[2016] WASAT 43 (S)

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	PLANNING AND DEVELOPMENT ACT 2005 (WA)
CITATION	**:**	RANSBERG PTY LTD and CITY OF BAYSWATER [2016] WASAT 43 (S)
MEMBER	**:**	MR M SPILLANE (SENIOR MEMBER) MS D QUINLAN (MEMBER)
HEARD	**:**	27 MARCH 2017 (FINAL SUBMISSIONS 26 APRIL 2017)
DELIVERED	**:**	21 JULY 2017
FILE NO/S	**:**	DR 196 of 2015
BETWEEN	**:**	RANSBERG PTY LTD Applicant AND CITY OF BAYSWATER Respondent

Catchwords:

Town planning - Costs application - Tribunal previously approved concrete batching plant - New application for superior design with improved dust, noise and traffic outcomes - Council refused application for second time - Whether decision-maker genuinely attempted to make a decision on its merits - Whether decision-maker behaved unreasonably

Legislation:

Legal Profession (State Administrative Tribunal) Determination 2016
Planning and Development Act 2005 (WA), s 252(1)(c)(i)
State Administrative Tribunal Act 2004 (WA), s 9, s 31, s 87, s 89

Result:

Applicant's application for costs allowed and fixed in the amount of $112,772.73

Summary of Tribunal's decision:

In ***Ransberg and City of Bayswater*** [2014] WASAT 12 (***Ransberg No 1***), the Tribunal granted approval for a concrete batching plant situated at Nos 277 - 279 (Lot 2) Collier Road, Bayswater (subject site), subject to a number of conditions which included the management of dust and noise. In ***Ransberg and City of Bayswater*** [2016] WASAT 43 (***Ransberg No 2***), the Tribunal granted approval, subject again to a number of conditions, for a modified design of the previously approved concrete batching plant which was greatly improved in relation to dust and noise. Following the decision of the Tribunal in ***Ransberg No 2***, the applicant made an application to the Tribunal for an indemnity costs order against the respondent in the amount of $248,798.42.

The Tribunal noted that an invitation from the Tribunal under s 31 of the *State Administrative Tribunal Act 2004* (WA) for a decision-maker to reconsider its decision is simply that, an invitation. The decision-maker may decide to refuse that invitation from the Tribunal. However, once that invitation is accepted, the decision-maker must discharge its duty to genuinely attempt to decide a matter on its merits. It was apparent to the Tribunal that the respondent took the view it would always oppose a concrete batching plant at the subject site regardless of any professional advice or previous decision of the Tribunal. The Tribunal found, whilst the respondent may oppose a concrete batching plant at the subject site, the respondent was still obliged to consider the proposal on its merits, to apply the relevant provisions of the planning framework and to be cognisant of its legal obligations as a decision-maker which includes the importance of consistency in decision-making in the interests of orderly and proper planning.

In addition, the Tribunal found that, in circumstances where the council of the respondent was well informed and advised by extensive professional planning, legal and environmental advice that the modified design was superior and better addressed amenity concerns than the existing approval, advice which notably accorded with the Tribunal's ultimate findings, the respondent acted unreasonably in refusing to approve the superior design at the time of the respondent's reconsideration on 22 September 2015 in ***Ransberg No 2***.

The Tribunal determined that in the circumstances the applicant should be awarded costs, however not on an indemnity basis, and made orders for costs inclusive of disbursements and GST of $112,772.73.

Category: B

Representation:

Counsel:

Applicant	:	Mr P McQueen and Mr B Foley
Respondent	:	Mr CA Slarke

Solicitors:

Applicant	:	Lavan Legal
Respondent	:	McLeods

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

Aydogan and Town of Cambridge [2007] WAST 19
Citygate Properties Pty Ltd and City of Bunbury (2005) 38 SR (WA) 246; [2005] WASAT 53
Hanson Construction Materials Pty Ltd and Town of Vincent [2008] WASAT 71
Humphrys and City of Stirling [2011] WASAT 105
J & P Metals Pty Ltd and Shire of Dardanup [2006] WASAT 282 (S)
Marshall v Metropolitan Redevelopment Authority [2015] WASC 226
Myburgh Concepts Pty Ltd and City of Stirling [2010] WASAT 20
Perth Central Holdings Pty Ltd and Doric Constructions Pty Ltd [2008] WASAT 302
Rainbow Pty Ltd and Hawkins [2007] WASAT 216 (S)
Ransberg and City of Bayswater [2014] WASAT 12
Ransberg and City of Bayswater [2016] WASAT 43
Rossi and City of Bayswater [2010] WASAT 33
Springmist Pty Ltd and Shire of Augusta-Margaret River (2005) 41 SR (WA) 207; [2005] WASAT 143(S)
Tran and Town of Vincent (2009) 65 SR (WA) 260; [2009] WASAT 123 (S)
Western Australian Planning Commission v Questdale Holdings Pty Ltd [2016] WASCA 32

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 On 28 January 2014, in ***Ransberg and City of Bayswater*** [2014] WASAT 12 (***Ransberg No 1***), the Tribunal granted development approval for a concrete batching plant situated at Nos 277 - 279 (Lot 2) Collier Road, Bayswater (subject site), subject to a number of conditions which included the management of dust and noise.

2 On 14 December 2016, in ***Ransberg and City of Bayswater*** [2016] WASAT 43 (***Ransberg No 2***), the Tribunal granted development approval for a modified, but improved, design of the previously approved concrete batching plant, subject again to a number of conditions which included the management of dust and noise.

3 On 22 December 2016, following the decision of the Tribunal in ***Ransberg No 2***, the applicant made an application to the Tribunal for an indemnity costs order against the respondent.

4 The Tribunal heard that application for costs on 27 March 2017 and at the conclusion of the hearing, the Tribunal made programming orders allowing additional time for the applicant to provide submissions and supporting information on the quantum of costs sought and for the respondent to reply. That process was completed on 26 April 2017.

5 The total amount of costs sought by the applicant on an indemnity basis is $248,798.42, broken down into the following categories:

a) legal professional costs of $203,098.00 (inclusive of GST);

b) legal disbursements of $7,236; and

c) expert consultants costs (in the Tribunal proceedings only, not in the preparation of the application for approval) of $38,464.42.

Background facts to costs application

6 The extensive background to this costs application is detailed in both ***Ransberg No 1*** and ***Ransberg No 2*** and is incorporated into these reasons. The Tribunal will only detail the seminal aspects of those background facts in these reasons.

7 In both ***Ransberg No 1*** and ***Ransberg No 2*** the respondent refused to approve a concrete batching plant at the subject site. The substantive difference between the approvals in ***Ransberg No 1*** and ***Ransberg No 2*** was for a superior design which provides for the majority of activities at the subject site which produce dust emissions to now occur within a roofed building which will be enclosed on two sides, thereby substantially lessening the potential for dust and noise emissions.

8 The respondent's Planning and Development Services & Administration and Community Services Committee recommended approval of the superior design for the concrete batching plant subject to conditions.

9 On 26 May 2015, despite that professional advice, the Council of the respondent resolved to refuse the application in notably similar terms to its previous refusal in ***Ransberg No 1*** on 28 June 2011. The resolution of Council of the respondent stated:

> That Council:
>
> 1. Notes the amended plans dated 29 January 2015.
>
> 2. Reiterates its previous decision of 28 June 2011 and resolves to refuse the amended plans dated 29 January 2015 for the proposed concrete batching plant at Lot 2, Nos. 277-279 Collier Road, Bayswater, on the following grounds:
>
> (a) The proposed concrete batching plant is not an appropriate use on the subject site, particularly given it is a noxious industry and its proximity to an established residential area.
>
> (b) The proposed use will unduly impact on the amenity of the locality.
>
> (c) The proposed use is not consistent with proper and orderly planning of the locality.
>
> (d) The separation distance between the proposed development and residential dwellings is insufficient and will result in a significant reduction in amenity due to the externalities of the development, including poor visual appearance and undue dust and noise impacts.
>
> (e) The proposed development does not comply with the height requirements of the City's Town Planning Scheme No. 24.

(f) The proposed variation to the scheme height provisions will unduly affect the amenity of the locality.

(g) The proposed variation to the scheme height provisions is not consistent with the proper and orderly planning of the locality.

(h) Consideration of the considerable objections received in relation to the proposed concrete batching plant.

(Tribunal emphasis)

10 On 22 June 2015, the applicant sought a review in the Tribunal of the respondent's original refusal under s 252(1)(c)(i) of the *Planning and Development Act 2005* (WA) (PD Act).

11 At a directions hearing on 31 July 2015 the Tribunal invited the respondent to reconsider its refusal pursuant to s 31 of the *State Administrative Tribunal Act 2004* (WA) (SAT Act), and the Tribunal cautioned the respondent that it would need to genuinely consider the application on its merits and, if it failed to do so, it may be liable for costs in accordance with s 87(4)(b) of the SAT Act.

12 On 17 August 2015, the respondent's Planning and Development Services & Administration and Community Services Committee Meeting (Committee Meeting) agenda contained professional advice with the following conclusion and recommendation from the officer who prepared the agenda:

CONCLUSION

The existing approval issued by the SAT and associated conditions still stands, and should this amended application be refused the applicant can revert back to the original SAT approval. It is considered highly likely, that should the applicant not be able to proceed with this amended application, the applicant will construct and commence operations in accordance with the SAT approval and associated conditions.

The SAT at its directions hearing indicated that Council would need to genuinely consider the subject application on its merits or the City may be liable for costs in accordance with Section 87(4)(b) of the *State Administrative Tribunal Act 2004* (WA).

The City's officers have considered the additional comments provided by the environmental consultant and is of the technical view that the proposed amendments which include additional building structures will not have an undue impact on the visual amenity of the plant. The proposed alterations are considered to improve the applicant's ability to manage dust and noise

> emissions from the site. On balance, it is considered that the improvements to managing and potentially reducing dust and noise from the site outweighs the marginal increase to the building bulk from the additional buildings on the site.
>
> Given the proposed amendments are not considered to be beyond the scope of the originally approved application by the SAT it is recommended that Council reconsider its decision and approve the application, subject to appropriate conditions.
>
> (pages 10 and 11 of Committee minutes of 17 August 2015)

13 On 20 August 2015 the Minister for Planning refused to grant approval to a scheme amendment (Amendment 55) which the respondent had resolved to introduce in June 2011 which, if successful, would have prohibited a concrete batching plant use on the subject site. The Minister's reason for refusal was:

> [It] is considered to be contrary to orderly and proper planning and not consistent with the strategic direction of 'Directions 2031 and Beyond' and the 'Economic and Employment Lands Strategy' which seek to protect industrial areas and land uses from the encroachment of high end, competing uses and to ensure a balanced distribution.

14 At its Ordinary Council Meeting on 25 August 2015 the respondent reconsidered the proposed development. The Tribunal notes that it is not entirely clear from the evidence provided what the actual recommendation from the Committee Meeting was, however, the addendum to the Ordinary Council meeting minutes of that meeting on 25 August 2015 states:

> **Committee Recommendation to Council**
>
> That this item be deferred to the next Ordinary Council Meeting to further consider the concerns raised regarding the proposal.
>
> ***Reason for Change***
>
> *Council changed the Committee's recommendation as it was of the opinion that the proposed amended Concrete Batching Plant be deferred until the environmental issues have been addressed.*
>
> **COUNCIL RESOLUTION**
>
> That Council defers consideration of the proposed amended Concrete Batching Plant until the concerns raised, including the environmental matters raised by the City's environmental consultant and insufficient buffer, have been addressed in relation to the amended proposal.
>
> (page 137 of Ordinary Council minutes of 25 August 2015)

15 On 4 September 2015, the Tribunal again invited the respondent to reconsider its refusal of 26 May 2015 pursuant to s 31 of the SAT Act and again warned the respondent regarding a potential costs order and otherwise programmed the proceedings to a final hearing in the event the respondent did not approve the proposed development.

16 Council of the respondent again met and reconsidered the matter at its meeting on 22 September 2015. The Tribunal notes from the Ordinary Council minutes of that meeting that the professional advice given to the Council was as follows:

> **EXECUTIVE SUMMARY**
>
> **Application:**
>
> In accordance with further orders from the State Administrative Tribunal (SAT), pursuant to Section 31(1) of the *State Administrative Tribunal Act 2004*, the SAT has invited Council to reconsider its decision made at the 26 May 2015 and 25 August 2015 Ordinary Council Meetings, to refuse and defer amended plans for approved proposed concrete batching plant at Lot 2, 277-279 Collier Road, Bayswater.
>
> **Key Issues:**
>
> - Despite Council's opposition and refusal of a concrete batching plant at the subject site, the SAT has approved this use at the site. This approval is still valid, and the applicant can proceed with the concrete batching plant accordingly.
>
> - The current proposal is an amended design to the approved concrete batching plant, and the SAT is seeking Council's reconsideration of the amended design and not the appropriateness of a concrete batching plant at the site, as this use has already been approved by SAT.
>
> - Council is to reconsider the appropriateness of the amended proposal in terms of the additional information contained within this report.
>
> - SAT's comments regarding the provisions of Section 87(4)(b) of the *State Administrative Tribunal Act 2004* (WA) on awarding costs against the City where an application has not been genuinely determined on its merits.

(page 201 of Ordinary Council minutes of 22 September 2015)

> *State Administrative Tribunal Comments*
> The SAT at its initial directions hearing on 31 July 2015 indicated that Council would need to genuinely consider the subject application on its

merits or the City may be liable for costs in accordance with Section 87(4)(b) of the *State Administrative Tribunal Act 2004* (WA).

If costs are awarded against the City, this could include the costs of the applicant's solicitors and associated consultants used to appeal Council's decision. Generally costs could amount up to 75% of the total amount spent by the applicant to appeal a decision.

(page 205 of Ordinary Council minutes of 22 September 2015)

ANALYSIS

Key issues
The key issues raised in relation to this matter are as follows:

- *[Same as first dot point in **Key Issues** above]*.

- *[Same as second dot point in **Key Issues** above]*.

- The City's offices are still of the view that a concrete batching plant land use is inappropriate in its current location, however the SAT overruled the City's original refusal and found the land use to be acceptable at the site. The City's offices are endeavouring to address the amended proposal with the intent to reduce the impact of the concrete batching plant on the surrounding area.

- The City is also required to give due regard to the advice received by the City's solicitors and environmental consultant, advising that the amended plans detailing better operated plant with minimal risk given the enclosing of the wet-mix plant and the existing SAT conditions, and additional conditions proposed.

- Council is to reconsider the appropriateness of the proposal in terms of the additional information contained within this report.

- SAT's comments regarding the provisions of Section 87(4)(b) of the State Administrative Tribunal Act 2004 (WA) on awarding costs against the City where an application has not been genuinely determined on its merits.

Key considerations
Generally a planning application shall be assessed and determined in accordance with the objectives and prescribe requirements of the City's Town Planning Scheme No. 24 (TPS 24).

The original application has been approved by the SAT, therefore the concrete batching plant land use was deemed to be acceptable in its current location and previous form. The City's solicitors have advised that the original approved application has set a benchmark; therefore, if an amended application is received which is not materially different, and is

deemed to be less of an impact, it is considered the City is not in a position to refuse the amended proposal.

The original SAT approved application includes stringent conditions particularly relating to dust and noise[.]

(pages 205 - 206 of Ordinary Council minutes of 22 September 2015 - Tribunal emphasis)

Furthermore, Strategen [Dr Forster - the respondent's expert who gave evidence at the substantive hearing] has advised that "*overall, the information provided by the Applicant and discussions held at mediation serve to support the Applicant's position that the amended design for the proposed concrete batching plant and proposed operating conditions will provide acceptable dust and noise outcome for the receiving environment. Modelling of dust and noise impacts has suggested that acceptable performance can be achieved, relative to air quality and assigned noise levels at nearest sensitive receptors.*

On that basis, there now appears no impediment from a dust and noise risk perspective to refuse the application for the proposed concrete batching plant["].

(page 211 of Ordinary Council minutes of 22 September 2015 Tribunal's emphasis)

CONCLUSION

…

The proposed alterations are considered to improve the applicant's ability to manage dust and noise emissions from the site, given the plant will be mostly enclosed. The amended plans will essentially eliminate the consistent use of front-end loaders which is considered to substantially lower any potential noise impacts.

The original approved SAT application and the amended plans are for a wet-mix plant which is considered to pose less of a risk relating to dust emissions when compared to a dry-mix concrete batching plant. Not only is a wet-mix batching plant considered better at reducing dust emissions than a conventional plant, the amended proposal includes mostly enclosed areas of the process as part of the amended plans. The environmental consultant [Dr Forster - the respondent's expert] has advised this process and associated amendments are considered to dramatically reduce impacts relating to dust generation.

The City's officers have considered the additional comments provided by the City's solicitors and environmental consultant and the applicant, and are of the technical view that the amended approval (that complies with applicable conditions) will not have an undue impact on the visual amenity of the surrounding area.

> Given the above, it is recommended that Council reconsidered its decision and approves the amended application, subject to appropriate conditions.
>
> (pages 212 - 213 of Ordinary Council minutes of 22 September 2015)

17 Following that advice the respondent again resolved to refuse the application for the reasons set out in the Ordinary Council minutes of 22 September 2015 which stated:

> COUNCIL RESOLUTION
>
> That Council, in consideration of the additional information provided by the applicant and environmental consultant, refuses the revised plans dated 29 January 2015 in relation to the planning approval granted by the State Administrative Tribunal on 15 July 2015 (sic - it was 28 January 2014) for the proposed concrete batching plant at Lot 2, 277-279 Collier Road, Bayswater, for the following reasons:
>
> 1. The amended proposal does not provide sufficient information demonstrating satisfactory control of dust emissions to not unduly impact the surrounding residential area and Joan Rycroft reserve, in relation to the following matters:
>
>   (a) The controls and maintenance of the cement silo filters.
>
>   (b) The control and maintenance of the building ventilation systems, water sprays and sprinklers.
>
>   (c) The process of ensuring the stored aggregate and sand outside the building is wetted or covered at all times to prevent wind driven dust erosion.
>
>   (d) The reporting of dust incidents as soon as possible to the City of Bayswater and associated remediation works.
>
> 2. The amended proposal is considered to be generally not consistent with clause 3.6 of the City of Bayswater Town Planning Scheme No. 24 relating to matters to be considered by the City on planning application, more specifically:
>
>   (a) Clause 3.6(i) - *the compatibility of a use or development with its setting*.
>
>   (b) Clause 3.6(n) - *the preservation of the amenity of the locality.*
>
>   (c) Clause 3.6(y) - *any relevant submissions received on the application.*

> 3. The amended proposal is considered to be not consistent with clause 1.6(b) objective of the City of Bayswater Town Planning Scheme No. 24 to "*secure the amenity, health and convenience of the Scheme Area and inhabitants thereof*".
>
> 4. The amended proposal will unduly impact on the amenity of the locality.
>
> 5. The amended proposal will unduly impact on the operations of adjoining businesses.
>
> 6. The amended proposal is not consistent with proper and orderly planning of the locality.
>
> (pages 216 - 217 of Ordinary Council minutes of 22 September 2015)
> (Respondent's reconsideration in ***Ransberg No 2***)

Legal principles in costs applications in the Tribunal

18 The effect of s 87(1) of the SAT Act, relevant to these proceedings, is that each party bear their own costs unless the Tribunal orders otherwise. This is the usual approach in review proceedings under the PD Act: ***Citygate Properties Pty Ltd and City of Bunbury*** (2005) 38 SR (WA) 246; [2005] WASAT 53 (***Citygate***) at [28].

19 However, pursuant to s 87(2) of the SAT Act, the Tribunal may exercise its discretion and make an order for the payment by a party of all, or any, of the costs of another party. In the recent decision of the Court of Appeal in ***Western Australian Planning Commission v Questdale Holdings Pty Ltd*** [2016] WASCA 32, Murphy JA (Martin CJ and Corboy J agreeing) found at [51]:

> Section 87(2) is to be construed in the context that the legal rationale for an order for costs is not to punish the person against whom the order is made, but to compensate or reimburse the person in whose favour it is made. That rationale is evident in s 87(3) of the SAT Act. Accordingly, even in a statutory context where the presumptive position is that no costs will be ordered, generally speaking, the question is whether, in the particular circumstances of the case, it is fair and reasonable that a party should be reimbursed for the costs it incurred. The onus is on the party seeking an order in its favour. [footnotes omitted]

20 The power to make a costs order includes the power under s 87(3) of the SAT Act to make an order for the payment of an amount to compensate a party for any expenses resulting from the proceeding. The effect of s 87(3) is that the expenses that may be recovered are not

limited to the traditional notion of legal costs, but can include other expenses and loss in connection with the conduct of the proceedings before the Tribunal: ***Springmist Pty Ltd and Shire of Augusta-Margaret River*** (2005) 41 SR (WA) 207; [2005] WASAT 143(S) at [64].

21 Section 87(4) of the SAT Act identifies certain matters to which the Tribunal is to have regard in exercising its discretion to award costs in the Tribunal's review jurisdiction. That subsection does not limit the matters which might be considered under s 87(2): ***Citygate*** at [32].

22 Costs orders are generally only made in review proceedings where a party has acted unreasonably, including where a party has failed to meet the expectation expressed in s 87(4) of the SAT Act: ***Tran and Town of Vincent*** (2009) 65 SR (WA) 260; [2009] WASAT 123 (S) (***Tran***) at [35]; ***Humphrys and City of Stirling*** [2011] WASAT 105 (***Humphrys***) at [27].

23 The expectation in s 87(4) of the SAT Act that is relevant and which the Tribunal must have regard to in determining a costs application is whether the respondent has genuinely attempted to make a decision on its merits.

24 The Tribunal's established practice when exercising its discretion to award costs under s 87(2) of the SAT Act reflects its statutory role and function when exercising its jurisdiction in review proceedings: ***Aydogan and Town of Cambridge*** [2007] WASAT 19 at [18].

25 The fact that the Tribunal reached a different conclusion from the respondent does not, of itself, inevitably lead to a conclusion that the respondent failed to genuinely attempt to make a decision on its merits: ***Myburgh Concepts Pty Ltd and City of Stirling*** [2010] WASAT 20 at [50].

26 By analogy, the fact that a decision-maker reaches a different conclusion to that recommended by professional advice, does not, of itself, inevitably lead to such a conclusion.

27 In somewhat similar circumstances of an applicant being forced into conducting a second review in the Tribunal, the Tribunal in ***Tran*** found as follows:

> 36. Although I do not doubt for one moment that the respondent's actions were undertaken other than in good faith it is important for the process of orderly public sector decision-making that original decision-makers pay careful attention to consistency in that decision-making process; that they also pay regard to the advice of

> their professional officers; and that they avoid the need for the rearguing of cases where there are in fact no *material* changes to the circumstances where an earlier identical planning approval had been given.
>
> 37. Here, the respondent Town was put expressly on notice of the possible consequences of its actions by both the Tribunal and the applicant's, and passed up the opportunity to change its position in the reconsideration process. It ought to have reasonably known that the chance of a successful review in the applicants' favour in such circumstances was very high indeed. Every conceivable indication was given that that was so. It was unreasonable to ignore the signals.

28 Similarly, in ***Rossi and City of Bayswater*** [2010] WASAT 33 (***Rossi***) the Tribunal held that the City of Bayswater behaved unreasonably by maintaining its objection to the development despite the fact that the planning framework had not materially changed and in rejecting the professional advice of its planning officer, warranting the exercise of discretion in the favour of a costs application. It was also held that this unreasonableness was compounded by the earlier costs decision in the similar matter of ***Tran*** and that this unreasonable conduct meant that the City of Bayswater failed to genuinely attempt to assess the matter on its merits: at [28] to [29].

29 The importance of consistency in decision-making in the interests of orderly and proper planning has been highlighted by the Tribunal in a number of decisions in relation to costs. Decision-makers who continue to fail to have proper regard to an earlier approval in circumstances where the planning framework has not materially altered must do so fully cognisant of the potential costs implications: for instance see ***Humphrys*** at [28] to [29] citing ***Hanson Construction Materials Pty Ltd and Town of Vincent*** [2008] WASAT 71 at [54].

30 Pursuant to s 89 of the SAT Act, where the Tribunal makes a costs order it may fix the amount of costs.

31 The procedures of the Tribunal are designed to achieve the objectives prescribed by s 9 of the SAT Act. In the unusual event that an order for costs is made by the Tribunal, the Tribunal's obligation to minimise the costs to parties will be reflected in the costs assessed by the Tribunal as recoverable. That approach reflects an expectation that parties will approach proceedings in a way that minimises costs to their clients. If parties choose to approach proceedings in a way which substantially increases costs for them, it will be a rare case where that increase in costs

will be recoverable: ***J & P Metals Pty Ltd and Shire of Dardanup*** [2006] WASAT 282 (S) at [38].

32 An award of costs is not intended to be a full indemnity for the actual expenses incurred by a party. Generally speaking, an order for an amount of costs should be approached in a broad fashion and should not have to descend into any inquiry into small items of expenditure: ***Perth Central Holdings Pty Ltd and Doric Constructions Pty Ltd*** [2008] WASAT 302 at [67].

33 The Tribunal will give consideration to 'the nature of the matter, its complexity, its importance, urgency, and the amount of time and effort required to properly prepare and present the case': ***Rainbow Pty Ltd and Hawkins*** [2007] WASAT 216 (S).

The applicant's submissions

34 The applicant submits that it should be entitled to indemnity costs on the basis that the respondent:

a) did not genuinely seek to deal with the application on its merits at any stage;

b) unreasonably prolonged the hearing of the matter;

c) conducted itself unreasonably and inappropriately in its conduct of the proceedings in a manner which increase the costs to the applicant; and

d) maintained a position that was without merit.

The respondent's submissions

35 The respondent submits that it did genuinely attempt to make a decision on its merits on the basis that the respondent considered that the modified design was materially different to the approved design and, in particular, the Council of the respondent did not accept that the new and significantly more expensive modified design would only produce an average of 135m³ of concrete per day. The respondent also submits that the Council gave detailed consideration to the merits of the application as it was drawn clearly to the Council's attention that it was required to make a genuine decision on the merits.

36 The respondent further submits that:

a) it did not unreasonably prolong the hearing of the matter;

b) there was nothing unreasonable in the respondent's conduct in the proceedings; and

c) the respondent's position was not devoid of merit or unarguable.

Consideration

37 It will be apparent from the reasons which follow that the Tribunal considered it was unnecessary to make findings in relation to some of the allegations made by the applicant. However, it will also be apparent, that the Tribunal does not accept that the respondent *genuinely* attempted to make a decision on its merits.

38 The Tribunal notes that an invitation from the Tribunal under s 31 of the SAT Act for a decision-maker to reconsider its decision is simply that, an invitation. The decision-maker may decide to refuse that invitation from the Tribunal. However, once that invitation is accepted, the decision-maker must discharge its duty to genuinely attempt to decide a matter on its merits.

39 The Tribunal finds that, as the decision under review is the reconsideration made on 22 September 2015, that is the relevant decision that is under consideration in relation to s 87(4)(b) of the SAT Act (s 31(3) of the SAT Act).

40 It was apparent to the Tribunal from the way the Council consistently dealt with the matter and the final reasons given by the respondent on 22 September 2015, that the respondent took the view that it would always oppose a concrete batching plant at the subject site regardless of any professional advice or previous decisions of the Tribunal.

41 Whilst the respondent may oppose a concrete batching plant at the subject site, the respondent is still obliged to consider the proposal on its merits, to apply the relevant provisions of the planning framework and to be cognisant of its legal obligations as a decision-maker which includes consistency in decision-making in the interests of orderly and proper planning (see ***Marshall v Metropolitan Redevelopment Authority*** [2015] WASC 226 at [178] to [183]).

42 The respondent's disregard of its obligations and the professional advice it received was also evident to the Tribunal in the evidence of the Mayor, Mr Barry McKenna at the substantive hearing. The Mayor appeared to have little substance underpinning his own reasons for

refusing the proposed development beyond stating a number of times in different ways what the Tribunal finds to be implausible statements to the effect that the decision '… was for valid planning reasons' and being unduly fixated on whether the proposal was a new proposal or an amended proposal without having proper regard to the substance of the development proposal.

43 The Mayor's evidence and an examination of the reasons for decision of the respondent in the reconsideration appear to the Tribunal to be clearly incongruous when set against all of the professional advice that was before the respondent and appear to be contrived in an attempt to appear to genuinely decide the proposal on its merits.

44 In ***Hanson Construction Materials Pty Ltd and Town of Vincent*** [2008] WASAT 71 (***Hanson***), the Tribunal stated at [54]:

> In circumstances where the planning framework is the same and the circumstances have not changed in any substantial way, it is in the interests of orderly and proper planning that planning decisions in relation to a site are made in a consistent way.

45 In ***Humphrys*** at [29] Parry J, in commenting on that quote from ***Hanson*** stated:

> It does not appear that the Council had regard to the planning principle referred to in *Hanson* in making its decision to refuse the development application which is the subject of this proceeding. The Council's failure to have regard to its approval of the earlier development application and the principle of consistency in planning assessment referred to in *Hanson* means that it did not genuinely attempt to make a decision on the merits of the development application and acted unreasonably[.]

46 Following that in ***Tran***, as outlined earlier, Member McNab stated at [36]:

> … it is important for the process of orderly public sector decision-making that original decision-makers pay careful attention to consistency in that decision-making process; that they also pay regard to the advice of their professional officers; and that they avoid the need for the rearguing of cases where there are in fact no *material* changes to the circumstances where an earlier identical planning approval had been given. (original emphasis)

Each of those comments are apposite to this matter.

47 The Tribunal therefore finds on the facts of this case that the Council of the respondent failed to genuinely attempt to make a decision on the merits for the purposes of s 87(4)(b) of the SAT Act because:

i) it failed to have regard to this Tribunal's previous approval in ***Ransberg No 1*** and that the planning framework and factual circumstances had not changed in any material respect;

ii) it clearly ignored extensive planning, legal and environmental advice supporting the application and without any advice to the contrary on which to base a refusal; and

iii) it made the decision of 22 September 2015 in circumstances where Amendment 55 (which sought to make a concrete batching plant at the site a prohibited use) had been disallowed by the Minister barely a month before on 20 August 2015.

48 The issue of significance between ***Ransberg No 1*** and ***Ransberg No 2*** was not just that the use had already been approved in ***Ransberg No 1*** and there had been no material change to the planning framework (noting the two exceptions found by the Tribunal in ***Ransberg No 2*** at [79]) but that the significant issue concerning dust was substantially improved by the superior design of the plant submitted for approval in ***Ransberg No 2***.

49 As stated above, the respondent was well informed and well advised by extensive planning, legal and environmental advice that the modified design was superior and better addressed amenity concerns than the existing approval, and yet the respondent unreasonably refused to approve the superior design at the time of its reconsideration on 22 September 2015 in ***Ransberg No 2***.

50 The Tribunal notes that the professional advice that the respondent effectively disregarded in its reconsideration in ***Ransberg No 2*** accords with the ultimate findings by the Tribunal in ***Ransberg No 2***.

51 The respondent's position in ***Ransberg No 2*** was therefore in the Tribunal's view as unreasonable, if not more so than that of the original decision-makers in ***Tran***, ***Rossi*** and ***Humphrys*** and the Tribunal finds, that not only did the respondent fail to genuinely attempt to determine ***Ransberg No 2*** on its merits on the reconsideration of the matter on 22 September 2015, but that that conduct was unreasonable.

52 Therefore, in consideration of all of the facts and circumstances in this matter and the findings just outlined, the Tribunal will exercise its

discretion to award costs to the applicant in this matter for the reasons that the respondent did not *genuinely* attempt to make the reconsideration decision on its merits and the respondent acted unreasonably based on all of the professional advice it received and without any advice to the contrary to support its position, in not approving at the point of reconsideration a superior design which alleviated or at least significantly improved the amenity outcomes relating to dust in particular, but also in relation to traffic and noise issues.

53 Despite running a case that raised issues concerning traffic and noise impacts on the amenity of the locality, the respondent did not proffer any expert evidence in respect of those issues to assist the Tribunal in reaching the correct and preferable decision upon review. The expert that the respondent provided in relation to dust impacts, Dr Peter Forster, largely, if not entirely in all material respects, supported approval of the proposal's superior design as detailed in the decision of the Tribunal in ***Ransberg No 2***.

54 However, whilst this approach by the respondent was not of assistance to the Tribunal in reaching a determination of the issues raised by the respondent, the Tribunal finds that that conduct did not amount to unreasonable conduct in the proceedings.

Quantum of costs

55 Taking into account the submissions made by the respondent and what the Tribunal considers to be fair and reasonable, the Tribunal will adjust the transcript amount sought and will not allow the courier fees and will allow the disbursements in the total amount of $6,249 detailed as follows:

a) transcript of the final hearing of $2,308.50;

b) SAT application and hearing fees of $2,657; and

c) copying of $1,283.50.

56 The Tribunal will also allow the full amount sought for the costs of expert consultants totalling $38,464.42. The costs sought are only those of the applicant's experts in relation to the Tribunal proceedings and not the reports they prepared to support the application for approval lodged with the respondent. The Tribunal considers the total amount sought for the costs of the experts to be entirely fair and reasonable, in particular, as

the resolution of these proceedings by the Tribunal was greatly assisted by the expert evidence.

57 In relation to the legal costs of $203,098 (inclusive of $40,625 GST) sought by the applicant, the Tribunal notes the legal principles enunciated above concerning such matters as: the objectives prescribed by s 9 of the SAT Act; and the Tribunal's obligation to minimise costs.

58 The Tribunal accepts the submissions of the respondent that these proceedings were not overly complex. The only aspect of real complexity related to the expert evidence concerning dust modelling and the application of the *National Environment Protection (Ambient Air Quality) Measure*, however there was no substantive or material dispute amongst the experts concerning these matters and a significant amount of similar evidence was canvassed in ***Ransberg No 1***.

59 The Tribunal finds that, whilst on 22 September 2015 the respondent did not genuinely attempt to decide the proposed development on its merits, that conduct should not attract an indemnity costs order.

60 Moreover, the Tribunal finds that, whilst there was unreasonable conduct on the part of the respondent in its reconsideration of the matter in ***Ransberg No 2***, there was otherwise nothing unreasonable in the way that the respondent *conducted* the proceedings in the Tribunal which might impact on the Tribunal's decision as to the quantum of costs to award or that the matter should attract an indemnity costs order.

61 The Tribunal finds that these proceedings are not the rare case where an order for indemnity costs or all of the legal costs should be made.

62 However, the Tribunal does find that, in the exercise of its discretion and giving consideration to the nature of the proceedings, and the amount of time and effort required to properly prepare and present the case that the applicant should be awarded a contribution to its reasonable legal costs.

63 The Tribunal is of the view that the appropriate guide for a determination of the quantum of costs to award in these proceedings, in circumstances where the Tribunal considers these proceedings were not overly complex, is the *Legal Profession (State Administrative Tribunal) Determination 2016* (Determination) which is the amount that a practitioner may, in the absence of a written agreement as to costs, charge a client in Tribunal proceedings.

64 The rates in that Determination are approximately two thirds of the rates claimed by the applicant which would reduce the legal costs sought of $184,634.50 (exclusive of GST) to approximately $123,089.66. Having considered all of the facts and circumstances outlined above, the Tribunal finds that a fair and reasonable contribution to the applicant's legal costs is 50% of the reduced amount of $184,634.50 or $61,544.83 plus GST, making a total amount for legal fees of $68,059.31.

Accordingly, the Tribunal will order as follows:

Orders

1. The application for costs is allowed.

2. Within 21 days of the date of these orders, the respondent is to pay to the applicant's costs of the review proceedings fixed in the total amount of $112,772.73 being $68,059.31 in legal fees (inclusive of GST); $6,249.00 in disbursements; and $38, 464.42 in consultants' fees.

I certify that this and the preceding [64] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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MR M SPILLANE, SENIOR MEMBER