appear to have some merit. But the Applicants' argument does not address the question that is ultimately asked by s 6.37(1) of the LG Act.

⁵² Set out at [19].

127 All that is necessary for a local government to impose a specified area rate is for the local government to 'consider' that the relevant 'ratepayers or residents' 'have or will benefit from', 'have access to or will have access to' or 'have contributed or will contribute to the need for' the upkeep and maintenance of, relevantly, the Community Open Space Land. The Community Open Space Land being the 'work, service or facility' that the specified area rate is directed to.

128 In my view, there is no room for argument that the maintenance of the Community Open Space Land (such open space having been created and established for the Lakewood Shores community), is a 'work, service of facility' that provides an overall benefit for the ratepayers and residents within the area the subject of the Specified Rate, including the Applicants.

129 In my view, it plainly does and benefits the Lakewood Shores community so as to fall within the scope of s 6.37 of the LG Act. In this regard I accept the Respondent's submissions set out at [83] to [92] above.

130 The fact that upkeep and maintenance of the Community Open Space Land has, to date, been provided via other arrangements (under TPS 12) does not allow me to go behind the terms of the inquiry set out in s 6.82 of the LG Act.

131 I do not deny, and indeed it seems to be the case, that there is a legitimate argument between residents of Lakewood Shores and the Respondent as to the terms of TPS 12, and the ongoing ownership and management of the Community Open Space Land. However, my jurisdiction in this matter begins and ends with the LG Act, read with the SAT Act.

132 The Respondent has made no reviewable decision in relation to TPS 12 that would cloak the Tribunal with jurisdiction to inquire into the arrangements under TPS 12. Nor does s 6.82 of the LG Act give me any authority under the ACL. Clause 7.5 of TPS 12 provides for arbitration under the *Commercial Arbitration Act 2012* (WA) should any 'difference' arise between any person and the Council, including in relation to the Community Open Space Land. That is the proper forum for that debate.

133 I return to the analysis of Chaney DP in *Citygate Properties* where his Honour outlined that the right of review under s 6.82 relates only the question of general interest in the imposition of the specified area rate. That question is the beginning, and the end, of any jurisdiction the

Tribunal has in such matters. I also agree with the Respondent that I should be mindful of the Court of Appeal's analysis in *The Match Group* decision.

134 In *Carter and Whitby MLA*, I recently noted, again, that the Tribunal is a creature of statute and its jurisdiction is not one that operates at large. That is, the Tribunal's jurisdiction rises and falls based on the terms of enabling Acts read with the SAT Act.⁵³ I therefore disagree with Mr Dawkins that I have an inherent jurisdiction to undertake an inquiry into TPS 12.

135 In this instance, the jurisdiction I may exercise is to consider whether the Respondent's decision to impose the Specified Rate raises a 'question of general interest' as to whether it was 'imposed in accordance with the [LG Act]'. My jurisdiction does not extend to an anterior inquiry as to arrangements that may be in place under TPS 12. Clause 7.5 of TPS 12 deals with those disputes, including in relation to the Community Open Space Land.

136 Furthermore, and more problematically, the Applicants' submissions and the materials before me (in the form of the Application and the Bundle) do not provide any basis on which it may be argued that the Specified Rate has been imposed in a manner that does not accord with requirements of the LG Act, in particular s 6.37.

137 I find it unarguable for the Applicants to suggest that residents of Lakewood Shores have not, and will not, benefit from the maintenance, at a higher than standard rate, of the Community Open Space Land. It is the maintenance of the Community Open Space Land which is the 'specific work' for the purposes of s 6.37 of the LG Act.

138 I am satisfied that the relevant benefit will be additional to, and greater than, that enjoyed by other ratepayers and that the decision to impose the Specified Rate, in the circumstances of this case, is not unreasonable in the sense explained in *Citygate Properties 2010*.⁵⁴ I find there is no basis for an argument that the Specified Rate was not imposed in accordance with the LG Act.

139 I do not consider it is necessary to engage with the Applicants' arguments in relation to either s 3.18(3)(b) or s 6.18(2) of the LG Act. I agree with the Respondent that reference to, and reliance on, these

⁵³ *Carter and Whitby MLA* [2021] WASAT 168, [43].

⁵⁴ *Citygate Properties 2010* [93] (Chaney DP).

provisions by the Applicants is plainly misconceived. I make the same comment about the Applicants' reference to s 147 of the SAT Act as well as s 211 of the PD Act.

140 I therefore find that the Applicants' case is not arguable.

Prejudice to the Respondent

141 The Respondent does not raise any question of prejudice.

Conclusion

142 The decision to extend time under r 10 of the SAT Rules is discretionary. The discretion should be exercised to extend time, in my view, if it is, in all the circumstances, in the interests of justice to do so. That reasoning accords with the analysis of McHugh J in *Gallo v Dawson*.⁵⁵ It is also the case that where the application seeks an extension of time, it is necessary to consider the prospects of success.⁵⁶

143 The relevant factors that I have referred to, and discussed, above inform, but do not dictate, the exercise of that discretion. I have found:

- a) the length of the delay is material, but not of itself fatal;
- b) the explanation for that delay is less than satisfactory;
- c) the Applicants' case is not arguable; and
- d) no question of prejudice is raised.

144 On balance, and in the exercise of discretion, I am not prepared to grant an extension of time under r 10 of the SAT Rules. To allow this matter to progress would be contrary to the objectives of the SAT Act which include minimising the costs to the parties.⁵⁷ While I note the Applicants' reference to s 32(2)(b) of the SAT Act, that section cannot be used to give the Tribunal jurisdiction that it simply does not have.

145 Ultimately, this is a dispute about the operation of TPS 12. Yet, I reiterate, the Respondent has not made a reviewable decision under TPS 12. If the Applicants have an issue with the ownership and management of the Community Open Space Land, then there is an avenue for that 'difference' to be arbitrated under cl 7.5 of TPS 12.

⁵⁵ *Gallo v Dawson* [1990] HCA 30; (1990) 64 ALJR 458, 459 (McHugh J).

⁵⁶ *Burns v Grigg* [1967] VR 871, 872 cited in *O'Connor* [38].

⁵⁷ s 9(c), SAT Act.

146 The Tribunal simply does not have jurisdiction to deal with the
actual issue between the parties. The Applicants' argument that s 6.82
can be used as a vehicle to undertake an inquiry into the operation of
TPS 12 is, in my view, not correct.

147 The application to extend time will be dismissed.

Orders

The Tribunal orders:

1. The application to extend time is dismissed.

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

DR S WILLEY, SENIOR MEMBER

28 JANUARY 2022



HON. BEN DAWKINS MLC

Member for the South West Region

Hon John Carey MLA
Minister for Planning
11th Floor Dumas House
2 Havelock St
WEST PERTH WA 6005

23 August 2023

Dear Minister

The Shire of Harvey Town Planning Scheme 12 for Lakewood Shores Golf Course Estate has not been implemented or enforced, nor have the WAPC subdivision conditions. This has led to the loss of the golf course and the prospect of it being developed into housing. WAPC and Shire of Harvey have been derelict in their duties, noting that deliberate failure to perform the functions of office is a form of corruption.

Further, Shire of Harvey have unlawfully signed Landgate forms transferring Community land over to themselves, without so much as seeking the permission of the Community Association to which it was promised by the statute, this is unlawful and corrupt conduct. The Community is outraged as they have been charged extra rates to maintain land they should own themselves.

Please arrange for me to meet WAPC Chairman David Caddy. Or please ask him to provide me with the following information;

- 1) What is the process for approval of the new Shire of Harvey TPS 2 (and foreshadowed repeal of TPS 12) and when will this happen? Will I be able to make a deputation to the WAPC/Committee on this? What are the steps in the process at which the community can provide input?
- 2) Can the approval of the new Shire of Harvey TPS 2 (and foreshadowed repeal of TPS 12) be stayed/delayed whilst my concerns above and that of my constituents are investigated?

Separately, can you please refer TPS 12 to SAT under section 211 of the Planning and Development Act, I am an aggrieved person for the purposes of that section. I would have thought that where corruption has been alleged it is appropriate or even essential that the Minister allow the Judicial members of the SAT to sort it out. They will have far greater understanding of the legalities of this situation than any of us. I do not think that any of the bureaucrats involved are objective and cannot be left to regulate themselves, SAT must be involved.

Yours sincerely,

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