City of Wanneroo

DISTRICT PLANNING SCHEME No. 2

Amendment No. 169

Planning and Development Act 2005

RESOLUTION TO PREPARE AMENDMENT TO LOCAL PLANNING SCHEME

CITY OF WANNEROO

DISTRICT PLANNING SCHEME NO. 2 – AMENDMENT NO. 169

RESOLVED that the local government pursuant to section 75 of the *Planning and Development Act 2005*, amend the above local planning scheme by:

1. Adding the following land use definition for 'massage premises' into Section 2 of Schedule 1:

   massage premises *: means premises involving the massaging manipulation or other treatment of body parts for therapeutic or remedial purposes, but does not include the provision of any sexual services.*

2. Inserting permissibility for the 'massage premises' use class into "Table 1 (Clause 3.2) - The Zoning Table" as follows:

ZONES / USE CLASSES	RESIDENTIAL	MIXED USE	BUSINESS	COMMERCIAL	CIVIC & CULTURAL	PRIVATE CLUBS/RECREATION	GENERAL INDUSTRIAL	SERVICE INDUSTRIAL	GENERAL RURAL	RURAL RESOURCE	SPECIAL RURAL	SPECIAL RESIDENTIAL	LANDSCAPE ENHANCEMENT
Massage Premises	X	D	P	P	X	X	X	D	X	X	X	X	X

3. Inserting car parking standards for the 'massage premises' use class into "Table 2 (Clause 4.14) - Car Parking Standards" as follows:

USE CLASS	NUMBER OF ON-SITE CAR PARKING SPACES
Commercial	
Massage Premises	5 per practitioner

The Amendment is complex under the provisions of the *Planning and Development (Local Planning Schemes) Regulations 2015* for the following reason:

An amendment that is not addressed by any local planning strategy.

Date of Council Resolution: 13 November 2018

.....
(Chief Executive Officer)

Dated this ……. day of …… 20……

CITY OF WANNEROO

DISTRICT PLANNING SCHEME NO 2 – AMENDMENT NO. 169

SCHEME AMENDMENT REPORT

Background – Circumstances that have prompted this Amendment

The City has considered over 20 development applications since 2011 for massage premises (excluding Home Businesses that offer massage). In each instance, the City has considered these premises as an unlisted use – that is, a use that the City's District Planning Scheme No. 2 (DPS 2) does not define or set land use permissibility for.

Clause 3.3 of DPS 2 – relating to unlisted uses is as follows:

If the use of the land for a particular purpose is not specifically mentioned in Table 1 and cannot reasonably be determined as falling within the interpretation of one of the use categories the Council may:

(a) determine that the use is consistent with the objectives and purposes of the particular zone and is therefore permitted; or

(b) determine that the proposed use may be consistent with the objectives and purposes of the zone and thereafter follow the "D" procedures of Clause 6.2.2 in considering an application for development approval; or

(c) determine that the use is not consistent with the objectives and purposes of the particular zone and is therefore not permitted.

The City's preparation of this DPS 2 amendment was prompted by the following comment made in a State Administrative Tribunal (SAT) decision relating to a development application for a 'remedial massage centre' (refer SAT decision [2017] WASAT 145, included in **Appendix 1**):

> *The Tribunal observed that it is in the interests of orderly and proper strategic and statutory planning for an identified innominate use to be specifically listed in the Zoning Table and for the Scheme to expressly nominate whether the use is prohibited, permitted (but may be conditioned), or may be approved or refused in the exercise of planning discretion, in the various zones. The Tribunal observed that this would provide greater certainty and avoid public and private resources having to be incurred is the complex task of assessment as to whether an unlisted use is consistent with, may be consistent with, or is not consistent with the objectives and purposes of the zone.*

Although the City is not bound to take action in respect to the SAT comment above, the City considers it would be useful to include a massage premises land use in DPS 2. This would provide certainty and clarity on massage premises as a use as well as the zones in which they should be located.

Detail of the Amendment Proposal

The purpose of this amendment is to introduce a use class into DPS 2 relating to massage premises. The definition will encompass premises that provide services such as remedial massage, traditional massage, sports massage, reflexology massage and other associated therapeutic or remedial services such as acupuncture and aromatherapy.

The massage premises use class will not include the provision of any sexual services, as the proposed definition will specifically prescribe as outlined below. Therefore, any premise that

offers a sexual service will not be considered a 'massage premises' in the context of the proposed land use and the proposed land use definition.
The City is proposing to amend DPS 2 by:

1. Adding the following land use definition for 'massage premises' into DPS 2:

   massage premises *: means premises involving the massaging manipulation or other treatment of body parts for therapeutic or remedial purposes, but does not include the provision of any sexual services.*

2. Inserting permissibility for the 'massage premises' use class into the DPS 2 Zoning Table as follows:

ZONES / USE CLASSES	RESIDENTIAL	MIXED USE	BUSINESS	COMMERCIAL	CIVIC & CULTURAL	PRIVATE CLUBS/RECREATION	GENERAL INDUSTRIAL	SERVICE INDUSTRIAL	GENERAL RURAL	RURAL RESOURCE	SPECIAL RURAL	SPECIAL RESIDENTIAL	LANDSCAPE ENHANCEMENT
Massage Premises	X	D	P	P	X	X	X	D	X	X	X	X	X

3. Inserting a car parking standard for 'massage premises' into DPS 2, being five bays per practitioner.

The *Planning and Development (Local Planning Schemes) Regulations 2015* (Regulations) set out the criteria for the various types of local planning scheme amendments. The City considers that this proposed amendment will be a 'complex amendment' in the context of the Regulations, in that this amendment is not addressed by a local planning strategy.

Comment on the Proposed Amendment from the City of Wanneroo Administration

Key considerations that the City's Administration has made in preparing this proposed DPS 2 amendment are discussed below:

<u>Difference between Massage Premises to Consulting Rooms and Medical Centres</u>

It could be argued that massage premises could fall under either or both of the 'Consulting Room' and 'Medical Centre' land uses, which are already listed in DPS 2. DPS 2 defines 'Consulting Room' and 'Medical Centre' as follows:

> ***consulting room :*** *means a building used by not more than one* ***health consultant*** *at any one time for the investigation or treatment of human injuries or ailments and for general patient care.*
> (emphasis added)
>
> ***medical centre :*** *means premises accommodating two or more consulting rooms.*

The City does not however consider that massage premises fall under the land use definitions for either 'Consulting Room' or 'Medical Centre'. Massage premises provide massaging manipulation or other treatment from a masseur, masseuse, acupuncturist or other therapist, rather than from a 'health consultant' as the definitions above refer to.

Misalignment with the Model Provisions

Schedule 1 of the *Planning and Development (Local Planning Scheme) Regulations 2015* (Regulations) provides model provisions for local planning schemes (model provisions).

The model provisions do not have a definition for massage premises; and as such, proposing to include a massage land use into DPS 2 would be a departure from the model provisions. The City understands that any local planning scheme amendment that proposes a departure from the model provisions should be appropriately justified. The City considers that it is appropriate and justifiable to depart from the model provisions in this instance.

The 'closest' land use definition in the model provisions that massage premises fall under could be 'shop', it which is defined as follows:

> ***shop*** *means premises other than a bulky goods showroom, a liquor store — large or a liquor store — small used to sell goods by retail, to hire goods, or to* ***provide services of a personal nature****, including hairdressing or beauty therapy services.*
> (emphasis added)

This is different to the current DPS 2 definition of 'Shop', which is as follows:

> ***shop :*** *means premises where goods are kept exposed or offered for sale by retail. This interpretation excludes restricted premises, but may include a bakery.*

Modifying the 'shop' land use definition to align with the model provisions – in order just to respond to the issue of massage premises not being defined in DPS 2 – would be impractical and have 'flow-on' effects which would require:

- Adding additional land uses from the model provisions into DPS 2;
- Removing other land uses from DPS 2; and
- Reviewing Table 1 of DPS 2 (Zoning Table) in respect to land use permissibility for the 'shop' land use.

Although it is not impossible to undertake all the above through the same DPS 2 amendment, addressing all the implications would be complex and labour intensive; particularly as the ultimate purpose of the amendment is just to encompass massage activities into a DPS 2 land use definition. Discussion and reason for the above-listed flow-on effects is provided below:

Adding and Removing Land Uses

The definition for 'shop' in the model provisions refers to the 'bulky goods showroom', 'liquor store – large' and 'liquor store – small' land uses which are currently not included in DPS 2. To align the 'shop' definition in DPS 2 to that of the model provisions, the City would then need to also introduce the 'bulky goods showroom', 'liquor store – large' and 'liquor store – small' land uses through the same DPS 2 amendment. The amendment would then need to propose land use permissibility and car parking requirements for all the introduced land uses.

The 'shop' definition in the model provisions is specific that 'services of a personal nature' could include hairdressing and beauty therapy. The City already has 'hairdresser' and 'beauty parlour' land use classes in DPS 2 – and therefore amending the 'Shop' definition to align with the Model Provisions would duplicate which land use definition hairdressers and beauty parlours would fall under. This would need to be resolved by removing 'hairdresser' and 'beauty parlour' from the land use definitions (Schedule 1), Zoning Table (Table 1) and car parking requirements (Table 2) of DPS 2.

Land Use Permissibility for 'Shop' Land Use

The ‘shop’ definition in the model provisions allows for different forms of ‘shop’ such as ‘retail’ shops (that sells goods) as well as premises that provide a service (e.g. hairdressers, beauty parlours and massage premises).

Under DPS 2 currently, the shop land use only relates to the sale of goods and is only permitted in the Commercial Zone. If the shop land use definition was then modified to also include the provision of services of a personal nature, it may warrant the argument that shop should be permissible in more zones (e.g. to all the zones where hairdressers and beauty parlours are currently permissible; being the Mixed Use, Commercial, Business and Private Clubs/Recreation Zone).

Comments made in a State Administrative Tribunal Decision

Not having a definition or use class listed in DPS 2 for massage has become problematic for both the City and the SAT.

The SAT in a previous planning decision (refer to the ‘Background’ section above) expressed the need for the City to identify the relevant innominate use (or unlisted use being massage premises) in DPS 2, and to expressly nominate its permissibility in each zone. In the City’s opinion, this proposed DPS 2 amendment sets out to achieve this.

As outlined above, it is understood that the City is not bound to amend DPS 2 in a manner as advised in a SAT decision relating to development application. However, listing and defining massage premises as a land use in DPS 2 would address the observation and comment made by the SAT, recognising that SAT Members have the expertise in delivering decisions relating to town planning law.

The City could amend DPS 2 to redefine another land use to encompass massage premises – such as for ‘shop’ as discussed above. However, an amendment that seeks to redefine another land use to encompass massage premises would not align with the SAT’s comment – which was for DPS 2 to specifically list the innominate land use (e.g. massage premises).

Massage Premises Land Use Definition

The definition for massage premises proposed by the City in this amendment is drawn from the definition for ‘massage parlour’ included in the City of Belmont’s Local Planning Scheme No. 15, which is as follows:

> *massage parlour : means a use of land involving the massaging manipulation or other treatment of body parts for therapeutic or remedial purposes, of a kind generally administered in association with medical treatment. The term does not include the provision of any sexual services.*

The City of Belmont’s local planning scheme definition is considered to be sound, except for the reference to massage “being of a kind generally administered in association with medical treatment”. Although clients may have an underlying medical condition that can be treated at a massage premise, often massage premises offer a service for clients for other reasons such as for relaxation. As such, the City has omitted this phrase in preparing its proposed massage premises definition.

Massage Premises Land Use Permissibility and Zone Objectives

The DPS 2 objectives of the Business and Commercial Zones encourage the establishment of business services. As massage premises meet the objectives of the Business and Commercial Zones by offering a form of service, the City therefore has proposed this land use be permitted (‘P’) in these zones.

Similarly, the DPS 2 Mixed Use Zone objectives encourage appropriate businesses to locate in close proximity to residential areas. Although massage premises could meet the objectives of the Mixed Use Zone, the use does have the potential to have some amenity impact on surrounding residents situated in the zone (e.g. by way of traffic movements, parking etc). As such, the City has proposed for the massage premises land use to be a discretionary ('D') use in the Mixed Use Zone.

The development application for massage premises referred to in the Background section of this Report – and was subject to SAT's review – was situated in the Service Industrial Zone. The objectives of the Service Industrial Zone in DPS 2 are as follows:

(a) accommodate a range of light industries, showrooms and warehouses, entertainment and recreational activities, and complementary business services which, by their nature, would not detrimentally affect the amenity of surrounding areas;

(b) ensure that development within this zone creates an attractive façade to the street for the visual amenity of surrounding areas.

In making its decision, the SAT considered that particular massage premise may be consistent with the objectives and purposes of the Service Industrial Zone, because;

- It was a 'complementary business service' to 'recreational activities' that are already capable of being approved in the zone; and

- That massage premise could be accommodated in the zone and not detrimentally affect the amenity of the area.

In light of the SAT decision discussed above, the City considers that massage premises are capable of meeting the objectives of the Service Industrial Zone, and therefore the massage premises use is also proposed to be a discretionary ('D') use in this zone.

The City is proposing that massage premises not be permitted ('X') in all other zones.

Proposed Car Parking Requirements

In this DPS 2 amendment, the City is proposing a car parking standard of five bays per practitioner for massage premises. This is consistent with the car parking standards already set out for the Medical Centre use class in DPS 2.

The City considers that five bays per practitioner is an acceptable parking standard for massage premises; as it would provide parking for the practitioner, a support staff member (such as a receptionist), a client receiving treatment, a waiting client, and a departing client.

Appendix 1

Copy of State Administrative Tribunal Decision

Review of City of Wanneroo Decision Development Application for Remedial Massage Centre at Unit 6, 4 Arrigo Street, Wangara

[2017] WASAT 145

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	PLANNING AND DEVELOPMENT ACT 2005 (WA)
CITATION	**:**	MOORE and CITY OF WANNEROO [2017] WASAT 145
MEMBER	**:**	JUDGE D R PARRY (DEPUTY PRESIDENT)
HEARD	**:**	2 AND 6 NOVEMBER 2017
DELIVERED	**:**	21 NOVEMBER 2017
FILE NO/S	**:**	DR 198 of 2017
BETWEEN	**:**	JOHN CHARLES MOORE Applicant AND CITY OF WANNEROO Respondent

Catchwords:

Town planning - Development application - Remedial massage centre - Innominate or unlisted use - Service Industrial zone - Whether remedial massage is not consistent with the objectives and purposes of the zone - Whether consistency with purposes / intent of zone is to be determined separately from consistency with objectives of zone - Proper approach to interpretation and application of planning schemes - Whether remedial massage is 'entertainment activity', 'recreational activity' or a 'complementary business service' to recreational activities - Words & phrases: 'complementary business service', 'entertainment activity', 'recreational activity', 'remedial massage'

Legislation:

City of Wanneroo Town Planning Scheme No 2, cl 1.9.1, cl 1.9.3, cl 3.2.2, cl 3.3, cl 3.6, cl 3.7, cl 3.7.2(b), cl 3.12.1, cl 3.12.2, cl 6.2.1, cl 6.2.2, cl 6.2.4, Table 1, Table 2, Sch 1
Interpretation Act 1984 (WA), s 56(1)
Planning and Development (Local Planning Schemes) Regulations 2015 (WA), reg 10(4), Sch 2 (deemed provisions) cl 67
Planning and Development Act 2005 (WA), s 252(1), s 257B

Result:

Conditional development approval granted for remedial massage centre

Summary of Tribunal's decision:

Mr John Moore and his wife, Ms Fan Yoke Chan, have conducted a remedial massage business with development approval at premises in Irwin Road, Wangara for the past four years. They wish to relocate their business to premises in Arrigo Street, Wangara, about 500 metres away.

The new site is zoned 'Service Industrial' under the *City of Wanneroo Town Planning Scheme No 2*. Remedial massage centre is an innominate or unlisted use under the Scheme. The City refused Mr Moore's application for development approval for change of use to enable the business to operate at the new site. Mr Moore sought review of that decision by the Tribunal.

The principal issue for determination by the Tribunal was whether the proposed remedial massage centre use:

(as the City contended) is not consistent with the objectives and purposes of the zone and is therefore 'not permitted', that is, it is a use which must be refused consent under the Scheme; or

(as Mr Moore contended) is consistent with the objectives and purposes of the zone and is therefore 'permitted', that is, it is a use which may not be refused consent, but may be conditioned under the Scheme, or may be consistent with the objectives and purposes of the zone, in which case it is a use which may be approved or refused in the exercise of planning discretion under the Scheme.

The Tribunal determined that the proposed use may be consistent with the objectives and purposes of the zone, because it is a 'complimentary business service' to 'recreational activities' (such as martial arts centres, gyms and dance centres) which are permissible and exist in the zone, it can be accommodated in the zone and it would not detrimentally affect the amenity of the area.

The Tribunal also determined that the correct and preferable decision in the circumstances of this case is to grant conditional development approval for the proposed use.

The City proposed four conditions to regulate the approved development. The only condition in dispute related to the hours of operation. The Tribunal restricted the hours of operation to those proposed by Mr Moore, namely 9 am to 8 pm seven days a week, rather than more restricted hours proposed by the City. This is because there was evidence that other businesses in the area operate in the evenings and that martial arts centres operate on weekends, and the Council had approved recreation centre uses without imposing any conditions restricting hours of operation (even though two of these were proposed to operate in the evenings).

Finally, the Tribunal noted that the City has been aware since an earlier decision of the Tribunal in May 2010 that remedial massage centre is an innominate or unlisted use under the Scheme, but does not appear to have initiated a Scheme amendment to list that use and nominate its permissibility in the various zones. The Tribunal observed that it is in the interests of orderly and proper strategic and statutory planning for an identified innominate use to be specifically listed in the Zoning Table and for the Scheme to expressly nominate whether the use is prohibited, permitted (but may be conditioned), or may be approved or refused in the exercise of planning discretion, in the various zones. The Tribunal observed that this would provide greater certainty and avoid public and private resources having to be incurred is the complex task of assessment as to whether an unlisted use is consistent with, may be consistent with, or is not consistent with the objectives and purposes of the zone.

Category: B

Representation:

Counsel:

Applicant	:	Mr T Cockman
Respondent	:	Mr M Gregory

Solicitors:

Applicant	:	Justice Legal Pty Ltd
Respondent	:	Castledine Gregory

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

Mirvac Mandurah Pty Ltd and City of Mandurah [2006] WASAT 44
Paintessa Developments Pty Ltd and Town of East Fremantle [2014] WASAT 81; (2014) 85 SR (WA) 312
Pearce and City of Wanneroo [2010] WASAT 77

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 For the past four years, Mr John Moore and his wife, Ms Fan Yoke Chan, have conducted a business trading as Touch of Asia providing 'deep tissue remedial massage' services at Unit 3 No 1 Irwin Road, Wangara. That property is zoned 'Business' under the *City of Wanneroo Town Planning Scheme No 2* (DPS 2 or Scheme) and Mr Moore and Ms Chan sought and obtained development approval from the City of Wanneroo (City or Council) for change of use to 'remedial massage facility' to authorise that development.

2 Mr Moore and Ms Chan wish to relocate their remedial massage business to Unit 6 No 4 Arrigo Street, Wangara (site), which is about 500 metres away from their current business premises The site forms part of a six unit strata complex and is currently used as a martial arts centre. Mr Moore and Ms Chan have made an offer to purchase the strata lot comprising the site.

3 The site is zoned 'Service Industrial' under DPS 2 and 'Industrial' under the *Metropolitan Region Scheme* (MRS).

4 On 13 April 2017, Mr Moore applied to the City for development approval under DPS 2 and the MRS for change of use of the site to 'remedial massage parlour'. More appropriately and consistently with the Tribunal's decision in ***Pearce and City of Wanneroo*** [2010] WASAT 77, the proposed use is described as 'remedial massage centre' and will be referred to as such in these reasons.

5 The Tribunal determined in ***Pearce and City of Wanneroo*** as follows [28]:

> … As a 'massage centre' is not specifically mentioned in the Zoning Table (Table 1) of DPS 2 and cannot reasonably be determined as falling within the interpretation of one of the use categories under the Scheme, it is an unlisted use for the purposes of cl 3.3 of the Scheme.

6 Clause 3.3 of DPS 2 states as follows:

> If the use of the land for a particular purpose is not specifically mentioned in Table 1 and cannot reasonably be determined as falling within the interpretation of one of the use categories the Local government may:
>
> (a) determine that the use is consistent with the objectives and purposes of the particular zone and is therefore permitted; or

(b) determine that the proposed use may be consistent with the objectives and purposes of the zone and thereafter follow the 'D' procedures of Clause 6.2.2 in considering an application for development approval; or

(c) determine that the use is not consistent with the objectives and purposes of the particular zone and is therefore not permitted.

7 It is common ground in this case that, following ***Pearce and City of Wanneroo***, the proposed remedial massage centre use is a 'use of land for a particular purpose that is not specifically mentioned in Table 1 [the Zoning Table] [of DPS 2] and cannot reasonably be determined as falling within the interpretation of one of the use categories' in terms of cl 3.3 of the Scheme. The proposed use is therefore an innominate or unlisted use for the purposes of the Scheme and its permissibility is to be determined by the City (and by the Tribunal or review) in accordance with paras (a), (b) and (c) of cl 3.3 of DPS 2.

8 On 8 May 2017, the Council refused Mr Moore's development application for the following reason:

> The proposed Unlisted Use (Massage Parlour) is not consistent with the objectives and purposes of the Service Industrial zone stated in Clause 3.12 of District Planning Scheme No. 2 and therefore, is not permitted in accordance Clause 3.3 of District Planning Scheme No. 2.

9 On 12 June 2017, Mr Moore sought review by the Tribunal of the Council's decision pursuant to s 252(1) of the *Planning and Development Act 2005* (WA) (PD Act).

10 The principal issue for determination in this review is whether the proposed remedial massage centre use:

- (as the City contends) 'is not consistent with the objectives and purposes of the [Service Industrial] zone and is therefore not permitted' (cl 3.3(c) of DPS 2), that is, it is a use which must be refused consent under the Scheme (cf cl 3.2.2 and cl 6.2.4 of DPS 2 '"X" Uses'); or

- (as Mr Moore contends) 'is consistent with the objectives and purposes of the [Service Industrial] zone and is therefore permitted' (cl 3.3(a) of DPS 2), that is, it is a use which may not be refused consent by reason of the unsuitability of the use, but may be conditioned under the Scheme (cf cl 3.2.2 and cl 6.2.1 of DPS 2 '"P" Uses'), or 'may be consistent with the objectives and purposes of

> the [Service Industrial] zone' (cl 3.3(b) of DPS 2), in which case it is a use which may be approved or refused in the exercise of planning discretion under the Scheme (cf cl 3.2.2 and cl 6.2.2 '"D" Uses').

11 For reasons set out below, in my view, the proposed remedial massage centre use may be consistent with the objectives and purposes of the Service Industrial zone and is therefore a use which may be approved or refused in the exercise of planning discretion under the Scheme. As indicated further below, if (as I have determined) the proposed development can be approved in the exercise of planning discretion, the City does not raise any substantive planning issue against development approval being granted for the proposed use. In particular, the City does not contend that the proposed development would have any adverse impact on the amenity or character of the locality or that it would have any other adverse planning impact.

12 As the proposed development is permissible and the City has not identified any substantive issue militating against development approval being granted, the correct and preferable decision in this case is to grant conditional development approval for the proposed use.

13 As indicated further below, there is a dispute between the parties in relation to the hours of operation that the proposed development should be restricted to under a condition of development approval. For reasons set out below, Mr Moore's and Ms Chan's current trading hours of 9.00 am to 8.00 pm seven days a week should also be permitted in relation to the remedial massage centre use at the site.

Is the proposed remedial massage use not consistent with the objectives and purposes of the zone?

14 The objectives and purposes of the Service Industrial zone are set out in cl 3.12 of the Scheme as follows:

> 3.12.1 The Service Industrial Zone is intended to provide for a wide range of business, industrial and recreational developments which the Local government may consider would be inappropriate in Commercial, Business and General Industrial Zones and which are capable of being conducted in a manner which will prevent them being obtrusive, or detrimental to the local amenity.
>
> 3.12.2 The objectives of the Service Industrial Zone are to:
>
> (a) accommodate a range of light industries, showrooms and warehouses, entertainment and recreational activities,

> and complementary business services which, by their nature, would not detrimentally affect the amenity of surrounding areas;
>
> (b) ensure that development within this zone creates an attractive façade to the street for the visual amenity of surrounding areas.

15 The City submits that the proposed remedial massage centre use is not consistent with the objectives and purposes of the Service Industrial zone for two reasons.

16 The City submits that, on the proper interpretation of cl 3.3 of the Scheme, a proposed unlisted use must be assessed as to whether it is consistent with, may be consistent with, or is not consistent with the stated 'purposes' (or intent) of the particular zone and then must be assessed separately as to whether it is consistent with, may be consistent with, or is not consistent with the stated 'objectives' of the particular zone, in order to determine whether the use is capable of approval under the Scheme. The City submits, therefore that cl 3.12.1 and cl 3.12.2 of DPS 2 create two separate requirements or 'hoops' for the development application made by Mr Moore.

17 The City submits, further, that if the proposed use is found not to be consistent either with the intent (or purposes) of the Service Industrial zone stated in cl 3.12.1 of DPS 2 or with the objectives of the Service Industrial zone stated in cl 3.12.2 of DPS 2, then it is 'not permitted' under cl 3.3(c) of the Scheme. As indicated earlier, the words 'not permitted' mean that the use must be refused consent under the Scheme (cf cl 3.2.2 and cl 6.2.4 of DPS 2 '"X" Uses').

18 The City also refers to the joint evidence of the town planning expert witnesses, Ms Amanda Butterworth, who was called by the City, and Mr Cane Spaseski, who was called by Mr Moore. The town planning expert witness both expressed the opinion that a remedial massage centre is capable of approval in and is consistent with the objectives and purposes of the Business zone and the Commercial zone under the Scheme. The town planning expert witnesses also both expressed the opinion that a remedial massage centre use would therefore not be inappropriate in the Commercial and Business zones.

19 The City submits, in consequence of its proposed interpretation of cl 3.3 of DPS 2 and the joint evidence of the town planning expert witnesses (that the proposed remedial massage centre use would not be

inappropriate in the Commercial and Business zones), that the proposed remedial massage centre use 'fails to get through a critical hoop' in cl 3.12.1 of DPS 2 and is, therefore, 'not permitted' under cl 3.3(c) of DPS 2 and hence must be refused consent.

20 In short, the City's first submission as to why it says that the proposed use is not consistent with the objectives and purposes of the Service Industrial zone is that the use would not be inappropriate in the Commercial and Business zones, whereas, it contends, cl 3.12.1 of DPS 2 precludes from the Service Industrial zone all business, industrial and recreational developments which would not be inappropriate in the Commercial, Business and General Industrial zones.

21 I do not accept the City's first submission for the following reasons.

22 The principles in relation to the proper interpretation of provisions of local planning schemes were set out by the Tribunal in ***Paintessa Developments Pty Ltd and Town of East Fremantle*** [2014] WASAT 81; (2014) 85 SR (WA) 312 as follows [20] - [21]:

> Under s 87(4) of the PD Act, [a local planning scheme] 'has full force and effect as if it were enacted by [the PD Act]'. The Court of Appeal has recently said the following in relation to statutory interpretation:
>
> > The High Court of Australia has iterated, and reiterated, that the starting point and ending point for the task of statutory construction is the statutory text. The context, including legislative history and extrinsic materials, has utility only to the extent that it assists in fixing the meaning of the statutory text: ***Thiess v Collector of Customs*** [2014] HCA 12 [22] (the court); ***Federal Commissioner of Taxation v Consolidated Media Holdings Ltd*** [2012] HCA 55; (2012) 87 ALJR 98, 107 [39] (the court); ***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*** [2009] HCA 41; (2009) 239 CLR 27, 46-47 [47] (Hayne, Heydon, Crennan & Kiefel JJ). The duty of a court is to give the words of the statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, but not universally, that meaning will correspond with the grammatical meaning of the provision: ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355 [78]. (***City of Kwinana v Lamont*** [2014] WASCA 112 at [47]).
>
> In giving the words of a planning scheme the meaning that the maker of the scheme is taken to have intended them to have, the terms of the planning instrument:

> … will ordinarily be construed in a manner which acknowledges that planning schemes are largely the work of town planners, not parliamentary counsel; ergo, they should be read as a whole and applied in a practical and commonsense, and not an overly technical way, and in a fashion which will best achieve their evident purpose.
>
> (***Chiefari v Brisbane City Council*** [2005] QPELR 500 at 502 (Wilson J); referred to by the Tribunal in ***Galloway and Associates and City of Melville*** [2007] WASAT 238 at [41]).

23 In my view, on its proper interpretation, cl 3.3 of DPS 2 does not create two separate requirements or 'hoops' of consistency with the purposes (or intent) of the zone, on the one hand, and consistency with the objectives of the zone, on the other, that a proposed unlisted use must separately, successfully pass through before it can be approved.

24 Clause 3.3 of DPS 2 uses the composite expression 'the objectives and purposes of the particular zone' in each of par (a) and par (c) and uses the same composite expression without the word 'particular' in par (b). In light of this composite expression in cl 3.3 of DPS 2 and the proper approach to giving the words of a planning scheme the meaning that the maker of the scheme is taken to have intended them to have, referred to earlier, in my view, cl 3.12.1 and cl 3.12.2 of DPS 2 do not prescribe separate requirements or 'hoops', but rather must be read as a whole and applied in a practical and commonsense, and not in an overly technical way, and in a fashion which will best achieve their evident planning purpose.

25 The evident planning purpose of cl 3.12.1 and cl 3.12.2 of DPS 2 is for the Service Industrial zone to accommodate a wide range of light industries, showrooms, warehouses, entertainment activities, recreational activities and complementary business services which can be suitably accommodated in the zone and which, by their nature, would not detrimentally affect the amenity of the area.

26 Furthermore, in my view, it could not have been the intention of the maker of the Scheme to preclude from the Service Industrial zone all business, industrial and recreational developments which would not be inappropriate in the Commercial, Business and General Industrial zones, for the following four reasons.

27 First, cl 3.12.1 uses the words 'may consider', rather than 'does consider' or 'considers'. The use of the word 'may' indicates a legislative intent to confer discretion and flexibility; cf s 56(1) of the

Interpretation Act 1984 (WA) ('Where in a written law the word ***may*** is used in conferring a power, such word shall be interpreted to imply that the power so conferred may be exercised or not, at discretion').

28 Secondly, the evident purpose of the words 'which the [l]ocal government may consider would be inappropriate in Commercial, Business and General Industrial Zones' is to *accommodate* in the Service Industrial zone business, industrial and recreational developments which the Council may consider would be inappropriate in the Commercial, Business and General Industrial zones, *not* to *preclude* from the Service Industrial zone all business, industrial and recreational developments which would not be inappropriate in those other zones.

29 Thirdly, even if a particular business, industrial or recreational development would not be inappropriate in the Commercial, Business or General Industrial zones, it may nevertheless not merit development approval in the exercise of planning discretion in those zones.

30 Fourthly, if cl 3.12.1 of DPS 2 would preclude from the Service Industrial zone all business, industrial and recreational developments which would not be inappropriate in the Commercial, Business and General Industrial zones, then parts of cl 3.12.2 of DPS 2 would be rendered otiose.

31 The objectives and purposes of the Commercial zone are set out in cl 3.7 of the Scheme as follows:

> 3.7.1 The Commercial Zone is intended to accommodate existing or proposed shopping and business centres where the planning of the locality is well advanced.
>
> 3.7.2 The objectives of the Commercial Zone are to:
>
> (a) make provision for existing or proposed retail and commercial areas that are not covered currently by a Structure Plan;
>
> (b) provide for *a wide range of uses within existing commercial areas, including* retailing, *entertainment*, professional offices, *business services* and residential.
>
> (emphasis added)

32 As the objectives of the Commercial zone include to 'provide for a wide range of uses within existing commercial areas, including … entertainment … [and] business services …' (cl 3.7.2(b) of DPS 2),

entertainment and business services uses within existing commercial areas would not be inappropriate in the Commercial zone. As set out earlier, the objectives of the Service Industrial zone include to 'accommodate a range of … entertainment … activities, and complementary business services …'.

33 If cl 3.12.1 of DPS 2 would preclude from the Service Industrial zone all business developments involving an unlisted use which would not be inappropriate in the Commercial zone, then the words '… entertainment … activities, and complementary business services' in cl 3.12.2 of DPS 2 would be otiose, because those uses would not be inappropriate within existing commercial areas zoned Commercial under the Scheme. The presence of those words is a textual indication that it could not have been the intention of the maker of the Scheme to preclude from the Service Industrial zone all business, industrial and recreational developments which would not be inappropriate in the Commercial, Business and General Industrial zones. The presence of those words also underscores my determination that cl 3.12.1 and cl 3.12.2 of DPS 2 must be read as a whole and applied in a practical and commonsense, and not in an overly technical way, and in a fashion which will best achieve their evident planning purpose.

34 Ms Butterworth considers, and City concedes, that the proposed remedial massage centre use, by its nature, 'would not detrimentally affect the amenity of surrounding areas' (cl 3.12.2(a) of DPS 2) and is therefore consistent with that aspect of the objectives of the Service Industrial zone. The City also accepts that, because the proposed use would be internal to the building and does not involve any external physical works, the objective of the zone to 'ensure that development within this zone creates an attractive façade to the street for the visual amenity of surrounding areas' (cl 3.12.2(b) of DPS 2) is not relevant to the proposal.

35 However, the City's second submission as to why it says that the proposed use is not consistent with the objectives and purposes of the Service Industrial zone is that it is not consistent with the zone objectives, because it does not fall within any of the land uses or categories of land uses referred to in cl 3.12.2(a) of the Scheme. As indicated earlier, the land uses or categories of land uses referred to in the objective of the zone in that provision are 'light industries, showrooms and warehouses, entertainment and recreational activities, and complementary business services'.

36 The meaning of each of the land use classes 'industry - light', 'industry', 'showroom' and 'warehouse' is defined in Sch 1 to the Scheme. Under cl 1.9.1 of DPS 2, the defined meanings given to those land use classes in Sch 1 apply when the term is used in the Scheme. However, it is unnecessary to set out those definitions, because it is common ground, and plainly the case, that the proposed use does not fall within the defined meaning of 'light industry' (which incorporates the definition of 'industry'), 'showroom' or 'warehouse'.

37 There is a dispute between the parties as to whether the proposed use falls within the meaning of the words 'recreational activity', 'entertainment activity', or 'complementary business service' in cl 3.12.2(a) of DPS 2. The City submits that the proposed use does not fall within the meaning of any of those terms, whereas Mr Moore submits that the proposed use is a 'recreational activity' or a 'complementary business service'. In opening Mr Moore's case, Mr T Cockman also said that the use could possibly be an 'entertainment activity'.

38 The terms 'entertainment activities', 'recreational activities' and 'complimentary business services' are not defined in the Scheme or in the deemed provisions for local planning schemes set out in Sch 2 of the *Planning and Development (Local Planning Schemes) Regulations* 2015 (WA) (LPS Regs) (model provisions) which under s 257B of the PD Act and reg 10(4) of the LPS Regs are applicable to all local planning schemes. These expressions are also not defined in *State Planning Policy 3.1 - Residential Design Codes of Western Australia*. Consequently, under cl 1.9.3 of DPS 2, these expressions 'shall have their normal and common meanings'.

39 Before referring to the normal and common (dictionary) meanings of the terms in question, it is instructive to set out the apposite dictionary meanings of the words 'remedial' and 'massage' in order to appreciate the nature and purpose of the proposed use.

40 The adjective 'remedial' relevantly means (*Macquarie Dictionary*, (6th ed), 2013, at page 1242):

> **1.** affording remedy; tending to remedy something. **2.** of or relating to the treatment of physical defects with exercises, etc., rather than by medical or surgical means.

41 The noun 'remedy' is relevantly defined in the *Macquarie Dictionary* at page 1242 as follows:

> something that cures or relieves a disease or bodily disorder; a healing medicine, application, or treatment.

42 The verb 'to remedy' is relevantly defined in the *Macquarie Dictionary* at page 1242 as follows:

> to cure or heal.

43 The noun 'massage' is defined in the *Macquarie Dictionary* at page 906 as follows:

> the act or art of treating the body by rubbing, kneading, or the like, to stimulate circulation, increase suppleness, etc.

44 'Remedial massage', therefore, involves treating the body by rubbing, kneading, or the like, in order to cure, relieve or heal physical defects.

45 This meaning is consistent with Mr Moore's evidence before the Tribunal and his explanation of the proposed use to the City's assessing planning officer while the development application was being considered by the Council.

46 In his evidence, Mr Moore characterised the business which he has run in partnership with his wife for the past four years as providing 'deep tissue remedial massage services'. Mr Moore also gave evidence that, in his observations, 'people get a massage because it is relaxing and therapeutic'.

47 When, during his oral evidence, Mr Moore was asked as to why people obtain massages, he replied:

> People who use the body as a - tool … electricians, plumbers, builders. They need it - becoming more and more necessary.
>
> (T:71; 02.11.17)

48 In an email to the City's assessing planning officer dated 5 May 2017, Mr Moore said:

> The benefits from deep tissue massage align with physio/chiro, and we can provide testimonials from regular clients.as [sic] to the positive outcome.

49 Both the ordinary meaning of 'remedial massage' and the evidence therefore indicates that the proposed remedial massage centre land use involves treating the body by rubbing, kneading, and the like, in order to cure, relieve or heal physical defects.

50 The adjective 'recreational' is relevantly defined in the *Macquarie Dictionary* at page 1229 as follows:

> of, relating to, or used for recreation.

51 The noun 'recreation' is relevantly defined in the *Macquarie Dictionary* at page 1229 as:

> a pastime, diversion, exercise, or other resource affording relaxation and enjoyment.

52 As indicated earlier, Mr Moore gave evidence that, in his observations, 'people get a massage because it is relaxing and therapeutic'. In cross-examination, Ms Butterworth said that she has had deep tissue massage for back and shoulder injuries and disagreed with Mr Moore that it is 'relaxing'. In answer to a question as to how deep tissue massage made her feel, Ms Butterworth replied:

> It's painful. I do not consider it any form of relaxation.
>
> (T:136; 02.11.17)

53 Having regard to Mr Moore's statement to the City's assessing planning officer that '[t]he benefits from deep tissue massage align with physio/chiro', and on the basis of guidance drawn from the definition of the land use class 'recreation centre' in Sch 1 of DPS 2 and the use classes listed under the heading 'Recreation' in Table 2 of the Scheme, Ms Butterworth expressed the opinion that the proposed use is not a 'recreational activity'.

54 The use class 'recreation centre' is nominated in the Zoning Table (Table 1) of DPS 2 a discretionary ('D') use which may be approved in the exercise of planning discretion in the Service Industrial zone. 'Recreational centre' is defined in Sch 1 of DPS 2 as follows:

> **recreation centre:** means any premises used for physical exercise or sports including swimming, ice skating, ten pin bowling, cricket, tennis, squash, soccer, billiards and similar activities.

55 Table 2 of DPS 2 prescribes car parking standards for nominated use classes under the Scheme. Under the heading 'Recreation', Table 2 of DPS 2 lists only three use classes, namely 'Golf Course', 'Recreation Centre' and 'Special Place of Assembly'.

56 In light of these provisions of DPS 2, Ms Butterworth expressed the opinion that 'Recreational Land Uses relate to uses where physical

exercise or sports are undertaken or observed' and therefore that the proposed use is not a 'recreational activity'.

57 In my view, although it is permissible to seek textual guidance from other provisions of a planning scheme when ascertaining the meaning of a term that is used, but not defined, in the scheme, I am not satisfied on the basis of the definition of 'recreation centre' and the limited use classes under the heading 'Recreation' in Table 2 of DPS 2, and Ms Butterworth's consequent expert opinion, that the term 'recreational activities' in cl 3.12.2(a) of DPS 2 is limited to 'uses where physical exercise or sports are undertaken or observed'.

58 The term 'recreational activities' is different to, and considerably broader than, the defined land use classification 'recreation centre'. Furthermore, Table 2 of DPS 2 prescribes car parking standards for certain land use classes which are listed in the Zoning Table (Table 1) of the Scheme. The term 'recreational activities' in cl 3.12.2(a) of DPS 2 is not limited to nominated or listed use classes under the Scheme. It is also a different term to 'Recreation' which is used in Table 2 of DPS 2.

59 In my view, the ordinary meaning of the term 'recreational activities' applies. A recreational activity is therefore an activity involving a pastime, diversion, exercise, or other resource affording relaxation and enjoyment.

60 However, in my view, remedial massage is not a 'recreational activity' according to the ordinary meaning of these words. Although some people may find remedial massage to be relaxing and enjoyable, its character and purpose, as denoted by the adjective 'remedial', is to cure, relieve or heal physical defects. The character and purpose of the proposed land use is remedial and therapeutic, rather than relaxing and enjoyable. The proposed use is, therefore, not, in my view, a 'recreational activity'.

61 Mr Cockman submitted on behalf of Mr Moore that the proposed use is a 'complementary business service' for either of two reasons.

62 First, Mr Cockman relied on the evidence of Mr Spaseski who expressed the opinion that a remedial massage centre is a complementary business service, because the Service Industrial zone in Wangara is 'predominantly an employment area' and '[m]any people would attend massage after work'.

63 However, as Mr Gregory suggested to Mr Spaseski during cross-examination (although Mr Spaseski rejected the proposition) and as Mr Gregory submitted in his closing address, Mr Spaseski's analysis makes the meaning of 'complementary business service' 'too wide'. Indeed, in my view, Mr Spaseski's assessment is so wide as to make the words 'complementary business service' almost meaningless. According to Mr Spaseski's opinion, any business land use providing a service that people employed in the zone may wish to attend before or after work, or at lunchtime, would be a 'complementary business service'. That cannot be correct.

64 Secondly, Mr Cockman submitted that the proposed remedial massage centre use is a 'complementary business service', because it is complimentary to martial arts, dancing, gym and fitness land uses which exist in the zone. In my view, this submission is correct.

65 The adjective 'complementary' is defined in the *Macquarie Dictionary* at page 310 as follows:

> **1.** forming a complement; completing. **2.** complementing each other.

66 The noun 'complement' is relevant defined in the *Macquarie Dictionary* at page 310 as follows:

> **1.** that which completes or makes perfect. … **3.** either of two parts or things needed to complete the whole.

67 I accept Ms Butterworth's opinion that, when used in the present planning context, a 'complementary business service' is one that is complementary to 'the actual land use[,] not the people who take part in the land use' (T:145; 2/11/17). Thus, a 'complementary business service' is a business land use providing a service which forms a complement to or completes another land use operating in the zone.

68 Mr Moore gave evidence, which was not questioned or contradicted and which I accept, that there are at least ten martial arts centres, at least five gyms or fitness centres and at least six dance centres operating in Wangara. Mr Moore listed these businesses in his witness statement.

69 Mr Timothy Dawson, who is the Senior Planner, Approval Services at the City, gave evidence, which was not questioned or contradicted and which I accept, that the ten martial art centres, five gyms or fitness centres and six dance centres referred to by Mr Moore in his evidence all fall within the land use class 'recreation centre' under DPS 2. As Mr Dawson

also said, under the Zoning Table of the Scheme, 'recreation centre' 'is a discretionary ('D') use in the Service Industrial Zone'.

70 Mr Moore also gave the following evidence, which was not questioned or contradicted and which I accept:

> Some people attend [for a remedial massage at the current premises] prior to martial arts. It is common for sports oriented people to get a massage. I had a friend who was a tri-athlete who would have had a massage before and after competition. You can see it on TV when sportspeople receive a massage prior to a game.

71 On the basis of Mr Moore's evidence, and having regard to the nature and purpose of remedial massage discussed earlier, I find that the proposed remedial massage centre use is a business land use providing a service which forms a complement to or completes the land uses of martial arts centres, gyms and dance centres in the zone. As Mr Dawson said, martial arts centres, gyms and dance centres fall within the land use class 'recreation centre' under DPS 2. These uses are also 'recreational activities' according to the ordinary meaning of those words for the purposes of cl 3.12.2(a) of DPS 2. A remedial massage centre use provides a service which forms a complement to or completes uses such as martial arts centres, gyms and dance centres, because participation in those recreational activities may give rise to muscle strains and other musculoskeletal injuries necessitating treatment by remedial massage in order to cure, relieve or heal physical defects.

72 Ms Butterworth expressed the opinion that the proposed remedial massage centre use does not complement the other uses permissible in the Service Industrial zone, because treatment or personal service uses, such as 'medical centre' and 'beauty parlour', are prohibited ('X') uses in the Service Industrial zone. In particular, Ms Butterworth reasoned that, because 'medical centre' is prohibited in the Service Industrial zone, this indicates that uses of a similar nature which involve treatment are not consistent with the objectives and purposes of the zone.

73 The land use class 'medical centre' and the term 'consulting room' are defined in Sch 1 of DPS 2 as follows:

> **medical centre:** means premises accommodating two or more consulting rooms.
>
> **consulting room:** means a building used by not more than one health consultant at any one time for the investigation or treatment of human injuries or ailments and for general patient care.

74 In ***Pearce and City of Wanneroo*** the Tribunal determined [24] that a masseuse is not a 'health consultant' and [27] that '[t]he client of a masseuse is not a "patient" and massage therefore does not involve "general patient care"'. The Tribunal also held [28] that, in consequence, 'a building used for massage is not a "consulting room" within the meaning of DPS 2' and that '[c]onsequently, a "massage centre" is not a "medical centre" within the meaning of the Scheme'.

75 Ms Butterworth acknowledged that the proposed land use is not a 'medical centre' involving 'consulting rooms', but expressed the opinion that 'it is relevant to consider the proposed use in context of similar uses to assist in the assessment of this use'. Ms Butterworth reasoned that, in so far as the proposed use involves treatment, it is similar to physiotherapy, which is prohibited in the Service Industrial zone as a 'medical centre', but is a permitted ('P') use in the Commercial and Business zones under the Scheme. Ms Butterworth reasoned that, in consequence, the proposed use is not consistent with the objectives and purposes of the Service Industrial zone, but rather is contemplated by the Scheme as being located in the Commercial and Business zones.

76 As the Tribunal said in ***Mirvac Mandurah Pty Ltd and City of Mandurah*** [2006] WASAT 44 [96], 'guidance can be obtained as to the objectives and purposes of the zone from the land uses which are permitted and not permitted'. However, in my view, the expression 'complementary business services' in cl 3.12.2(a) of the Scheme is wide and, for reasons set out earlier, relevantly includes remedial massage centre.

77 Furthermore, although physiotherapy may well include remedial massage, it is a health profession involving many other forms of patient care and treatment. I do not consider that the prohibition of other personal services or the specific prohibition of 'medical centre' in the Service Industrial zone indicates that remedial massage centre land use is not consistent with the objectives and purposes of the zone.

78 Finally, and for completeness, I do not consider that the proposed remedial massage centre use is an 'entertainment activity' within the meaning of cl 3.12.2(a) of DPS 2. As indicated earlier, in opening, Mr Cockman suggested on behalf of Mr Moore that the proposed use could possibly be an entertainment activity.

79 The noun 'entertainment' is relevantly defined in the *Macquarie Dictionary* at page 493 as follows:

> something affording diversion or amusement, especially an exhibition or performance of some kind.

80 Plainly, remedial massage is not 'entertainment'. It is not something affording diversion or amusement, and is certainly not an exhibition or performance.

81 In my view, the proposed remedial massage centre use may be consistent with the objectives and purposes of the Service Industrial zone, because it is a 'complementary business service' to 'recreational activities' which are permissible and which exist in the zone, it can be accommodated in the zone and it would not detrimentally affect the amenity of the area. The proposed use may therefore be approved or refused in the exercise of planning discretion under the Scheme.

82 Finally, I note that in his witness statement, Mr Spaseski referred to his experience of 'light/service industrial zones generally', that is not just in relation to DPS 2, but in other local government areas as well. He also specifically referred to the provisions of other local government planning schemes which contain light/service industrial zones.

83 I accept the City's submission that these are not relevant matters for consideration under DPS 2 or cl 67 of the deemed provisions. Although the paragraphs of Mr Spaseski's witness statement referring to his experience of other light/service industrial zones and the provisions in other local planning schemes were not objected to, I have disregarded those paragraphs on the basis that they are irrelevant.

Should development approval be granted?

84 I have found that the proposed remedial massage centre use may be consistent with the objectives and purposes of the Service Industrial Zone. In accordance with cl 3.3(b) of DPS 2, I must now 'follow the "D" procedures of cl 6.2.2 in considering an application for development approval'.

85 Clause 6.2.2 of DPS 2 states as follows:

> 'D' Uses –The Local government in exercising its discretion as to the approval or refusal of an application for Development approval, shall have regard to the provisions of Clause 67 of the deemed provisions.
>
> If in any particular case Local government considers that it would be appropriate to consult with the public generally or with the owners or occupiers of properties adjoining or in the vicinity of a site the subject of an application for Development approval involving a 'D' use, the Local

> government may direct that the provisions of Clause 64 of the deemed provisions shall apply to that application.

86 Under cl 67 of the deemed provisions, in considering the application for development approval, the Tribunal is required to have 'due regard' to the matters set out in the paragraphs of that clause to the extent that, in the opinion of the Tribunal, those matters are relevant to the development. I accept Ms Butterworth's evidence that the following matters referred to in cl 67 of the deemed provisions are relevant to the proposed development:

> (a) the aims and provisions of this Scheme …;
>
> (b) the requirements of orderly and proper planning …;
>
> …
>
> (m) the compatibility of the development with its setting …;
>
> (s) the adequacy of -
>
> (i) the proposed means of access to and egress from the site; and
>
> (ii) arrangements for the loading, unloading, manoeuvring and parking of vehicles;
>
> …

87 As indicated earlier, the City has not raised any substantive planning issue in relation to the proposed development. In particular, the City does not contend that the proposed development would have any adverse impact on the amenity or character of the locality or that it would have any other adverse planning impact.

88 In opening the City's case, Mr Gregory foreshadowed a potential issue as to whether approval of the proposed use would be contrary to orderly and proper planning, because the Council has refused three development applications for massage centres in the zone since 2010 and has not approved any development application for such a use in the zone over that period of time. However, following a discussion during the hearing, in his closing submissions Mr Gregory properly conceded that if the Tribunal determines that the use is or may be consistent with the objectives and purposes of the zone, then the issue of orderly and proper planning in terms of consistent decision-making does not arise, because the Council refused the other development applications on the basis that it

had determined that the use is not consistent with the objectives and purposes of the zone.

89 The only other potential planning issue which might arise on the evidence relates to the adequacy of on-site car parking. Ms Butterworth observed that the City has not undertaken a car parking assessment of the proposed use. However, Mr Moore gave evidence, which was not questioned or contradicted and which I accept, that there are between 10 and 12 on-site car bays at the front and between 12 and 15 on-site car parking bays at the back in the strata complex, as well as available on-street car parking. Furthermore, the site is currently used as a martial arts centre.

90 Given that there is an existing commercial use at the site, there are 22 to 27 car bays within the strata complex, there is on-street car parking, and it is proposed that there would generally be no more than two masseuses working at the site, namely Ms Chan and an employee, the available car parking is likely to be adequate for the proposed use.

91 The City did not advertise the development application for public comment and did not refer the Tribunal to any policy suggesting that there should be public consultation in this case. Mr Moore gave evidence that the other lot owners in the complex do not oppose the development application and the strata manager 'has put in writing that they have no objections' (T:73; 02.11.17). In these circumstances, in my view, public consultation in relation to the development application is not warranted.

92 The correct and preferable decision in the circumstances of this case is to grant conditional development approval for the proposed use.

Should the hours of operation be restricted as proposed by the City?

93 In accordance with the Tribunal's usual practice and programming orders, the City filed with the Tribunal and gave to Mr Moore a set of 'without prejudice', draft conditions of approval to be imposed by the Tribunal if it determines that the proposed development merits development approval. Condition 3 proposed restricting the hours of operation of the business to 9.00 am to 8.00 pm seven days a week, which are Mr Moore's and Ms Chan's current operating hours. Mr Moore did not object to any of the draft conditions.

94 However, the City subsequently filed and provided to Mr Moore an amended set of 'without prejudice' conditions. In particular, condition 3 was amended to restrict the hours of operation of the proposed

development to 9.00 am to 6.00 pm Monday to Friday (except public holidays), and 9.00 am to 1.00 pm on Saturday and to preclude trading on Sunday and public holidays. Mr Moore objected to the amended version of condition 3.

95 Mr Dawson explained that the reason for the proposed reduction of hours in the amended draft conditions is that, if the proposed use is (as the Tribunal has found) a complementary business service to other uses in the zone, then it should be restricted to the same trading hours as other uses in the zone. Similarly, Ms Butterworth expressed the opinion that, if the Tribunal formed the view that the proposed use is a complementary business service, 'then opening hours that are commensurate with those opening hours of that complementary business may be appropriate', although she added that 'I don't know the opening hours of certain businesses in the area' (T:144; 2/11/17).

96 Mr Moore gave evidence that the proposed restricted hours of operation are 'not workable for us' and 'would severely curtail our business and result in our closure'. He explained that 'our busiest times are after people finish work on weekdays (5 pm onwards) and between 4 pm to 8 pm on weekends'.

97 The City put forward little evidence to support its contention that other businesses in the area are restricted to the hours of operation proposed in amended condition 3 or indeed restricted in terms of hours of operation at all. As indicated earlier, Ms Butterworth is not aware of the hours of operation of other uses in the area. Although Mr Dawson initially gave evidence that all businesses in the zone close at 5 pm (T:56; 2/11/17), he later said that he did not know what time the martial arts facilities are normally open until (T:57; 2/11/17).

98 Mr Moore gave evidence that other businesses in the area operate during the evenings, and, in particular, that martial arts premises are 'often [open] Saturdays, Sundays and sometimes late at night' (T:70; 2/11/17). Mr Moore's evidence in this regard was not questioned or contradicted and I accept it.

99 Furthermore, although Mr Dawson provided development approvals for four recreation centre uses in the Service Industrial zone as part of his evidence, none of those development approvals restrict the hours of operation of the approved uses to the hours proposed by the City in this case, or at all.

100 The four development approvals were granted in July 2012, April 2015, August 2015 and September 2016 for recreation centre land uses comprising performing arts and dance classes, yoga and floatation pods/tanks, yoga, and a boxing club. The Council did not impose any condition of development approval on any of these approved uses restricting the hours of operation. This was notwithstanding that the City's change of use assessment sheet for the performing arts and dance class development noted that 'the majority of classes [were proposed to be] run in the evening, outside typical business trading hours (general 8 am to 5 pm)' and that the development application for the boxing club stated that 'we train 4.30 pm to 8 pm weeknights and most Saturday mornings'.

101 In consequence of Mr Moore's evidence that other businesses in the area operate in the evenings and that martial arts centres in the area operate on Saturdays, Sundays and sometimes late at night, the evidence that the Council has approved recreation centre uses without restricting their hours of operation (even though at least two of them were proposed to operate in the evenings), and the lack of any specific evidence from the City that it has restricted the hours of operation of any other business in the locality, I consider that the approved hours of the proposed development should be as proposed by Mr Moore, namely 9.00 am to 8.00 pm seven days a week, rather than the more restricted hours proposed by the City.

Conclusion

102 For these reasons, in my view, the proposed remedial massage centre use is a development that may be approved in the exercise of planning discretion under cl 3.3(b) of DPS 2 and the correct and preferable decision on the review is to set aside the City's refusal of the development application and to substitute a decision granting development approval subject to conditions.

103 I add that City has been aware since the publication of the Tribunal's decision in ***Pearce and City of Wanneroo*** in May 2010 that remedial massage centre is an innominate or unlisted use under DPS 2, but does not appear to have initiated a Scheme amendment to list that use and nominate its permissibility in the various zones. Consequently, the Council has had to determine under cl 3.3 of DPS 2 in relation to each development application for a remedial massage centre whether that use is consistent with, may be consistent with or is not consistent with the objectives and purposes of the particular zone.

104 Notwithstanding cl 3.3 of the Scheme, it is in the interests of orderly proper strategic and statutory planning for an identified innominate use to be specifically listed in the Zoning Table and for the Scheme to expressly nominate whether the use is prohibited, permitted (but may be conditioned), or may be approved or refused in the exercise of planning discretion in the various zones. This would provide greater certainty to those who wish to carry out this type of development, the Council and the community. It would also avoid public and private resources having to be incurred in the complex task of assessment under cl 3.3 of the Scheme as to whether an unlisted use is consistent with, may be consistent with or is not consistent with the objectives and purposes of the particular zone.

Orders

105 The Tribunal makes the following orders:

1. The application for review is allowed.

2. The decision of the City of Wanneroo made on 8 May 2017 to refuse to grant development approval for a change of use to unlisted use (massage parlour) at Unit 6 No 4 Arrigo Street, Wangara is set aside and in its place a decision is substituted granting development approval for change of use to unlisted use (remedial massage centre) subject to the following conditions:

    (1) The approval only relates to the proposed change of use to unlisted use (remedial massage centre).

    (2) The use of the approved premises shall be for the purposes of providing remedial massage services only. A change of use from the approved use will require the approval of the City.

    (3) The hours of operation shall be from 9.00 am to 8.00 pm seven days a week.

    (4) Advertising signage associated with the premises shall be in accordance with the City's Signs Local Planning Policy. A sign licence is to be applied for and obtained from the City prior to any sign being erected on the premises.

I certify that this and the preceding [105] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

_____

JUDGE D R PARRY, DEPUTY PRESIDENT

PLANNING AND DEVELOPMENT ACT 2005

CITY OF WANNEROO

DISTRICT PLANNING SCHEME NO. 2 – AMENDMENT NO. 169

The City of Wanneroo under and by virtue of the powers conferred upon it in that behalf by the Planning and Development Act 2005 hereby amends the above local planning scheme by:

1. Adding the following land use definition for 'massage premises' into Section 2 of Schedule 1:

   massage premises *: means premises involving the massaging manipulation or other treatment of body parts for therapeutic or remedial purposes, but does not include the provision of any sexual services.*

2. Inserting permissibility for the 'massage premises' use class into "Table 1 (Clause 3.2) - The Zoning Table" as follows:

ZONES / USE CLASSES	RESIDENTIAL	MIXED USE	BUSINESS	COMMERCIAL	CIVIC & CULTURAL	PRIVATE CLUBS/RECREATION	GENERAL INDUSTRIAL	SERVICE INDUSTRIAL	GENERAL RURAL	RURAL RESOURCE	SPECIAL RURAL	SPECIAL RESIDENTIAL	LANDSCAPE ENHANCEMENT
Massage Premises	X	D	P	P	X	X	X	D	X	X	X	X	X

3. Inserting car parking standards for the 'massage premises' use class into "Table 2 (Clause 4.14) - Car Parking Standards" as follows:

USE CLASS	NUMBER OF ON-SITE CAR PARKING SPACES
Commercial	
Massage Premises	5 per practitioner

COUNCIL PREPARATION

This Complex Amendment was prepared by resolution of the Council of the City of Wanneroo at the Ordinary Meeting of the Council held on the 13th day of November 2018

.....
MAYOR

.....
CHIEF EXECUTIVE OFFICER

COUNCIL RESOLUTION TO ADVERTISE

By resolution of the Council of the City of Wanneroo at the Ordinary Meeting of the Council held on the 13th day of November 2018, proceed to advertise this amendment.

.....
MAYOR

.....
CHIEF EXECUTIVE OFFICER

COUNCIL RECOMMENDATION

This Amendment is recommended for [support with/without modification or not support] by resolution of the City of Wanneroo at the Ordinary Meeting of the Council held on the [number] day of [month], 20[year], and the Common Seal of the City of Wanneroo was hereunto affixed by the authority of a resolution of the Council in the presence of:

.....
MAYOR

.....
CHIEF EXECUTIVE OFFICER

WAPC RECOMMENDATION FOR APPROVAL

.....
DELEGATED UNDER S.16 OF
PD ACT 2005

DATE .....

Approval Granted

.....
MINISTER FOR PLANNING, LANDS AND
HERITAGE

DATE .....