



S. 31 Reconsideration - Responsible Authority Report (Regulation 18)

Application Details:	Proposed Mixed-Use Development (31 Multiple Dwellings, 4 Shops & an Office) within a 4-Storey Building (plus Basement & Loft)
Property Location:	Nos. 87-91 (Lots 3-5) Waratah Avenue, Dalkeith
DAP Name:	Metro-West JDAP
Applicant:	McDonald Jones Architects
Owner:	Waratah Ave Dalkeith Pty Ltd ATFT Waratah Ave Dalkeith Unit Trust
LG Reference:	WA3/87 – DA12/156
Responsible Authority:	City of Nedlands
Authorising Officer:	Peter Mickleson – Director Planning & Development
Application No and File No:	DP/12/473
Report Date:	09 May 2013
Application Receipt Date:	23 April 2012
Attachment(s):	1 – Council’s amended comments to JDAP

Amended Recommendation:

That the Metropolitan West Joint Development Assessment Panel resolves to:

- A. Vary DAP approval reference DP/12/473, subject to the following amendment to condition 2:
2. The development may not commence unless and until the owners of Lots 3, 4 and 5 procure and have registered a public access easement pursuant to sections 195 and 196 of the Land Administration Act over the 6.0m wide driveway that connects a public road to the rear laneway. The easement shall name the City of Nedlands as the grantee and shall be prepared by the City’s solicitors at the cost of the owners of lots 3, 4 and 5.

Or alternatively:

- B. Vary DAP approval reference DP/12/473, subject to the following amendment to Condition 2:
2. This approval remains effective only while Lots 3, 4 and 5 retain a right of vehicular access to the rear (north) of those Lots which is satisfactory to the City of Nedlands, and which is achieved via an easement over the adjoining Lot 8 (No. 81) Waratah Avenue, or via a public road. This access shall allow for refuse collection and servicing of the rear laneway until such time as alternate access to the rear of those lots has been created. If this vehicular access to the rear of any of Lots 3, 4 or 5 is lost, the development the subject of this approval must cease.

Details:

Property Address:	Nos. 87-91 (Lots 3-5) Waratah Avenue, Dalkeith
Zoning	MRS: Urban
	TPS: Retail Shopping
Use Class:	'P' permitted (for all proposed land uses)
Strategy Policy:	N.A.
Development Scheme:	Town Planning Scheme No. 2 (TPS2)
Lot Size:	3,412m ²
Existing Land Uses:	Shops, Office and vacant Service Station
Value of Development:	\$21.5 million

Background:

This application was considered by the Metro-West JDAP on 18 July 2012, 5 September 2012, and 19 March 2013.

On 19 March 2013, the JDAP resolved to approve the application subject to conditions. Condition 2 of this decision has been appealed to SAT for review by the applicants.

Condition 2 is as follows:

*'This approval remains effective only while Lots 3, 4 and 5 retain a right of vehicular access to the rear (north) of those Lots which **is satisfactory to the City of Nedlands.**' [emphasis added].*

After the approval was granted, the City wrote to the applicant explaining that in relation to Condition 2, "...to the **satisfaction of the City of Nedlands**", would mean that access to the rear laneway would need to include public access. This is in accordance with the Council resolution dated 26 February 2013 which recommended to the JDAP that a condition be imposed stating that:

'...permanent dedicated vehicular public access shall be provided to the rear laneway.'

In response, the landowner lodged an application for review to the State Administrative Tribunal (**SAT**) on the wording of the Condition 2.

The applicant's grounds for the review are that the condition is invalid as it is:

- Uncertain;
- Vague and ambulatory;
- Does not fairly and reasonably relate to the development; and
- Is otherwise unreasonable.

Consequently, the SAT has invited the JDAP to reconsider the matter. The *State Administrative Tribunal Act 2004*, s. 31(2) allows the JDAP to:

- '(a) affirm the decision; or*
- (b) vary the decision; or*
- (c) set aside the decision and substitute its new decision.'*

Legislation & policy:

Legislation

- *State Administrative Tribunal Act 2004 (SAT Act)*
- *Local Government Act 1995 (LG Act)*
- *Planning and Development Act 2005 (P&D Act)*
- *City of Nedlands Town Planning Scheme No. 2 (TPS2 or Scheme)*

Consideration:

Introduction

The focus of this report is Condition 2 of the approval which relates to the north/south laneway, and whether access rights should be public or private.

Currently the laneway is made up of 1m of land on the eastern boundary of the subject site and 6m of the abutting existing driveway to the east, which is located on the western boundary of No. 81 Waratah Avenue.

The applicant's 1m portion of land is proposed to be open to the public via an easement-in-gross under Condition 1 of the approval. This condition has not been appealed.

The appeal is about Condition 2 which relates to the 6m portion of the laneway which is currently proposed as a private easement on the neighbouring property.

The applicants consider the proposed private easement is sufficient for the purposes of providing access to the development, and the submitters and the Council consider that the access should be public.

Discussion

When the laneway at the rear of the site is constructed, it is required to be ceded to the City, which will then be available to the general public. However, if the north/south laneway is via a private easement for occupiers of the development site only and not open to the public, then the rear laneway will be landlocked to vehicular traffic until such time as one or more of the other laneways proposed in the scheme are constructed.

Both the Council and the submitters believe this is not in accordance with the intent of the Scheme provisions.

Clause 1.3 (e) of the Town Planning Scheme (Amendment 192), requires that (emphasis added):

'Development in accordance with these guidelines shall only occur when a required rear laneway has full access to a gazetted road as outlined on the DAPs (refer clause 2.8 of these guidelines for laneway specifications).'

Although the rear laneway does have access to a gazetted road, it is via a private easement. It is not clear what full access to a gazetted road means and it can be

argued that the private easement is sufficient for this development because the development itself does not generate the need for public access.

However, in relation to the overall objective of the Scheme amendment, it can also be argued that full access should include full public access i.e. a direct connection, not via an easement.

Clause 1.5 indicates that there is no discretion as to “*public access gained from rear laneways*”- although there is discretion as to the north/south laneways.

Clause 2.6 (a) reinforces that for Precinct 3 the north/south laneway can be varied or not provided at all, but clause 2.6 (k) provides that “*laneways are to be constructed to provide access within the precinct and not on, through or be reliant on access of adjacent sites not in this precinct*”. The rear laneway provided by the current proposal does, at present, rely on access from an adjoining lot in an adjoining precinct.

The scheme provisions are ultimately not clear, however, it could be considered that the intent of the scheme is to provide public access.

The 6m portion of laneway on the adjacent site is required to be public in the future (as shown on the Precinct Plan) and therefore it could be said to be orderly and proper planning to secure this public laneway sooner rather than later, fulfilling the future intent of the scheme provisions.

In addition, there is a concern that because the rear laneway is not proposed to have public access, this will result in refuse trucks and road maintenance vehicles not being able to reach the rear ceded laneway which will become a gazetted road.

In response to this, it is advised that the refuse trucks will be contracted by the owners as an ‘inside bin service’, so they would have access rights via the private easement. In addition, it is expected that road maintenance vehicles would be permitted to access the rear laneway for any repairs as the owners of the site require use of the rear laneway to access the building. These maintenance vehicles would also likely have powers under the Local Government Act, especially for emergencies.

Although it is considered unlikely that access to these vehicles would be denied, it is recommended that if access remains private, that the private easement be amended to include access for these vehicles.

Conclusion:

It is recommended that as a minimum, the proposed laneway service the site under a private arrangement and the existing easement, however, although the scheme provisions are not ultimately clear, it is also considered appropriate that the laneway provide access to the general public due to the nature of laneways, the requirements under the Scheme, and the intended outcome of the Scheme Amendment.

Accordingly, it is recommended that the Metro-West Joint Development Assessment Panel vary condition No. 2 to provide suitable public access to rear laneway, or alternatively, as a minimum, vary condition 2 to ensure that the private access provide for road maintenance and refuse vehicles to access the rear laneway.