



Town of
Cambridge

**DEVELOPMENT
COMMITTEE MEETING**

TUESDAY 14 DECEMBER 2021

**ATTACHMENT 1 OF 3 TO ITEM
DV21.114**

PROSSER AND TOWN OF COTTESLOE [2021] WASAT 115

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : PLANNING AND DEVELOPMENT ACT 2005 (WA)

CITATION : PROSSER and TOWN OF COTTESLOE [2021]
WASAT 115

MEMBER : MS M CONNOR, MEMBER

HEARD : 16 AND 17 FEBRUARY 2021, WRITTEN
SUBMISSIONS RECEIVED 18 MARCH 2021,
15 AND 30 APRIL 2021, FURTHER WRITTEN
SUBMISSIONS RECEIVED 5, 12 AND
20 AUGUST 2021

DELIVERED : 2 SEPTEMBER 2021

FILE NO/S : DR 195 of 2020

BETWEEN : DAVID PROSSER
Applicant

AND

TOWN OF COTTESLOE
Respondent

Catchwords:

Town planning - Development application - Additions and alterations to existing dwelling - Determination of natural ground level - Extent of variation to maximum height permitted - Interpretation of cl 5.7.5 of *Town of Cottesloe Local Planning Scheme No 3* - Access to views of significance - Impact on character of streetscape - Impact on amenity of adjoining properties - Visual privacy - Site works - Compatibility with setting

Legislation:

Metropolitan Region Scheme

Planning and Development (Local Planning Schemes) Regulations 2015 (WA),
Sch 2, cl 1, cl 63, cl 67, cl 67(m), cl 67(n), cl 90(2)

Planning and Development Act 2005 (WA), s 252(1), s 257B, s 257B(3)

Planning Regulations Amendment Regulations 2020 (WA), Pt 2, reg 44(2),
reg 74(2), Pt 8, Pt 9

State Administrative Tribunal Act 2004 (WA), s 27(2)

State Planning Policy 7.3 - Residential Design Codes Volume 1 (2021), cl 5.1.3,
cl 5.1.4, cl 5.2.2, cl 5.3.7, cl 5.4.1

Town of Cottesloe Local Planning Scheme No 3, cl 1.6, cl 4.2.1, cl 5.1, cl 5.1.3,
cl 5.2.2, cl 5.3, cl 5.3.2, cl 5.3.3, cl 5.3.7, cl 5.4.1, cl 5.7, cl 5.7.1, cl 5.7.2,
cl 5.7.5, cl 5.7.5(d), cl 5.7.2(b), cl 9.2(a)(b), cl 10.2.1

Result:

Application for review allowed

Decision of respondent set aside and a decision substituted

Category: B

Representation:

Counsel:

Applicant : Mr B Moharich

Respondent : Mr MD Reid

Solicitors:

Applicant : Moharich & More

Respondent : Jackson McDonald

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

APP Corporation Pty Ltd and City of Perth [2008] WASAT 291

Canning Mews Pty Ltd and City of South Perth [2005] WASAT 272;
(2005) 41 SR (WA) 79

Chiefari v Brisbane City Council [2005] QPELR 500

Empire Securities Pty Ltd & Ors and Western Australian Planning Commission
[2005] WASAT 98
Lee and City of Cockburn [2008] WASAT 268
Loxton and City of Fremantle [2015] WASAT 46
Puma Energy Australia and City of Cockburn [2016] WASAT 36
Sapphire Developments Alliance Pty Ltd and City of Nedlands
[2020] WASAT 149
Sunbay Developments Pty Ltd and Shire of Kalamunda [2006] WASAT 74;
(2006) 150 LGERA 116
Tempora Pty Ltd v Shire of Kalamunda (1994) 10 SR (WA) 296
Tenacity Consulting v Waringah [2004] NSWLEC 140

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 Mr David Prosser (applicant) seeks review by the Tribunal, under s 252(1) of the *Planning and Development Act 2005* (WA) (PD Act), of the decision of the Town of Cottesloe (Town, Council or respondent) to refuse to grant development approval for alterations and additions to an existing single house on Lot 37 (No 7) Avonmore Terrace, Cottesloe (subject land or site).

2 In these reasons, the Tribunal will firstly describe the site and locality, the proposed development, and the applicable planning framework. The Tribunal will then set out the five principal issues for determination in these proceedings and address each of the issues in turn.

3 The Tribunal heard expert evidence from Mr Howard Charles Mitchell, a landscape architect and Mr Jeremy Richard Hofland, a town planning consultant called on behalf of the applicant; and Mr Peter Hillman, a landscape architect and Mr Thomas James Hockley, a town planning consultant, called on behalf of the respondent. The Tribunal also admitted into evidence witness statements from Mr Paul Hayter, an owner of No 5B Avonmore Terrace, Cottesloe (No 5B) and Ms Sue Galvin, the owner of Unit 1, 5 Princes Street, Cottesloe (Unit 1/No 5), who were not required for cross-examination.

4 Further, the Tribunal, together with representatives of the parties and their experts, had the benefit of a view of the subject land and surrounds including, No 5A Avonmore Terrace, Cottesloe (No 5A), No 5B and Unit 1/No 5.

5 For the reasons given below, the Tribunal has determined that 'the correct and preferable decision at the time of the decision upon the review', under s 27(2) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act) in the exercise of planning discretion, is to grant development approval for the proposed development under the *Metropolitan Region Scheme* (MRS) and the *Town of Cottesloe Local Planning Scheme No 3* (LPS 3 or Scheme) subject to four conditions.

Subject land and localtiy

6 The subject land is more particularly described as Lot 37 on Deposited Plan 3392 being the whole of the land contained in Certificate of Title Volume 1763 Folio 129 and is 1,031m² in area.

The lot is rectangular in shape, being 22.8 metres wide and 45.2 metres deep.

7 The subject land is located on the south-western corner of the intersection of Princes Street and Avonmore Terrace, with Avonmore Terrace providing the primary street frontage to the subject land.

8 The site slopes from east to west, from a high point of approximately 17.5 metres Australian Height Datum (AHD) at the Avonmore Terrace boundary down to approximately 12.8 metres AHD at the western (rear) boundary.¹

9 The existing architecturally-designed two storey dwelling on the site was constructed in the late 1980's, together with high retaining walls which are visible along Princes Street and a portion of the western boundary. These existing walls elevate the western end of the site by approximately 2.4 metres above the adjoining street level of Princes Street.²

10 The existing dwelling is listed as a 'Category 6' in the Town's Municipal Inventory, noting that the dwelling is 'a clever reinterpretation of Federation architecture by one of Perth's innovative architects, but as a recent construction this house has no heritage significance'.³

11 Number 5 Avonmore Terrace (No 5), the land immediately to the south of the site, is developed with three multiple dwellings. Due to the topography of the lot, No 5 presents as a two storey development to Avonmore Terrace (eastern elevation) and three storeys on the western (rear) elevation. The ground level of the rear portion of No 5 is approximately 1.8 metres above the adjacent ground level of the subject land and the finished floor level (FFL) of the ground floor multiple dwelling (No 5A) is raised approximately another 500 millimetres above that level.

12 The land immediately to the west of the subject land, No 5 Princes Street, contains four grouped dwellings that are orientated with a westerly outlook toward the Indian Ocean. Unit 1/No 5 and portion of Unit 2/No 5 Princes Street share a common boundary with the subject land. The ground floor level of Unit 1/No 5 is approximately 2.5 metres below the ground level of the subject land. Unit 1/No 5 has

¹ Site Plan (Exhibit 15).

² Respondent's s 24 bundle of documents, dated 23 October 2020, (Exhibit 3) page 336.

³ Respondent's s 24 bundle of documents, dated 23 October 2020, (Exhibit 3) pages 337.

recently been extensively redeveloped, including an upper level addition.

- 13 The land immediately to the north of the subject land is developed with numerous two storey single dwellings, and the land on the eastern side of Avonmore Terrace comprises two storey single and grouped dwellings.

The proposal

- 14 In January 2018, Horizon Design on behalf of the applicant lodged an application with the Town seeking approval for alterations and additions to the existing dwelling on the subject land. The development application was advertised for public comment and four submissions objecting to the proposed development were received. An amended proposal was subsequently submitted by Rowe Group on behalf of the applicant on 19 September 2018, with further additional supporting information being provided on 28 November 2018 and a Visual Impact Statement submitted on 29 May 2020.⁴ The amended proposal was advertised and two submissions objecting to the amended proposal were received on behalf of three landowners.

- 15 Officers of the Town prepared a report that forms part of the of the Town of Cottesloe Ordinary Council Meeting Minutes held on 28 July 2020, which contained a planning assessment of the amended proposal and a recommendation that development approval be granted for the amended proposal subject to six conditions and three advice notes. The Council at its meeting of 28 July 2020 resolved to refuse to grant development approval for 'front and rear alteration and additions' to the existing dwelling on the subject land for the following reasons:

1. The height, bulk and scale of the proposed west-facing alterations and additions will have a detrimental impact on the amenity of the adjoining southern and western properties and will not maintain access to views of significance from the adjoining southern lot.
2. The proposed raised outdoor kitchen, extended pool deck, and external western stairs do not satisfy the design principles relevant to Visual Privacy in the Residential Codes and will result in significant overlooking of the adjoining western property.

⁴ Respondent's s 24 bundle of documents, dated 23 October 2020, (Exhibit 3) pages 209-258.

16 The rationale provided in the minutes of the Ordinary Council Meeting of 28 July 2020 states:

1. The proposed development does not warrant a variation to the maximum permitted building heights specified in clause 5.7.2 of Local Planning Scheme No. 3, having regard to the provisions of clause 5.7.5 in the Scheme.
2. The proposed development does not satisfy the design principles relevant to Visual Privacy in the Residential Design Codes.⁵

17 On 26 August 2020, the applicant sought review by the Tribunal of the Council's decision to refuse to grant development approval.

18 The applicant, at the commencement of the final hearing, tendered a set of scaled A3 plans of the proposed development that the applicant sought approval for. It was agreed by the parties that the A3 plans are the same as the package of A4 plans found at Tab 9 of the respondent's s 24 bundle of documents (Exhibit 3), with the exception of the Town's refusal stamp. For convenience, the Tribunal marked the set of A3 plans as Exhibit 15.

19 Mr Hofland helpfully summarised the alterations and additions/extensions to the existing dwelling (proposed development or proposal) as follows:⁶

a) Ground Floor Western Boundary

- i. New rectangular shaped bedroom at a floor level 686mm lower than the existing ground floor (13.024m in lieu of 13.71m);
- ii. Conversion of existing bedroom to a walk-in robe and ensuite bathroom;
- iii. Replacement of existing northern wall of the hallway with bifold doors;
- iv. Extension to the existing pool area to the west, increasing the ground level in this location by approximately 0.7m, with glass pool safety fence, gate and steps to the existing ground level;
- v. New heptagonal shaped outdoor kitchen with a floor level of 13.66[m] to integrate with the existing floor level of the adjacent pool area to the north, representing

⁵ Respondent's s 24 bundle of documents, dated 23 October 2020, (Exhibit 3) page 354.

⁶ Witness Statement of Jeremy Richard Hofland dated 22 January 2021 (Exhibit 12) at para 31.

an increase of approximately 750mm above the existing natural ground level to the west.

b) Upper Floor Eastern Boundary

- i. New porch/entry foyer to the Avonmore Terrace frontage;
- ii. New ensuite bathroom and walk in robe to the existing master bedroom.

c) Upper Floor Western Boundary

- i. New rectangular shaped library at a floor level 686mm lower than the existing ground floor (16.074m in lieu of 16.76m); and
- ii. Demolition of existing octagonal balcony and construction of a larger heptagonal balcony with a minimum setback of 3465mm to the western boundary.

20 The parties described the two components of the proposed development that are contentious as:

- an extension at the south-western corner comprising a new bedroom/en-suite/walk-in-robe at ground floor level; and a library at the first floor level (library extension); and
- an extension of the north-western corner comprising the extension of the existing balcony at the first floor level in a westward direction; and underneath that balcony, an outdoor kitchen and extension of pool deck area, which includes an external staircase connecting the two areas (balcony extension).

Planning framework

21 The subject land is zoned 'Urban' in the MRS and 'Residential' with a density coding of R30 under LPS 3. Schedule 2 - Deemed Provisions for Local Planning Schemes of the *Planning and Development (Local Planning Schemes) Regulations 2015* (WA) (deemed provisions) have effect as part of LPS 3 due to the operation of s 257B of the PD Act.

22 One of the purposes of LPS 3 is to control and guide land use and development. Clause 1.6 of LPS 3, sets out the aims of the Scheme. The relevant aims relating to this matter include:

...

(f) sustain the amenity, character and streetscape of the Scheme area;

...

(n) protect the integrity, amenity and scenic quality of the coastal landscape;

(o) ensure that proper regard is given to the needs of the local community in the determination of land use and development proposals;

(p) ensure that development and the use of land within the district complies with accepted standards and practices for public amenity and convenience; and

(q) recognise the principle of the maintenance and enhancement of important views to and from public places.

23 Cl 4.2.1 of the Scheme set outs the objectives for the Residential zone, which amongst other things, seeks to 'encourage residential development only [if the development] is compatible with the scale and amenity of the locality'.

24 Clause 5.1 of the Scheme provides that:

[a]ny development of land is to comply with the provisions of the Scheme and unless otherwise provided for in the Scheme, all development shall comply with the requirements specified in Table 2 - Development Requirements.

25 Table 2 - Development Requirements (Table 2) specifies the following requirements for 'Residential Development'⁷ in the Residential zone:

⁷ 'Residential Development' is defined in cl 5.3.2 of LPS 3 as meaning 'any development for residential purposes dealt with by the Residential Design Codes'.

TABLE 2 - DEVELOPMENT REQUIREMENTS

ZONE	MAXIMUM PLOT RATIO	MAXIMUM SITE COVER	MINIMUM BOUNDARY SETBACKS	MAXIMUM HEIGHT (Refer clause 5.7)
a) Residential development	In accordance with Residential Design Codes	In accordance with Residential Design Codes	In accordance with Residential Design Codes	2 storey

26 Clause 5.2.2 of the Scheme provides:

Unless otherwise provided for in the Scheme, the development of land for any of the residential purposes dealt with by the Residential Design Codes is to conform to the provisions of those Codes.

27 The applicable Residential Design Codes in this instance is *State Planning Policy 7.3 - Residential Design Codes Volume 1 (2021) (R Codes)*.

28 Clause 5.3 of the Scheme sets out the special application of the R Codes. Clause 5.3.3 imposes design standards in respect of height and states:

Building Height

Despite anything contained in the Residential Design Codes to the contrary, the building height for Residential Development shall comply with the provision of clause 5.7.

29 Clause 5.7 of the Scheme sets out building height provisions within the Scheme Area. Clause 5.7.1 of the Scheme contains definitions for 'building height', 'storey' and 'wall height'. However, it is common ground, and the Tribunal concurs, that the defined terms of 'building height' and 'wall height' in cl 5.7.1 of LPS 3, which are relevant terms in the determination of this case, are inconsistent with the terms as now defined in the deemed provisions.⁸ In accordance with s 257B(3) of the PD Act, where a local planning scheme provision is inconsistent with a deemed provision, the deemed provision prevails and the other provision is to the extent of the inconsistency of no effect.

⁸ Regulation 44(2) of Pt 2 of the *Planning Regulations Amendment Regulations 2020 (WA)* which came into effect on 15 February 2021, amended Sch 2 cl 1 of the *Planning and Development (Local Planning Schemes) Regulations 2015 (WA)* (deemed provisions) by inserting a number of new definitions. Three of these new definitions are central to these proceedings, namely, 'natural ground level', 'building height' and 'wall height'.

30 The effect is that the defined terms in the deemed provisions prevail, and as such, in cl 5.7:

'Building height' in relation to a building that is used for residential purposes means:

... the distance between the point where the base of the **wall** meets the **natural ground level** and measured to the highest point of a wall or roof of a **building** vertically above that point (for measurement guidance refer to **Figure Series 7**) excluding minor projections.⁹

and, 'wall height' in relation to a building that is used for residential purposes means:

... the vertical distance between the point where the base of the **wall** meets the **natural ground level** at the boundary immediately adjacent to the wall to the roof or top of the parapet.¹⁰

31 The remaining subclauses of cl 5.7 of LPS 3 provide as follows:

5.7.2 All buildings shall comply with each of the following maximum heights, as applicable to the building -

- (a) 1 storey
 - (i) *Building Height (inclusive of wall and roof height; including to top of a parapet) - 6.0 metres maximum height.*
- (b) 2 storeys
 - (i) *Building Height - 8.5 metres maximum height.*
 - (ii) *Wall Height (to level of roof) - 6.0 metres maximum height.*
 - (iii) *Wall Height (to top of a parapet) - 7.0 metres maximum height.*
- (c) More than 2 storeys
 - (i) *Building Height - 8.5 metres, plus 3.0 metres for each storey more than 2, maximum height.*
 - (ii) *Wall Height (to level of roof) - 6.0 metres, plus 3.0 metres for each storey more than 2, maximum height.*

⁹ R Codes - Appendix 1 - Definitions.

¹⁰ R Codes - Appendix 1 - Definitions.

- (iii) *Wall Height (to top of a parapet) - 3.0 metres for each storey up to the highest storey, plus 4.0 metres for the highest storey, maximum height.*

5.7.3 Unless otherwise provided for in the Scheme, all development shall comply with the requirements of Table 2 in relation to height.

...

5.7.4 In the Residential Zone the local government may permit a third storey to be located within the roof space of a dwelling, provided that the development complies with the maximum wall and roof height requirements stipulated in clause 5.7.2 and also provided that, in the opinion of the local government, the dwelling will retain the appearance of a two-storey dwelling and will not unduly adversely affect local amenity.

5.7.5 In the case of proposed alterations, additions or extensions to existing dwellings in the Residential, ... zones, the local government may vary the maximum heights specified in Table 2 and clause 5.7.2, where in its opinion (sic) warranted due the circumstances and merits of the proposal, having regard to -

- a) the existing heights of the dwelling;
- b) any relevant Local Planning Policy or Design Guidelines;
- c) any heritage considerations relating to the dwelling;
- d) relevant planning considerations identified in clause 67 of the *Planning and Development (Local Planning Schemes) Regulations 2015*;
- e) adequate direct sun into buildings and appurtenant open spaces;
- f) adequate daylight to major openings into habitable rooms;
- g) access to views of significance;
- h) building design to ameliorate the visual effects of height including consideration of setting-back the side walls of added storeys from the side walls of existing buildings; and

- i) the amenity of adjoining properties, including road and public open space reserves, and the character of the streetscape; 24

and subject to the development -

- a) not exceeding the existing number of storeys or, where that is already exceeded, not exceeding the existing number of storeys;
- b) Not exceeding the height of the existing dwelling, unless the Council is satisfied with the design and its implications having regard to the above criteria; and
- c) In the Foreshore Centre Zone, the development not exceeding the requirements of clause 6.4.3.1 (a) and (b).

An application for planning approval requiring the exercise of the discretion under this clause is to be advertised in accordance with clause 9.4 and the notice of the application is to include such reference to the variation sought to any height standard or requirement as the local government thinks fit.

32 In the context of this application, cl 5.7.2(b) in conjunction with Table 2 of the Scheme set out the default height provisions, which allow for two storeys with a wall height of 6.0 metres, and a maximum building height of 8.5 metres. In relation to alterations, additions or extensions to existing dwellings, which is the case in this instance, cl 5.7.5 provides discretion to allow variations to those maximum heights provided the matters set out in a) to i) and then a) to c) of cl 5.7.5 are met.

33 Clause 10.2.1 of LPS 3, which specifies the matters to be considered in determining an application for development approval, has been effectively replaced by cl 67 of the deemed provisions.¹¹ In addition, in this case, cl 5.7.5(d) the Scheme expressly requires a consideration of 'relevant planning considerations identified in clause 67' of the deemed provisions. The relevant matters in cl 67 of the former deemed provisions to which the Tribunal is to have due regard to in determining this application are:¹²

¹¹ *Puma Energy Australia and City of Cockburn* [2016] WASAT 36, at [36]-[47].

¹² The Tribunal notes that reg 74(2) of Pt 2 of the *Planning Regulations Amendment Regulations 2020*, which came into effect on 15 February 2021, amended Sch 2 cl 67 of the deemed provisions. However, cl 90(2) of the amended deemed provisions provides that Pt 8 and Pt 9 made by the *Planning Regulations Amendment Regulations 2020* do not apply in relation to an application for development approval made before

- the aims and provisions of the Scheme (subclause (a));
- the requirements of orderly and proper planning (subclause (b));
- any approved State planning policy (subclause (e));
- the compatibility of the development with its setting (subclause (m));
- the amenity of the locality (subclause (n));
- the history of the site where the development is to be located (subclause (w)); and
- any submissions received on the application (subclause (y)).

34 The term 'amenity' is referred to several times in the planning framework. 'Amenity' as defined in cl 1 of Sch 2 of the deemed provisions 'means all those factors which combine to form the character of an area and includes the present and likely future amenity'. As articulated by the Tribunal in *Sapphire Developments Alliance Pty Ltd and City of Nedlands* [2020] WASAT 149 at [38], planning law in relation to the assessment of amenity impact is well settled. The approach adopted is set out in *Tempora Pty Ltd v Shire of Kalamunda* (1994) 10 SR (WA) 296, where the Town Planning Appeal Tribunal observed at 304 that 'the determination of the amenity of the locality is a question of fact and consists of three parts: the existing amenity, the manner in which the proposed use will affect the existing amenity and the degree of impact on the locality'. Consistent with the definition of amenity in cl 1 of the deemed provisions, *Sunbay Developments Pty Ltd and Shire of Kalamunda* [2006] WASAT 74; (2006) 150 LGERA 116 at [21] also confirmed that an evaluation of amenity should take account of future amenity. Further, as articulated in *Canning Mews Pty Ltd and City of South Perth* [2005] WASAT 272; (2005) 41 SR (WA) 79 at [48]:

... in undertaking [the] objective inquiry [as to the character of the area that represents the state of amenity], a specialist planning tribunal is assisted not only by the expert opinions of town planners, but also by the views of residents [of the locality who] are often well placed to

commencement day. As the application for development approval was made prior to the commencement day, cl 67 of the 'former deemed provisions' apply in this case.

identify the particular qualities and characteristics which contribute to their residential amenity.

Issues for determination

35 At the commencement of the final hearing the parties agreed the following five issues for determination in this review:

- 1) What is the natural ground level that is to apply to the proposed development?
- 2) Does the proposed development comply with the development standards in respect of height set out in cl 5.7.2 of LPS 3?
- 3) If the answer to issue 2 is 'no', should a variation to the maximum height be granted in accordance with cl 5.7.5 of LPS 3 having regard to the consideration set out in that clause?
- 4) Whether the proposed development satisfies the requirements of the R Codes as incorporated by cl 5.2.2 and in particular -
 - i) lot boundary setbacks (cl 5.1.3);
 - ii) visual privacy (cl 5.4.1); and
 - iii) site works (cl 5.3.7)?
- 5) Whether the proposed development is considered acceptable having regard to those considerations in cl 67 of Sch 2 of the deemed provisions and in particular cl 67(m)?

36 The Tribunal will address each issue in turn.

What is the natural ground level that is to apply to the proposed development?

37 The height of the proposed development is in dispute between the parties and arises from the interpretation of the meaning given to 'natural ground level' (NGL), consequently, the parties have taken a different approach determining the NGL of the subject land.

38 The parties agree that prior to the recent amendments to the deemed provisions the definition of NGL as provided for in the R Codes applied in this case.¹³ Further, it is common ground that by way of the amended deemed provisions, the definition of NGL (definition) for the purposes of interpreting cl 5.7 of LPS 3 now applies. The definition reads as follows:

natural ground level, in relation to land subject to development, means -

- (a) the ground level specified in either of the following that applies to the land (or, if both of the following apply to the land, the more recent of the following) -
 - (i) a condition on an approval of a plan of subdivision that specifies a ground level;
 - (ii) a previous development approval for site works on the land that specified a ground level;

or

- (b) if paragraph (a) does not apply - the level of the land before any disturbance to the land relating to the development[.]

39 The default height provisions set out in cl 5.7 of the Scheme allow for two storeys with a wall height of 6.0 metres, and a maximum building height of 8.5 metres. NGL is the base line from which LPS 3 requires wall height and building height to be determined. Principally, the parties are in dispute as to the interpretation of para (a)(ii) of the definition.

40 While the parties agree that the bedroom extension exceeds the heights specified in cl 5.7.2 of the Scheme, this part of the development is not in issue. The heart of the dispute relates to the calculation of the building height and wall height for the balcony extension and library extension and flowing from that the extent of the variation sought by the proposed development. Exhibit 18, which is reproduced below, sets out the planning experts' height calculations and the extent of variation required based on their respective interpretation of NGL.

¹³ 'Natural ground level' is defined in Appendix 1 – Definitions of the R Codes as – 'The levels on a **site** which precede the proposed **development**, excluding any site works unless approved by the **decision-maker** or established as part of subdivision of the land preceding development'.

Comparison Table - Height of Upper Floor Balcony

	Maximum Height Permitted by LPS 3	Respondent's Assessment	Variation to Permitted Height (on Respondent's Assessment)	Applicant's Assessment	Variation to Permitted Height (on Applicant's Assessment)
Building Height	8.5m	10.25	1.75m	9.26m	0.76m
Wall Height	6m	Northern Wall = 8.1m	2.1m	6.76m	0.76m
		Western Wall = 8.3m	2.3m		

Comparison Table - Height of Library

	Maximum Height Permitted by LPS 3	Respondent's Assessment	Variation to Permitted Height (on Respondent's Assessment)	Applicant's Assessment	Variation to Permitted Height (on Applicant's Assessment)
Building Height	8.5m	8.9m	0.4m	8.27m	N/A - Compliant
Wall Height	6m	Southern Wall = 5.5m	N/A - Compliant	5.634m	N/A - Compliant
		Western Wall = 6.9m	0.9m		

41 The respondent acknowledges that there is a difference in the wording between the definition of NGL in the R Codes and the amended deemed provisions but says that there is in effect no practical change. Rather, the respondent submits that the definition 'picks up and encapsulates' the Tribunal's decision in *Lee and City of Cockburn* [2008] WASAT 268 (*Lee*). The respondent says, that para (b) of the definition is the ordinary definition of NGL and paragraphs (a)(i) and (a)(ii) are the provisos to the definition of NGL referred in the *Lee* decision.

42 The respondent submits that the use of the word 'for' in the expression 'a previous development approval for site works' means that the site works which specify a ground level are intended to be the object or purpose of the development approval.¹⁴ The respondent says that this interpretation is consistent with the Tribunal's decision in *Lee*, that is 'any proviso (such as a reference to site works or pre-existing development) must be read strictly in its context and therefore in a narrow sense to ensure that they include only such limited works which necessarily prepare the land for development'.¹⁵

43 The respondent relied on the expert evidence of Mr Hockley who gave evidence about two previous development approvals granted by the respondent relating to the site. The first being a new two storey dwelling in 1989 (1989 approval) and the second, in May 2011 for a 'swimming pool and alterations and two-storey additions to dwelling' (2011 approval). The respondent contends that the 1989 and 2011 approvals do not fall within ambit of para (a)(ii) of the definition because there is no development approval specifically approving site works on the subject land which specify a ground level, and as such, para (b) of the definition applies in the determination of NGL in the circumstances of this case.

44 The respondent concedes that the 2011 approval plans identify finished levels across the site and that development approval for the alterations and additions was granted as per those plans, however, it argues that approving the development application to which the plans relate does not reset the NGL for the site to those specified levels, but rather adjusts the finished levels to give effect to that proposed development. Mr Hockley is of the view that unless a specific development approval for site works specifying a ground level for the site has been approved, the NGL for all development applications (notwithstanding ground levels may have been shown on the plans) would revert to pre-development levels, that is, the original NGL of the site. He considers that in this case, the 'Application for Planning Approval' for the 2011 approval did not seek approval for site works specifying a ground level, and neither the 1989 approval nor the 2011 approval expressly granted development approved for site works on the land specifying a ground level.

45 The respondent submits that to interpret para (a)(ii) as advocated by the applicant would result in a resetting of NGL every time there is a

¹⁴ Respondent's closing submissions dated 15 April 2021 para 37.

¹⁵ *Lee* at [45].

development approved on land which includes increasing ground levels within the site. The respondent submits that this could lead to an abuse of height standards referenced to NGL by subsequent developments artificially seeking to take advantage of resetting the NGL.

46 The applicant submits that para (a)(ii) applies in this case as site works approved pursuant to previously granted and implemented development approvals have set the NGL across the site. The applicant relies on the 2011 approval which expressly approves the 'Swimming Pool and Alterations & Two-Storey Additions to Dwelling at 7 Avonmore Terrace COTTESLOE ... as shown on plans received on 4 April 2011. These plans include:-

- i) Ground Floor Plan - identifying, amongst other things, new Reduced Levels (RL) throughout the rear of the site, and annotations such as 'demolish all garden levels and dwarf walls, new RL 23.30'; and
- ii) West and East Elevations Plans - identifying the existing ground level as RL 22.645, and the new ground level of RL23.00.

47 The applicant says that the 2011 approval expressly permitted site works to be undertaken in accordance with the ground levels specified on the approved plans. The applicant also draws attention to the fact that a building licence was issued that includes plans reflecting the ground levels approved in the 2011 approval, and that the approval was implemented.

48 Mr Hofland holds the view that as the previous development approvals included site works on the land that specified a ground level, the NGL for the site is the ground level as shown on the plans that form part of the 2011 approval. He also gave the following oral evidence based on his previous 17 years' experience as a town planner working for six local governments in Western Australia that 'it would be highly unusual [for a local government] to receive a development application for an existing single residential lot just proposing site works for the land.'¹⁶ From his experience he observed that development applications typically sought simultaneous approval for buildings/structures and associated site works on the land.

¹⁶ ts 119, 17 February 2021.

49 For the reasons that follow, I prefer the evidence of Mr Holfand over the evidence of Mr Hockley in relation to this issue where they differ, and find that in the circumstances of this case, the applicant's submissions in relation to the proper interpretation of the term of NGL as defined in the amended deemed provisions is correct and respondent's submissions are incorrect. Consequently, the applicant's height calculations and extent of variation as set out in the Comparison Tables at [40] in respect to the proposed development are considered to be correct.

50 The respondent relies on a previous decision of the Tribunal in support of its interpretation of NGL. As the applicant submits, *Lee* is distinguishable because the factual scenario is different and there is nothing in the decision which suggests there was a development approval in place which specifically approved the NGLs. Further, the decision in *Lee* was based upon the definition of NGL in the R Codes, whereas the definition in the amended deemed provisions is much more explicit.

51 The definition is to be read as a whole and applied in a practical and common sense, and not in an overly technical way, and in a fashion that will best achieve its evident purpose.¹⁷ The definition speaks to the two approval processes available in Western Australia. Clearly, (a)(i) and (a)(ii) of the definition capture the instances where approvals under both processes have been granted that involve proposed alterations to site levels and if those alterations are shown on the approvals then the applicant gains the benefit of those levels. The purpose of (b) is to provide for scenarios that do not fall within (a).

52 I do not agree with the respondent's interpretation that in order for para (a)(ii) of the definition to apply, a separate development approval expressly for site works that specifies a ground level is required. On its face, the provision does not require that the previous development approval be only for site works. The respondent's interpretation requires the word 'only' to be read into the provision. I find that as long as the proposed ground levels form part of the development application and that development approval is issued granting approval in accordance with a specified ground level(s) (whether it be a specific condition or approved in accordance with the corresponding plans) and enacted, para (a)(ii) of the definition is enlivened. To find otherwise is counter intuitive to cl 63(i)(a)(ii) of the deemed provisions which

¹⁷ *Chiefari v Brisbane City Council* [2005] QPELR 500 at 502 (Wilson J).

requires 'existing and proposed ground levels over the whole of the land the subject of the application' to form part of the materials to accompany an application for development approval.¹⁸ This clause confirms that in order to determine whether to grant development approval to a proposed development consideration of ground levels is integral to the planning assessment.

53 Further, to find that because a development application does not specifically seek approval for site works on the 'Application for development approval' form but includes plans that plainly contemplate changes in ground levels is to ignore the maxim of 'substance over form'. Clearly, it is implicit from the annotations on the submitted plans that site works formed part of the development application and the Town, by approving the proposed development as shown on plans that clearly references ground levels, has simultaneously granted development approval to the swimming pool and alterations to the existing dwelling and associated site works. The form of the approval shows a clear intent to link the two 'works' together.¹⁹ This approach is consistent with Mr Hofland's evidence that development applications typically seek simultaneous approval for buildings/structures and associated site works on the land. The approach advocated by Mr Hockley results in piecemeal planning applications, which is less than desirable as it makes the overall assessment of the site works more difficult as the key element of the final built form is not shown and cannot be evaluated.

54 Further, the Tribunal does not share the respondent's concern that subsequent developments may artificially seek to take advantage of resetting the NGL resulting in an abuse of height standards reference to NGL because, firstly, any subsequent development that seeks to change ground levels on the site will need to be assessed on its merits and determined accordingly, and secondly, as accepted by Mr Hockley in cross-examination, on a sloping site, such as the subject land, a consequence of reverting back to the original NGL may also lead to areas within the site gaining additional height in locations where cutting has occurred.

¹⁸ Similarly, cl 9.2(a)b) of LPS 3, which preceded the former deemed provisions, required that existing and proposed ground levels over the whole of the land where to be provided as part of the information for every application for 'planning' approval.

¹⁹ 'Works' as defined in Sch 2 of the deemed provisions in the Planning Regulations.

Does the proposed development comply with the development standards in respect of height set out in cl 5.7.2 of LPS 3?

55 Given the findings above with respect to the interpretation of the definition of NGL and based on the evidence, the Tribunal finds that the bedroom extension at the north-eastern corner of the site (which is not in dispute or contested by the respondent) and the balcony extension of the proposed development do not comply the height standards as set out in cl 5.7.2 of LPS 3. On the correct interpretation of the definition of NGL the balcony extension exceeds the maximum building height as set out in cl 5.7.2 by 0.76 metres both in respect to wall height and building height.

If the answer to issue 2 is 'no', should a variation to the maximum height be granted in accordance with cl 5.7.5 of LPS 3 having regard to the consideration set out in that clause?

56 Clause 5.7.5 of LPS 3 (cl 5.7.5) provides discretion in the case of proposed alterations, additions or extensions to an existing dwelling in the Residential zone to vary the maximum heights specified in Table 2 and cl 5.7.2 of LPS 3, where, in the opinion of the decision-maker it is warranted due to the circumstances and merits of the proposed development having regard to the matters as set out in cl 5.7.5 at [31] above.

57 The applicant submits that it is only the balcony extension that invokes the requirement for assessment under cl 5.7.5 and that in the exercise of discretion the decision-maker's focus is on the extent of the variation, rather than an assessment of the development as a whole.

58 The respondent does not accept this approach and submits that cl 5.7.5 requires the decision-maker to have regard to the 'merits of the proposal'. The proposal being the development as a whole, that being all of the proposed alterations and extensions. The respondent argues that if other aspects of the proposed development are relevant to any of the nine matters set out in cl 5.7.5, the Tribunal should have regard to them because they form part of 'the proposal'.

59 The respondent's interpretation of cl 5.7.5 is correct. Clause 5.7.5 only applies to a 'proposal' that involves 'alterations, additions or extensions to existing dwellings' in specified zones. It is likely that a 'proposal' that triggers an assessment under cl 5.7.5 may involve both compliant and non-compliant parts, as is the case in this instance.

The precursor to the exercise of discretion to vary the maximum height requires the decision-maker to be of the opinion that the 'circumstances and merits of the proposal', having regard to the matters specified in the clause, warrants the exercise of discretion. It is clear on its face that 'the proposal' in cl 5.7.5 is the alterations, additions or extensions to the existing dwelling not just that part of the proposal that seeks variation to the maximum height requirements. Therefore, the Tribunal in its consideration will assess the proposed alterations and additions to the existing dwelling against the matters set out in cl 5.7.5.

(a) *the existing height of the dwelling*

60 The site falls approximately 7 metres from east to west and the design of the existing dwelling responds to the sloping nature of the site as the entrance and eastern portion of the dwelling is single storey and the second floor to the west is below the entrance level. The result is that the height of the building on the Avonmore Terrace frontage carries through to the western elevation.

61 The respondent argues that the highest part of the existing dwelling is at the western end of the dwelling and that by extending the footprint of the dwelling to the west, the built form as proposed will introduce additional bulk when viewed from the Princes Street streetscape and adjoining properties to the west and south.

62 The planning experts are of the opinion that the proposal is consistent with the existing heights of the dwelling and the visual experts agree that the proposal would not be out of character with the broader surrounding area and will not detract from the views experience from the public domain.

63 The Tribunal is satisfied that the proposal is harmonious with the existing heights of the dwelling as it is designed to integrate with the height and floor levels of the existing dwelling and is in the same style and character of the existing dwelling. The roof form extends as a gable westward with the north western portion echoing the existing turret roof form.

(b) *any relevant Local Planning Policy or Design Guidelines*

64 It is agreed that there are no relevant policies or guidelines.

(c) *any heritage consideration relating to the dwelling*

65 The parties agree that while the house is listed on the Town of Cottesloe's Municipal Inventory, it has no heritage significance which would invoke a consideration under this limb of cl 5.7.5.

(d) *relevant planning considerations identified in cl 67 of the deemed provisions*

66 The relevant planning considerations identified in cl 67 of the former deemed provisions to which the Tribunal is to have due regard to in determining this application are set out at [33] of these reasons. The parties agree that subclauses (m) and (n) are of particular import in this review.

67 The respondent asserts that the height, size and location of the upper floor balcony is incompatible with its setting, which results in adverse amenity impacts on adjoining properties. Mr Hockley expressed the opinion that significant additional building bulk and scale will be introduced into the streetscape and locality through the extension of the ground and upper floors of the existing dwelling to the west and that access to views to the coast are likely to be impacted by the proposed extension, particularly from adjacent and adjoining neighbouring properties to the north and south of the subject land.

68 The amenity impacts of the proposal and the compatibility of the development with its setting are considerations addressed in issue 3(a); 3(g); 3(h); 3(i) and issue 4 - visual privacy and site works. On balance for the reasons given above and below, the Tribunal finds that the proposal is compatible with its setting and the degree of the impact on the amenity of adjoining properties is acceptable.

(e) *adequate direct sun into buildings and appurtenant open spaces*

69 The evidence of the planning experts is that the proposal does not adversely affect the capacity for adequate direct sun.

(f) *adequate daylight to major openings to habitable rooms*

70 The evidence of the planning experts is that the proposal does not adversely affect the capacity for adequate daylight into habitable rooms.

(g) *access to views of significance*

71 The respondent in its Statement of Issue Facts and Contentions (SIFC) contends that the balcony extension will obstruct some important views of the ocean and horizon currently experienced and enjoyed by users of the roadway and footpaths in the vicinity of the intersection of Princes Street and Avonmore Terrace, thereby having an adverse effect on the amenity of the locality.²⁰ No expert evidence was adduced by the respondent to support this contention.

72 Mr Mitchell as part of his visual impact assessment (VIA) considered the visual impact of the proposal on the public domain. He concludes that significant views are not adversely affected, and the extensions do not adversely affect the public's amenity.²¹ In the Joint Witness Statement of the Landscape Architects, Mr Mitchell and Mr Hillman agree the following in respect to public amenity:

- 1) the vista looking west down Princes Road is a significant view;
- 2) the proposal may be considered prominent in some locations within the public domain but would not be considered out of character within the broader surrounding area; and
- 3) significant views within the public domain will not be adversely affected. The development has limited impact on the vantage points within the surrounding context and does not detract from the view experience from public areas.

73 On the evidence I find that the proposed development is in keeping with the character of the locality and will not adversely affect views of significance from the public domain.

74 The respondent in its SIFC also asserts that the proposal will have an adverse effect on views of significance from neighbouring properties, citing No 14 Princes Street, No 16 Princes Street, No 5A and No 5B. No evidence was adduced in respect to No 14 and No 16 Princes Street and the visual experts, in oral evidence, agree that the current views obtained in the north/north westerly directions from No 5A are impeded by the planting along the southern boundary of the

²⁰ Respondent's SIFC dated 23 October 2021 (Exhibit 2) para 61(e).

²¹ Witness Statement of Howard Charles Mitchell dated 4 February 2021 (Exhibit 11) para 63.

site and would be further impacted if a boundary wall was erected on that boundary.

75 The respondent in its closing submissions maintained that the proposed development, in particular the library extension, will have a significant detrimental impact on the views of significance currently enjoyed by the owners of No 5B.²² Mr Hayter in his evidence refers to the west and north-west facing outdoor living area of No 5B, which has been integrated (by the inclusion of bi-fold doors) with the lounge and kitchen areas, as an area that enjoys views of the ocean, Rottnest Island and the Norfolk Island pine trees. He is concerned that the library and balcony extensions will have a detrimental impact on the views enjoyed from the outdoor living area, lounge and kitchen areas of No 5B.

76 The applicant argues that if the Tribunal finds that its interpretation of NGL is correct, then it is only the balcony extension that exceeds the maximum height requirement of the Scheme and it is this element of the design that is to be assessed against the matters set out in cl 5.7.5. The applicant submits that the balcony extension would not impact upon views experienced from No 5A and No 5B because those views will be immediately impacted by the library extension, which is a compliant element of the proposed development.

77 To address this issue, Mr Hillman and Mr Mitchell both prepared VIAs. Mr Hillman's VIA examined the visual impact of the proposed development on the private viewing areas of No 5A and No 5B.²³ Viewshed 3D modelling was undertaken which involved the identification of 19 key directional viewpoints used to develop photomontage images. Mr Hillman accepted in cross-examination that his VIA assessed the impact of views in a particular direction rather than the impact on the panorama as a whole and clarified that his percentage calculation of loss of view related to a particular viewing location and not the panorama view.²⁴ Mr Mitchell utilised the Point Cloud model²⁵ in his VIA, which 'provides a mobile non-static view of any point'.²⁶ Mr Mitchell explained that his focus was in the context of the impact of the proposed development on the whole locality. Both visual experts agree that the computer modelling used as a tool to assist forming an opinion was suitable, accurately

²² Respondent's Closing Submission dated 15 April 2021 para 78.

²³ Witness Statement of Peter Hillman dated 21 January 2021 (Exhibit 5) Annexure 2.

²⁴ ts 60-61, 17 February 2021.

²⁵ Mr Mitchell during the course of the final hearing gave a demonstration of the capabilities of the Point Cloud model in the context of the subject land, No 5A, No 5B and Unit 1/No 5 and the locality.

²⁶ ts 49, 17 February 2021.

demonstrated the proposed development and sufficient to inform considerations.

78 Regarding the visual impact of the proposed development on No 5A and No 5B, the visual experts agree the following:

- the outlook from No 5A and No 5B provides private views of significance. The view contains a panoramic view across the South Cottesloe coastline towards the ocean with background views to Rottnest Island, passing ships and waterfront activity;
- the orientation of the view from No 5B is west/north-west and is available from within the internal and external living areas of the residence;
- the open panorama to the ocean will be reduced by the proposed development; and
- there will be significant impact to the private views from the outdoor living area, lounge, and kitchen areas of No 5B when the view is in the general north westerly direction.

79 The main divergence of opinion between the visual experts arises as to whether the private view to the north/north-west from No 5B is a 'view of significance'. Mr Hillman considers the view currently available to be a view of significance. Mr Mitchell does not hold the same opinion because he argues that these views are obtained across the southern boundary and over the garden of the subject land and the extent of the views is reliant on the boundary treatments being open and permeable.

80 It is clear from the plans and Mr Hillman's VIA that the library extension of the proposed development is the built form element of the proposal that will impact views to the north/north-west from the external and internal living areas of No 5B. The evidence before the Tribunal from the planning experts is that the wall height and side setback of the southern wall of the library extension is compliant with the requirements of the planning framework. Further, given the Tribunal's findings regarding the interpretation of the definition of NGL, the building height and the wall height of the western wall of the library extension is also compliant with the maximum height permitted under LPS 3.

81 In *APP Corporation Pty Ltd and City of Perth* [2008] WASAT 291 (*APP Corporation*), the Tribunal referred to a four stage assessment adopted by the New South Wales Land and Environment Court as being of assistance in determining the acceptability of the visual impact of a proposed development on a private property.²⁷ It is useful to refer to the same assessment in determining the acceptability of the loss of view from No 5B as a consequence of the proposal.

82 In relation to the first step of the assessment, to identify the views to be affected, the open panorama of the ocean will be reduced in the north/north westerly direction from No 5B and there will be loss of views of vegetation, namely the Norfolk Island pine trees.

83 In relation to the second step of the assessment, to consider from what part of the property the views are obtained, the view in question is across a side boundary and as the Tribunal noted in *APP Corporation*, the retention of side views is often unrealistic.

84 In relation to the third step of the assessment, to determine the extent of impact which should be undertaken for the whole of the property, not just for the view that is affected. Whilst the impact on the view when looking in a north/north westerly direction is significant, when considered in the context of the whole of the panoramic view the extent of the impact is significantly reduced. The broad panorama of the ocean to the west is unimpeded.

85 In relation to the fourth step of the assessment, to determine the reasonableness of the development that is causing the impact, the Tribunal considers that the proposed development is reasonable for the following two reasons. Firstly, the view from No 5B that is impacted is across a side boundary and the built form element of the proposal (library extension) that is affecting the view is compliant with the planning framework. Secondly, notwithstanding the view to the north/north-west is significantly affected, the view of significance, that is, the panorama view to the west remains unimpeded by the proposal. Further, it is also noted that the built form element of the proposal that triggers the assessment under cl 5.7.2 of LPS 3 (balcony extension) does not impact views experienced from No 5B because those views will be immediately impacted by the library extension.

²⁷ *Tenacity Consulting v Waringah* [2004] NSWLEC 140.

(h) *building design to ameliorate the visual effects of height including consideration of setting-back the side wall of added storeys from the side walls of existing buildings*

86 The proposal involves extending the two storey form of the existing dwelling westward on the site. The respondent submits that the proposal does not ameliorate the visual effect of height because the design does not step down to follow the natural topography of the site, and as such will introduce additional building bulk when viewed from the Princes Street streetscape and adjoining properties to the west and south.

87 Based on the Tribunal's interpretation of the definition of NGL, the building height and wall height of the library extension is compliant with the height requirements of LPS 3. Further, the FFL of the library extension is 686 millimetres lower than the FFL at the 'Back Door' of the existing dwelling, which, together with the level difference between the subject land and No 5²⁸ assists in mitigating the impact of the height of the library extension on the adjoining property to the south.

88 Although the building height and the wall height of the western elevation of the balcony extension exceeds the height requirements of LPS 3 (by 0.76 metres), the roof line of this element is increased by approximately 0.4 metres due to the heptagonal 'turret' roof, which is considered to be positive feature of the design. Further, the 8.5 metre setback to the secondary street (Princes Street) and the sloping nature of the site and surrounding area assists in ameliorating the visual effects of the height on the streetscape and adjoining lots.

(i) *the amenity of the adjoining properties, including road and public open space reserves, and the character of the streetscape*

Impact on No 5B

89 The respondent contends that the principal amenity consideration in respect of No 5B is the impact of the library extension on views enjoyed from within No 5B. The Tribunal considers the impact of the proposal on the amenity of No 5B to be reasonable for the reasons expressed above at [80]-[85].

²⁸ Mr Hofland in oral evidence, which was not challenged, estimated that the ground level of the subject land was approximately 1.8 metres lower than the ground level of No 5. He further surmised that the FFL of No 5A was a further 500 millimetres above that level, making the level difference between the ground level of the subject land and the FFL of No 5A approximately 2.3 metres (ts 147, 17 February 2021).

Impact on Unit 1/No 5

90 Ms Galvin in her evidence expressed concerns that the proposal will have a negative impact on the amenity of the outdoor area of Unit 1/No 5 by way of building height, overlooking from the balcony extension and external staircase (staircase) into the outdoor area of Unit 1/No 5, and noise impacts associated with the use of the balcony.

91 The Tribunal has addressed building height under (a) and (h) of this issue and overlooking from the balcony extension under the heading 'visual privacy' of issue 4. As overlooking from the staircase does not fall within the ambit of cl 5.1.4 of the R Codes, consideration of any amenity impacts that may arise from this aspect of the proposal will be dealt with under this heading of these reasons.

92 The staircase will provide access between the upper and ground outdoor living areas and is setback approximately 2.6 metres (at the base of the staircase) increasing to approximately 4.8 metres (at the landing at the top of the staircase) from the western boundary of the subject lot. Ms Galvin is concerned that users of the staircase will inevitably be drawn to look towards the western view of the ocean and consequently into the outdoor area of Unit 1/No 5, which will result in significant and detrimental impact on the use and enjoyment of that area.

93 Mr Mitchell considers that there may potentially be some visual interaction more so on the descent than the ascent and that the potential is less likely the closer you move toward the western boundary. All the experts agree that from the landing at the top of the staircase a person standing still looking westward would have unimpeded views into the outdoor area of Unit 1/No 5.

94 The existing amenity of the outdoor area of Unit 1/No 5 is quite significantly affected by overlooking from the existing balcony on the site. The proposal, which includes fixed privacy screening to the balcony extension, will appreciably reduce the overlooking currently experienced and as such, the degree of impact from the proposal will be significantly less than what is experienced now. Whilst overlooking into the outdoor area of Unit 1/No 5 will be possible from the upper landing of the external staircase it will occur as a consequence of ascending and descending the staircase and not as a direct result of the use of an active habitable space.

95 Although the R Codes are not strictly applicable to the staircase element of the proposal, the approach adopted regarding the protection of privacy in the R Codes can assist in determining a reasonable level of privacy as an amenity expectation. The central tenant of visual privacy as manifested in the R Codes is minimisation of overlooking, not absolute prohibition on visual interaction. Given this position, absolute prohibition on visual interaction would be an unreasonable amenity expectation. Given the location of the outdoor area of Unit 1/No 5 being forward of the street setback line, the extent of the privacy screening measures proposed to ameliorate overlooking from the upper floor level, and the nature of the space where potential overlooking may occur, the Tribunal is satisfied that a relatively high level of protection from overlooking is afforded from the upper floor level of the proposal to the outdoor area of Unit 1/No 5.

96 The respondent did not adduce any evidence in relation to Ms Galvin's concern about noise impacts associated with the use of the balcony. The Tribunal acknowledges the concern raised by Ms Galvin but in this instance, is not convinced that the amenity of Unit 1/No 5 will be affected by the use of the balcony extension as the noise likely to be generated will be comparable to the use of the existing balcony.

Impact on the character of the streetscape

97 Mr Hockley says that the extension of the ground and upper floors of the dwelling towards the west will introduce significant additional building bulk and scale into the streetscape, which is likely to result in an incompatible development response to the amenity of the locality.

98 Mr Mitchell as part of this visual amenity assessment carried out an extensive analysis of the impact of the proposed development on the local character of the streetscape and made the following conclusions:

...

... the proposed development will be seen from roads in the immediate vicinity. When walking or driving the changes will be observed obliquely to the direction of travel and the building character does not change. The scale and nature of the building although extended, will still be in character. It is therefore unlikely to change perception of the character and qualities of this suburban area.

Significant views are not adversely affected and the extensions does not adversely affect the public's amenity.

The changes within the urban landscape caused by the proposed building will in my opinion, not be significant. It will have very local impacts, however, the insertion of an additional built form of this scale and form within this urban character will not change the character of the locality nor will it cause the public amenity of the neighbourhood to be adversely affected[.]²⁹

99 On the evidence, the Tribunal finds that the proposed development will, depending on the viewpoint, result in an increased presence of built form on the Princes Street streetscape but as Mr Mitchell points out, the existing character of the dwelling is proposed to be continued through the design that extends and replicates features, materials and detailing. Although the new extensions will be prominent in the streetscape, particularly in views looking eastward from lower street locations, the Tribunal accepts the evidence of Mr Mitchell 'that the scale and nature of the building although extended, will still be in character'. Further, the 8.2 metres setback to Princes Street, which is the secondary street frontage of the site, assists in ameliorating the impact of the proposal on the existing streetscape. In addition, when considered in the context of possible future development, given the R30 coding of the site, it is very likely to be less intrusive than what would otherwise be able to be built in this location. The Tribunal finds that the degree of impact of the proposed development on the character of the streetscape is acceptable.

Tribunal's finding as whether discretion should be exercised under cl 5.7.2

100 For the above reasons, the Tribunal is satisfied that the development does not exceed the existing number of storeys and that the height of the existing dwelling is not exceeded and in having regard to the matters set out in cl 5.7.5 of LPS3, finds that the exercise of discretion to vary the maximum heights specified in Table 2 and cl 5.7.2 is warranted in the circumstances and merits of this case.

²⁹ Witness Statement of Mr Howard James Mitchell dated 4 February 2021 (Exhibit 11) para 62-64.

Whether the proposed development satisfies the requirements of the R Codes as incorporated by cl 5.2.2 and in particular -

- . *lot boundary setbacks (cl 5.1.3);*
- . *visual privacy (cl 5.4.1); and*
- . *site works (cl 5.3.7)?*

Lot boundary setbacks

101 The parties agree that the proposed lot boundary setbacks satisfy the deemed-to-comply requirements of cl 5.1.3 of the R Codes.

Visual privacy

102 The respondent contends that the ground floor outdoor kitchen and western pool deck extension (pool deck area) does not satisfy the deemed-to-comply requirements of cl 5.4.1 C1.1 and C1.2 of the R Codes. Mr Hofland confirms that the pool deck area does not strictly comply with the requirement for a 7.5 metre setback from the lot boundary, but he observes that there is 7.5 metres between the western edge of the pool deck area and the outdoor area of Unit 1/No 5. Consequently, this aspect of the proposed development is to be assessed against the corresponding design principles of the R Codes, which provides as follows:

5.4.1 Visual Privacy

P1.1 Minimal direct overlooking of active habitable spaces and outdoor living areas of adjacent **dwelling**s achieved through:

- **building** layout and location;
- design of major openings;
- landscape screening of outdoor active habitable spaces; and/or
- location of screening devices.

P1.2 Maximum visual privacy to side and rear boundaries through measures such as:

- offsetting the location of ground and first floor windows so that viewing is oblique rather than direct;
- **building** to the boundary where appropriate;

- setting back the first floor from the side boundary;
- providing higher or opaque and fixed windows; and/or
- screen devices (including **landscaping**, fencing, obscure glazing, timber screens, external blinds, window hoods and shutters).

103 Ms Galvin raised concerns about the existing overlooking from the balcony area and lower deck area of the subject land into the outdoor area of Unit 1/No 5. Ms Galvin is concerned that overlooking will be worsened by the balcony extension moving closer to the common boundary with Unit 1/No 5 thereby further negatively impacting on her privacy in the use and enjoyment of the outdoor area. She is also concerned that the use of the staircase will result in significant and detrimental overlooking of the outdoor area of Unit 1/No 5 'as people using the staircase would inevitably be drawn to look toward the western view of the ocean and consequently into [the] Outdoor Area'.³⁰ Ms Galvin does not accept that the landscaping along the western boundary of the subject land is an acceptable solution because of the 'impermanence of private planting'.³¹

104 Mr Hockley in his assessment of visual privacy acknowledges that the upper floor balcony complies with the deemed-to-comply requirements of cl 5.1.4 of the R Codes as fixed privacy screening at a height of 1.6 metres is proposed to the western and southern elevations of the balcony. Regarding the pool deck area, Mr Hockley does not consider the planting along the western boundary of the site to be an effective screen as, in his view, 'landscaping is not a permanent form of screening'. He considers that 'permanent screening at the point at which potential overlooking occurs is the most effective method to adequately address visual privacy impacts onto adjoining neighbours'.³² However, in cross-examination, he accepted that the if the vegetation remains where it is and establishes, then it will form a screen.³³ He also indicated that his concern about the permanency of the vegetation could be overcome by the imposition of a condition that requires the vegetation screening and that it be maintained in perpetuity.

105 In regard to the staircase, Mr Hockley accepts that this element does not require assessment under provisions of cl 5.1.4 as it does not

³⁰ Witness Statement of Sue Galvin dated 21 January 2021 (Exhibit 4) para 38.

³¹ Witness Statement of Sue Galvin dated 21 January 2021 (Exhibit 4) para 15.

³² Witness Statement of Thomas James Hockley dated 21 January 2021 (Exhibit 6) para 112.

³³ ts 167, 17 February 2021.

meet the definition of 'active habitable space' under Appendix 1 - Definition of the R Codes but asserts that this element will result in loss of privacy to the outdoor area of Unit 1/No 5.

106 The Tribunal finds that the proposed development meets objective (a) of cl 5.4 of the R Codes for the following reasons³⁴. Firstly, the fixed privacy screening to the upper floor balcony satisfies the deemed-to-comply requirements of cl 5.1.4 C1.1 and C1.2. Secondly, the Tribunal does not share the concern expressed by Mr Hockley relating to the pool deck area. Vegetation in the form of screen planting or selective planting of suitable trees or shrubs is expressly contemplated by the R Codes as a suitable screening device for privacy control subject to ensuring that the vegetation will remain in place. The Tribunal is satisfied, subject to a condition being imposed that requires the maintenance of the existing vegetation along the western boundary of the site, that the existing boundary wall together with the existing vegetation screening demonstrates compliance with the design principles and will minimise the impact of the pool deck area and afford a reasonable level of protection to the outdoor area of Unit 1/No 5. Thirdly, while the Tribunal acknowledges that there may be overlooking from the staircase, as Mr Hockley rightly concedes, this element of the proposal does not require assessment under provisions of cl 5.1.4 as it does not meet the definition of 'active habitable space' under Appendix 1 - Definition of the R Codes. However, this element of the proposal has been addressed in (i) of issue 3.

Site works

107 The proposed development involves extending the pool deck by approximately 4 metres to the west of the existing pool deck area. The applicant submits that the site works and retaining wall is approximately 0.72 metres above NGL at the lot boundary adjacent to that point of the works.³⁵ Mr Hockley calculates that at its western extent the FFL of the pool deck area will be approximately 2.62 metres above NGL as measured at the northern property boundary.³⁶ He also calculates, based on the survey levels, the pool deck area will be constructed approximately 0.8 metres above the existing ground level.

³⁴ Objective (a) of cl 5.4 of the R Codes states: To design buildings and landscape to minimise adverse impact on the privacy of adjoining dwellings and private open space.

³⁵ Applicant's submissions in response to amendments to R Codes.

³⁶ Witness Statement of Thomas James Hockley dated 21 January 2021 (Exhibit 6) para 23.

The vast difference in the calculations between the parties is due to their interpretation of NGL.

108 It is common ground that the proposed fill and retaining associated with the pool deck area do not comply with the deemed-to-comply requirements of cl 5.3.7 of the R Codes, and therefore are to be assessed against the corresponding design principles. As the Tribunal has previously articulated, '[t]he exceedance of the development with the deemed-to-comply requirement is not an appropriate measure for assessing whether the development satisfied the relevant objective(s) of the Codes, and demonstrates compliance with the design principles'.³⁷ Therefore, the extent of non-compliance with Table 4 of cl 5.3.7 C7.2 is not an appropriate measure.

109 The respondent says that the extension the pool deck area does not respond to the natural features of the site and has the potential to adversely affect the amenity of the adjoining property to the west because of visual privacy impacts.

110 Based on the Tribunal's interpretation of the definitions of NGL, the Tribunal finds that the site works and retaining wall associated with the extension of the pool deck area is approximately 0.72 metres above NGL at the lot boundary adjacent to that point of the works. The Tribunal is satisfied that this aspect of the proposal demonstrates compliance with the corresponding design principles as the works necessary will not be visible from the street due to the to the existing masonry wall constructed along the boundary with Princes Street and the area created will be beneficial for the residents to utilise as a space for recreation and entertainment and will not adversely affect the amenity of the adjoining property to the west (Unit 1/No 5) for the reasons expressed at [106].

Whether the proposed development is considered acceptable having regard to those considerations in cl 67 of Sch 2 of the deemed provisions and in particular cl 67(m)?

111 The relevant planning considerations identified in cl 67 of the former deemed provisions to which the Tribunal is to have due regard to in determining this application are set out at [33] of these reasons. Each of these planning matters has been addressed in at least one of the preceding issues and given the finding above, the Tribunal concludes that the proposed development is acceptable.

³⁷ *Loxton and City of Fremantle* [2015] WASAT 46 at [29].

Conclusion

112 Under s 27(2) of the SAT Act, the purpose of the review is 'to produce the correct and preferable decision at the time of the decision upon the review'. Consequently, the function of the Tribunal in these proceedings is to consider the material before it and form its own view, in the exercise of planning discretion, as to whether to grant development approval to the proposed development.

113 For all the reasons above, the Tribunal is persuaded the correct and preferable decision in all of the circumstances of this case, is to set aside the respondent's decision and to substitute a decision to approve the development application subject to the imposition of appropriate conditions.

Conditions

114 As required by direction of the Tribunal, the respondent prepared 'without prejudice' draft conditions to be imposed if the Tribunal considers that approval of the application subject to conditions is appropriate. Four conditions and three advice notes were submitted.

115 The applicant accepts proposed conditions 1, 2, and 3 and objects to proposed condition 4, which reads as follows:

4. Following completion of the development, if the Town considers that the glare of the roof surface(s) and elevations adversely affects the amenity of adjoining or nearby properties, the applicant shall take steps to reduce the glare to the satisfaction of the Town.

116 The applicant argues that proposed condition 4 should not be imposed as the condition is uncertain and lacking in finality, the issue was not raised as a matter of concern in the respondent's SIFC and the roof is to be constructed to match the existing roof.

117 The Tribunal is of the view that the proposed condition as expressed is unclear in its intent and lacks finality as it leaves open for later consideration the possibility of a totally different outcome from that applied for and is therefore devoid of certainty, and, has the potential to undermine the approval granted. Further, the Tribunal considers the proposed condition to be unreasonable as the roof of the proposal is to be constructed to match the zincalume roof of the existing dwelling.

118 Also, the Tribunal, at [106], indicated that if approval were to be granted to the proposal a condition should be imposed that requires the maintenance of the existing vegetation along the western boundary of the subject land in perpetuity. The parties have agreed the wording of the condition as follows:

Non-deciduous screen planting to be maintained along the western boundary to a minimum height of 1.6 metres, to be measured from the ground level at the western boundary at identified on plan SK2 dated June 2018.

119 In regard to appending advice notes to subdivision and development approvals the Tribunal in *Empire Securities Pty Ltd & Ors and Western Australian Planning Commission* [2005] WASAT 98 at [78]-[79] (*Empire Securities Pty Ltd*) found that:

Such advice notes, ... have no statutory status under the [*Town Planning and Development Act (1928)* (WA)] or any other legislation. A decision to give such 'advice' is not a 'reviewable decision' for the purposes of the Tribunal Act. Moreover, any function or discretion which the respondent had to give 'advice' was arguably not 'exercisable by [it] in making the reviewable decision' and is, therefore, not available to the Tribunal under s 29(1) of the Tribunal Act. In consequence, the Tribunal does not have power, in its determination of review proceedings concerning a subdivision or development application, to review, endorse or give 'advice'.

Moreover, in my opinion, even if the Tribunal had power to give or endorse 'advice', it would be inappropriate to do so, for each of the following reasons. First, if an 'advice note' sets out requirements which are material to a subdivision or development, the requirement should be contained in a condition of approval, which is enforceable as such. Second, if advice is given about one aspect, but not about another aspect of a subdivision or development, the whole process of giving 'advice' is likely to mislead those it is intended to assist. Third, the 'advice' is that of the respondent, or in the present case, of the respondent and of the Council, not that of the Tribunal.

120 Although the *Town Planning and Development Act (1928)* (WA) has been repealed and replaced by the PD Act, there has been no change to provisions of the PD Act that would give advice notes any statutory status. For the same reasons as stated in *Empire Securities Pty Ltd*, the Tribunal will not append any of the suggested advice notes to this approval.

Orders

For the above reasons, the Tribunal makes the following orders:

1. The application for review is allowed.
2. The decision of the respondent made on 28 July 2020 to refuse development approval for front and rear alterations and additions to the existing dwelling on Lot 37 (No 7) Avonmore Terrace, Cottesloe is set aside and a decision is substituted that development approval is granted under the *Metropolitan Region Scheme* and the *Town of Cottesloe Local Planning Scheme No 3* for alterations and additions to the existing dwelling as shown on plans SK 1, SK 2, SK 3, SK 4, SK 5, SK 6 and SK 7 prepared by Horizon Design dated June 2018, subject to the following conditions:
 - (i) The applicant shall ensure that all water draining from roofs and other impermeable surfaces is directed to garden areas, sumps or rainwater tanks within the development site where climatic and soil conditions allow for the effective retention of stormwater on-site.
 - (ii) The applicant shall ensure that all plant and equipment, including airconditioning units, is designed, positioned and screened:
 - (a) so as not to be visible from the street;
 - (b) to integrate with the building; and
 - (c) located so as not to be visually obtrusive.
 - (iii) As part of the Building Permit stage, the applicant shall ensure, to the Town's satisfaction, that the upper floor balcony and library privacy screens shown on the approved plans are:
 - (a) a minimum 1.6 metres in height above the finished floor level;
 - (b) 75% obscured;
 - (c) permanently fixed;

- (d) made of durable material; and
 - (e) designed to restrict overlooking of the adjoining properties.
- (iv) Non-deciduous screen planting to be maintained along the western boundary to a minimum height of 1.6 metres, to be measured from the ground level at the western boundary at identified on plan SK2 dated June 2018.

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

MS M CONNOR, MEMBER

2 SEPTEMBER 2021



Town of
Cambridge

**DEVELOPMENT
COMMITTEE MEETING**

TUESDAY 14 DECEMBER 2021

**ATTACHMENT 2 of 3 TO ITEM
DV21.114**

AMENDED LPP 3.24 (MODIFICATIONS TRACKED)

Local Planning Policy 3.24: Determining Natural Ground Levels

ADOPTION DATE: 28 April 2020

LAST AMENDED DATE: N/A

AUTHORITY: *Planning and Development Act 2005*
Planning and Development (Local Planning Schemes) Regulations 2015

INTRODUCTION

This Policy has been adopted for the purpose of establishing natural ground levels land preceding development. The State Administrative Tribunal in Lee-Prosser and City of Cockburn Town of Cottesloe [20082011] WASAT 268-115 determined that the natural ground level of a building site is its state existing at the date of the proposed development, ~~as opposed to an artificially modified state unless such level has been altered by a previous approval of the local government.~~ It is not always straightforward to determine the natural ground level of a site that has previously been developed, as such this Policy has been developed to assist applicants and the Town in how to determine the established natural ground level preceding development.

APPLICATION

This Policy operates pursuant to Clause 4 of the Deemed Provisions for Local Planning Schemes [Planning and Development (Local Planning Schemes) Regulations 2015] (Deemed Provisions). The Policy applies to all development in the Town of Cambridge where natural ground levels are required to be used when assessing development in accordance with State and/or local planning policies.

OBJECTIVES

- Provide guidance on the method of determining natural ground levels preceding development;

DEFINITIONS

Natural Ground Level

~~a) If the development is used for residential purposes, has the meaning given in the R-Codes; or~~

~~b)a) _____ If the development is used for purposes other than residential purposes, means the levels on a site which precede the proposed development, excluding any site works unless approved by the decision-maker or established as part of subdivision of the land preceding development.~~

Has the same meaning given to it in and for the purpose of the Planning and Development (Local Planning Schemes) Regulations 2015 (Deemed Provisions)

PROVISIONS

1. Natural Ground Level Preceding Development

For the purpose of establishing the *natural ground level of a site*, 'the levels on a site which precede the proposed development' means ~~the~~ levels:

1.1 That exist on the site, where those levels are depicted on a previous development approval granted by the local government, where the works have been substantially commenced, or

1.2 Where 1.1 does not apply, the levels shown on the Department of Lands & Surveys 1975 Perth BG34 1:2000 series maps unless the Town determines that:

- a) A particular district-wide survey level is more appropriate, in which case these levels are considered to be the level on a site preceding development; or
- b) The site has a nominated lot level notated on a Local Development Plan, Outline Development Plan or Restrictive Covenant, in which case the nominated level is considered to be the level on a site preceding development; or
- c) It can be proven by a licensed surveyor to the Town's satisfaction that the Department of Lands & Surveys 1975 Perth BG34 levels or other district-wide survey levels are not appropriate in a particular instance and other survey levels are more appropriate, in which case these levels will be considered to be the level on a site preceding development.



Town of
Cambridge

**DEVELOPMENT
COMMITTEE MEETING**

TUESDAY 14 DECEMBER 2021

**ATTACHMENT 3 OF 3 TO ITEM
DV21.114**

AMENDED LPP 3.24

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LAST AMENDED DATE: N/A

AUTHORITY: *Planning and Development Act 2005*
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INTRODUCTION

This Policy has been adopted for the purpose of establishing natural ground levels land preceding development. The State Administrative Tribunal in Prosser and Town of Cottesloe [2011] WASAT 115 determined that the natural ground level of a building site is its state existing at the date of the proposed development, unless such level has been altered by a previous approval of the local government. It is not always straightforward to determine the natural ground level of a site that has previously been developed, as such this Policy has been developed to assist applicants and the Town in how to determine the established natural ground level preceding development.

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Adopted: 28 April 2020