1.	15.04.03	Memorandum of Appearance	5	$75.00
2.	17.03.03	Responding to applicant's application by notice of motion for order nisi for writ of certiorari (By analogy to item 20):	27	$0.00
3.		Getting up: (by analogy) (Schedule 1)	20(c)	$27,777.70 -4380.3
4.	15.10.03	Counsel fee on hearing, including preparation, (fee for junior counsel includes 25% reduction) (Schedule 2)	20(d)	$5,429.25 - 2989.7
5.	15.10.03	Senior Counsel fee on hearing, including preparation of further submissions pursuant to O66 r23 direction (Schedule 3)	20(e)	$25,063.500 ✓
6.	14.11.03	Counsel fee on second day	20(f)	$1767.00 - 912
7.	14.11.03	Senior counsel fee on second day	20(g)	$3,234.00 - 1848
8.	28.11.03	Attending on reserved decision	20(h)	$418.00 ✓
9.	00.03.04	Extracted order – 28.11.03	15(b)	$157.00 ✓
10.	03.02.04	Notice of motion for special costs orders Schedule 4)	22	$4,003.00 - 2003
11.	03.02.04	O59 r9 Memo	4(f)	$35.00 ✓
12.	13.02.04	Extracted order made by consent – 11.02.04	15(b)	$157.00 ✓
13.	00.03.04	Extracted order – 25.03.04	15(b)	$157.00 ✓
14.		Photocopying (Schedule 5)	29	$1,545.75 - 884.00
15.		Drawing, copying, filing and serving bill of costs Invoice not attached	16	$1,200.00 ✓
16.		Attending on taxation of costs, including preparation	17	$1,000.00 ✓
		Subtotal		**$72,019.20**
17.		**DISBURSEMENTS**		
17.1		Fee on bill of costs		$221.00 ✓

17.2	03.02.04	Fee on Notice of Motion	$221.00 ✓
17.3	04.09.03	Law Library photocopying 2nd reading speech	$46.20 ✓
		Subtotal	**$488.20**
		TOTAL	**$72,507.40**

Less Taxed Off	$13016.55 $
Sub Total	$59490.85 $
Add Taxing Fee	$1487.27 $
TOTAL	60,978.12 $

I HEREBY CERTIFY that I have this day taxed the above Bill of Costs and allowed same in the sum of $ 60,978.12 .

P Jolman

Taxing Officer

14-9-04 .

[2003] WASCA 293 (S)

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
TITLE OF COURT	:	THE FULL COURT (WA)
CITATION	:	RE CITY OF JOONDALUP; EX PARTE MULLALOO PROGRESS ASSOCIATION INC [2003] WASCA 293 (S)
CORAM	:	PULLIN J
HEARD	:	15 OCTOBER, 14 NOVEMBER 2003 & 9 & 25 MARCH 2004
DELIVERED	:	28 NOVEMBER 2003
SUPPLEMENTARY DECISION	:	25 MARCH 2004
FILE NO/S	:	CIV 1285 of 2003

EX PARTE

MULLALOO PROGRESS ASSOCIATION INC
Applicant

AND

THE CITY OF JOONDALUP
First Respondent

RENNET PTY LTD
Second Respondent

Catchwords:

Practice and procedure - Special costs order - Extension of time

Legislation:

Nil

Result:

Application granted

Category: B

Representation:

Counsel:

Applicant	:	In person
First Respondent	:	Ms M L Coulson
Second Respondent	:	No appearance

Solicitors:

Applicant	:	In person
First Respondent	:	Watts & Woodhouse
Second Respondent	:	Hardy Bowen

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

Anfrank Nominees Pty Ltd v Connell (1991) 6 WAR 271
Collins v Westralian Sands Ltd (1993) 9 WAR 56
Geneva Finance Ltd v Resource & Industry Ltd [2002] WASC 121
Geraldton Building Co Pty Ltd v Christmas Island Resort Pty Ltd (1994) 13 WAR 242
Snowtop Mushrooms v Powley, unreported, FCt SCt of WA; Library No 4501; 14 May 1982

Case(s) also cited:

Briggs v Glentham Pty Ltd, unreported; FCt SCt of WA; Library No 930223; 21 April 1993
McConnell v Nationwide News Pty Ltd, unreported; SCt of WA (Owen J); Library No 920670; 10 December 1992
Schmidt v Gilmour [1988] WAR 219
Tenbohmer v Eden (1992) 6 WAR 366

1 **PULLIN J**: This is an application by the first respondent, seeking a special costs order pursuant to O 66 r 12. The parties agreed that I should decide this application. The application is one which the rules say should be brought within 30 days after judgment has been handed down. This appears from O 66 r 51(2), which reads:

> "Where under these Rules a party is required to obtain some special certificate for costs, there shall be deemed to be reserved to such party liberty to apply within 30 days."

2 The Court has the power to extend time pursuant to O 3 r 5, even though the application for extension is not made until after the expiration of time for taking some step under the rules.

3 ***Geneva Finance Ltd v Resource & Industry Ltd*** [2002] WASC 121 and ***Snowtop Mushrooms v Powley***, unreported, FCt SCt of WA; Library No 4501; 14 May 1982 are two authorities relating to applications of this kind. Both reveal that extensions of time may be granted in the present circumstances. Each case, of course, must turn on its own facts. Here it is clear that the failure to ask for a special costs order was as a result of the oversight on the part of the first respondent's solicitor. The failure to apply for the costs order sought in the ***Snowtop Mushroom's*** case was for that same reason, and an extension was granted.

4 *Prime facie*, the time limits laid down in the rules must be complied with. If an extension is to granted, then the discretion of the court will be exercised after taking into account a number of factors. The merits of the application is a relevant factor, the extent of the delay is relevant, and so is prejudice which might be said to be suffered if an extension be granted.

5 In relation to the extent of the delay, it is not great, given that the delay occurred over the Court vacation period. This application was made on 3 February 2004. The judgment was handed down on 28 November 2003, so the time for bringing the application in accordance with O 66 r 51 would have expired towards the end of December 2003. Taking into account the Court vacation period, the delay is not so great as to disqualify the first respondent's application.

6 There has not been any material put before me that indicates that there is any prejudice to the applicant, other than the applicant's concern about the possibility of a special costs order being made.

7 At this point, I should turn to deal with the merits of the application for a special costs order because that is relevant in deciding whether or not to grant an extension of time.

8 The court may order that the scale limits be removed: see ***Geraldton Building Co Pty Ltd v Christmas Island Resort Pty Ltd*** (1994) 13 WAR 242. Factors which have to be taken into account when deciding whether or not to make such an order were set out in ***Collins v Westralian Sands Ltd*** (1993) 9 WAR 56 at 67. Factors which are relevant are whether additional work has been done, whether work was necessarily or reasonably done, whether the fees proposed were reasonable, and whether an inadequacy exists in the scale. It is also relevant to take into account the principle that a successful party should recover costs reasonably and properly incurred.

9 The evidence here reveals that a substantial amount of work was done and it exceeded what would normally be done in the conduct of litigation of this kind. The amount of time that would normally be spent is revealed by the scale of costs in the determination which applies in this case. It is clear from the evidence that the work done has well and truly exceeded the amount that would be done in an ordinary case. The other grounds put forward for a special costs order are the usual complexity of the case and the importance of the case. The mere fact that a substantial amount of work is done, is a good or sufficient reason to make the order.

10 The case was complex and, speaking as member of the court involved in mastering the issues in the case, I can agree that it was a case which had complexity beyond the ordinary case that might come before the court on prerogative writ proceedings. The case did attract a deal of public interest, although I accept the applicant's submissions that the extent of the publicity was not as great as the first respondent suggests in the affidavits. Taking into account what the applicant has put forward, it is clear enough that there were a considerable number of newspaper articles, probably 20-odd articles, concerning the development. This is evidence of the extent of public interest.

11 It is submitted by the applicant that the solicitors involved in this case had a considerable knowledge about the proceedings because of their involvement in other matters concerning the development. The applicant submits that they were involved in relation to proceedings in the Liquor Licensing Court, proceedings before the Minister, and in other related matters, which meant (so the applicant submits) that the solicitors became familiar with the history of the development. While that may be true, they

are points which would be considered on taxation of costs, and it would be a matter for the taxing officer to decide whether or not costs were unreasonably incurred or were unreasonable in amount.

12 A point is also raised by the applicant that the solicitors have a costs agreement with the first respondent. In my view, it is not relevant to this application, but it may be relevant in relation to taxation because in ***Anfrank Nominees Pty Ltd v Connell*** (1991) 6 WAR 271 at 284, the Chief Justice said this:

> "It is always possible that a party may have entered into a costs agreement with his solicitor which would provide for a lesser fee than that which would be allowed on taxation. If such an agreement was in existence, I consider that the solicitor for the party would be bound to disclose it in the taxation in the event that the amount of the bill as taxed exceeded the amount agreed. Failure to do so would amount to unprofessional conduct."

13 So the fact that the applicant raises the existence of a costs agreement between the first respondent and the solicitors acting for them in this case, is not a matter which would bear on whether or not I make the special costs order. It is a matter which may be relevant in relation to taxation; that would be a matter for the solicitors to consider.

14 So as a result of taking into account all of the submissions made by both parties, I am satisfied that a special costs order should be made. Because I consider that the merits warrant such a costs order being made, that is a relevant consideration also in relation to the exercise of the discretion to extend time. Taking into account the other factors that I mentioned and the fact that the application has merit, I would extend the time for the making of the application and make the orders which have been sought by the first respondent.

[2003] WASCA 293

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	:	THE FULL COURT (WA)
CITATION	:	RE CITY OF JOONDALUP; EX PARTE MULLALOO PROGRESS ASSOCIATION INC [2003] WASCA 293
CORAM	:	PARKER J MILLER J PULLIN J
HEARD	:	15 OCTOBER & 14 NOVEMBER 2003
DELIVERED	:	28 NOVEMBER 2003
FILE NO/S	:	CIV 1285 of 2003
MATTER	:	Application for a Writ of *Certiorari* against the City of Joondalup EX PARTE MULLALOO PROGRESS ASSOCIATION INC Applicant AND THE CITY OF JOONDALUP First Respondent RENNET PTY LTD Second Respondent

Catchwords:

Town planning - Whether discretion to grant planning approval despite non-compliance with standards and requirements of Scheme - Net lettable area -

Density requirements in the R Codes - Alleged failure to take into account relevant consideration

Words and phrases - "Development"

Administrative law - Court required to consider whether jurisdictional facts exist

Legislation:

Interpretation Act 1984, s 19
Town Planning and Development Act 1928, s 2

Result:

Order *nisi* discharged

Category: B

Representation:

Counsel:

Applicant	:	Mr M S Macdonald
First Respondent	:	Mr R L Le Miere QC & Mr J M T Woodhouse
Second Respondent	:	Mr L A Stein & Mr M J Hardy

Solicitors:

Applicant	:	Macdonald Rudder
First Respondent	:	Watts & Woodhouse
Second Respondent	:	Hardy Bowen

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

Arnedo Pty Ltd v Monaco [1994] ANZ Conv R 372
Attorney-General for the Northern Territory v Minister for Aboriginal Affairs (1986) 67 ALR 282
Chambers v Maclean Shire Council (2003) 126 LGERA 7
City of Enfield v Development Assessment Commission (2000) 199 CLR 135
Ex parte Mullen; Re Hood (1935) 35 SR (NSW) 289

Highway Hotel Pty Ltd v City of Bunbury [2001] WASCA 385
Hunter Valley Developments Pty Ltd v Cohen (1984) 3 FCR 344
Londish v Knox Grammar School (1997) 97 LGERA 1
McLean Bros & Rigg Ltd v Grice (1906) 4 CLR 835
R v Federal Court of Australia; Ex parte WA National Football League (1979) 143 CLR 190
Re City of Perth; Ex parte Lord [2002] WASCA 254
Re Monger; ex parte WMC Resources Ltd [2002] WASCA 129
Re Smith; Ex parte Rundle (1991) 5 WAR 295
Saraswati v The Queen (1991) 172 CLR 1
Settlers Holdings Pty Ltd v Coles Myer Property Developments Pty Ltd (2000) 109 LGERA 203
Shire of Perth v O'Keefe (1964) 110 CLR 529
Starwest Management Pty Ltd v The Director of Liquor Licensing [2003] WASCA 271
Timbarra Protection Coalition Inc v Ross Mining NL (1999) 46 NSWLR 55
University of Western Australia v City of Subiaco (1980) 52 LGRA 360
Western Stores Ltd v Orange City Council [1971] 2 NSWLR 36

Case(s) also cited:

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
Australian Conservation Foundation Inc v Forestry Commission of Tasmania (1988) 19 FCR 127
Australian Heritage Commission v Mount Isa Mines Ltd (1997) 187 CLR 297
Bienke v Minister for Primary Industries & Energy (1996) 63 FCR 567
Bridgetown Greenbushes/Friends of the Forest v Department of Conservation & Land Management (1997) 18 WAR 102
Craig v State of South Australia (1995) 184 CLR 163
Denhope Constructions Pty Ltd v Parramatta City Council (1997) 42 NSWLR 104
Ex parte City of Canning (1998) 101 LGERA 284
Ex parte Helena Valley/Boya Association Inc; State Planning Commission and Beggs (1989) 2 WAR 422
Gavranich v Shire of Wanneroo, unreported; SCt of WA; Library No 980473; 25 August 1998
HIH Casualty & General Insurance Ltd v Maclaw No 651 Pty Ltd [1999] VSCA 217
Inland Revenue Commissioners v National Federation of Self-Employed & Small Businesses Ltd [1982] AC 617

Low v Swan Cove Holdings Pty Ltd [2003] WASCA 115

Maryland Development Co Pty Ltd v Penrith City Council (2001) 115 LGERA 75

Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323

North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd (1990) 21 NSWLR 532

Onus v Alcoa of Australia Ltd (1981) 149 CLR 27

Re City of Bunbury; Ex parte Highway Hotel Pty Ltd [2000] WASC 62

Re Minister for Local Government; Ex parte Buddhist Society of Western Australia [2001] WASCA 380

Re Real Estate and Business Agents Supervisory Board; Ex parte Cohen & Ors, unreported; SCt of WA (Scott J); Library No 980668; 17 November 1998

Re Western Australian Planning Commission; Ex parte Leeuwin Conservation Group Inc [2002] WASCA 150

Sharp v O'Driscoll, unreported; FCt SCt of WA; Library No 970111; 21 March 1997

Shire of Lillydale v Gainey [1930] VLR 73

West Australian Field & Game Association Inc v Pearce (1992) 8 WAR 64

PARKER J
MILLER J
PULLIN J

1 **PARKER J**: For the reasons published by Pullin J, with which I agree, I would discharge the order *nisi*.

2 **MILLER J**: I have had the opportunity of reading in draft the reasons for judgment of Pullin J. I agree with those reasons and agree that the order *nisi* should be discharged.

3 **PULLIN J**: This is a return of an order *nisi* for a writ of *certiorari* seeking to remove into this Court for the purpose of being quashed, a decision of the council of the City of Joondalup made 13 August 2002 granting Rennet Pty Ltd ("Rennet") approval to commence development on land at Lot 100 Oceanside Promenade, Mullaloo ("subject land"). The Mullaloo Progress Association Inc ("Association") objects to the proposed development and is the applicant in these proceedings.

Facts

4 In November 2000, Rennet purchased the Beach Tavern in Mullaloo, which is situated on the subject land and which is within the City of Joondalup ("City"). There is presently a tavern/restaurant on the subject land. The subject land is 2,377 square metres in area. The City of Joondalup District Planning Scheme No 2 ("Scheme") governs development in relation to the subject land. Clause 8.10 of the Scheme provides that no person shall undertake any development unless approval required by the Scheme has been granted.

5 On 20 December 2001, Rennet lodged with the City an application for planning approval to commence development of the subject land. The application described the proposed development as "mixed use development including shops, offices, tavern, residential dwellings and serviced apartments" – in short, development which involved a proposed building which would contain residential and non-residential uses – at an estimated cost of $4 million.

6 On 13 August 2002, the council considered the application. Incorporated into the minutes of the meeting on 13 August 2002 was the planning officer's report and recommendation. The officer's recommendation was that the council should exercise the discretion conferred in relation to cls 4.5 and 4.8 of the Scheme and approve the application, and recommended the imposition of a number of conditions. The executive summary in this report stated that:

> "The proposal is to demolish the existing tavern and to create a new 5 storey development when viewed from Oceanside

Promenade, plus basement. Three levels of carparking are proposed at the rear of the site. This proposal the [*sic*] entails cutting into the site with the nett effect that a total height will be equivalent to the existing 2 storey homes on Oceanside Promenade which are to the north of the development site, and built at the natural ground level.

The proposal consists of the following elements:

- Office, restaurant and retail at street level.
- Tavern on first floor.
- Five (5) multiple dwellings above tavern level.
- Ten (10) residential (short stay apartments) above tavern.

...

- Total of 155 carbays provided made up of 121 on site & 34 on the opposite of road.

...

- The maximum height of the building above Oceanside Promenade is 16.8m. The height of the building above the highest fence at the rear is approximately 6.3m.

..."

7 It is important to this case to understand that the proposal put forward by Rennet was for a row of 10 apartments on the floor above the tavern consisting of five "short stay 2 storey 3 bedroom" apartments and five "short stay 1 storey 1 bedroom" apartments. On the floor above were located five "permanent residential 2 storey 3 bedroom" apartments, which were located above the five "short stay 1 storey 1 bedroom" apartments.

8 The executive summary also recorded the fact that the proposal had been the subject of public advertising and that awareness was very high among nearby landowners and local community groups. It noted that petitions had been received objecting to the development and that a petition in favour of the development had also been submitted to council.

9 The recommendation to council was that the proposal be approved.

10 Council approved the development, except for the five "short stay 1 storey 1 bedroom" apartments. The 13 August 2002 resolution was in the following terms:

> "Council:
>
> 1 EXERCISES discretion in relation to Clauses 4.5 and 4.8 of District Planning Scheme No 2 and determines that:
>
> (a) the variation for the provision of 160 carbays in-lieu-of 210 carbays;
>
> (c)[*sic*] the front setback of nil in lieu of 9 metres; and
>
> (c) a rear setback of nil in lieu of 6 metres;
>
> are appropriate in this instance;
>
> 2 APPROVES the application received on 20 December 2001 and revised plans dated 17 May, 5 June, and 19 July 2002 submitted by Perrine & Birch Architecture and Design on behalf of the owners Rennet Pty Ltd for a Mixed Use development (tavern, shop, residential buildings (serviced apartments), multiple dwellings, bottleshop, restaurant and office) at Lot 100 (10) Oceanside Promenade, Mullaloo, subject to the following conditions:
>
> ...
>
> (j) the submission of an acoustic consultant's report demonstrating to the satisfaction of the City that the proposed development is capable of containing all noise emissions in accordance with the Environmental Protection Act;
>
> (k) submission of a noise management plans [*sic*] addressing noise from patrons in the carpark and noise from music played on the premises;
>
> ...

(s) the height of the building being reduced by the deletion of the uppermost level shown on the application drawings dated 17 May 2002, with 5 short stay apartments being deleted to achieve this modification.

...

The Motion was Put and CARRIED (10/2)"

11 It is again important to note that the effect of condition (s) is that the five "short stay 1 storey 1 bedroom apartments" were deleted. The elimination of these apartments reduced the height of the proposed building. As a result of this deletion, the five apartments above the deleted apartments shift down to the level below, so that the development approved allowed for a single row of 10 apartments above the tavern. The five middle apartments were the "permanent residential 2 storey 3 bedroom apartments". On one side of this group were three "short stay 2 storey 3 bedroom" apartments and on the other side two similar apartments.

12 On 24 September 2002, there was a motion to rescind the resolution of 13 August 2002 and another to affirm the 13 August 2002 resolution. The motion to affirm the 13 August 2002 resolution was put and carried. The motion to rescind the resolution of 13 August 2002 was put and not carried.

13 It is only the resolution of 13 August 2002 which is the subject of review in these proceedings, but the City submits that quashing the 13 August 2002 decision of council would be futile because it was reaffirmed on 24 September 2002. That submission only becomes important if some of the grounds succeed. It would not assist the City if the conclusion were that the council had no jurisdiction.

14 The grounds for review of the 13 August 2002 decision are in broad terms that the council had no jurisdiction to approve the application, or alternatively if it did have jurisdiction then the council had regard to an irrelevant consideration or failed to have regard to relevant considerations and thereby exceeded its jurisdiction.

15 The subject land is in the Commercial Zone which, according to cl 3.7.1 of the Scheme, "is intended to accommodate existing shopping and business centres where it is impractical to provide an Agreed Structure Plan in accordance with Part 9 of the Scheme". There was no Agreed Structure Plan.

Standing

16 At the beginning of the hearing of this appeal, Rennet submitted that the Association had not demonstrated a relevant interest over and above that of the public at large, because it had not provided proof as to the identity and location of the residents who were members of the Association and had not shown the manner in which the proposal affected them. It is now agreed that there are members of the Association who live in the vicinity and would be affected by the project. The members of the Association therefore have a relevant interest over and above the public at large, and as a result Rennet no longer contends that the Association lacks standing. I find that the Association does have standing to bring these proceedings

Delay

17 Further, Rennet submits that there has been a delay in seeking relief. Order 56 r 11(1), which fixes six months as the time in which proceedings for *certiorari* are to be commenced, does not apply to proceedings relating to a decision which is not by an inferior court, tribunal, Magistrate, or Justice: ***Re Monger; ex parte WMC Resources Ltd*** [2002] WASCA 129 at [74], [91]. However, the grant of prerogative relief is always discretionary, and delay is relevant in that regard. The application for the order *nisi* in this case was filed on 17 March 2003. The decision under review was made on 13 August 2002, a little more than seven months before the order *nisi* was granted.

18 It is relevant that the motion to rescind was not dealt with until September and formal advice of the decision was not given to the Association until 25 September 2002. After the decision, the Association made representations to the Minister for Planning and Infrastructure under s 18(2) of the *Town Planning and Development Act*. While this was going on, in about October 2002, the Association sought advice from solicitors, who did not advise the Association about the right to seek *certiorari*. The Association then instructed other solicitors to draft material for the Minister. The Association first instructed its current solicitors on 22 February 2003, and it was only then that the present proceedings were commenced. Rennet submits that the delay, coupled with prejudice that it will suffer, is a ground for dismissing the application.

19 There is no doubt that Rennet is suffering financially while the project is delayed, and this constitutes prejudice, which is a factor in the exercise of the court's discretion. The further question is whether there

is unacceptable delay in the bringing of these proceedings. As Rennet states, the history of the matter goes back well before the meeting of 13 August 2002 because of the high public interest in this proposed development. Rennet submits that the applicant was armed with sufficient information to commence these proceedings much earlier than 17 March 2003. Indeed, Rennet submits that the Association was armed with information before the August 2002 meeting, which allowed the Association to consider whether it should challenge the decision.

20 I do not accept that submission. The proposal put up for approval by Rennet was not the proposal approved by council. The deletion of five units by condition (s) was a significant change. The Association did not learn of this until 25 September 2002. The time which must be closely scrutinised is the period between 25 September 2002 and the commencement of these proceedings. After 25 September 2002, the Association made its submissions to the Minister under s 18 of the *Town Planning and Development Act*, asking the Minister to direct a rehearing. It was therefore clear that soon after the Association was told of the decision of council, it took steps to challenge it. It is true that these proceedings could have been commenced earlier, but those proceedings would almost certainly have been met by an argument that the proceedings in this Court should not proceed until the application to the Minister had been dealt with. That aspect, and the fact that the Association was not aware until February 2003 that it could bring these proceedings, leads me to the view that there was no unexplained or unacceptable delay which would warrant the exercise of discretion to dismiss the proceedings. In reaching this decision, I have been guided by the decision of Wilcox J in ***Hunter Valley Developments Pty Ltd v Cohen*** (1984) 3 FCR 344 and of this Court in ***Highway Hotel Pty Ltd v City of Bunbury*** [2001] WASCA 385.

21 I now turn to the grounds of the application.

Ground 1 – No Discretion under cl 4.5.1

22 Ground 1 of the motion reads:

"**No discretion to depart form the DPS**

1. The approval was ultra vires the City of Joondalup because:

   (a) The development does not comply with all of the standards and requirements of the City of

Joondalup's District Planning Scheme No 2 (DPS);

(b) Council has no discretion to approve an application that does not so comply if the development is one in respect of which the Residential Planning Codes apply;

(b) the Residential Planning Codes apply to the development."

23 The Association alleges that the proposed development did not comply with the Scheme because the proposed development does not comply with the requirements and standards in cl 4.7 (setback requirements), cl 4.8 (car parking requirements), and cl 4.12 (landscaping requirements).

24 There is no issue that the proposed development did not comply with cl 4.7 and cl 4.12. The City denies that cl 4.8 applies to this development. (I should add that Rennet supported the City in all the submissions it made on all of the grounds.) It is sufficient for the Association's argument in relation to this ground that cl 4.7 and cl 4.12 have not been complied with.

25 The council did not have any jurisdiction to grant planning approval to a proposed development which did not comply with the Scheme, unless there was express provision conferring such jurisdiction on the council. The City submits that there was a provision conferring jurisdiction on council to grant approval, notwithstanding non-compliance with cl 4.7, cl 4.8 and cl 4.12. That provision is cl 4.5.1. Clause 4.5.1 reads:

"4.5 **VARIATIONS TO SITE AND DEVELOPMENT STANDARDS AND REQUIREMENTS**

4.5.1 Except for development in respect of which the Residential Planning Codes apply and the requirements set out in Clauses 3.7.3 and 3.11.5, if a development is the subject of an application for planning approval and does not comply with a standard or requirement prescribed under the Scheme, the Council may, notwithstanding that non-compliance, approve the application unconditionally or subject to such conditions as the Council thinks fit."

26 The Association submits that in relation to this development (meaning this building project), the Residential Planning Codes ("R Codes") do apply and, therefore, cl 4.5.1 did not authorise the council to exercise any discretion to grant planning approval in the face of the non-compliance with cl 4.7 and cl 4.12. The Association submits that the opening words of cl 4.5.1 operate on the facts in this case to deny the council any power to grant planning approval.

27 The Association's written submissions read:

> "The (R) Codes apply to the development because:
>
> (a) the land is zoned R20;
>
> (b) a significant portion of the development is for residential accommodation. At present two levels are residential. If the second respondent is successful in its appeal to the Town Planning Appeal Tribunal, 3 levels will be residential;
>
> (c) Clause 4.3 expressly provides that the (R) Codes apply when residential development is mixed with non residential development."

28 There is no dispute that the land is zoned R20, and there is no dispute that the proposal is for the development of the land for both residential purposes and non-residential purposes.

29 The City submits that the Association misunderstands the meaning of the word "development" where it is first used in cl 4.5.1. The City submits that the third word in cl 4.5.1, "development", is not a reference to the project or to the "entire development" (an expression used by counsel for the Association during oral submissions), but to the processes or the activities which were to take place on the subject land and which were controlled by the R Codes, and that once that is understood, the council did have a discretion to exercise in relation to the activities not controlled by the R Codes.

30 The difference between the parties therefore boils down to the meaning of the word "development" where it appears for the first time in cl 4.5.1.

31 The word "development" may have different meanings. In its ordinary meaning it may mean (1) "the act, process or result of developing" or it may mean (2) "a building project, usu. large, as an

office block, housing estate, shopping complex, etc". See Macquarie Dictionary. In my opinion, the word does not have both of its ordinary meanings in the Scheme unless the context otherwise makes this clear. "Development" is defined in Sch 1 of the Scheme as follows:

> "Development: shall have the same meaning given to it in and for the purposes of the Act ..."

32 The "Act" is the *Town Planning and Development Act 1928*, s 2 of which defines "development" to mean:

> "The development or use of any land, including any demolition, erection, construction, alteration of or addition to any building or structure on the land and the carrying out on the land of any excavation or other works ..."

33 In ***University of Western Australia v City of Subiaco*** (1980) 52 LGRA 360, Burt CJ said at 363-364:

> "In my opinion the definition of 'development' in the *Town Planning and Development Act* makes use of and it encompasses two ideas. The first is the 'use' of the land which 'comprises activities which are done in ... or on the land but do not interfere with the actual physical characteristics of the land' and the second being 'activities which result in some physical alteration to the land which has some physical degree of permanence to the land itself'."

34 In my opinion, the word "development", where it is used for the first time in cl 4.5.1, does not bear the popular meaning of "the entire development" or the building project, as the Association, in effect, contends. The word refers to those activities to be carried out on site and which will be subject to the R Codes. The R Codes will apply to part of the activities. These activities will be those which result in physical alteration to the land to create the residential component of the project. The provisions of cl 3.4 and cl 4.3.1 of the Scheme make it clear that the R Codes apply to residential development, and in particular residential development mixed with non-residential development. The R Codes in cl 1.1.1 apply to "single houses, grouped and multiple dwellings". In my opinion, as will appear later in these reasons, part of the residential development approved by council falls within that description. The R Codes do not, however, apply to the non-residential development.

35 In my opinion, the result is that the opening 11 words of cl 4.5.1 do not, in the circumstances of this case, exclude the council's discretion contained in cl 4.5.1.

36 For those reasons, I would dismiss the first ground.

Ground 3 – Retail Net Lettable Area

37 It is logical that I deal with this ground before ground 2, because this ground also involves a submission that the council had no discretion at all under cl 4.5.1, whereas ground 2 assumes that council did have such a discretion.

38 Ground 3 reads:

> **"Retail net lettable area**
>
> 3. Further or alternatively the approval was ultra vires the City of Joondalup because:
>
> (a) clause 3.7.3 of the DPS in effect prohibits any development of the land with a retail net lettable area in excess of 500 m^2 unless there is an Agreed Structure Plan for the land;
>
> (b) the retail net lettable area of the development exceeds 500 m^2 and there is no Agreed Structure Plan for the land; alternatively
>
> (c) by virtue of the stipulation in clause 3.7.3 of the DPS, Council had to make a determination of the retail net lettable area of the development before it could approve it."

39 The Association argues that council could not grant approval under cl 4.5.1 because of the opening words "Except for … the requirements set out in cl 3.7.3". The drafting of this clause is unsatisfactory, but it seems not to be in dispute that cl 4.5 should be read as meaning that if the requirements of cl 3.7.3 are not complied with, then council does not have any discretion to exercise under cl 4.5.1.

40 Clause 3.7 is designed to impose restrictions on "retail net lettable area" ("NLA") in relation to development in the Commercial Zone. Clause 3.7.3 refers to cl 3.7.2, and so I will set out both of those clauses.

"3.7.2 All land contained in the Commercial Zone shall specify a maximum retail net lettable area (NLA) which relates to retail floor area. The maximum NLA shall be included in Schedule 3 of this Scheme and shall bind the development of the land to no more than that area specified

3.7.3 Notwithstanding the provisions of clause 3.7.2, the floorspace figures contained within Schedule 3 shall be adhered to except as otherwise varied by an Agreed Structure Plan for the centre locality as adopted by the Council and the Western Australian Planning Commission."

41 The drafting of cl 3.7.2 is also unsatisfactory, but the parties argued the case on the basis that the clause means that in relation to proposed development within the Commercial Zone, approval may not be granted if the proposed NLA exceeds that specified in Sch 3. Schedule 3, which is referred to in those clauses, refers expressly to the subject land and states that the maximum NLA for that land is 500 square metres. So much is not in dispute.

42 The Association submits that the NLA does exceed 500 square metres, and the City submits that the NLA is less than 500 square metres.

43 Before turning to consider the factual issue, I must deal with the City's submission that it was for council to determine, as a question of fact, what the NLA was, and that the decision involved subjective views as to matters of fact and degree, and that based on the decision in ***Londish v Knox Grammar School*** (1997) 97 LGERA 1, it was open to council to conclude that the tavern floorspace (which is said by the applicant to make up part of the NLA) was not retail floorspace. In effect, it was argued that the court could not review the decision other than on the usual grounds of unreasonableness, failure to take into account a relevant consideration, taking into account an irrelevant consideration, or error of law. The Association, on the other hand, submits that the ***Londish*** decision does not apply. I agree with the Association's submissions for the following reasons.

44 In ***Ex parte Mullen; Re Hood*** (1935) 35 SR (NSW) 289 at 298, it was said:

> "When the jurisdiction of a court is limited, the question whether a particular matter is one the actual existence of which, notwithstanding any decision of that court, is a condition of its having jurisdiction to proceed to determine the matters which lie within its general jurisdiction, or is merely one of the matters which arise for its decision in the exercise of its general jurisdiction, is frequently one of considerable difficulty. It commonly arises in relation to a statute conferring jurisdiction in which the legislature has made no express pronouncement on the subject, and in which its intention has therefore to be extracted from implications to be found in or inferences to be drawn from the language which it has used."

45 In ***Timbarra Protection Coalition Inc v Ross Mining NL*** (1999) 46 NSWLR 55 at [44], Spigelman CJ said:

> "The authorities suggest that an important, and usually determinative, indication of parliamentary intention, is whether the relevant factual reference occurs in the statutory formulation of a power to be exercised by the primary decision-maker or, in some other way, necessarily arises in the course of the consideration by that decision-maker of the exercise of such a power. Such a factual reference is unlikely to be a jurisdictional fact. The conclusion is likely to be different if the factual reference is preliminary or ancillary to the exercise of a statutory power."

46 In my opinion, it is clear that the factual reference in the introductory words of cl 4.5.1, raises a jurisdictional fact. In other words, the requirement in cl 3.7.3 that NLA must not exceed 500 square metres is a fact governing jurisdiction. As Ipp J said in ***Chambers v Maclean Shire Council*** (2003) 126 LGERA 7 at [48], the question about the existence of such a fact must be answered objectively and not by reference to the subjective opinion of the council about whether the fact exists. This is because if NLA exceeds 500 square metres, then the requirements of cl 3.7.3 have not been complied with, and therefore the council had no discretion conferred on it under cl 4.5.1. The criterion was not that council decide whether, in its opinion, NLA was more or less than 500 NLA. (The City, in its submission that the issue about the NLA was for council to decide, referred to ***Shire of Perth v O'Keefe*** (1964) 110 CLR 529. In my opinion, that decision does not support the City's submission. The case was not concerned with the issue about whether or not a jurisdictional fact existed.) The criterion is that NLA,

in fact, not exceed 500 square meres. This means that the Court may examine the evidence adverted to and decide whether the council reached the correct decision. The Court is not restricted to a review of the council's procedure in making its decision on the point. I should add that legislation may sometimes entrust a tribunal with the power to determine whether a jurisdictional fact exists (***R v Federal Court of Australia; Ex parte WA National Football League*** (1979) 143 CLR 190 at 214 and ***Starwest Management Pty Ltd v The Director of Liquor Licensing*** [2003] WASCA 271 at [19]); but that is not so in this case.

47 In ***City of Enfield v Development Assessment Commission*** (2000) 199 CLR 135, Gaudron J said at [60]:

> "Where, as here, the legality of an executive or administrative decision or of action taken pursuant to a decision of that kind depends on the existence of a particular fact or factual situation, it is the function of a court, when its jurisdiction is invoked, to determine, for itself, whether the factual or the factual situation does or does not exist."

48 In some cases, the evidence may be susceptible of different findings of fact, and in such cases, as Gaudron J stated at [60]:

> "... a court may, but need not, decline to make a different finding from that made by the primary decision-maker, particularly if the latter possesses expertise in the area concerned. Even so, in that situation, the question is not so much one of 'judicial deference' as whether different weight should be given to the evidence from that given by the primary decision-maker."

49 In this case, the evidence and the findings to be made from it are not of a kind where the council had any special expertise. This Court is in as good a position as the council to consider the issue about NLA.

50 I turn then to the evidence. The following figures were not in dispute:

Tavern	560 square metres
Other Retail	495 square metres
Store Room	47 square metres
Total	1,102 square metres

51 There is no dispute between the parties that the 495 square metres of "Other Retail" is NLA. The debate is about whether the tavern and the Store Room contain NLA. If they do not, then the NLA is 495 square metres and the requirements of cl 3.7.3 have been complied with, and the council therefore did have jurisdiction to approve the development under cl 4.5.1. The applicant therefore seeks to show that either the tavern or the Store Room are to be included in the NLA, in which case council had no discretion to grant approval.

52 I deal first with the dispute about the tavern. The word "retail" which is used in cl 3.7.2 is not defined in the Scheme. The question then is whether that word should be given its ordinary meaning, namely "pertaining to, connected with, or engaged in sale at retail" or "the sale of commodities to household or ultimate consumers, usu. in small quantities (opposed to *wholesale*) ...". Macquarie Dictionary. That meaning would then suggest that "retail net lettable area" in cl 3.7.2 means an area in which retail activities take place. "Retail floor area" would then mean floor area in which retail activities take place.

53 The Association points to cl 1.9 of the Scheme, which reads:

> "1.9.1 Words and expressions used in the Scheme shall have the respective meanings given to them in Schedule 1 or elsewhere in the Scheme and the Residential Planning Codes.
>
> ...
>
> 1.9.3 Words and expressions used in the Scheme but not defined in Schedule 1, elsewhere in the Scheme or in the Residential Planning Codes shall have their normal and common meanings."

54 The word "retail" does, in my opinion, bear its ordinary meaning, but that does not decide whether the tavern floor area is to be included in the measurement of NLA. The Association refers to the decision of ***Arnedo Pty Ltd v Monaco*** [1994] ANZ Conv R 372, where there was obiter to the effect that a tavern was used wholly or predominantly for the sale of liquor and food and for that reason should be regarded as a retail shop under the *Commercial Tenancy (Retail) Shops Agreements Act 1985*. In my view, that decision does not decide the question here, which requires a consideration of the Scheme and purpose behind it.

55 There is no doubt that liquor is sold within a tavern. However, the sale of liquor is only a part of services provided in a tavern. Does the

fact that liquor is sold in a tavern mean that tavern floor area is to be measured as NLA?

56 If a tavern is to be regarded as a place where retail activities take place, then that would suggest that a tavern would not need to be separately defined in the Scheme, because there is a definition of "shop", which reads "premises where goods are kept exposed or offered for sale by retail ...". However, a "tavern" is separately defined to mean:

> "Any land or buildings wherein the primary use is the consumption of beverages and may include a restaurant or facilities for entertainment and to which a licence may have been granted under the provisions of the Liquor Licensing Act 1988".

It will be noted that this defines "tavern" beyond its ordinary meaning to include not only taverns but also restaurants and other facilities where alcohol is to be served. Furthermore, the definition concentrates not at all on retailing but on the "primary" activity of consumption of alcohol. In the case of either a tavern or a restaurant, a licence can be obtained under the *Liquor Licensing Act 1988*. In the case of a tavern licence, this is a hotel licence requiring a person to sell liquor on premises for consumption of liquor on the premises. In the case of a restaurant licence, liquor is served only ancillary to a meal. The sale of liquor, either at a hotel or in a restaurant, is the subject of strict control under the *Liquor Licensing Act 1988*. Conditions may be imposed specifying how many premises may exist for the purpose of the sale of liquor under such licences, and more importantly the legislation controls the size and layout of the premises.

57 In view of these matters, should the floorspace in a tavern be regarded for the purposes of the Scheme as retail net lettable area? Is the floor area of "shop" only to be measured, or should the floor area of shops and taverns be measured?

58 Section 7(3) of the *Town Planning and Development Act 1928* provides that the Scheme, when published in the Government Gazette, "shall have full force and effect as if it were enacted" by that *Act*. Section 18 of the *Interpretation Act* requires this Court to adopt a construction that would promote the purpose or object underlying an *Act* in preference to a construction that would not promote that purpose or object.

59 Section 19 of the *Interpretation Act 1984*, which provides for the use of extrinsic material, makes it plain that "the ordinary meaning conveyed by the text of the provision" is the meaning conveyed by that provision after "taking into account its context in the (Act) and the purpose or object underlying the (Act) ..." As a result, it is always necessary, in determining the ordinary meaning of a provision, to have regard to the purpose of the legislation and the context of the provision as well as the literal meaning of the provision. Sometimes the purpose of the legislation is expressly stated; sometimes it can only be discerned by reference to the history of the legislation and the state of the law when it was enacted. A particular Act may have many purposes: ***Saraswati v The Queen*** (1991) 172 CLR 1 at page 21.

60 Determining the purpose of the Scheme is assisted by the existence of the statutory report prepared at the time of drafting the Scheme. The Scheme Report has the purpose of explaining the provisions set out in the Scheme. See the Town Planning Regulations, reg 12(1). In the Scheme Report, reference was made to the previous Town Planning Scheme and the fact that one of its provisions related to a requirement that developers negotiate with council, the maximum "gross leasable area" to be used for retail purposes in proposed shopping centres. The report noted the difficulties of administration associated with that provision. The report then read:

> "There is inconsistency with the Metropolitan Centres Policy, which refers to retail net lettable areas (NLA) rather than GLA [gross leasable area]. To ensure consistency with this document and at the instruction of the Western Australian Planning Commission, retail net lettable areas have been adopted in Scheme 2."

61 The reference to the "Metropolitan Centres Policy" was a reference to the Metropolitan Centres Policy 1991. This policy refers to "shopping floorspace standards" in determining the amount and distribution of "retail floorspace". The policy provides that taverns were to be excluded from shopping floorspace and are not covered by the standards. This appears in the following statement:

> "It is the intent of this policy statement to move away from rigid floorspace standards in determining the amount and distribution of retail floor space. The use of standards has a number of shortcomings. ... Nevertheless floorspace standards are useful in providing a general guide for the preparation of local commercial strategies and assessing

> development proposals. ... Only shopping floorspace (as defined in Category 5 of the PLUC codes but excluding hotels, taverns, and nightclubs) is covered by these standards. ..."

62 Elsewhere in the policy "net lettable area" was defined in a way which corresponds with the definition of NLA where it appears in the Scheme. The Association submitted that the Metropolitan Centres Policy 1991 should not be considered because it was not a statutory policy published under s 5AA of the *Town Planning and Development Act 1928*. In my opinion, that does not matter. What matters is that the policy has been referred to in the Scheme Report. The policy makes it plain that the purpose of the Scheme when it set limits on NLA, is setting those limits by reference to floor area which is for "shopping floorspace", excluding taverns. Clause 3.7.2 should be read with that purpose in mind.

63 The definition of "net lettable area" within the Scheme identifies the parts of a building which have to be measured to arrive at an area. The policy and the separate definitions of "shop" and "tavern" lead me to the conclusion that the expression "retail net lettable area (NLA) which relates to retail floor area" in cl 3.7.2 should not be read to include tavern floor area. In my opinion, therefore, tavern floor area should be excluded from the NLA calculations.

64 However, having reached that decision, it still does not finally decide the issue about total NLA, because the rest of the areas which are said by the Association to constitute NLA add up to 542 square metres. Included in the 542 square metres is the 47 square metres for the Store Room.

65 The evidence in relation to this 47 square metres is as follows. The Store Room was identified in the January 2002 development application documents as a "restaurant store". Amendments were then made to the application in July 2002, and it was this amended application which was before council on 13 August 2002. This showed the Store Room, but it was shown to be a "Store" which opened into the foyer area. Under the definition of "net lettable area", this was not NLA because it was excluded by par (d) of the definition of NLA in the Scheme, which reads:

> "Areas set aside for the provision of facilities or services to the floor or building where such facilities are not for the exclusive use of occupiers of the floor or building."

66 Counsel for the Association then referred to plans submitted to the liquor licensing authorities, which showed that the Store Room had been reincorporated into the bottle shop as part of the bottle shop and therefore measurable as NLA. In my view, the liquor licensing plans are of no relevance because they were not before council. If it is suggested that Rennet is proposing to engage in some subterfuge, this would not avail it. Rennet has gained planning approval for a project with the Store Room shown as part of, and associated with, the foyer and not incorporated into the bottle shop. If, when the project is completed, the Store Room is found to be incorporated into the bottle shop, then the second respondent will have built contrary to the planning approval granted to it. It could then be prosecuted and other action could be taken against it under the *Town Planning and Development Act 1928* and the *Metropolitan Region Town Planning Scheme Act 1959.*

67 In my opinion, the 47 square metre Store Room was not part of NLA.

68 The result is that in the application put before council, the NLA was 495 square metres.

69 As a result, the council was not prevented by the introductory words in cl 4.5.1 from exercising the discretion conferred by cl 4.5.1 to approve the development. The decision to grant planning approval was not *ultra vires* as contended by the applicant, and this ground must be dismissed.

Ground 2 – Determination that Council was Satisfied

70 This ground reads:

> "Jurisdictional condition – determination that Council was satisfied
>
> 2. In the alternative to ground 1 above the approval was ultra vires the City of Joondalup because:
>
> (a) The discretion conferred upon Council by clause 4.5.1 of the DPS can only be exercised after Council is satisfied of the things specified in clause 4.5.3 of the DPS;
>
> (b) Council did not determine that it was so satisfied alternatively there is nothing to

establish that it was so satisfied alternatively Council could not have been so satisfied because:

(i) it had no regard to its Centres strategy policy and the other matters set out in clause 5 below;

(ii) non compliance with the DPS will have an adverse effect upon the inhabitants of the locality further or alternatively upon the likely future development the locality."

71 This ground proceeds on the assumption that there is no prohibition in the opening words to cl 4.5.1, to prevent the council from exercising the discretion found within that clause.

72 The Association begins its submission by referring to that part of cl 4.5.3 which states that:

"The power conferred by this clause may only be exercised if the Council is *satisfied* that:

(a) approval of the proposed development would be appropriate having regard to the criteria set out in Clause 6.8; and

(b) the non-compliance will not have any adverse effect upon the occupiers or users of the development or the inhabitants of the locality or upon the likely future development of the locality."

(I have added italics to emphasise where the issue arises).

73 The Association submits that council was obliged to express its satisfaction by a resolution, and submits that support for this submission is to be found in ***Settlers Holdings Pty Ltd v Coles Myer Property Developments Pty Ltd*** (2000) 109 LGERA 203; ***Re Smith; Ex parte Rundle*** (1991) 5 WAR 295 at 310; and ***City of Enfield v Development Assessment Commission*** (*supra*) at [34] and [35]. In my opinion, none of those cases provide support for the applicant's submission.

74 In the ***Settlers Holdings'*** case, Pidgeon J merely said that the council could not exercise the power it had under the clause in question unless it was satisfied of the matters referred to in that clause. His

Honour was there considering the decision of the Town Planning Appeal Tribunal, which had given reasons for its decision. In this case, the council did not give reasons for its decision, and it was not required to do so. In ***Re Smith; Ex parte Rundle*** (*supra*), the question was whether the opinion of the Metropolitan Planning Council rather than the State Planning Commission was a valid opinion for the purposes of s 33A(1) of the *Metropolitan Region Town Planning Scheme Act 1959* so as to provide a valid basis for approval of the proposed amendment to the planning scheme by the Minister. It was common ground that, as a matter of fact, the State Planning Commission had not formed the opinion that the amendment to the Planning Scheme did not constitute a substantial alteration to the Metropolitan Region Scheme. Finally, the ***City of Enfield*** case was not a case concerned with whether or not an opinion or expression of satisfaction as a prerequisite to the exercise of any power had to be recorded by resolution.

75 The City submits that no resolution recording its satisfaction was necessary and submits that the Association has not led any evidence that the council was not satisfied of the matters specified in cl 4.5.3.

76 The Association, in turn, seeks to prove that council did not satisfy itself about these matters by referring to the resolution of the council granting planning approval. The Association submits that the failure to recite any satisfaction about the matters in cl 4.5.3 provides the evidence.

77 In my opinion, it was not necessary for council to state that it was satisfied of the matters referred to in cl 4.5.3. Where a power is conferred upon terms requiring the prior formation of a particular opinion by the donee of the power, it will be presumed from the exercise of that power, in the absence of evidence to the contrary, that the donee had the required opinion. See ***McLean Bros & Rigg Ltd v Grice*** (1906) 4 CLR 835 at 859-860.

78 ***Western Stores Ltd v Orange City Council*** [1971] 2 NSWLR 36 provides an example of the presumption of regularity applying in similar circumstances to the present one. The case involved an appeal by ratepayers against a decision dismissing their application for declarations that rates were invalid. The exercise of the power to levy the rate required the council to form the opinion whether or not work or service would be of a special benefit to a portion of its area. The rate was made without reciting in the resolution that it was satisfied of the requisite matters. It was held that where the opinion was open to be held, it was presumed, in default of reasons to the contrary, that the

opinion was duly formed and the rate regularly made. See also ***Attorney-General for the Northern Territory v Minister for Aboriginal Affairs*** (1986) 67 ALR 282 for a further example. The respondent argues that the decision in ***Western Stores*** (*supra*) is distinguishable because there is nothing in the case to suggest that there was a provision analogous to s 5.20(1) of the *Local Government Act*, which provides that:

> "A decision of a council does not have effect unless it has been made by a simple majority or, if another kind of majority is required under any provision of this Act or has been prescribed by regulations or a local law for the particular kind of decision, by that kind of majority."

79 In my opinion, that section does not assist the applicant. The only "decision" of the council in this case was the decision to exercise the power to grant planning approval in the exercise of the discretion under cl 4.5. It could not exercise that power unless it was satisfied of the matters in cl 4.5.3, and in the absence of any evidence to the contrary, the presumption must be that the council was so satisfied.

80 I should add that the text of subclause 4.5.3. was set out in written answers to questions from members of the public, and these were put before the council. Further, during the meeting, a question was asked during debate concerning cl 4.5.3. That evidence, and the fact that the resolution itself refers to cl 4.5, supports an inference that consideration was given to the requirements of the clause. The presumption of regularity allows the Court to conclude that the council was satisfied as required by the clause.

81 Ground 2(b)(i) is that council could not have been "satisfied" because it had no regard to its "Centres strategy policy". Clause 6.8.1(d) obliges council to consider its own policies adopted under the Scheme. The planning officer's report did refer to the policy. The report noted that the council had earlier resolved to recommend to the Minister that the Scheme be amended to delete references to the policy. It is trite law that a policy should not be applied blindly without regard to the particular circumstances under consideration. Council was free to depart from the policy if it chose. The report reveals, contrary to the Association's submissions, that the policy was considered.

82 I would dismiss this ground of appeal.

Ground 4 – Density of the Residential Development

83 Ground 4(a) reads:

"Density of the residential development

4. Further or alternatively the approval was ultra vires the City of Joondalup because:

(a) as the land has a density code of R20, and given the provisions of clauses 4.2.4, 4.2.5 and 4.2.6 of the DPS, the only permissible residential development on the land without an Agreed Structure Plan is single house or grouped dwelling. The approval has allowed a multiple dwelling and a residential building."

84 The Association's written outline of argument reads:

"The effect of clause 4.3.1 is that the Council cannot alter the minimum area of lot per dwelling for R20 (450 m^2). The concept *dwelling* in this clause of the Scheme means the type of dwelling specified under the relevant density code. Council cannot approve a residential development on the land that is not contemplated by the R20 density code. VIZ it can only approve single house or a grouped dwelling. Otherwise the clear intent of clause 4.3.1 (ie to control density) could be circumvented."

85 Insofar as the ground asserts that the approval has allowed a "multiple dwelling", I do not agree.

86 "Multiple dwelling" is defined in the Scheme as having the same meaning as that set out in the R Codes. In the R Codes, "multiple dwelling" is defined to mean:

"A dwelling in a group of more than one where any part of a dwelling is vertically above part of any other."

87 It is true that the application to council included an application for multiple dwellings, because the five "short stay 1storey 1 bedroom" apartments had located above them, five "permanent residential 2 storey 3 bedroom" apartments. However, condition (s) to the approval granted by council required the deletion of the five "short stay 1 storey 1 bedroom" apartments, as a result of which the development, as approved, was for 10 apartments side by side in a row, five of them

being designated as "short stay 2 storey 3 bedroom" apartments and the five middle ones being designated as "permanent residential 2storey 3 bedroom" apartments.

88 In relation to the "short stay" apartments, these were referred to by the planning officer's report, and in my opinion correctly so, as "residential building". The planning officer's report stated that "apartments will be managed in-house by the tavern operators or may involve a specific apartment operator". "Residential building" is defined in the Scheme to have the same meaning as in the R Codes. "Residential building" in the R Codes was defined to mean:

> "... a building or portion of a building, together with rooms and outbuildings separate from such building but ancillary thereto; such building being used or intended, adapted or designed to be used for the purpose of human habitation –
>
> - temporarily by two or more persons, or
> - permanently by seven or more persons,
> - who do not comprise a single family; but does not include a hospital or sanatorium, a prison, an hotel, a motel, or a residential school."

89 The "short stay" apartments are for "temporary" human habitation.

90 The Association's written submissions state, in effect, that because Table 1 Column 2 of the R Codes only refers to "single house" and "grouped dwelling", that council could not approve anything other than those two types of residential development. I disagree with that submission. The R Codes do not state what uses the council may or may not approve. The R Codes set standards in relation to certain residential development. The Scheme in cl 4.2.3 states that development of land "for any of the residential purposes dealt with by the (R Codes) shall conform to the provisions of those Codes". It is the Scheme which states what uses may be approved by council. The uses permitted in the Scheme are listed in the zoning table, which is Table 1 to the Scheme. "Residential building" is a "D" use. A "D" use is a use class which is "not permitted but to which Council may grant its approval" after having regard to the matters set out in cl 6.8 of the Scheme, which required *inter alia* that the council take into account the comments or wishes of objectors (which it did). The council therefore had jurisdiction to approve a "residential building" if it wished to do so.

The fact that "residential building" is not listed in the R Codes density table does not mean that council had no jurisdiction to grant planning approval. The fact that it is not listed means that the R Codes have nothing to say about them. This ground must be dismissed.

91 I then turn to grounds 4(b) and (c), which read:

> "(b) alternatively the residential development on the land exceeds the maximum area of lot per dwelling prescribed by the DPS contrary to clause 4.3.1 of the DPS because:
>
> (i) the 5 two storey three bedroom apartments classified by Council as a *residential building* is not in fact a residential building but rather grouped dwellings; and
>
> (ii) the 5 two storey three bedroom apartments classified by Council as a *multiple dwelling* is in fact a grouped dwelling;
>
> (a)[*sic*] alternatively the decision of Council to classify 5 two storey three bedroom apartments as a *residential building* was so unreasonable that no reasonable Council could have made that decision."

92 The facts in relation to this ground are complicated by the fact that the proposal put up to council, and commented on by the planning officer, was a proposal which combined "multiple dwellings" in relation to the five middle apartments (because of the stacking of one apartment above the other) and "residential building" for the five other short stay apartments. The effect of condition (s), however, changed the circumstances so that what was approved was development which involved five "short stay 2 storey 3 bedroom" apartments and five "permanent residential 2 storey 3 bedroom apartments".

93 The City submitted to this Court that the five "permanent" apartments in this new configuration were "multiple dwellings". That cannot be correct, because a "multiple dwelling" is defined in the Scheme and R Codes as I have set out above, and no apartment is located one above the other.

94 In my opinion, the five permanent residential apartments are "grouped dwellings", because they satisfy the definitions of "dwelling" and "grouped dwelling", which definitions are defined in the Scheme to have the meanings in the R Codes which read:

> "Dwelling means a building or portion of a building being used or intended, adapted or designed to be used for the purpose of human habitation on a permanent basis by –
>
> - a single person,
> - a single family, or
> - no more than six (6) persons who do not comprise a single family."

and

> "Grouped dwelling means a dwelling which is one of a group of two or more dwellings on the same lot such that no dwelling is placed wholly or partly vertically above another, except where special conditions of landscape or topography dictate otherwise."

95 There was a submission made that the five permanent apartments were not "grouped dwellings" because they were not located on the ground. It was submitted that the R Codes manual states that "grouped dwellings" must be located on the ground. That is not what the manual says. The manual indicates that a "grouped dwelling" will "normally" have its own private garden area attached. There is nothing to say that a "grouped dwelling" must be located on the ground.

96 The R Codes require 450 square metres of site for each "grouped dwelling". That means that on the 2,377 square metre site, five "grouped dwellings" could be constructed. That is what council approved. It was argued that the reference to 450 square metres of site must refer to 450 square metres of clear site with no other buildings – in effect, 450 square metres of open space. That is not, however, what the density table requires. The requirement in column 3 is about the size of the site. In my opinion, that is a reference to the land the subject of the application. The R Codes provide separately in column 6 for the "open space" requirements. In my opinion, the density requirements have been met, because only five grouped dwellings are located on the subject land, and that does not exceed the density requirements in the R Codes.

97 As to the five short stay apartments which, in my opinion, satisfy the definition of "residential building", there is no density requirement and the council was free to approve them. The Association argued that the density requirements could be circumvented by designating some apartments "short stay" and later selling them as permanent homes. I disagree. The planning approval includes approval for five "short stay" apartments. If those apartments are later used without approval as permanent residences, that use will be a use contrary to the approval, and the council could take action under s 10 of the *Town Planning and Development Act 1928* or s 43A of the *Metropolitan Region Town Planning Scheme Act 1959* to prevent such use.

98 In my opinion, this ground must be dismissed.

Ground 5

99 This contains a number of grounds, each alleging that irrelevant considerations were taken into account by the council in granting planning approval.

(a) Ground 5(a) alleges that council took into account an irrelevant consideration, namely the Western Australian Planning Commission Coastal Planning Policy. The planning officer's report which was before council read:

> "The Western Australian Planning Commission Coastal Policy indicates that development within 500 metres of the coast should not exceed 12 metres in height when measured from the mean natural ground level of the site. A plan has been submitted indicating that the development does not exceed 12 metres in height at the mean natural ground level."

For my part, I do not see why reference to the policy is an irrelevant consideration. There was no height restriction under the Scheme, and so the Country Coastal Planning Policy may have been of some assistance to council when considering the issue of height. In any event, the council resolved that approval was to be on condition that the height of the building be reduced by deleting the uppermost level by the expedient of deleting five "short stay" apartments. The council did not therefore make its decision on the basis that the project could be approved because the height did not infringe the policy. In my opinion, this ground should be dismissed.

(b) Ground 5(b) alleges that the council took into account a statement by a council officer that the existing tavern had

1,125 square metres of standing/seating area compared with the proposed tavern which would have a standing/seating area of 553.7 square metres. The Association contends that the total area of the existing tavern was only 450 square metres, whereas the proposed tavern was 725 square metres. The Association therefore submits that the council acted in reliance upon erroneous factual information which it took into account when making its decision.

A reading of the planning officer's report, however, reveals that he stated that the current tavern had a floor area (not a standing/seating area) of 1,125 square metres, with a licensed area of 972 square metres, and that the new tavern would have a licensed area of 983 square metres. The planning officer's report did not state – as this ground contends – that the existing tavern had 1,125 square metres of "standing/seating" area. This ground must be dismissed.

(c) Ground (c) alleges that the council took into account an irrelevant consideration, namely a statement that the development had the "overwhelming majority of community support".

This statement was contained in the "applicant's comments", ie Rennet's comments, which were incorporated into the report put before council. This statement was said by the Association to be based on the results of a petition that was, in turn, based upon a colour brochure which the Association submits depicted a different development from the one under consideration before the council.

The council well understood that the statement was one made by Rennet. It was not a statement made by the planning officer, and it was not adopted by the planning officer. The statement was contained in the report because it was necessary to summarise the public consultation which had taken place, the objections raised to the development, and Rennet's response to the objections. The council was entitled to take into account all of this information. There was no warranty that Rennet's assertion was correct. I would dismiss this ground.

(d) Ground 5(d) alleges that council took into account an irrelevant consideration, namely a statement in the planning officer's report which was before council that "car parking, setbacks and landscaping can be varied by the Council based on the merit of the individual application".

That is not an accurate representation of what was contained in the report. The statement made in the report was that:

"The setback and landscape standards are the only development requirements applying to the site (apart from car parking), these can be varied by the Council based on the merit of the individual application."

The statement did not therefore relate to car parking.

As to setback and landscape standards, the ground alleges that the statement that the standards could be "varied by the Council based on the merit of the individual application" was a misstatement of the requirements of cl 4.5.1 and cl 4.5.3. It is true that the statement did not set out the requirements of cl 4.5, but I am satisfied that council knew that it was making a decision pursuant to cl 4.5.1 and that this is what the report was referring to. The resolution passed expressly states that the discretion was exercised pursuant to cl 4.5, and the fact that the planning officer's statement did not, at the point identified by the applicant, set out the requirements of cl 4.5 is no basis for setting aside council's decision. I would dismiss this ground.

(e) Ground 5(e) alleges that the council took into account an irrelevant consideration, namely a statement in the council officer's report that "even though the development will affect views, the current tavern has been positioned to one side of the site and redevelopment of the tavern at this current height would also affect views". A statement to that effect was contained in the planning officer's report.

The Association then referred to ***Re City of Perth; Ex parte Lord*** [2002] WASCA 254 at [42], where Parker J concluded that the opinion of the planning officer in that case, that a proposed variation to a setback requirement could be supported because "a building could be designed which complied fully with the setback requirements ...", was an irrelevant consideration. It is clear, therefore, that the officer's opinion in the ***Ex parte Lord*** case was a statement about a hypothetical situation. Unlike ***Ex parte Lord***, the statement in the planning officer's report in this case does not refer to a hypothetical situation. It relates to the existing building and assisted councillors by informing them about the effect the proposed development would have on the views of the properties located directly behind the subject site and the effect that the

redevelopment of the existing tavern would have on such properties. In my opinion, this ground should be dismissed.

Ground 6

100 The Association also alleges that the council failed to have regard to relevant considerations.

(a) The first consideration which the Association says council failed to take into account was the number of car bays required by the Scheme.

The planning officer's report had a section headed "Parking demand and provision". It set out a table showing the various land uses, a carparking standard, and the proposed number of carbays, and concluded with a statement that the parking required under the Scheme was 209.8. This was then followed by a statement that "the provision of car parking for the multiple dwellings and short stay accommodation has been based on the standard for mixed use developments within the City Centre".

The Association submits that the summary misstated the true position in two respects, namely, that it understated the number of car bays required by the Scheme and, secondly, that it overstated the number of on-site car bays. The Association states that cl4.8.2 of the Scheme required the number of on-site car parking bays to be calculated in accordance with Table 2 of the Scheme. The issue between the parties is whether or not cl 4.8 is the relevant clause.

Clause 4.1 of the Scheme states that "the development requirements or standards specified in clauses 4.5 and 4.7 to 4.12 inclusive shall apply to all development other than development controlled by the Residential Planning Codes". Development is a reference to the activities to be carried out in relation to this project. In relation to that part of the project which involved "development" (ie activities) to produce that part of the project controlled by the Residential Planning Codes, it is my opinion that cl4.8 does not apply.

Furthermore, if that conclusion were wrong and cl4.8 did apply to all of the development to be carried out on site, then cl4.8.2 reads:

"... The Council may also determine that a general car parking standard shall apply irrespective of the development proposed in cases where it considers this to be appropriate."

The council adopted the standard applied by the planning officer, namely that which applied for mixed use developments within the City centre. The council did not therefore fail to take into account a relevant consideration, as alleged by the Association.

The Association and the City also made submissions which included detailed calculations about the number of car bays calculated in accordance with Table 2. Each disagree with the calculations put forward by the other. In view of the conclusion that I have reached above, it is not necessary to descend into the detail of these calculations. This ground should be dismissed.

(b) Ground 6(b) was abandoned.

(c) In ground 6(c), the Association also contends that the council failed to have regard to a relevant consideration, namely "the noise levels that would be generated by the development and the extent to which that noise could be controlled".

The council officer's report contained a section which read:

"**Acoustic Requirements**

The applicants have submitted an acoustics report prepared by Herring Storer Acoustics. The report does address noise from patrons in the car park, music, and dining in the front balcony. Noise from these areas should be controlled with a well-managed noise management plan which clearly identifies these areas. These noise sources should be addressed prior to the issue of a building license [*sic*] approval. As a result of the changes proposed to the licensed floor areas, a management plan will be sought through that process the tavern owners will be required to make application to the Licensing Court for a liquor licence."

The Association submits that the question about noise should have been, and was not, considered by council in determining the application. Clause 4.5.3 of the Scheme stated that the power conferred by the clause to grant approval might only be exercised if the council was satisfied that non-compliance would not have any adverse effect upon the inhabitants of the locality. The Association submits that the council was obliged to, and did not, form a view on noise before it could be satisfied of those matters.

In my opinion, it is clear, contrary to the Association's submission, that the council did consider and form a view about the effect of noise. Condition (j) to the approval granted by council was a condition that Rennet was to submit an acoustic consultant's report, demonstrating to the satisfaction of the City that the proposed development was capable of containing all noise emissions in accordance with the *Environmental Protection Act*, and condition (k) required Rennet to submit "noise management plans addressing noise from patrons in the carpark and noise from music played on the premises". It is clear, therefore, that council did not fail to take into account considerations about the noise from the proposed development.

Futility

101 The City submitted that the application for an order absolute should be dismissed on the grounds of futility. This argument is based upon the fact that on 24 September 2002, as I mentioned at the beginning of these reasons, the council affirmed its approval of the development application.

102 In view of the reasons I have set out above, it is unnecessary to consider this argument.

103 I would discharge the order *nisi*.