DR 362 of 2013

BETWEEN

WATTLEUP ROAD DEVELOPMENT COMPANY PTY LTD — Applicant

- and -

WESTERN AUSTRALIAN PLANNING COMMISSION — Respondent

- and -

ALCOA OF AUSTRALIA LIMITED — Intervenor

DR 444 of 2013

BETWEEN

PRIMEWEST (WATTLEUP) PTY LTD — Applicant

- and -

WESTERN AUSTRALIAN PLANNING COMMISSION — Respondent

- and -

ALCOA OF AUSTRALIA LIMITED — Intervenor

DECISION OF THE MINISTER FOR PLANNING PURSUANT TO SECTION 246(2)(b) OF THE *PLANNING AND DEVELOPMENT ACT 2005*

BACKGROUND

Applications under review

1. I refer to applications DR362 of 2013 and DR444 of 2013, concerning two applications for subdivision at Wattleup Road, Hammond Park. These applications were subject to deemed refusals, and later called-in from the State Administrative Tribunal to the then Minister for Planning, the Hon. John Day. Under section 246 of the *Planning and Development Act 2005*

('**PD Act**'), Minister Day referred the called-in applications back to the Tribunal to hear the applications but, without determining them, to refer them with recommendations to the Minister for determination.

The proposals

2. The two subdivision applications subject to this matter of review are as follows:

   (a) DR 362 of 2013 - On 23 May 2013, the Wattleup Road Development Company Pty Ltd lodged an application with the Western Australian Planning Commission ('**Commission**') seeking approval under s. 135 of the PD Act to subdivide Lot 809, Lot 9002 and Lot 9003 Wattleup Road, Hammond Park (which have a total area of 9.4749 hectares). The application proposes that these lots be subdivided into 147 residential lots, two public open space reserves (with a total area of 8,207 m^2) and new local road reserves.

   (b) DR 444 of 2013 - On 20 May 2013, Primewest (Wattleup) Pty Ltd lodged an application with the Commission seeking approval under s. 135 of the PD Act to subdivide Lot 117 and Lot 9001 Wattleup Road, Hammond Park (which have a total area of 7.2974 hectares). The application proposes that these lots be subdivided into 93 residential lots, two public open space reserves (with a total area of 6,571 m^2), new local road reserves and two balance lots - one (of 3,874 m^2) containing the original homestead, the second (of 6,908 m^2) containing land required for the western extension of Rowley Road.

The recommendation of the State Administrative Tribunal

3. In 2014, in decision 2014 of WASAT 159, still during the term of a previous Minister under the Barnett Government, the Tribunal delivered its recommendation. It advised the then Minister that the Tribunal considers that:

   > "the correct and preferable decision" under s 27(2) of the SAT Act is that the applications for review should be dismissed and subdivision approval should be refused for the proposed subdivisions.

4. Amongst a range of factors, including the application of the planning framework, residential amenity and industrial amenity, a key issue in this matter concerns the potential impacts of dust, especially given the sites' relative location to Alcoa's Residue Drying Area ('**RDA**') and other industrial uses. Without limiting the Tribunal's full suite of reasons, which I have had regard to and are set out in detail in the Tribunal's own judgment, the Tribunal did affirm

that scientific evidence illustrated compliance with relevant safety standards. At paragraph 25 of its reasons the Tribunal affirmed:

> The Tribunal is, therefore, satisfied that the health impacts of dust were acceptable for the proposed subdivisions during the year of monitoring.

5. Nonetheless, the Tribunal ultimately recommended refusal in significant part, amongst also citing other factors, because it was not satisfied to the extent that scientific data could be relied upon. It further noted at paragraph 25:

> ...the applicants' monitoring results cannot reasonably be relied upon as predictive of the health impacts of dust on the site at present or in the future.

6. Notwithstanding this recommendation, there was thereafter a long deferral of this matter, which appeared reasonable given the circumstances. The Tribunal's recommendation was further challenged by various legal proceedings in the Supreme Court.

Deferrals by the Barnett Government to enable further scientific studies

7. This deferral also permitted a succession of Ministers throughout almost the entire era of the Barnett Government, including during the tenure of both the Hon. John Day and Hon. Donna Faragher, and which has now extended into this term of the McGowan Government, to carry out further scientific testing. Again, I believe the actions of Minister Day and Minister Faragher were reasonable in this regard.

8. These further studies included one conducted by the Environmental Protection Authority (**'EPA'**) to provide advice under section 16(e) of the *Environmental Protection Act 1986*. In June 2017, the EPA published its report entitled, *Consideration of potential health and amenity impacts of dust in determining the size of a buffer for urban development in the Mandogalup area* and *Supplementary information: Mandogalup area buffer zone s16e advice* (**'EPA Report'**). The key findings of the EPA Report included:

> The eastern area of Mandogalup is located sufficiently far away from the RDA, and outside the predominant wind field that generates dust from the RDA, that there is negligible health risk and low likelihood of unreasonable amenity impacts in this area; and
>
> Air quality in the north and north-east Mandogalup area does not appear to meet recently revised national air quality goals for particulates. This is likely due to a combination of dust from Alcoa's RDA, and sand and limestone quarrying in the area.

9. I understand that the two subdivision sites are not in fact within the area subject to the EPA Report. They are, however, directly north of "Area D", which is within the scope of the north Mandogalup area. There is, therefore, some question as to what extent the EPA Report can be relied upon conclusively for these sites.

10. Due to these findings, the EPA Report also recommended further investigations were required as to the source of the dust, particularly in the north and north-east of the Mandogalup area:

> There is a need for further investigation to determine the sources of dust contributing to the exceedances of the NEPM goal in this area and for corrective measures to be undertaken if practicable to achieve the NEPM air quality goal in this area.

11. To this end, there was further monitoring, this time, by the Department of Water and Environmental Regulation (**'DWER'**). This resulted in the release of a *study Mapping dust plumes at Mandogalup using a LiDAR* (**'Dust Monitoring Report'** or **'LiDAR Report'**). In January 2019, DWER published the LiDAR Report and it can be accessed by the general public from DWER's website. Several stakeholders have accessed the report and provided further comments in relation to its findings, which I have considered.

Key findings of the LiDAR Report

12. In summary, the LiDAR Report suggests the majority of the air quality issues could be considered as primarily amenity-related. Which is to say, with the potential exception of those with underlying chronic health issues or sensitivities, any dust is more likely to impact the quiet enjoyment of residential property owners, rather than be a danger to their health.

13. In understanding why this is the case, first and foremost, the LiDAR Report makes clear not all particles are equal in terms of their impacts on either health or amenity. Small, large (and one might add very small) dust particles all have different impacts, and were measured to exist at different times and at different levels.

14. In terms of smaller dust particles (measured as **'PM_{10}'** particles), which are the particles that can affect respiratory health, the LiDAR Report found levels were acceptable and within National Environment Protection Measure (**'NEPM'**) standards:

> During the study period, industrial and agricultural activity both contributed to elevated dust levels in Mandogalup but did not cause an exceedance of the National Environment Protection (Ambient Air Quality) Measure (NEPM) standard for PM_{10}.

15. In fact, PM_{10} levels were comparable to other locations in Perth. They were similar to existing residential and semi-residential suburbs, such as South Lake and Caversham:

> The levels of PM_{10} dust at the Central and Norkett sites over the study period seem to be somewhat comparable to other locations in Perth and semi-rural areas in the wider Perth metropolitan area.
>
> ...A general observation of the data shown in these plots indicates that the 75th and 50th percentile plots at Norkett and Central are somewhat similar to each other and to South Lake and Caversham.

16. In terms of events that exceeded standards, it was only total suspended particles (being the full aerosol range, being up to PM_{50}, described as **'TSP'**) that primarily affect amenity – not PM_{10} particles that affect health – that exceed those standards. In fact, there was no contravention of standards if one took an average over a 24-hour period, but there was some exceedance during isolated 15-minute periods of monitoring:

> TSP concentrations did not exceed the applicable Environmental Protection (Kwinana) (Atmospheric Wastes) Regulations 1992 (EPR) standard of 90 $\mu g/m^3$ averaged over 24 hours but exceeded the EPR TSP limit of 1000 $\mu g/m^3$ averaged over 15 minutes at two locations on 17 December 2017. Directional and pictorial analysis of these events indicates that it is unlikely the RDA was a major source of the exceedance.

17. The LiDAR Report also found these TSP particles seemed to decrease away from Alcoa's RDA:

> Amenity impacts were unable to be assessed, except to note that the levels of total suspended particles (TSP – larger particles) seem to decrease with distance from the RDA.

18. In terms of overall dust in the area, some did admittedly originate from the Alcoa's RDA, but there were also other sources:

> Major contributors to overall dust levels in the area include the Alcoa RDA, sand and other quarries, roads, truck movements, agricultural activities and industrial activity in the Kwinana industrial area.

19. However, in the thirteen instances of elevated TSP concentration levels, only two (or approximately 15 per cent) of those incidents possibly derived from Alcoa's RDA. Other sources of TSP dust included two instances of a ride-on lawn-mower, two instances of bushfire smoke, one instance of dust from agricultural source or a quarry, and six other unknown instances but where RDA dust was excluded. This is to say, in relation to the subdivision sites in question, Alcoa's operations are only a likely minor impact on amenity.

20. There was finally some discussion by stakeholders about even smaller particles (measured as **'$PM_{2.5}$'** particles), which are particles that most impact human health. However, DWER further explained, referencing back to the original EPA Report:

> $PM_{2.5}$ particles are mainly the result of combustion processes for which there are no major localised sources and consequently are not as relevant in this study... that the recommendation of further monitoring of $PM_{2.5}$ is baseless since there are no major combustion sources nearby, and the only impact by $PM_{2.5}$ would be from regional fires events that are monitored at nearby regional monitoring stations. Minor localised sources such as woodheaters and vehicle emissions are not considered significant in this area. The EPA Sec 16 advice stated "Residue dust studies have shown that there is a very low $PM_{2.5}$ fraction in residue dust, indicating that any $PM_{2.5}$ particles from the RDA are unlikely to contribute to health impacts in the area."

21. In terms of whether the LiDAR Report, supporting the EPA Report and other scientific studies, peer reviews, submissions and evidence could be trusted, especially when there was only a four-month rather than continuous twelve-month period of monitoring, the latest monitoring would now seem to be proportionate, appropriate and cost effective. In particular, it is considered that daily monitoring from December to March reasonably represents the worst-case scenario in terms of weather trends contributing to dust impacts. Higher wind speed and low rain fall in Perth's summer months create dryer conditions which is expected to increase air quality impacts from dust. As one stakeholder seemed to acknowledge, who otherwise was generally hostile to the LiDAR Report, albeit in relation to Alcoa's operations in Pinjarra and not Kwinana but for which the same principles of monitoring could reasonably apply, a full continuous period of monitoring over twelve months may not be needed if one considers:

> The months from October to April (7 months) are considered to be the time period throughout the year when there is the greatest risk of airborne dust generation at Alcoa's Pinjarra Refinery due in principal to the prevailing, gusty and strong easterly winds conditions.

22. While there may be some question of degree between stakeholders, whether monitoring should be for seven months over summer and autumn or whether four months of monitoring over just summer, there seems to be a consensus that something less than a full continuous twelve months of monitoring is reasonably sufficient. I accept the proposition put forward by DWER that a twelve-month period of monitoring may not be just difficult but essentially:

> Impossible to do in all cases as there are practical considerations such as land owner permission, power issues, security etc.

23. To this end, and distinguishing my decision from that of the Tribunal, the decision of DWER to undertake four months of monitoring over summer, on the basis of a worst-case scenario, is now accepted as a sufficiently explained and logical course of action.

Further submissions received and considered

24. Noting this is something of a legacy issue inherited from the previous Government, and observing this latest scientific monitoring brings this longstanding issue to something of a natural end, I have concluded it appropriate now to make a final decision. I have had regard to the scope of my duties, which under section 246(6) includes not only considering the Tribunal's recommendation, but also other submissions received. I have had regard to those additional submissions, which include but are not necessarily limited to:

    (a) a letter from Peter Forster of Strategen Environmental dated 19 April 2019;

    (b) a letter from Deon White of Robertsday Planning dated 13 May 2019;

    (c) an officer's report to the City of Kwinana Council meeting of 12 June 2019;

    (d) a peer review report from Talis Consultants Pty Ltd dated March 2019;

    (e) a letter from Chris Oughton of the Kwinana Industries Council dated 17 June 2019; and

    (f) further comments by the Department of Water and Environmental Regulation dated 25 June 2019.

STATUTORY FRAMEWORK

The basis of jurisdiction

25. The jurisdictional basis for my decision is set out in sections 246 and 247 of the PD Act, which relevantly state the following:

> **246. Minister may call in application to SAT for review**
>
> (1) This section applies to an application made to the State Administrative Tribunal if the Minister considers that the application raises issues of such State or regional importance that it would be appropriate for the application to be determined by the Minister.
>
> (2) The Minister may direct —
>
> (a) the President to refer an application to which this section applies to the Minister for determination; or

(b) the State Administrative Tribunal to hear the application but, without determining it, to refer it with recommendations to the Minister for determination.

(3) The Minister cannot give a direction under subsection (2) —

(a) in respect of an application made to the State Administrative Tribunal under the Heritage of Western Australia Act 1990; or

(b) more than 14 days after the application was made to the State Administrative Tribunal; or

(c) after a final determination has been made in relation to the application.

(4) The Minister, within 14 days after a direction is given, is to cause a copy of it to be published in the Gazette and, as soon as is practicable, is to cause a copy of it to be laid before each House of Parliament or dealt with under section 268A.

(5) If the Minister gives a direction under subsection (2)(a), each party to the proceeding may present the case of that party to the Minister.

(6) The Minister is to have regard to the submissions of the parties and may have regard to any other submission received by the Minister.

(7) A copy or transcript of any submission to which the Minister has regard is to be —

(a) given to each party; and

(b) published in the manner prescribed by the regulations.

247. Determination of application by Minister

(1) In determining an application the Minister is not limited to planning considerations but may make the determination having regard to any other matter affecting the public interest.

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

(3) When an application is referred to the Minister under section 246(2)(b) the executive officer of the State Administrative Tribunal is to —

(a) give a copy of the recommendations that accompanied the referral to each party within a reasonable time after the referral; and

(b) make a copy of the recommendations available during office hours for inspection by any person without charge.

(4) The Minister is to —

(a) give to each party written reasons for the determination of the Minister on the application; and

(b) as soon as is practicable, cause a copy of those reasons to be laid before each House of Parliament; and

(c) upon payment of a fee determined in the manner prescribed by the regulations, supply a copy of those reasons to any other person.

(5) The decision of the Minister is final.

26. Importantly, while I am greatly assisted by SAT's comments and recommendation, I equally observe my role is not simply a duplication of that of the Tribunal. I am instead bound by the scope of duties and functions set out in the PD Act. I take note of the helpful comments in *Hanson Construction Materials Pty Ltd and City of Vincent* [2017] WASAT 81 at [35] that:

> In fact the PD Act does not specify what powers are available to the Minister when determining a review application called in pursuant to s 246 of the PD Act. The powers of the Tribunal on determining a review application, including one made under Pt 14 of the PD Act, are specified in s 29 of the SAT Act. The Minister is to determine the review application as specified in s 247(1) of the PD Act. That determination is to have effect according to its tenor: s 247(2) of the PD Act.

27. To that end, it may be useful if I briefly draw attention to those key planning and public interest principles that may be applicable in this matter.

The underlying planning framework

28. In making this decision I have turned my mind to the underlying planning framework, both as it existed at the time of the Tribunal's recommendation and now as the planning system continues to evolve. Noting this is a subdivision application, I do not believe there is any existing scheme provision for the purpose of section 138(2) that would prevent me from approving these applications.

29. Without attempting to list every single potential planning factor, I observe the land is zoned as Urban under the Metropolitan Region Scheme. The sites were rezoned from Urban Deferred to Urban on or about 31 October 2008. That change in zoning from Urban Deferred to Urban is important insofar as it suggests the WAPC is essentially saying, as the State's premier strategic planning body, that the land is now ready for such further intensive development and subdivision.

30. I further observe the sites are zoned Urban Development under the City of Cockburn's own local planning scheme, which requires the preparation and endorsement of a structure plan.

I have also observed the effect of clause 27 of the Deemed Provisions of the *Planning and Development (Local Planning Schemes) Regulations 2015*. Under clause 27(1), a structure plan is to be given due regard in any application for subdivision or development, but a decision-maker is not otherwise bound by that structure plan when making a decision. Under clause 27(2), where a structure plan is to be prepared but has not yet been prepared and approved, there are limitations – but not an absolute prohibition – on approving certain applications for subdivision and development within that area.

31. I take note that in 2008 the Southern Suburbs District Structure Plan was approved for the area, but in 2011 the City of Cockburn amended that structure plan as it relates to the site and the adjoining properties, by inserting the words "subject to future structure planning". I also take note of the Tribunal's decision that it considered the proposed subdivisions inconsistent with the applicable planning framework.

32. Nonetheless, it would appear the Southern Suburbs District Structure Plan has not been formally revoked for the purposes of clause 28(4) of the Deemed Provisions. There was a deliberate decision by the City of Cockburn not to exclude the area entirely from the structure plan, which reflected a future desire for residential and compatible development to occur within this area subject to the appropriate modelling and environmental studies being undertaken. As there is a structure plan in force, albeit one where future investigations are expected, it could not be said these are areas to which no structure plan has yet been prepared and approved for the purposes of triggering clause 27(2) of the Deemed Provisions.

33. Even if one were to adopt a different characterisation and say clause 27(2) does apply, I note the Tribunal's conclusions on this aspect were formulated by reference to outstanding questions of health and amenity impacts from dust. On that basis, and as further canvassed elsewhere in this decision, I depart from the Tribunal's own conclusion based on new information, which is information the Tribunal did not have before it at the time, but which I now have before me. I am satisfied approving these applications would not conflict with the principles of orderly and proper planning, and would not prejudice the overall development of the area.

34. Finally, I have considered Improvement Plan 47, which has specifically been raised by some stakeholders in their submissions, presumably from the perspective of interface and compatibility. I observe that the improvement plan was published on 12 April 2019 and that

an improvement scheme will be prepared under the improvement plan, but at this time, has not yet been prepared.

35. Importantly, the sites in question do not fall within the improvement plan area. Rather, the sites lay to the north and from the perspective of interface, are separated from the improvement plan area by the Rowley Road road reservation which once constructed, will range from 90 to 135 metres in width. Moreover, even were the land to fall within the improvement plan area, nothing under the improvement plan or the as yet undrafted improvement scheme would preclude me from approving these subdivision applications. It remains open to me to consider the merits of the proposals, based on the zoning and scheme provisions that are in place today.

36. In terms of applying the underlying planning framework against the decision before me, and notwithstanding I agree previous Planning Ministers were right in deferring a decision until these further scientific studies were completed, I note these studies have now been completed, especially as set out in the LiDAR Report. As the scientific studies expected have now come to a natural end, a sufficient period of time has also passed to allow stakeholders to comment upon those studies.

37. Therefore, I am of the view the matter should be delayed no longer, and there is no further justification for providing what may be viewed as an almost continuous moratorium on subdivision and development approvals on the subject sites. Other relevant planning considerations are set out in the future detailed reasons below.

Non-planning considerations

38. I further observe that under section 247(1), I am not limited to planning considerations but may have regard to any other matter affecting the public interest. In accordance with these powers, I have had regard to matters affecting the public interest, not limited by planning considerations. Relevant non-planning considerations are set out in the further detailed reasons below.

FURTHER DETAILED REASONS IN CONSIDERING WHETHER TO GRANT APPROVAL

39. For the reasons set out below, I exercise my discretion and depart from the Tribunal's recommendation by approving these subdivision applications. I do not take that course of

action lightly, but do so based on what I believe is the most reasonable application of the latest scientific data, data the Tribunal did not have before it and which I accept, and also based on non-planning grounds in the public interest, criteria the Tribunal was not permitted to consider.

40. I provide the following further detailed reasons, which expand upon the findings set out in the LiDAR Report outlined above:

1. I am satisfied the proposals would not represent an undue risk to public health.

41. Importantly, both the Tribunal's original decision in 2014 and the latest scientific investigations essentially recognise there is unlikely to be an undue risk to public health if these subdivision applications were approved.

42. Within this context, it is worth noting there appears to be consensus amongst stakeholders, including those who were generally hostile to the LiDAR Report, that there are essentially no risks to human health in terms of drinking or ingestion of food. There do not appear to be any local drinking water catchment areas or market garden activities in the area that are or would be affected. Any health risks, to the extent they exist, appear to be questions relating to the inhalation of dust particles.

43. As already observed but for the sake of re-emphasising the point, in terms of respiration risks, dust measurements were somewhat comparable to other locations in Perth and semi-rural areas within the wider Perth metropolitan area. Air quality affected by dust generally meets the standards for both size (health) and quantity (amenity) of particulate matter.

2. I am satisfied most dust-related issues go to amenity, not public health.

44. The scientific data suggests the majority of air quality issues could be considered as primarily amenity-related. To this end, it is important to draw a distinction between smaller PM_{10} particle levels that can inhaled and hence may affect health, compared with total TSP particle levels, which are not likely to affect health but can be a source of nuisance and more likely to affect amenity. Thus, one must be cautious of overly simplistic statements about the impact of dust, as different types of dust can have impacts in different ways.

45. It is important to stress that PM_{10} particle levels, which affect health, did not exceed standards. In terms of PM_{10}, a person living in these sites would be exposed to similar levels of small particles as current residents do in the suburbs of South Lake or Caversham.

46. What also especially comes through in the stakeholder submissions is special concern about $PM_{2.5}$ particles, which are even smaller dust particles that can most significantly affect human health. I recognise those stakeholder concerns. However, I accept the advice of the DWER that generally the main source of $PM_{2.5}$ particles would be from fires, such as wood-heaters or bushfires.

47. It was the TSP particle levels that showed some – albeit limited – elevated levels. Again, I do not dismiss the results concerning the full range of particle material, but do also take note that they largely affect the enjoyment of the use of land rather than health.

48. In light of these facts, I do accept there may also be some land use conflicts between residential and industrial users, which may impact the amenity of landowners. I have certainly taken note of those concerns. However, these land use conflicts are routinely managed within the planning system and in my view, those land use conflicts do not justify refusal in this instance. However, it would be reasonable to impose a notification on title to forewarn landowners of potential impacts on amenity which may arise from the range of land uses being undertaken in the locality.

49. I observe and accept the views of the Tribunal and Supreme Court that a notification on title does not in itself have any effect on the manifestation of risk. Importantly, that view was premised on an underlying assumption that the Tribunal was not yet satisfied about this proposed subdivisions' risks in relation to health and amenity impacts of dust. Those views can now be distinguished based on scientific data the Tribunal and Court did not have before it at that time, but which I have before me and am satisfied and rely upon.

50. Some may claim that I am being too cautious from a purely planning perspective. However, to the extent that contention might be true, I believe such a stance is justified on non-planning grounds in the public interest. I think the approach to impose a notification on title(s) would reflect general community expectations for a decision of this kind.

3. I acknowledge risks arising from $PM_{2.5}$ particles, but I am satisfied with those risks.

51. I acknowledge the concerns of stakeholders who see some risk in approving these subdivision applications. I acknowledge a no-risk scenario is impossible to achieve when it comes to measuring particles, no matter the extent of monitoring performed.

52. There is no city in the world where there is not some degree of air pollution. There are also clearly many suburbs across the Perth metropolitan area that are adjacent to potentially polluting sources.

53. Within this context, I again recognise the special concern raised by stakeholders about smaller $PM_{2.5}$ particles, which are amongst the most dangerous to human health. Nonetheless, as several stakeholders observed in their submissions, the dust particles that are dangerous to health, including PM_{10} particles but also especially $PM_{2.5}$ particles, most often arise from combustion sources, which is explicitly mentioned to include bushfires.

54. In this particular case, the scientific data suggests there are no major $PM_{2.5}$ generating combustion sources nearby. The main, known $PM_{2.5}$ generating combustion sources are in fact minor localised sources, such as from wood-heaters and vehicle emissions.

4. I am satisfied the applications do not represent a significant risk to industrial amenity, especially Alcoa's operations.

55. I take note of the Tribunal's original concerns about the impact of these subdivisions on industrial amenity, both industrial amenity generally, and Alcoa's operations especially as it relates to its RDA. I recognise the importance of this industrial land to the State, including Alcoa's operations.

56. The longevity and future of the Alcoa operations are not definitive, however may operate for in excess of another 20 years. I remain cognisant that, subject to known environmental parameters and legislation, industrial operations of state significance should not be prejudiced from operating in its anticipated and desired manner due to the nearby presence of, or perceived impacts on sensitive receivers such as medium density residential development.

57. To that point, I am satisfied that the locational and geographical characteristics of the subject sites, combined with the physical distancing and separation from the Alcoa landholdings, particularly the RDA, is such that the proposed residential developments are unlikely to prejudice the ability for Alcoa to operate in the manner sought and expected into the future.

5. I am satisfied the original Tribunal's concerns in 2014 about the soundness of air quality monitoring have been now addressed.

58. Given the scientific data has consistently upheld that health impacts of dust were acceptable for the proposed subdivisions, I recognise a cornerstone concern underpinning the Tribunal's original reason for refusal was not so much the scientific findings themselves but rather whether such scientific findings could reasonably be relied upon. To me, this appears to have been the key stumbling block to the proponents in obtaining their approvals in the past.

59. As a preliminary point of scope, there seems agreement between stakeholders that the sites chosen for the monitoring were appropriate, even if there is some discussion about whether there may have been better sites. I also acknowledge there was some discussion between stakeholders about the reliability of the instruments, although the accuracy of the instruments was ultimately accepted.

60. What seems especially concerning to me in the latest 2019 monitoring program is the degree to which it addressed what the Tribunal indicated would be the requisite standard of monitoring length. In particular, it seems the latest monitoring was only for four months, which is less than the full year of monitoring recommended by the Tribunal. To that end, I take special note of the Tribunal's comments at paragraph 39 of its judgment, directed to me as Minister about weighing such evidence:

> The planning consent authority (in this case the Minister, following the report and recommendations by the Tribunal) is certainly not bound by the advice given by [government agencies]. Nevertheless, usually, the planning consent authority would place considerable weight upon the advice of specialist environmental and health regulatory authorities. However, in this case, no meaningful basis has been put forward by either authority to support the soundness of the nomination of less than a full year of daily monitoring for TSP amenity purposes.

61. A full twelve months of monitoring would have been preferable. Nevertheless, I take special note that the Tribunal did not categorically demand a full years' worth of monitoring as some arbitrary measure. Rather, it came to that view at that time, because it did not have a meaningful basis put forward that justified a shorter period of monitoring. This would seem to leave open the possibility of a shorter period of monitoring if I could, in turn, receive the sort of meaningful explanation that the Tribunal had considered deficient.

62. I also accept the submission by some stakeholders who suggest the monitoring could, at least in theory, have been improved upon, both in length and in locations chosen. However, the question before me does not seem to be whether the monitoring was ideal. As the Tribunal

suggested, it would rather seem to be whether the monitoring was proportionate, appropriate and cost-effective.

63. Having regard to all the submissions and evidence before me, including the recommendations of the Tribunal on this factor, I am now satisfied there is a meaningful basis for accepting something less than a continuous twelve-months of monitoring, as was used to underpin the LiDAR Report:

    (a) First, the recent monitoring was daily monitoring. It was not the one-in-six days' approach that was previously before the Tribunal.

    (b) Second, while the four months of monitoring is less than the full year recommended, I understand this represented the four months of summer when conditions generally result in the most dust. That is to say, these four months represent a worst-case scenario as to what dust could reasonably be expected. Therefore, it is reasonable to conclude a full years' worth of daily monitoring would offer nothing substantially more in terms of scientific outcome.

    (c) Third, some stakeholders who otherwise were critical of the LiDAR Report likewise acknowledged a seven-month analysis was reflective of the time of year when there was the greatest risk of airborne dust generation. While there might be some dispute as to the exact length of the monitoring, and whether it should include summer and autumn or just summer, there did appear some consensus that a full years' worth of monitoring may not be strictly needed if a worst-case scenario approach were adopted.

    (d) Fourth, I recognise the practical issues with a longer study in other locations. Some stakeholders, including those who are generally hostile to the LiDAR Report, seem to acknowledge these practical difficulties. I also accept DWER's advice that twelve months of continuous monitoring may be essentially impossible.

    (e) Fifth, there is an argument that the accumulation of different studies over the years, totalling at least some 195 days of monitoring, sufficiently complies with the intent of what would be considered acceptable. I also observe additional desktop studies and analyses, which add to the conclusion this area has been subject to a very significant amount of investigation, but all with the same conclusion – health impacts of dust were acceptable.

(f) Sixth, the accumulation of studies arguably offers some advantages over a single continuous year-long study. One has the advantage of different and independent participants, officers, analysers, and circumstances.

(g) Seventh, I acknowledge the concerns of some stakeholders, such as the City of Kwinana and the Kwinana Industries Council, who believe there should have been monitoring of $PM_{2.5}$ particles. However, I accept the EPA advice that $PM_{2.5}$ particles from the RDA are unlikely to contribute to health impacts in the area.

(h) Eighth and finally, the Tribunal raised concerns about how an approval in 2014 would interact with likely future impacts, notably due to forecasted effects of climate change. However, by virtue of a five-year deferral between the Tribunal's original decision and this 2019 report, there is now much greater confidence and certainty about likely longer-term impacts.

6. I believe approval of these applications goes beyond planning considerations, and is in the public interest.

64. Even if my decision was questioned on the planning merits, I note under section 247(1) my own powers as Minister are not limited to planning considerations. Instead, I may have regard to any matter affecting the public interest. In other words, I can consider non-planning arguments the Tribunal itself did not and could not consider when it formulated its recommendation to me.

65. Further and in the alternative to any planning merit consideration, I am further satisfied approval of these two subdivision applications is warranted on public interest grounds for the following reasons:

(a) First, it seems undeniable that a succession of different Ministers, across the political divide, have recognised the clear State and regional significance of this matter. I note these applications are in fact something of a legacy, which I inherited from the then Minister Hon. John Day, who called-in this application.

I note neither Minister Day nor Minister Faragher simply affirmed the Tribunal's recommendation for refusal. Instead, the matter has been deferred for some five years.

And I would affirm that Minister Day in fact probably did the right and prudent thing, in calling-in this application. I also affirm the actions of Minister Faragher, in continuing to defer this matter in order to obtain better scientific data.

It therefore seems there is something of a historic bipartisan consensus that there are relevant State and regional considerations here, in the public interest, which go beyond the sort of planning merits the Tribunal considered in its original 2014 recommendation. If this were not the case, one might reasonably ask why this matter was not resolved during the tenure of the previous Barnett Government. One might legitimately ask if the Tribunal recommended "no" why they did not simply affirm "no".

(b) Second, it is important to place these applications in their proper context. One should appreciate that under the planning rules that had existed at the time of application, there was strong indications that subdivision and development of this kind would be supported.

In October 2008, at the beginning of the Barnett Government, the Commission rezoned the land from Urban Deferred to Urban. The City of Cockburn also supported a structure plan that at the time also contemplated residential subdivision and development of this kind, although the City of Cockburn did later roll-back that development potential with amendments to that structure plan in 2011.

When the applicants submitted their applications, they were offered conditional support by both the Commission and the City of Cockburn. There is therefore nothing to suggest the applicants were unreasonable in expecting planning approvals for this land, albeit subject to relevant conditions.

(c) Third and following from the preceding point, to refuse these applications raises serious matters of long-term economic and investment uncertainty. Beyond strict planning merits, the planning system is premised on a high degree of expected certainty.

Landowners, whether small "mum-and-dad" investors, or large sophisticated corporate developers who invest millions of dollars decades in advance of actual development activities, trust the State will not change the rules unreasonably. This certainty expected in the planning system is vital to the ongoing prosperity of this State, and a matter that Ministers must – and have on all sides – considered with utmost seriousness.

(d) Fourth and finally, I note Parliament has mandated, under section 247(2) and (5), that my decision is final and has effect according to its tenor. Nonetheless, under section 247(4)(b), I am required to give a copy of these reasons to each House of Parliament.

It is ultimately to Parliament that I must explain and justify this decision, as to what would legitimately be in the public interest in accordance with notions of Responsible Government under a Westminster Democracy. I once again affirm my support for the steps taken by previous Planning Ministers in this matter, and believe my own decision broadly accords with their own.

I consider my decision a likely continuation of previous approaches across Governments to resolve a very complex issue. To this end, I would offer special appreciation to all the hard work by everyone involved in this matter, including the efforts of officers of the State Administrative Tribunal, EPA, DWER, stakeholders and my own Department.

MODIFICATIONS TO THE PLANS OF SUBDIVISION

66. In addition to considering whether the applications should be approved, it is necessary that I examine each proposed plan of subdivision and consider whether there are matters that can and should be addressed through modifications to those plans. Having given the subdivision plans careful consideration, I provide the following comments:

1. The effect of the Rowley Road extension.

67. Each application involves land affected by Planning Control Area 156, declared by the Western Australian Planning Commission in September 2020, to protect land required for the western extension of Rowley Road from development which might compromise its use for regional road purposes. This new road will be an important connection between Western Trade Coast industries and a potential future outer harbour, residential development in Hammond Park and the Kwinana Freeway.

68. In relation to the planned regional road corridor and its relationship with the applications:

(a) The applications propose that 21 residential lots be created directly abutting the planned regional road corridor.

(b) The acquisition of land required for the western extension of Rowley Road will result in the loss of a significant proportion of the public open space proposed by application DR 362 of 2013.

69. With regard to these matters:

(a) I recognise that regional transport corridors such as this one have a significant role in moving people and goods around the State and have a wide range of social and economic benefits. However, the noise associated with these corridors can affect the health of nearby residents and the amenity of the nearby community. To protect both the function of the transport corridor and the health and amenity of the community, it is necessary that a balanced approach be taken.

Having deliberated on this matter, I have formed the opinion that the proposed subdivision should be further modified, to ensure there are no residential lots within 41 metres of the planned corridor comprised of public open space of 30 metres in width and an 11 metre wide local road. Not only will this provide a more positive outcome in terms of residential amenity, by reducing the effect of transport noise on residents, it will also reduce the cost to landowners of building a home to the higher standard required to mitigate the effect of that noise. Further, separating the lots from the road in this manner will provide opportunities for the provision of usable public open space including reasonable landscaping and shared pathways.

(b) The planning framework recognises that public open space areas are important to a community's sense of self and accommodate a wide variety of activities such as exercise, children's play, sport and social activity. It is, therefore, important to ensure that residents have access to adequate areas of public open space and the social and recreational opportunities they provide and I consider the land adjacent to the Rowley Road corridor to be an appropriate location for the majority of the open space to be designated.

(c) In acknowledgement that the developable area of the subject sites has been modified by the conditions I have imposed in respect of setting aside land for the Rowley Road PCA locating the public open space adjacent to the PCA and separating the open space and lots by a local road, I consider it appropriate in the public interest to ensure that a minimum of 10 per cent of the gross subdivisible area, as recommended by the state planning framework, be ceded free of cost to the Crown for public open space purposes.

(d) For these reasons, I consider it appropriate and in the public interest for this matter to be addressed by a condition requiring the applicant prepare a further concept plan to the

satisfaction of the Western Australian Planning Commission, and encourage the applicants to liaise with the adjoining landowners and City of Cockburn during the preparatory stages of the concept plan.

2. ***Access to Wattleup Road.***

70. As I have already noted, each plan of subdivision is consistent with now superseded district structure planning, which permitted direct access to Wattleup Road. However, I also note that the more-recent and approved local structure plan identifies the subject land for 'further investigation' and the urban development north of Wattleup Road which is directly opposite these two subdivision sites, has limited direct access to Wattleup Road. This has been achieved through reduced and rationalised access points, the creation of service roads and lots which front Wattleup Road, but have rear vehicle access.

71. In contrast, the submitted plans of subdivision provide for four local road intersections with Wattleup Road, and a further 14 residential lots which would be accessible directly from Wattleup Road via crossovers. The creation of so many points of access will undoubtedly affect the function of Wattleup Road which is currently the only existing road link between this part of Hammond Park and the coast, providing direct access to Rockingham Road and carrying a higher proportion of heavy vehicles than is normal for a residential area.

72. As the only such road link, the function of Wattleup Road should be protected. To achieve this, I propose that access to the two subdivision sites be similarly limited and rationalised. For these reasons, in addition to planning considerations, I consider it appropriate in the public interest for this matter to be addressed by a further condition to this end.

3. ***The staged creation of local roads.***

73. Having considered each plan of subdivision, I have formed the opinion that the creation of an integrated, unencumbered and deliverable road network across the span of the landholdings is essential and appropriate. However, I note the proposals depict equal and shared road reserves which straddle the cadastral boundaries. While this approach is philosophically understandable, the proportionate road reserve under a 50-50 shared scenario is deficient in that the delivery of a functional two-way road would be reliant on the adjacent landholding progressing with development concurrently. I do not consider it desirable or appropriate to permit the creation of shared road reserves which are too narrow to properly support the proposed development should the development of the adjacent landholdings or

the timing and delivery of those shared road reserves be misaligned. For this reason, in addition to planning considerations, I consider it appropriate in the public interest to impose conditions which specifically require that where north-south roads are provided, that at least one verge of 4.3 metres in width and a 6 metre wide trafficable/bitumised road surface which can support two-way traffic shall be wholly located within a single landholding.

74. The exception to the above position is Lot 9003 where the adjacent property to the west (Lot 813) is currently used for light industrial purposes and any future redevelopment is highly uncertain. As such, it is reasonable to require Lot 9003 to provide a standard width local road along the entirety of its western boundary, completely within its landholding. I consider it appropriate in the public interest for this matter to be addressed by a condition to this effect.

75. Notwithstanding these road reserve requirements, I note that the PD Act (in section 159) specifically provides that a subdivider who creates and constructs a road may recover half the cost of providing the road from a later subdivider (in section 160).

4. The need for consultation.

76. There are a number of modifications to the subdivisions which are required to address the matters I have outlined. As the proposed developments connect to and with each other, and modifying one element of the plan is likely to impact on other elements, it will be highly desirable for the applicants/landowners to liaise with each other, and the relevant local government, to ensure that the modified plans of subdivision are appropriately integrated and all modifications are addressed holistically across both plans.

77. As such, I consider it necessary to require the applicants/landowners to undertake these modifications and draft the concept plans to the satisfaction of the Western Australia Planning Commission in consultation with the landowners and with the City of Cockburn. This will provide independent oversight of the modifications being made, and facilitate the protection of adjacent transport infrastructure. For these reasons, in addition to planning considerations, I consider it appropriate in the public interest for this matter to be addressed by a further condition to this end.

DECISION

78. For these reasons, I decline to adopt the Tribunal's recommendation, and instead substitute a new decision that the applications for review subdivisions should be affirmed. The subdivision approval should be approved for the proposed, subject to conditions.

79. A full copy of the conditions that now apply to this approval are set out in Annex A and Annex B. The wording of conditions in the Annexes prevail to the extent of any ambiguity or inconsistency with these reasons.

80. I now will cause these reasons to be given to the Parties, laid before each House of Parliament, and provided to any other person as requested, pursuant to 246(4) of the PD Act.

HON RITA SAFFIOTI MLA
MINISTER FOR PLANNING

18 NOV 2020