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COASTAL LAW

Ecologically Sustainable Development in WA Planning Cases

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This paper discusses the application of sustainability, or ecologically sustainable development principles in recent Western Australian planning cases. The paper begins by referring to important parallel developments during the first half-decade of the new century, namely strategic and statutory planning for sustainability and a new and cohesive administrative review jurisdiction incorporating planning cases. It then reviews five leading decisions made over the last two years which have considered various aspects of sustainability. Finally, the paper discusses implications from these cases.

ESD and SAT – planning principles and planning review jurisdiction for a new century

Ecologically sustainable development

Between 2001 and 2003, the State Government developed the *Western Australian State Sustainability Strategy – a vision for quality of life in Western Australia* (Sustainability Strategy). The Government adopted the Sustainability Strategy in September 2003.

The Sustainability Strategy has been described by Professor Peter Newman, one of its principal authors and the Professor of City Policy and Director of the Institute for Sustainability and Technology Policy at Murdoch University, as having 'changed the planning paradigm in the Government significantly, consistent with global and local trends to this way of doing planning'.[1]

The Sustainability Strategy defines 'sustainability' as 'meeting the needs of current and future generations through integration of environmental protection, social advancement and economic prosperity', the so-called 'triple bottom line'.

Between 2003 and 2006, State and some local government authorities carried out further considerable strategic and statutory planning, particularly at State and regional levels, in relation to sustainability, which is also referred to as

[1] ***Moore River Company Pty Ltd and Western Australian Planning Commission*** [2007] WASAT 98 (***Moore River subdivision case***) at [85].

ecologically sustainable development (ESD). Among other publications, the Government gazetted *State Planning Policy No. 1 – State Planning Framework Policy* (Variation No. 2) (SPP 1) (February 2006), *State Planning Policy No. 2 – Environmental and Natural Resources* (SPP 2) (June 2003), *State Planning Policy No 2.6 – State Coastal Planning Policy* (SPP 2.6) (June 2003) and *State Planning Policy No. 3 – Urban Growth and Settlement* (SPP 3) (March 2006).

SPP 1 states that '[t]he primary aim of planning is to provide for the sustainable use and development of land'.[2] SPP 1 also identifies five key principles in relation to environment, community, economy, infrastructure and regional development which 'further define this primary aim and describe the considerations which influence good decision-making in land use planning and development'.[3] SPP 1 states that planning 'should take account of and give effect to these principles and related policies'.[4] Further provisions of these instruments relating to ESD will be referred to in the discussion of cases below.

In 2004, the Government introduced a bill into the WA Parliament to consolidate the former planning legislation, to update its language, particularly the *Town Planning and Development Act 1928* (WA) (TPD Act), and to make several substantive amendments to planning laws. A substantially identical bill was introduced in 2005, which, when enacted in November 2005, became

[2] SPP 1 Pt A cl 1.
[3] SPP 1 Pt A cl 2.
[4] SPP 1 Pt A cl 2.

the *Planning and Development Act 2005* (WA) (PD Act). The PD Act commenced on 9 April 2006.

One of the amendments made by the PD Act was the incorporation of purposes in the Act. The purposes of the PD Act include:

> 'to promote the sustainable use and development of land in the State'.[5]

The Explanatory Memorandum described this amendment as:

> '*Promoting sustainability* by including sustainable land use and development as a fundamental and underlying purpose of the planning legislation;'

While the PD Act did not define the meaning of the expression 'sustainable use and development of land', the State Administrative Tribunal (SAT or Tribunal) held that its meaning was 'informed by' the Sustainability Strategy and the State planning policies referred to earlier.[6]

The principles underlying ESD have also been described in planning decisions in this State and elsewhere. In particular, in a seminal decision in 2006[7], which has been applied by SAT in relation to the precautionary principle[8], Chief Judge Brian Preston of the New South Wales Land and Environment Court stated as follows:

> 'Ecologically sustainable development, in its most basic formulation, is 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs':

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[5] PD Act s 3(1)(c).
[6] ***Moore River subdivision case*** at [95].
[7] ***Telstra Corporation Limited v Hornsby Shire Council*** [2006] NSWLEC 133; (2006) 146 LGERA 10; (2006) 67 NSWLR 256 (***Telstra***) at [108] – [120].
[8] ***WA Developments Pty Ltd and Western Australian Planning Commission*** [2008] WASAT 260 (***Tall Donkey Orchid case***) at [38] – [45].

World Commission on Environment and Development, *Our Common Future* (1987), p 44 (also known as the Brundtland Report after the Chairperson of the Commission, Gro Harlem Brundtland). More particularly, ecologically sustainable development involves a cluster of elements or principles. Six are worth highlighting.'[9]

The six main principles of ESD identified by Justice Preston were as follows:

- 'First, from the very name itself comes the principle of sustainable use – the aim of exploiting natural resources in a manner which is 'sustainable' or 'prudent' or 'rational' or 'wise' or 'appropriate';[10]
- 'Secondly, ecologically sustainable development requires the effective integration of economic [, social] and environmental considerations in the decision-making process';[11]
- 'Thirdly, there is the precautionary principle';[12]
- 'Fourthly, there are principles of equity [, namely] … inter-generational equity … [and] intra-generational equity';[13]
- 'Fifthly, there is the principle that conservation of biological diversity and ecologically [sic] integrity should be a fundamental consideration';[14]
- 'Sixthly, ecologically sustainable development involves the internalisation of environmental costs into decision-making for economic and other development plans, programs and projects likely to affect the environment'.[15]

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[9] ***Telstra*** at [108]. See also ***Walker v Minister for Planning & Ors*** [2007] NSWLEC 741; (2007) 157 LGERA 124 at [47] – [112] where Biscoe J in the Land and Environment Court traced the international origins of ESD since the early 1970s and its recognition in NSW legislation and cases since the mid 1990s.
[10] ***Telstra*** at [109] citations and further discussion omitted.
[11] ***Telstra*** at [110] and [112] citations and further discussion omitted.
[12] ***Telstra*** at [113] citations and further discussion omitted.
[13] ***Telstra*** at [116] and [117] citations and further discussion omitted.
[14] ***Telstra*** at [118] citations omitted.
[15] ***Telstra*** at [119] citations and further discussion omitted.

State Administrative Tribunal of Western Australia

At about the same time that it developed the Sustainability Strategy and State and other authorities commenced strategic and statutory planning for ESD, the Government was also involved in the process of significant reform in relation to administrative justice.[16]

From the early 1980s, for a period of more than 20 years, a number of reports and reviews identified the critical need for reform of the fragmented system of administrative review in the State[17], and identified significant benefits for administrative justice that would result from a single, comprehensive, coherent, independent and specialist approach.[18] Most recently, in March 2001, the Government established a Taskforce under the chairmanship of Mr Michael Barker QC[19] to develop a model of a civil and administrative review tribunal for consideration by the Government. In May 2002, the Taskforce published a comprehensive report in which

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[16] See David Parry *Revolution in the West: The transformation of planning appeals in Western Australia* (2008) 14 LGLJ 119 – 139. This article traced the history of WA planning appeals through the ministerial and dual ministerial and court or tribunal systems, to the establishment of the Tribunal, and described the significant developments that have taken place in relation to planning review proceedings over the last four years.

[17] In 2003 administrative appeals in Western Australia were determined by no less than six separate tribunals, a State government authority, a review board, the Supreme Court (in relation to decisions under 33 Acts), the District Court (in relation to decisions under 22 Acts), the Local Court (in relation to decisions under 31 Acts), the Courts of Petty Sessions (in relation to decisions under 15 Acts), various ministers (in relation to decisions under 63 Acts) and other public officials (in relation to five types of decisions under three Acts).

[18] *Report on Review of Administrative Decisions: Appeals Project No 26 – Part 1* (Western Australian Law Reform Commission, 1982), *Report of the Royal Commission into Commercial Activities of Government and Other Matters* (1992), *Commission on Government Report No 4* (July 1996), *Report of Tribunal's Review to the Attorney General* (Commissioner Gotjamanos and Mr G Merton, August 1996), *Review of the Criminal & Civil Justice System Final Report* (Western Australian Law Reform Commission, Project 92, 1999) and *Western Australian Civil & Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal* (Mr Michael Barker QC, Chair, May 2002).

[19] Now Hon Justice Michael Barker, a Judge of the Federal Court of Australia and the inaugural President of the Tribunal

it recommended the establishment of the Tribunal and the conferral upon it of jurisdiction in relation to most administrative review proceedings, including planning and some environmental matters.

The Government accepted the Taskforce's recommendation to establish the Tribunal and most of its recommendations in relation to the conferral of jurisdiction. The legislation giving effect to these recommendations was enacted in November 2004[20] and the Tribunal commenced operation in January 2005.

Although jurisdiction in relation to environmental matters was not conferred on the Tribunal, the Tribunal held in 2007 that '[s]ustainability is now a core element of orderly and proper planning'.[21] 'Orderly and proper planning' is usually a mandatory consideration in planning assessments, including planning review proceedings, in this State.

It was inevitable, therefore, that the State's new planning review jurisdiction would, in time, come to consider and apply ESD principles in the resolution of planning disputes. This paper will now review five leading decisions in which this has occurred.

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[20] *State Administrative Tribunal Act 2004* (WA) and *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* (WA).

[21] ***Mount Lawley Pty Ltd and Western Australian Planning Commission*** [2007] WASAT 59 (***Mount Lawley fill case***) at [47]. Similarly, the New South Wales Court of Appeal held in ***Minister for Planning v Walker & Ors*** [2008] NSWCA 224; 161 LGERA 423 at [42] – [43] that 'the public interest', which is a mandatory consideration in planning assessments in that State under s 79C of the *Environmental Planning and Assessment Act 1979* (NSW), 'embraces ESD' (endorsing ***Telstra*** at [121] – [124]).

Five SAT ESD decisions

***Mount Lawley Pty Ltd and Western Australian Planning Commission* [2007] WASAT 59 (*Mount Lawley fill case*)**

Mount Lawley Pty Ltd applied for development approval to carry out sand extraction and earthworks on a part of its land at Ellenbrook which was reserved under the *Metropolitan Region Scheme* as 'Primary Regional Roads' for the proposed Perth-Darwin National Highway. Mount Lawley Pty Ltd intended to use the sand to achieve the approved site levels for a residential subdivision on an adjoining part of its land. The Western Australian Planning Commission (Commission) argued that the proposed development would have a detrimental impact on the State's ability to develop the highway, principally because the sand extraction would require the State to import 50,000 cubic metres of fill, thereby increasing the cost of construction by $600,000.

To attain the site levels approved in the adjoining residential subdivision, Mount Lawley Pty Ltd required approximately 272,000 cubic metres of fill. The development application proposed the extraction of 101,000 cubic metres from the highway reserve. Mount Lawley Pty Ltd could obtain a further 68,000 cubic metres of fill from the residential subdivision area. The remaining 103,000 cubic metres of fill would have to be imported from elsewhere.

The Tribunal identified the following evidence given jointly by the traffic engineers called on behalf of the parties:

> 'Based on the calculations provided by the experts, it is estimated that, as a result of the need to import an additional 101,000 cubic metres of fill [to carry out the residential subdivision if the development application for sand extraction was refused], the residents of Ellenbrook would be subjected to an additional 11,222 semi-trailer movements. The engineering experts agree that, as a result of these additional truck movements, the local roads would be subject to greater loading than they are normally designed to carry and may wear out prematurely, which would result in a cost to local government. The experts also agree that, if [Main Roads WA] would be required to import an additional 50,000 cubic metres of fill, the necessary truck movements would be via the regional road reservation, rather than via the local road network.'[22]

Having referred to the stated purpose of the PD Act, 'to promote the sustainable use and development of land in the State', and the five key principles which further define the primary aim of planning 'to provide for the sustainable use and development of land' identified in SPP 1, the Tribunal held that '[s]ustainability is now a core element of orderly and proper planning',[23] and decided to grant development approval for sand extraction and earthworks, principally for the following reasons:

> '**Sustainability requires the integration of the social, economic and environmental consequences of land use and development in order to deliver a better quality of life now and for future generations. The proposed development involves orderly and proper planning, and in particular, the sustainable use and development of land.** It involves the '**wise use and management**' (SPP 1 cl 3 A1) of 101,000 cubic metres of fill, **reduce[s] the need for transport** (SPP 1 cl 3 A2) and **avoids social, economic** (avoiding damage to streets within the local government's care, control and management) **and environmental detriments which would flow from 11,222 heavy vehicle truck movements** passing along the local streets and close to residences. It does not compromise 'the logical and efficient provision and maintenance of infrastructure, including the setting aside of land for future transport routes' and 'protecting key

[22] ***Mount Lawley fill case*** at [39].
[23] ***Mount Lawley fill case*** at [47].

> infrastructure, including … roads from inappropriate land use and development' (SPP 1 cl 3 A4). Although the consequence of approval of the development application is that [Main Roads WA] would ultimately need to import an additional 50,000 cubic metres of fill when it comes to construct the [highway], this is half the volume of fill the applicant can extract and, as noted earlier, the respondent will be able to utilise the road reservation and avoid local roads to do so.'[24] (Emphasis in bold added)

Moore River Company Pty Ltd and Western Australian Planning Commission **[2007] WASAT 98 (*Moore River subdivision case*)**

Moore River Company Pty Ltd sought subdivision approval to create 661 residential lots (later reduced to 550 residential lots), open space and roads on land with direct frontage to the Indian Ocean and the Moore River at South Guilderton. The site was approximately 75 kilometres by air and approximately 90 kilometres by road to the north of the Perth Central Business District (CBD), approximately the same distance as Mandurah is to the south of the Perth CBD. By road, the site was approximately 60 kilometres north of the Joondalup regional centre, approximately 30 kilometres north of the proposed St Andrews regional centre in the Two Rocks-Yanchep area, and approximately 25 kilometres north of the northern boundary of the Perth metropolitan region.

The site was rezoned from 'Rural' to 'Urban Development' in the mid 1990s. In January 2000, the Commission approved an outline development plan (ODP) for the site and adjoining land including approximately 5,000 dwellings to accommodate approximately 13,500 residents,

[24] ***Mount Lawley fill case*** at [48].

commercial/community/open space centres, two primary schools, a high school, commercial facilities and a tourist development. The proposed subdivision was the first of six neighbourhoods shown on the approved ODP.

The former Minister for Planning and Infrastructure, the Hon Alannah MacTiernan MLA, 'called in' the proceeding under s 70 of the TPD Act (now s 246 of the PD Act), on the basis that it raised issues of such regional importance that it was appropriate for it to be determined by the Minister. However, under s 70(2)(b) of the TPD Act (now s 246(2)(b) of the PD Act), the Minister directed that the Tribunal should hear the proceeding, but without determining it, refer it with its recommendations to the Minister for determination.

The first of the Commission's five reasons for refusal of the subdivision application was that the subdivision was contrary to the Sustainability Strategy and SPP 3, as it did not promote an urban structure which integrated economic, social and environmental sustainability, and did not maximise accessibility to jobs and services. Sustainability was also a principal issue in the review of the Commission's decision by the Tribunal.

The Tribunal approached the issue of sustainability on the basis of the total development contemplated in the ODP, rather than just the proposed subdivision.[25] In this context, the Tribunal considered the sustainability of the

[25] ***Moore River subdivision case*** at [113].

proposal in terms of its impacts on the natural environment, access to employment opportunities, and urban sprawl and car dependency.[26]

In relation to impacts on the natural environment, the Tribunal accepted the agreed position of the seven expert witnesses called by the parties in relation to sustainability that:

- 'The Moore River is a special area from an environmental point of view. It is relatively rare in WA, in having the confluence of a river and the coast.
- Some of the environmental values of the area stem from the intactness of the vegetation along the river and the coast. Virtually all areas of natural bush are in good condition and there is a considerable diversity in the representative vegetation.'[27]

The Tribunal's findings in relation to the impacts of the proposal on the natural environment were as follows:

> 'The respondent accepted that urban development south of Moore River is capable of being managed so as to be undertaken in an environmentally acceptable manner. In relation to matters of vegetation and dune stability, we agree. There was no significant challenge to the adequacy of the environmental analysis undertaken in relation to the ODP, or to the management proposals contained in the various reports. The respondent contends, however, that **the special nature of the Moore River environment is a factor which, from a sustainability perspective, provides a reason for directing urban development towards less environmentally sensitive areas**. That is a submission with which **we** also **agree.** The development of the proposed subdivision, and the ODP area as a whole, will **inevitably destroy large areas of natural coastal vegetation**. That may be inevitable, and if a consideration of all other planning, including sustainability issues, led to a conclusion that the subdivision should be approved, environmental issues – including environmental aspects of sustainability – would not, of themselves, provide a basis for refusal of the application. However, **if those other considerations led to a conclusion that the concentration of residential development should occur elsewhere in the region, and in a location where a lesser environmental impact would result, then the loss of the**

[26] ***Moore River subdivision case*** at [114] – [145].
[27] ***Moore River subdivision case*** at [114].

> **valuable coastal vegetation of the site would provide a further reason for rejecting the proposal**. That approach is consistent with the foundation principle of the [Sustainability Strategy] that seeks to minimise the 'ecological footprint' of human settlement.'[28] (Emphasis in bold added)

In relation to access to employment opportunities, the Tribunal noted that SPP 3 had as an objective the promotion of neighbourhoods 'with convenient access to employment and services', and that a key stated requirement for sustainable communities was 'a strong diversified and sustainable economic base with assured access to jobs and employment'. SPP 3 also stated that new settlements and major town expansions should only be considered where they will have a planned economic and employment base.[29] The Tribunal found that, whereas, at the time the ODP was approved, the strategic planning for the region contemplated industrial development within reasonable proximity to the land, in January 2003, the State Cabinet agreed not to rezone or acquire land for that purpose in the area.[30]

The Tribunal's findings in relation to access to employment opportunities were as follows:

> 'We consider it likely that, if St Andrews were developed as contemplated [namely, with a residential population of approximately 150,000 and approximately 60,000 jobs], residents of the ODP area would be likely to avail themselves of employment opportunities there. Because of the area's reasonable proximity to the proposed St Andrews development, and to the northern portions of the metropolitan region generally, it is likely that residents of the ODP area would have reasonable prospects of employment, albeit that **job opportunities may involve quite lengthy car travel. We would not, however, categorise the proximity as providing convenient access**

[28] ***Moore River subdivision case*** at [125].
[29] ***Moore River subdivision case*** at [126].
[30] ***Moore River subdivision case*** at [131].

to employment in the sense described in SPP 3'.[31] (Emphasis in bold added)

In relation to urban sprawl and car dependency, the Tribunal noted that SPP 3 identified, as one of the key requirements for sustainable communities, that there be sufficient serviced land in the right locations 'co-ordinated with the efficient and economic provision of transport, essential infrastructure and human services'. The Tribunal noted that SPP 2.6 encouraged urban development 'in and around existing settlements, particularly those with established infrastructure and services', and discouraged 'continuous linear urban development along the coast'.[32]

The Commission contended that the proceedings provided an opportunity to define the northern boundary of Perth's urban expansion at the northern boundary of the metropolitan region. The Commission argued that, from a sustainability perspective, the metropolitan region was a better area in which to direct urban development, rather than permitting continuous linear urban development along the coast. The Commission argued that the opportunity to define the boundary would be lost if the proposed subdivision were carried out.

In contrast, Moore River Company Pty Ltd contended that the proposed subdivision did not represent an extension of the Perth metropolitan area, because its land was separated from the northern boundary of the Perth metropolitan region by the Wilbinga Nature Reserve, which occupies

[31] ***Moore River subdivision case*** at [133]. See also at [22].
[32] ***Moore River subdivision case*** at [138].

approximately 8 kilometres of Indian Ocean frontage, and adjacent State Forest. Moore River Company Pty Ltd argued that these areas of reserve and forest provided an effective barrier to the expansion of the Perth metropolitan region and sufficiently separated the ODP area so that, when developed, it could not be said to be an extension of the metropolitan region.

The Tribunal's findings in relation to this key issue were as follows:

> 'If, as contemplated, the St Andrews area is ultimately developed as a major source of employment for the suburban areas developed at the northern extremity of the metropolitan region, the likelihood is that the ODP area, if fully developed, would function, in an urban and demographic sense, in the same way as the suburban developments immediately to the south of the northern boundary of the metropolitan region. In time, it might reasonably be expected that there would be pressure to develop further areas of the [Moore River Company Pty Ltd's] land, to the south of the ODP area, for residential purposes. Given the proximity of the Woodbridge rural residential subdivision, and the Sovereign Hill subdivision, the consequences of incremental urban expansion would involve **a clear potential for, in effect, an extension of the northern metropolitan corridor. In that sense, the proposed development of the ODP area would run counter to the approach enunciated in SPP 2.6 of discouraging continuous linear urban development along the coast**.
>
> A consequence of the distance of the ODP area from locations such as St Andrews, or the broader Gingin region, coupled with the absence of any public transport, is that **it is likely that the ultimate population of the ODP area would have a high degree of car dependency. It is communities of that nature, born of continual pressure for development in coastal locations, that SPP 3 impliedly crirticises**.'[33] (Emphasis in bold added)

The Tribunal drew the following conclusion in relation to ESD:

> 'It follows from this discussion that the [Sustainability Strategy], SPP 2.6 and SPP 3 are certainly relevant to the planning assessment of the proposed subdivision and that the proposed subdivision is inconsistent with these instruments in relation to sustainability in material respects.'[34]

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[33] ***Moore River subdivision case*** at [143] – [144].
[34] ***Moore River subdivision case*** at [145].

The Tribunal recommended to the Minister that subdivision approval should be refused for each of four reasons, including the following:

> 'The conflicts identified above between the proposal and certain provisions of SPP 2.6, SPP 3 and the [Sustainability Strategy] as discussed above, namely –
>
> i) the provision of new settlements with a planned economic and employment base;
> ii) discouraging continuous linear urban development along the coast;
> iii) minimisation of settlements with a high level of car dependency; and
> iv) minimisation of the 'ecological footprint' of human settlement.'[35]

Hanson Construction Materials Pty Ltd and Town of Vincent* [2008] WASAT 71 *(Hanson concrete batching case)

Hanson Construction Materials Pty Ltd applied for development approval for an extension of the approved hours of operation of its existing concrete batching plant in East Perth so as to permit 24-hour operation from Monday to Saturday, excluding public holidays, until the expiry of the development approval for daytime operations in June 2012. The Minister for Planning and Infrastructure made a submission to the Tribunal under s 245(2) of the PD Act requesting the Tribunal to give 'due regard to the broader issues of our State's long-term economic and environmental sustainability'. In particular, the Minister submitted that locating the plant further away from the CBD would have the detrimental ESD consequences of 'increasing travel distances, carbon emissions and potential for traffic conflict on our roads'.[36]

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[35] ***Moore River subdivision case*** at [229].

[36] ***Hanson Construction Materials Pty Ltd and Town of Vincent*** [2008] WASAT 71 (***Hanson concrete batching case***) at [33].

The Tribunal found that the applicable local planning framework had not changed since the approval of extended hours by previous planning authorities, between June 2000 and November 2007, and that the characteristics of the immediate locality of the site, including the predominant land uses in the area, did not appear to have changed substantially, or at all, since the previous approvals.[37] The Tribunal determined that:

> 'In circumstances where the planning framework is the same and the circumstances have not changed in any substantial way, it is in the interests of orderly and proper planning that planning decisions in relation to a site are made in a consistent way.'[38]

The Tribunal also found that the proposed development was consistent with orderly and proper planning having regard to ESD principles as follows:

> 'The proposed extension of hours of operation promotes sustainable use and development of land, because the location of the site, proximate to the CBD and abutting the regional freeway system, **minimises travel distances, and hence carbon emissions, and reduces traffic pressures on minor roads**, and enables construction activities to take place in the CBD at night when there is generally reduced traffic on the roads, resulting in **shorter travel times and thereby reduced carbon emissions**.'[39] (Emphasis in bold added)

***WA Developments Pty Ltd and Western Australian Planning Commission* [2008] WASAT 260 (*Tall Donkey Orchid case*)**

The central boundary of a proposed two-lot subdivision of land at Picton East, near Bunbury, traversed a small wetland area containing a population of *Diuris drummondii* (Tall Donkey Orchid) which is a declared rare flora (DRF) under the *Wildlife Conservation Act 1950* (WA) and classified by the

[37] ***Hanson concrete batching case*** at [51] and [53].
[38] ***Hanson concrete batching case*** at [54].
[39] ***Hanson concrete batching case*** at [56].

Department of Environment and Conservation as 'vulnerable'. The species was also listed as 'vulnerable' under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). A 'vulnerable' species is one that is 'considered to be facing a high risk of extinction in the wild'.

The Commission approved the proposed subdivision subject to a condition that the central boundary be realigned to ensure that all DRF populations were located within one lot. This condition was challenged on the basis that it was invalid, or, alternatively, inappropriate and unreasonable.

The evidence showed that there were only 32 scattered populations of Tall Donkey Orchid known to exist in Western Australia and that the wetland area on the site contained the largest known population in the State.[40]

The Tribunal held that:

> 'In order for a condition of planning approval to be validly imposed, the condition must:
>
> - be for a planning purpose and not for any ulterior purpose;
> - fairly and reasonably relate to the proposed development or subdivision; and
> - not be so unreasonable that no reasonable planning authority could have imposed it; ***Western Australian Planning Commission v Temwood Holdings Pty Ltd*** (2004) 221 CLR 30 at [57]; ***Newbury District Council v Secretary of State for the Environment*** [1981] AC 578.'[41]

[40] ***Tall Donkey Orchid case*** at [7].
[41] ***Tall Donkey Orchid case*** at [14].

The Tribunal found that the disputed condition was for a planning purpose, namely 'to avoid or minimise the impact of the subdivision on the environment and, in particular on the DRF population on the site, consistently with [SPP 2]'.[42] In particular, the Tribunal noted that, in accordance with cl 5.1 of SPP 2, planning decision-making should:

> '(iv) protect significant natural … features, including sites and features significant as habitats and for their floral … values;
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> …
>
> (vi) recognise that certain natural resources, including biological resources, are restricted to particular areas and that these geographical areas or land types may need to be identified accordingly and appropriate provision made to protect the areas of those natural resources;
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> …
>
> (x) support conservation, protection and management of native remnant vegetation where possible to enhance soil and land quality, water quality, biodiversity, fauna habitat, landscape, amenity values and ecosystem function; …'[43]

The Tribunal found that the disputed condition fairly and reasonably related to the proposed subdivision for the following reasons:

> 'The purpose of the subdivision is to facilitate the development of the site for motor racing and industrial purposes, increasing the risk of damage to the DRF, including through edge effects. Edge effects are the impacts that occur at the interface between development areas and native bushland including fire, fertiliser and other spray drift and incursion of weed species into the bushland.
>
> Furthermore, the proposed central boundary passes directly through the area containing the DRF. The location of the boundary poses a threat of serious or irreversible environmental damage to the DRF population on the site in consequence of the potential construction of a fence and clearing of a firebreak along the boundary and potential adverse effect on proper management.'[44]

The Tribunal also determined that, for the same reasons, the condition was not manifestly unreasonable. Indeed, the Tribunal found that 'it is both

[42] ***Tall Donkey Orchid case*** at [15].
[43] ***Tall Donkey Orchid case*** at [15].
[44] ***Tall Donkey Orchid case*** at [19] – [20].

appropriate and reasonable, having regard to the threat of serious or irreversible environmental damage to the DRF population on the site posed by the proposed subdivision and in particular by the location of the proposed central boundary'.[45]

In its decision, the Tribunal applied the precautionary principle which, the Tribunal noted[46], has been defined as follows:

> 'Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. (***Rio declaration on Environment and Development***, n 25, Principle 15).'

The Tribunal referred to the comprehensive consideration of the precautionary principle by Preston CJ in ***Telstra*** at [125] – [183] and, in particular, to the following statement at [128]:

> 'The application of the precautionary principle and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds: a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage. These conditions or thresholds are cumulative. Once both of these conditions or thresholds are satisfied, a precautionary measure may be taken to avert the anticipated threat of environmental damage, but it should be proportionate: N de Sadeleer, Environmental Principles: From Political Slogans to Legal Rules, Oxford University Press, 2005 at 155.'

The Tribunal determined as follows:

> 'The Tribunal considers that the precautionary principle applies in this case and warrants the imposition of condition 1. Both of the conditions or thresholds identified by Preston CJ in ***Telstra*** at [128] are satisfied on the basis of the findings made earlier. The proposed subdivision and, in particular, **the location of the proposed central boundary, poses a threat of serious or irreversible environmental damage to**

[45] ***Tall Donkey Orchid case*** at [36].
[46] ***Tall Donkey Orchid case*** at [39].

> **the DRF population on the site in consequence of the potential construction of a fence and clearing of a firebreak and potential effect on proper management. Furthermore, there is scientific uncertainty as to the environmental damage posed by the threat.** …
>
> Condition 1 embodies **a precautionary measure that mitigates the anticipated threat** of environmental damage. The measure is **proportionate to the threa**t and is **cost-effective**. The condition is therefore both appropriate and reasonable.'[47] (Emphasis in bold added)

***APP Corporation Pty Ltd and City of Perth* [2008] WASAT 291 (*Turby wind turbine case*)**

This case concerned a development application to install and operate three vertical axis wind turbines on the roof of a five-level commercial building under construction at the corner of Terrace Road and Victoria Avenue, adjacent to Langley Park, in the City of Perth. The proposed wind turbines, which were known by the model name 'Turby', were developed in the Netherlands as a rooftop wind turbine for use in an urban environment. Unlike most wind turbines in operation in Australia, which are horizontal axis or propeller-type wind turbines, Turbys are vertical axis wind turbines. The proposed development would be the first use of Turbys in Australia, the first wind turbine in an urban location in Western Australia and one of the first wind turbines in an urban location in the country.[48]

The Turby consisted of a 0.3 metre high base frame, a narrow mast with a height to optimise power generation, a 0.25 metre high generator and three

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[47] ***Tall Donkey Orchid case*** at [42] – [45].

[48] ***APP Corporation Pty Ltd and City of Perth*** [2008] WASAT 291 (***Turby wind turbine case***) at [10].

vertical symmetrical airfoil blades, with a helical twist, a height of 2.65 metres and a combined diameter of 2 metres. The proposed height of each mast was 6 metres, and the total height of each Turby was 9.2 metres.[49]

The Turby is designed to utilise 'wind over buildings' to optimise its power generation. Wind passes over a building at an upward angle of 30° to 40° from the leading edge of the roof. The wind speed directly above this line will be 20% to 40% higher than undisturbed horizontal wind flow, equating to two to three times higher power. The Turby's helical twist generates torque particularly well from upward-slanting airflow. The evidence indicated that the Turby could, therefore, extract more useful energy than a propeller-type turbine when placed optimally in an urban environment.[50]

The building incorporated numerous sustainable initiatives to increase its energy efficiency, including:

- building façade design and external building fabric insulation;
- automated operable louvres to the western elevation;
- floor plate design to maximise natural daylight;
- partial natural ventilation to the basement carpark;
- energy efficient lift selection and a feature stair to reduce lift usage;
- light fitting selections, perimeter and internal area light zoning, timers to low frequency occupancy areas and tenant sub-metering;
- light modelling to ensure no unintended or light spill beyond the building;

[49] ***Turby wind turbine case*** at [11] and [13].
[50] ***Turby wind turbine case*** at [12].

- extended building commissioning, maintenance and fine-tuning period;
- extensive building management and user guide; and
- mechanical active chilled beam air conditioning system.[51]

In consequence of these initiatives, the building, without the proposed wind turbines, achieved a five star Green Building Council of Australia Green Star Environmental Rating, which was considered to be 'Australian Excellence'. With the addition of the three Turbys, the building would achieve a six star Green Star Environmental Rating, which was considered to be 'World Leadership'. At the date of the decision, there were only five six star Green Star rated buildings in Australia. There were no six star Green Star rated buildings in Western Australia. Wind turbine, rather than solar, technology was selected for the development, because the site had good access to wind across the Swan River and Langley Park, there was inadequate solar access to the roof because of overshadowing by buildings to the north, and there was potential for glare to an adjoining apartment building.

The following three principal issues arose for determination in the proceeding:

- Whether the proposed wind turbines would have an undue adverse effect on the visual amenity of the locality.
- Whether the proposed wind turbines would have an undue adverse effect on the acoustic amenity of the inhabitants of the locality.

[51] ***Turby wind turbine case*** at [28].

- Whether the proposed wind turbines were contrary to orderly and proper planning.

In relation to visual impact, the City argued that the wind turbines would have an undue adverse effect, both from residential units in an adjoining apartment building and from the public domain. In particular, the City argued that the turbines would create a 'visual distraction due to their constant spinning'. The City argued that Turbys were not the type of object people expected or desired to see from a residential apartment.

However, having viewed a DVD showing the operation of Turbys, the Tribunal determined that the proposal would not cause a visual distraction. The Tribunal found that the urban landscape of the CBD was not static, but included movement in the form of traffic, trees swaying in the wind, ferries and other boats, and waves on the river.[52] The Tribunal found that the Turbys would produce a stable visual outline, rather than a distracting flicker.[53] It determined that the proposed development would have only limited visual impact on a small number of units in the adjoining building. To the extent that the Turbys could be seen from some units, they would form a minor aspect of the view and would not be visually distracting.[54]

In relation to visual impact on the public domain, the Tribunal determined as follows:

[52] At the time of the determination, the Tribunal was not aware of the prior approval by the City of Perth of the Ferris wheel which has since been erected on the foreshore near the Perth Convention and Exhibition Centre.
[53] ***Turby wind turbine case*** at [50].
[54] ***Turby wind turbine case*** at [51] – [60].

> 'The proposed wind turbines are both sensitive and innovative. They are not overly prominent, but to the extent to which they could be seen, they accentuate the built character of the area and **reflect the application of environmentally sustainable development principles in a tangible way**.'[55] (Emphasis in bold added)

In relation to acoustic impact, the Tribunal accepted the evidence of an acoustics engineer that the noise generated from the operation of the building, including the Turbys, cooling towers and mechanical services, would comply with the assigned levels under the *Environmental Protection (Noise) Regulations 1997* (WA) (Noise Regulations) at the closest affected units. Furthermore, as the ambient noise of traffic and general activity would exceed the noise from the building, the noise generated by the building would be generally inaudible from the closest residential units. However, given that the noise modelling was carried out on the basis of manufacture-provided information, as no Turbys were operating in Australia, the Tribunal considered it appropriate to impose strict conditions of approval requiring on-site testing once the turbines were in place, to ensure that they complied with the Noise Regulations, and the removal of the turbines if they did not achieve the assigned noise levels under the Noise Regulations.

In relation to orderly and proper planning, the Tribunal referred to the statement in the City's *Development and Design Policy* that development 'should incorporate ecologically sustainable design principles, while maximising the health, safety, comfort and productivity of people and places by … aiming to achieve high energy efficiency ratings in an accredited system for energy efficient building design and maintenance'. The Tribunal also had

[55] ***Turby wind turbine case*** at [68].

regard to cl 5.1 of SPP 2, which stated that planning decision-making should actively seek opportunities 'for improved environmental outcomes including support for development which provides for environmental restoration or enhancement', and cl 5.10 of SPP 2, which stated that planning decision-making should 'promote energy efficient development and urban design incorporating such issues as energy efficient building design [and] the use of alternative energy generation, including renewable energy, wherever appropriate'.[56]

The Tribunal's findings in relation to orderly and proper planning were as follows:

> '**The installation and operation of three Turby wind turbines on the roof of [the building] promotes an energy efficient environment, achieves the highest energy efficiency rating possible under the Green Star system, representing 'World Leadership', and generally improves environmental outcomes by innovative use of alternative energy generation.** While the Turbys would generate only a tiny fraction of the overall energy requirements of [the building], they utilise a source of **freely available, renewable energy to achieve an actual net reduction in carbon dioxide emissions**; in combination with other sustainable development initiatives referred to earlier, in Mr Lee's [an electrical engineer] words, they 'will provide a **significant reduction in the carbon footprint** of [the building]' and achieve a six star 'World Leadership environmental rating; and **increase public awareness of the pressing need for environmentally sustainable development and the availability of renewable energy options**. The proposal appropriately and admirably demonstrates, to quote Mr Davies [the project architect], that:
>
> > 'Each and every building has the opportunity to minimise its carbon footprint and, moreover, the Turbys demonstrate the only appropriate naturally occurring and commonly available resource to the site – wind.'[57] (Emphasis in bold added)

[56] ***Turby wind turbine case*** at [85] – [87].
[57] ***Turby wind turbine case*** at [88].

Implications from the cases

ESD – a profound change in coastal and other planning

These cases show that sustainability principles have had a profound change in coastal and other urban and regional planning during the first decade of the new century. While consideration of direct environmental impacts of development and subdivision has long been regarded as an element of orderly and proper planning,[58] the identification, development and application of ESD principles in recent years has significantly expanded, and has given far greater definition and direction to, the scope of planning considerations.

This is perhaps best illustrated by reference to the ***Moore River subdivision case*** and the ***Tall Donkey Orchid case***.

As recently as the last year of the 20th century, the Commission adopted an ODP for Moore River Company Pty Ltd's land that expressly contemplated the creation of a new coastal town, accommodating approximately 13,500 residents in approximately 5,000 dwellings, about 30 kilometres north of the Perth metropolitan region. The adoption of the ODP was consistent with the pattern of linear coastal development which occurred in this State, and in the country generally, throughout the second half of the 20th century. South Guilderton is about the same distance from the Perth CBD as is Mandurah. If the same coastal planning framework and considerations

[58] As was made explicit in the title of the *Environmental Planning and Assessment Act 1979* (NSW) 30 years ago.

as operated during the second half of the 20th century had continued for even one further decade, the likelihood is that the southern linear expansion of Perth would have been matched by a northern linear expansion.

As the Commission correctly contended in the ***Moore River subdivision case***, the planning framework, and in particular the State's strategic sustainability framework, had developed during the first five years of the new century to the point where it required a new approach under which the northern boundary of Perth's urban expansion was, in effect, defined at the northern boundary of the metropolitan region. In contrast, in the absence of ESD principles, the southern boundary of Perth's urban expansion now extends south through the Peel region. It would be fair to characterise the ***Moore River subdivision case*** as a watershed in WA coastal planning.

The ***Tall Donkey Orchid case*** also demonstrates the significance of the change in planning brought about by ESD principles. It could **not** have been concluded in that case that there was **likely to be a significant direct impact** in consequence of the carrying out of the subdivision on the declared rare flora population on the site. However, the Tribunal readily found that the subdivision posed **a threat of serious or irreversible environmental damage** and that there was scientific uncertainty as to the environmental damage posed by the threat. The precautionary principle required the Tribunal to 'assume that the threat of serious or irreversible environmental damage is no longer uncertain but is a reality' and permitted 'the taking of preventative measures without having to wait until the reality and seriousness

of the threats become fully known'.[59] The Tribunal determined that the disputed condition was appropriate and reasonable, because it mitigated the anticipated threat of environmental damage, it was proportionate and cost-effective.

Definition not essential

The Tribunal determined in the ***Moore River subdivision case*** that the meaning of the expression 'sustainable use and development of land' is 'informed by' the Sustainability Strategy and State planning policies.[60] Furthermore, the cases show that the main principles of ESD are now sufficiently well understood that explicit articulation and definition of these principles in planning legislation is not required. Thus, in the ***Tall Donkey Orchid case***, the Tribunal applied the precautionary principle without any specific reference to that concept in the statutory and strategic planning framework.

ESD v amenity – the planning challenge for the 21st century?

An interesting question which could have arisen, but which ultimately did not require consideration, in the ***Turby wind turbine case*** was how, in the exercise of planning discretion, a consent authority would balance and resolve a conflict between ESD considerations in favour of a proposal with amenity considerations against it.

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[59] ***Telstra*** at [150] and [156] applied in the ***Tall Donkey Orchid case*** at [43] – [45].
[60] ***Moore River subdivision case*** at [95].

In the ***Turby wind turbine case***, the City argued that when the adverse impacts of the proposed development, in terms of visual and acoustic amenity, were measured against the benefit to the developer and/or the broader community through having the wind turbines installed, 'the net benefit would be negligible and certainly insufficient to justify the support for the proposal in proper and orderly planning terms'.[61] It was common ground that, although the Turbys would achieve an actual net reduction in carbon dioxide emissions and would enable the achievement of a six star 'World Leadership' environmental rating, the Turbys would only generate enough energy to operate 16 laptop computers for five hours each day or 82 20-watt light fittings for six hours each day.[62]

However, as the Tribunal found that the proposed wind turbines would have limited and acceptable visual impacts on both the private and public domain, and compliant and generally no discernible acoustic impacts on the closest residential units, the development did not have the adverse impacts contended by the City. It was, therefore, unnecessary to seek to balance competing ESD and amenity considerations in the exercise of planning discretion.

However, the Chief Judge of the Land and Environment Court has considered this issue in a case where there was a clear conflict between ESD considerations in favour of a proposed wind farm consisting of 69 wind turbines in a rural landscape and visual and acoustic amenity considerations

[61] ***Turby wind turbine case*** at [81].
[62] ***Turby wind turbine case*** at [36].

against the proposal.[63] His Honour came down firmly in favour of ESD over amenity. The Court's judgment commenced as follows:

> 'The insertion of wind turbines into a non-industrial landscape is perceived by many as a radical change which confronts their present reality. However, those perceptions come in differing hues. To residents, such as members of Taralga Landscape Guardians Inc (the Guardians), the change is stark and negative. It would represent a blight and the confrontation is with their enjoyment of their rural setting.
>
> To others, however, the change is positive. It would represent an opportunity to shift from societal dependence on high emission fossil fuels to renewable energy sources. For them, the confrontation is beneficial – being one much needed step in policy settings confronting carbon emissions and global warming.
>
> Resolving this conundrum – the conflict between the geographically narrower concerns of the Guardians and the broader public good of increasing the supply of renewable energy – has not been easy. However, I have concluded that, on balance, the broader public good must prevail. The reasons for doing so are set out in the body of this judgment.'[64]

Interestingly, however, the Court considered that the visual and acoustic impacts of the wind turbines on two particular residential properties were so severe as to require the imposition of a condition of development approval giving the owners an option to insist on the developer purchasing their properties, at market value, in what was, essentially, a private compulsory acquisition.[65] One of the properties was owned by a couple in their 70s. Interestingly, also, the Court imposed a condition of development approval, on the basis of 'a "polluter pays" approach to environmental harm', requiring the developer to pay $1,500 to the NSW Wildlife Information

[63] ***Taralga Landscape Guardians Inc v Minister for Planning & Anor*** [2007] NSWLEC 59; (2007) 161 LGERA 1 (***Taralga***).
[64] ***Taralga*** at [1] – [3].
[65] ***Taralga*** at [244] – [253]. See also [161] – [168] and [191] – [199].

and Rescue Service for each wedge-tailed eagle killed by the operation of wind turbines.[66]

ESD as a double-edged sword

One might have thought that ESD principles would be factors warranting refusal, rather than approval, of planning proposals. Sustainability is a relatively new concept that development during the last century, and earlier, did not have to address as a regulatory consideration. Intuitively, ESD is anti-development.

However, in three of the five decisions discussed earlier, ESD was a or the factor warranting approval of the planning proposal. In only two cases did ESD require refusal of the proposal or the imposition of a condition contended for by the original decision-maker.

Interestingly, therefore, ESD appears to be a double-edged sword in coastal and other planning. This was most clearly demonstrated in the ***Mount Lawley fill case*** and the ***Turby wind turbine case***. In both cases, it might be said that the original decision-maker was 'hoisted on its own ESD petard'.[67]

[66] ***Taralga*** at [258] – [270]. The evidence suggested that, even with a range of amelioration measures, the development would result in the deaths of up to three eagles a year.
[67] William Shakespeare, *Hamlet*, act II, scene iv, line 207: 'For 'tis the sport to have the engineer Hoist with his own Petar; and't shall go hard'.

In the ***Mount Lawley fill case***, the Commission argued that Mount Lawley Pty Ltd should not be allowed to utilise 101,000 cubic metres of fill from its land which was reserved for the highway so that the State could avoid the cost of importing 50,000 cubic metres of fill to construct the road. However, SPP 1 and the Commission's own *Development Control Policy 1.2 – General Principles* warranted, in the circumstances of the case, that Mount Lawley Pty Ltd, and not the State, should utilise the resource.

In the ***Turby wind turbine case***, the City argued that the Turbys should be refused consent, whereas its *Development and Design Policy* required development to incorporate ecologically sustainable design principles to achieve high energy efficiency ratings on an accredited system for energy efficient building design and maintenance, which is precisely what the Turbys would achieve.

Conclusion

During the first half-decade of the new century, significant changes took place in Western Australian planning law. The Government and its agencies carried out strategic and statutory planning for sustainability and the Parliament created a new and cohesive administrative review jurisdiction incorporating planning cases.

During the second half-decade of the century, the State Administrative Tribunal has begun to consider the application of ESD principles in planning

cases before it. While the small number of cases concerning sustainability issues have already had profound implications for coastal and other urban and regional planning, the Tribunal has thus far seen only the very tip of the ESD iceberg.

The Tribunal has yet to even address key ESD principles of inter-generational and intra-generational equity, biological diversity and internationalisation of environmental costs. It has yet to grapple with the fascinating challenge of how to balance ESD and amenity considerations in the exercise of planning discretion. Interesting times lie ahead.