

IN THE MATTER of an application for review called in by the Minister pursuant to section 246(2)(a) of the *Planning and Development Act 2005* (WA)

B E T W E E N:

DR 33 OF 2024

RUAH COMMUNITY SERVICES LTD

Applicant

and

CITY OF PERTH

Respondent

**RESPONDENT'S SUBMISSIONS
IN RESPONSE TO APPLICATION FOR REVIEW**

Date of Document: 22 April 2024

Filed on behalf of: The Respondent

Date of Filing: 22 April 2024

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Background

- 1 On 11 December 2023, the Applicant submitted a development application to the Respondent for a proposed “Safe Night Space for Women” at the premises at 247-249 James Street, Northbridge.
- 2 At its Council meeting on 27 February 2024, the Respondent resolved to grant a conditional development approval.
- 3 The Respondent issued its determination notice for the development approval on 6 March 2024.
- 4 The development approval contains 4 conditions.
- 5 Also on 6 March 2024, the Applicant lodged an application for review with the State Administrative Tribunal (**SAT**) in respect of the decision of the Respondent to grant the conditional development approval.
- 6 On 15 March 2024, the Minister for Planning (being the Hon John Carey MLA) issued a “call in” direction to the SAT, pursuant to section 246(2)(a) of the *Planning and Development Act 2005* (WA) (**PD Act**).
- 7 As a consequence, this application for review is now to be determined by the Minister.

Preliminary procedural matters

- 8 The Respondent raises the following two preliminary procedural matters for consideration.
- 9 This application for review has been lodged in the name “Ruah Community Services Ltd”.

- 10 An online search on the ASIC website suggests that there is no registered company in existence under this particular name.
- 11 Before the Minister determines this application for review, the Applicant should be asked to confirm the correct entity name, which would presumably be the entity that leases the premises and that will run the proposed operation from the premises.
- 12 The Respondent would consent to the name of the Applicant in this matter being appropriately amended for this purpose, should it be required.
- 13 On 2 April 2024, the Hon Amber-Jade Sanderson MLA (who is the Minister for Health and the Minister for Mental Health) issued a letter to the Respondent's legal representatives, advising that the Minister for Planning "has transferred to me his powers and functions to consider and determine SAT review application (DR 33 of 2024)".
- 14 No further detail has been provided to the Respondent in relation to how exactly this transfer of powers and functions has been effected.
- 15 The power under sections 246 and 247 of the PD Act to determine an application for review vests specifically in the Minister who is responsible for the administration of the PD Act, being the Minister for Planning.
- 16 The Respondent invites very careful consideration to ensuring that the purported transfer of powers and functions is legally effectual and that proper jurisdiction is vested in the decision-maker, before a final determination is made.

Condition 1

17 Condition 1 of the development approval reads:

The Safe Night Space for Women only operating from 7:00pm to 7:00am seven days a week.

18 The Applicant in its grounds accompanying the application for review has not objected to condition 1 of the development approval.

19 Indeed, the development application as lodged proposed operating hours of 7pm to 7am.

20 Condition 1 of the development approval should therefore stand unchanged.

Condition 2

21 Condition 2 of the development approval reads:

The Safe Night Space for Women having a limited approval period of 30 months from the date of this determination, after which time the use must cease to the satisfaction of the City.

22 The Applicant in its grounds accompanying the application for review has not objected to those words before the comma in condition 2 of the development approval, so the position that the development approval is time limited to a duration of 30 months from the date of determination should remain unchanged

23 Indeed, the development application as lodged proposed a temporary duration of 30 months, on the basis that the premises would not be required for the proposed land use after that time.

24 The time limitation of 30 months, as currently reflected in condition 2 of the development approval, should therefore be retained.

25 The Applicant in its grounds accompanying the application for review has however argued that the words after the comma (being the words “after which time the use must cease to the satisfaction of the City”) should be deleted.

26 It is useful to consider how the SAT has recently determined contentious matters involving conditions imposing time limitations on development approvals.

27 In *Jag Traffic Pty Ltd and City of Cockburn* [2022] WASAT 99, the SAT upheld a condition of development approval that read:

This is a temporary approval only, valid for a period of two (2) years from the date of this decision. Upon expiry of this date the use shall cease.

28 In *Goldfield Villages Pty Ltd and City of Kalgoorlie Boulder* [2023] WASAT 6, the SAT upheld a condition of development approval that read:

This approval is valid for five (5) years from the date of occupancy. Following expiry of this period, all development works must be demolished, materials removed from the site unless a further development approval is granted by the City.

29 These conditions of development approval that have been upheld in recent SAT cases demonstrate that it is appropriate for conditions of development approval that impose time limitations to include a specific requirement for a land use to cease or for works to be dismantled upon the expiry of the relevant time period.

30 A positive requirement for development to come to an end is necessary from the perspective of local government for the purpose of taking appropriate enforcement action in the event that a land use continues or works are not dismantled following the expiry of development approval.

- 31 In particular, if condition 2 of the development approval was to be amended in the way proposed by the Applicant, then the condition would be nothing more than a bare statement as to duration (arguably more in the nature of an advice note), without the condition actually imposing any obligation on the proponent to cease the land use at a particular time.
- 32 By reference to the above SAT decisions, the Respondent would not oppose condition 2 of the development approval being modified to delete the words “to the satisfaction of the City”, given that the question of whether the land use has ceased would be a binary question and not something for which the City would need to make an evaluation.

Condition 3

Overview

- 33 Condition 3 of the development approval reads:

Prior to the commencement of the Safe Night Space, an updated Operational Management Plan, that includes:

a. a provision to require the presence of one (1) security personnel to be positioned external to the building at all times that the Safe Night Space is operational; and

b. specific provisions to engage with the Northbridge Neighbourhood Group on a regular basis to discuss any potential issues relating to the operation of the Safe Night Space and measures to resolve these issues

must be submitted to and approved by the City. The Safe Night Space being managed and operated in accordance with the approved Operational Management Plan at all times to the satisfaction of the City.

- 34 The Applicant in its grounds accompanying the application for review contends that condition 3 of the development approval should be replaced with the following:

The Safe Night Space for Women being managed and operated at all times in accordance with the attached Operational Management Plan dated 4 March 2024.

- 35 The application for review then appends a proposed updated version of the operational management plan (**OMP**) (dated 4 March 2024), which has been modified by the Applicant as compared to the version of the OMP that formed part of the development application when it was determined by the Respondent (which was dated 23 January 2024).
- 36 The Applicant appears to accept that an OMP of some form is appropriate for the purposes of the proposed land use.
- 37 The fundamental question in relation to condition 3 of the development approval therefore concerns the content and manner of implementation of the OMP.
- 38 The minutes of the Council meeting on 27 February 2024, read together with condition 3 of the development approval, demonstrate that the Respondent is content with the version of the OMP dated 23 January 2024, subject to that document being updated to address two additional topics, being external security and community engagement.
- 39 Notably, the Applicant in its grounds accompanying the application for review both disputes the need for the updates required in condition 3 of the development approval and says that an alternative version of the OMP should now be adopted (being the version dated 4 March 2024, rather than the version dated 23 January 2024).
- 40 It is unclear to the Respondent why the Applicant no longer relies upon the version of the OMP dated 23 January 2024.

Options available to Minister

- 41 It is observed that in determining this application for review, the Minister is effectively limited to either accepting some existing version of the OMP as being the final version or imposing a condition of development approval that requires a further updated OMP to be prepared (to address particular topics) prior to commencement.
- 42 Given that the application for review has been the subject of a “call in” pursuant to section 246(2)(a) of the PD Act, there is no apparent scope for the Applicant and the Respondent to mediate an agreed version of the OMP (as could potentially have happened before the SAT).
- 43 It is otherwise the case that, due to the process that has been followed, the Respondent has not had any opportunity to engage with the Applicant in relation to the version of the OMP that the Applicant is now proposing to adopt (being the version dated 4 March 2024).

Issues for consideration

- 44 The primary substantive issues for consideration by the Minister in relation to condition 3 of the development approval concern the requirements for additional content in limbs (a) and (b) of the condition.
- 45 The minutes of the Council meeting on 27 February 2024 record the following in relation to the decision of the Respondent to impose limbs (a) and (b) in condition 3 of the development approval:

Having had the opportunity to hear our community last week, we took the opportunity to not only welcome them but thank them for their courage for coming forward and highlighting concerns. One of the consistent themes that we heard was the importance of security to be stationed at all times, during in particular, the Safe Night Space operation if indeed that did proceed.

We've also heard from our community a desire and a want to be able to be engaged and to engage via the City of Perth with RUAH who are coordinating and running the Safe Night Space facility. It's sensible that our community most impacted in the James Street area have that ability to be able to raise any concerns or issues of performance where perhaps standards have slipped as can happen from time to time.

- 46 Further issues for consideration by the Minister in relation to condition 3 of the development approval concern the differences in content as between the 23 January 2024 and 4 March 2024 versions of the OMP and the extent to which the text of the condition should refer to the roles of the City in terms of approval and enforcement of the OMP.

Limb (a) – external security

- 47 The 23 January 2024 version of the OMP does not explicitly address the topics of ensuring security and preserving amenity in areas external to the premises (save for a couple of concise references to periodic external security patrols).
- 48 In imposing limb (a) in condition 3 of the development approval, the underlying objective of the Respondent is essentially to ensure that the proposed land use does not give rise to any adverse amenity impacts associated with persons attending the premises congregating or otherwise remaining in the public areas external to the premises.
- 49 This is a genuine amenity concern for which the proposed development creates a material risk, so the question of ensuring adequate security external to the premises is something that needs to be carefully considered in the determination of this application for review and in the final formulation of condition 3 of the development approval.

50 The preservation of amenity within the locality of the premises is a consideration that should be given significant weight by the Minister in the determination of this application for review, given the various existing residential, hospitality, entertainment and tourism land uses in close proximity to the premises.

51 The risk of antisocial behaviour associated with the proposed land use was otherwise a key theme in the public submissions made in relation to the development application.

52 The 4 March 2024 version of the OMP includes a new passage (not included in the 23 January 2024 version) on page 8 that reads:

Security will conduct hourly patrols as part of their shift schedule, covering the interior, external side of the building, and the area directly outside the front of the building, ensuring that any hazards are identified, removed, and properly disposed of.

53 Similarly, the 4 March 2024 version of the OMP includes a new passage (not included in the 23 January 2024 version) on page 9 that reads:

Security will conduct hourly patrols as part of their shift schedule, covering the interior, external side of the building, and area directly outside the front of 247 James St.

54 Further, the 4 March 2024 version of the OMP includes a new passage (not included in the 23 January 2024 version) on page 12 that reads:

Security personnel conduct hourly checks inside, outside, and around the sides of the building as a core part of their duties, and are responsible for reporting any illegal activity to the police.

55 The above content constitutes a proposed compromise on the part of the Applicant, to provide hourly security patrols external to the premises, in lieu of the permanent external security presence (during operating hours) currently required by condition 3 of the development approval.

- 56 The Respondent maintains that it would be appropriate for there to be security personnel located external to the premises at all times of operation, as a preventative measure to deter and otherwise control potential antisocial behaviour in front of the premises and in the immediate locality (bearing in mind the proposed operating hours).
- 57 This is especially so given that the 4 March 2024 version of the OMP does not include content that was included in the 23 January 2024 version of the OMP about there being a 10pm curfew for arrivals.
- 58 The Respondent considers that having hourly external security patrols only, as proposed by the Applicant in the 4 March 2024 version of the OMP, would be insufficient to mitigate the risk of adverse amenity impacts arising from activities external to the premises that occur as a consequence of the proposed land use.

Limb (b) – community engagement

- 59 The 23 January 2024 version of the OMP addresses the topic of community engagement (see pages 17 to 19), albeit in a manner that does not include much in the way of confirmed detail.
- 60 For example, the 23 January 2024 version of the OMP refers to the planned formation of a community advisory group, for which the terms of reference have not yet been confirmed.
- 61 The 23 January 2024 version of the OMP otherwise refers to planned monthly meetings with the “local community”, for the stated purposes of fostering a collaborative relationship, keeping neighbours informed of activities and addressing any issues that neighbours may experience as a result of the operations.

- 62 In relation to limb (b) in condition 3 of the development approval, the underlying objective of the Respondent is essentially to ensure that there are appropriate confirmed avenues for community engagement in connection with the proposed land use.
- 63 In particular, in imposing limb (b) in condition 3 of the development approval, the Respondent wants the OMP to be specific in relation to who exactly the Applicant should be engaging with on a regular basis, rather than just having bare references to an undefined “local community” and bare references to planned future engagement.
- 64 To clarify, the reference in limb (b) in condition 3 of the development approval to the “Northbridge Neighbourhood Group” is intended to be a reference to the incorporated association known as Northbridge Common Incorporated.
- 65 The website for Northbridge Common Incorporated (northbridgecommon.org.au) contains the following statement as to the objects of the organisation:
- Northbridge Common is an inclusive volunteer collective of residents, business owners, and creatives united for the core purpose to enrich our neighbourhood. We cover the suburbs of Northbridge, Highgate, and Perth.*
- OUR MISSION: To champion the diversity of culture, arts, entertainment, and local businesses through community building.*
- 66 The Applicant in the 4 March 2024 version of the OMP (at page 16) suggests that it has now established a community advisory group for the premises, but it is apparent that the membership of that community advisory group (beyond representatives of the Applicant itself) is still yet to be confirmed.

- 67 In particular, the 4 March 2024 version of the OMP (at page 17) states that the community advisory group will include “senior-level representatives from key stakeholders and organisations” as well as “community and neighbour representatives”, without identifying the particular individuals or entities.
- 68 If the Applicant is to establish a community advisory group pursuant to its OMP, then the Respondent maintains that it would be appropriate for Northbridge Common Incorporated to be involved.
- 69 The Respondent therefore maintains that limb (b) in condition 3 of the development approval is wholly appropriate, but the Respondent would be content with the words “Northbridge Neighbourhood Group” being replaced with the words “Northbridge Common Incorporated”, so that there is a reference to a particular ascertainable entity.

Differences in versions

- 70 The Respondent has detected the following substantive differences as between the 23 January 2024 and 4 March 2024 versions of the OMP.
- 71 Whereas the 23 January 2024 version of the OMP refers to security staff being on site between 7pm and 8am, the 4 March 2024 version of the OMP refers to security staff being on site between 7pm and 7am.
- 72 As stated above, whilst the 23 January 2024 version of the OMP refers to a 10pm curfew for arrivals to the premises, there is no such content within the 4 March 2024 version of the OMP (there is instead new content saying that clients are “encouraged” to arrive before 10pm).

- 73 Also, as explained above, the 4 March 2024 version of the OMP contains revised content on the topic of community engagement, as compared to the 23 January 2024 version of the OMP.
- 74 Content that was contained in the 23 January 2024 version of the OMP about maximum numbers of clients at the premises (see pages 6 and 7) does not appear within the 4 March 2024 version of the OMP, which would seem to contemplate the removal of any capacity restrictions under the terms of the development approval.
- 75 The 4 March 2024 version of the OMP also contains a significant amount of new substantive content on the topic of security management.
- 76 The above changes are not exhaustive and the 4 March 2024 version of the OMP contains various other additions and deletions, as compared to the 23 January 2024 version of the OMP.
- 77 The Respondent would prefer for the 23 January 2024 version of the OMP to be implemented, subject to the changes referred to in condition 3 of the development approval being incorporated.
- 78 That is because the 23 January 2024 version of the OMP is the version that the Respondent has properly assessed and is the version that has been the subject of discussions between the Applicant and the Respondent.
- 79 In determining this application for review, the Minister should consider asking the Applicant to provide a tracked changes comparison document, so that all of the differences between the 23 January 2024 and 4 March 2024 versions of the OMP can be properly considered.

References to City in condition 3

- 80 The Applicant in its grounds accompanying the application for review otherwise objects to how condition 3 of the development approval currently contains words requiring an updated OMP to be “submitted to and approved by the City” and then subsequently implemented to “the satisfaction of the City”.
- 81 The issues raised by the Applicant in this respect were considered by the SAT in the case of *Phil Lukin Pty Ltd and Lower Pty Ltd and Shire of Busselton* [2006] WASAT 124 at paragraphs [83] to [88].
- 82 The SAT at paragraph [85] of this decision held:

The Tribunal accepts that incidental aspects of a development may properly be the subject of a condition which requires the preparation of a plan, detail or specification for approval by the original decision-maker and implementation of the approved plan, detail or specification. A condition cannot lawfully defer, for later consideration, a non-incidental aspect of a development and cannot "leave open the possibility that development carried out in accordance with the consent and condition will be significantly different from the development for which the application was made"...

- 83 The SAT then held at paragraph [86] of this decision:

In circumstances where it is appropriate for a condition to require approval of a plan, detail or specification, in relation to an incidental aspect of a development, by the original decision-maker, the condition should specify "approval", rather than "satisfaction". In such circumstances, the discretion of the original decision-maker not to approve the plan, detail or specification is necessarily limited by the specific aspect in question. The Tribunal assumes that an original decision-maker, the approval of which to an incidental aspect of a development in the form of a plan, detail or specification is required by a condition imposed by the Tribunal, will properly and reasonably approach its task within the confines of the condition.

84 By reference to the above extracts from this SAT decision, if the Minister ends up imposing a version of condition 3 that requires further updates to be made to the OMP, then it would be entirely appropriate and necessary for the condition to specify that the relevant document must be “submitted to and approved by the City”.

85 Alternatively, if the Minister intends to assume responsibility for endorsing any further updated version of the OMP, then condition 3 of the development approval would refer to the “approval of the Minister for Planning” (the Respondent would prefer to assume the responsibility for approving any updated OMP, as the relevant local government).

86 At paragraph [88] of the above SAT decision, it was held that:

The second sense in which the word "satisfaction" is used is in place of, or as an aid to, enforcement of a condition. The use of the word "satisfaction" in this sense exceeds the appropriate function of a planning consent authority. Conditions of approval must be expressed with sufficient certainty so that they are able to be enforced. However, enforcement of conditions is a separate matter to the imposition of conditions.

87 By reference to the above paragraph from the SAT decision, it is arguable that the words “to the satisfaction of” may in some cases be practically unnecessary to include in a condition of development approval, if they are intended to relate specifically to potential future enforcement.

88 There is however an important distinction on the facts of this matter, which is that the final version of the development approval for the premises will have been granted by the Minister, pursuant to section 247 of the PD Act, rather than being granted by the Respondent or by the SAT in place of the Respondent.

89 Section 247(2) of the PD Act provides:

When the Minister determines an application that determination has effect according to its tenor.

90 If the final version of the development approval for the premises is granted with condition 3 worded in the manner proposed by the Applicant, then there will be ambiguity as to whether responsibility for enforcing compliance with condition 3 of the development approval rests with the Respondent or with the Minister.

91 On this note, the inclusion of the words “to the satisfaction of the City” at the end of condition 3 of the development approval is practically necessary to confirm that the Respondent (rather than the Minister) will have the ongoing responsibility for enforcing compliance with condition 3 of the development approval.

92 Alternatively, if the Minister would prefer to be responsible for enforcing compliance with condition 3 of the development approval, then words to the effect of “to the satisfaction of the Minister for Planning” should be included at the end of condition 3 of the development approval instead.

93 The substance of the obligation for the Applicant to comply with the OMP would not change in any way as a consequence of including the words “to the satisfaction of” within condition 3 of the development approval.

94 If however the Minister determines that the words “to the satisfaction of” should be deleted from the end of condition 3 of the development approval, then it would be very important for the final content of the OMP be comprehensive and certain, so that there can be no doubt or ambiguity as to the nature of any required operational measures.

Condition 4

95 Condition 4 of the development approval reads:

Prior to the commencement of the Safe Night Space, an updated Waste Management Plan shall be submitted to and approved by the City providing the following:

a. Specify what measures are being taken to mitigate the disposal of illegal items.

b. Specify what measures are being taken to mitigate biohazard items.

with the approved Waste Management Plan being implemented at all times by the operator/manager, to the satisfaction of the City.

96 The Applicant in its grounds accompanying the application for review contends that condition 4 of the development approval should be replaced with the following:

The attached Waste Management Plan dated 22 December 2022 being implemented at all times.

97 The Applicant appears to accept that a waste management plan is appropriate for the purposes of the proposed land use.

98 The fundamental question in relation to condition 4 of the development approval therefore concerns the content and manner of implementation of the required waste management plan.

99 The development application for the premises did not actually include any waste management plan.

100 The development application materials instead explained that the Applicant was proposing to rely upon an existing waste management plan for the premises (dated 22 December 2022) that had been prepared in connection with a previous development application for the premises.

- 101 The wording of condition 4 of the development approval confirms that the Respondent is content with the Applicant relying upon this existing waste management plan, subject to the document being updated to address two additional topics, being “illegal items” and “biohazard items”.
- 102 The fundamental rationale behind condition 4 of the development approval is that “illegal items” and “biohazard items” will potentially arise in connection with the proposed land use, would invariably need to be appropriately disposed of and should therefore also be addressed in the waste management plan (not just in the OMP).
- 103 By reference to its grounds accompanying the application for review, the Applicant appears to oppose the current wording of condition 4 of the development approval on the basis that the topics of “illegal items” and “biohazard items” are already addressed in the OMP.
- 104 On this note, the Applicant appears to accept that it is appropriate for there to be management measures, of some form, to address the topics of “illegal items” and “biohazard items”.
- 105 The current version of the waste management plan is quite generic in terms of its content (whilst also referring to a different land use at the premises) and does not contain anything to address any unique waste management requirements that may be associated with the proposed land use in question.
- 106 Further, whilst the OMP does touch upon the potential need to deal with “illegal items” and “biohazard items”, the OMP does not actually set out any management measures in relation to the disposal of such items.

- 107 In circumstances where the OMP properly acknowledges the risk of “illegal items” and “biohazard items” emerging in connection with the proposed land use at the premises, it would be entirely appropriate for a waste management plan to then set out the corresponding disposal measures.
- 108 Confirming the proposed measures in this respect is particularly important given that the Respondent as local government does not offer any service in terms of the disposal of such items.
- 109 An additional topic that is addressed in the OMP is the possibility for “unclaimed items” to be left on or outside the premises by individuals who have attended the premises.
- 110 The OMP indeed states that any such “unclaimed items” will be disposed of by the Applicant.
- 111 On reflection, the Respondent considers that condition 4 of the development approval should also require the updated waste management plan to address the disposal of such “unclaimed items”.
- 112 The Applicant in its grounds accompanying the application for review has otherwise objected to the inclusion of the phrases “submitted to and approved by the City” and “to the satisfaction of the City” as they currently appear within condition 4 of the development approval.
- 113 On this note, the Respondent repeats its submissions made on the same point made above in the context of condition 3 of the development approval.

114 That is, the Respondent maintains that the words “submitted to and approved by the City” are entirely appropriate (if an updated waste management plan is to be required) and says that the words “to the satisfaction of the City” are necessary, given that the final development approval will have been granted by the Minister (not the Respondent).

Conclusion

115 For the reasons outlined above, the Respondent maintains that, subject to some minor points, the existing conditions of the development approval for the premises are entirely appropriate and do not impose any undue risk or burden on the Applicant.

116 The Respondent would support the final conditions of development approval reading as follows:

1. The Safe Night Space for Women only operating from 7:00pm to 7:00am seven days a week.

2. The Safe Night Space for Women having a limited approval period of 30 months from the date of this determination, after which time the use must cease ~~to the satisfaction of the City.~~

3. Prior to the commencement of the Safe Night Space, an updated Operational Management Plan, that includes:

a. a provision to require the presence of one (1) security personnel to be positioned external to the building at all times that the Safe Night Space is operational; and

b. specific provisions to engage with Northbridge Common Incorporated ~~the Northbridge Neighbourhood Group~~ on a regular basis to discuss any potential issues relating to the operation of the Safe Night Space and measures to resolve these issues

must be submitted to and approved by the City. The Safe Night Space being managed and operated in accordance with the approved Operational Management Plan at all times to the satisfaction of the City.

4. *Prior to the commencement of the Safe Night Space, an updated Waste Management Plan shall be submitted to and approved by the City providing the following:*

a. Specify what measures are being taken to mitigate the disposal of illegal items.

b. Specify what measures are being taken to mitigate biohazard items.

c. Specify what measures are being taken in relation to the disposal of any unclaimed items left behind by individuals who have attended the premises.

with the approved Waste Management Plan being implemented at all times by the operator/manager, to the satisfaction of the City.



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Solicitors for the Respondent