



Our Ref: TM:CPH:AL411690

Owner: Tanguy Mwilambwe

**24 September 2021**

**Attention: Amie Groom, Senior Planning Officer**

**Town of Victoria Park**

99 Shepperton Road

VICTORIA PARK WA 6979

By email.

Dear Ms Groom,

**RE: DR191/2021 – CHOON PING TAN v TOWN OF VICTORIA PARK**

We refer to the above subject matter and confirm that we instructed by Mr Choon Ping Tan, the Applicant in the matter (**'the Applicant'**).

We are instructed by the Applicant to provide the following information pursuant to direction 3 of the State Administrative Tribunal (**'the Tribunal'**)'s Direction dated 10 September 2021. The purpose of the following information is to assist the Respondent with the process of appropriately determining whether a recommendation for reassessment of the Application is correct and preferable on the materials.

## **PART I DECISION UNDER REVIEW**

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- The Applicant sought review, with the Tribunal, of the decision made by the Respondent to refuse the application for development (**'the Original Decision'**).
- The Respondent's decision is a reviewable decision under clause 76 of the deemed provisions in schedule 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015* (WA). In that, the Applicant is an affected person in relation to a reviewable determination, being the Applicant for development approval and owner of the land in

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respect of which an application for development approval is made. Further, the Original Decision is a reviewable determination by the local government to refuse an application for development approval. Accordingly, it is understood that the Applicant may apply to the Tribunal for a review in accordance with Part 14 of the *Planning and Development Act 2005* (WA).

- Therefore, the Respondent's decision is a reviewable decision by the Tribunal under section 252(1) in Part 14 of the *Planning and Development Act 2005* (WA).
- The Respondent's decision was affected by questions of fact, discretion and law.

## **PART II RELEVANT ISSUES**

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- Whether the it is correct and preferable on the material for the Respondent to recommend a reassessment of the Applicant's application for development approval.

## **PART III REVELANT LAW**

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- *Planning and Development Act 2005* (WA) (**'the Act'**);
- *Planning and Development (Local Planning Schemes) Regulations 2015* (WA) (**'the Regulations'**);
- *Local Planning Scheme No. 1* (**'the LPS1'**);
- *Local Planning Policy No. 3 Non-Residential Uses In or Adjacent to Residential Areas* (**'the LPP3'**);
- *Local Planning Policy No. 23 Parking Policy* (**'the LPP23'**);
- *Local Planning Policy No. 31 Serviced Apartments and Residential Buildings including Short Term Accommodation* (**'the LPP31'**); and
- *Residential Design Codes* (**'the R-Codes'**).

## **PART IV OVERVIEW OF THE LEGISLATIVE SCHEME**

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1. Section 256 of the Act authorises the making/existence of the Regulations in relation to local planning schemes such as the Town of Victoria Park.
2. Section 256(1) and (5) of the Act provides that the Regulations must prescribe model provisions and deemed provisions.



3. Section 257B(2) of the Act describes the effect of the deemed provisions in the Regulations, being that:

*“Deemed provisions, as amended from time to time, have effect and may be enforced as part of each local planning scheme to which they apply, whether they are prescribed before or after the scheme comes into force.”*
4. The LPS1 is the local planning scheme text prepared by the Respondent under section 72 of the Act and in accordance with sections 8 to 10 of the Regulations.
5. Schedule 2 of the Regulations prescribes the deemed provisions that are to apply to any local planning schemes, including the Respondent, regardless of whether the deemed provisions are incorporated into the local planning scheme text, such as the LPS1, per section 10(4) of the Regulations.
6. Clause 3(1) of the deemed provisions in schedule 2 of the Regulations provides that:

*“The local government may prepare a local planning policy in respect of any matter related to the planning and development of the Scheme area.”*
7. LPP3 and LPP31 are the local planning policies that the Respondent prepared pursuant to clause 3(1) if the deemed provisions in schedule 2 of the Regulations.

## **PART V CRITICAL INFORMATION**

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### **LOCATIONAL REQUIREMENTS**

8. Insofar as it appears from the Notice of Determination on Application for Development Approval (**‘the Notice’**) read in conjunction with Minutes of the Council in relation to the Application for Development Approval (**‘the Minutes’**), the reasoning for the refusal was as undermentioned:
  - a. The proposal put forth by the Applicant accompanying the Application for Development Approval is not consistent with the LPP31, in that, it is the Council’s view that the proposal fails to meet the required minimum two (2) locational criteria for land use. In turn, the proposal fails to satisfy the policy objective (a) of the LPP31; and
  - b. Without specificity or reasoning as to how the proposal is also contrary to the LPP3 and LPP23.
  - c. Without specificity or reasoning as to how the proposal is contrary objectives (a) and (d) of the LPP3, noting that the Minutes reflect the Council have accepted, to the effect, that objectives (a) and (d) of the LPP3 are satisfactorily met through proposed



management.

- d. Without specificity or reasoning as to how the proposal is contrary objectives (d) and (e) of the LPP31, noting that the Minutes reflect the Council have accepted, to the effect, that objectives (d) and (e) of the LPP3 are satisfactorily met through proposed management.
9. In the premise of paragraphs 8(c) and 8(d) above, despite mentions of the proposal being contrary to objectives (a) and (d) of the LPP3 and objectives (d) and (e) of the LPP31, it appears that only objective (a) of the LPP31 (requiring an analysis of clause 1 of the LPP31) was traversed and formed the basis for the refusal.
  10. For sake of clarity, it is noted that clauses 1.1 and 1.2 of the LLP31 are of particular relevance to the Original Decision. For completeness, clauses 1.1 and 1.2 of the LLP31 read as follows:

*“1.1 Residential Buildings and Serviced Apartments should be appropriately located to ensure they are in convenient, easily accessible locations for their guests, and to minimise potential adverse impacts on the amenity of surrounding residential properties, particularly within low density, suburban environments.*

*1.2 To achieve 1.1 above, Residential Buildings and Serviced Apartments will only be supported by the Council where they are located on sites which meet at least two or more of the following criteria:*

    - a) Are on a Primary, District or Local Distributor road;*
    - b) Are within 400 metres of a train station or high frequency bus route stop;*
    - c) Are within 400 metres of an area of tourist potential as determined by the Town, such as adjacent to the Swan River foreshore and major sporting/entertainment complexes;*
    - d) Are within 400 metres of a District Centre zone, Commercial zone or other location providing convenience shopping and access to everyday goods and services; and/or*
    - e) Are within 800 metres of a higher education provider (TAFE or University campus), where the proposal is for Short Term Accommodation to house students.”*
  11. It is noted that the Council had accepted that the proposal does indeed meet the requirement prescribed in clause 1.2(b) of the LPP31.
  12. The Respondent had made an incorrect finding of fact, in that, the proposed ancillary building may be used for Short Term Accommodation to house students, as such, this should not have been disregarded to render clause 1.2(e) of the LPP31 inapplicable. Consideration ought to have been afforded the proposal being multipurpose in nature, including and not



limited to the usage for Short Term Accommodation to house students, whether domestic or international. Had the foregoing been attended to, the correct and preferable decision on the material would have been that the proposal does indeed satisfy two (2) minimum locational criteria as required in clause 1.2 of the LPP31, namely;

- a. The proposed ancillary building is within 400 metres of a train station or high frequency bus route stop; and
- b. The proposed ancillary building is within 800 metres of a higher education provider (TAFE or University campus), where the proposal is for Short Term Accommodation to house students.

13. In reference to paragraph 12(b) above, according to the Town Planning Scheme No.1 East Victoria Park Precinct and the IntraMap tool, the South Metropolitan TAFE, Bentley Campus, located at:

Hayman Road  
BENTLEY WA 6102

is approximately 780 metres from the proposed ancillary building. Therefore, it is abundantly clear that there is a higher education provider within 800 metres radius of the proposed ancillary building. Accordingly, the conclusion must be that the proposal also meets clause 1.2(e) of the LPP31. In turn, clause 1.2 of the LPP31 is wholly satisfied by reason of two (2) locational requirements having been met.

## **THE NATURE AND FUNCTION OF POLICY**

14. We further note and reiterate the Tribunal Member's preliminary remarks in passing during the Directions Hearing dated 10 September 2021 in respect to the nature and function of policy being that it must not be met with rigidity.
15. It is noted that the power to grant or refuse the Application for Development Approval is fundamentally an exercise of discretionary power by the Council, as conferred upon it under the Act and Regulations, to determine whether the grant of development approval is correct and preferable on the material. The LPP31 and other relevant policies of the Respondent are not the source of power, but rather, the proper understanding is that they are tools that would assist the decision makers in exercising their discretion.
16. The design of policies, such as the LPP31, are to serve the purpose of providing guidance to decision makers in exercising their discretion. It must not be taken as a fixed, determinative rule or applied inflexibly to the exclusion of consideration of the merits of the individual circumstances.



17. Of particular importance is that inflexible/mechanical application of policy as a fixed and/or determinative rule can fetter with the discretion conferred upon the decision maker under the Act and Regulations, to the effect of preventing the Act and Regulations from governing the decision-making process. Accordingly, this point must be taken with the utmost respect.
18. The inflexible application of the LPP31 is evident in consideration of the undermentioned:
- a. According to the Town Planning Scheme No.1 East Victoria Park Precinct and the IntraMap tool, the proposed ancillary building is within reasonable/relatively close distance from the Commonwealth Hockey Stadium, a major sporting/entertainment complex.
  - b. According to the Town Planning Scheme No.1 East Victoria Park Precinct and the IntraMap tool, the proposed ancillary building is within reasonable/relatively close distance from the nearest District Centre zone located on Albany Highway.
  - c. According to the Town Planning Scheme No.1 East Victoria Park Precinct and the IntraMap tool, the proposed ancillary building is within reasonable/relatively close distance from locations providing convenience shopping and access to everyday goods and services:
    - i. Approximately 600 metres away from the nearest Local Centre on Berwick Street; and
    - ii. Approximately 650 metres of the Shell Coles Express Victoria Park.The aforementioned locations are reasonably within reach for those choosing to stay at the proposed ancillary building, noting that that it is within walking distance.
  - d. According to the Town Planning Scheme No.1 East Victoria Park Precinct and the IntraMap tool, the proposed ancillary building is only approximately 420 metres from the nearest Parks and Recreation of Harold Rossiter Park.
19. In the premise of paragraphs 14 to 18, it is clear that the Council had applied the LPP31 inflexibly to the extent that it may be said to have fettered with the discretion conferred under the Act and Regulations.

## **PART VI CONCLUSION**

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20. A recommendation for reassessment of the Application for Development Approval should be made, because:
- a. By reason of the facts, matters and circumstances set out above, the Applicant has strong grounds of appeal on questions of fact, discretion and law;
  - b. Proceeding to mediation or continuing with the Tribunal process would require the



- parties to incur significant further costs;
- c. If a recommendation for reassessment of the Application for Development Approval is not made, the Applicant will proceed to mediation and/or hearing through the Tribunal.
  - d. In respect to the abovementioned information, the Applicant would like to finalise this matter; and
  - e. It is in the Respondent's interests to have the matter finalised at an early stage without commitment to further proceedings in the Tribunal.
  - f. A recommendation for reassessment of the Application for Development Approval is an attempt to compromise without the parties having to incur costs associated with any proceedings in the Tribunal.

In the event that you do not understand the contents of this letter, please do not hesitate to contact me on 1300 636 846 or by email on [ckam@armstronglegal.com.au](mailto:ckam@armstronglegal.com.au).

**Yours faithfully,**

**Tanguy Mwilambwe**  
**National Practice Director – Civil, Administrative and Immigration Law**  
**Armstrong Legal**