
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : DEVELOPMENT & RESOURCES

ACT : PLANNING AND DEVELOPMENT ACT 2005 (WA)

CITATION : ABLE LOTT HOLDINGS PTY LTD and CITY OF FREMANTLE [2010] WASAT 117

MEMBER : MR D R PARRY (SENIOR MEMBER)
MS R MOORE (SENIOR SESSIONAL MEMBER)

HEARD : 21, 22 AND 26 JULY 2010 AND 12 AUGUST 2010

DELIVERED : 17 AUGUST 2010

FILE NO/S : DR 73 of 2010

BETWEEN : ABLE LOTT HOLDINGS PTY LTD
Applicant

AND

CITY OF FREMANTLE
Respondent

Catchwords:

Town planning - Development application - Mixed use development comprising tourist accommodation, ancillary pool and gym, restaurant, small bar, theatrette, commercial tenancy and caretaker's dwelling - Additions, alterations and adaptive re-use of historic warehouse building - Development partly carried out without development approval - Development application to authorise physical development already carried out, further development and use - Car parking - 71 on-site car bays required - Nine on-site car bays and 71 on-site electric scooters proposed - Relaxation of car parking requirements - Sharing of car spaces by multiple uses - Historical car parking deficiency associated with commercial use of land - Availability of public transport - Availability of car parking within

locality including street parking - Anticipated extent of scooter use - Adequacy of access and egress - Use of 2.5 metre wide right of carriageway forming part of 4 metre wide private laneway shared by three properties - Drainage and flooding - Proximity of water table - Sea level rise

Legislation:

City of Fremantle Local Planning Scheme No 4, cl 4.2.1(e), cl 5.7.1(a), cl 5.7.3, cl 5.7.3(a)(i), cl 5.7.3(a)(ii), cl 5.7.3(a)(iii), cl 5.7.3(a)(iv), cl 5.7.3(a)(viii), cl 5.7.5, cl 5.7.5(a), cl 5.7.5(d)(i), cl 5.7.5(d)(ii), cl 8.4.1, Table 3

Planning and Development Act 2005 (WA)

State Administrative Tribunal Act 2004 (WA), s 31

Transfer of Land Act 1893 (WA), s 70A

Result:

Application for review allowed and conditional development approval granted

Category: B

Representation:

Counsel:

Applicant : Mr CS Williams
Respondent : Mr A Roberts

Solicitors:

Applicant : Solomon Brothers
Respondent : McLeods

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

Gosatti Holding Pty Ltd v City of Fremantle [2000] WATPAT 3
(Appeal No 48 of 1999, 17 March 2000)
Seattle Bay Pty Ltd and Western Australian Planning Commission
[2006] WASAT 261
Sertari Pty Ltd v Nirimba Developments Pty Ltd [2007] NSWCA 324

St Patrick's Community Support Centre
[2007] WASAT 318

and

City of Fremantle

REASONS FOR DECISION OF THE TRIBUNAL:***Summary of Tribunal's decision***

1 This case concerned a development application for retrospective approval of partially completed alterations and additions to an historic warehouse building in Fremantle, completion of building works and use of the building for tourist accommodation, ancillary recreational uses, restaurant, bar and theatre. The principal issues related to car parking, access and egress, and stormwater and potential flooding.

2 The Tribunal determined that the development application warranted conditional approval. Although the development incorporated only nine on-site car bays, whereas the local planning scheme requirement was for 71 bays (if each proposed use were assessed separately), the scheme enabled reduction or even waiver of the standard parking requirement where an applicant satisfactorily justified a reduction due to one or more of the nominated factors. In the circumstances of this case, the applicant justified a reduction due to:

- a) shared uses within the development - from 71 bays to 48 bays;
- b) availability of public transport - from 48 bays to 36 bays;
- c) provision and maintenance of 10 electric scooters for use of people staying at the tourist accommodation units - from 36 bays to 31 bays; and
- d) availability of car parking in the locality including street parking - from 31 bays to 9 bays.

3 The Tribunal was satisfied that the proposed means of vehicular access and egress by nine cars and 10 electric scooters via a registered right of carriageway is lawful, adequate and acceptable in planning terms.

4 Finally, the Tribunal found that the level of the water table over the lifetime of the development (including anticipated increase in the water table due to sea level rise by 2100) will not compromise the structural stability of the building or cause water ingress; there is adequate capacity for on-site management of stormwater, and the proposal does not warrant refusal because of potential for flooding.

5 The development application was approved subject to 40 conditions including conditions to ensure that the development is carried out

promptly and in a manner that is appropriate having regard to heritage and amenity considerations.

Introduction

6 No 5 (Lot 123) Beach Street, Fremantle (site) comprises the front façade, side walls and wooden trusses of an historic warehouse building and various uncompleted physical works by way of alterations and additions to the building. Until the late 1970s, the warehouse was used for storing and sorting wool for export through the nearby Port of Fremantle. From the 1980s until the early 2000s, the site was used for shops and other commercial purposes.

7 In 2003, Able Lott Holdings Pty Ltd (Able Lott) obtained development approval from the City of Fremantle (City or Council) to carry out 'alterations and additions to existing warehouse to provide 8 x three storey short-term accommodation units over parking plus 1 x two storey caretaker residence over parking/office'. In 2004, the City issued a building licence. Over the next five and a half years, Able Lott and its principal, Mr Giacomino Fazio, carried out sporadic development on the site, some of which was authorised by the development approval and the building licence and some of which was not. In the process, substantial unauthorised excavations were carried out within the warehouse building footprint, apparently because of the need to shore up the front façade and Mr Fazio's desire to maintain a common ground floor level, and the rear wall of the warehouse collapsed. Furthermore, in 2007, excavations undertaken at the rear of the site caused the collapse of a limestone wall located on the common property of an adjoining strata plan comprising four historic terrace houses at Nos 18-24 Queen Victoria Street, necessitating the erection of a safety barrier on the adjoining property which has precluded car parking by the residents of three of the four terrace houses.

8 Able Lott and Mr Fazio retained Mr John Kirkness, a heritage architect, to prepare development plans for the site to regularise the physical development that has taken place and to enable alterations, additions and adaptive re-use of the warehouse building to be completed. In December 2009, Able Lott lodged a development application and accompanying development plans drawn by Mr Kirkness with the City for a four-level mixed use development on the site comprising 17 one-room and 12 two-room tourist accommodation units, each with en suite facilities, ancillary gym/sauna, pool/spa and laundrette at the ground level, public atrium and adjoining eatery (restaurant), small bar and 80 person

theatrette at the ground level, two-level commercial tenancy adjacent to Beach Street and a 'caretaker dwelling' as the residence for Mr and Mrs Fazio on the fourth level at the Beach Street façade. The proposed development incorporates the front façade, side walls and wooden trusses of the warehouse building and, as Mr Kirkness explained, fits the bulk of the new development into the 'existing historic building shell'. Owing to the natural rise in the site from Beach Street to the rear boundary, the pool/spa and theatrette, which are located outside the warehouse building footprint, are excavated at a level approximately one storey below the terrace houses at Nos 18 - 24 Queen Victoria Street to the rear of the site.

9 Mr Fazio initially gave evidence to the Tribunal that the larger units would be operated in a backpacker style, with up to 12 adults accommodated in the two-room units, generating a total maximum of more than 200 adults and around 30 children in the development. However, after an adjournment in which he obtained advice from Mr Kirkness and his counsel, Mr Chris Williams, Mr Fazio significantly revised the proposal so that accommodation would be limited to two adults (17 years of age and above) and two children (up to 16 years of age) in the 14 smaller one-room units and three adults (17 years of age and above) and two children (up to 16 years of age) in the 12 two-room and three larger one-room units, generating a total maximum of 73 adults and 58 children.

10 The proposed development includes a private car park with nine car bays above the pool/spa and theatrette at the approximate level at which there was historically informal parking for the warehouse building accessed via a 2.5 metre wide right of carriageway to Queen Victoria Street over part of the common property of the strata plan comprising the terrace houses at Nos 18 - 24 Queen Victoria Street. The right of carriageway forms part of an approximately 4 metre wide private laneway, approximately 2.88 metres of which is constructed on the common property of the strata plan comprising the terrace houses and approximately 1.12 metres of which is constructed on the property at Nos 12 - 16 Queen Victoria Street. This latter property is owned by the Roman Catholic Archbishop of Perth and used by the St Patrick's Community Support Centre (St Patrick's) to provide accommodation, meals, crisis support, health and personal care, educational activities and a day centre for people in need and, in small part, by the Stella Maris Sea Farers' Centre to provide services for seamen. The Roman Catholic Archbishop of Perth also has a right of carriageway over the 2.5 metre wide section of the private laneway that is the subject of the right

of carriageway benefiting the site. St Patrick's uses the private laneway to access its car park and for deliveries. In accordance with a condition imposed by the Tribunal when granting development approval to St Patrick's to provide meals for non-residents in *St Patrick's Community Support Centre and City of Fremantle* [2007] WASAT 318 (*St Patrick's*), St Patrick's has installed a remote control security gate at the entrance to the private laneway which closes automatically approximately one minute and 40 seconds after it is opened. The residents of the terrace houses have remote controls for the gate and employees and volunteers working at St Patrick's use a keypad to open the gate. It appears that the Tribunal imposed the requirement for a remote control gate to address concerns of the residents of the terrace houses that the laneway would be used by intoxicated people wishing to access St Patrick's services or wishing to visit residents of its facility.

11 The proposed development also includes a private scooter parking deck above the private car park accessed via a ramp from the car park adjacent to its entrance. The development application proposes that the owner/operator of the tourist accommodation development will provide 71 electric scooters for the use of guests (2.5 scooters per unit). It is proposed that the scooters would access the site via the right of carriageway from Queen Victoria Street. Two delivery bays are proposed for the development off Beach Street.

12 The site is zoned Mixed Use under the *City of Fremantle Local Planning Scheme No 4* (LPS 4 or Scheme). Clause 4.2.1(e) of LPS 4 states that:

Development within the Mixed Use zone shall:

- (i) provide for a limited range of light, service and cottage industry, wholesaling, trade and professional services, small scale retailing of goods and services (ie showrooms, cafes, restaurants, consulting rooms), small scale offices and administration, entertainment, residential at upper levels and recreation,
- (ii) ensure future development within each of the Mixed Use zones is sympathetic with the desired future character of each area,
- (iii) ensure that development is not detrimental to the amenity of adjoining owners or residential properties in the locality, and
- (iv) conserve places of heritage significance the subject of or affected by the development.

13 The City accepts that the uses proposed in the development application are contemplated by the objectives of the zone and does not contend that the development is inconsistent with any of the other objectives, other than para (iii), in relation to the impact of the use of the private laneway for access, particularly by the proposed scooters, and para (iv), in relation to certain works carried out without approval which have a detrimental impact on the heritage significance of the warehouse building, in relation to which the City has proposed draft, without prejudice, conditions of approval in order to satisfactorily address the concerns. The Tribunal accepts the evidence of Mr Kirkness that:

The application embraces a number of these uses [referred to in cl 4.2.1(e)(i) of LPS 4], with a predominant focus on tourist accommodation (an 'entertainment' use class) and the ancillary provision of supporting amenity and service uses to complement that accommodation facility (including food and beverage facilities, laundromat, theatre, gym and swimming pool). The development has been strategically conceived to effect this complementary arrangement, providing a holistic experience and facility for patrons and guests visiting Fremantle, with the design of the building carefully considered to successfully achieve this.

14 Able Lott initially commenced this proceeding as an application for review by the Tribunal of the City's deemed refusal of the development application. Following the commencement of the proceeding, Able Lott lodged a further development application to supplement the development application it made in December 2009 incorporating a slab linking two parts of the development and common ablution facilities. It is common ground that this further development application can be incorporated into the development the subject of this proceeding. When invited by the Tribunal to reconsider its decision in accordance with s 31 of the *State Administrative Tribunal Act 2004* (WA), the Council refused the development application on the grounds of inadequate car parking, inappropriate vehicular access arrangements, and drainage and flooding issues.

Issues for determination

15 The following three principal issues arise for determination in this review:

- 1) Whether the applicant for development approval has satisfactorily justified a reduction in the vehicle parking requirement specified in Table 3 of LPS 4 to the extent necessary for approval of the proposed development due

to one or more of the factors identified in cl 5.7.3 of LPS 4.

- 2) Whether the proposed means of vehicular access and egress via the right of carriageway over part of the common property of the strata plan comprising the terrace houses at Nos 18 - 24 Queen Victoria Street is lawful, adequate and acceptable.
- 3) Whether the proposed development is acceptable in terms of drainage and having regard to the potential for flooding.

16 The Tribunal will address each of these issues in turn.

Vehicle parking

17 Clause 5.7.1(a) of LPS 4 states as follows:

Subject to clause [5.7.3], a person shall not use land for a purpose specified in Table 3 unless car parking spaces, delivery bays and bicycle racks of the number specified in Table 3 are provided and sealed, drained and marked to the Council's specifications prior to occupancy of development or commencement of a use and maintained to the satisfaction of Council thereafter.

18 The Tribunal had the benefit of expert evidence in relation to vehicular parking and access from two traffic engineers, Ms Heidi Herget-Lansdell, called by Able Lott, and Mr Gordon MacPherson, called by the City. Ms Herget-Lansdell and Mr MacPherson agreed that, subject to cl 5.7.3 of the Scheme, cl 5.7.1(a) and Table 3 of LPS 4 require the provision of 71 on-site car parking spaces and four delivery bays for the proposed development, assessing each of the proposed land uses separately. However, cl 5.7.3 of LPS 4 enables the relaxation of parking requirements under the Scheme as follows:

Council may:

- (a) Subject to the requirements of Schedule 12*, waive or reduce the standard parking requirement specified in Table 3 subject to the applicant satisfactorily justifying a reduction due to one or more of the following:
 - (i) the availability of car parking in the locality including street parking,

- (ii) the availability of public transport in the locality,
- (iii) any reduction in car parking demand due to the sharing of car spaces by multiple uses, either because of variation of car parking demand over time or because of efficiencies gained from the consolidation of shared car parking spaces,
- (iv) any car parking deficiency or surplus associated with the existing use of the land,
- (v) legal arrangements have been made in accordance with clause 5.7.4 for the parking or shared use of parking areas which are in the opinion of the Council satisfactory,
- (vi) any credit which should be allowed for a car parking demand deemed to have been provided in association with a use that existed before the change of parking requirement,
- (vii) the proposal involves the restoration of a heritage building or retention of a tree or trees worthy of preservation,
- (viii) any other relevant considerations.

*Note:** In some sub-areas identified in Schedule 12 reduction of parking bays is not permitted. The requirements of Schedule 12 prevail over this clause.

- (b) Council may require an applicant to submit a report completed by a suitably qualified person or persons justifying any of the points cited above.

Note: Provides greater flexibility to vary car-parking requirements based upon alternative transport opportunities.

19 Ms Herget-Lansdell and Mr MacPherson agreed that, while four delivery bays are required by Table 3 of LPS 4 for the proposed development (one bay for each of the eatery (restaurant), private recreation facilities, theatrette and commercial tenancy), the two delivery bays that are proposed for the development off Beach Street are adequate for the delivery requirements of all of the proposed uses.

20 The traffic engineers also agreed that the maximum required supply of car parking spaces for the total development, taking into account shared uses within the proposal, is 48 bays, rather than 71 bays that would be required if the uses were assessed separately. As the gym/sauna and pool/spa are ancillary private recreational facilities for the tourist accommodation units, they do not require any additional car parking

provision. While the eatery (restaurant), small bar and theatrette would be open to members of the public generally, these facilities are likely to be principally used by people staying at the tourist accommodation units.

- 21 Mr Andrew Roberts, counsel for the City, submitted that the consideration of shared use of car parking facilities falls for consideration under cl 5.7.5 of LPS 4, rather than cl 5.7.3 of LPS 4. Clause 5.7.5(a) of LPS 4 states as follows:

Car parking facilities may be provided jointly by two or more owners or users of land or by one owner or user in respect of separate buildings or uses, subject to the satisfaction of the standards and requirements hereinafter set out in this clause.

- 22 However, it is apparent from the standards and requirements set out in cl 5.7.5 of LPS 4 that this clause provides flexibility in relation to car parking provision in circumstances where different uses can utilise the same car parking bays at different times (joint or reciprocal use), rather than circumstances, such as the present case, where different uses utilise the same car parking bays at the same time (shared use). Thus, cl 5.7.5(d)(i) of LPS 4 requires evidence sufficient to satisfy the Council 'that no substantial conflict will exist in the peak hours of operation of the building or uses for which the joint use of car parking spaces or the reciprocal access and circulation arrangements is proposed'. Furthermore, cl 5.7.5(d)(ii) of LPS 4 requires that the number of car parking spaces which may be credited from one building or use to another 'shall not exceed the number of spaces reasonably anticipated to be in excess of the requirement of the second building or use during its peak hours of operation'.

- 23 The consideration of the maximum required supply for car parking from a development taking into account shared uses within the development falls for consideration under cl 5.7.3(a)(iii) of LPS 4:

any reduction in car parking demand due to the sharing of car spaces by multiple uses, either because of variation of car parking demand over time or because of efficiencies gained from the consolidation of shared car parking spaces.

- 24 Based on the joint evidence of the traffic engineers, the standard parking requirement of 71 spaces specified in Table 3 of LPS 4 should be reduced to 48 bays, having regard to the reduction in car parking demand due to the sharing of car spaces by multiple uses within the proposed development, because of efficiencies gained from the consolidation of shared car parking spaces.

25

The traffic engineers agreed that a further reduction in the standard parking requirement specified in Table 3 of LPS 4 should be allowed for the availability of public transport in the locality (cl 5.7.3(a)(ii) of LPS 4). The experts disagreed, however, as to the appropriate level of reduction in the standard parking requirement on account of this factor. Mr MacPherson considered that there should be a 10% reduction (5% for buses and 5% for trains) from the requirement of 29 car spaces for the tourist accommodation units under Table 3 of LPS 4, but no reduction in relation to any other use within the proposed development. In Mr MacPherson's opinion, the appropriate reduction for public transport is three spaces, from 48 spaces to 45 spaces. In contrast, Ms Herget-Lansdell considered that, having regard to the locational characteristics of the site, a 25% reduction from the maximum required supply for car parking for the development, taking into account shared uses, is a reasonable, although conservative, relaxation of parking requirements. In Ms Herget-Lansdell's opinion, the appropriate reduction for the availability of public transport in the locality is 12 spaces, from 48 spaces to 36 spaces.

26

The Tribunal prefers Ms Herget-Lansdell's evidence in relation to the appropriate reduction for the availability of public transport in the locality. As Ms Herget-Lansdell said, while 10% is a reasonable reduction in a middle suburban location with access to public transport, as an experienced traffic engineer she could not 'think of an area [in the Perth metropolitan region] other than the Perth CBD that is better served by public transport and other spatial attractions than this site'. There is a comprehensive CAT bus service within a two minute walk of the development operating every 10 minutes between 7.30 am and 6.30 pm on weekdays and between 10 am and 6.30 pm on weekends and public holidays. There are less frequent bus services outside these hours. Furthermore, Fremantle Railway Station is located approximately 500 metres from the site, that is, within a five to seven minute walking distance. This high level of public transport is available to people who would access all of the uses within the proposed development. The Tribunal is, therefore, satisfied that the maximum required supply of 48 car spaces, taking into account shared uses, should be reduced on account of the availability of public transport in the locality by 25%, or 12 spaces, to 36 spaces.

27

As noted earlier, the proposal involves the provision of 71 electric scooters for the use of people staying at the tourist accommodation units. While cl 5.7.3 of LPS 4 does not expressly refer to the reduction of car parking for provision of scooters, the Tribunal is satisfied that the

provision of scooters is an 'other relevant consideration' falling within cl 5.7.3(a)(viii) of LPS 4, provided that the scooters are likely to be used to the extent proposed. Mr MacPherson gave evidence, which was not questioned by Ms Herget-Lansdell, that, in the broader community, motorcycle users represent only 5.4% of road users. Mr MacPherson considered that, in the absence of any empirical data as to the attraction of electric scooters for tourists, he 'wouldn't think that there would be a great deal more [demand] than the general population', because 'you have to have a degree of confidence' to ride a scooter. Mr MacPherson estimated that maximum demand for this form of transport by tourists would be double the general motorcycle use in the community, that is, up to about 12% of adults accommodated at the development. Ms Herget-Lansdell did not question Mr MacPherson's reasoning. She thought that 'the take up will be quite high, but I do not know to what extent'. She considered that it would be particularly attractive to the 'under 35s'.

28

The Tribunal considers that the maximum likely demand for scooters provided within the development is in the order of 12% of adults. While younger people on holiday may be willing to try riding a scooter, as Mr MacPherson said, one would need to have a degree of confidence to do so in traffic. It is likely, therefore, that the maximum demand for scooters would be in the order of nine or 10 scooters. The Tribunal considers that the provision of 10 scooters for tourists accommodated at the development would justify a reduction of five car spaces, from 36 spaces to 31 spaces.

29

As noted earlier, from the 1980s until the early 2000s, the warehouse building contained shops and other commercial uses. Mr Kirkness calculated that, applying Table 3 of LPS 4 to the areas available for those uses would create a notional requirement at that time of 39 car spaces. As only nine car spaces were available on site, this means that there was an historical shortfall of 30 car spaces associated with the use of the site. These additional cars were necessarily accommodated elsewhere in the locality. Mr Kirkness' calculation was not questioned or contradicted, although the traffic engineers disagreed as to what, if any, reduction is appropriate due to the shortfall in car parking provision for uses previously accommodated on the site. Mr MacPherson urged caution in reducing required car parking on the ground of historical shortfall, because of the difference in the nature of the former shop use and the proposed tourist use. Ms Herget-Lansdell accepted that the uses are different and therefore considered that up to 50% of the historical car parking deficiency, that is, 15 bays, should be offset, taking into account the nature of the different activities.

30 The Tribunal considers that Ms Herget-Lansdell's approach is sensible and appropriate. It is correct that shop and tourist accommodation uses are different. In particular, tourists are likely to leave their vehicles for longer periods than people visiting a shop and are likely to leave vehicles in the locality overnight, whereas people visiting a shop are likely to only do so during normal business hours. However, it is appropriate to recognise the historical shortfall to the extent proposed by Ms Herget-Lansdell. Historically, the use of the site imposed a car parking burden on the surrounding locality of up to 30 car spaces. It is appropriate and reasonable to reduce the car bays required to be provided on the site for the proposed uses by half this historical shortfall. Clause 5.7.3(a)(iv) of LPS 4 allows reduction of 'any car parking deficiency ... associated with the existing use of the land'. The Tribunal considers that, in the case of an application for development approval for development already commenced or carried out under cl 8.4.1 of LPS 4, the words 'existing use of the land' include a former use that ceased when the development was commenced. In any case, even if the former uses of the site are not an 'existing use of the land' within the meaning of cl 5.7.3(a)(iv) of LPS 4, a reduction for an historical shortfall associated with a use that ceased when redevelopment that has not yet been completed commenced is an 'other relevant consideration' falling within cl 5.7.3(a)(viii) of LPS 4.

31 However, in any case, even if the Tribunal were to entirely ignore the historical shortfall in car parking provision associated with the former shop and other commercial uses of the site, Able Lott has satisfactorily justified a reduction in the car parking requirements by 22 spaces, from 31 spaces to the nine on-site spaces proposed, due to the availability of car parking in the locality including street parking (cl 5.7.3(a)(i) of LPS 4).

32 Ms Herget-Lansdell found that, between 8 am and 5 pm on a typical work day, there were at least six on-street bays free on Beach Street within the subject street block. These car bays are subject to a two hour restriction until 6.30 pm. Ms Herget-Lansdell said that there is substantially less parking demand for on-street parking at night in Beach Street. Furthermore, the site is located across the road from the City of Fremantle Carparks 12A and 12B which have 296 car bays. Ms Herget-Lansdell found that, between 8 am and 5 pm on a typical working day, there were a minimum of 40 bays free at any given time within 50 metres of the site and at least 100 bays free within 100 metres of the site.

33 Mr MacPherson considered that there should be no reduction due to the availability of car parking in the locality, including street parking, for five reasons.

34 First, Mr MacPherson considered that the six car bays on Beach Street should not be taken into account, because they are restricted to two hour parking during the day and because of a lack of security at night. However, while the two hour restriction during the day limits the desirability of these spaces, it does not preclude them from being used by tourists staying at the site. Furthermore, members of the public accessing other uses at the site can utilise these bays. In relation to Mr MacPherson's security concerns at night, as Ms Herget-Lansdell pointed out, LPS 4 does not identify security of street parking as a factor discounting reduction; cl 5.7.3(a)(i) of LPS 4 simply refers to 'the availability of car parking in the locality including street parking'.

35 Secondly, Mr MacPherson considered that Carparks 12A and 12B should be ignored in this case because of uncertainty as to the continued availability of public car parking in that location. Mr Steven Sullivan, a town planner who gave evidence on behalf of the City, said that Carparks 12A and 12B are leased by the City from the Public Transport Authority (PTA) under a lease that expires on 31 August 2011 and does not contain an option for renewal. Furthermore, under the lease, the PTA can give the City six months' notice of early termination. Mr Sullivan said that, at this stage, there have been no negotiations between the City and the PTA regarding the renewal of the lease.

36 However, Ms Herget-Lansdell gave evidence, based on her conversation with the Acting Manager of Transperth, that the PTA does not have any current proposal that would preclude the renewal of the lease. It is likely, therefore, that Carparks 12A and 12B, and particularly the areas proximate to the site, will remain available for public car parking into the foreseeable future. Under cross-examination, Mr Sullivan agreed that the lease for Carparks 12A and 12B has been renewed at least once before.

37 Thirdly, Mr MacPherson said that tourists would have a concern about security in leaving their vehicles at the car park overnight. However, as Ms Herget-Lansdell observed, the Scheme does not preclude reduction for car parking in the locality because a car park is an open area. Indeed, cl 5.7.3(a)(i) of LPS 4 does not identify security as a relevant matter.

38 Fourthly, Mr MacPherson considered that the restriction on the operating hours of the car park across the road to between 6 am and 10 pm on Friday and to between 6 am and 8 pm every other day means that the availability of public car parking in the car park should be entirely ignored. Mr Sullivan explained that retractable bollards are used to prevent vehicular access to the car park outside the hours of operation and that the bollards were introduced by the City as an 'anti-hoon' measure to address complaints from residents within the locality over antisocial behaviour involving cars.

39 Ms Herget-Lansdell said that Carparks 12A and 12B are the only open Council car parks that are restricted to certain hours of operation. She explained that the area was formerly quite deserted at night. However, the area has undergone and is undergoing transformation, with the development of the Fremantle Cold Stores site by the Department of Housing immediately to the north of the site and with the recent approval of residential development at the Fort Knox site to the immediate north of the Fremantle Cold Stores development. Ms Herget-Lansdell explained that the transformation will continue if the development of the site for tourist and other purposes is approved.

40 There is a reasonable prospect that, in light of the ongoing transformation of the area for residential and other active uses, the factors that led to the restriction of hours for Carparks 12A and 12B have been diminished to the point where the restrictions may be lifted or modified. However, in any case, even if the hours of the car park were to remain as currently restricted, the presence of such a large car park directly across the road from the site justifies a reduction in car parking requirements for the site to the extent required in this case. The restriction on hours does not preclude cars being left in the car park overnight. Furthermore, as Ms Herget-Lansdell said, there is greater on-street parking available at night on Beach Street than during the day.

41 Finally, Mr MacPherson referred to the Council's decision to close the Point Street Carpark, which has a capacity of 296 bays. However, as Ms Herget-Lansdell said, there is no evidence that the Point Street Carpark is operating at capacity. Furthermore, Ms Herget-Lansdell gave evidence that demand created by the closure of the Point Street Carpark is likely to be absorbed by car parks that are closer than Carparks 12A and 12B. Ms Herget-Lansdell noted that there are about 3,000 car parking bays within reasonable walking distance of the Point Street Carpark.

42 It follows that Able Lott has satisfactorily justified a reduction in the standard parking requirement specified in Table 3 of LPS 4 under paras (i), (ii) and (iii) of cl 5.7.3(a) of the Scheme to the number of on-site bays proposed in the development application.

43 Mr Roberts noted that the extent of variation sought from the car parking standard in this case is 87% (nine in lieu of 71 bays), and referred the Tribunal to the statement in *Seattle Bay Pty Ltd and Western Australian Planning Commission* [2006] WASAT 261, at [29], that:

The Tribunal would make the comment that, in the normal course of events, flexibility would not extend to the relaxation of a standard by 50%. The applicant must look to other factors to support its position.

44 However, this statement is distinguishable in the present case given the terms of cl 5.7.3(a) of the Scheme. In particular, this clause enables reduction or even waiver of the standard parking requirement specified in Table 3 where an applicant satisfactorily justifies a reduction due to one or more of the nominated factors. The applicant has done so in the circumstances of this case.

Vehicular access and egress

45 The Tribunal is satisfied that the proposed means of vehicular access and egress by nine cars and 10 electric scooters via the right of carriageway over part of the common property of the terrace houses at Nos 18 - 24 Queen Victoria Street is lawful, adequate and acceptable in planning terms, for the reasons which follow.

46 In terms of lawful access, the following statement by the New South Wales Court of Appeal in *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324 at [16] is equally apposite in this case:

The Court [or Tribunal] is [as confirmed by the decision of the High Court of Australia in *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528; [2007] HCA 45] limited to the material in the folio identifiers, the registered instrument, the deposited plans, and the physical characteristics of the tenements. These provide no basis for reading down the clear and unqualified words of the grant. The grant was for all purposes, for all times, and extended to every person with an estate or interest in any part of the dominant tenement with which the right was capable of enjoyment, and persons authorised by them.

47 The registered right of carriageway in this case is similarly unqualified:

... full and free right and liberty for the [owner of the site] and the occupiers for the time being of the [site] or any part thereof and its and their tenants servants and agents and all persons authorised by it or them from time to time and at all times hereafter at its or their will or pleasure to pass and re-pass over and along the subject land with or without motor cars motor trucks or other vehicles of any description laden or unladen and with or without animals for all purposes whatsoever connected with the use and enjoyment of the [site].

48 In terms of the adequacy of access and egress, Mr Sullivan and Mr MacPherson noted that the owners of the terrace houses at Nos 18 - 24 Queen Victoria Street are entitled to install services or erect a barrier to preclude access of vehicles using the right of carriageway onto the 0.38 metre portion of the private laneway between the edge of the right of carriageway and the face of the closest terrace house. Similarly, Mr Sullivan and Mr MacPherson noted that St Patrick's may install services or preclude access to the 1.12 metre section of the private laneway that is on the property owned by the Roman Catholic Archbishop of Perth.

49 However, there are existing gas services within the area of the laneway that restrict its width in places but do not preclude its ability to function. Furthermore, as the laneway is necessary for access to the rear car parking area of the terrace houses and the St Patrick's car park, as well as for the site, there is a practical necessity for each property owner to maximise the width of the accessway.

50 Mr MacPherson also raised the concern of the sufficiency of sightlines for vehicles exiting the private laneway. However, Ms Herget-Lansdell gave detailed evidence demonstrating that there are adequate sightlines, having regard to the capacity of drivers to stop and look for traffic at various points. Furthermore, the evidence shows that the accessway is used satisfactorily at present by vehicles including minibuses. The accessway was also historically used by up to nine cars parked on the site.

51 In relation to the acceptability of vehicular access and egress from the site via the right of way, three of the four owners and residents of the terrace houses gave evidence on behalf of the City in which they raised concerns about the amenity impacts. However, each of the residents who gave evidence referred to the noise insulation effect of the thick walls of the terrace houses. They each indicated that they are not disturbed by

vehicular noises in the laneway. Furthermore, the concerns of the residents related to the use of the right of carriageway by nine cars and 71 scooters, whereas, as found earlier, there is only likely to be demand for up to 10 scooters. If approval of the proposed development is otherwise appropriate, the development consent should require the provision of 10 on-site scooters and eliminate the ramp between the private car park and the deck so that the vehicular impact of the development will be restricted to nine cars and 10 scooters.

52 Although it is correct that the proposed development would introduce additional vehicles to the laneway and that these vehicles may use the laneway at night, whereas existing vehicles accessing the St Patrick's site generally do so during business hours, as the former Town Planning Appeal Tribunal said in *Gosatti Holding Pty Ltd v City of Fremantle* [2000] WATPAT 3 (Appeal No 48 of 1999, 17 March 2000), which was referred to in *St Patrick's* at [57]:

It barely needs to be said that residential uses in close proximity to non-residential uses cannot expect the same degree of amenity as would be found in a homogenous residential suburb.

53 Two further specific amenity concerns were raised in the evidence. First, one of the residents of the terrace houses observed that there would be greater potential for intoxicated people to enter the private laneway because the gate would be opened more often. Secondly, St Patrick's expressed concern about safety because there is a door from the St Patrick's building opening directly onto the private laneway. However, given that the accessway appears to be in relatively constant use by St Patrick's during the day at present, including by minibuses sometimes reversing out, without intoxicated people entering the laneway and without any apparent experience of anyone having been hurt, the proposal would not introduce any unacceptable amenity consequences by use of the right of carriageway. The Tribunal therefore considers that, if the development's use of the right of carriageway were restricted to nine cars and 10 electric scooters, the proposed vehicular access and egress is appropriate in planning terms.

Drainage and flooding

54 Able Lott and Mr Fazio have carried out substantial unauthorised excavations within the footprint of the warehouse building and have constructed a slab at approximately 0.9 AHD in the proposed public atrium area, which is 0.56 metre below the level of Beach Street abutting the frontage of the site. The City retained Dr James Davies, a hydrologist,

to determine the level of the water table at the site and to give advice and evidence in relation to drainage and flooding issues. Dr Davies hand augered a hole 2 metres deep at the car park on the opposite side of Beach Street from the site and found that the water table is at 0.31 metre AHD in that location. Dr Davies gave evidence that the level of the water table on the site is, therefore, likely to be approximately 0.3 metre AHD prior to winter and approximately 0.5 metre AHD immediately following winter. As current State planning anticipates a 0.38 metre increase in sea level due to climate change between 2000 and 2100 (cl D.3 *State Planning Policy 2.6 - State Coastal Planning Policy*), the water table at the site is likely to reach approximately 0.7 metre AHD - 0.9 metre AHD during the lifetime of the development. Consequently, the water table currently ranges between 400 millimetres and 600 millimetres below the level of the slab and is likely to increase over the next 90 years to range between abutting the slab and 200 millimetres below the slab.

55 The following three sub-issues were discussed and debated at the hearing.

- 1) Whether the level of the water table over the lifetime of the development may compromise the structural stability of the building or cause ingress of water into the building.
- 2) Whether there is adequate capacity for on-site management of stormwater.
- 3) Whether the development is subject to an unacceptable risk of flooding.

56 As to the structural stability of the building and the potential for ingress of water due to proximity to the water table, the only engineering evidence presented to the Tribunal was from Mr Brett Lucchesi, a structural and civil engineer called by Able Lott. Mr Lucchesi gave evidence that he has 'no concerns about the location of the slab' and that he is 'confident ... that the integrity of the structure is not compromised' by the level at which the structure has been and will be built. Mr Lucchesi said that the level of the water table will not cause water buoyancy (uplift) or result in ingress of water. While Mr Lucchesi was not sure whether Mr Fazio had included a waterproof membrane on the underside of the slab, Mr Lucchesi said that waterproofing admixtures can be added to the proposed 70 millimetre topping slab if necessary. He explained that this determination will be made as part of the

application for the building licence. Based on Mr Lucchesi's evidence, the Tribunal finds that the level of the water table over the lifetime of the development will not compromise the structural stability of the building or cause ingress of water.

57 In relation to whether there is adequate capacity for on-site management of stormwater, it is common ground between the parties that the area of the site (1,428 square metres) requires soakwells with a volume of 41.4 cubic metres for the on-site management of stormwater. Dr Davies explained that, in order to be effective, soakwells must be sufficiently removed from the water table. However, Mr Kirkness gave evidence that there is an area in excess of 100 square metres in the northern and central parts of the rear of the site which is proposed to be at 2.62 metres AHD. Mr Kirkness said that there is adequate capacity in this area to accommodate 41.4 cubic metres of soakwells sufficiently above the likely level of the water table (0.9 metre AHD by 2100). Mr Lucchesi agreed with Mr Kirkness' evidence on this point. Mr Kirkness also pointed out that there is some capacity to accommodate soakwells at the original ground level of 1.46 metres AHD abutting the Beach Street frontage of the site. Although Dr Davies originally raised concerns about the capacity of the site to accommodate sufficient soakwells, under cross-examination he conceded that soakwells with the requisite volume of 41.4 cubic metres can probably be provided on site.

58 Based on this evidence, the Tribunal finds that there is adequate capacity for on-site management of stormwater within the development. The Tribunal notes that Mr Kirkness also referred to the possible incorporation of an infiltration system running in strip drains under the atrium space to dispose of stormwater into the groundwater. However, it is unlikely that this method would be effective over time, given the likely increase in the level of the groundwater. Mr Kirkness also referred to the capacity to capture rainwater in tanks on the site and re-use rainwater within the development. However, these ideas were not sufficiently developed for consideration.

59 In relation to flooding risk, Dr Davies raised concerns in relation to the Beach Street drainage system and flood levels of the Swan River. Mr Phillip Gale, the City's Manager of Infrastructure Services, gave evidence that the City is aware of problems with the Beach Street drainage system and is currently investigating whether these problems are due to factors such as blockages or capacity limitations. Dr Davies, Mr Kirkness and Mr Lucchesi agreed that, until the City completes the investigation and any necessary upgrades, 'there is a short-term risk of

Beach Street inundation overtopping into 5 Beach Street and inundating the site'. However, these witnesses also agreed that there are options to temporarily raise the threshold during such a flood event, such as by sandbagging. Mr Lucchesi also said that, in the eight years that he has been involved in relation to the development of the site, he has never observed flooding of the site.

60 Based on a 1982 study, the Department of Water has advised that the 100 year flood level of the Swan River at Beach Street is 1.15 metres AHD. The Department of Water has advised that minimum habitable floor levels should be at least 0.75 metre above the adjacent one in 100 year flood level, that is, in this case, at 1.9 metres AHD.

61 However, Dr Davies, Mr Kirkness and Mr Lucchesi agreed that 'much of Fremantle has finished floor levels below the [Department of Water's] current recommendation of 1.9 metres AHD' and said that they are 'not aware if the City adopts this criterion or applies it broadly when assessing development applications'. The City did not present any evidence to suggest that it generally applies the Department of Water's recommendation.

62 The Tribunal is satisfied that the proposed development does not warrant refusal of development consent because of the potential for flooding. The City is engaged in the process of investigating and resolving problems with the Beach Street drainage system. While the level of the public atrium and adjoining areas within the development is lower than the 100 year flood level of the Swan River in Beach Street, the entry areas to the development from Beach Street are higher than the flood level. Furthermore, Mr Lucchesi explained that the entry may be permanently raised by contouring of the entry ramps. The desirability and necessity of raising the entry areas should be considered at the building licence stage. This consideration should be based on the anticipated sea level rise of 0.38 metre between 2000 and 2100.

63 The Tribunal, therefore, finds that the proposed development is acceptable in terms of drainage and having regard to potential for flooding.

Conclusion

64 Having regard to the Tribunal's findings in relation to parking, vehicular access and egress and drainage and potential flooding, the proposed development warrants conditional development approval. In accordance with the Tribunal's usual practice, the City provided draft,

without prejudice conditions of development approval and Able Lott provided comments in relation to the draft conditions. During the hearing, there was further discussion between the Tribunal and the parties in relation to the proposed draft conditions and further draft conditions to address issues discussed in the proceeding.

Conditions

65 Ultimately, the parties disagreed in relation to aspects of only two of the draft conditions proposed by the City. Before addressing the disputed conditions, it is appropriate to make comments in relation to four other matters addressed in the conditions.

66 First, as the Tribunal has found that the maximum likely demand for scooters is nine or 10, it is appropriate to reduce the number of on-site scooters provided for in the conditions from 71 to 10 (see condition 13) and to require the deletion of the ramp between the private car park and the rear deck which is, consequently, no longer required for scooter parking (see condition 14). Mr Kirkness gave evidence that, if the ramp were deleted, there is sufficient space between the car park entrance and the stairs abutting the rear boundary of the site to accommodate 10 scooters.

67 The Tribunal considered whether the rear deck should also be deleted. The Tribunal asked the town planning witnesses, Mr Sullivan and Mr David Jones, called by Able Lott, about the likely amenity consequences of the deck for the residents of the terrace house to the rear. Both town planning witnesses gave evidence that the deck is not likely to give rise to any unacceptable amenity impacts for the residents of the terrace houses, provided that a 1.6 metre - 1.8 metre high privacy wall is constructed above deck level (see condition 12) and that any actual use is regulated and conditioned by a separate development approval (see condition 14). The Tribunal therefore considers that the deck should be constructed with the privacy wall and landscaped (see conditions 10 and 11) as part of the approved development. While Mr Williams suggested, on behalf of Able Lott, that the deck should be able to be used for storage purposes without the need for a further development approval, the Tribunal considers that the deck should not be used for any purpose (other than to maintain the landscaping in accordance with condition 11) without separate development approval having been sought and obtained to regulate and condition its use. When assessing any further development application in relation to the use of the deck, the Council should consider whether and how to regulate the nature and intensity of

use, including restrictions on the number of people, the activities, the hours of use and lighting.

68 Secondly, the Tribunal suggested during the course of the hearing that, if the application is approved, it is appropriate to impose a condition requiring the prompt construction of a new retaining wall at the rear (eastern) boundary of the site and the reinstatement of the limestone wall previously on the common boundary between the site and the common property of the terrace houses at Nos 18 - 24 Queen Victoria Street. As noted earlier in these reasons, the limestone wall collapsed as a result of excavations carried out on the site. In consequence of the erection of scaffolding to prevent people and vehicles from falling from the common property of the terrace houses into the excavation on the site, the rear car parking area of the terrace houses can only currently be used by the residents of one of the four terrace houses at any one time. This state of affairs, which has apparently been in existence for the past three years, has given rise to considerable, understandable consternation on the part of the adjoining residents. Condition 31 reflects the Tribunal's suggestion and requires Able Lott to apply to the City for a building licence to construct the new retaining wall and to reinstate the limestone wall within one month of the Tribunal's approval and to construct the new retaining wall and reinstate the limestone wall within four months of the issue of the building licence. Able Lott and Mr Fazio agreed to this condition during the hearing.

69 Thirdly, as noted earlier in these reasons, Mr Fazio initially said in his evidence that he intended to operate part of the tourist development in a backpacker manner and accommodate more than 200 adults and around 30 children, although, following an adjournment in which he obtained legal and technical advice, he said that he no longer intended to operate the development in that manner, but rather, to limit the tourist accommodation units to a maximum of two adults and two children in the case of the smaller units, and three adults and two children in the case of the larger units. The Tribunal suggested to the parties that these restrictions should be reflected in the conditions of approval, if the application were approved. Conditions 34 and 35 reflect the Tribunal's suggestion. During the hearing, it was agreed between the parties that a child should be defined as having a maximum age of 16 years, as 17-year-olds can be independent. The Tribunal considers that, for the avoidance of doubt, a corresponding definition of 'adult' as being a person of 17 years of age and above should be inserted into these conditions.

70 Finally, having regard to the lengthy and unfortunate development history of the site since 2003, the Tribunal suggested to the parties during the hearing that, unusually, it would be appropriate in the circumstances of this case to impose a condition requiring the development to be completed within a specified period, failing which the development approval would lapse and no longer be valid. Condition 40 reflects the Tribunal's suggestion and requires Able Lott to submit a building licence to the City for the whole of the development (other than the rear retaining wall and the limestone wall abutting the common boundary with the common property of the terrace houses) within five months of the Tribunal's approval and to complete the development within 24 months of the issue of the building licence. Able Lott and Mr Fazio agreed to this condition during the hearing.

71 The two disputes between the parties in relation to the draft conditions concern conditions 24(e)(i) and 37(a).

72 Able Lott and Mr Fazio constructed three windows within the parapet of the historic front façade of the warehouse building without development approval. The building licence drawings, which were prepared by Mr Kirkness and approved by the City, did not show the windows as constructed, but rather, contained windows within the rebated portions of the parapet. This aspect of the building licence should not have been approved by the City, as it involved a change to the historic fabric of the building and was not authorised by the development approval. In any case, the building licence has lapsed and the windows that have been constructed do not accord with the building licence plans.

73 Proposed condition 24(e)(i) requires the removal of the three windows in the parapet and the careful bricking up of the openings and repair of the damaged brickwork to match the original.

74 Mr Kirkness gave evidence that the new windows are a 'corruption of the front façade' and that, from a heritage perspective, 'the most desirable option is to restore the wall'. However, Mr Kirkness said that, ultimately, having regard to the existing windows and alternative design approaches to facilitate natural light to these rooms, he was 'reasonably comfortable with retaining the three windows' as they 'sit proportionately to three of the four original windows in the main level of the front façade.

75 The Tribunal considers that the installation of the three windows within the historic parapet has a significant and unacceptable impact on the heritage significance of the building. Furthermore, the windows

are not necessary for the reasonable adaptive re-use of the warehouse building. The tourist accommodation rooms in question can obtain natural light through windows to the public atrium in the central part of the development. It is inappropriate to introduce any glazed elements within the parapet of the historic façade. The condition as proposed by the City should be imposed.

76 Finally, proposed condition 37(a) requires the approval by the City of a plan for the private car park showing the dimensions of all parking bays and requisite manoeuvring areas in accordance with Australian Standard No 2890 - parking facilities and off-street parking (Australian Standard). Able Lott objected to this condition because the development cannot be made to comply with the Australian Standard in two respects. First, the Australian Standard would require a 1 metre aisle at the northern end of the car park to enable a car parked in Bay 1 to be able to reverse into the aisle so as to exit the car park in a forward direction. However, Mr Kirkness gave evidence that there is insufficient room on the site to provide this additional aisle and that it is possible to reverse from this bay and turn around in the central part of the car park adjacent to the stairs. Secondly, the Australian Standard would require an additional 0.2 metre width for Bay 9 because it adjoins a wall. However, Mr Kirkness said that, having regard to the constraints of the site, it is not possible to provide this additional width and that passengers can, in any case, exit the car before it is parked. Mr Kirkness added, in relation to both of these aspects, that it is not uncommon for the Australian Standard to be varied in relation to parking arrangements on historic sites in Fremantle.

77 The Tribunal considers that exceptions can appropriately be made in relation to the two aspects referred to by Mr Kirkness. Under condition 37(b), Bay 1 would be allocated to the commercial tenancy and Bay 9 would be allocated to the caretaker's dwelling. The occupants of these bays will, therefore, be long-term users of the car park and more able to negotiate its constraints. Furthermore, the Tribunal considers that an additional condition (condition 38) should be imposed requiring the applicant to install and the owner of the commercial tenancy thereafter to maintain a sign adjacent to Bay 1 stating that the vehicle parked in Bay 1 must reverse to the area adjacent to the stairs and must there turn so as to exit the car park in a forward direction. The Tribunal is satisfied that the proposed car park would operate in a satisfactory manner, excepting the 1 metre aisle at the northern end and the additional 0.2 metre width for Bay 9, provided that this additional condition is imposed.

Orders

78

The Tribunal makes the following orders:

1. The application for review is allowed.
2. The decision made by the respondent on 16 June 2010 to refuse development approval for unauthorised works and approval for proposed works and change of use to Tourist Accommodation, Offices, Restaurant, Small Bar, Theatre, Private Recreation, Caretaker's Dwelling at No 5 (Lot 123) Beach Street, Fremantle is set aside and a decision is substituted that development approval is granted under the *Metropolitan Region Scheme* and the *City of Fremantle Local Planning Scheme No 4* for this development, subject to the following conditions:
 1. Except as varied by the following conditions, the development shall be carried out in accordance with the following plans:
 - (a) Plans A1 to A8, date stamped 18 December 2009 by the City of Fremantle;
 - (b) Plan A9 - East (Rear) Elevation, date stamped 23 April 2010 by the City of Fremantle; and
 - (c) Plans A1 to A4 - Proposed Additional Ablution Facilities, date stamped 11 June 2010 by the City of Fremantle.
 2. The development the subject of this approval is limited to the tourist accommodation, commercial tenancy, eatery (that is, restaurant), gym, sauna, pool, spa, bar, theatre, caretaker's dwelling and associated parking areas as shown on the approved plans referred to in condition 1.
 3. The use of the site by the public for restaurant and small bar purposes (identified as 'Eatery' and 'Bar' respectively on the plans date stamped 18 December 2010) shall be restricted to areas identified as 'Public Seating' on plan A1

date stamped 18 December 2009 and shall not extended beyond these areas.

4. Prior to or together with the submission of an application for a building licence, a seating plan for the small bar and the restaurant shall be submitted for the approval of the City of Fremantle. The maximum number of patrons to each of those spaces shall be determined by the seating plan approved by the City of Fremantle.
5. The seating capacity of the theatre shall be restricted to a maximum of 80 patrons.
6. All stormwater discharge shall be contained and disposed of on site.
7. Prior to or together with the submission of an application for a building licence, drainage plans shall be submitted for the approval of the City of Fremantle. The plans must address the potential impact of stormwater runoff, flooding and the level of the water table and the means by which stormwater is to be contained and disposed of on site.
8. Prior to occupation, drainage works must be completed in accordance with the approved drainage plans.
9. Prior to or together with the submission of an application for a building licence, a lighting plan shall be submitted for the approval of the City of Fremantle. The lighting plan shall provide for lighting which minimises light spill onto the adjoining properties. The lighting is to be provided and maintained in accordance with the approved lighting plan.
10. A detailed landscaping plan for the rear deck shall be submitted for the approval of the City of Fremantle. The landscaping plan shall include information relating to species selection, reticulation, details of existing vegetation to be

retained, and treatment of landscaped surfaces (that is, mulch, lawn, synthetic grass, etc).

11. Prior to occupation, the landscaping shall be completed in accordance with the approved landscaping plan and maintained in good condition thereafter.
12. The wall to the rear deck on the northern side and eastern rear elevation shall have a minimum height of 1.6 metres and a maximum height of 1.8 metres, measured above the deck level, in order to provide privacy to the adjoining residential properties.
13. The owner(s)/operator of the tourist accommodation units shall provide, maintain and make available 10 on-site electric scooters for the private use of the occupants of the tourist accommodation units. The use, hire or lease of the electric scooters to any other person is prohibited. The scooters shall be parked, charged and maintained adjacent to the eastern rear wall of the private car park between the car park entrance and the stairs.
14. The ramp between the private car park and the rear deck shall be deleted on the plans submitted for a building licence. The rear deck may not be used for any purpose (other than to maintain the landscaping in accordance with condition 11) without separate planning approval having been sought and obtained to regulate and condition its use.
15. Prior to or together with the submission of an application for building a licence, detailed plans shall be submitted for the approval of the City of Fremantle which show how any air conditioning plant, satellite dishes, antennae and any other plant and equipment to be located on the roof of the building is to be screened from view from

- adjoining buildings and the street. The approved plans shall be implemented.
16. Prior to occupation, the owner shall submit written confirmation that a notification pursuant to s 70A of the *Transfer of Land Act 1893* (WA) has been registered against the Certificates of Title for the site, advising the owners and subsequent owners of the lots comprising the site that the site is located in close proximity to the Fremantle Port and the Perth-Fremantle railway line and may be subject to noise, odour, vibration and activity not normally associated with residential or commercial use.
 17. Signs do not form part of this approval and shall be the subject of a separate planning application.
 18. Prior to or together with the submission of an application for a building licence, details of the location of the proposed pump, filter and plant equipment for the swimming pool shall be submitted to the City of Fremantle for approval. These details shall provide for the location of the pump, filter and plant equipment so as to ensure that there is no noise and vibration nuisance to the adjoining properties.
 19. Prior to or together with the application for a building licence, details of all materials, colours, finishes and architectural detailing shall be submitted to the City of Fremantle for approval. The materials, colours, finishes and architectural detailing of the development shall be in accordance with the approved details.
 20. Prior to occupation, the boundary walls located on the side and rear boundaries shall be of a clean finish in sand render or face brick.
 21. Prior to or together with the submission of an application for a building licence, revised plans for the development shall be submitted to the City of Fremantle for approval which:

- (a) provide for the adequate provision of rubbish storage and laundry facilities;
 - (b) show how disabled access is to be provided throughout the development, having regard to AS 1428.1 - Access and Mobility for Disabled Persons; and
 - (c) incorporate modifications to the rear wall (as shown on the east rear elevation) of the first level plan, such modifications to incorporate the provision of an open panel above 750 millimetres in height in order to permit traffic sightlines through the wall.
22. The existing and proposed development must comply with the requirements stated in paragraphs (a) to (e) and paragraph (g) in the 'Built Form (all development)' section of 'Part 4.1 Area 1' of *Local Planning Policy 2.3 - Fremantle Port Buffer Area Development Guidelines*. Detailed plans shall be submitted to the City of Fremantle for approval demonstrating how the development will comply/be modified to comply with these requirements.
23. Certification shall be submitted to the City of Fremantle by a suitably qualified practitioner prior to occupation of the building that the development has been completed in accordance with condition 22.
24. The front façade of the existing building shall be restored. Prior to or together with the submission of an application for a building licence, details of the proposed restoration works shall be submitted to the City of Fremantle for approval. The following restoration works, as a minimum, shall be carried out to the fabric of the front façade of the original warehouse building:
 - (a) Limestone

- (i) Carefully remove all cement-based patching and pointing from limestone.
- (ii) Replace all damaged limestone with new to match original.
- (iii) Reinstate all removed pointing with new to match the original lime-based mortar.

(b) Brickwork

- (i) Carefully remove paint from brickwork.
- (ii) Carefully cut out all brick joints.
- (iii) Replace damaged bricks with new to match original.
- (iv) Fill brick joints with lime-based mortars and reinstate tuck pointing with new to match the original.

Note: Limestone and brickwork conservation to be guided by evidence of original pointing and finishes at the gap between No 5 Beach Street and neighbouring building on northern boundary.

(c) Rendered enrichment

- (i) Carefully remove paint from all areas of render.
- (ii) Carefully remove cement-based patching from rendered elements and repair using lime-based mortars to match original.
- (iii) Apply limewash coating to render.

(d) Lintels

- (i) Carefully remove cement-based patching from lintels and repair

using lime-based mortars to match original. Apply limewash coating to render.

- (e) Windows
 - (i) Remove recently installed windows from the third level of the wall that faces Beach Street. Carefully brick up openings and repair damaged brickwork. Render brickwork using lime-based mortars to match original.
 - (f) Exposed plumbing
 - (i) Conceal existing exposed plumbing so that it is not visible when the building is viewed from Beach Street.
 - (ii) Replace missing and damaged limestone caused by this work with new to match original.
- 25. The restoration works shall be documented and supervised by an experienced practitioner in architectural conservation and heritage.
- 26. Prior to occupation of the development, certification shall be submitted to the City of Fremantle by the experienced practitioner in architectural conservation and heritage that the approved restoration works have been carried out.
- 27. Prior to or together with the submission of an application for a building licence, the detailed treatment of the space between the existing Beach Street façade and the more recent deck/caretaker's dwelling addition to the upper level shall be submitted to the City of Fremantle for approval. Such treatment is to be designed generally in accordance with the plans referred to in condition 1 to provide a separation between the existing warehouse façade and the new additions.

- An acceptable method of achieving this would be to remove the existing strip of corrugated steel cladding, which at present runs as a band between the top of the original parapet and the underside of the additions, and to replace it with a horizontal band of structural silicone glazing with no visible framing.
28. The existing concrete deck projection over the Beach Street boundary shall be reduced so that it no longer overhangs the street boundary.
 29. The existing gantry crane is to be retained and maintained as a feature on permanent display within the development.
 30. Prior to or together with the submission of an application for a building licence, a detailed survey of the existing roof trusses, including but not limited to the number and location of the trusses, shall be submitted to the City of Fremantle. The roof trusses shall be retained and maintained.
 31.
 - (a) Within one month of the grant of this approval, the applicant must apply to the City of Fremantle for a building licence to construct a new retaining wall at the rear (eastern) boundary of the site and to reinstate the limestone wall previously on the common boundary between the site and the terrace houses at Nos 18 - 24 Queen Victoria Street, Fremantle.
 - (b) Within four months of the issue of the building licence referred to in paragraph (a), the applicant must construct the new retaining wall and reinstate the limestone wall.
 32. The individual strata lots presently comprising the subject site shall be resubdivided by way of strata or survey strata subdivision to reflect the form of the approved development prior to use of any of

the tourist accommodation units and subject to a management statement agreed to in writing by the City of Fremantle regulating the use of the tourist accommodation units and ensuring that the ancillary facilities of the gym/sauna, pool/spa and laundrette will be available for use by persons staying at the tourist accommodation units and their guests. Any amendment or repeal of the management statement in these respects shall be approved by the City of Fremantle in writing.

33. The pool, gymnasium, spa, sauna and laundry may only be used by occupants of the accommodation units or their guests.
34. Units 1, 2, 5, 6, 9, 10, 16, 17, 20, 21, 24, 25, 28 and 29 may each accommodate up to a maximum of two adults (17 years of age and above) and up to two children (with a maximum age of 16 years) at any one time.
35. Units 3, 4, 7, 8, 11, 12, 13, 14, 15, 18, 19, 22, 23, 26 and 27 may each accommodate up to a maximum of three adults (17 years of age and above) and up to a maximum of two children (with a maximum age of 16 years) at any one time.
36. Prior to the issue of a building licence, the applicant must submit to the City of Fremantle for its approval a plan showing the number and arrangement of beds for each accommodation unit which is consistent with the number of occupants for that unit as specified in conditions 34 or 35, as the case may be. The number of beds in each unit must not exceed those shown on the plan approved by the City of Fremantle.
37. Prior to the issue of a building licence, the applicant must provide to the City of Fremantle for its approval a plan for the private car park on the first level of the development, which shows:

- (a) the dimensions of all parking bays and requisite manoeuvring areas in accordance with Australian Standard No 2890 - Parking facilities and off-street parking, except:
 - (i) a 1 metre aisle at the northern end of the car park; and
 - (ii) additional 0.2 metre width for Bay 9;
- (b) the following allocation of parking bays:
 - (i) Bay 1 - commercial tenancy;
 - (ii) Bays 2 - 8 - occupants of tourist accommodation units;
 - (iii) Bay 9 - caretaker's dwelling; and
 - (iv) Bay 5 - disabled access bay, which must be at least 4 metres wide;
- (c) an area in which up to a maximum of 10 electric scooters may be parked adjacent to the eastern rear wall between the car park entrance and the stairs.

38. Prior to occupation, the applicant shall install and the owner of the commercial tenancy shall thereafter maintain a sign adjacent to Bay 1 stating that the vehicle parked in Bay 1 must reverse to the area adjacent to the stairs and must there turn so as to exit the car park in a forward direction.

39. Parking shall be provided in accordance with the plan approved by the City of Fremantle under condition 37 and, prior to occupation, the applicant shall provide the City of Fremantle with certification from a qualified traffic consultant that the car parking has been provided in accordance with the approved plan.

40. (a) Within five months of the grant of this approval, the applicant must lodge an application for a building licence with the City of Fremantle for the whole of the development, other than those parts of the development subject to condition 31.
- (b) Within 24 months of the issue of the building licence referred to in paragraph (a), the development must be completed, failing which this development approval will lapse and no longer be valid.

I certify that this and the preceding [78] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

MR D R PARRY, SENIOR MEMBER