

HOME BUSINESS

STATUS:	City Policy - <i>A policy that is developed for administrative and operational imperatives and has an internal focus.</i> <i>Developed by the Policy Committee and/or the administration and adopted by Council.</i>
RESPONSIBLE DIRECTORATE:	Planning and Community Development
OBJECTIVE:	To establish guidelines for the exercise of Council's discretion when assessing Home Business uses.

RELATED DOCUMENTATION

This Local Planning Policy is part of a wider framework of documents, which relate to people working from home. It should be read in conjunction with section 4.4 of the City's District Planning Scheme No 2 (The Scheme) and the 'Local Planning Strategy Relating to People Working From Home' which contains strategies and a statement of principles.

This Policy draws on these principles and supports the strategies by setting down aims and provisions, which the Council will consider before making a decision in relation to home business activities.

STATEMENT

1 Policy Aims

- (a) To maintain residential areas as primarily a place to live, not primarily a place to work whilst recognizing that working from home is an expanding area of employment, and a significant contributor to local employment.
- (b) To protect the amenity and character of residential areas by ensuring that potential impacts associated with home business such as noise, traffic, pollution, people and advertising signs are minimised and adequately controlled.
- (c) To enhance the effectiveness of Council's decision making through consultation with interested parties.
- (d) To provide a measure of the extent of the home business to ensure that it does not dominate the use of the land nor be so large or intensive that it changes the residential character of the neighbourhood.

- (e) To guide the location of home business proposals to minimise any impact on the amenity and character of residential locations.

2 Policy Area:

This Policy applies to the whole of the City of Joondalup.

3 Policy Statement

- (a) The applicant must use the dwelling as the principal place of residence.
- (b) Only one Home Business Category may be undertaken on the site at any one time.
- (c) Where a Category 3 Home Business is proposed in either a Residential zone or Special Residential zone, the preferred location of the proposal is where it abuts or is directly opposite one of the commercial centres listed in the City of Joondalup Centres Strategy.
- (d) Where a Home Business attracts customers, the maximum number of customers must be as follows:-

Category 1:

No Customers permitted
No additional car bays necessary

Category 2:

- (i) Customer visits must be by appointment only
- (ii) No more than 2 customers are to be at the premises at any one time
- (iii) 2 bays for the residents of the dwelling, plus 1 bay per customer, plus 1 bay per employee
- (iv) All parking bays are to be provided within the lot boundary

Category 3:

- (i) Customer visits must be by appointment only
- (ii) No more than three customers may attend the premises at any one time;
- (iii) 2 bays for the residents of the dwelling, plus 1 bay per customer, plus 1 bay per employee
- (iv) All parking bays are to be provided within the lot boundary

- (e) Regular deliveries of goods and equipment including deliveries carried out at intervals of less than a month are not considered appropriate. Proposals involving intervals of less than a month will only be considered taking into account the following factors:

- (i) nature of the goods delivered;
 - (ii) frequency of deliveries;
 - (iii) type of delivery vehicle used;
 - (iv) likely inconvenience to existing traffic.
- (f) A Home Business must not result in a substantial and or inappropriate modification of the dwelling.
- (g) Any appliances or machinery used for the purpose of the home business must be of a domestic scale. Large industrial appliances or machinery will be prohibited.
- (h) Where an application relates to property on a Strata Title, the written permission of the Body Corporate is to be submitted with the application.
- (i) For the purpose of this policy, amenity refers to all factors that combine to form the character of the area to residents and passers by and shall include the present and likely future amenity. In determining whether a proposed home business is likely to detrimentally affect the amenity of the neighbourhood, the following factors will be considered:
- (i) emission of noise, vibration, smell, fumes, vapour, steam, soot, ash, dust, grit, oil, waste water or waste products;
 - (ii) hours of operation;
 - (iii) number of customers visiting the premises;
 - (iv) traffic likely to be generated;
 - (v) additional parking requirements created by the proposed home business;
 - (vi) storage of harmful or poisonous chemicals,
 - (vii) compliance with the management plan;
 - (viii) compliance with the requirements set out by the City's District Planning Scheme No 2;
 - (ix) public submissions and or complaints by adjoining owners.
- (j) Applicants proposing to carry out a Home Business -Category 3 use, must submit a Management Plan as part of the application. As a minimum, Management Plans are to include the following information:
- (i) measures to minimise and control noise;
 - (ii) measures to minimise vehicle loading and unloading and traffic movements;
 - (iii) the proposed hours of operation;
 - (iv) a car parking plan;
 - (v) a landscaping plan including landscape buffers;
 - (vi) details of any poisonous, flammable or harmful chemicals or other hazardous materials proposed to be stored or used and measures to ensure that no polluting or harmful substances will escape from the site;
 - (vii) measures to minimise emissions of odours, dust or vapours from the site;
 - (viii) ways to limit the number of people visiting the house at any one time in relation to the business;
 - (ix) a diagram of proposed signage;

- (x) a plan showing any proposed outdoor storage areas;
 - (xi) measures to ensure that no detrimental impact occurs to the character of the neighbourhood;
 - (xii) measures to manage the impact of the home business on any building or place listed on the Municipal Inventory of Heritage Places.
 - (xiii) compliance with all other relevant State and Commonwealth legislation and or Regulations.
 - (xiv) details of all appliances or machinery to be used in the Home Business.
- (k) The days and hours of operation for each category of home business shall not exceed the following:
- (i) 8.00 am to 5.00 pm Monday to Friday
 - (ii) 9.00 am to 5.00 pm Saturday
- (l) When determining an application, the Council:
- (i) may limit the number of hours and/or days of operation of a home business proposal where it is deemed necessary to protect the amenity of the surrounding area
 - (ii) elect to grant an initial term of approval of twelve (12) months. In some instances where it is considered appropriate a longer period may be considered. The applicant is to seek renewals thereafter to effect the continuance of the home occupation
- (m) Community Consultation

In considering any variations to the required standards, Council will carry out community consultation as part of the decision making process. Planning related concerns of consulted owners will be considered as a relevant factor in the assessment of applications for planning approval. Because of the differing range of issues which may be involved with individual applications it is recognised that Council and staff will need to make value judgments on the level of consultation required in specific cases. However, in all cases Council will respond with:

- a commitment to community consultation;
- a systematic approach;
- accountability;
- post consultation follow up.

Decisions about consultation are to be documented for future reference and must consider the following:

- decision in relation to views being sought, e.g. immediate neighbourhood or wider community;
- a short explanation of the issues canvassed;
- description of the method used, e.g. letter, pamphlet, advertisement;
- the duration of consultation period, e.g. 14 days, 21 days etc.;
- respondents are to be advised of the outcome

File No: 13048

Previous Policy No: G3-18, 3.1.11

Amendments: CJ213-06/99, CJ297-09/99, CJ020-02/02, CJ238-11/05

Related Documentation: N/A

Issued:

HOME BUSINESS LOCAL PLANNING POLICY

CATEGORY:	Council Policy
RESPONSIBLE DIRECTORATE:	Planning and Community Development
OBJECTIVE:	To provide criteria for the establishment of home businesses within the City.

1. AUTHORITY

This Policy has been prepared in accordance with Clause 8.11 of the *City of Joondalup District Planning Scheme No. 2* which allows Council to prepare planning policies relating to planning or development within the Scheme area.

2. APPLICATION

This Policy applies to the whole of the City of Joondalup.

3. DEFINITIONS

“**amenity**” means all those factors which combine to form the character of the area to residents and passers-by and shall include the present and likely future amenity, as defined within the *City of Joondalup District Planning Scheme No. 2*.

“**Home Business — Category 1**” means an occupation carried on within a dwelling by a resident of the dwelling which:

- a. does not entail the retail sale, outdoor display or hire of goods of any nature;
- b. does not cause injury to or prejudicially affect the amenity of the neighbourhood;
- c. does not entail any substantial and/or inappropriate modification of the dwelling;
- d. does not entail the employment of any other person, except a member of the household;
- e. does not occupy an area greater than 20m² or where more than one resident is involved not cause the area used for the home business within the dwelling to occupy an area greater than 30m²;
- f. does not display any advertising signage;

- g. does not attract customers or regular and frequent deliveries of goods or equipment to the site;
- h. will not result in the requirement for a greater number of parking facilities than normally reserved for a single dwelling, and will not result in any increase in the amount of vehicular traffic in the vicinity;
- i. does not entail the presence, parking and garaging of a vehicle of more than 1.5 tonnes tare weight;
- j. does not involve the servicing or repair for gain of motor vehicles.
- k. Notwithstanding factors (a)–(j); a Home Business Category 1 may entail the operation of a Family Day Care Centre as defined by Clause 1.9 of the *City of Joondalup District Planning Scheme No. 2*.

As defined within the *City of Joondalup District Planning Scheme No. 2*.

“Home Business — Category 2” means an occupation carried on in a dwelling by a resident of the dwelling which:

- a. does not entail the retail sale, outdoor display or hire of goods of any nature;
- b. does not cause injury to or prejudicially affect the amenity of the neighbourhood;
- c. does not detract from the residential appearance of the dwelling house or domestic outbuilding;
- d. entails the employment of no more than 1 person not a member of the occupier's household;
- e. does not occupy an area greater than 30m². Council may permit an area greater than 30m² where it is considered that the scale of the business is limited by other factors and the increase in floor space will not have a detrimental effect on the amenity of the surrounding areas;
- f. does not have more than one advertisement sign and the sign displayed does not exceed 0.2m² metres in area;
- g. will not result in the requirement for a greater number of parking facilities than normally reserved for a single dwelling, and will not result in a substantial increase in the amount of vehicular traffic in the vicinity;
- h. does not involve the servicing or repair for gain of motor vehicles; and
- i. does not entail the presence, parking and garaging of a vehicle of more than 3.5 tonnes tare weight.

As defined within the *City of Joondalup District Planning Scheme No. 2*.

“Home Business — Category 3” means an occupation or professional practice undertaken for the purposes of commercial gain; and carried on in a dwelling or on land around a dwelling by a resident of the dwelling which:

- a. does not entail the retail sale, outdoor display or hire of goods of any nature;
- b. does not cause injury to or prejudicially affect the amenity of the neighbourhood;
- c. does not detract from the residential appearance of the dwelling house or domestic outbuilding;
- d. entails employment of a maximum of 2 persons not members of the occupier's household. Council may approve a greater number of employees, not exceeding 4 persons, subject to community consultation;
- e. occupies an area not exceeding 50m². Council may approve, subject to community consultation, an area of up to 100m², or one-third of the floor area of the dwelling whichever is the lesser;
- f. displays a sign describing the nature of the approved home occupation. The sign must not exceed 0.2m², and a maximum of 2 metres high;
- g. will not result in the requirement for a greater number of parking facilities than those provided on the site so as to cause an unacceptable inconvenience for adjoining residents and road users;
- h. will not result in a substantial increase in the amount of vehicular traffic in the vicinity;
- i. does not involve the servicing or repair for gain of motor vehicles; and
- j. does not entail the presence, parking and garaging of a vehicle of more than 3.5 tonnes tare weight.

As defined within the *City of Joondalup District Planning Scheme No. 2*.

4. STATEMENT

The City of Joondalup recognises that working from home is an expanding area of employment. The City, in addition, recognises that the amenity of residential areas should be protected by minimising potential impacts to maintain residential areas as primarily a place to live, not primarily a place to work.

To protect the amenity and character of residential areas, impacts associated with home businesses such as noise, traffic, parking, pollution, people and advertising signs should be minimised.

5. DETAILS

In assessing a Development Application for a home business the following will be considered:

5.1 Criteria applying to all Home Business Categories:

- a. The applicant must use the dwelling as the principal place of residence.
- b. Only one Home Business Category may be undertaken on the site at one time.
- c. The Home Business must not result in a substantial and/or inappropriate modification to the dwelling.
- d. Any appliances or machinery used for the purpose of the home business must be of a domestic scale. Large industrial appliances are prohibited.
- e. Applicants must demonstrate that the proposal will not have an undue impact on amenity of the surrounding area and land uses.

5.2 Additional Criteria Applying to Home Business — Category 1

5.2.1 Car Parking and Customers:

- a. No customers permitted.
- b. No additional car bays required.

5.3 Additional Criteria Applying to Home Business — Category 2 and Home Business — Category 3

5.3.1 Car Parking and Customers:

- a. One on-site car parking bay is required per customer and per employee. The total number of on-site car parking bays shall be equal to the maximum number of employees and customers that are permissible at the home business at any one time. On-site car parking is to be designed and provided in accordance with the *Residential Design Codes of Western Australia*.
- b. All car parking bays associated with the home business are to be made available and maintained for the parking of customer and employee vehicles only, during the approved home business operating hours. Resident parking is not permitted in customer bays during the approved home business operating hours. No verge parking for the business is permissible.

- c. The home business must not require the provision of car parking bays in a manner that would detract from the residential appearance of the dwelling or dominate the streetscape.

5.3.2 Operating Hours:

- a. The days and hours of operation for a home business shall generally be limited to the following:
 - i. 8.00 am to 6.00 pm, Monday to Friday
 - ii. 9.00 am to 5.00 pm, Saturday.
- b. When determining an application, the number of hours and/or days of operation may be increased or further restricted through conditions of development approval where it is deemed necessary to protect the amenity of the surrounding area.

5.3.3 Signage:

- a. One advertising sign, not exceeding 0.2 square metres in area, is permitted on the front facade of the dwelling for Home Business Category 2 and Category 3 in accordance with the City's *Signs Policy*.

5.4 Additional Criteria Applying to Home Business — Category 3

5.4.1 Location

Where a Category 3 Home Business is proposed in either a Residential zone or Special Residential zone, the location of the proposal shall be where it abuts or is directly opposite one of the commercial centres listed in the City of Joondalup Centres Strategy, unless the applicant can demonstrate to the satisfaction of the City that the proposal will not have an undue impact on the amenity of the surrounding area as a result of noise, traffic, parking, pollution, people and advertising.

5.4.2 Management Plan

A Management Plan is required to be submitted as part of any application for a Home Business — Category 3. As a minimum, the Management Plan is to include the following information:

- a. A car parking plan.
- b. Measures to minimise and control noise.
- c. Measures to minimise vehicle loading and unloading and traffic movements.
- d. The proposed hours of operation.

- e. Details of any poisonous, flammable or harmful chemicals or other hazardous materials proposed to be stored or used and measures to ensure that no polluting or harmful substances will escape from the site.
- f. Measures to minimise emissions of odours, dust or vapours from the site.
- g. Ways to limit the number of people visiting the house at any one time in relation to the business.
- h. A plan showing any proposed outdoor storage areas.
- i. Measures to ensure that no detrimental impact occurs to the character of the neighbourhood.
- j. Measures to manage the impact of the home business on any building or place listed on the municipal inventory of heritage places.
- k. Details of all appliances or machinery to be used in the home business.

5.5 Public Consultation:

- a. All new applications for a home business will be advertised for public comment for a minimum period of 21 days by way of letters to adjoining and nearby landowners.
- b. For an application for renewal of a home business, if any changes are proposed to the operation of the business, or if complaints have been received within the previous 12 months, advertising of the application may be required in accordance with 5.5a.
- c. Planning-related concerns received from consulted owners will be considered as a relevant factor in the assessment of development applications.

5.6 Approval Period:

Any approval issued for a home business category 2 is valid for an initial period of 12 months or less, as determined by the City. Prior to the expiry of the initial approval, an application to renew the home business must be submitted to the City.

Following the initial 12 month approval period, should there be no changes to the operation of the home business category 2 and should no complaints be received from nearby landowners, an extended home business renewal may be approved by the City to enable continuation of the activity for a longer period without the need for an annual renewal.

Any approval issued for a home business category 3 and renewal of a home business category 3 is valid for a period of 12 months or less, as determined by the City. Prior to the expiry of the approval, an application must be submitted and approved by the City to enable the continuation of the activity.

Creation Date:	June 1999
Amendments:	CJ213-06/99, CJ297-09/99, CJ020-02/02, CJ238-11/05
Related Documentation:	<ul style="list-style-type: none">• <i>City of Joondalup District Planning Scheme No. 2</i>• Home Business Fact Sheet• <i>Residential Design Codes of Western Australia</i>

DRAFT



[2014] WASAT 174

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : PLANNING AND DEVELOPMENT ACT 2005 (WA)

CITATION : BRUHN and CITY OF JOONDALUP [2014] WASAT 174

MEMBER : MS N OWEN-CONWAY (MEMBER)

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 23 DECEMBER 2014

FILE NO/S : DR 196 of 2014

BETWEEN : PETER BRUHN
DEIRDRE BRUHN
Applicants

AND

CITY OF JOONDALUP
Respondent

Catchwords:

Home business approval - Grant of approval for a limited time of 12 months - Impact of policy - Proposed revised policy - Seriously-entertained amendment to planning scheme - Proposed revised policy purports to mandate outcome - Validity of policy that restricts full exercise of wide discretion conferred by planning scheme - Consideration of circumstances when limited term of policy is justified

Legislation:

City of Joondalup District Planning Scheme No 2, cl 3.2.2, cl 4.4.3, cl 6.9, cl 6.8.1(g), cl 6.9.2, cl 8.11.3.1, Sch 1
Local Government Act 1995 (WA), s 1 - s 4

Planning and Development Act 2005 (WA), s 4, s 252
State Administrative Tribunal Act 2004 (WA), s 17, s 28(2), s 29(3)(b)

Result:

Limited term of grant of approval varied to remove limited term condition

Summary of Tribunal's decision:

Mr and Mrs Bruhn applied for approval to operate a real estate business from their home in an area that was zoned residential. The *City of Joondalup District Planning Scheme No 2* was the subject of an amendment whereby the zoning of their property was to change from residential to mixed use.

Both parties agreed that the proposed amendment was to be considered by the Tribunal and given significant weight as a seriously-entertained amendment to the Scheme. The application for approval met all Scheme and policy guidelines. The respondent, the City of Joondalup, proposed a new policy which restricted the grant of approval for Home Business - Category 3 type uses to 12 months or less.

The Tribunal concluded that the proposed new policy was ineffective to mandate the manner in which the broad discretion granted by the Scheme to the respondent should be exercised. Further, the Tribunal concluded that there was no evidence to support the contention that a limited term of the grant was justified upon proper planning principles. The decision to grant the approval on the condition that the applicants were permitted to operate their home business for no more than 12 months was varied to delete the condition imposing the 12 month term limitation.

Category: B

Representation:

Counsel:

Applicants	:	Mr M Swift
Respondent	:	Ms A Butterworth

Solicitors:

Applicants	:	Michael Swift & Associates (Town Planners)
Respondent	:	Allerding & Associates

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

- Clive Elliott Jennings & Co Pty Ltd v Western Australian Planning Commission [2002] WASCA 276
- Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission [2000] HCA 47; (2000) 203 CLR 194
- Lloyd v Robinson [1962] HCA 36; (1962) 107 CLR 142
- NEAT Domestic Trading Pty Ltd v AWB Limited [2003] HCA 35; (2003) 216 CLR 277).
- Nicholls and Western Australian Planning Commission [2005] WASAT 40
- Potter and Shire of Northam [2009] WASAT 118
- Re Drake and Minister for Immigration and Ethnic Affairs (No 2) [1979] AATA 179; (1979) 2 ALD 634).
- Re Minister for Immigration and Multicultural Affairs; Ex parte Miah (2001) 206 CLR 57
- Reynolds v Redland Shire Council [2000] QPEC 93

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

- 1 On 3 April 2014, Mr Peter Bruhn and Mrs Deirdre Bruhn (applicants), as the owners of a residential dwelling at 26 (Lot 240) Banks Avenue, Hillarys (site), made an application to the City of Joondalup (respondent) for a grant of approval to operate a home business from the site. The proposed business is that of a real estate agency operated by the applicants and up to four employees (proposed home business). On 12 June 2014, the respondent granted the applicants' application on conditions, one of which is condition (j), is that the proposed home business could operate from the site for a period of 12 months from the date of the grant (12 June 2014) and thereafter, only on the grant of further approval by the respondent (reviewable decision).

The application

- 2 On 18 June 2014, the applicants lodged an application with the Tribunal seeking a review of the reviewable decision. The applicants seek an order from the Tribunal varying the reviewable decision so as to delete condition (j) to the respondent's grant of approval. Alternatively, the applicants seek an order from the Tribunal varying the terms of condition (j) itself.

Jurisdiction of the Tribunal

- 3 Section 252 of the *Planning and Development Act 2005* (WA) (PD Act) provides:

- (1) Subject to subsection (3), if -
- (a) under a planning scheme, the grant of any consent, permission, approval or other authorisation is in the discretion of a responsible authority; and
 - (b) a person has applied to the responsible authority for such a grant; and
 - (c) the responsible authority has -

...

- (ii) granted it subject to any condition,

the applicant may apply to the State Administrative Tribunal for a review, in accordance with this Part, of the responsible authority's decision.

4 The phrase 'responsible authority' is defined by s 4 of the PD Act to mean:

... in relation to a local planning scheme ... the local government responsible for the enforcement of the observance of the scheme[.]

5 The reference to the local government is a reference to a government established pursuant to the *Local Government Act 1995* (WA) (s 1 - 4). In this proceeding the respondent is the relevant local government responsible for the enforcement of the observance of *City of Joondalup District Planning Scheme No 2* (DPS 2).

6 This application is an application for review of a decision that falls within the Tribunal's review jurisdiction (see s 17 of the *State Administrative Tribunal Act 2004* (WA) (SAT Act)) and is properly before the Tribunal.

Powers of the Tribunal

7 As this application falls within the Tribunal's jurisdiction the Tribunal is empowered to, inter alia, vary the reviewable decision (see s 29(3)(b) of the SAT Act).

Site and locality

8 The site is situated within the Local Government area of Joondalup. The respondent is the responsible authority for compliance with DPS 2. The site is located directly opposite Whitfords City Shopping Centre on Banks Avenue; is largely rectangular with a 21.670 metre street frontage and comprises 683m² of land. The site is developed with a single level dwelling with a garage and three rear outbuildings.

The issues

9 The parties are only in dispute in relation to the imposition of condition (j) to the grant of approval to operate the proposed home business from the site. The proposed home business meets all other definitional requirements of a Home Business - Category 3 and all other Home Business Policy preferences which Home Business Policy has been adopted by the respondent. The applicants contend that the Home Business Policy does not compel the respondent, to grant approval only for 12 months. Further, the applicants contend that the proposed Revised Home Business Policy (which is yet to be adopted by the respondent following advertising), to the extent that it compels the respondent to grant only a 12 month term for any approval for a

Home Business - Category 3 use, is not a proper exercise of the discretionary power conferred on the respondent by DPS 2. The respondent contends that the proposed Revised Home Business Policy is a seriously-entertained proposal in keeping with the principles established by the Tribunal and as detailed in *Nicholls and Western Australian Planning Commission* [2005] WASAT 40 and that it is to be preferred as the directive on the length of the term of any grant for a Home Business - Category 3 use approval.

Planning framework

10 The site is currently zoned residential under DPS 2 and has a residential density code rating of R20. The applicants propose to use the site to operate a business falling with the definition in DSP 2 of 'Home Business - Category 3', which use is not permitted in respect of the site, unless approval is granted by the respondent. DPS 2 provides at cl 4.4.3:

Home Business – Category 3

4.4.3.1 A person wishing to conduct a Home Business – Category 3 on residential premises is required to apply to Council for an approval to commence development, and such use or occupation may be approved by Council at its discretion.

4.4.3.2 The provisions of the residential Design Codes and all other clauses in the Scheme relating to developments in a residential Zone shall apply to a Home Business – Category 3. Council may exercise its discretion and vary a provision of the Codes, except the minimum area of lot per dwelling prescribed in Column 3, Table 1 of the Codes.

11 'Home Business – Category 3' is defined in the in Sch 1 to DPS 2 to mean:

.. an occupation or professional practice undertaken for the purposes of commercial gain; and carried on in a dwelling or on land around a dwelling by a resident of the dwelling[.]

12 The definition of Home Business - Category 3 comprises a number of specific restrictions on the manner in which that business may be operated. None of the restrictions are in issue in this proceeding. Clause 6.9 of DPS 2 is headed 'Power to Determine Applications for Planning Approval' and identifies, relevantly:

6.9.1 The Council having regard to the appropriateness of any proposed application for planning approval may:

...

- (c) grant approval subject to such conditions and requirements as it deems fit; ...

...

6.9.2 Without limiting the generality of the foregoing, the Council may, where it deems appropriate, grant a Planning Approval which:

...

- (b) permits the use and/or other development of land to occur for a *limited period of time* specified in the approval, after the expiration of which period the use and/or other development shall cease and unless otherwise stipulated by the Council the site shall be restored to the condition existing at the time when the Approval was given, unless a further Approval has been sought and obtained[.] (Tribunal emphasis)

13 The respondent has proposed amendments to DPS 2 and, in particular, Amendment No 73, which proposed amendment both parties agree, is a seriously-entertained proposal that should be given significant weight by the Tribunal in this proceeding. Clause 6.8.1(g) of DPS 2 directs that when considering an application for approval, the respondent shall have 'due regard' in this matter to:

any relevant proposed new town planning scheme of the Council or amendment or proposed Metropolitan Region Scheme Amendment insofar as they can be regarded as seriously entertained planning proposals[.]

14 The critical change to DPS 2 which will be brought about by proposed Amendment No 73 is that the zoning of the site will change from residential to mixed use. The impact of changing the zoning of the site is that a Home Business - Category 3 use on a mixed use zoned site is a permitted use (designated by reference to the symbol 'P' in the Zoning Table as Sch 1 of DPS 2). Clause 3.2.2 of DPS 2 identifies that a 'P' in the Zoning Table indicates:

A Use Class that is permitted but which may be subject to any conditions that the Council may wish to impose in granting its approval[.]

15 Currently, DPS 2 Sch 1 provides that the site is zoned residential and Home Business – Category 3 use is not permitted (as designated by the symbol 'A' in the Zoning Table as Sch 1 of DPS 2). Clause 3.2.2 of DPS 2 provides:

A Use Class that is not permitted unless the Council has exercised its discretion and has granted planning approval after giving special notice in accordance with Clause 6.7[.]

16 Consistently with proposed Amendment No 73, the respondent has granted approval to the applicants' application for approval to operate the proposed home business from the site but has imposed a condition limiting the term that the proposed home business may be operated from the site.

17 It is common cause between the parties that such a condition is valid in the sense that it is of a kind that is permitted by the provisions of cl 6.9.2 of DPS 2.

18 The Tribunal notes that the submissions by the respondent and a number of the conditions imposed focus on minimising the impact of the operation of the proposed home business on the residential amenity of the surrounding area. This objective, however, is somewhat inconsistent with the fact that proposed Amendment 73 will alter the zoning of lots facing onto Banks Avenue, including the site from residential to mixed use. Having given significant weight to proposed Amendment No 73, the Tribunal concludes that the residential amenity to the surrounding area is less significant than the respondent's focus tends to suggest and less significant in light of proposed Amendment 73. With the advancement of proposed Amendment No 73, there will be a limit on the reasonable expectation of owners and occupiers of neighbouring lots to those along Banks Avenue, which are to be rezoned that the current residential amenity will continue.

19 The parties have referred the Tribunal to a Home Business Policy that has been adopted by the respondent to establish guidelines for the exercise of the respondent's discretion when assessing home business uses. The Tribunal notes that there is no statutory policy that the Tribunal is bound to apply as provided for by s 28(2) of the SAT Act. Relevantly, the Home Business Policy's aims are stated as:

- (a) To maintain residential areas as primarily a place to live, not primarily a place to work whilst recognizing that working from home is an expanding area of employment, and a significant contributor to local employment.
- (b) To protect the *amenity* and character of *residential* areas by ensuring that potential impacts associated with home business such as noise, traffic, pollution, people and advertising signs are minimised and adequately controlled.

...

- (d) To provide a measure of the extent of the home business to ensure that it does not dominate the use of the land nor be so large or intensive that it *changes the residential character* of the neighbourhood.
- (e) To guide the location of home business proposals to minimise any impact on *the amenity and character of residential locations*.
(Tribunal emphasis)

20 Relevantly, clause 3 of the Home Business Policy provides:

- (1) When determining an application, the Council:

...

- (ii) elect to grant an initial term of approval of twelve (12) months. In some instances where it is considered appropriate a longer period may be considered. The applicant is to seek renewals thereafter to effect the continuance of the home occupation[.]

Clause 3 (1)(ii) of the Home Business Policy, permits the respondent to 'elect' to grant only an initial term of 12 months and then clarifies that in some circumstances the initial term may be longer than 12 months. Clause 3(1)(ii) does not purport to limit the respondent to granting only 12 month approvals nor does it countenance the grant of successive limited terms of approval. At best it provides the respondent with the option of a grant of approval of one (that is, an 'initial') term of 12 months or where 'appropriate' longer. The intention of clause 3(1)(ii) of the Home Business Policy is clearly facilitative rather than restrictive or proscriptive. Further, the Tribunal concludes that the purpose of the policy of permitting the respondent to *elect* to grant an approval for use for an *initial* limited period is to assess whether the Home Business - Category 3 is likely to be able to continue to meet the restriction of the grant of approval. The *Local Commercial Strategy - Part B - Shop Retail Assessment* speaks of the need to ensure that the home business that is 'incubated' in the home does not grow to be incapable of operating within the restrictions of the home business of the category approved. For example, the documents speak of a home business that must, because of its success and growth, move from the home and into an area for appropriate commercial uses. The conditions to the grant of approval that are not in dispute adequately protect against the proposed home business growing to the extent that it cannot meet the definition of 'Home Business - Category 3' as provided for in DPS 2. If that were to occur, the

applicants would not be using the site in accordance with the approval granted and would not be operating a Home Business - Category 3. The use would be an unapproved use at that point. If that were to occur, the respondent would be able to take all appropriate action to prevent the applicants from conducting an unapproved use from the site. The Tribunal concludes that the unobjectionable conditions comprised in the reviewable decision do not require and are not served by a probationary approval period for the proposed home business to be assessed as being one within the definition of Home Business - Category 3.

21 The respondent in its submissions (at paragraphs 20 and 21), asserts that the 12 month restriction on the grant of approval in this matter, is to assess the impact of the proposed home business on the amenity of the area and upon the amenity of the rear neighbour to the site. Whilst the Tribunal does not consider it to be an improper use of power to impose a condition where the impact of a proposed use in a particular respect may not be reasonably foreseeable, in this particular case, the respondent has failed to demonstrate that the foreseeability of the impact of the proposed home business on the amenity of the neighbourhood and on the rear neighbour is problematic in some way, such as to justify a limited period of approval.

22 The Tribunal concludes that clause 3(1)(ii) of the Home Business Policy expressly permits the respondent to make an election to grant an approval for use for an *initial* term of 12 months or longer, depending on the facts of the application. Clause 3(1)(ii) of the Home Building Policy does not compel or direct the respondent that it must or should only grant an approval for use for an initial term for 12 months. The Tribunal concludes that, properly construed, clause 3(1)(ii) of the Home Business Policy does not permit the respondent to make successive grants of approval for a particular use for a period of 12 months. Further, the Tribunal concludes that the election by the respondent would only likely be the correct and preferable decision where the proposed use genuinely required revision after 12 months, with a view to granting permanent or long term approval after that review.

23 The respondent has considered a revision of the Home Business Policy and resolved to adopt a Revised Home Business Policy for the purposes of public advertising (proposed Revised Home Business Policy). The proposed Revised Home Business Policy was advertised from 15 May to 5 June 2014 in accordance with cl 8.11.3.1 of DPS 2 and the agreed facts provide it is envisaged that the proposed Revised Home Business Policy will be considered by Council at some later stage.

24 The provisions of the proposed Revised Home Business Policy at clause 5.6 provide:

...

Any approval issued for a home business category 3 and renewal of a home business category 3 *is valid for a period of 12 months or less*, as determined by the City. Prior to the expiry of the approval, an application must be submitted and approved by the City to enable the continuation of the activity.

25 The question for the Tribunal is: what is the import of the Home Business Policy and the proposed Revised Home Business Policy? The parties appear to agree that as the proposed Revised Home Business Policy has reached the stage of consideration for final adoption by the respondent following advertising, it should be given significant weight by the Tribunal as a policy. Assuming that proposition is correct as a matter of law, the Tribunal must still determine the role of the policy in the decision-making process required DPS 2 in this matter.

26 A valid and lawful administrative policy generally should be applied unless there are cogent reasons to the contrary, including where the application of the policy will give rise to an injustice in an individual case (*Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* [1979] AATA 179; (1979) 2 ALD 634). Where the respondent adopts a policy, the respondent must be satisfied that the policy itself is lawful and not inconsistent with the legislation which confers the statutory power upon the respondent (*NEAT Domestic Trading Pty Ltd v AWB Limited* [2003] HCA 35; (2003) 216 CLR 277). The application of the policy must not prevent the respondent from exercising the full extent of the legislative power conferred. In this matter, the policy must not restrict the respondent from exercising to the fullest extent to power conferred by DPS 2. Otherwise, a policy could affect a change to the local planning scheme that would not be in accordance with the means by which a scheme amendment must be affected. That is, a policy cannot affect a de facto change to the scheme but rather, must be consistent with the powers conferred by the scheme. The policy must be in aid of guiding the respondent in the exercise of a conferred discretion and not for the purposes of limiting the conferred discretion. Further, the policy must be exercised for the pursuit of proper planning principles (*Lloyd v Robinson* [1962] HCA 36; (1962) 107 CLR 142; *Clive Elliott Jennings & Co Pty Ltd v Western Australian Planning Commission* [2002] WASCA 276). The strict application of the policy without regard to the facts at hand may constitute a misconception of the exercise of the power conferred or a

constructive failure to exercise the conferred power (see *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57).

27 In every case, the Tribunal must consider the application of the policy to the facts of the matter before it. To simply apply a policy without regard to the merits of the matter at hand and whether in any matter the application is consistent with the provisions of DPS 2 and proper planning principles, would be an improper application of the policy. In this matter, clause 3(1)(ii) of the Home Business Policy has the status of a relevant factor which will assist the Tribunal, standing in the shoes of the respondent, to exercise the discretion conferred by cl 6.9.2 DPS 2. Further, because it has been adopted by the respondent, it should be given significant weight unless there the application would lead to an injustice.

28 The proposed Revised Home Business Policy in so far as clause 5.6 is concerned, by its restrictive and proscriptive terms, appears to demand that an application for approval to use a site for Home Business – Category 3 purposes can only ever be granted for 12 months (or less), regardless of the facts of the matter. To that extent the Tribunal considers that clause 5.6 is inconsistent with the conferral of the broad discretion by cl 6.9.2 of DPS 2, because it purports to bind the respondent to a self-imposed obligation to limit the exercise of the broad power conferred by cl 6.9.2 DPS 2. Further, clause 5.6 of the proposed Revised Home Business Policy has no meaningful application on the facts of this matter. Any proper planning purposes which clause 5.6 intends to advance are not obvious and have not been advanced by the respondent. The alleged matters of concern to the respondent that it will consider in 12 months' time - impact on the amenity of the neighbourhood, impact on the rear car park to the site on the rear neighbouring property and compliance with the other conditions of the reviewable decision - are matters that can be currently, reasonably foreseen and can be (and have been) dealt with by relevantly designed conditions to the grant of approval. Further, the provisions of clause 5.6 of the proposed Revised Home Business Policy does not disclose an intention that a limited grant of approval should be made *initially* so as to test any unforeseeable consequences of the approval, or to test the likelihood of compliance with the terms of the grant by the applicants. The respondent cites *Potter and Shire of Northam* [2009] WASAT 118 (*Potter*) and *Reynolds v Redland Shire Council* [2000] QPEC 93) in support. For the reasons expressed below, however, the Tribunal concludes that in citing these authorities, the

respondent has failed to appreciate the significant difference between the facts of those matters - principally, that in each of those authorities, there was a genuine issue whether the use could operate within the terms of the approval which could only be determined conclusively, following a probationary period.

29 Further, clause 5.6 of the proposed Revised Home Business Policy stipulates that even subsequent grants of approval may not be for more than 12 months. The Tribunal concludes that clause 5.6 of the proposed Revised Home Business Policy is inconsistent with the proper planning principles of assessing whether the impact on the amenity of the neighbourhood can be minimised in practice. Rather, it is a clear directive that, contrary to the provisions of cl 6.9.2 of DPS 2, no Home Business - Category 3 use may be granted for longer than 12 months, regardless of the impact on the amenity or the merits of the application. In the Tribunal's view, such a clause is *ultra vires*, as it is inconsistent with the discretion conferred upon the respondent by cl 6.9.2 DPS 2. It is an attempt to amend DPS 2 without undertaking the process of amendment called for by DPS 2.

30 The Tribunal concludes that, in the case of clause 3(1)(ii) of the *Home Business Policy*, the provisions confer on the respondent the discretion to limit the initial grant of approval to use the site for a Home Business - Category 3 use to 12 months, and is consistent with the discretion conferred by cl 6.9.2 of DPS 2. However, strict application of that policy, regardless of the merits and where there is no reasonable need to reassess the impact of the proposed use on the amenity of the neighbourhood in 12 months' time, is not a proper exercise of the power conferred by cl 6.9.2 of DPS 2. The respondent is free in every case to assess whether the merits of the application and proper planning principles are best served by application of any policy as contemplated by the terms of DPS 2 and in particular, cl 6.9.2 of DPS 2.

Consideration

31 As stated above, the Tribunal notes as follows:

- 1) Proposed Amendment No 73 to DPS 2 has the effect of changing the zoning from residential to mixed use in the near future.
- 2) It is therefore envisaged that in the not too distant future, this site and those along Banks Avenue contiguous to the site will cease to have so much of a residential amenity as a

mixed use amenity albeit that there will be some residential and, in the shorter term, substantial residential use.

- 3) The Tribunal considers that, given the concession by the respondent that proposed Amendment No 73 is a seriously-entertained proposal to which the Tribunal should have regard and to which the Tribunal should give substantial weight, the Tribunal's view is that the residential amenity in an area that is zoned for mixed use, is of less importance than the residential amenity in an area that is zoned for residential use.
- 4) There are substantial other conditions imposed on the grant of approval to prohibit the proposed home business from growing beyond the definition of Home Business - Category 3. There is therefore no need to grant only a limited term of approval for the proposed home business use to operate from the site. If the applicants' business exceeds the operational restrictions imposed by the conditions comprised in the reviewable decision or they operate the proposed home business in breach of the conditions, then the respondent may respond to the situation on the basis that the use is an unapproved use.
- 5) Condition (j) is not required and is not suitable as a method of enforcement of the conditions of the approval comprised in the reviewable decision.
- 6) As to the issue that the limited terms allows for assessment of whether the proposed home business has a deleterious impact on the residential amenity of the surrounds or the amenity of the rear neighbour, the Tribunal considers that the condition is not necessary because in the first place, the residential amenity of the area will be impacted by a change in the zoning which, at this stage, must be considered by the Tribunal as a likely event. Secondly, the impact of the proposed home business does need a trial or probationary period.

32

At paragraph 19 of the respondent's submission it is stated that:

Further in this context the Home Business on the Review Site seeks to establish a carpark in the rear yard. At the time of determination of the application that car park has not been constructed but the existing ground

levels are such that a person standing in the location of the proposed car park can overlook into the rear neighbouring property at 26 Hicks Way. The neighbour at 26 Hicks Way has objected to the proposal and one of those grounds of objection is on the basis of their concern about overlooking into the property from the residence and car park. Photos from the review Site towards the property at 26 Hicks Way are provided at Annexure R1.

33 The ground level of the proposed car park is a fact that may be ascertained, if the respondent considered it to be of significant weight to affect the decision to grant the application for approval. The fact that the rear neighbour's home may now be overlooked is a known fact, but the respondent has not chosen to impose any conditions specified to prevent overlooking the rear neighbour's property, although some of the conditions as to rear setback, planting of vegetation along the rear boundary and car park barriers have an impact on the ability to oversee the rear neighbour's property. The respondent has not proposed any alternative condition to condition (j) and has not made any submissions in that regard. The Tribunal also notes that the proposed car parks to the rear of the site are to be used only by the applicants and for employees of the proposed home business. All customer car parking is to the front of the site and will have no or little impact on the rear neighbouring property. As the nature of this business is such that all business operations shall take place within the residence, rather than within or near the car park, the Tribunal considers the opportunity to overlook the rear neighbour's property to be very limited. In any event, this issue could have been assessed at the time of the respondent's consideration, before making the reviewable decision. It may also be assessed by the Tribunal now, upon review. As there were no additional conditions imposed to deal with the possibility of overseeing into the rear neighbouring property from the proposed car parks and there were none proposed to the Tribunal, the Tribunal considers that the conditions imposed in respect of the proposed car parks mitigate against the low risk of loss of amenity to the rear neighbouring property from the proposed car parks.

34 For example, the provisions of a setback from the rear boundary, a car park barricade and the provision of vegetation between the rear boundary and the commencement of the car parking area will limit the opportunity or prospect of the rear neighbour's residential amenity being deleteriously impacted.

35 As stated above, the respondent relied upon *Potter* to support its contention that the respondent was properly able to impose a time limitation condition on the grant of approval in this matter. However, the

Tribunal concludes that that authority is not of assistance to the respondent in this matter. *Potter* specifically applied to a situation where there was a genuine concern as to whether a condition of the grant of approval could be complied with. In that matter, the applicant for the grant of approval to operate a dog minding business asserted that she had the personal capacity to control the dogs within her care and thus minimise any possibility of nuisance arising from dogs barking. Whether or not the applicant had that capacity, could only be determined by reference to what was essentially a trial or probationary period. In this case, the impact of the proposed home business on the amenity of the surrounding area may be reasonably and accurately foreseen, along with the impact on the rear neighbour's privacy. The proposed home business involves the operation of a real estate agency, which is largely administratively based and requires the use of commonly household operating equipment, such as a telephone, a fax machine, the internet, computers and a photocopier. There are no large, non-residential types of machinery involved, nor is there any kind of conduct that is likely to cause noise, odour, or any other impact on the amenity of the surrounding area. The greatest impact on the amenity of the surrounding area is most likely to be the vehicular traffic along the driveway and parking at the rear of the site. The impact of that amenity is capable of being assessed and the respondent has imposed relevant conditions upon the grant of approval so as to minimise the impact of the vehicular traffic on the site to the immediate neighbouring properties. The Tribunal considers the conditions that have been imposed are sufficient to safeguard the impact of the operation of the proposed home business on this site upon the amenity of the surrounding area. In any event, the Tribunal notes that the respondent has not proposed any alternative conditions to condition (j) and it was open to the respondent to do so.

36 Further and finally, the proposed Revised Home Business Policy, to the extent that it directs or mandates a limited term for the grant of approval of a Home Business – Category 3 use on a site, is not consistent with the power conferred upon the respondent by cl 6.9.2 of DSP 2. Even if the proposed Revised Home Business Policy had been adopted finally by the respondent, the Tribunal is not obliged to give that policy plenary effect because it is inconsistent with the broad power conferred upon the respondent by cl 6.9.2 of DSP 2.

37 Neither party has canvassed any alternative condition or any alternative term of the approval. In particular, the respondent has not advanced an alternative term of approval which was open to it to do and has asserted at all times that the term should be limited to 12 months.

That being the case, the respondent has foregone the opportunity of persuading the Tribunal that a longer period should be imposed as a condition to the grant of approval. As neither party advanced an alternative term of the grant of approval; any evidence in support of any alternative nor justification of the same, the Tribunal considers that the correct and preferable decision, in this proceeding, is to vary the reviewable decision by deletion of condition (j) to the grant of the approval comprised in the reviewable decision.

Conclusion

38 The Tribunal has determined that the grant of planning approval to the applicants by the respondent made on 12 June 2014 should be varied so as to delete condition (j).

Order

39 Pursuant to s 29(2)(b) of the *State Administrative Tribunal Act 2004* (WA), upon review of the respondent's decision to grant the applicants conditional approval to operate a Home Business - Category 3 (real estate office) from Number 26 (Lot 240) Banks Avenue Hillarys, referred to in the respondent's letter of approval and stamped plans dated 12 June 2014, the respondent's decision is varied so as to delete condition (j) thereto.

I certify that this and the preceding [39] paragraphs comprise the reasons for decision of the State Administrative Tribunal.



MS N OWEN-CONWAY, MEMBER

[2014] WASAT 174 (S)

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : PLANNING AND DEVELOPMENT ACT 2005 (WA)

CITATION : BRUHN and CITY OF JOONDALUP
[2014] WASAT 174 (S)

MEMBER : MS N OWEN-CONWAY (MEMBER)

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 11 JUNE 2015

FILE NO/S : DR 196 of 2014

BETWEEN : PETER BRUHN
DEIRDRE BRUHN
Applicants

AND

CITY OF JOONDALUP
Respondent

Catchwords:

Costs - Award - No challenge to quantum - Factors - Turns on own facts

Legislation:

City of Joondalup District Planning Scheme No 2
Planning and Development Act 2005 (WA)
State Administrative Tribunal Act 2004 (WA), s 47, s 87

Result:

Costs awarded

Summary of Tribunal's decision:

The applicants sought an order for costs against the respondent for the costs incurred by them in prosecuting the application in the Tribunal for a review of a conditional grant of approval to operate a home business. The Tribunal considered the respondent's conduct in responding to the review application to be unreasonable. The respondent maintained that it was necessary to preserve the residential amenity of any area that the respondent conceded was the subject of a proposed change in zoning from Residential to Mixed Use. The respondent conceded that the proposed change should be relied upon by the Tribunal as a seriously-entertained amendment. Further, the respondent, in drafting a proposed amendment to its policy to guide it on how the discretion conferred by the *City of Joondalup District Planning Scheme No 2* should be exercised, intended to, in effect, prohibit its full exercise of the conferred discretion. The respondent did not challenge the quantum of the costs claimed by the applicants, which costs appeared within the reasonable expectation of the Tribunal for a matter of this nature. The Tribunal awarded costs to be paid by the respondent to the applicants.

Category: B

Representation:

Counsel:

Applicants : Mr M Swift (Acting as Agent)
Respondent : Mr J Corbellini

Solicitors:

Applicants : Michael Swift & Associates (Town Planners)
Respondent : City of Joondalup

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

Aydogan and Town of Cambridge & Anor [2007] WASAT 19
Bruhn and City of Joondalup [2014] WASAT 174
Chew and Director General of the Department of Education and Training
[2006] WASAT 248
Humphrys and City of Stirling [2011] WASAT 105

J & P Metals Pty Ltd and Shire of Dardanup [2006] WASAT 282
Pearce & Anor and Germain [2007] WASAT 291 (S)
Rossi and City of Bayswater [2010] WASAT 33
Springmist Pty Ltd and Shire of Augusta-Margaret River [2005] WASAT 143
Tran and Town of Vincent [2009] WASAT 123

REASONS FOR DECISION OF THE TRIBUNAL:

The application for costs

1 The applicants sought a review of the respondent's decision to grant approval to operate a home business from No 26 (Lot 240) Banks Avenue, Hillarys. On 23 December 2014, upon review, the Tribunal varied the respondent's conditional grant of approval by deletion of condition (j) to the original conditional approval (*Bruhn and City of Joondalup* [2014] WASAT 174).

2 On 11 January 2015, the applicants made application for the payment of costs by the respondent pursuant to s 87 of the *State Administrative Tribunal Act 2004* (WA) (SAT Act). By letter dated 6 February 2015, the respondent informed the applicants of its response to the various arguments advanced by the applicants in support of their application for costs. The respondent asserts that the application is 'misconceived, lacking in substance and should be withdrawn'. The respondent asserts that the application for costs should be the subject of an order to dismiss pursuant to s 47 of the SAT Act.

The proceeding in the Tribunal - costs

3 The application for costs was listed for directions on 25 February 2015. On that date, the Tribunal made orders for each party to file in the Tribunal, and serve on the other, their respective submissions. The Tribunal also ordered that, subject to any further order, the application for costs should be determined on the documents. On 25 February 2015, the Tribunal ordered that the parties agreed that the Tribunal may have regard to the correspondence filed by each party, along with the submissions to be filed, when making its decision. The applicants filed a copy of an open letter from the applicants' representative, Mr Swift, offering to resolve the application for costs by the respondent paying the sum of \$14,880 by way of a cheque or direct deposit receipted by the applicants by 4.30 pm on 6 February 2015. The applicants have not provided any itemisation of that offer. At the directions hearing, the applicants' representative claimed \$14,880 against the respondent for costs. On 12 March 2015, the parties filed their final submissions.

The statutory framework

4 Section 87 of the SAT Act provides that the primary position is that each party is to bear their own costs of the proceeding in the Tribunal

(*Aydogan and Town of Cambridge & Anor* [2007] WASAT 19), subject to:

- a) another provision in the SAT Act;
- b) a provision in the enabling Act (being the *Planning and Development Act 2005* (WA) (PD Act) in this proceeding); or
- c) an order by the Tribunal made 'under' s 87 of the SAT Act.

5 Relevantly, s 87(2) of the SAT Act empowers the Tribunal to make an order for the payment by a party of all or any of the costs of another party. This power is subject to the provisions of the relevant enabling Act. The PD Act does not prohibit the Tribunal from making an order that one party pay some or all of the other party's costs of the proceedings. The nature of the recoverable costs is identified in s 87(3) of the SAT Act.

6 Accordingly, the Tribunal has jurisdiction and power to make an order in this proceeding that one party pay some or all of the other party's costs of the proceeding in the Tribunal. The application is not therefore misconceived as asserted by the respondent.

7 The order that the Tribunal may make must be compensatory and not punitive in nature. An order for costs is intended by s 87(3) of the SAT Act to address the compensation a party has suffered, within the bounds of s 87 of the SAT Act as a whole. In considering s 87(3) of the SAT Act in *Springmist Pty Ltd and Shire of Augusta-Margaret River* [2005] WASAT 143 (*Springmist*), the Tribunal concluded that the costs recoverable under s 87 of the SAT Act were costs of the proceeding in the Tribunal. However, the 'type' of costs recoverable pursuant to s 87 of the SAT Act is not limited to 'traditional notions of legal costs' and includes other expenses and losses incurred which are connected with the conduct of the Tribunal process. The Tribunal may order that one party pay:

- the other party's expenses incurred to a 'non lawyer advocate' (*Springmist* at [64]);
- the other party's expenses of having to travel to a hearing (*Springmist* at [64]); or

- some other amount which compensates a party for the inconvenience or expense of its participation in the proceedings (*Springmist* at [64]).

8 Section 87(4) of the SAT Act proposes that the Tribunal 'is to have regard to' two additional factors without limiting 'anything else that may be considered' in relation to a matter that falls within the Tribunal's review jurisdiction. This proceeding falls within the Tribunal's review jurisdiction. The two factors outlined in s 87(4) of the SAT Act are:

- (a) whether a party (in bringing or conducting the proceeding before the decision-maker in which the decision under review was made) genuinely attempted to enable and assist the decision-maker to make a decision on its merits;
- (b) whether the party (being the decision-maker) genuinely attempted to make a decision on its merits.

9 Relevantly, the authorities concerning a finding in relation to s 87(4)(b) of the SAT Act arise:

- where a decision-maker has failed to give proper, genuine and realistic consideration to the substantial merits of the particular case before it;
- where a decision-maker has applied one consideration with greater weight than was justified or warranted; or
- where a decision-maker rejected the reasoned professional advice of an officer of the decision-maker or the determination of the Tribunal in an earlier related proceeding;

(see: *J & P Metals Pty Ltd and Shire of Dardanup* [2006] WASAT 282); *Rossi and City of Bayswater* [2010] WASAT 33; *Tran and Town of Vincent* [2009] WASAT 123 and *Humphrys and City of Stirling* [2011] WASAT 105).

10 Whilst the discretion conferred on the Tribunal to award costs pursuant to s 87 of the SAT Act should not be an indication that the costs should follow the event (*Pearce & Anor and Germain* [2007] WASAT 291 (S)), it is open to the Tribunal to order that the costs of a party be paid by another party in circumstances where that other party has conducted itself unreasonably, particularly where that conduct gives

rise to unnecessary costs being incurred by the other party (see: *Chew and Director General of the Department of Education and Training* [2006] WASAT 248 at [85]).

Consideration and conclusion

11 In this proceeding:


- a) The respondent maintained at all times that condition (j) of the approval was necessary to ensure that the proposed home business did not expand beyond the definition of Home Business - Category 3 as provided for in the *City of Joondalup District Planning Scheme No 2 (DPS 2)*, whereas it was obvious that the other conditions were more than adequate to limit the type of home business that could be operated at the applicants' property to one that conformed with the DPS 2 definition of Home Business - Category 3.
- b) Condition (j) was not a necessary or suitable means of enforcing compliance with the other terms and conditions of the conditional approval granted by the respondent.
- c) The respondent placed too great a weight and emphasis on the need to maintain a residential amenity in the area in question when, by its own admission, the Tribunal was to treat a proposed amendment to DPS 2 as a seriously-entertained amendment by which the zoning of the area in question would become mixed use.
- d) The respondent's assertion that the area in question should be treated as being zoned for mixed use was also inconsistent with the respondent's assertion that the residential amenity of the area was to be preserved.
- e) The respondent, in an endeavour to succeed in this proceeding, resolved to pass a number of amended policies, the crux of which was to place upon itself a restriction from exercising the wide discretion that DPS 2 had conferred upon the respondent in such matters.
- f) The respondent advanced no alternative condition to condition (j) to the Tribunal that might have been open for the Tribunal to impose.

- 12 The respondent's commitment to the maintenance of the residential amenity of the area in question, in the face of an amendment to the zoning of the area from Residential to mixed use was not reasonable. The respondent's endeavour to maintain the supremacy of this factor over the reality of the proposed change to the zoning of the area in question extended to the respondent making several proposed changes to its internal policy on the exercise of its discretion in such matters so as to restrict the outcome in this and, indeed, any similar case, evidenced the respondent's over-reliance on the residential amenity of the area as a factor. The respondent's position as referred to above, in the circumstances of this proceeding, was unreasonable and as a result of which the applicants' were compelled to prosecute this proceeding so as to vindicate their position. For these reasons, the Tribunal concludes that it should make an order that the respondent pay the applicants' costs of this Tribunal proceeding.
- 13 As to the quantum of the costs that the respondent should be ordered to pay, it appears that the respondent has no submission to make in opposition to the amount that the applicants have advanced (\$14,880). The costs incurred are not itemised, but the respondent has not challenged the lack of itemisation. The respondent has not challenged the amount at all. Given that the applicants filed a comprehensive application, written submissions in support of the substantive application, and written submissions on the issue of costs, the amount claimed does not appear, on its face, to be manifestly excessive or excessive at all. The Tribunal considers that the applicants have prosecuted the proceeding in an efficient and cost effective manner. In light of these facts and the fact that the respondent has not in any way challenged the amount sought by way of costs, the Tribunal considers that the quantum claimed is within the reasonable expectation and contemplation for such an application.
- 14 Accordingly, the Tribunal concludes that the respondent should pay the applicants' costs of the proceeding in the Tribunal in the sum of \$14,880 pursuant to s 87(2) of the SAT Act. The Tribunal heard no submissions on the time for compliance with the order but shall permit 21 days as a reasonable period of time for compliance with an order to pay money.

Order

1. The respondent shall pay to the applicants the sum of \$14,880 by 4 July 2015.

I certify that this and the preceding [14] paragraphs comprise the reasons for decision of the State Administrative Tribunal.



MS N OWEN-CONWAY, MEMBER

IN THE MATTER OF:

Peter Bruhn and Deidre Bruhn
-and-
City of Joondalup

Applicants
Respondent

Matter Number: DR 196 2014
Application Lodged: 18 June 2014

ORDER

On the application determined on the documents by Member Natasha Owen-Conway, it is on 11 June 2015 ordered that:

1. The respondent shall pay to the applicants the sum of \$14,880 by 4 July 2015.



Member Natasha Owen-Conway





HOME BUSINESS LOCAL PLANNING POLICY

CATEGORY:	Council Policy
RESPONSIBLE DIRECTORATE:	Planning and Community Development
OBJECTIVE:	To provide criteria for the establishment of home businesses within the City.

1. AUTHORITY

This Policy has been prepared in accordance with Clause 8.11 of the *City of Joondalup District Planning Scheme No. 2* which allows Council to prepare planning policies relating to planning or development within the Scheme area.

2. APPLICATION

This Policy applies to the whole of the City of Joondalup.

3. DEFINITIONS

“amenity” means all those factors which combine to form the character of the area to residents and passers-by and shall include the present and likely future amenity, as defined within the *City of Joondalup District Planning Scheme No. 2*.

“Home Business — Category 1” means an occupation carried on within a dwelling by a resident of the dwelling which:

- a. does not entail the retail sale, outdoor display or hire of goods of any nature;
- b. does not cause injury to or prejudicially affect the amenity of the neighbourhood;
- c. does not entail any substantial and/or inappropriate modification of the dwelling;
- d. does not entail the employment of any other person, except a member of the household;
- e. does not occupy an area greater than 20m² or where more than one resident is involved not cause the area used for the home business within the dwelling to occupy an area greater than 30m²;
- f. does not display any advertising signage;

- g. does not attract customers or regular and frequent deliveries of goods or equipment to the site;
- h. will not result in the requirement for a greater number of parking facilities than normally reserved for a single dwelling, and will not result in any increase in the amount of vehicular traffic in the vicinity;
- i. does not entail the presence, parking and garaging of a vehicle of more than 1.5 tonnes tare weight;
- j. does not involve the servicing or repair for gain of motor vehicles.
- k. Notwithstanding factors (a)–(j); a Home Business Category 1 may entail the operation of a Family Day Care Centre as defined by Clause 1.9 of the *City of Joondalup District Planning Scheme No. 2*.

As defined within the *City of Joondalup District Planning Scheme No. 2*.

“Home Business — Category 2” means an occupation carried on in a dwelling by a resident of the dwelling which:

- a. does not entail the retail sale, outdoor display or hire of goods of any nature;
- b. does not cause injury to or prejudicially affect the amenity of the neighbourhood;
- c. does not detract from the residential appearance of the dwelling house or domestic outbuilding;
- d. entails the employment of no more than 1 person not a member of the occupier's household;
- e. does not occupy an area greater than 30m². Council may permit an area greater than 30m² where it is considered that the scale of the business is limited by other factors and the increase in floor space will not have a detrimental effect on the amenity of the surrounding areas;
- f. does not have more than one advertisement sign and the sign displayed does not exceed 0.2m² metres in area;
- g. will not result in the requirement for a greater number of parking facilities than normally reserved for a single dwelling, and will not result in a substantial increase in the amount of vehicular traffic in the vicinity;
- h. does not involve the servicing or repair for gain of motor vehicles; and
- i. does not entail the presence, parking and garaging of a vehicle of more than 3.5 tonnes tare weight.

As defined within the *City of Joondalup District Planning Scheme No. 2*.

“Home Business — Category 3” means an occupation or professional practice undertaken for the purposes of commercial gain; and carried on in a dwelling or on land around a dwelling by a resident of the dwelling which:

- a. does not entail the retail sale, outdoor display or hire of goods of any nature;
- b. does not cause injury to or prejudicially affect the amenity of the neighbourhood;
- c. does not detract from the residential appearance of the dwelling house or domestic outbuilding;
- d. entails employment of a maximum of 2 persons not members of the occupier's household. Council may approve a greater number of employees, not exceeding 4 persons, subject to community consultation;
- e. occupies an area not exceeding 50m². Council may approve, subject to community consultation, an area of up to 100m², or one-third of the floor area of the dwelling whichever is the lesser;
- f. displays a sign describing the nature of the approved home occupation. The sign must not exceed 0.2m², and a maximum of 2 metres high;
- g. will not result in the requirement for a greater number of parking facilities than those provided on the site so as to cause an unacceptable inconvenience for adjoining residents and road users;
- h. will not result in a substantial increase in the amount of vehicular traffic in the vicinity;
- i. does not involve the servicing or repair for gain of motor vehicles; and
- j. does not entail the presence, parking and garaging of a vehicle of more than 3.5 tonnes tare weight.

As defined within the *City of Joondalup District Planning Scheme No. 2*.

4. STATEMENT

The City of Joondalup recognises that working from home is an expanding area of employment. The City, in addition, recognises that the amenity of residential areas should be protected by minimising potential impacts to maintain residential areas as primarily a place to live, not primarily a place to work.

To protect the amenity and character of residential areas, impacts associated with home businesses such as noise, traffic, parking, pollution, people and advertising signs should be minimised.

5. DETAILS

In assessing a Development Application for a home business the following will be considered:

5.1 Criteria applying to all Home Business Categories:

- a. The applicant must use the dwelling as the principal place of residence.
- b. Only one Home Business Category may be undertaken on the site at one time.
- c. The Home Business must not result in a substantial and/or inappropriate modification to the dwelling.
- d. Any appliances or machinery used for the purpose of the home business must be of a domestic scale. Large industrial appliances are prohibited.
- e. Applicants must demonstrate that the proposal will not have an undue impact on amenity of the surrounding area and land uses.

5.2 Additional Criteria Applying to Home Business — Category 1

5.2.1 Car Parking and Customers:

- a. No customers permitted.
- b. No additional car bays required.

5.3 Additional Criteria Applying to Home Business — Category 2 and Home Business — Category 3

5.3.1 Car Parking and Customers:

- a. One on-site car parking bay is required per customer and per employee. The total number of on-site car parking bays shall be equal to the maximum number of employees and customers that are permissible at the home business at any one time. On-site car parking is to be designed and provided in accordance with the *Residential Design Codes of Western Australia*.
- b. All car parking bays associated with the home business are to be made available and maintained for the parking of customer and employee vehicles only, during the approved home business operating hours. Resident parking is not permitted in customer bays during the approved home business operating hours. **No verge parking for the business is permissible.**

- c. The home business must not require the provision of car parking bays in a manner that would detract from the residential appearance of the dwelling or dominate the streetscape.

5.3.2 Operating Hours:

- a. The days and hours of operation for a home business shall generally be limited to the following:
 - i. 8.00 am to 6.00 pm, Monday to Friday
 - ii. 9.00 am to 5.00 pm, Saturday.
- b. When determining an application, the number of hours and/or days of operation may be increased or further restricted through conditions of development approval where it is deemed necessary to protect the amenity of the surrounding area.

5.3.3 Signage:

- a. One advertising sign, not exceeding 0.2 square metres in area, is permitted on the front facade of the dwelling for Home Business Category 2 and Category 3 in accordance with the City's *Signs Policy*.

5.4 Additional Criteria Applying to Home Business — Category 3

5.4.1 Location

Where a Category 3 Home Business is proposed in either a Residential zone or Special Residential zone, the location of the proposal shall be where it abuts or is directly opposite one of the commercial centres listed in the City of Joondalup Centres Strategy, unless the applicant can demonstrate to the satisfaction of the City that the proposal will not have an undue impact on the amenity of the surrounding area as a result of noise, traffic, parking, pollution, people and advertising.

5.4.2 Management Plan

A Management Plan is required to be submitted as part of any application for a Home Business — Category 3. As a minimum, the Management Plan is to include the following information:

- a. A car parking plan.
- b. Measures to minimise and control noise.
- c. Measures to minimise vehicle loading and unloading and traffic movements.
- d. The proposed hours of operation.

- e. Details of any poisonous, flammable or harmful chemicals or other hazardous materials proposed to be stored or used and measures to ensure that no polluting or harmful substances will escape from the site.
- f. Measures to minimise emissions of odours, dust or vapours from the site.
- g. Ways to limit the number of people visiting the house at any one time in relation to the business.
- h. A plan showing any proposed outdoor storage areas.
- i. Measures to ensure that no detrimental impact occurs to the character of the neighbourhood.
- j. Measures to manage the impact of the home business on any building or place listed on the municipal inventory of heritage places.
- k. Details of all appliances or machinery to be used in the home business.

5.5 Public Consultation:

- a. All new applications for a home business will be advertised for public comment for a minimum period of 21 days by way of letters to adjoining and nearby landowners.
- b. For an application for renewal of a home business, if any changes are proposed to the operation of the business, or if substantial complaints have been received within the previous 12 months, advertising of the application may be required in accordance with 5.5a.
- c. Planning-related concerns received from consulted owners will be considered as a relevant factor in the assessment of development applications.

5.6 Approval Period:

Where an applicant is not able to demonstrate to the satisfaction of the City that a home business will be able to operate without detriment to adjoining or nearby landowners, the City may elect to grant a time limited approval. Following the initial approval period, should it be demonstrated that the home business can operate without detrimentally impacting on nearby landowners, a permanent approval may be granted.

Creation Date: June 1999

Amendments: CJ213-06/99, CJ297-09/99, CJ020-02/02, CJ238-11/05

Related Documentation:

- *City of Joondalup District Planning Scheme No. 2*
- Home Business Fact Sheet
- *Residential Design Codes of Western Australia*