

7 May 2021

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Dear Mr Fitchat

# Proposed unmanned road train refuelling facility on Lot 3 Eyre Highway, Norseman

Thank you for your letter dated 29 April 2021.

We have now reviewed the documents relating to the applicant's revised development application received by the Shire on 17 February 2021 and met with the Shire's planning consultant, Mr Tony Dowling, to discuss the application.

Your letter requested advice whether it could be argued that for all intents and purposes, and in the spirit of the law rather than the precise letter of the law, the proposed development is akin to and closely conforms to the 'roadhouse' use class, regardless of whether the proposed development specifically conforms to the definition of the freeway service centre element of the definition?

In this advice we have addressed your question as well as the following issues which were discussed with Mr Dowling and which may assist the Shire in dealing with the applicant's revised development application:



- 1. Whether the applicant's arguments that the revised development application can be approved have any merit?
- 2. What are the options available to the Shire in dealing with the development application?

#### 1. The question raised in your letter

- 1.1 Your letter asks whether the proposed development could be classified as a 'roadhouse' even though it does not conform to the definition of this land use under Local Planning Scheme No. 2 (LPS2) because the proposed development is akin to or closely conforms to the roadhouse use class? This is an approach which is often as referred to as the 'best fit' approach. The State Administrative Tribunal (SAT) has recently undertaken a detailed consideration of this approach and decided not to apply it (Dao JI Association and City of Gosnells [2020] WASAT 10). Rather, the SAT affirmed that in classifying proposed land uses under local planning schemes, relevant schemes definitions and provisions will be considered having regard to their terms and the orthodox principles that apply to the interpretation of statutory instruments.
- 1.2 Having regard to this decision of the SAT, it is not possible in our view to classify the proposed development as a roadhouse on the basis that it is akin to or closely conforms with this use class, even though it does not satisfy the LPS2 definition for the use class.

## 2. The applicant's arguments that the revised development proposal can be approved

- 2.1 The revised development application is not materially different from the initial application for Lot 3 Eyre Highway (Lot 3) considered in our previous advice.
- 2.2 The revised development application seeks approval for a roadhouse which is to comprise a 24 hour unmanned refuelling facility and incidental road train parking. The refuelling aspect of the proposed development application is clearly the predominant use and is expected to generate 200 vehicle trips per day with 20 vehicles in the morning peak period and 10 vehicles in the afternoon peak period.
- 2.3 In his planning report, the applicant's consultant planner (Cody Myer of Dynamic Planning and Development) has argued that the proposed development should be classified as a



- roadhouse under LPS2. The basis for this conclusion is that the definition of roadhouse includes transport depot facilities and makes reference to facilities or services provided by a freeway service centre which include service station facilities.
- 2.4 However, these matters do not provide a basis for classifying the proposed development as a roadhouse.
- 2.5 Transport depot facilities are among the list of additional facilities or services that a roadhouse may provide, but the provision one or more of these additional facilities or services does not itself establish that a development is a roadhouse. The key requirement for classification as a roadhouse is that a proposed development 'provides the services or facilities provided by a freeway service centre'. The applicant's planning report approaches this requirement on the basis that it is satisfied if only one of the list of services or facilities referred to in the definition of freeway service centre is provided. For the reasons explained in our previous advice, we do not regard this as the correct interpretation of the definition. In our view, all the facilities or services must be provided, not some lesser number or, as in this case, only one of those services or facilities.
- 2.6 Consequently, the planning reports proposition that the proposed development is a roadhouse is based on the misapplication of the relevant land use definitions in LPS2.
- 2.7 From our meeting with Mr Dowling, we understand that the applicant's planning consultant has more recently suggested that the proposed development could be approved as a 'use not listed'. This is a reference to using the provisions of clause 18(4) of LPS2. However, clause 18(4) does not apply in this instance, because in relation to special use zones, clause 21(2) provides that land in a special use zone can only be used for a class of use permissible in the zone (ie the uses specified in Table 4). Consequently, clause 18(4) does not provide the Shire with a way to approve the proposed development.
- 2.8 In summary, neither of the arguments advanced by the applicant's consultant planner enable the Shire to approve the proposed development in its entirety.
- 3. The Shire's options in determining the development application
- 3.1 As previously advised, it is our view that the proposed development cannot be approved in its entirety under LPS2. The Shire could approve the road train parking component of the proposed development as this is a separate transport depot use. However, it would need to



- refuse the refuelling component of the proposed development. Any such approval would need to make clear that it was limited to the road train parking component and include any conditions necessary for this use.
- 3.2 Should the Shire determine the application on this basis, the applicant could then elect whether to challenge the refusal of the refuelling component by initiating review proceedings in the SAT. In any such review proceeding, the proper use classification of the proposed development would be the central issue (perhaps, the only issue). The procedure by which the SAT usually determines use classification issues is one which is largely based on documents filed by the parties, rather than a formal hearing. If the parties can provide SAT with an agreed set of facts and documents (something which rarely proves difficult), the parties would then simply file written submissions on the use classification issue, after which the SAT would determine the correct use classification. While this option can only be initiated by the applicant (as SAT review rights are limited to applicants and don't include decision makers), it provides one means by which the use classification issue could be resolved.
- 3.3 Another option is to suggest to the applicant that it modifies its development application so that the proposed development can be classified in its entirety as a transport depot. This is a permissible use on Lot 3 under Table 4 of LPS2. The modification required to enable classification of the proposed development as a transport depot in its entirety, is for refuelling to be limited to road trains parked on Lot 3. This would accord with the definition of transport depot because it allows ancillary refuelling of commercial vehicles parked on the premises. However, it would not be possible to refuel road trains which did not park on Lot 3.
- 3.4 This would allow the applicant to construct the proposed development, although it could only operate on the basis that refuelling was confined to road trains which park on the premises.
- 3.5 It would not be possible for the Shire to bring about this outcome by simply approving the proposed development subject to a condition limiting refuelling to road trains which parked on Lot 3. Planning conditions can only be used to address incidental aspects of development. They cannot be used to convert a development from one which is incapable



- of approved to one that could be approved (*Catalano & the Shire of Harvey [2017] WASAT 55*). Consequently, the applicant would need to modify its development application in the manner suggested, in order for it to be classified as transport depot in its entirety.
- 3.6 The second element of this proposal is that the Shire could then initiate an amendment to LPS2 to make an unmanned refuelling facility for all road trains capable of approval. If that amendment is successful, the applicant could then apply for a further development approval to enable all road trains to refuel at the facility.
- 3.7 The risk in this approach for the applicant is that the amendment may not be supported by the West Australian Planning Commission. In that instance, the applicant would have expended considerable funds in undertaking the development which could not then be operated on a commercial basis with unrestricted refuelling.
- 3.8 I maybe useful for the Shire's planning consultant, Mr Dowling, to have a preliminary discussion with relevant officers of the Department of Planning Lands and Heritage to see whether there is any initial resistance to such an amendment.

If we can be of any further assistance, please contact Andrew Roberts.

Yours faithfully

**Castledine Gregory** 

Copy to: Mr Tony Dowling – Dowling Giudici and Associates